U.S. Court of International Trade

Slip Op. 19–71

NATIONAL NAIL CORP., Plaintiff, SHANDONG ORIENTAL CHERRY HARDWARE GROUP CO., LTD., Consolidated-Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 16–00052
PUBLIC VERSION

[United States Department of Commerce's Remand Results are sustained, in part, and remanded.]

Dated: June 12, 2019

Adams C. Lee, Harris Bricken McVay Sliwoski, LLP, of Seattle, WA, argued for Plaintiff National Nail Corp.

Brittney R. Powell, Fox Rothschild LLP, of Washington, DC, argued for Consolidated-Plaintiff Shandong Oriental Cherry Hardware Group Co., Ltd. With her on the brief were *Lizbeth R. Levinson* and *Ronald M. Wisla*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Jessica R. DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION and ORDER

Eaton, Judge:

This case involves a challenge to the United States Department of Commerce's ("Commerce" or the "Department") final results of the sixth administrative review of the antidumping duty order on imports of certain steel nails from the People's Republic of China. *See Certain Steel Nails From the People's Rep. of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) ("Order"); *see also Certain Steel Nails From the People's Rep. of China*, 81 Fed. Reg. 14,092 (Dep't Commerce Mar. 16, 2016), *amended by* 81 Fed. Reg. 19,136 (Dep't Commerce Apr. 4, 2016), and accompanying Issues and Dec. Mem. (Mar. 7, 2016), P.R. 259 ("Final IDM") (collectively, "Final Results"). The period of review was August 1, 2013, through July 31, 2014. *Certain Steel Nails From the People's Rep. of China*, 80 Fed. Reg. 53,490 (Dep't Commerce Sept. 4, 2015), and accompanying Dec. Mem. for the Prelim. Results (Aug. 28, 2015), P.R. 217 ("Prelim. Dec. Mem.") at 1 (collectively, "Preliminary Results").

In *National Nail Corp. v. United States*, 42 CIT __, 279 F. Supp. 3d 1372 (2018) ("*National Nail I*"),[1] the court remanded the Final Results. In its remand order, the court directed Commerce to "evaluate the evidence on the record regarding [Consolidated-Plaintiff Shandong Oriental Cherry Hardware Group Co., Ltd.'s ("Shandong"[2])] eligibility for a separate [dumping] rate, including the information it submitted in response to Section A of Commerce's questionnaire [regarding corporate structure], and determine whether such evidence demonstrates an absence of *de jure* and *de facto* control by the Chinese government." *National Nail I*, 42 CIT at __, 279 F. Supp. 3d at 1379. The court further directed that "if Commerce determines that Shandong is eligible for a separate rate, it shall determine a separate rate" for the company. *Id*.

Commerce's remand results are now before the court. *See Final Results of Redetermination Pursuant to Remand Order in National Nail Corp. v. United States*, Consol. Ct. No. 16–00052 (Apr. 20, 2018) ("Remand Results"). In the Remand Results, Commerce determined, under protest,[3] that Shandong was eligible for a separate dumping rate. *See* Remand Results at 6. Commerce did not, however, determine a rate using the production and U.S. sales information that Shandong placed on the record in response to Commerce's questionnaires. Rather, Commerce assigned Shandong the highest rate from any prior segment—the China country-wide dumping rate of 118.04 percent[4]—based on "total adverse facts available."[5] Remand Results at 19.

---

[1] Familiarity with *National Nail I* is presumed.

[2] In this opinion, "Shandong" refers to the collapsed Shandong entity, which includes Consolidated-Plaintiff Shandong Oriental Cherry Hardware Group Co., Ltd. and its affiliates Jining Dragon Fasteners Ltd., Shandong Oriental Cherry I&E, Jining Huarong Hardware, Heze Products Co., and Jining Yonggu Metal. *See* Prelim. Dec. Mem. at 10.

[3] Since the court did not instruct Commerce to find that Shandong was entitled to a separate rate, but merely to "evaluate the evidence," it is difficult to see what is "under protest."

[4] The 118.04 percent rate was originally an estimated dumping margin based on information found in the petition filed by Mid Continent Nail Corp. and other domestic producers in 2007. *Certain Steel Nails from the People's Rep. of China and the United Arab Emirates*, 72 Fed. Reg. 38,816, 38,821 (Dep't Commerce July 16, 2007) (initiation of antidumping duty investigations). By way of comparison, the highest rate determined for any cooperating respondent in this segment of the proceeding was 11.95 percent. Final Results, 81 Fed. Reg. at 19,136.

[5] Although, in the Preliminary Results, Commerce did not include the adjective "total" before "adverse facts available," it made the equivalent statement that "the entirety of [Shandong's] responses need[ed] to be disregarded for the preliminary results." Prelim. Dec. Mem. at 27. In its subsequent memoranda, Commerce referred to its finding as "total adverse facts available." *See* Final IDM at 2 ("[W]e continue to apply total adverse facts available . . . to [Shandong]."); Remand Results at 3 (citing use of "total adverse facts available" in the Preliminary Results and Final IDM).

Commerce's decision to use "total adverse facts available" rested on its conclusion that Shandong's reported production and sales information was incomplete, inaccurate, or unreliable, and that, therefore, none of it was usable. *See* Remand Results at 15–17. Thus, Commerce found that "necessary information" was missing from the record. On this basis, Commerce found that the use of "facts otherwise available," pursuant to 19 U.S.C. § 1677e(a) (2012),[6] was authorized. *See* Remand Results at 17 ("[T]he application of facts available is warranted because [Shandong] failed to provide necessary information requested by Commerce, in the form and manner requested, and significantly impeded our ability to conduct the review."). Additionally, Commerce found that Shandong had failed to comply with Commerce's requests for information to "the best of its ability," and applied an adverse inference to all of the facts available for sales and production. *See* 19 U.S.C. § 1677e(b)[7]; *see also* Remand Results at 17–18 ("[B]ecause [Shandong's] deficiencies were so pervasive, impeding Commerce's ability to conduct its review, and [Shandong] did not cooperate to the best of its ability, Commerce determined that total [adverse facts available] . . . was warranted."). As noted, Shandong was assigned the 118.04 percent rate. In the immediately preceding administrative review, Shandong Oriental Cherry Hardware Group Co., Ltd. (exclusive of its affiliates) was found to be eligible for a separate rate and was assigned the rate of 16.62 percent. *Certain Steel Nails from the People's Rep. of China*, 80 Fed. Reg. 18,816, 18,817 (Dep't Commerce Apr. 8, 2015) (final results of fifth admin. review).

Plaintiff National Nail Corp. is a U.S. importer of subject merchandise produced and exported during the period of review by Consolidated-Plaintiff Shandong, a mandatory respondent (collectively, "Plaintiff" or "National Nail"). National Nail disputes Commerce's use of "total adverse facts available" to assign a rate for the respondent. Specifically, National Nail argues that Commerce's use of "facts otherwise available," as to Shandong's factors of production and

[6] The statute provides that Commerce shall use facts available "[i]f . . . necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested," or "significantly impedes" a proceeding. 19 U.S.C. § 1677e(a)(1)-(2)(B), (C).

[7] Where Commerce determines that the use of facts available is warranted, it must make the requisite additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information" before it may use an adverse inference "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A).

U.S. sales,[8] was not supported by substantial evidence because Shandong provided the production and sales information that Commerce asked for in the form and manner requested. National Nail also contends that substantial evidence does not support Commerce's finding that Shandong failed to comply with the Department's information requests to "the best of its ability." Thus, for Plaintiff, Commerce's decision to find "unusable" all of the production and sales information Shandong provided and, instead, to use "total adverse facts available" to arrive at a dumping margin for Shandong lacks the support of substantial evidence and is not in accordance with law. *See* National Nail's Cmts. on Remand Results 5, ECF No. 70 ("NN's Cmts."). For its part, Shandong "agrees with and adopts the comments filed by National Nail Corp. in response to Commerce's remand results." Shandong's Cmts. on Remand Results 1, ECF No. 71.

Defendant the United States, on behalf of Commerce, urges the court to sustain the Remand Results. *See* Def.'s Resp. Pls.' Cmts. on Remand Results, ECF No. 74 ("Def.'s Resp. Cmts.").

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(iii).

Commerce's application of total adverse facts available in the Remand Results is neither supported by substantial evidence nor in accordance with law.[9] That is, neither the law nor the facts support the Department's findings (1) that none of Shandong's factors of production or its U.S. sales information was usable, and (2) that Shandong failed to comply with Commerce's requests for production and sales information to the best of its ability. Therefore, the court remands this matter to Commerce for further action in accordance with this Opinion and Order.

BACKGROUND

I. Administrative Review Proceeding

On September 30, 2014, Commerce commenced the sixth administrative review of the Order at the request of, among others, Mid Continent Steel & Wire, Inc., a U.S. producer of steel nails and the

[8] As discussed *infra*, Part III, among the U.S. sales with respect to which Commerce used facts available were Shandong's affiliate Jining Dragon Fasteners Ltd.'s sales of shooting nails. As shall be seen, National Nail concedes that Shandong did not provide the information Commerce asked for to determine whether the shooting nails met the criteria for exclusion from the Order, but claims, nonetheless, it was unreasonable for Commerce to resort to adverse facts available with respect to those sales.

[9] As shall be seen, the court sustains that portion of the Remand Results only with respect to the application of adverse facts available to shooting nails produced by Shandong's affiliate Jining Dragon Fasteners Ltd. ("Jining Dragon"). These nails constituted 0.001 of total period of review sales.

petitioner in the proceeding, and The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. ("Stanley"), a producer and importer of steel nails from China. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 79 Fed. Reg. 58,729 (Dept. Commerce Sept. 30, 2014); *see also* Mid Continent Steel & Wire, Inc.'s Req. for Admin. Rev. (Aug. 29, 2014), P.R. 3; Stanley's Req. for Admin. Rev. (Aug. 28, 2014), P.R. 1.

The Order described the steel nails included in its scope, and expressly excluded others. Among the merchandise excluded from the Order were "fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under [Harmonized Tariff Schedule of the United States subheadings] 7317.00.20 and 7317.00.30." Order, 73 Fed. Reg. at 44,961.

Commerce selected two mandatory respondents for individual review, Shandong and Stanley. Because China is a nonmarket economy country,[10] each company was sent Commerce's standard nonmarket economy antidumping questionnaire seeking information on factors of production[11] (Section D); U.S. sales[12] (Section C); and corporate structure[13] (Section A). *See* Commerce's Orig. Questionnaire (Nov. 20, 2014), P.R. 31, ECF No. 52–6. Between April 2015 and July 2015,

[10] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

[11] Factors of production are the inputs consumed to produce the subject merchandise. In nonmarket economy cases, such as those involving imported merchandise from China, Commerce uses "the input amounts [reported by the exporter], along with the appropriate price from the chosen surrogate country, to construct the normal value of the merchandise under consideration." Commerce's Orig. Quest. (Nov. 20, 2014), P.R. 31, ECF No. 52–6 at D-1; *see* 19 U.S.C § 1677b(c) (describing method to determine normal value in nonmarket economy cases).

[12] In nonmarket economy cases, Commerce "compare[s] the prices at which [the subject merchandise] was sold in or to the United States with a constructed value using the factors of production to determine whether the merchandise was sold at less than normal value in the United States during the [period of review]." Commerce's Orig. Quest. at C-1; *see* 19 U.S.C. §§ 1677a (describing export price and constructed export price), 1677(34) (defining "dumping" as the "sale or likely sale of goods at less than fair value"); 1677(35)(A) (defining "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise").

[13] Commerce's questionnaire seeks information about a respondent's "organization and accounting practices, and general information regarding sales of the merchandise under review." Commerce's Orig. Quest. at G-2. In Section A of the questionnaire, Commerce asks for information that pertains to a respondent's eligibility for a separate rate, including *de jure* and *de facto* independence from government control. *Id*. at A-1 to -6.

Commerce issued supplemental questionnaires. Responses were received between May 2015 and August 2015.

A. Factors of Production Information

With respect to Shandong's factors of production, Commerce and Shandong went back and forth on an acceptable reporting method. Initially, Commerce asked Shandong to report the actual or estimated amounts of the factors of production used to make the subject merchandise solely on a *CONNUM-specific* basis.[14] Commerce's Orig. Questionnaire at D-2, D-6. Later, when Shandong made it clear that, because of the way it kept its records and because of its production processes, it could only report some factors of production (*e.g.*, wire rod used in the wire-drawing workshop[15]) on a CONNUM-specific basis, and that it could report other factors of production (*e.g.*, chemicals and water used in the electrogalvanization or "EG" workshop) on a "production-group"[16] basis, Commerce agreed that Shandong could report its factors of production "either on a production-group basis or on a CONNUM-specific basis." Commerce's Fourth Sec. D Suppl. Quest. to Shandong (June 25, 2015), P.R. 190, ECF No. 52–28 at 16 ("Please revise [Shandong's] reported amounts for each [factor of production] and ensure that they are allocated either on a production-group basis or on a CONNUM-specific basis."); *see also* Def.'s Resp. Cmts. 10 (quoting Remand Results at 16) ("It is true that Commerce permitted [Shandong] to report its factors of production on 'a less-than CONNUM-specific basis.'"). No matter which method was selected, however, for Commerce, "it was 'unacceptable to report a single average [factors of production] usage ratio for all CONNUMs in

[14] "A 'CONNUM' is a control number assigned to materially-identical products to distinguish them from non-identical, *i.e.*, similar, products." *Eregli Demir ve Celik Fabrikalari T.A.S v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1297, 1321 n.34 (2018) (citation omitted).

[15] Shandong's nail production happens in workshops: "There are three basic production processes to make nails: wire-drawing, nail-making, and polishing, with each process handled in an individual workshop. And there are seven other optional production processes handled in seven other workshops," including, for example, electrogalvinization. *See* Shandong's Sec. C and D Questionnaire Resp. (Jan. 13, 2015), P.R. 95, ECF No. 52–11 at D-4, D-6.

[16] Here, a production group consists of nails having different CONNUMs that have identical factors of production. *See* Shandong's Third Suppl. Sec. A and C and Fourth Suppl. Sec. D Questionnaire Resp. (July 21, 2015), P.R. 208, ECF No. 52–33 at 34 ("Different CONNUM[s] [have] identical [factors of production] if they belong to the same production group."). The record shows that Shandong categorized the subject merchandise into thirteen production groups: Common Nails, Duplex Nails, RS Nails, VC Sinker Nails, EG Nails, EG RS Nails, HDG Nails, HDG RS Nails, Concrete Nails, RS Pole Barn Nails, HDG RS Pole Barn Nails, Cut Masonry Nails, and HDG Cut Masonry Nails. "Each one of these thirteen product[/ production] groups represents a different combination of [f]ield numbers of 3.1 (nail form), 3.4 (steel type), 3.5 (surface finish), 3.6 (shank style) and 3.9 (nail head style) to form a specific CONNUM and has different production steps." Shandong's Second and Third Sec. D Suppl. Resp. (June 5, 2015), P.R. 165, ECF No. 52–18 at 4.

[the] Section D database.'"[17] Final IDM at 36 (quoting Commerce's Second Suppl. Sec. D Quest. to Shandong (Apr. 27, 2015), P.R. 139, ECF No. 52–13 at 4).

Ultimately, Shandong reported some of its factors of production on a CONNUM-specific basis, and others on a production-group basis. Commerce found, however, that none of the factors information was usable, because, according to the Department, some of the factors of production were reported on a single-average basis. Therefore, for Commerce, necessary factors of production information was "missing" from the record. *See* Final IDM at 43.

B. U.S. Sales Information

With respect to U.S. sales, Commerce asked Shandong to, among other things, reconcile its period of review sales data with other sales data for the two fiscal years that overlapped the period of review (August 1, 2013 to July 31, 2014), and to provide a narrative explanation of "how all worksheets and supporting documentation tie together."[18] Commerce's Orig. Questionnaire app. V(A).

Initially, in its December 24, 2014 Section A submission (the "December 2014 Submission"), Shandong provided audited financial statements covering all of 2013, and monthly internal financial reports for all of 2014, except November and December. *See* Shandong's Sec. A Questionnaire Resp. (Dec. 24, 2014), C.R. 36, ECF No. 51–2 Ex. A-18 (2013 audited financial statement) and A-19 (2014 monthly internal financial reports). In the December 2014 Submission, Shandong "noted . . . that it was not submitting the full, audited . . . 2014 financial statement because the financial statement would not be ready until later in the year." Final IDM at 44. November and December 2014 were outside of the period of review.

In its January 13, 2015 Section C submission (the "mid-January 2015 Submission"), filed a few weeks after the December 2014 Submission, Shandong continued to omit the November and December 2014 sales data, but did not reiterate the explanation it had offered in

[17] In the first reviews of the Order, Commerce did not require respondents to report factor of production consumption amounts on a CONNUM-specific basis. Reporting on a single-average basis was acceptable. In the final results of the third administrative review, however, Commerce stated that, going forward, it would require "all 'respondents . . . [to] report all [factors of production] data on a CONNUM-specific basis using all product characteristics in subsequent reviews.'" Final IDM at 37 n.197 (quoting *Certain Steel Nails From the People's Rep. of China*, 78 Fed. Reg. 16,651 (Dep't Commerce Mar. 18, 2013) and accompanying Issues and Dec. Mem. at Comment 5).

[18] Commerce's questionnaire asked for accounting and financial information of Shandong and its affiliates, including audited financial statements and internal (unaudited) financial statements that are "prepared and maintained in the normal course of business for the merchandise under review." Commerce's Orig. Questionnaire at A-7.

its previous submission. *See* Final IDM at 44 (noting Shandong "failed to provide an explanation in its Section C response as to why it was not reporting the complete monthly sales data for [2013 and 2014]"). It is worth noting that, given its previous explanation, it is hardly surprising that Shandong should not have audited financials for November and December since its Section C submission was made on January 13, 2015—thirteen days after the company closed its books for the year.

Six months later, in June 2015, Commerce sought the November and December 2014 data by way of supplemental questionnaire. *See* Final IDM at 45. In its July 2015 response (the "July 2015 Submission"), Shandong provided the missing internal financial reports for November and December 2014, along with an explanation as to why they were not included in Shandong's original response, *i.e.*, that they were not available at the time its response was filed. As for the requested narrative explanation tying the sales reconciliation to the 2013 and 2014 financial statements, Shandong provided that, too. *See* Final IDM at 46. Thus, Shandong placed the missing sales information on the record in response to Commerce's supplemental questionnaire. Indeed, all of the information Shandong placed on the record with respect to 2013 and 2014, including the November and December 2014 information, the explanation for why it was not provided when initially requested, and the narrative explanation tying the sales reconciliation to the 2013 and 2014 financial statements, was provided by way of timely filed responses to Commerce's supplemental questionnaires.

In addition to providing the information that Commerce requested, in the July 2015 Submission Shandong made unsolicited revisions to its sales data, decreasing the quantity of subject merchandise sold in two months of the period of review (August 2013 and December 2013), which had the effect of decreasing the total quantity of sales to the United States by approximately one percent. Shandong did not offer an explanation for these revisions. *See* Final IDM at 46.

C. Shooting Nails Information

With respect to shooting nails, Shandong reported that its affiliate Jining Dragon sold a small number[19] of shooting nails in the United States during the period of review. Shandong claimed, however, that Jining Dragon's sales of shooting nails were excluded from the Order because they were "fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified

[19] In its case brief, Shandong argued that shooting nails "constitute only 0.001 of total quantity sold in the [period of review]." Shandong Case Br. (Nov. 2, 2015), P.R. 245 at 46.

under [Harmonized Tariff Schedule of the United States subheadings] 7317.00.20 and 7317.00.30." Order, 73 Fed. Reg. at 44,961. Based on this claim, Shandong asked that it be excused from reporting Jining Dragon's factors of production and sales information for its shooting nails sales. *See* Shandong's Letter Requesting Rescission of Question 10 of the June 25, 2015 Quest. (July 1, 2015), P.R. 192, ECF No. 52–29 at 2.

