



A-602-809
AR: 03/22/16-09/30/17
Public Document
AD/CVD V: AB

April 23, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Hot-Rolled Steel Flat Products from Australia: Issues and
Decision Memorandum for the Final Results of Antidumping Duty
Administrative Review; 2016-2017

I. SUMMARY

The Department of Commerce (Commerce) analyzed the case and rebuttal briefs submitted by interested parties in the administrative review of the antidumping duty order on certain hot-rolled steel flat products (hot-rolled steel) from Australia. As a result of this analysis, we made no changes to the *Preliminary Results*¹ and continue to find that the use of facts otherwise available with an adverse inference (AFA) is appropriate. We recommend that you approve the positions described in the “Discussion of Comments” section of this memorandum.

II. LIST OF COMMENTS

Comment 1: Whether Commerce’s Application of AFA to BlueScope was Warranted
Comment 2: Whether Using the Petition Rate as the AFA Rate was Appropriate

II. BACKGROUND

The review covers one producer/exporter of the subject merchandise, the collapsed entity BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Distribution Pty Ltd.

¹ See *Certain Hot-Rolled Steel Flat Products from Australia: Preliminary Results of Antidumping Duty Administrative Review; 2016–2017*, 83 FR 56817 (November 14, 2018) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).



(collectively, BlueScope).² The period of review (POR) is March 22, 2016, through September 30, 2017. On November 14, 2018, Commerce published the *Preliminary Results* of the 2016-2017 administrative review of the antidumping duty order on hot-rolled steel from Australia.³ In those results, Commerce preliminarily determined that BlueScope withheld information that had been requested by Commerce by failing to provide it in the form and manner requested which significantly impeded the proceeding under sections 776(a)(2)(A)-(C) of the Tariff Act of 1930, as amended (Act), respectively, which resulted in missing information necessary to Commerce's ability to calculate BlueScope's dumping margin under section 776(a)(1) of the Act.⁴ Commerce further determined that BlueScope failed to cooperate to the best of its ability with Commerce's requests for information.⁵ Therefore, Commerce applied adverse facts available (AFA) in determining BlueScope's dumping margin in this administrative review.⁶ On December 14, 2018, Commerce received a timely filed case brief from BlueScope.⁷ On December 19, 2018, Commerce received a timely filed rebuttal brief from United States Steel Corporation, ArcelorMittal USA, Nucor Corporation, AK Steel Corporation, Steel Dynamics, and SSAB Enterprises (collectively, the petitioners).⁸

Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.⁹ If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the final results of this administrative review is now April 23, 2019.

On March 5, 2019, Commerce held a public hearing.¹⁰ On March 6, 2019, BlueScope submitted a request to extend the deadline for the final results.¹¹ On March 11, 2019, the petitioners submitted an opposition to BlueScope's request to extend the deadline for the final results.¹² On

² In the investigation, Commerce found that BlueScope Steel Ltd., BlueScope Steel (AIS) Pty Ltd., and BlueScope Steel Distribution Pty Ltd. (BlueScope) are a single entity and because there were no changes to the facts which supported that decision since that determination was made, we continue to find that these companies are part of a single entity for this administrative review. See *Certain Hot-Rolled Steel Flat Products from Australia: Final Determination of Sales at Less Than Fair Value*, 81 FR 53406, 53407 (August 12, 2016).

³ See *Preliminary Results*.

⁴ See Preliminary Decision Memorandum at 7-10.

⁵ *Id.* at 10.

⁶ *Id.* at 10-12.

⁷ See BlueScope's Letter re: "Case Brief of BlueScope Steel Ltd: Certain Hot-Rolled Steel Products from Australia," dated December 14, 2018 (BlueScope's Case Brief).

⁸ See Petitioners' Letter re: "Hot-Rolled Steel Flat Products from Australia: Rebuttal Brief of United States Steel Corporation, ArcelorMittal USA, Nucor Corporation, AK Steel Corporation, Steel Dynamics, and SSAB Enterprises in Response to Case Brief Filed by BlueScope Steel Limited," dated December 19, 2018 (Petitioner's Rebuttal Brief).

⁹ See Memorandum, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

¹⁰ See Public Hearing Transcript, Case No. A-602-809, dated March 5, 2019.