On July 2, 2015, Commerce conditionally withdrew[20] its request that Shandong provide Jining Dragon's production and U.S. sales databases for the allegedly excluded shooting nails, but continued to seek information as to whether the nails were, in fact, excluded from the scope of the Order. Specifically, Commerce asked Shandong: "For two product codes of shooting nails . . . please provide product specifications or model diagrams, of each product type's head style, point style, shank style, *and the hand tool with material [i.e., "powder"] used in the hand tool to shoot this nail, along with supporting documentation* ." Final IDM at 54 (citation omitted) (emphasis added). In response, Shandong did not supply the requested supporting documentation, but simply repeated its assertion that "the shooting nails were used in a 'shooting gun' and that material used was 'gunpowder.'" Final IDM at 54 (citation omitted).

II. The Preliminary Results

The Department published the Preliminary Results on August 28, 2015,[21] in which it found that the use of total adverse facts available with respect to Shandong was justified. First, Commerce found that the use of "facts otherwise available" was warranted because necessary information was "missing" from the record for Shandong's production and sales, and for Jining Dragon's shooting nails. Commerce stated:

> During the course of this review, the Department discovered that [Shandong] withheld key information that was requested by the Department for calculating an accurate margin for [Shandong]. Specifically, [Shandong] failed to provide in the form and

[20] Commerce stated:

> Based on [Shandong's] letter, the Department, at this time, is hereby excusing [Jining Dragon] from submitting a Section C and D database. However, the Department requires that [Jining Dragon] answer the other portions of questions 10(a)-(g) regarding its production and sales of shooting nails, the specifications of these shooting nails, etc. Based on [Jining Dragon] response to these questions and the record documentation that it provides regarding these "shooting" nails, the Department will consider whether it is necessary to request that [Jining Dragon] submit a Section C and D database.

Commerce's Letter to Shandong re: Shandong's Request for Excusal (July 2, 2015), P.R. 194, ECF No. 52–31.

[21] Commerce fully extended the deadline for the Preliminary Results, *i.e.*, by 120 days, until August 31, 2015. *See* Prelim. Dec. Mem. at 2.

> manner requested by the Department: (1) an accurate, reliable sales reconciliation regarding its reported sales of subject merchandise to the United States during the [period of review]; (2) an accurate, reliable factors of production . . . database that is reported on a [CONNUM]-specific basis; and (3) sales data, [factors of production] data, and full product specifications, including supporting documentation regarding the hand tool that the shooting nails are used in, from [Shandong's] affiliate, [Jining Dragon], regarding its sales of shooting nails to the United States during the [period of review]. Additionally, [Shandong] along with its affiliate, [Jining Dragon], significantly impeded the proceeding by not providing accurate or complete responses to the Department's questions about its U.S. sales data and [factors of production] data regarding its sales of subject merchandise to the United States during the [period of review].

Prelim. Dec. Mem. at 14; *see also* 19 U.S.C. § 1677e(a). Thus, Commerce found that because the information that Shandong provided in its questionnaire responses was "so incomplete . . . the entirety of the responses need[ed] to be disregarded for the preliminary results." Prelim. Dec. Mem. at 27. In other words, Commerce found that none of Shandong's reported production and sales information was usable.

With respect to Jining Dragon's shooting nails sales, Commerce found that Shandong had failed to show that the nails were outside the scope of the Order. For Commerce, this failure was significant because the Department's withdrawal of its request for Jining Dragon's factors of production and U.S. sales databases was conditioned on Shandong providing information that showed Jining Dragon's shooting nails were excluded from the scope of the Order. Since Shandong failed to meet that condition, and failed to provide the requested databases, Commerce found that necessary information was missing from the record for the shooting nails. *See* Prelim. Dec. Mem. at 25.

Additionally, in the Preliminary Results, Commerce found that Shandong had failed to comply with the Department's requests for information to "the best of its ability," under 19 U.S.C. § 1677e(b)(1). Commerce stated:

> [D]espite the Department's detailed and specific questionnaires, [Shandong] failed to meet its statutory duty to reply accurately and completely to requests for information regarding its affiliates, and the production and sales of subject merchandise. For example, the Department finds that [Shandong] failed to provide: (1) an accurate, reliable sales reconciliation regarding its reported sales of subject merchandise to the United States during the [period of review]; and (2) sales data, [factors of produc-

> tion] data, and full product specifications, including supporting documentation regarding the hand tool that the shooting nails are used in, from [Shandong's] affiliate, [Jining Dragon], regarding its sales of shooting nails to the United States during the [period of review]. Accordingly, the Department finds that [Shandong] failed to cooperate to the best of its ability, pursuant to [19 U.S.C. § 1677e(b)]. Therefore, we are applying [adverse facts available] to [Shandong] for these preliminary results.

Prelim. Dec. Mem. at 27–28. Thus, the findings that Commerce claimed supported its decision to use facts otherwise available, *i.e.*, that necessary information was missing from the record, were also cited by Commerce to support the conclusion that Shandong had failed to comply with the Department's requests for information to "the best of its ability." For Commerce, its questionnaires clearly identified the production and sales information Commerce was looking for, and Shandong simply "chose not to" provide that information. Prelim. Dec. Mem. at 14–15. Importantly, Commerce relied solely on Shandong's alleged failure to supply requested information relating to the reconciliation of 2013 and 2014 sales data and shooting nails to support its adverse inferences finding.

Consequently, the Department found that because (1) none of the information Shandong provided as to its factors of production, U.S. sales, and Jining Dragon's shooting nails was usable, and that (2) Shandong failed to do its best to comply with Commerce's requests for information, "total adverse facts available" should be employed to determine Shandong's antidumping duty rate. Commerce then preliminarily determined that Shandong was a part of the country-wide entity and assigned it the country-wide rate of 118.04 percent.[22] *See* Prelim. Dec. Mem. at 28.

III. The Final Results

After the Preliminary Results were published, Commerce received comments and case briefs from interested parties. The Department then issued the Final Results on March 7, 2016. In the Final Results, Commerce again found that "it is appropriate to apply total [adverse facts available] to [Shandong] for these final results." Final IDM at 31. The reasons provided by Commerce for using "facts available"

[22] Commerce assigns the country-wide entity rate if a respondent does not establish independence from state control. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002) ("Under the [nonmarket economy] presumption, a company that fails to demonstrate independence from the [nonmarket economy] entity is subject to the country-wide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy."); *see also Hubbell Power Sys., Inc. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1302, 1306–07 (2019).

were largely those found in the Preliminary Results. *See* Final IDM at 33 (reciting reasons stated in Prelim. Dec. Mem. at 27–28).

In addition, Commerce continued to find that Shandong had failed to cooperate to "the best of its ability," and, thus, that the use of an adverse inference was warranted, with respect to Shandong's production and sales information. Commerce found:

> Pursuant to [19 U.S.C. § 1677e(b)], the Department continues to find that [Shandong] failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information and that the application of [adverse facts available] is warranted. In sum, . . . despite the Department's detailed and specific requests for information through the issuance of multiple questionnaires, [Shandong] failed to meet its statutory duty to reply accurately and completely to requests for information regarding its affiliates, and the production and sales of subject merchandise. Specifically, [Shandong] failed to provide: 1) an accurate, reliable [factors of production] database that is reported on a CONNUM-specific basis; 2) an accurate, reliable sales reconciliation regarding its reported sales of subject merchandise to the United States during the [period of review]; and 3) sales data, [factors of production] data, and full product specifications for the shooting nails of [Shandong's] affiliate, [Jining Dragon]. In this regard, the Department finds . . . that [Shandong], from the outset, failed to follow specific instructions, repeatedly misrepresented the data it was submitting to the Department, and repeatedly failed to explain adequately why it needed to make revisions to data previously submitted to the Department. Accordingly, and based on the totality of the evidence discussed [in the Final IDM], the Department continues to find that [Shandong] failed to cooperate to the best of its ability, pursuant to [subsection 1677e(b)]. Therefore, we are applying [adverse facts available] to [Shandong] for these final results.

Final IDM at 58–59. Thus, in the Final Results, Commerce again recited its facts available findings to support its further finding that Shandong had failed to cooperate with Commerce's requests to the best of its ability.[23] *See* Final IDM at 59.

[23] In the Final Results, Commerce also found that Shandong was not eligible for its own calculated rate because none of Shandong's separate rate information was reliable. *See* Final IDM at 60 (noting that "the Department found that [Shandong's] submissions were generally so incomplete and unreliable that we could not use them for . . . , *e.g.*, determining separate rate eligibility").

National Nail and Shandong commenced this consolidated action to dispute Commerce's findings and determinations in the Final Results, including the Department's decision to deny Shandong a separate rate and its use of total adverse facts available. In *National Nail I*, the court remanded this matter to Commerce, directing the Department to "evaluate the evidence on the record regarding Shandong's eligibility for a separate rate, including the information it submitted in response to Section A of Commerce's questionnaire, and determine whether such evidence demonstrates an absence of *de jure* and *de facto* control by the Chinese government." *National Nail I*, 42 CIT at __, 279 F. Supp. 3d at 1379. The court further ordered that "if Commerce determines that Shandong is eligible for a separate rate, it shall determine a separate rate for Shandong." *Id*.

IV. The Remand Results

On April 20, 2018, Commerce published the Remand Results. On remand, Commerce determined that Shandong was eligible for a separate dumping rate because the record supported the finding that Shandong demonstrated an absence of *de jure* and *de facto* government control. *See* Remand Results at 8–12; *see also id.* 10 (finding, "under protest, . . . that the deficiencies identified in [Jining Dragon's] separate rate reporting do not undermine [Shandong's] entitlement to a separate rate."). Commerce did not, however, determine a rate using any of the production and sales information that Shandong had placed on the record in response to its questionnaires. Rather, the Department again assigned Shandong the rate of 118.04 percent as the total adverse facts available rate, *i.e.*, the highest rate on the record of this proceeding, and restated its findings from the Final Results. *See* Remand Results at 12, 15–18.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

I. Facts Available and Adverse Inferences

In an antidumping proceeding, Commerce relies primarily on the interested parties' submissions of factual information to create an administrative record. *See* 19 C.F.R. § 351.301(a) (2015) ("The Department obtains most of its factual information in antidumping . . . proceedings from submissions made by interested parties during the

course of the proceeding."); *see also QVD Food Co. v. United States,* 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with interested parties and not with Commerce."). "If . . . necessary information is not available on the record, or . . . an interested party or any other person . . . fails to provide . . . information [that has been requested by Commerce] . . . in the form and manner requested, subject to [19 U.S.C. § 1677m(c)(1)[24] and (e)[25]]," or "significantly impedes" a proceeding, the statute provides that Commerce "shall, subject to [19 U.S.C. § 1677m(d)[26]], use the facts otherwise available." 19 U.S.C. § 1677e(a)(1)-(2)(B), (C); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (discussing adverse facts available statutory framework).

Prior to 1994, "whenever a party or any other person refuse[d] or [was] unable to produce information requested in a timely manner and in the form required, or otherwise significantly impede[d] an investigation," Commerce made its determinations on the basis of the "best information otherwise available." 19 U.S.C. § 1677e(c) (1988).[27]

---

[24] This subsection provides in pertinent part:

> If an interested party, promptly after receiving a request from [Commerce] . . . for information, notifies [Commerce] . . . that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, [Commerce] . . . *shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party*.

19 U.S.C. § 1677m(c)(1) (emphasis added).

[25] Subsection (e) provides that Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce]," if five conditions are met:

> (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e)(1)-(5).

[26] If Commerce receives a response to a request for information that it finds deficient, the statute requires Commerce to "promptly inform the person submitting the response of the nature of the deficiency and . . . to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency" bearing in mind the timeframe permitted for reviews. 19 U.S.C. § 1677m(d). If Commerce finds that further submissions by that person in response to such deficiency are untimely or "not satisfactory," Commerce may, subject to subsection (e), "disregard all or part of the original and subsequent responses." *Id*.

[27] The 1988 version of subsection 1677e(c), "Determinations to be made on best information available," read in pertinent part, "In making [its] determinations under this title, [Commerce] . . . shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988).

"The purpose of the [best information available] provision [was] to induce respondents to provide Commerce with timely, complete and accurate information so that Commerce [could] determine dumping margins as accurately as possible." *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 915, 865 F. Supp. 857, 865 (1994) (citation omitted), *aff'd*, 68 F.3d 487 (Fed. Cir. 1995).

Under the best information available standard, Commerce employed either "total best information available" or "partial best information available." As described by this Court:

> For "total [best information available]" the respondent's entire dumping margin is calculated upon the basis of [best information available]. Commerce uses "total [best information available]" for a respondent whose reporting or verification failure is *so extensive as to make its entire response unreliable*. Commerce's choice of a particular [best information available] rate is dependent upon whether the respondent is deemed to have been "cooperative" or "uncooperative." Commerce will use the highest possible [best information available] rate for an "uncooperative" respondent.
>
> Commerce applies "partial [best information available]" when a respondent's submitted information is *deficient in limited respects*, yet is still reliable in most other respects. In a "partial [best information available]" situation, Commerce alleges it does not consider the level of cooperation of the respondent.

Id., 18 CIT at 915 n.21, 865 F. Supp. at 865 n.21 (emphasis added). Thus, use of total best information available was authorized when all of the information on the record was unreliable, and partial best information available was used when only some of the information was unreliable.

According to the Statement of Administrative Action ("SAA"),[28] the use of best information available was considered "an essential investigative tool in antidumping and countervailing duty proceedings," because its potential use "provide[d] the only incentive to foreign exporters and producers to respond to Commerce questionnaires." SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 868 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198.

---

[28] The SAA is "an authoritative expression" of legislative intent when interpreting and applying the Uruguay Round Agreements Act. *See* 19 U.S.C. § 3512(d).

In 1994, Congress enacted the Uruguay Round Agreements Act, incorporating into U.S. law the Uruguay Round agreements that were negotiated and adopted by the members of the World Trade Organization. *See* Uruguay Round Amendments Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). The Act more clearly defined the use of adverse type inferences in making dumping determinations. The 1994 law divided Commerce's procedure into two parts. First, if there was necessary information missing from the record, or the other statutory prerequisites were satisfied, Commerce was directed to use "facts otherwise available." 19 U.S.C. § 1677e(a) (1994)[29]; *see also* SAA at 869, 1994 U.S.C.C.A.N. at 4198 ("New section 776(a) requires Commerce . . . to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information."). The statute did not foresee a situation where all of the information that was placed on the record would be found unusable. Rather, the idea was that facts available would be used to fill gaps where some information was not on the record. *See Nippon Steel*, 337 F.3d at 1381.

The second part of the new procedure permitted Commerce to draw adverse inferences from among the facts available, if a party failed to cooperate to "the best of its ability" with Commerce's requests for information. *See* 19 U.S.C. § 1677e(b) (1994)[30]; *see also* SAA at 870, 1994 U.S.C.C.A.N. at 4199 ("[N]ew section 776(b) permits Commerce . . . to draw an adverse inference where a party has not cooperated in a proceeding. A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information."). Thus,

---

[29] The 1994 version of subsection 1677e(a), which is the same in substance to the version currently in effect, provided, in pertinent part:

> If . . . necessary information is not available on the record, or . . . an interested party or any other person . . . (A) withholds information that has been requested by [Commerce] . . . , (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . , (C) significantly impedes a proceeding . . . , or (D) provides such information but the information cannot be verified . . . , [Commerce] . . . shall, subject to [19 U.S.C. § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (1994); *see also* 19 U.S.C. § 1677e(a) (2012).

[30] The 1994 version of subsection 1677e(b) provided, in pertinent part:

> If [Commerce] . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] . . . , [Commerce] . . . , in reaching the applicable determination . . ., may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from . . . (1) the petition, (2) a final determination in the investigation . . . , (3) any previous review under [19 U.S.C. § 1675] or determination under [19 U.S.C. § 1675b], or (4) any other information placed on the record.

19 U.S.C. § 1677e(b) (1994).

adverse facts available would necessarily be less favorable to the respondent than would normally be the case with just facts available. *See* SAA at 870, 1994 U.S.C.C.A.N. at 4199 ("Where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.").

Construing the language and legislative history of section 1677e, the Federal Circuit has described a two-part analysis:

> The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination. Under subsection (a), if a respondent "fails to provide [requested] information by the deadlines for submission," Commerce shall fill in the gaps with "facts otherwise available." The focus of subsection (a) is respondent's *failure to provide information.* The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination. As a separate matter, subsection (b) permits Commerce to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability, not its failure to provide requested information*.

Nippon Steel, 337 F.3d at 1381 (emphasis added) (construing 19 U.S.C. § 1677e (2000)[31]); *see also F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (noting, where a respondent is uncooperative, adverse facts available "will create the proper deterrent to non-cooperation with [Commerce's] investigations"); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (citing *De Cecco*, 216 F.3d at 1032). Thus, the use of "facts otherwise available," to fill in gaps, applies when necessary information is lacking, regardless of the rea-

[31] The Federal Circuit's *Nippon Steel* opinion construed the 2000 version of subsections 1677e(a) and (b). Although Trade Preferences and Extension Act of 2015 amended certain parts of § 1677e(b), the statutory language that is relevant here, remained unchanged. *Compare* 19 U.S.C. § 1677e(a) & (b) (2000) *with* 19 U.S.C. § 1677e(a) & (b) (2012) and 19 U.S.C. § 1677e(b) (Supp. IV 2016).

son for its absence. *Nippon Steel*, 337 F.3d at 1381. An adverse inference, on the other hand, may only be drawn where the reason underlying the absence of necessary information was the respondent's failure to cooperate to "the best of its ability," that is, where the respondent failed to do "the maximum it [was] able to do." *Id*. at 1382.

To find a respondent has failed to cooperate to the best of its ability, the Department must perform two tasks:

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. . . . Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83 (citation omitted). It is worth noting that the subjective component of the "best of its ability" standard judges what constitutes the maximum effort that a particular respondent is capable of doing, not some hypothetical, well-resourced respondent. Thus, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Id.* at 1383. While there is no required formula for Commerce to follow in reaching its conclusion, a reviewing court must be able to conclude that Commerce looked at the respondent's ability to comply as well as its performance in complying. This is consistent with the 1994 amendments to the law, which moved away from the use of the "best information available" to the use of "facts otherwise available" with or without an adverse inference. In other words, whereas under the former standard, Commerce could use "total [best information available]" for a respondent "whose reporting or verification failure is *so extensive as to make its entire response unreliable*," now, the statute requires that Commerce look subjectively and objectively at the efforts that a particular respondent has made. *Ad Hoc Comm. of AZ-NM-TX-FL Producers*, 18 CIT at 915 n.21, 865 F. Supp. at 865 n.21.

The "best of its ability" standard requires a respondent to "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of [its] ability to do so." *Nippon Steel*, 337 F.3d at 1382. "While that standard does not require perfection, it 'does not condone inattentiveness, carelessness, or inadequate record keeping.'" *NSK Ltd. v. United States*, 481 F.3d 1355, 1361 (Fed. Cir. 2007) (quoting *Nippon Steel*, 337 F.3d at 1382). "[I]ntentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate." *Nippon Steel*, 337 F.3d at 1383; *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) ("Providing false information and failing to produce key documents unequivocally demonstrate that [a respondent] did not put forth its maximum effort.").