¹¹ See BlueScope's Letter re: "Request for Extension of Final Determination Period, First Administrative Review," dated March 6, 2019.

¹² See Petitioners' Letter re: "Hot-Rolled Steel Flat Products from Australia: U.S. Steel's Opposition to

April 3, 2019, BlueScope submitted a renewed request to extend the deadline for the final results.¹³¹⁴

III. SCOPE OF THE ORDER

The products covered by this *Order*¹⁵ are certain hot-rolled, flat-rolled steel products, with or without patterns in relief, and whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement (“width”) of 12.7 mm or greater, regardless of thickness, and regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, etc.). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

- (1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the resulting measurement makes the product covered by the existing antidumping¹⁶ or countervailing duty¹⁷ orders on Certain Cut-To-Length Carbon-Quality Steel Plate Products From the Republic of Korea (A-580-836; C-580-837), and
- (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

BlueScope’s Request to Extend the Final Results of the First Administrative Review,” dated March 11, 2019.

¹³ See BlueScope’s Letter re: “Renewed Request for Extension of Final Determination Date,” dated April 3, 2019.

¹⁴ Consistent with our recommendations below, we find that an extension of the final determination date is not necessary in this review.

¹⁵ See *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016) (*Order*).

¹⁶ See *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products from France, India, Indonesia, Italy, Japan and the Republic of Korea*, 65 FR 6585 (February 10, 2000).

¹⁷ See *Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate from India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, and the Republic of Korea*, 65 FR 6587 (February 10, 2000).

Steel products included in the scope of this *Order* are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

Unless specifically excluded, products are included in the scope regardless of levels of boron and titanium.

For example, specifically included in these scopes are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, the substrate for motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). If steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes hot-rolled steel that has been further processed in a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of this *Order* if performed in the country of manufacture of the hot-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this *Order* unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this *Order*:

- Universal mill plates (*i.e.*, hot-rolled, flat-rolled products not in coils that have been rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, of a thickness not less than 4.0 mm, and without patterns in relief);
- Products that have been cold-rolled (cold-reduced) after hot-rolling;¹⁸
- Ball bearing steels;¹⁹
- Tool steels;²⁰ and
- Silico-manganese steels;²¹

The products covered by this *Order* are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.10.1500, 7208.10.3000, 7208.10.6000, 7208.25.3000, 7208.25.6000, 7208.26.0030, 7208.26.0060, 7208.27.0030, 7208.27.0060, 7208.36.0030, 7208.36.0060, 7208.37.0030, 7208.37.0060, 7208.38.0015, 7208.38.0030, 7208.38.0090, 7208.39.0015, 7208.39.0030, 7208.39.0090, 7208.40.6030, 7208.40.6060, 7208.53.0000, 7208.54.0000, 7208.90.0000, 7210.70.3000, 7211.14.0030, 7211.14.0090, 7211.19.1500, 7211.19.2000, 7211.19.3000, 7211.19.4500, 7211.19.6000, 7211.19.7530, 7211.19.7560, 7211.19.7590, 7225.11.0000, 7225.19.0000, 7225.30.3050, 7225.30.7000, 7225.40.7000, 7225.99.0090, 7226.11.1000, 7226.11.9030, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.5000, 7226.91.7000, and 7226.91.8000.

The products covered by this *Order* may also enter under the following HTSUS numbers: 7210.90.9000, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7214.99.0060, 7214.99.0075, 7214.99.0090, 7215.90.5000, 7226.99.0180, and 7228.60.6000.

The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of this *Order* is dispositive.

¹⁸ For purposes of this scope exclusion, rolling operations such as a skin pass, levelling, temper rolling or other minor rolling operations after the hot-rolling process for purposes of surface finish, flatness, shape control, or gauge control do not constitute cold-rolling sufficient to meet this exclusion.