Finally, the purpose for using an adverse inference is carried over from the pre-1994 best information available analysis—to encourage compliance with questionnaire inquiries. *See Ta Chen*, 298 F.3d at 1340 (citing *De Cecco*, 216 F.3d at 1032) (Congress "intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.").

II. Specific Findings

As has been seen, the law requires that the record must support a finding that the use of facts available is warranted before Commerce may make the separate, additional finding that an adverse inference is warranted. *Nippon Steel*, 337 F.3d at 1381; *see also Guizhou Tyre Co. v. United States*, 43 CIT __, __, Slip Op. 19–59 at 7 (May 15, 2019) ("[B]efore Commerce can apply [adverse facts available], it must first determine under § 1677e(a) that information is missing from the record *and* that the gap was caused by a respondent's failure to cooperate."). It should be kept in mind, though, that the facts available and adverse facts available findings are distinct, and Commerce may not use its facts available finding as the sole justification for use of an adverse inference. *See Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 488, 149 F. Supp. 2d 921, 930 (2001) (citing *Borden, Inc. v. United States*, 22 CIT 233, 261, 4 F. Supp. 2d 1221, 1246 (1998) ("In making its determination that an interested party did not act 'to the best of its ability,' the Department cannot merely recite the relevant standard or repeat its facts available finding. Rather, in order to satisfy its statutory obligations, the Department must be explicit in its reason for applying adverse inferences.").

Since the 1994 amendments to section 1677e, Commerce has adopted the practice, under certain circumstances, of using what it calls

"total adverse facts available" when determining dumping margins.[32] "Total adverse facts available" is not defined by statute or agency regulation. Commerce uses "total adverse facts available" administratively to refer to Commerce's application of adverse facts available not only to the facts pertaining to specific sales or information related to factors of production not present on the record, but to the facts respecting all of respondents' production and sales information that the Department concludes is needed for an investigation or review. *Mukand, Ltd. v. United States*, 37 CIT __, __, 2013 WL 1339399, at *7 (Mar. 25, 2013) (citation omitted), *aff'd*, 767 F.3d 1300 (Fed. Cir. 2014). Commerce has chosen this practice of applying "total adverse facts available" even though it is evident that the statute did not anticipate its use. That is, the statute does not authorize the use of adverse inferences to all of a respondent's information, but only "*in selecting from among the facts otherwise available*." 19 U.S.C. § 1677e(b)(1)(A) (emphasis added).

Although the statute provided for a picking-and-choosing process, this Court has sustained Commerce's use of total adverse facts available where (1) the record contained no usable information for core components of Commerce's dumping analysis (as where the respondent simply did not answer the questionnaire) and (2) substantial evidence showed that the respondent was egregious in its failure or refusal to comply with Commerce's requests for information (as where the respondent concealed information requested by Commerce). *See, e.g.*, *Mukand*, 37 CIT at __, 2013 WL 1339399, at *7 (citations omitted); *Papierfabrik August Koehler Se v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1304, 1314 (2014). Where, on the other hand, some of the information could be used, or the deficiency was only "with respect to a discrete category of information," and a respondent is found not to have complied to the best of its ability, the use of "partial adverse facts available" is directed by the statute. *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1416, 2011 WL 4829947, at *14 (Oct. 12, 2011).

In sum, courts have held that, in order to apply "total adverse facts available," Commerce must first find, based on the record, that the use of facts available is warranted with respect to all requested information. The absence of any usable information, however, is a necessary, but not sufficient, condition for the application of "total adverse facts available." Before Commerce may apply total adverse facts available, the record must support a finding that the respon-

[32] It appears that the earliest mention of the phrase "total adverse facts available" in an opinion by this Court was in 1999. *See, e.g.*, *Ferro Union, Inc. v. United States*, 23 CIT 178, 198, 44 F. Supp. 2d 1310, 1329 (1999).

dent, both objectively and subjectively, failed to act to "the best of its ability" to cooperate with Commerce's requests for information, and that thus, the use of adverse facts available was needed to encourage future cooperation. *See Ta Chen*, 298 F.3d at 1340 (citation omitted).

DISCUSSION

I. Shandong's Factors of Production

During the underlying review, Commerce sought information with respect to Shandong's factors of production by way of its Section D questionnaire. Initially, the company was asked to report the actual or estimated amounts of the factors of production that it consumed making the subject merchandise solely on a *CONNUM-specific* basis. In its questionnaire responses, however, Shandong made it clear that, because of its production process and the way it kept its records, it could only report some factors of production (*e.g.*, wire rod used in the wire-drawing workshop) on a CONNUM-specific basis. Shandong did, however, represent that it could report other factors of production (*e.g.*, chemicals and water used in the electrogalvinization, or "EG" workshop) on a production-group basis. *See* National Nail's Mem. Supp. Mot. J. Agency R., ECF No. 34 at 24 ("Unlike Stanley, [Shandong] did not have sophisticated software that recorded material and other [factors of production] consumption for all nails produced through all production stages. The best it could do was to break down its material consumption into thirteen different production groups."). As is provided for in 19 U.S.C. § 1677m(c)(1),[33] Commerce took the representations into account, and agreed that Shandong could report its factors of production "either on a production-group basis or on a CONNUM-specific basis." Commerce's Fourth Sec. D Suppl. Quest. to Shandong at 16. No matter which reporting method was selected, though, Commerce directed that "it was unacceptable to report a single average [number for factors of production] usage ratio for *all* CONNUMs in [the] Section D database." Final IDM at 36 (emphasis added) (citation omitted).

In addition, Commerce took seriously the provisions of 19 U.S.C. § 1677m(e) (relating to consideration of information submitted by a party that "does not meet all the applicable requirements established by [Commerce]") and 19 U.S.C. § 1677m(d) (relating to information that Commerce finds deficient) and issued supplemental questionnaires in order to obtain usable information on which to base its

[33] "If an interested party, promptly . . . notifies [Commerce] . . . that such party is unable to submit the information requested in the requested form and manner, . . . [Commerce] may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." 19 U.S.C. § 1677m(c)(1).

determination. By issuing these supplemental questionnaires, Commerce complied with Congress's clear preference that information supplied by the parties, even imperfect information, provide the agency the evidence essential for reaching the applicable determination.

In the Remand Results, Commerce found, as it did in the Final Results, that Shandong failed to provide the requested factors of production data in the form and manner requested:

> [Shandong] failed to provide a reliable, accurate database for [factors of production] on a CONNUM-specific basis. In numerous questionnaires, Commerce asked [Shandong] to provide updated databases or to explain why it could not provide its [factors of production] on a CONNUM-specific basis, yet [Shandong] continued to report its [factors of production] on a single average basis. Commerce gave [Shandong] three opportunities to provide its factors of production data on a CONNUM-specific basis and to explain its efforts to report the data on that basis, but it failed to do so. Commerce also provided [Shandong] three opportunities to explain why reporting these data on a CONNUM-specific basis was impossible. However, [Shandong] disregarded Commerce's request to report on a CONNUM-specific basis and continuously *reported factors of production on a single-average basis*, applying the average ratio to more than 100 CONNUMs, despite Commerce's instruction that it was unacceptable to report [factors of production] on a single-average basis, and with no explanation detailing [Shandong's] efforts to provide Commerce with the [factors of production] data in the form and manner requested.

Remand Results at 15–16 (emphasis added). Based on this narrative, Commerce concluded that none of the factors of production information was usable because necessary factors of production information was "missing" from the record.

The parties disagree as a factual matter as to whether Shandong provided Commerce with the factors of production information in the form and manner requested. National Nail maintains that Shandong reported all of its factors of production either on a CONNUM-specific basis or, as Commerce permitted, on a production-group basis:

> After several rounds of supplemental questionnaires and responses, [Shandong] submitted revised [factors of production] databases in which all of the key [factors of production] were reported either on a CONNUM-specific basis (wire rod) or on a production-group basis (other materials, labor, coal/water, elec-

> tricity). Unlike its first [factors of production] database, [Shandong's] revised [factors of production] database reflected different per-unit consumption amounts for the key [factors of production] . . . . [Shandong] explained that it had used different yield rates from each of the thirteen different production stages that were derived from actual material consumption data collected at each production stage. . . . These production group yield rates were then used to calculate the different per-unit [factors of production] consumption amounts ultimately reported in the "production-group" [factors of production] database.

National Nail's Reply, ECF No. 49 at 4–5 (citations omitted). Put another way, Shandong maintains that its revised databases contained the factors of production information Commerce asked for in the form and manner that the Department ultimately agreed to accept, *i.e.*, on a CONNUM-specific or production-group basis.

For its part, Commerce insists that Shandong's responses did not comply with the Department's instructions. Commerce takes particular issue with the factors of production reported on a production-group basis:

> [Shandong] reported certain factors of production on a production-group basis, but reported these "factors of production on a single-average basis, applying the average ratio to more than 100 CONNUMs, despite Commerce's instruction that it was unacceptable to report [factors of production] on a single-average basis." Despite receiving multiple opportunities from Commerce to explain its efforts to provide the factors of production databases in the form and manner requested, [Shandong] never contacted Commerce with questions or explained why it could only provide a single-average factors of production usage ratio across all production groups.

Def.'s Resp. Cmts. 10 (quoting Remand Results at 16). Commerce, then, maintains that even though it permitted Shandong to report on a production-group basis, this resulted in reporting some costs on a single-average basis, which was unacceptable.

National Nail nevertheless maintains that Shandong's production-group database did not report costs on a single-average basis:

> Unlike [Shandong's] original "single-average" [factors of production] database which reflected only one average per-unit consumption amount for most of the [factors of production], the "production-group" [factors of production] database reflected a range of different per-unit consumption amounts for the [factors of production] that accounted for up to 98 percent of the total

> nail weight, as derived from yield rates calculated from thirteen different production stages. Fundamentally, [Commerce] failed to acknowledge that these differences in the final version of [Shandong's] production-group [factors of production] were ultimately more specific than the originally reported single-average [factors of production] database.
>
> Different CONNUMs may have reported identical [factors of production amounts], but only because these CONNUMs all went through the same production groups. [Commerce] unreasonably assumed that different CONNUMs would have different per-unit consumption amounts even though these nails were essentially produced in the same manner because they all went through the same production stages. Slight differences in CONNUM characteristics would not necessarily result in different per-unit [factors of production] consumption amounts.

National Nail's Reply 5. Therefore, according to National Nail, nails of different kinds, classified as different CONNUMs, can go through the same production stages and consume the same, or nearly the same, amount of inputs, as with, for example, the chemicals and water inputs used in the electrogalvinization workshop. *See* Shandong's Third Suppl. Sec. A and C and Fourth Suppl. Sec. D Questionnaire Resp. (July 21, 2015), P.R. 208, ECF No. 52–33 at 33 (referencing workshops, including the electrogalvinization workshop, where "the chemicals are the main [factors of production] used to treat . . . semi-finished nails. All the nails going through [a] specific workshop are processed together in a container full of liquid (water added with chemicals). There is no method or necessity to allocate the chemicals on a CONNUM-specific basis.").

For National Nail, Shandong ultimately supplied Commerce with factors of production information in the form and manner requested, *i.e.*, consumption amounts of some factors of production were reported on a CONNUM-specific basis (*e.g.*, the amount of wire rod used in the wire-drawing workshop), and the consumption amounts of other factors of production were reported on a production-group basis (*e.g.*, chemicals and water used in other workshops, such as electrogalvinization), as permitted by Commerce. So, according to National Nail, while it may at first blush appear as though Shandong was reporting the consumption of certain factors of production on a single-average basis, that is, the same number for multiple CONNUMs, the number was not an average but represented the actual consumption of the factor of production.

National Nail is right. An examination of the treatment of two different kinds of nails, identified by different CONNUMs, illustrates the point. For example, Shandong reported low-carbon wire rod as a factor of production for two different CONNUMs.[34] For each CONNUM, Shandong reported different per-unit consumption amounts of wire rod, *i.e.*, more rod for bigger nails. Galvanized wire-drawing powder,[35] a lubricating material, was another factor of production for both CONNUMs. For each, Shandong reported different per-unit consumption amounts of galvanized wire-drawing powder. *See* Shandong's Second and Third Suppl. Sec. D Resp. (June 5, 2015), C.R. 136 Ex. TSD-1, ECF No. 51–6 (revised factors of production database).

For the same two types of nails, Shandong reported consumption of other inputs, such as chemicals and water, on a production-group basis. As an example, "Electrogalvinization Nails" are one of Shandong's thirteen production groups that went through the electrogalvanization workshop. The electrogalvinization workshop includes a thirteen-step production process in which a zinc coating is applied to nails to protect against corrosion. *See* Shandong's Sec. C and D Questionnaire Resp. (Jan. 13, 2015), P.R. 95 Ex. D-1(2) (electrogalvanization flow chart of production steps). Three of those steps are "washing," one is "rinsing," and one is "hot water washing." Nails went through each step of this process "in bulk" amounts, and tracking the consumption amount of, for example, water, on a per-CONNUM basis, according to Shandong, was not feasible. *See* Shandong's Third Suppl. Sec. A and C and Fourth Suppl. Sec. D Questionnaire Resp. at 33. Because per-CONNUM reporting was not feasible, Shandong reported consumption of this factor of production on a production-group basis. Commerce found that the amounts consumed were reported on a single-average basis, because the consumption rate for both kinds of nails was the same. *See* Final IDM at 39. In fact, though, Commerce's finding cannot be reconciled with the record evidence showing that the amounts consumed were reported on a production-group basis and that the amounts consumed were reported to be identical because, as best as could be determined, they were the same.

[34] In Shandong's questionnaire responses, the CONNUMs were identified by number as 207201501061111 and 207201501091111. *See* Shandong's Second and Third Suppl. Sec. D Resp. (June 5, 2015), C.R. 136 Ex. TSD-1 at 1–2, ECF No. 51–6 (revised factors of production database). Shandong reported different low-carbon wire rod consumption amounts for each of these CONNUMs of 1.07427 kg. and 1.00771 kg., respectively. *Id.* Shandong also reported different per-unit consumption amounts of galvanized wire-drawing powder for each of these CONNUMs of 0.002748573 kg. and 0.002578287 kg., respectively. *Id.*

[35] Wire-drawing powder is a lubricant used to reduce friction between the drawn wire and the wire-drawing die, among other uses. *See Wire Drawing Die And Auxiliaries*, WUXI ANBER MACHINE CO., LTD., http://www.wiredrawingchina.com/spare-parts/Wire-Drawing-powder.htm (last visited May 30, 2019) (describing wire-drawing powder uses).

Shandong's Sec. D Questionnaire Resp. (Jan. 13, 2015), P.R. 94 Ex. D-8 ("FOP Water Consumption") (indicating, for example, 0.002 kilograms of water consumed per one kilogram of nails).

These are but two kinds of nails where record evidence demonstrates that Shandong reported estimated consumption amounts of factors of production on a per-CONNUM basis, where it was able to do so, and otherwise on a production-group basis. Though equal amounts of an input, *e.g.*, water, were consumed for both kinds of nails, this does not mean that water consumption was reported on a single-average basis, but rather that the reported factor of production number was the amount consumed by each production group. As noted, just because the amount of water consumed when a basket of nails is dipped in a pool is the same for different nails does not make the reported number an average. Since the information that Commerce requested was provided in accordance with its instructions, *i.e.*, to report either on a CONNUM-specific basis *or* a production-group basis, its finding that Shandong "disregarded Commerce's request to report on a CONNUM-specific basis and continuously reported factors of production on a single-average basis" lacks the support of substantial evidence. Remand Results at 16.

Additionally, the court finds that substantial evidence does not support Commerce's "best of its ability" finding used to apply an adverse inference. It is difficult to see how Shandong can be said to have failed to put forth its maximum effort, under the objective and subjective standards set out in *Nippon Steel*,[36]where its revised factors of production database contained the information Commerce asked for in the form and manner it permitted Shandong to use (*i.e.*, on a CONNUM-specific or production-group basis). *Nippon Steel*, 337 F.3d at 1382–83 (citation omitted). To the extent that Commerce grounded its decision to apply total adverse facts available on this "missing" factors information, the use of total adverse facts available is not supported by substantial evidence.

Moreover, the adverse facts available finding with respect to factors of production is not in accordance with law because Commerce completed none of the steps required by *Nippon Steel* to apply total adverse facts available. *Nippon Steel*, 337 F.3d at 1382–83. Here, Commerce relied on a recitation of its facts available findings as a basis for its decision to apply an adverse inference, which is not

[36] First, Commerce must show that "a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained" under applicable law. *Nippon Steel*, 337 F.3d at 1382. Second, Commerce must show that "the respondent['s] . . . failure to fully respond is the result of [its] . . . : (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382–83.

enough under the statute. *See Steel Auth. of India*, 25 CIT at 488, 149 F. Supp. 2d at 930 (citation omitted) ("In making its determination that an interested party did not act 'to the best of its ability,' the Department cannot merely recite the relevant standard or repeat its facts available finding. Rather, in order to satisfy its statutory obligations, the Department must be explicit in its reason for applying adverse inferences."). In other words, Commerce must make it possible for a reviewing court to discern its reasons for finding that Shandong, specifically, did not put forth its maximum effort before employing adverse inferences.

Finally, 19 U.S.C. § 1677m(e) provides that Commerce "shall not decline to consider information that is submitted by an interested party" that "does not meet all the applicable requirements established by [Commerce]," if five conditions are met. 19 U.S.C. § 1677m(e). One of the conditions is that "the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information." *Id.* § 1677m(e)(4). Here, the facts demonstrate that Shandong made this showing, and Commerce has not questioned the other four requirements. Thus, Commerce erred by declining to consider the factors of production information Shandong placed on the record.

Based on the foregoing, on remand Commerce is directed to use the factors information Shandong reported (1) on a CONNUM-specific basis; and (2) on a production-group basis, to determine normal value.

II. Shandong's U.S. Sales

In the Remand Results, Commerce found, as it had in the Final Results, that Shandong "failed to provide a reliable, accurate database for U.S. sales." Remand Results at 16; *see also* Final IDM at 43. By way of explanation, Commerce stated:

> [Shandong] did not provide the necessary information requested in Commerce's questionnaires, including why certain sales data were not included for two months [*i.e.*, November and December 2014], when [Shandong] had submitted monthly internal financial statements for the other months that had reported sales data in its original sales reconciliation . . . . Commerce provided [Shandong] two opportunities to remedy and explain deficiencies in its initial questionnaire response. . . . In responding, [Shandong] did not include two [different] months of sales data from the period of review [*i.e.*, August and December 2013] and failed to provide an explanation for how the sales reconciliation and supporting worksheets tied to its financial statements.

Remand Results at 16–17. So, Commerce found that Shandong initially did not supply sales data for two of the twenty-four months requested (November and December 2014, both outside of the period of review), and that later, it changed the quantity of merchandise sold for two of the twelve months in the period of review (August and December 2013), without explaining the change. Commerce also found missing a narrative explanation for how Shandong's sales reconciliation and supporting worksheets tied to its financial statements. Thus, Commerce concluded that the use of facts available was warranted.

In addition, Commerce found that Shandong's "repeated unexplained revisions to its U.S. sales database support[ed] a determination that it did not put forth the maximum effort in responding to the Department's request for information and thus it did not cooperate within the meaning of" 19 U.S.C. § 1677e(b). Final IDM at 49.

National Nail argues that Commerce's decision to extend adverse facts available with respect to its U.S. sales information (thus contributing to its determination to assign a rate based on total adverse facts available) is not supported by substantial evidence and not in accordance with law. For National Nail:

> [Shandong] had complied fully with the Department's first supplemental questions on the sales reconciliation and there were no outstanding deficiencies. The Department is incorrect to assert that there was a pattern of unresponsiveness in [Shandong's] responses to the Department's questions on the sales reconciliation.
>
> The Department does not dispute that the sales values in [Shandong's] sales reconciliation tie perfectly to the accounting records and audited financial statements. The Department also does not dispute that it never gave [Shandong] the opportunity to fix or explain why the sales quantities reported for two months [of the period of review, *i.e.*, August and December 2013] had changed.
>
> The Department never addressed the fact that the discrepancy in the sales quantities were *de minimis* (less than one percent of total sales quantities). It is simply not credible for the Department to assert that such *de minimis* differences in sales quantities were enough to call into question the overall credibility of [Shandong's] sales reconciliation, when it is undisputed that [Shandong's] reported sales values reconciled fully to its audited financial statements.

> In short, the discrepancies regarding [Shandong's] sales reconciliation do not warrant even the application of neutral facts available, and most certainly do not support the application of total [adverse facts available]. These were easily explainable discrepancies of trivial amounts[37] that do not warrant such a punitive application of total [adverse facts available], particularly when [Shandong] was not given the opportunity to explain or remedy the discrepancies cited by the Department.

NN's Cmts. at 7–8.

Substantial evidence does not support Commerce's decision to use facts available as to all of Shandong's U.S. sales. This is because, except with respect to the unexplained revisions to the August and December 2013 data, the information Commerce found was "missing" is not, in fact, missing. First, the November and December 2014 sales data is not missing from the record. While it is true that Shandong's *original* sales reconciliation (provided in the mid-January 2015 Submission) did not include November and December 2014 sales data, the record shows that Shandong *timely* provided this information in response to a supplemental questionnaire[38] in its July 2015 Submission, and explained it was "previously absent from its response because the data had not been prepared when the original sales reconciliation chart was submitted" in the mid-January 2015 Submission. Final IDM at 46. Although Commerce found otherwise, *i.e.*, that "as [Shandong] was preparing its [mid-January 2015 Submission] between when it received the original questionnaire [dated November

[37] [In its original sales reconciliation, Shandong reported a sales quantity for August 2013 of 82,576.51 kg. and for December 2013 of 179,860.32 kg., and revised those amounts downward in its revised reconciliation to 78,680.83 kg. and 169,261.92 kg., respectively. *See* Shandong's Sec. C and D Questionnaire Resp. (Jan. 13, 2015), app. 1 (original sales reconciliation), C.R. 62, 63, ECF No. 51–3; Shandong's Third Suppl. Sec. A and C and Fourth Suppl. Sec. D Resp., Ex. 3rd SSAC-23 (revised sales reconciliation), ECF No. 51–5.]

[38] In response to Commerce's June 2015 supplemental questionnaire, asking for the November and December 2014 data, Shandong provided that data along with an explanation as to why it was omitted. Commerce found:

> In its next supplemental questionnaire response, [the July 2015 Submission, Shandong] submitted a revised sales reconciliation that reported the missing sales data for two months of 2014 and explained that data for these two months were previously absent from its response because the data had not been prepared when the original sales reconciliation chart was submitted in [the mid-January 2015 Submission]. Additionally, [Shandong] provided an explanation for how its revised sales reconciliation tied to the monthly general ledger and values listed for each month in the general ledger tied to [Shandong's] audited annual financial statements for . . . 2013 and 2014. Finally, [Shandong] provided an explanation for the revisions to the revised U.S. sales database that it submitted in response to the Department's supplemental Section D questionnaire. Specifically, [Shandong] submitted an exhibit that detailed the comparisons by each variable of the changes between the two different U.S. sales databases.

Final IDM at 46.

20, 2014] and when it was due [*i.e.*, January 27, 2015], it should have been able to provide information on those last two months of . . . 2014 based on the monthly internal financial statements admittedly in its possession,"[39] it is difficult to see how demanding complete sales information twenty-seven days after Shandong closed its books for the year was reasonable. Final IDM 44–45. Nor is it immediately obvious why information for the two months of sales data starting three months after the close of the period of review was so important. Nevertheless, since there is no dispute that the information was placed on the record *on time* in a supplemental submission solicited by Commerce, the Department's claims that information is missing from the record are not supported by substantial evidence.

Second, in the Final Results, Commerce, as it had in the Preliminary Results, found that Shandong provided a narrative explanation of how its sales reconciliation and supporting worksheets tied to its financial statements. Commerce stated:

> [Shandong] provided an explanation for how its revised sales reconciliation tied to the monthly general ledger and values listed for each month in the general ledger tied to [Shandong's] audited annual financial statements for . . . 2013 and 2014. [Additionally, Shandong] provided an explanation for the revisions to the revised U.S. sales database that it submitted in response to the Department's supplemental Section D questionnaire. Specifically, [Shandong] submitted an exhibit that detailed the comparisons by each variable of the changes between the two different U.S. sales databases.

Final IDM at 46; Prelim. Dec. Mem. at 15 ("In its Third Supplemental Questionnaire Response, [Shandong] addressed the Department's clarification questions and submitted a revised sales reconciliation, as requested, including the two months of sales data that were omitted in its original sales reconciliation."). Again, the information was placed on the record in a timely manner. On remand, Commerce did not find that the numbers in the sales reconciliation failed to tie. Thus, substantial evidence does not support Commerce's finding that U.S. sales data was missing for November or December 2014, or that Shandong failed to provide the requested narrative explanation.

As to the August and December 2013 sales data, the record does not support Commerce's finding on remand that Shandong "did not in-

[39] The admission to which Commerce referred is, apparently, Shandong's statement in its December 2014 Submission that "it maintains monthly internal financial statements (*i.e.*, balance sheets and profit & loss statements), which list the business income net of profit." Final IDM at 44.

clude [these] months of sales data from the period of review" in its sales reconciliation, as Commerce found on remand. Remand Results at 17. The record shows that Shandong *timely* submitted a revised reconciliation with *changes* to its sales data for August and December 2013 in the July 2015 Submission. Moreover, Commerce found that the changes to August and December 2013 sales numbers amounted to a *de minimis* decrease, approximately one percent, in the total reported sales to the United States. This being the case, Commerce's findings with respect to the sales reconciliation do not support a determination of facts available.

It is true, though, with respect to the unsolicited changes to the August and December 2013 sales data, that Shandong did not provide an explanation, as is required by the regulations. *See* 19 C.F.R. § 351.301(b)(2) ("If the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted."). As such, and because the revisions to the August and December 2013 sales data were submitted roughly a month before the fully extended deadline for the Preliminary Results, Commerce did not act unreasonably by declining to issue another supplemental questionnaire asking Shandong to explain its revisions. Shandong's failure to provide an explanation for *de minimis* changes in the two months of sales data, though, was insufficient to justify Commerce's finding that none of the sales data was usable, nor was it sufficient to provide the sole basis for drawing an adverse inference with respect to all of the sales information on record. Indeed, since there does not seem to be any question about the accuracy of the sales data, it is not unreasonable for Commerce to accept an explanation on remand. If Commerce finds the explanation to be sufficient, it shall use the revised August and December 2013 sales data in its analysis. If the explanation is not sufficient, then, the Department may use facts available to fill in any gaps in that information.

Based on the foregoing, it appears that the November and December 2014 sales data and the requested narrative explanation that the Department claims was missing from the record were on the record at the time of the Preliminary Results. Thus, except with respect to the unexplained revisions to the August and December 2013 sales data, Commerce's decision to apply facts available with respect to the sales reconciliation and U.S. sales data was not supported by substantial evidence.

In addition, the Department's application of an adverse inference with respect to any of the sales information is not in accordance with law because, as with the factors of production, Commerce took none of the steps required by *Nippon Steel*. *Nippon Steel*, 337 F.3d at 1382–83; *see also Steel Auth. of India*, 25 CIT at 488, 149 F. Supp. 2d at 930 (citation omitted). Without the objective and subjective findings required by *Nippon Steel*, Commerce has failed to provide the court with a discernable reason for finding that Shandong was not doing its best to comply with Commerce's requests for information. Finally, it bears repeating that the use of adverse inferences when determining a respondent's rate is intended to create "a deterrent to non-compliance," which as far as can be seen is not needed to encourage Shandong's efforts to supply requested information. *Ta Chen*, 298 F.3d at 1340 (citing *De Cecco*, 216 F.3d at 1032).

Accordingly, on remand, Commerce must use the sales information Shandong provided in making its comparison of normal value and the price at which the subject merchandise was sold in the United States, including (1) sales data from November and December 2014, although it is hard to see how information outside the period of review can be put to use, and (2) the narrative explanation Shandong provided to tie its sales reconciliation and supporting documentation to its financial statements. As to the unexplained revisions to sales data for August and December 2013, Commerce shall solicit an explanation in accordance with this opinion. In no event, however, may the Department use an adverse inference when selecting from among the facts on the record relating to sales.

III. Shandong's Affiliate Jining Dragon's Shooting Nails

Related to Commerce's finding that necessary U.S. sales information was missing from the record, is the Department's finding that Shandong failed to provide "sufficient information showing that [Jining Dragon] produced and sold only *non-subject* merchandise to the United States during the [period of review]." Remand Results at 16 (emphasis added).

The Order excluded certain fasteners from its scope, *i.e.*, "fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under [Harmonized Tariff Schedule of the United States subheadings] 7317.00.20 and 7317.00.30." Order, 73 Fed. Reg. at 44,961. Before Commerce, Shandong argued that Jining Dragon's "shooting nails" fell within this exclusion. Based on this representation, Commerce conditionally withdrew its request that Shandong provide Jining Dragon's production and U.S. sales databases for the allegedly excluded shooting

nails, but continued to seek information on whether the nails were, in fact, excluded from the scope of the Order. That is, based on the information provided regarding Jining Dragon's shooting nails, the Department indicated that it would "consider whether it is necessary to request that [Jining Dragon] submit a Section C and D database." Commerce's Letter to Shandong re: Shandong's Request for Excusal (July 2, 2015), P.R. 194, ECF No. 52–31.

Ultimately, Commerce found that Shandong failed to show that the shooting nails met the criteria for exclusion from the Order. For Commerce, because Shandong failed to show that the shooting nails were excluded from the Order, it was required to provide production and sales information for Jining Dragon's U.S. sales of shooting nails during the period of review. In the Remand Results, Commerce stated:

> [Shandong] failed to provide requested details regarding sales and [factors of production] data for [Jining Dragon's] shooting nails, instead claiming that shooting nails were excluded from the scope of the *Order* without substantiating its claim. As such, Commerce determined that [Shandong] failed to explain adequately why shooting nails produced and exported by [Jining Dragon] are outside the scope of the *Order*, warranting the application of adverse inferences in selecting from the facts otherwise available. Therefore, pursuant to [19 U.S.C § 1677e(a)(2)(A), (B), and (C)], Commerce finds that the application of facts available is warranted because [Shandong] failed to provide necessary information requested by Commerce, in the form and manner requested, and significantly impeded our ability to conduct the review. Moreover, because [Shandong's] deficiencies were so pervasive, impeding Commerce's ability to conduct its review, and [Shandong] did not cooperate to the best of its ability, Commerce determined that total [adverse facts available], consistent with [subsection 1677e(b)], was warranted.

Remand Results at 17–18.

National Nail maintains that Commerce never informed Shandong that it had failed to demonstrate to Commerce's satisfaction that Jining Dragon's shooting nails were excluded from the Order. According to National Nail, the Department failed to "give [Shandong] any request or opportunity to submit the shooting nails sales and [factors of production] data." NN's Cmts. 9. In National Nail's view, Commerce "inappropriately and arbitrarily jumped from giving [Shandong] a conditional excusal to not report its shooting nail data to giving [Shandong] total [adverse facts available]." NN's Cmts. 9.

Commerce counters that it "specifically requested [sales and factors of production] information [for the shooting nails], in addition to evidence demonstrating whether the shooting nails were subject merchandise--specifically, whether the shooting nails were used in a 'powder-actuated hand tool,' as required by the exclusion in the order." Def.'s Resp. Cmts. 13–14 (citing Final IDM at 52–53). Further, Commerce maintains that it "also informed [Shandong] that it required answers to all other portions of the questionnaires pertaining to [Jining Dragon's] alleged shooting nails because the information submitted did not sufficiently address whether [its] nails were excluded from the order." Def.'s Resp. Cmts. 14 (citing Final IDM at 52–53). Shandong, however, did not provide the requested information.

The record here supports Commerce's decision to use facts available with respect to Jining Dragon's shooting nails. The Department asked for information about the shooting nails to determine whether or not they were within the scope of the Order, *i.e.*, whether they were used in a "powder-actuated hand tool." For example, in one of the supplemental questionnaires Commerce instructed, "For two product codes of shooting nails . . . please provide product specifications or model diagrams, of each product type's head style, point style, shank style, and *the hand tool with material used in the hand tool to shoot this nail, along with supporting documentation*." Final IDM at 54 (emphasis added). Shandong's responses to the supplemental questionnaires were insufficient because Shandong "simply stated . . . again without any supporting evidence that the shooting nails were used in a 'shooting gun' and that material used was 'gunpowder.'" Final IDM at 54. Further, "[w]hile [Shandong] again provided the same product specifications and sales packages for [its affiliate Jining Dragon's] two types of shooting nails, these documents did not contain any information regarding the hand tool or material used in the hand tool, as specifically requested by the Department." Final IDM at 54. Without the information the Department requested concerning the hand tool used to shoot the nail, including the supporting documentation, Commerce could not determine whether the terms of the exclusion were satisfied.[40] Thus, substantial record evidence supports Commerce's decision to use facts available to fill in necessary information that was missing from the record regarding shooting nails.

Additionally, Commerce's application of an adverse inference was reasonable because the record supports the conclusion that Shandong

[40] The Order excluded "fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under [Harmonized Tariff Schedule of the United States subheadings] 7317.00.20 and 7317.00.30." Order, 73 Fed. Reg. at 44,961.

did not act to the best of its ability to cooperate with the Department's requests for shooting nails information under the objective and subjective standards in *Nippon Steel*. That is, there can be little doubt that "a reasonable and responsible [respondent]" that sells a variety of steel nails in the United States, some of which it believed were not subject to the Order, would have known that it should maintain information that would support such an exclusion, *i.e.*, the kind of hand tool used to drive in the nail. *Nippon Steel*, 337 F.3d at 1382. Moreover, if the exporter of those allegedly excluded nails did not have the requested supporting documentation in its possession, it should have asked for the documents from its affiliated company. *See Nippon Steel*, 337 F.3d at 1383 (an adverse inference may be drawn "only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown"). Here, Commerce reasonably sought information as to whether Jining Dragon's shooting nails were within the scope of the Order that surely was in Shandong's hands or in the hands of Jining Dragon from which it could be obtained. Indeed, in its case brief (*i.e.*, after the close of the fact-gathering stage and the publication of the Preliminary Results), Shandong conceded that it did not provide "the technical description of the powder-actuated nail gun" that Commerce requested, claiming that "that information [was] not in the possession of [Shandong]." Shandong's Case Br. (Nov. 2, 2015), P.R. 245 at 1. Apparently, Shandong did not obtain this information from Jining Dragon because it never asked for it.

In none of Shandong's questionnaire responses did it claim that it did not have, or could not obtain, the requested information. *See* Final IDM at 55. Accordingly, the decision to apply adverse facts available with respect to Shandong's shooting nails information is supported by substantial evidence and is in accordance with law.

Commerce notes the absence of reliable information as to shooting nails as a reason to apply total adverse facts available. While it is doubtful that the Department would contend that the lack of information on shooting nails alone was sufficient to apply total adverse facts available to Shandong's U.S. sales, there is little doubt that the absence of sales information for imports constituting 0.001 of total sales would be insufficient to support the use of total adverse facts available.

CONCLUSION and ORDER

Commerce's application of total adverse facts available in the Remand Results is neither supported by substantial evidence nor in accordance with law. That is, neither the law nor the facts support the Department's findings (1) that none of Shandong's factors of production or its U.S. sales information was usable, (2) that Shandong failed to comply with Commerce's requests for production and sales information to the best of its ability, and (3) that a rate of 118.04 percent was legally and factually justified. Therefore, it hereby

ORDERED that the Remand Results are sustained in part and remanded; it is further

ORDERED that, on remand, Commerce issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall:

(1) calculate a rate for Shandong:

(a) with respect to Shandong's factors of production, Commerce shall use the information Shandong reported (i) on a CONNUM-specific basis, and (ii) on a production-group basis, to determine normal value;

(b) with respect to Shandong's U.S. sales information, Commerce shall use the information Shandong provided, including but not limited to sales data for November and December 2014 and the narrative explanation Shandong provided to tie its sales reconciliation and supporting documentation to its financial statements, in making its comparison of normal value and the price at which the subject merchandise was sold in the United States. With respect to Shandong's unexplained revisions to the August and December 2013 sales quantities, Commerce shall conduct its analysis in accordance with this opinion; and

(c) with respect to Jining Dragon's shooting nails, Commerce shall use facts available in filling in missing necessary information, and may draw an adverse inference with respect to information regarding the period of review sales of shooting nails; however, Commerce may not use the deficiencies in Jining Dragon's shooting nails information as a basis for using total adverse facts available; and it is further

ORDERED that the remand results shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the

remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.
Dated: June 12, 2019
New York, New York

/s/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 19–73

NEXTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, MAVERICK TUBE CORPORATION, and TENARISBAYCITY, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00083
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2015–2016 administrative review of the antidumping duty order of oil country tubular goods from the Republic of Korea.]

Dated: June 17, 2019

J. David Park and *Henry D. Almond*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., argued for Plaintiff NEXTEEL Co., Ltd. With him on the brief were *Daniel R. Wilson, Leslie C. Bailey*, and *Kang W. Lee*.

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., argued for Consolidated Plaintiff SeAH Steel Corporation. With him on the brief was *Amrietha Nellan. Hardeep K. Josan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Thomas M. Beline, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant-Intervenor United States Steel Corporation. With him on the brief were *Myles S. Getlan, Sarah E. Shulman*, and *James E. Ransdell*.

Frank J. Schweitzer and *Kristina Zissis*, White & Case, LLP, of Washington, D.C., argued for Defendant-Intervenors Maverick Tube Corporation and TenarisBayCity. With them on the brief was *Gregory J. Spak*.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves the second application of the statute permitting the U.S. Department of Commerce ("Department" or "Commerce") to find the existence of a particular market situation under the Trade Preferences Extension Act of 2015 ("TPEA"). Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") and Consolidated Plaintiff SeAH Steel Corpora-

tion ("SeAH") bring this consolidated action contesting Commerce's final results in the 2015–2016 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea ("Korea"). *See Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 17,146 (Dep't Commerce Apr. 18, 2018) (final results of antidumping administrative review and final determination of no shipments; 2015–2016) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, PD 368, bar code 3694005–01 (April 11, 2018) ("Final IDM"). Before the court are two Rule 56.2 motions for judgment on the agency record filed by NEXTEEL and SeAH. For the reasons discussed below, the court sustains in part and remands in part Commerce's *Final Results*.