¹⁹ Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

²⁰ Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

²¹ Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

IV. DISCUSSION OF COMMENTS

Comment 1: Whether Commerce's Application of AFA to BlueScope was Warranted

BlueScope's Comments:

- Commerce's decision to apply total AFA to BlueScope fails to meet the statutory requirements for AFA.²² There is no evidence to support the claim that BlueScope withheld information or impeded the review, and there is no indication that BlueScope's information could not be verified.²³ BlueScope submitted all of its information in accordance with the deadlines and in the form and manner requested by Commerce.²⁴
- Commerce's statement that BlueScope failed to provide quantity and value information in the form requested by Commerce is contradicted by the information on the record.²⁵ BlueScope correctly reported the quantity and value (Q&V) of subject merchandise it sold to the United States during the POR, and correctly reported the Q&V of U.S. sales by Steelscape.²⁶
- BlueScope did not fail to provide information on Steelscape's CEP sales of subject merchandise.²⁷ All of BlueScope's sales of subject merchandise were made by BlueScope's Australian affiliate, Australian Iron & Steel (AIS) through BlueScope Steel Americas (BSA) to Steelscape, and BlueScope clearly told Commerce that Steelscape had no sales of subject merchandise.²⁸ BlueScope's charts did show the Q&V of Steelscape's sales of non-subject merchandise made from BlueScope-originated hot-rolled steel.²⁹
- Commerce's conclusion ignores the reconciliation chart provided at Exhibit SA3-2, which shows AIS's sales of hot-rolled coil to BSA, the subsequent entries of hot-rolled coil into the United States by BSA, the subsequent sales of hot-rolled coil by BSA to Steelscape, and the subsequent sales of coated steel by Steelscape to unaffiliated customers.³⁰
- BlueScope did not fail to report its Q&V of sales by affiliates either to the United States or home market.³¹ BlueScope fully disclosed what entities were making what sales to and in the United States.³² BlueScope clearly explained to Commerce that the channels of distribution had changed from the original investigation.³³

²² See BlueScope's Case Brief at 1, 5.

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.* at 9.

²⁶ *Id.* at 9-10.

²⁷ *Id.* at 10-11.

²⁸ *Id.*

²⁹ *Id.* at 12.

³⁰ *Id.* at 12-13.

³¹ *Id.* at 13.

³² *Id.* at 13-16.

³³ *Id.* at 16.

- There are no inconsistencies between the consolidated quantity and value chart and BlueScope's affiliates' individual quantity and value charts.³⁴ The Q&V sales data for individual affiliated companies were for sales in the home market, and were not for sales to the United States, as only AIS had exports of subject merchandise to the United States.³⁵ In BlueScope's U.S. sales database, BlueScope included the invoice numbers for AIS and BSA, and every one of the invoice numbers provided appears in the reconciliation.³⁶ Commerce failed to consider all of the evidence on the record in reaching its conclusion.³⁷
- BlueScope provided extensive detail on its quantity and value information, and fully explained the slight change in its reported quantities, which amounted to only 0.24 percent of its total sales of subject merchandise.³⁸ BlueScope explained that the quantity and value chart does not reconcile to the U.S. sales database because BlueScope removed sales that had been partially returned by the customer after the close of the POR.³⁹ While these changes may not have been specifically requested by Commerce in a supplemental questionnaire, they were fully explained to Commerce and consistent with Commerce's original questionnaire requests.⁴⁰ Moreover, BlueScope specifically tied the returns to the change in the database.⁴¹
- There is no evidence on the record that BlueScope significantly impeded the review.⁴²
- The changes BlueScope made to its databases were made in accordance with Commerce's instructions and were fully explained by BlueScope.⁴³ The fact that BlueScope changed its database information to respond to Commerce's supplemental questionnaires cannot reasonably be grounds for concluding that the changes call into question the reliability of all databases and reconciliation submitted by BlueScope.⁴⁴
- Commerce incorrectly states that one dataset "appears to include additional sequence numbers for sales during the period of review," and that "it is unclear which sales have been added."⁴⁵ BlueScope's databases contained a separate variable that tied to the previously submitted database.⁴⁶ The comparison made it possible for Commerce to see which sales had been added in the database.⁴⁷

³⁴ *Id.* at 17.

³⁵ *Id.*

³⁶ *Id.* at 18.

³⁷ *Id.*

³⁸ *Id.* at 19.

³⁹ *Id.*

⁴⁰ *Id.* at 19, 23.

⁴¹ *Id.* at 23.

⁴² *Id.* at 21.

⁴³ *Id.* at 22.

⁴⁴ *Id.*

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 22-23.