ISSUES PRESENTED

The court reviews the following issues:

1. Whether Commerce's application of total facts available with an adverse inference ("total adverse facts available" or "total AFA") to NEXTEEL is unsupported by substantial evidence and contrary to the law;
2. Whether Commerce's particular market situation analysis is unsupported by substantial evidence and contrary to the law;
3. Whether Commerce's calculation of SeAH's constructed value profit rate is supported by substantial evidence and contrary to the law;
4. Whether Commerce's decision to reject portions of NEXTEEL's rebuttal brief from the administrative record is contrary to the law;
5. Whether Commerce's classification of proprietary SeAH products is supported by substantial evidence;
6. Whether Commerce's decision to cap the adjustment for freight revenue on SeAH's U.S. sales is in accordance with the law;
7. Whether Commerce's deduction of general and administrative expenses as U.S. selling expenses is supported by substantial evidence;
8. Whether Commerce's use of the differential pricing analysis is supported by substantial evidence and in accordance with the law.

BACKGROUND

Commerce initiated an administrative review of the antidumping duty order of oil country tubular goods from Korea on November 9,

2016, based on timely requests from multiple companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778 (Nov. 9, 2016) (initiation notice). The period of review was September 1, 2015, through August 31, 2016. *See id.* at 78,781. Commerce selected NEXTEEL and SeAH as mandatory respondents for individual examination because they were the two exporters or producers accounting for the largest volume of subject merchandise during the period of review. *See* Mem. Selection of Respondents for the 2015–2016 Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods from the Republic of Korea, PD 28, bar code 3535941–01 (Jan. 12, 2017).

Commerce found the existence of a single particular market situation in the previous administrative review.[1] *See Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015). Maverick alleged the continued existence of the particular market situation during the instant period of review. *See* Maverick Letter Re: Other Factual Information Submission for Valuing the Particular Market Situation in Korea, PD 95, bar code 3569192–01 (May 4, 2017). Maverick contended that the following conditions existed to create a single particular market situation: (1) subsidies were provided by the Government of Korea to producers of hot-rolled coil; (2) the flood of Chinese hot-rolled flat products caused resulting pressure on Korean domestic hot-rolled coil prices; (3) strategic alliances existed between Korean hot-rolled coil suppliers and Korean oil country tubular good producers; and (4) the Government of Korea influenced the cost of electricity. *See id.* Commerce accepted comments and supporting documentation from all interested parties on this matter. *See* Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review at 14, PD 298, bar code 3625402–01 (Oct. 2, 2017) ("Prelim. IDM").

Commerce issued its preliminary results on October 10, 2017. *See Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 46,963 (Dep't Commerce Oct. 10, 2017) (preliminary results of antidumping duty administrative review; 2015–2016) ("*Preliminary Results*"). Commerce preliminarily assigned a weighted-average dumping margin of 46.37% to NEXTEEL, 6.66% to SeAH, and 19.68% to all non-examined companies. *See Preliminary Results*, 82 Fed. Reg. at 46,964.

[1] The court held that Commerce's finding of a particular market situation in the previous administrative review was unsupported by substantial evidence on the record. *NEXTEEL Co., Ltd. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1336, 1351 ("*NEXTEEL I*").

Commerce issued its final results on April 18, 2018. *See Certain Oil Country Tubular Goods from the Republic of Korea*, 83 Fed. Reg. 17,146 (Dep't Commerce Apr. 18, 2018) (final results of the antidumping duty administrative review; 2015–2016) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, PD 368, bar code 3694005–01 (Apr. 12, 2018) ("Final IDM"). The Department discovered that NEXTEEL's financial statements contained a mistranslation after briefing concluded and was not able to inquire further about this mistranslation through the issuance of supplemental questionnaires. *See* Final IDM at 44. Commerce found "that the nature of the loans recorded in the line item in question call into question the accuracy of information submitted by NEXTEEL during the instant review." *Id.* As a result, Commerce determined that NEXTEEL withheld information and "significantly impeded the proceeding," and applied total AFA to NEXTEEL. *See id.* at 44–49. Commerce assigned a weighted-average dumping margin of 75.81% to NEXTEEL and 6.75% to SeAH. *Final Results*, 83 Fed. Reg. at 17,147. Commerce assigned a weighted-average dumping margin of 6.75% to all non-examined companies based on SeAH's rate because it was the only calculated rate that was not zero, *de minimis*, or determined entirely on the basis of facts available, consistent with the agency's practice. *Id.*

NEXTEEL and SeAH initiated separate proceedings in this Court, which the court consolidated. *See* Order, July 31, 2018, ECF No. 29. NEXTEEL and SeAH both filed Rule 56.2 motions for judgment on the agency record. *See* Rule 56.2 Mot. J. Agency R. Pl. NEXTEEL Co., Ltd., Oct. 8, 2018, ECF No. 36; Mem. Supp. Pl. NEXTEEL Co., Ltd.'s Rule 56.2 Mot. J. Agency R., Oct. 8, 2018, ECF No. 36–1 ("NEXTEEL's Br."); Mot. Pl. SeAH Steel Corporation J. Agency R., Oct. 5, 2019, ECF No. 33; Br. SeAH Steel Corporation Supp. Rule 56.2 Mot. J. Agency R., Oct. 5, 2019, ECF No. 35 ("SeAH's Br."). The court held oral argument on April 9, 2019. *See* Closed Oral Argument, Apr. 9, 2019, ECF No. 64.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)[2] and 28 U.S.C. § 1581(c), which grant the court the authority

[2] All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677b(e) are to the 2015 version, as amended pursuant to The Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2017 edition.

to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

ANALYSIS

I. Application of Total AFA to NEXTEEL

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. 19 U.S.C. §§ 1677e(a)(1), (a)(2)(B). If the Department finds further that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A). The U.S. Court of Appeals for the Federal Circuit has interpreted these two subsections to have different purposes. *See Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). On the other hand, subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Nippon Steel v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

When determining whether a respondent has complied to the "best of its ability," Commerce "assess[es] whether [a] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel*, 337 F.3d at 1382. This finding requires both an objective and subjective showing. *Id.* Commerce must determine objectively "that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002)). Next,

Commerce must demonstrate subjectively that the respondent's "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382–83. Adverse inferences are not warranted "merely from a failure to respond," but rather in instances when the Department reasonably expected that "more forthcoming responses should have been made." *Id.* at 1383. "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Id.*

Commerce may rely on information derived from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record when making an adverse inference. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c).

NEXTEEL contends that Commerce's application of total AFA to NEXTEEL based on one translation issue was contrary to law and unsupported by substantial evidence.[3] NEXTEEL's Br. 20–34. Defendant argues that Commerce properly found that necessary information was not on the record and that NEXTEEL withheld information and significantly impeded the proceeding. Def.'s Resp. Opp'n Mots. J. Administrative R. 25–30, Dec. 21, 2018, ECF No. 53 ("Def.'s Br."). The court disagrees. The information missing on the record was a proper translation of a single line item related to loans. *See* Final IDM at 43. The English translation of the line item at issue simply omitted a modifying phrase from the term. *See id.* at 46. The fact that the line item was related to loans is evident in both the mistranslation and the corrected translation provided by NEXTEEL. In order to apply facts available with an adverse inference, Commerce found that NEXTEEL "did not act to the best of its ability to comply with Commerce's requests for information because NEXTEEL failed to properly disclose information related to loans recorded in its 2016 financial statements," *i.e.*, "the English-language version of NEXTEEL's 2016 financial statements contain a mistranslated line item." *Final IDM* at 48. Because Commerce found that NEXTEEL did not act to the best of its

[3] [[

]]

ability, it applied AFA. *Id.* The court concludes that the showing that NEXTEEL did not act to the best of its ability and willfully withheld information is weak. NEXTEEL clarified the mistranslation and provided certified statements from both an independent auditor who originally translated the term and a third-party translator. *See* NEXTEEL's Response to Additional Duty Absorption Comments at 4, PD 344, bar code 3668932–01 (Feb. 2, 2018). The original translator stated that he translated the term with a "focus[] on the key financial word" and believed his translation was "a reasonable and accurate translation of the term." *Id.* at Ex. 1. He further acknowledged that he "inadvertently" left out the modifying phrase. *Id.* The court concludes that Commerce's use of total AFA was unreasonable and remands the issue for further consideration consistent with this opinion.

II. Particular Market Situation

Under the Tariff Act of 1930, as amended, Commerce conducts antidumping duty investigations and determines whether goods are being sold at less-than-fair value. *See* 19 U.S.C. § 1673. If the Department finds that subject merchandise is being sold at less-than-fair value, and if the U.S. International Trade Commission finds that these less-than-fair value imports materially injure a domestic industry, the Department issues an antidumping duty order imposing antidumping duties equivalent to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* Generally, export price is defined as the price at which the subject merchandise is first sold in the United States, whereas the normal value represents the price at which the subject merchandise is sold in the exporting country. *See id.* §§ 1677a(a), 1677b(a)(1)(B)(i). If Commerce cannot determine the normal value of the subject merchandise based on price, then the statute authorizes Commerce to calculate a constructed value. *Id.* § 1677b(a)(4). The constructed value shall be an amount equal to the sum of, for instance, "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade." *Id.* § 1677b(e)(1).

Section 504 of the TPEA amended the Tariff Act to allow Commerce to consider certain sales and transactions to be outside of the ordinary course of trade when "the particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15). When calculating constructed value under the revised version of the statute, if Commerce finds the existence of a

particular market situation "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." 19 U.S.C. § 1677b(e).

The legislative history of the TPEA reflects a desire to give Commerce the ability to choose the appropriate methodology when a particular market situation exists. One Senate Report stated that modifications to the Tariff Act under the TPEA "provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, the Department of Commerce has *flexibility* in calculating a duty that is not based on distorted pricing or costs." S. Rep. No. 114–45, at 37 (2015) (emphasis added). In a hearing before the House of Representatives, Senator Patrick Meehan noted that under the TPEA, Commerce would be "empowered . . . to disregard prices or costs of inputs that foreign producers purchase if the Department of Commerce has reason to believe or suspects that the inputs in question have been subsidized or dumped" in the interest of creating an accurate record and protecting domestic workers. 166 Cong. Rec. H4690 (daily ed. June 25, 2015) (statement of Sen. Meehan).

Commerce has the ability to choose the appropriate methodology so long as it comports with its statutory mandate and provides a reasoned explanation. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("*State Farm*"); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). The statute's language and legislative history permit Commerce's chosen methodology in this investigation, which was to consider allegations of a particular market situation based on the cumulative effect and the totality of the conditions in the foreign market.

In the first administrative review of the antidumping duty order covering oil country tubular goods from Korea, Maverick alleged the existence of four particular market situations based on: (1) subsidies provided by the Government of Korea to producers of hot-rolled coil; (2) the flood of Chinese hot-rolled flat products and the resulting pressure on Korean domestic hot-rolled coil prices; (3) strategic alliances between Korean hot-rolled coil suppliers and Korean oil country tubular good producers; and (4) the Government of Korea's influence on the cost of electricity. *See NEXTEEL I*, 355 F. Supp. 3d at 1345–46. Commerce found preliminarily that no particular market situation existed after evaluating all of the evidence on the record. *See id.* at __, 355 F. Supp. 3d at 1346. Commerce did not receive any new factual information between the issuance of its preliminary re-

sults and its final results. *See id.* at __, 355 F. Supp. 3d at 1349–50. Commerce reversed its conclusion and determined in its final results that the same record supported finding the existence of a single particular market situation. *See id.* Multiple parties, including some of the parties in this action, challenged Commerce's determination in this Court. Upon review of the governing statute and the administrative record, the court held that Commerce's finding of a single particular market situation based on the totality of circumstances was reasonable in theory, but that its finding was unsupported by substantial evidence in the first administrative review. *See id.* at __, 355 F. Supp. 3d at 1349–51.

In the instant matter, Commerce relied on its prior finding of the existence of a particular market situation in the first administrative review and continued to find in this administrative review that the circumstances remain "largely unchanged." Final IDM at 17; *see also* Prelim. IDM at 17 (stating the same). Maverick made the same four allegations and submitted the same supporting exhibits in this proceeding. *See* Final IDM at 17–18 (citing documents provided by Maverick in the first administrative review). Commerce itself stated, "[W]e agree with Maverick that facts in the instant review are largely identical to the facts in the first administrative review, and the same evidence is on the record of the instant review." *Id.* at 18. Because Commerce's original finding of a particular market situation was not supported by substantial evidence, it is difficult for this court to find, based on substantially the same facts and record evidence, that Commerce's finding in the subsequent administrative review is supported by substantial evidence.

Defendant-Intervenor United States Steel Corporation contends that this administrative review is distinguishable from the first administrative review because the record here is more robust. Specifically, United States Steel Corporation argues that the record contained twenty-nine new documents and five updated documents compared to the record in the first administrative review. Closed Oral Argument at 57:08–57:17, 1:01:46–1:02:05. United States Steel Corporation failed to raise this argument in its opening brief and the court thus deems the argument waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."). Notwithstanding the waiver of its arguments, the court notes that United States Steel Corporation's exhibits consisted mostly of news articles, and Commerce did not rely on them when making its ultimate determination. *Compare id.* at 4–5 (exhibits list)

with Final IDM at 17. Commerce's reliance on its previous finding to support its continued finding of a particular market situation in this administrative review is clear on the record. See Final IDM at 17–18.

The court concludes that Commerce's determination of the existence of a particular market situation in the *Final Results* is unsupported by substantial evidence. The *Final Results* are remanded for further proceedings.[4]

III. Constructed Value Profit Rate

When Commerce is required to calculate a constructed value for a respondent, the statute requires Commerce to utilize the respondent's actual selling expenses and profits from the home market or a third-country market. 19 U.S.C. § 1677b(e)(2)(A). If that data is unavailable, the statute provides Commerce with three alternatives:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

[4] At oral argument, SeAH contended that the plain language of the statute, 19 U.S.C. § 1677b(e), requires Commerce to make a specific finding that the respondent's cost of production does not accurately reflect the cost of production in the ordinary course of trade before resorting to other methodologies to calculate normal value. SeAH noted further that respondents want a company-specific determination, while Commerce advocates for a market-wide determination, but the court need not reach these issues here.

Id. § 1677b(e)(2)(B). Subsection three is termed the "profit cap." *See Atar S.r.L v. United States*, 730 F.3d 1320, 1321 (Fed. Cir. 2013).

In calculating SeAH's constructed value, Commerce determined that SeAH did not have a viable home or third-country market during the period of review. *See* Final IDM at 53. When evaluating the statutory alternatives, Commerce found that subsection (i) was unavailable because other steel products produced by SeAH were not in the same general category of products as oil country tubular goods. *See id.* at 54. Subsection (ii) was unavailable because no sales of oil country tubular goods existed in the home market, Korea. *See id.* Commerce chose subsection (iii). *See id.* Of the seven sources of information on the record identified by Commerce, Commerce chose to calculate SeAH's constructed value profit by utilizing profit data from the previous administrative review associated with SeAH's Canadian market sales, costs, selling, and general expenses. *See id.* at 55. Commerce did not address the constructed value profit issue as it pertained to NEXTEEL in the *Final Results* because it resorted to total adverse facts available and "because [Commerce was] applying total AFA to NEXTEEL for these results, [its] determination of which CV profit rate and selling expenses to use applies only to SeAH." Final IDM at 53.

NEXTEEL contends that the use of SeAH's data from the previous administrative review is inappropriate because (1) the data is not contemporaneous and there are important differences in the market place between the two periods and (2) SeAH's Canadian market sales are subject to a Canadian antidumping case with respect to the subject merchandise. NEXTEEL's Br. 38. NEXTEEL's first contention is incorrect. Using subsection (iii) to calculate constructed value, Commerce is free to use "any reasonable method" to determine plaintiff's constructed value. *See* 19 U.S.C § 1677b(e)(2)(B)(iii). Commerce explained that "[w]hile the financial data from SeAH are less contemporaneous to the POR than are the other alternative financial data sources, we continue to find that the specificity of the SeAH financial data outweighs concerns over contemporaneity" because "it represents profit from [oil country tubular goods] produced by a Korean producer in Korea" and therefore "eliminates some of the inherent flaws that occur using surrogate financial statements (*e.g.*, profits reflecting products that are not in the same general category of products as [oil country tubular goods])." Final IDM at 55–56. Commerce concluded that there were no important differences in the market between 2015 and 2016 because "producers faced a decline in oil and gas prices throughout 2015 and 2016; the first eight months of 2015 overlapped with the first review" and two producers had im-

proved financial performance. *Id.* at 60. The court concludes that Commerce's use of SeAH's prior review data is supported by substantial evidence.

NEXTEEL contends further that Commerce's use of SeAH's data is inappropriate because of an existing antidumping duty case in Canada regarding oil country tubular goods from Korea. *See* NEXTEEL Br. 38. Although there is a preference for not using "dumped third country prices to calculate" normal value, there was no evidence of a formal finding of dumping in the Canadian investigation. *See Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 340– 41, 201 F. Supp. 2d 1267, 1277 (2002) (sustaining Commerce's decision to rely on data derived from allegedly dumped merchandise in third-country sales). Commerce "subjected SeAH's Canadian market sales to a cost test, and only those sales that were made above the cost of production (i.e., made in the ordinary course of trade) were used in constructing the aggregate [constructed value] profit and selling expenses." Final IDM at 59. Commerce attempted to make adjustments for possible distortions and to utilize the best available information on the record to calculate NEXTEEL's constructed value profit. The court finds that Commerce's use of SeAH's Canadian market sales was reasonable.

SeAH contends that Commerce's calculation of constructed value profit is not consistent with the statute because Commerce did not apply a "profit cap" based on the financial statements of global oil country tubular goods producers. SeAH's Br. 6. Specifically, SeAH argues that Commerce's "use of the same figures to determine both the profit rate and the 'profit cap' means that no 'profit cap' was actually applied," and that Commerce erred in not applying a profit cap based upon the profit earned on all home-market sales of merchandise in the same general category of merchandise. *Id.* at 29–30. Defendant contends that "the statute does not dictate which data Commerce is to use when applying 'facts otherwise available,' . . . much less which data to use when choosing a facts available profit cap." Def.'s Br. 44. In the *Final Results*, Commerce was "unable to calculate a profit cap based on the actual amounts reported in accordance with the statutory intent under section 773(e)(2)(B)(iii) of the Act" because "[t]here is no profit information for sales in Korea of [oil country tubular goods] and products in the same general category on the record." Final IDM at 60. The statute requires only that Commerce calculate a profit cap but does not dictate which data it must use to do so. *See* 19 U.S.C § 1677b(e)(2)(B)(iii). Because Commerce calculated a profit cap, its use of SeAH's data from the previous administrative review is not contrary to law.

IV. Rejection of Portions of NEXTEEL's Rebuttal Brief

Antidumping duty determinations are subject to strict statutory guidelines. *See* 19 U.S.C. § 1675(a)(3). Commerce's regulations specify deadlines for submitting factual information. *See* 19 C.F.R. § 351.301(c). Commerce must cease collecting information before making a final determination, and Commerce must provide the parties with a final opportunity to comment on the information obtained by Commerce upon which the parties have not previously had an opportunity to comment. 19 U.S.C. § 1677m(g). Commerce must disregard comments containing new factual information. *Id.* Commerce's interpretation of what constitutes factual information is upheld unless an "alternative reading is compelled by the regulation's plain language or by other indications of . . . intent at the time of the regulation's promulgation." *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __,__, 163 F. Supp. 3d 1255, 1287 (2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

Commerce rejected NEXTEEL's rebuttal brief because it discussed "a proposed reallocation of G&A expenses, and incorporate[d] new factual information not previously on the record of this review." Letter from the Department to NEXTEEL Re: Rejection of NEXTEEL's Rebuttal Brief, PD 360, bar code 3689435–01 (Mar. 30, 2018); *see also* Final IDM at 3. NEXTEEL's information was untimely for purposes of submitting factual information because it made its submission after the deadline for such information, October 2, 2017. Letter from the Department to NEXTEEL Re: Rejection of NEXTEEL's Rebuttal Brief, PD 360, bar code 3689435–01 (Mar. 30, 2018). NEXTEEL was permitted to refile its rebuttal brief omitting the information at issue. Final IDM at 3. NEXTEEL contends that its proposed calculation was not new factual information because it was a calculation based on record information. *See* NEXTEEL's Br. 43. This Court has previously upheld Commerce's decision to reject from the record a margin calculation based on record data. *See Tri Union Frozen Prods., Inc.*, 40 CIT at __, 163 F. Supp. 3d at 1288. NEXTEEL contends that *Tri Union Frozen Products* is distinguishable from the instant case because the calculation at issue here "is a simple function of basic arithmetic" rather than data created by running record data thorough a "complicated program." *See* NEXTEEL's Br. 44, NEXTEEL's Reply Br. Supp. Rule 56.2 Mot. J. Agency R. 21, Feb. 25, 2019, ECF No. 58. The court disagrees. A calculation of general and administrative expenses would similarly constitute data under 19 C.F.R. § 351.102(b)(21)(ii) ("Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other inter-

ested party."). Commerce's rejection of certain portions of NEXTEEL's rebuttal brief is in accordance with the law.

V. Classification of Proprietary SeAH Products

Commerce's January 13, 2017, questionnaire asked SeAH to report a separate reporting code for proprietary grades of oil country tubular goods that are not listed in the API Specification 5CT. *See* SeAH Initial Questionnaire at B-11, PD 32, bar code 3536487–01 (Jan. 13, 2017). SeAH informed Commerce that it sold proprietary grades of oil country tubular goods in the United States and that its product "has the same tensile strength required by the N-80 specification but it is not heat treated (by normalization or by quenching-and-tempering) in the manner required by the N-80 norms." SeAH's March 6, 2017, Section C Questionnaire Response at 13 n.10, PD 77, bar code 3548887–02, (Mar. 6, 2017). In the *Preliminary Results* and in the *Final Results*, Commerce combined SeAH's reported code 075 with code 080, which represented products meeting Commerce's N-80 specification. *See* Final IDM 84–85. Commerce found that because SeAH's proprietary oil country tubular goods shared the same mechanical properties as goods coded under 080 (*i.e.*, tensile and hardness requirements), the two goods should be grouped together. *See id.* at 84. "[A]ny differences between these grades were already captured in other product characteristics." *Id.*

SeAH argues that Commerce's grouping of its proprietary oil country tubular goods into code 080 was improper because its proprietary product does not meet the heat treatment specification required for N-80 goods. *See* SeAH's Br. 7–11; *see also* Case Brief of SeAH Steel Corporation at 8 n.21, PD 319, bar code 3646189–01 (Nov. 30, 2017) (API 5CT specification for heat treatment, stating that for grade N-80 goods "Full body/ full-length heat treatment is mandatory. At the manufacturer's option either normalised or normalised and tempered."). The Government contends that "heat treatment is not a 'physical characteristic' of a product but rather a 'production process' feature." Def.'s Br. 47. The Government urges the court to sustain Commerce's finding as reasonable because while SeAH's proprietary oil country tubular goods differ from grade N-80 goods with respect to heat treatment, "they are the same with regard to critical performance properties." *Id.* at 48.

Despite the Government's arguments, Commerce failed to distinguish meaningfully between a product's physical characteristics and production process in the *Final Results*. The API 5CT specification implies that heat treatment influences a product's specifications and classification under the N-80 grade. Commerce did not address evi-

dence on the record adequately in making its determination. The court concludes that Commerce's decision to classify SeAH's proprietary oil country tubular goods as code 080 is unsupported by substantial evidence on the record and remands the issue for further consideration consistent with this opinion.

VI. Cap on Adjustment for Freight Revenue on SeAH's U.S. Sales

When calculating SeAH's constructed export price, Commerce offset freight charges and applied a cap on freight revenue for invoices where freight was separately billed. *See* Final IDM at 86. SeAH contends that Commerce's decision to do so is contrary to law because Commerce does not have the authority to deduct freight costs that are not included in the merchandise cost. *See* SeAH's Br. 3. SeAH contests also Commerce's decision to apply a cap for freight revenues but not for losses in export price. *See id.* at 4.

Under 19 U.S.C. § 1677a(c), "[t]he price used to establish export price and constructed export price shall be . . . reduced by . . . the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." *See* 19 U.S.C. § 1677a(c)(2)(A). Export price or constructed export price is the price at which the subject merchandise is first sold in the United States, as opposed to the sale price in the exporter's home country. *See* 19 U.S.C. §§ 1677a(a), 1677b(a)(1)(B)(i).

Commerce uses adjustments when calculating export price or constructed export price "to achieve 'a fair, "apples-to-apples" comparison' between U.S. price and foreign market value." *Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995)). Such adjustments prevent exporters from improperly inflating the export price of a good by charging a customer for freight more than the exporter's actual freight expenses. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1216, 1248–49 (2012). Commerce reasonably adjusts its price calculation using net freight revenue. *See id.* at __, 865 F. Supp. 2d at 1248. It is reasonable for Commerce not to consider freight revenue as part of the price of the subject merchandise in accordance with the statutory language. *See id.* at __, 865 F. Supp. 2d at 1248–49.

SeAH contends that Commerce's treatment of freight revenue below the cap as part of the U.S. price in its calculations, and freight revenue above the cap as not part of the U.S. price in its calculations,

is inconsistent with the statute. *See* SeAH's Br. 13. SeAH argues that under the language of section 1677a(c)(2)(A), when Commerce deducted the actual freight costs for sales with separately-invoiced freight charges it must have found that those costs were "included in" the "price used to establish export price and constructed export price," otherwise Commerce would not have been permitted to adjust them. *See* SeAH's Br. 12–13. This is an incorrect reading of the statute. Section 1677a requires Commerce to make adjustments when calculating export price or constructed export price "to achieve a fair, 'apples-to-apples' comparison between U.S. price and foreign market value." *Fla. Citrus Mut.*, 550 F.3d at 1110. A proper comparison between the U.S. price and foreign market value would not include a profit earned from freight rather than from the sale of the subject merchandise. The court concludes that Commerce's treatment of freight revenue is in accordance with the law.

VII. Deduction of General and Administrative Expenses as U.S. Selling Expenses

Commerce allocated the general and administrative ("G&A") expenses related to resold United States products for SeAH's U.S. affiliate Pusan Pipe America Inc. ("PPA"). *See* Final IDM at 89. SeAH contends that PPA's administrative activities are related to the overall activities of the company and thus are not all selling expenses that can be deducted. *See* SeAH's Br. 14–15.

When calculating a constructed value, Commerce must include selling, general, and administrative expenses. *See* 19 U.S.C. §§ 1677b(e)(B)(i)–(iii). G&A expenses are generally understood to mean expenses that relate to the activities of the company as a whole rather than to the production process. *Torrington Co. v. United States*, 25 CIT 395, 431, 146 F. Supp. 2d 845, 885 (2001). The court affords Commerce deference in developing a methodology for including G&A expenses in the constructed value calculation because it is a determination involving complex economic and accounting decisions of a technical nature. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039; *see also Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1161, 1166 (2017). Commerce still must explain cogently why it has exercised its discretion in a given manner. *See State Farm*, 463 U.S. at 48–49.

Commerce explained that because "PPA's G&A activities support the general activities of the company as a whole, including: (1) the sale and further manufacture of further manufactured products; and (2) the sale of non-further manufactured products," it applied the "G&A ratio to the total cost of further manufacture for these products. In addition, [it] applied PPA's G&A ration to the cost of the imported

pipe, regardless of whether the pipe was further manufactured in the United States." Final IDM at 90. Commerce also "attributed a portion of PPA's G&A activities, which includes selling functions, to the resold products." *Id.* This explanation does not clarify why Commerce deducted PPA's G&A expenses for resold products, nor does it clarify why it deducted G&A expenses from the cost of the imported pipe. The court concludes that Commerce's decision to deduct G&A expenses in the *Final Results* is unsupported by substantial evidence on the record and remands on this issue for clarification or reconsideration of Commerce's methodology.

VIII. Differential Pricing Analysis

Commerce ordinarily uses an average-to-average comparison ("A-to-A") of normal values to export prices for comparable merchandise in an investigation when calculating a dumping margin. *See* 19 U.S.C. § 1677f-1(d)(1)(A); 19 C.F.R. § 351.414(c)(1). Commerce can depart from using the A-to-A methodology and instead compare the weighted average of normal values to the export prices of individual transactions for comparable merchandise ("A-to-T") when (1) Commerce finds a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time and (2) Commerce explains why such differences cannot be taken into account using the A-to-A methodology. *See* 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)-(ii). Commerce has adopted the same basis for applying its A-to-T methodology in administrative reviews. *See JBF RAK LLC*, 790 F.3d at 1364 ("Commerce's decision to apply its average-to-transaction comparison methodology in the context of an administrative review is reasonable."). Commerce applied differential pricing analysis in this case when applying its A-to-T methodology. *See* Final IDM at 65.

Commerce determines whether a pattern of significant price differences exists among purchasers, regions, or periods of time with its two-stage differential pricing analysis. *See* Prelim. IDM at 8–9. First, Commerce applies what it refers to as the "Cohen's d test" that measures the degree of price disparity between two groups of sales. *See id.* at 9. Commerce calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the "comparison group"). *See id.* The result of this calculation is a coefficient. *See id.* The Cohen's d coefficient is used to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all

other sales of comparable merchandise. *See id.* A group of sales with a coefficient equal to or greater than 0.8 "passes" the test and signifies to Commerce that a significant pattern of price differences exists within that group of sales. *See id.* at 9–10. Commerce then applies the "ratio test" to measure the extent of significant price differences. *See id.* at 10. If the value of sales that pass the Cohen's d test account for 66 percent or more of the value of total sales, that indicates to Commerce that the pattern of significant price differences warrants application of the A-to-T method to all sales. *See id.* If the value of sales that pass the Cohen's d test is more than 33 percent and less than 66 percent of the value of all sales, Commerce takes a hybrid approach, applying the A-to-T method to the sales that passed its Cohen's d test and applying the A-to-A method to all other sales. *See id.* Commerce will apply the A-to-A method to all sales if 33 percent or less of a respondent's total sales pass its Cohen's d test. *See id.* If both the Cohen's d test and ratio test demonstrate that the A-to-T methodology should be considered, Commerce applies its "meaningful difference" test, pursuant to which Commerce evaluates whether the difference between the weighted-average dumping margins calculated by the A-to-A method is meaningfully different than the weighted-average dumping margins calculated by the A-to-T method. *See id.*

A. Commerce's Use of Numerical Thresholds Throughout the Differential Pricing Analysis

The Court of Appeals for the Federal Circuit and this Court have held the steps underlying the differential pricing analysis as applied by Commerce to be reasonable. *See e.g., Apex Frozen Foods Private Ltd. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1308, 1313–35 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017); *Apex Frozen Foods Private Ltd. v. United States*, 41 CIT __, __, 208 F. Supp. 3d. 1398, 1403–17 (2017); *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1255, 1303 (2016). Commerce's use of the differential pricing analysis was not subject to the notice and comment requirements of the Administrative Procedure Act. *See Apex Frozen Foods Private Ltd.*, 40 CIT at __, 144 F. Supp. 3d at 1321.

SeAH contends that record evidence does not support Commerce's use of the differential pricing analysis here. *See* SeAH's Br. 6–7. Specifically, SeAH argues that Commerce must explain why its differential pricing analysis application and why any of the numerical thresholds used during the analysis are appropriate in the context of each specific case. *See* SeAH's Br. 33. SeAH cites *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 CIT 301, 634 F. Supp. 419 (1986) ("*Carlisle Tire*"), and *Washington Red Raspberry*

Commission v. United States, 859 F.2d 898 (Fed. Cir. 1988) ("*Wash. Red Raspberry Comm'n*"), as support for the proposition that Commerce can only apply mathematical assumptions and numerical thresholds that have not been adopted in accordance with the Administrative Procedure Act if the record contains substantial evidence supporting the application. *See* SeAH's Br. 34–35. Both cases concerned only Commerce's application of the 0.5 percent *de minimis* standard in antidumping investigations and can be distinguished from the instant case. *See Wash. Red Raspberry Comm'n*, 859 F.2d at 902; *Carlisle Tire*, 10 CIT at 302, 634 F. Supp. at 421. The *de minimis* standard needed to be promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act. *See Carlisle Tire*, 10 CIT at 305, 634 F. Supp. at 423. That is not true of Commerce's differential pricing analysis. *See Apex Frozen Foods Private Ltd.*, 40 CIT at __, 144 F. Supp. 3d at 1321 ("Commerce's shift from the *Nails* test to the differential pricing analysis is not subject to notice and comment requirements."). Because there is not support for SeAH's argument that Commerce can only apply mathematical assumptions and numerical thresholds that have not been adopted in accordance with the Administrative Procedure Act if the record contains substantial evidence supporting the application, the court need not disturb Commerce's practice.

B. Commerce's Use of the Cohen's d Test

The Court gives Commerce deference in determinations "involv-[ing] complex economic and accounting decisions of a technical nature." *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039. When Commerce applies the Cohen's d test, all of the respondent's sales are analyzed. *See* Prelim. IDM at 9. Sampling technique, sample size, and statistical significance are not relevant considerations in the context of analyzing all sales. *See Tri Union Frozen Prods. Inc.*, 40 CIT at __, 163 F. Supp. 3d at 1302.

SeAH contends that Commerce's use of the Cohen's d test is contrary to well-recognized statistical principles. *See* SeAH's Br. 36–38. Specifically, SeAH argues that the Cohen's d test can only be used when comparing random samples drawn from normal distributions with roughly equal variance containing a sufficient number of data points. *See id.* at 36. During the review, Commerce explained that "the U.S. sales data which SeAH has reported to Commerce constitutes a population. As such, sample size, sample distribution, and the statistical significance of the sample are not relevant to the Department's analysis." Final IDM at 71. Commerce explained its use of the Cohen's d test in this case and did not need to consider sample size,

sample distribution, and the statistical significance of the sample, and therefore the court finds that Commerce's approach is supported by substantial evidence on the record.

C. The "Ratio Test" Thresholds

The thresholds in the ratio test have previously been upheld by this Court as reasonable and in accordance with the law. *See e.g., U.S. Steel Corp. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1300, 1311 (2017) (Commerce "has reasonably explained why its ratio test is reasonable and not arbitrarily applied."). If Commerce's rationale for adopting such thresholds is reasonably explained, the standard of review does not require that Commerce explain the statistical calculations and methodologies that allowed it to arrive at such thresholds. *See U.S. Steel Corp. v. United States*, 40 CIT __, __ 179 F. Supp. 3d 1114, 1126 (2016) (citing *State Farm*, 463 U.S. at 48–49).

SeAH contends that Commerce failed to provide any evidence or reasonable explanation to support the 33 and 66 percent thresholds used in the "ratio test" portion of the differential pricing analysis. *See* SeAH's Br. 38–40. Commerce explained that "when a third or less of a respondent's U.S. sales are not at prices that differ significantly, then these significantly different prices are not extensive enough to satisfy the first requirement of the statute," which requires Commerce to find a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or period of time. *See* Final IDM at 72. Commerce explained further that "when two thirds or more of a respondent's sales are at prices that differ significantly, then the extent of these sales is so pervasive that it would not permit the Department to separate the effect of the sales where prices differ significantly from those where prices do not differ significantly." *Id.* When Commerce "finds that between one third and two thirds of U.S. sales are at prices that differ significantly, then there exists a pattern of prices that differ significantly, and that the effect of this pattern can reasonably be separated from the sales whose prices do not differ significantly." *Id.* As in *United States Steel Corporation*, the court can discern that Commerce developed its ratio test to identify the existence and extent to which there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time. *See U.S. Steel Corp.*, 40 CIT at __, 179 F. Supp. 3d at 1127. The court finds that Commerce's use of the 33 and 66 percent thresholds in the ratio test is supported by evidence on the record.

D. Commerce's Explanation of Why the Alleged Pattern Could Not Be Taken into Account by the A-to-A Comparison

The Court of Appeals for the Federal Circuit has held that Commerce's use of the "meaningful difference analysis," through which Commerce evaluates whether the difference between the weighted-average dumping margins calculated by the A-to-A method is "meaningfully" different than the weighted-average dumping margins calculated by the A-to-T method, is reasonable. *See Apex Frozen Foods Private Ltd.*, 862 F.3d at 1347–48.

SeAH contends that Commerce failed to satisfy its statutory burden of explaining why the alleged pattern of price differences could not be taken into account by the normal A-to-A comparison. *See* SeAH's Br. 40–43. Specifically, SeAH argues that Commerce is required to explain how substantial evidence on the record provides a factual basis for concluding that the results of the A-to-T calculation are more accurate than the results of the A-to-A calculation in this specific case. *See id.* at 41. In the *Final Results*, Commerce explained that the comparison of the results using the A-to-T method versus the A-to-A method sheds light on whether use of the A-to-A method can account for SeAH's significant prices differences. *See* Final IDM at 73. Because Commerce's meaningful difference analysis is reasonable, and Commerce explained that the A-to-A method could not account for the significant price differences in SeAH's pricing behavior, the court finds that Commerce's use of the A-to-T method is supported by evidence on the record.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's application of total facts available to NEXTEEL is unsupported by substantial evidence and contrary to the law;
2. Commerce's particular market situation analysis is unsupported by substantial evidence;
3. Commerce's calculation of NEXTEEL's constructed value profit is supported by substantial evidence and in accordance with the law;
4. Commerce's decision to reject portions of NEXTEEL's rebuttal brief from the administrative record is in accordance with the law;
5. Commerce's classification of proprietary SeAH products is unsupported by substantial evidence;
6. Commerce's decision to cap the adjustment for freight revenue on SeAH's U.S. sales is in accordance with the law;

7. Commerce's decision to deduct SeAH's general and administrative expenses as U.S. selling expenses is unsupported by substantial evidence;
8. Commerce's use of its differential pricing analysis is supported by substantial evidence and in accordance with the law.

Accordingly, it is hereby

ORDERED that the Rule 56.2 motions for judgment on the agency record filed by NEXTEEL and SeAH, are granted in part; and it is further

ORDERED that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination on or before August 16, 2019; and it is further

ORDERED that Commerce shall file the administrative record on remand on or before August 30; and it is further

ORDERED that the Parties shall file comments on the remand redetermination on or before September 16, 2019; and it is further

ORDERED that the Parties shall file replies to the comments on or before October 16, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before October 30, 2019.

Dated: June 17, 2019
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19–74

ECHOSTAR TECHNOLOGIES, L.L.C., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 16–00074

[Defendant's motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied.]

Dated: June 17, 2019

Nancy A. Noonan and *Elyssa R. Kutner*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief were *David Hamill*, and *Jackson D. Toof*.

Hardeep K. Josan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION

Katzmann, Judge:

This case involves an action by plaintiff, EchoStar Technologies L.L.C. ("EchoStar"), against defendant the United States ("the Government") to collect a refund of 99% of duties paid on its exported video technology goods. Before the court is whether EchoStar's electronic transmission of summary data for refunds, known as drawback claims, was legally sufficient under the applicable 1993 version of a statute (since amended), or whether, as the Government contends, EchoStar was required to file paper claims containing more information. Although EchoStar submitted the summary data within the requisite time period, it submitted paper drawback claims after the statutory deadline to file its claims had passed. U.S. Customs and Border Protection ("CBP") liquidated the twelve claims in issue for goods exported in 2011 and 2012 and denied duty refunds worth $276,275.12. EchoStar protested the decisions with CBP, and CBP denied the protests. EchoStar then filed this action. EchoStar asks the court to void the denials of its protests and to remand its claims to CBP with instructions to liquidate the claims with full refunds. Both parties now move for summary judgment. The court grants the Government's motion for summary judgment and denies EchoStar's motion for summary judgment.