⁴⁷ *Id.*

- Commerce’s conclusion in note 7 of its BPI memorandum contradicts the clear facts of record.⁴⁸
- Commerce’s application of total AFA to BlueScope is a departure from past practice and differs from the approach taken for other respondents in the concurrent administrative review.⁴⁹ In four other concurrent hot-rolled administrative reviews, two involving Korea and two involving Japan, the petitioners also requested that Commerce apply total AFA.⁵⁰ However, in those cases, Commerce brushed aside the petitioners’ requests and did not apply total AFA.⁵¹
- Commerce has not even sought to verify BlueScope’s information, despite BlueScope’s request that it do so.⁵²
- Commerce should reverse its preliminary determination and use the information BlueScope has submitted.⁵³ In *Certain Frozen Warmwater Shrimp from India*, Commerce initially applied total facts available to certain respondents because of their failure to provide adequate Q&V information but reversed that decision in the final determination.⁵⁴
- If Commerce determines to apply AFA to BlueScope, it should limit that application to partial facts available in areas where Commerce determines that BlueScope’s information is usable and verifiable.⁵⁵ In *Certain Hot-Rolled Steel Flat Products from Japan*, Commerce reversed its decision to apply AFA in order to apply partial facts available.⁵⁶

Petitioners’ Comments:

- Commerce’s application of AFA is warranted because of BlueScope’s failure to reconcile its Q&V of shipments to the United States during the POR.⁵⁷ Here, despite three requests for BlueScope to provide usable and complete Q&V information, BlueScope merely re-submitted Q&V charts Commerce already found to be deficient.⁵⁸
- BlueScope’s case brief places blame upon Commerce for failing to understand BlueScope’s shipping patterns, but it is the respondent’s burden to create a clear record

⁴⁸ *Id.* at 24.

⁴⁹ *Id.* at 6-8.

⁵⁰ *Id.*

⁵¹ *Id.* at 8.

⁵² *Id.* at 5.

⁵³ *Id.* at 25.

⁵⁴ *Id.* at 26 (citing *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52055 (September 12, 2007) (*Certain Frozen Warmwater Shrimp from India*)).

⁵⁵ *Id.* at 26.

⁵⁶ *Id.* (citing *Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 53409 (Aug. 12, 2016) (*Certain Hot-Rolled Steel Flat Products from Japan*)).

⁵⁷ See Petitioners’ Rebuttal Brief at 3.

⁵⁸ *Id.* at 4.

for Commerce.⁵⁹ Commerce's understanding of the record supports its AFA determination.⁶⁰

- BlueScope's Q&V reporting remains incomplete.⁶¹ First, BlueScope's consolidated Q&V chart cannot be reconciled to the Q&V charts of its individual affiliates.⁶² Second, BlueScope's consolidated Q&V chart does not reconcile with its U.S. sales database.⁶³
- Commerce properly found that BlueScope's consolidated Q&V chart is inconsistent with its individual Q&V charts.⁶⁴ Despite BlueScope's assertion that it fully disclosed what entities were making what sales to the United States, its Q&V reporting for AIS was not consistent with its statement that AIS sold subject merchandise to the United States.⁶⁵
- Commerce twice asked BlueScope to separately report the total Q&V of sales during the POR by Steelscope of further processed merchandise made using the subject merchandise that entered during the POR, which Steelscope has yet to report.⁶⁶ Rather than reporting Steelscope's POR sales of further manufactured merchandise in the form and manner requested by Commerce, BlueScope pointed Commerce to its "Constructed Export Price (Sales Entered during the POR)" line on its consolidated Q&V chart, which did not answer Commerce's request.⁶⁷
- BlueScope's Q&V information cannot be reconciled to its U.S. sales database.⁶⁸ BlueScope claims the discrepancy stems from its attempt to report sales net of returns, but this explanation does not account for the Q&V chart not tying to the gross quantity reported under field "qtyu1_orig," nor does it justify BlueScope's failure to fully disclose any facts or documentation concerning its returned sales.⁶⁹
- BlueScope's failure to reconcile the Q&V data with the U.S. sales database is clearly synopsized by BlueScope itself in thumbing its nose at Commerce stating that, "providing separate quantity and value reconciliations for every affiliate under these circumstances would be a meaningless exercise."⁷⁰
- Commerce's application of AFA is warranted because BlueScope materially altered its sales databases without prompting from Commerce and those databases ultimately became unusable.⁷¹ Despite BlueScope's claims that it provided a narrative explaining the changes it made to its databases, BlueScope's case brief lacks any citations to where it provided an explanation for the significant changes Commerce noted in its *Preliminary*

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.*

⁶¹ *Id.* at 5.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 6-7.

⁶⁵ *Id.* at 5-6.

⁶⁶ *Id.* at 8-9.

⁶⁷ *Id.* at 9.

⁶⁸ *Id.* at 10.

⁶⁹ *Id.*

⁷⁰ *Id.* at 11.

⁷¹ *Id.*

*Results.*⁷² Without citing any record evidence, BlueScope makes the blanket assertion that it “explained every one of those changes in its responses.”⁷³

- BlueScope’s case brief fails to address Commerce’s findings of fact in note 7 of the BPI memorandum.⁷⁴ This is a tacit omission that Commerce correctly found that BlueScope made significant and unsolicited changes to its sales databases, and that such changes rendered the databases unusable for Commerce’s margin calculation.⁷⁵
- The reliability of BlueScope’s ever shifting data is called into question by the inability to tie its most recent consolidated home market database to any of its previously submitted databases.⁷⁶ Commerce unequivocally expressed its intent to analyze BlueScope’s datasets on a consolidated basis and explicitly instructed BlueScope that any changes made to an individual entity’s home market database must also be incorporated into BlueScope’s consolidated home market sales database.⁷⁷
- A respondent in the 2014-2015 administrative review of *Wire Rod from Mexico* significantly changed its Section D dataset and the Court of International Trade (CIT) recently upheld the application of total AFA to this respondent.⁷⁸ Similarly here, BlueScope submitted unsolicited changes and failed to adequately disclose the nature of the revisions and thus, total AFA application to BlueScope is warranted.⁷⁹
- In *Certain Frozen Warmwater Shrimp from India*, the respondent did not receive the Q&V questionnaire.⁸⁰ Circumstances beyond the respondent’s control were unique, such as ceasing operations prior to the Federal Express Q&V questionnaire delivery.⁸¹ The mitigating factors from that case are not applicable to BlueScope.⁸²
- *Certain Hot-Rolled Steel Flat Products from Japan*, in which a misunderstanding regarding the affiliation status of respondents prompted Commerce’s reversal, is factually distinct from this case and should be dismissed accordingly.⁸³
- Verification is meant to be a “spot-check” of the information already on the record, not an opportunity to provide new information.⁸⁴ By BlueScope’s admission earlier in the proceeding, it would need to provide additional record evidence for Commerce at

⁷² *Id.* at 13.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 14.

⁷⁷ *Id.* at 15-16.

⁷⁸ *Id.* (citing *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 82 FR 23190 (May 22, 2017) and accompanying Issues and Decision Memorandum at 4-8 (*Wire Rod from Mexico*) and *Deacero S.A.P.I. de C.V. v. United States*, No. 17-183, Slip Op. 18-155 (CIT Nov. 8, 2018)).

⁷⁹ *Id.* at 17-18.

⁸⁰ *Id.* at 18.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 19.

⁸⁴ *Id.* at 20.

verification.⁸⁵ Given the state of the record, it is unclear how Commerce could have conducted verification without straying from its mandate.⁸⁶

Commerce's Position:

As explained in detail below, Commerce continues to find that it is appropriate to apply total AFA to BlueScope for these final results. Sections 776(a)(1) and (a)(2)(A)-(D) of the Act, provide that, if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

As discussed in the *Preliminary Results* and below, during the course of the review, the record lacked necessary and usable information under section 776(a)(1) of the Act. Furthermore, we explained that, because BlueScope withheld information requested by Commerce, failed to report its Q&V information in the form and manner requested by Commerce - despite multiple requests for this information - thereby significantly impeding this review, recourse to the facts available was appropriate under section 776(a)(2)(A)-(C) of the Act.⁸⁷ Specifically, the record lacks a usable total consolidated U.S. sales quantity for the POR and a usable U.S. sales reconciliation. Further, BlueScope made significant unsolicited and unexplained changes to its fourth consolidated home market sales database, submitted over eight months into the review.⁸⁸ The unsolicited and unexplained changes that BlueScope made to the fourth consolidated home market sales database impact the majority of its home market sales and are so significant that we are unable to link this database to the three previously submitted consolidated home market sales databases.⁸⁹ BlueScope's multiple submissions of inconsistent and unreconcilable databases impeded Commerce's ability to analyze the home market sales data.⁹⁰ As a result of the unsolicited and unexplained changes made to the home market sales database, Commerce does not have a usable home market sales reconciliation, which is core to our margin calculation.

Regarding BlueScope's argument that it correctly reported the Q&V of subject merchandise it sold to the United States during the POR, and correctly reported the Q&V of U.S. sales by Steelscape,⁹¹ the record is still rife with inconsistencies and does not support BlueScope's contention. BlueScope argues that it clearly told Commerce that Steelscape had no sales of

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Preliminary Decision Memorandum at 7-9.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 9-10.

subject merchandise, that its chart did show the Q&V of Steelscape's sales of non-subject merchandise made from BlueScope-originated hot-rolled steel, and that Commerce's conclusion ignores the reconciliation chart that it provided.⁹² During the review, we found BlueScope's initial Q&V reporting to be unclear and inconsistent with its narrative response. In its initial questionnaire response, BlueScope stated that it had provided a consolidated quantity and value chart (Q&V chart) showing the Q&V of sales by Steelscape of further processed merchandise during the POR, as well as the quantity and value of the subject merchandise entered into the United States during the POR, as requested by the questionnaire.⁹³ However, the information reported in BlueScope's consolidated Q&V chart did not reconcile to its narrative response because the consolidated Q&V chart reported figures only in the "Total Quantity" and "Total Value in U.S. Dollars," columns.⁹⁴ Commerce was unable to discern what the Q&V figures reported in BlueScope's consolidated Q&V chart represented because the information did not tie to the narrative response, nor did it tie to the quantity and value figures reported in the charts BlueScope submitted for its individual affiliates.⁹⁵ Accordingly, we could not use the initial Q&V information submitted by BlueScope and related to its sales of subject merchandise in the United States during the POR.

We twice requested that BlueScope clarify the inconsistencies between its original narrative response and Q&V reporting, and to separately report, consistent with its narrative response to the original questionnaire, the total quantity and value of sales during the POR by Steelscape of further processed merchandise made using the subject merchandise that entered during the POR and the total quantity and value of the subject merchandise that entered into the United States during the POR.⁹⁶ However, on both occasions, BlueScope simply referred Commerce to the consolidated Q&V chart that we had previously found to be deficient. In response to Commerce's first request for this information, BlueScope replied that it had "updated its quantity and value chart at Exhibit SA1-1 to include separately the CEP quantity and value sold by Steelscape."⁹⁷ However, upon review, the chart was not updated to include a different reporting field for the information requested. In response to Commerce's second request for this information, BlueScope directed Commerce to its "Constructed Export Price (Sales Entered during POR)" line on its consolidated Q&V chart.⁹⁸ This response was not responsive to Commerce's request. We also disagree with BlueScope that our conclusion ignores the reconciliation chart submitted at Exhibit SA3-2. Contrary to BlueScope's claims, the reconciliation chart it provided was not responsive to Commerce's request because it was not

⁹² *Id.* at 9-13.

⁹³ See BlueScope's January 8, 2018 Section A Questionnaire Response (BlueScope's SAQR) at 3.

⁹⁴ *Id.* at Exhibit A-1.

⁹⁵ *Id.*

⁹⁶ See Commerce's Letter, "Antidumping Duty Administrative Review of Certain Hot Rolled Steel Flat Products from Australia: Supplemental A Questionnaire," dated February 2, 2018, at 3; see also Commerce's Letter, "Antidumping Duty Administrative Review of Certain Hot Rolled Steel Flat Products from Australia: Supplemental Section A-C Questionnaire," dated July 2, 2018, at 3-4.

⁹⁷ See BlueScope's February 22, 2018 Supplemental Section A Questionnaire Response (BlueScope's SSAQR) at 1.

⁹⁸ See BlueScope's July 16, 2018 Second Supplemental Section A Questionnaire Response (BlueScope's 2nd SSAQR) at 1.

submitted in the form and manner requested by Commerce, nor does the quantity reported in the reconciliation tie to the U.S. sales database.

Regarding BlueScope