BACKGROUND

I. Drawback Claims Generally

Under 19 U.S.C. §§ 1313(j)(1)[1] and 1313(*l*)(2)[2], CBP will refund up to 99% of duties and fees paid on goods imported into the United

[1] 19 U.S.C. § 1313(j)(1):
If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation—
(A) is, before the close of the 5-year period beginning on the date of importation and before the drawback claim is filed—
(i) exported, or
(ii) destroyed under customs supervision; and
(B) is not used within the United States before such exportation or destruction; then upon such exportation or destruction an amount calculated pursuant to regulations prescribed by the Secretary of the Treasury under subsection (l) shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

[2] 19 U.S.C. § 1313(*l*)(2):
(A) In general
Not later than the date that is 2 years after February 24, 2016, the Secretary shall prescribe regulations for determining the calculation of amounts refunded as drawback under this section.
(B) Claims with respect to unused merchandise

States if the importer subsequently destroys or exports the goods unused. 19 U.S.C. § 1313 refers to these refunds as "drawbacks." The exporter of those goods may claim the drawback, subject to 19 U.S.C. § 1313(r)(1)[3] and CBP's regulations, 19 C.F.R. § 191.82.

"[D]rawbacks are a privilege, not a right." *Shell Oil Co. v. United States*, 688 F.3d 1376, 1382 (Fed. Cir. 2012) (internal citations omitted); *Graham Eng'g Corp. v. United States*, 30 CIT 1907, 1912, 465 F. Supp. 2d 1353, 1357 (2006), *aff'd*, 510 F.3d 1385 (Fed. Cir. 2007) (holding drawbacks are a "mere gratuity, proffered by the government"). CBP has the authority to deny drawback claims which fail to strictly adhere to the drawback filing requirements. *Int'l Light Metals v. United States*, 279 F.3d 999, 1001 (Fed. Cir. 2002). Congress has expressly conditioned the privilege of drawback upon fulfilment of CBP's drawback regulations. 19 U.S.C. § 1313(*l*). The burden is on the applicant to take "preliminary steps and acts . . . in accordance with

The regulations required by subparagraph (A) for determining the calculation of amounts refunded as drawback under this section shall provide for a refund of equal to 99 percent of the duties, taxes, and fees paid on the imported merchandise, which were imposed under Federal law upon entry or importation of the imported merchandise, and may require the claim to be based upon the average per unit duties, taxes, and fees as reported on the entry summary line item or, if not reported on the entry summary line item, as otherwise allocated by U.S. Customs and Border Protection, except that where there is substitution of the merchandise, then—

(i) in the case of an article that is exported, the amount of the refund shall be equal to 99 percent of the lesser of—

(I) the amount of duties, taxes, and fees paid with respect to the imported merchandise; or

(II) the amount of duties, taxes, and fees that would apply to the exported article if the exported article were imported; and

(ii) in the case of an article that is destroyed, the amount of the refund shall be an amount that is—

(I) equal to 99 percent of the lesser of—

(aa) the amount of duties, taxes, and fees paid with respect to the imported merchandise; and

(bb) the amount of duties, taxes, and fees that would apply to the destroyed article if the destroyed article were imported; and

(II) reduced by the value of materials recovered during destruction as provided in subsection (x).

[3] 19 U.S.C. § 1313(r)(1) (1993):

A drawback entry and all documents necessary to complete a drawback claim, including those issued by the Customs Service, shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed, except that any landing certificate required by regulation shall be filed within the time limit prescribed in such regulation. Claims not completed within the 3-year period shall be considered abandoned. No extension will be granted unless it is established that the Customs Service was responsible for the untimely filing.

The statute, enacted in 1993, was substantially amended in 2016 to require electronic filing of drawback claims. *See infra* p. 16 n.14. Because EchoStar's claims predate the effective date of the amendment, however, the 1993 version of the statute governs the instant litigation. Unless otherwise stated, all further references to 19 U.S.C. § 1313(r)(1) are to the 1993 version.

[applicable] regulations" to establish a claim. *Graham Eng'g Corp.*, 465 F. Supp. 2d at 1357–58 (internal quotations omitted). Further, "'reasonable and proper' drawback regulations are within [CBP]'s authority[,] and . . . the drawback statute 'should be construed as a Governmental grant of privilege, and any doubt in construction thereof should be resolved in favor of the Government.'" *Id.* at 1358 (quoting *United States v. Ricard–Brewster Oil Co.*, 29 C.C.P.A. 192, 197 (1942)). Where, as here, the regulation is mandatory, "compliance is a condition precedent to the right of recovery of drawback." *United States v. Lockheed Petroleum Servs.*, 702 F.2d 1472, 1474 (Fed. Cir. 1983).

"By statute, claims for drawback generally must be filed *and completed* within a three-year limitations period accruing from the date of export." *Aectra Ref. & Mktg. v. United States*, 565 F.3d 1364, 1366 (Fed. Cir. 2009) (citing 19 U.S.C. § 1313(r)(1)) (emphasis added); *see also Flint Hills Res., LP v. United States*, 42 CIT __, 333 F. Supp. 3d 1362, 1371 (2018) ("In order for [CBP] to grant a drawback claim, the claim must be 'complete.'"). Pursuant to 19 U.S.C. § 1313(r)(1), "a drawback entry and all documents necessary to complete a drawback claim . . . shall be filed . . . within 3 years after the date of exportation . . . ." *See also Shell Oil*, 688 F.3d at 1379. Accordingly, the statute requires timely filing of both the "drawback entry" and "all documents necessary to complete a drawback claim." *Aectra*, 565 F.3d at 1366. If the claim is rejected as incomplete, the filer has an "opportunity to complete the claim subject to the requirement for filing a complete claim within 3 years." 19 C.F.R. § 191.52(a). Claims that are not completed within the three-year period are "considered abandoned." *Shell Oil*, 688 F.3d at 1379 (quoting 19 U.S.C. § 1313(r)(1)). "[A]llowing claimants to submit claims piecemeal after the three-year completion window has passed would detract from the ability of [CBP] to effectively carry out its duties, including preventing circumvention of the three-year statutory limit of 19 U.S.C. § 1313(r)(1)." *Aectra*, 565 F.3d at 1373 (internal quotations omitted).

Under Commerce's regulations, a complete "drawback claim" is comprised of "the drawback entry and related documents required by regulation which together constitute the request for drawback payment." 19 C.F.R. § 191.2(j). Drawback entries — which contain required information concerning the article on which drawback is claimed — must be filed using Customs Form 7551. 19 C.F.R. § 191.2(k). On Customs Form 7551, an exporter must list and describe each item for which the exporter claims a drawback, provide the dates of import and export, and indicate the preferred method of filing. 19

C.F.R. § 191.52(a)(1) provides the full list of the documents necessary to complete the claim, including Customs Form 7551.[4]

II. Factual Background and Procedural History

EchoStar is a television and entertainment company that creates, imports, and exports video and satellite technology. Pl.'s Br. at 2, July 17, 2018, ECF No. 26; Compl. ¶ 4, Dec. 23, 2016, ECF No. 9. In 2013, CBP approved EchoStar's application to file drawback claims to recover duties paid on certain imported video technology, including remote controls, switches, and Low Noise Block Feeds.[5] Pl.'s Stmt. Material Facts ¶ 1–2, July 17, 2018, ECF No. 27; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 1–2, Sept. 18, 2018, *as modified* Sept. 19, 2018, ECF No. 28. EchoStar then hired FAK Distribution and Logistics ("FAK"), which contracted Laredo Becnel, Inc. ("Laredo Becnel"), to file the drawback claims. Pl.'s Stmt. Material Facts ¶ 2; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 2.

Prior to attempting to file its drawback claims, EchoStar reviewed a 2010 memo ("Guidance") from CBP's San Francisco Drawback Office to drawback filers, provided to EchoStar by its outside counsel. Def.'s Br. Ex. C, Dep. Tr. 179:18–20. The Guidance provided tips on the submission of drawback claims. Pl.'s Br. Ex. B, July 17, 2018, ECF No. 27; Def.'s Br. Ex. C, Dep. Tr. 179:18–20. The Guidance was not accessible online, and CBP neither sent it to EchoStar nor instructed EchoStar to rely on it. Def.'s Br. Ex. C, Dep. Tr. 166:17–167:5. CBP describes the Guidance as an "informal list of tips and key points [that] is not all inclusive, but does address some of the most frequent issues we have observed." Pl.'s Br. Ex. B. The Guidance provides that "a complete claim must have . . . CBP form 7551 - Drawback Entry," among other required documents, and warns that "[i]f any of the above is missing, claims will be rejected prior to input by CBP." *Id.* The Guidance also indicates that the San Francisco Drawback Office

[4] 19 C.F.R. § 191.52(a)(1):

> Unless otherwise specified, a complete drawback claim under this part shall consist of the drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part.

[5] Low Noise Block Feeds are "amplifiers used in satellite dishes. . . .[T]hey take the very faint signal they receive and magnify it so that it is powerful enough to use. This is the first step in taking the microwave signal coming from space and turning it into images and sounds for televisions and computers." Ronald Kimmons, "Differences Between LNB & LNBF," *Sciencing* (Oct. 6, 2017), https://sciencing.com/differences-between-lnb-lnbf-12352553.html.

preferred that claimants file through the Automated Broker Interface ("ABI"), an online filing system.[6] *Id.* The Guidance states:

> How to file claims: There are two options: ABI & Manual.
>
> Filing ABI claims is the preferred method. This can be done directly or by transmitting through a service bureau. This will give you priority processing, fast accelerated payment, access to information on line [sic] and less [sic] documentation errors. If you want a solid cash flow and stay completive [sic] in this economic environment, get ABI certified or use a service bureau.
>
> Manual claims are at the bottom of our processing list. The procedure is to do the initial review and ACS input no sooner than 89 day [sic] after filing. We strongly encourage you to either use a service bureau to transmit these drawback claims or purchase drawback software and work with your ABI rep to become ABI certified for drawback.

Id. The Guidance also said that "[u]nless your claim is outside the standard time frames (if it was submitted without errors or deficiencies), do not contact the drawback office for a status report." *Id.*

At the time of filing, EchoStar also had in its possession the "Drawback Summary" chapter of the June 2011 CBP and Trade Automated Interface Requirements document ("CATAIR document"), which explained how to use the ABI system for document filing.[7] Def.'s Br. Ex. A, Sept. 18, 2018, ECF No. 28. The chapter was intended to "provide[] records related to the drawback summary processing" and stated that "[o]ne or more drawback summary transactions may be submitted." *Id.* The CATAIR document also stated that, "[i]t should be noted that at this time, a full paper claim is still required. The ABI data is a *summary* of the claim. Drawback summary data may be transmitted up to 30 days in advance of the estimated claim date (the date the legal paper claim is submitted)." *Id.*

EchoStar also reviewed the governing statute, 19 U.S.C. § 1313(r)(1), and the governing regulation, 19 C.F.R. § 191.51, prior to transmitting its claim data. Def.'s Br. Ex. C, Dep. Tr. 167:13–170:21. EchoStar understood the statutory language of 19 U.S.C. § 1313(r)(1),

[6] CBP, in its letter denying EchoStar's protests, described the purpose of the ABI system as allowing filers to submit data electronically "to the Drawback Office in advance of a complete drawback claim's paper filing, which enable[s] the Drawback office to better process a drawback claim." Compl. ¶ 45; Tab G(1)–(2).

[7] CBP contends that EchoStar also possessed a CBP publication called "Drawback, a Refund for Certain Exports," that was explicit about the need for a paper claim. Def.'s Br. at 12. However, EchoStar does not "have a specific recollection of seeing this document" prior to submitting its drawback entries. Def.'s Br. Ex. C, Dep. Tr. at 174:14–177:4.

requiring the filing of "[a] drawback entry and all documents necessary to complete a drawback," to mean that filing Customs Form 7551 was required. *Id.* at 168:10–18. EchoStar further understood the phrase to mean that it "needed more information" but "didn't have an appreciation for exactly what that portion of the provision required" and "didn't really parse the words and . . . dig into the drawback entry and all documents." *Id.* at 169:11–170:21. EchoStar understood 19 C.F.R. § 191.51 to "lay out what was required to complete drawback claims," *id.* at 173:19–21, but noted that it "didn't see anywhere where [the regulation] said you must file paper documents," *id.* at 112:3–5.

In a July 16, 2014 email, FAK explained to EchoStar that its protocol was to file a paper claim as "back up" and that EchoStar could call CBP to check whether filing a paper claim was required. Def.'s Br. Ex. C, Dep. Tr. 110:15–111:2.[8] EchoStar failed to do so. *Id.* at 111:6–114:1. EchoStar did not contact the San Francisco Drawback Office because it felt "status calls interrupt [the] work [of government agencies] and . . . they don't always appreciate you calling to check." *Id.* at 116:9–15. EchoStar also did not contact the San Francisco Drawback Office because it thought that FAK "hadn't read the [G]uidance all the way through" and that the Guidance did not require submitting a paper claim. *Id.* at 115:3–7. EchoStar emailed FAK that it "was checking with [the San Francisco] Drawback Office and will let you know what we hear" but did not check with CBP. *Id.* at 117:7–118:15. FAK also told EchoStar that "[a]ny supporting documents to the claims should be sent with the filing copies to [CBP] to back up the entries." *Id.* at 126:13–127:4.

When EchoStar electronically filed its summary data via the ABI system, it was not yet possible to submit Customs Form 7551 electronically, and "Customs Form 7551 had to be filed with [CBP] manually." Def.'s Br. at 2 (citing Def.'s Br. Ex. B (Pl.'s Resp. to Def.'s Interrog.) at 6; Compl. Tab G (CBP Protest Denials, 2809–15–100509 and 2809–15–100589)). *See also* Oral Argument, Mar. 13, 2019, ECF No. 37. EchoStar contends that it filled out Customs Form 7551 and gave it to drawback broker Laredo Becnel, which then transferred some of the information on Customs Form 7551 into the ABI system. At oral argument, the Government clarified that the ABI system did not allow for parties to enter some of the information required by Customs Form 7551, including the dates of exportation, which are necessary for CBP to determine whether a drawback claim is timely. Oral Argument. Neither party disputes these facts. *Id.*

[8] EchoStar received two more emails containing the same information. Def.'s Br. Ex. C, Dep. Tr. 118:17–120:04; 122:02–122:16.

EchoStar, through Laredo Becnel, filed eight summary data submissions electronically between July and December 2014, requesting a total of $225,510.12 for eight drawbacks. Compl. ¶ 10; Compl. Ex. C at 26–31. At the time of electronic filing, each of these claims had not yet expired; the last of these claims for refunds expired December 31, 2014. Pl's Br. Ex. 1 ¶ 11, July 17, 2018, ECF No. 27. In January 2015, the San Francisco Drawback Office sent a letter ("January letter") warning Laredo Becnel that "within 15 days from the date of this letter[,] [it] must submit the drawback claims associated with the ABI transmission or the drawback claims w[ould] be cancelled . . . ." Pl.'s Br. Ex. 1 Tab A. The January letter also quoted the CATAIR document, stating that the "ABI data is a *summary* of the claim. Drawback summary data may be transmitted up to 30 days in advance of the estimated claim date (the date the legal paper claim is submitted)." *Id.* Laredo Becnel submitted paper copies of all eight claims on Form 7551 within the 15-day period. Pl.'s Stmt. Material Facts ¶ 5; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 5. CBP denied all eight claims as untimely and liquidated the claims without refunds. Pl.'s Stmt. Material Facts ¶ 8; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 8.

In early February 2015, EchoStar, through its drawback broker, Laredo Becnel, electronically filed four more summary data submissions via the ABI system. Pl.'s Br. Ex. 1 Tab E; Def.'s Ans. ¶ 15, Apr. 27, 2017, ECF No. 13. On February 24, 2015, Becnel filed hard copies of the claims. Pl.'s Stmt. Material Facts ¶ 7; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 7. The claims contained entries of exports dated between February 13 and 24, 2012. Pl.'s Stmt. Material Facts ¶ 7; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 7. On February 25, 2015, CBP informed EchoStar that it needed to revise its four claims and exclude any exports dated prior to February 24, 2012. Pl.'s Br. Ex. 1 Tab E. EchoStar resubmitted these four claims. Pl.'s Stmt. Material Facts ¶ 12; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 12. It did not remove exports dated between February 13 and 24, 2012 because it believed that the "day of filing" meant the day it submitted its electronic claims, and thus it believed its claims for these exports were timely. Pl.'s Stmt. Material Facts ¶ 13; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 13. CBP liquidated the four claims with refunds but did not provide $50,765.40 worth of refunds for exports dated between February 13 and 24, 2012. Compl. ¶ 18; Pl.'s Stmt. Material Facts ¶ 14; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 14.

On August 18, 2015, EchoStar filed Protest 2809–15–100509, covering the first eight liquidated claims. Pl.'s Stmt. Material Facts ¶ 15; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 15. In early October 2015,

EchoStar filed Protest 2809–15–100589, covering the remaining claims. Pl.'s Br. Ex. 3 ¶ 20. On November 3, 2015, CBP's Port of San Francisco denied both protests and EchoStar's application for further review. Pl.'s Stmt. Material Facts ¶ 19; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 19. On January 5, 2016, EchoStar filed requests with the San Francisco Port Director to void the denial of the protests pursuant to 19 U.S.C. § 1515(c) and (d).[9] Pl.'s Stmt. Material Facts ¶ 19; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 19. On March 8, 2016, CBP denied all these requests. Pl.'s Stmt. Material Facts ¶ 19; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶ 19.

On December 23, 2016, EchoStar filed the present action, contesting CBP's denials of its protests. The Government answered the complaint on April 27, 2017. EchoStar moved for summary judgment on July 17, 2018, and the Government filed a cross-motion for summary judgment and its opposition to EchoStar's motion for summary judgment on September 18, 2018. The court heard oral argument on March 13, 2019.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(a). The court reviews *de novo* "civil actions contesting a denial of a protest under section 515 of the Tariff Act of 1930" "upon the basis of the record made before the court." See 28 U.S.C. § 2640(a)(1); *Flint Hills*, 333 F. Supp. 3d at 1371 (*de novo* review of record in appeal of denial of protest actions).

DISCUSSION

Summary judgment is proper where "the movant shows that there is no genuine dispute as to material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v. Harris*, 550 U.S. 372, 379 (2007) (internal citations omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587

[9] 19 U.S.C. § 1515(c) and (d) provide:

(c) Request for set aside of denial of further review

If a protesting party believes that an application for further review was erroneously or improperly denied or was denied without authority for such action, it may file with the Commissioner of U.S. Customs and Border Protection a written request that the denial of the application for further review be set aside. Such request must be filed within 60 days after the date of the notice of the denial . . . .

(d) Voiding denial of protest

If a protest is timely and properly filed, but is denied contrary to proper instructions, the Customs Service may on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate port director within 90 days after the date of the protest denial, void the denial of the protest.

(1986)). "When [as in this case] both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000).

EchoStar contends that (1) the date of filing for the purpose of timeliness is the date of electronic filing; and (2) in the alternative, because CBP was responsible for the untimely filing, the statutory time limit should be waived and CBP's failure to waive the time limit was an abuse of discretion. Pl.'s Br. at 1. The court concludes that the undisputed evidence supports summary judgment for the Government. The court determines that (1) EchoStar's electronic submission of summary data was not a "filing" under 19 U.S.C. § 1313; and (2) CBP was not responsible for EchoStar's untimely filing. The court thus sustains CBP's denial of EchoStar's protests and rejects EchoStar's request that the court remand its claims to CBP with instructions to liquidate the claims with full refunds.

I. Electronic Filing of Summary Data Does Not Constitute a Filing of a Drawback Claim Pursuant to the Governing 1993 Version of 19 U.S.C. 1313(r) and CBP's Regulations.

EchoStar argues that the applicable 1993 version of 19 U.S.C. § 1313 permits filing of electronic claims and that CBP's requirement that EchoStar submit paper claims is contrary to law. Pl.'s Br. at 4–11. In its primary argument, EchoStar contends that its drawback claims were timely because it transmitted "certain information" via ABI within the three-year statutory time limit. Pl.'s Br. at 2, 4–7. EchoStar asserts that because 19 U.S.C. § 1313(*l*) and 19 C.F.R. § 191.2(n) authorize the submission of documents electronically, the date that its drawback broker transmitted the summary data via ABI was the date that its claims were "filed" for purposes of § 1313(r)(1). The court is not persuaded by EchoStar's argument. EchoStar ignores the statutory requirement that a drawback claim will be considered timely only if "a drawback entry and *all documents necessary* to complete" the claim are filed within the three-year period. 19 U.S.C. § 1313(r)(1) (emphasis added).

As discussed above, pursuant to 19 U.S.C. § 1313(r)(1), "a drawback entry and all documents necessary to complete a drawback claim . . . shall be filed . . . within 3 years after the date of exportation . . . ." *See also Shell Oil*, 688 F.3d at 1379. Under CBP's regulations, a complete "drawback claim" is comprised of "the drawback entry and related documents required by regulation which together constitute the request for drawback payment." 19 C.F.R. § 191.2(j). Drawback entries — which contain required information concerning the article in which

drawback is claimed — must be filed using Customs Form 7551. 19 C.F.R. § 191.2(k). Thus, a drawback claim cannot be complete without Customs Form 7551. 19 C.F.R. § 191.51(a)(1).

Here, it is undisputed that EchoStar did not file the drawback entry on Customs Form 7551 and all of the documents necessary to complete the drawback claims within the three-year limitations period. *See* Pl.'s Stmt. Material Facts ¶¶ 5, 7; Def.'s Resp. to Pl.'s Stmt. Material Facts ¶¶ 5, 7; *see also* Compl. Tab B. When EchoStar filed its submissions, the ABI system did not permit filing of Form 7551. Thus, EchoStar was only able to transmit summary data, rather than complete claims. Def's Br. at 9. Having failed to adhere to the drawback filing requirements, EchoStar was not entitled to the drawback privilege. *See Int'l Light Metals*, 279 F.3d at 1001; 19 U.S.C. § 1313(*l*) (expressly conditioning the privilege of drawback upon fulfilment of CBP's drawback regulations). As such, CBP acted within its authority in denying EchoStar's drawback claims.

The court is not persuaded by EchoStar's arguments to the contrary. EchoStar contends that in 1993, when Congress amended 19 U.S.C. § 1313(*l*) as part of the Customs Modernization Act,[10] "Congress intended for a drawback claim to be considered 'filed' within the statutory meaning of that term by the submission . . . of either physical claims *or* electronic submission once the process is authorized by CBP." Pl.'s Br. at 5. EchoStar specifically cites 19 U.S.C. § 1313(*l*), authorizing the Secretary of the Treasury to regulate the drawback process. *Id.* At the time EchoStar submitted its claims, § 1313(*l*) stated, "[a]llowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of Treasury shall prescribe, which may include, but need not be limited to, the authority for the electronic submission of drawback entries . . . ." 19 U.S.C. § 1313(*l*). This provision, however, did not mandate the acceptance of electronic filing, much less acceptance of an incomplete electronic filing. EchoStar acknowledges that the intent of Congress was merely to allow CBP the discretion to accept electronic filings of certain documents. Pl.'s Br. at 5. Moreover, EchoStar misconstrues this provision by equating "drawback entries" to "drawback claims." *Id.* As has been noted, drawback entries are documents that contain descriptions of the articles "on which the drawback is claimed." 19 C.F.R. § 191.2(k). A drawback claim is the complete request for drawback payment. 19 C.F.R. § 191.2(j). Thus, the statute does not create any obligation to accept the electronic filing of drawback claims.

[10] Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057 (1993).

EchoStar further argues that CBP authorized the electronic submission of drawback claims when it amended its definition of the term "filing." Pl.'s Br. at 6. To support its contention that CBP must accept electronically filed claims, EchoStar cites the 1998 amendment to CBP's regulatory procedures, which defined "filing" in 19 C.F.R. § 191.2(n). *Drawback*; *Final Rule*, 63 Fed. Reg. 10,970, 10,970 (Mar. 5, 1998). The amended definition included "the delivery to [CBP] of any document or documentation, as provided for in this part, and includes electronic delivery of any such document or documentation." *Id.* at 11,008 (emphasis omitted). EchoStar contends that "[i]n promulgating this new regulation, CBP expressly and unequivocally permitted drawback claims to be 'filed' within the meaning of § 1313(r) electronically." Pl.'s Br. at 6. EchoStar does not explain, however, why redefining "filing" to include electronic delivery would allow incomplete claims to be considered timely. *See* 19 U.S.C. § 1313(r) (requiring a complete drawback claim within three years of export).

EchoStar also argues that the CATAIR document, a CBP document that instructs filers on how to use the ABI system, *supra* p. 7, materially changes 19 C.F.R. § 191.2(n) and therefore required notice and comment rulemaking under the Administrative Procedure Act § 553. Pl's Br. at 8. EchoStar contends that the CATAIR document's statement that "the claim date is the date the legal paper claim is submitted" and not the date that the claim was filed via electronic delivery contradicts 19 C.F.R. § 191.2(n). *Id.* This contention is not persuasive. The CATAIR document is an instruction manual for filers and does not constitute a "binding rule of law" subject to the notice and comment process, as EchoStar asserts. Pl's Br. at 9. *See Apex Frozen Foods Priv. Ltd. v. United States*, 40 CIT _, 144 F. Supp. 3d 1308, 1320 (2016), *aff'd*, 862 F.3d 1337 (Fed. Cir. 2017) (quoting *Am. Mining Cong. v. Mine Safety Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)) (setting forth notice and comment rulemaking considerations). Moreover, in any event, the CATAIR instructions did not amend the date of filing, nor are they inconsistent with the existing regulations. 19 C.F.R. § 191.51(a) lists the necessary documents to file a complete drawback claim, including Customs Form 7551.[11] 19 C.F.R. § 191.2(n) does not provide that an electronic filing alone constitutes a claim filed or that the absence of Form 7551 is permitted. It merely allows for the electronic filing of some documents: "[f]iling means the deliv-

[11] That provision stated:

> Unless otherwise specified, a complete drawback claim under this part shall consist of the drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part.

ery to [CBP] of any document or documentation, as provided for in this part, and includes electronic delivery of any such document or documentation." While EchoStar filed some data electronically, it did not file complete claims. Indeed, at oral argument, the Government acknowledged that if Customs Form 7551 could have been filed electronically, the claim could have been complete. Because the date of filing means the date that the complete claim is filed, and a complete claim could only be filed in paper form, the CATAIR document did not amend, nor was it inconsistent with, CBP regulations.[12]

II. CBP Was Not Responsible for EchoStar's Untimely Claims

EchoStar argues that CBP was responsible for the untimely filing and, thus, should have extended the three-year period pursuant to 19 U.S.C. § 1313(r)(1). *See* Pl.'s Br. at 11–16. EchoStar offers two alternative bases for ascribing blame to CBP. First, EchoStar alleges that the Guidance from the San Francisco Drawback Office misled EchoStar into believing that it could file its claims electronically via ABI. Second, EchoStar alleges that CBP should have notified EchoStar sooner that additional information was necessary to complete its drawback claims. *Id.* Because these allegations are not persuasive, EchoStar has failed to establish that CBP was responsible for the untimely filing.

A. EchoStar's Unreasonable Reliance on the Guidance Does Not Make CBP Responsible.

The Tariff Act requires drawback claims to be filed within three years. 19 U.S.C. § 1313(r)(1). "No extension will be granted unless it is established that the [CBP] was responsible for the untimely filing." *Id.* "On its face, and consistent with this history, § 1313(r)(1) creates an explicit exception to the three-year time period limitation for

[12] The court notes that its analysis is buttressed by subsequent amendment of the governing statute. Notably, Congress amended 19 U.S.C. § 1313 in February 2016. The changes included extending the statutory filing period to five years and requiring electronic filing of drawback claims. *See* 19 U.S.C. § 1313(r)(1) (2016) ("A drawback entry shall be filed or applied for, as applicable, not later than 5 years after the date on which merchandise on which drawback is claimed was imported."); 19 U.S.C. § 1313(r)(4) (2016) ("All drawback claims filed on and after the date that is 2 years after February 24, 2016, shall be filed electronically."). New regulations reflected these statutory changes. *See* 19 C.F.R. § 190.51(a)(1) ("[A] complete drawback claim under this part will consist of the successful electronic transmission to CBP . . . ."); 19 C.F.R. § 190.51(e)(1) ("A complete drawback claim is timely filed if it is successfully transmitted not later than 5 years after the date on which the merchandise designated as the basis for the drawback claim was imported and in compliance with all other applicable deadlines under this part."). The statutory amendment (and conforming modification of regulations) suggests that because Congress felt the need to require electronic filings, CBP was not previously required to accept them.

drawback claims when [CBP] is 'responsible' for the tardiness." *Delphi Petroleum, Inc. v. United States*, 33 CIT 1758, 1765, 662 F. Supp. 2d. 1348, 1354 (2009).

The Tariff Act does not define the term "responsible." 19 U.S.C. § 1313. Black's Law Dictionary defines "responsibility" as "[t]he obligation to answer for an act done, and to repair any injury it may have caused." *Black's Law Dictionary*, *available at* https://thelawdictionary.org/responsibility/ (last visited June 17, 2019). *See also Oxford English Dictionary*, *available at* https://www.oed.com/view/Entry/163863?redirectedFrom=responsible#eid (last visited June 17, 2019) (defining "responsible" as "answerable or liable to be called to account to another person for something"). These definitions, however, do not articulate the level of fault necessary for CBP to be considered "responsible."

The courts have seldom had occasion to address whether CBP is "responsible" for an untimely filing of a drawback claim under § 1313(r)(1). In *Aectra*, the plaintiff had filed and received drawbacks on several claims. 565 F.3d at 1366. The plaintiff filed incomplete claims because, at that time, exporters could not receive drawbacks on Harbor Maintenance Tax ("HMT") and Merchandise Processing Fees ("MPF"), and Aectra did not file to collect on these fees. *Id.* at 1367. The Federal Circuit ruled that "[a] claimant is generally required to file a complete and specific claim within the limitations period, even if the government authority to whom the claim is presented is certain to dispute the validity of the claim." *Id.* at 1375. The court acknowledged the statutory provision "allowing extensions for [CBP] delay" but found it "not applicable" because "Aectra's failure to file a protective claim for taxes and fees cannot fairly be attributed to the agency." *Id.* at 1373.

This court was presented with the question of CBP's responsibility for untimely claims under 19 U.S.C. § 1313(r)(1) in *Delphi*. 662 F. Supp. 2d at 1354. In *Delphi*, the court held that CBP was responsible for the plaintiff's untimely filing. *Id.* Delphi had filed its claims without HMT and MPF because, at the time of filing, it could not include the fees in their drawback claims. *Id.* at 1350. Delphi was aware that it might soon be able to file these fees under law, due to advice from a Supervisory Drawback Liquidator at CBP. *Id.* at 1350. The CBP official told Delphi that it could reserve the right to file for those fees and file a protest later. *Id.* at 1351. When Delphi did so, the claims were rejected as untimely. *Id.* at 1352–53. In *Delphi*, like in *Aectra*, this court rejected the plaintiff's contention that CBP's regulations themselves made it impossible to properly file its claims. *Id.* at 1353. Instead, the court held for Delphi because it had relied on the mis-

leading advice of a CBP official. *Id.* at 1353–54. The court emphasized the nature of CBP misleading Delphi: "[u]nder the facts of this case, Delphi's reliance on advice by the [CBP] supervisory drawback official for the Port of New York rendered [CBP] responsible for the otherwise untimely filing and qualifies Delphi for a statutory extension under the final provision § 1313(r)(1)." *Id.* at 1354. Thus, the court has recognized CBP as "responsible" if an exporter otherwise would have filed its claims in a timely fashion were it not for the inaccurate advice of a CBP official. In such circumstance, "Customs abused its discretion in not granting the extension of time to file the drawback claims." *Id.* at 1355.

EchoStar's reliance on *Delphi* is misplaced. During the period in which Laredo Becnel was electronically filing EchoStar's submissions, FAK contacted EchoStar multiple times and advised it to submit paper copies of its claims. Def.'s Br. Ex. C, Dep. Tr. 110:15–110:21. FAK also told EchoStar that it was FAK's protocol to file drawback claims in hard copy form and advised EchoStar to contact the San Francisco Drawback Office to confirm. *Id.* EchoStar told FAK it would contact the San Francisco Drawback Office, but it failed to do so. *Id.* at 111:6–114:1. In fact, EchoStar presumed that FAK had misunderstood the Guidance. *Id.* at 123:19–124:14. Instead of seeking clarification from FAK or CBP, EchoStar ignored these initial warnings. *Id.* at 125:11–126:12.

EchoStar contends that the Guidance said that filers should not contact the Office to check on their claims. Pl.'s Br. at 13. The Guidance does state that "[u]nless your claim is outside the standard time frames . . . do not contact the drawback office for a status report." Pl.'s Br. Ex. B. The Guidance included no language, however, instructing filers to refrain from asking CBP questions about how to file drawback claims, what constituted a complete claim, or whether filing through the ABI system alone, without Customs Form 7551, would be sufficient. FAK, moreover, repeatedly told EchoStar to contact CBP to ask which documents CBP required in hard copy. Thus, EchoStar's inference that first-time filers could not contact CBP to clarify the rules of filing was unreasonable.

The record also indicates that EchoStar had in its possession the CATAIR document that said filers had to submit a paper claim. Def.'s Br. Ex. D at 10 (acknowledging EchoStar's possession of the CATAIR document at the time of filing); Def.'s Br. Ex. A. Moreover, as has been noted, the Guidance did provide that "a complete claim must have . . . CBP form 7551 Drawback Entry." Pl.'s Br. Ex. B, July 17, 2018, ECF No. 27. EchoStar was, at minimum, on notice of the possibility that it had to file a paper claim. Def.'s Br. Ex. D at 10. Unlike in

Delphi, there is no indication that EchoStar contacted CBP to resolve any uncertainty about how to file or that CBP responded with misleading advice. EchoStar ignored FAK's warnings and failed to contact CBP to resolve any ambiguity created by the instructions in the Guidance and the CATAIR document.

Furthermore, as discussed above, EchoStar not only misinterpreted the Guidance issued by the San Francisco Drawback Office, but also unreasonably gave it more weight than the statute and regulations, which unequivocally enumerate the drawback filing requirements. EchoStar acknowledged that the statute and regulations require that a complete claim include Customs Form 7551 and do not dispute that Customs Form 7551 could not be filed through the ABI system. Instead of complying with statutory and regulatory requirements, EchoStar relied upon selected portions of CBP's self-described "informal list of tips and key points [that] is not all inclusive" from 2010 — which was neither posted on CBP's website nor provided to EchoStar by CBP and lacks the force of law. Thus, the facts of *Delphi* are distinguishable, and its holding does not support EchoStar's argument. *See, e.g., Flint Hills*, 333 F. Supp. 3d at 1380 ("The *Delphi* court was very clear that its holding was a narrow one, particular to the facts in that case.").

B. The January Letter Does Not Render CBP Responsible for EchoStar's Late Filing.

EchoStar also claims that because CBP waited six months to issue the January letter informing EchoStar that its claims were incomplete without paper claims, CBP was responsible for the untimely filing. This argument fails because a delay in a ruling from CBP, by itself, does not render CBP responsible for a delay in filing. *See Delphi*, 662 F. Supp. 2d at 1353–54 (holding in part that CBP's delay in liquidating claims "was insufficient to compel Customs to grant a filing extension"). EchoStar, moreover, cites no authority requiring CBP to notify it that its claim was incomplete prior to the expiration date for each of the claims.

The January letter also does not waive the statutory time period because CBP did not mislead EchoStar in a way that caused it to file its claims late. The claims in question needed to be filed before December 31, 2014 to be timely. CBP's January letter gave a 15-day period for EchoStar to submit its paper claims. Compl. Ex. A. CBP issued the letter after the claims had already expired, but before CBP had reviewed them and determined them to be incomplete. Thus, the claims were already untimely when CBP issued the letter, so CBP's letter could not have caused EchoStar to file its claims late. Had CBP sent the letter before the claims had expired and the 15-day time

period reasonably led EchoStar to believe that it could file the paper claims in that time, CBP may have abused its discretion. However, that is not the case here. EchoStar, moreover, cites to no authority to support its position that CBP's January letter reopened the filing window. In sum, the court concludes that CBP's issuance of the January letter does not make CBP responsible for the untimeliness of the paper claims, and no extension is warranted.

With respect to the later four claims EchoStar filed in February 2015, the court concludes CBP is not responsible for the untimely filings because the January letter put EchoStar on notice of the need to file paper claims. These claims were filed after the January letter, in which CBP had already told EchoStar that it needed to file paper claims. In fact, the January letter stated, "acceptance of claims is based on the date the legal paper claim is submitted." Compl. Ex. A. When EchoStar then filed electronically before filing its paper claims, it was on notice that the paper claim was the legal claim and that it had to submit the paper claim within three years of export. Thus, CBP did not mislead EchoStar at that point in time as to the proper filing of claims, and CBP correctly denied these claims as untimely.

In sum, the court's determination, confined as it is to the record, is necessarily a narrow one. While the Guidance was not a model of clarity, on review of the entire record and consideration of the governing statute, regulations, and clear precedent, the court concludes that CBP is ultimately not responsible for EchoStar's failure to timely file complete drawback claims because of either the Guidance or CBP's "late" notice to EchoStar to provide additional documents. Thus, EchoStar is not entitled to an extension under § 1313(r)(1). The court determines that CBP's denial of protests should be sustained. EchoStar's request that this matter should be remanded to CBP with instructions to reliquidate the entries at issue and refund the duties paid by EchoStar is denied.

CONCLUSION

EchoStar's motion for summary judgment is DENIED with respect to all claims. The Government's motion for summary judgment is GRANTED.

SO ORDERED.

Dated: June 17, 2019
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 19–75

STEIN INDUSTRIES INC., d/b/a CARLSON AIRFLO MERCHANDISING SYSTEMS, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00150

JUDGMENT

This case having been submitted for decision, and the court, after due deliberation, having rendered an opinion; now, in conformity with that opinion it is hereby

ORDERED that the Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Light-Walled Rectangular Pipe and Tube from the People's Republic of China issued in response to Carlson AirFlo Merchandising Systems' Scope Ruling Request (ECF No. 12–4), as amended by the Final Results of Remand Redetermination (ECF No. 30), is **SUSTAINED**, and it is further

ORDERED that the entries enjoined in this action, *see* Order for Statutory Inj. Upon Consent (July 24, 2018), ECF No. 14, must be liquidated in accordance with the final court decision, including all appeals, as provided for in Section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012).

Dated: June 18, 2019
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE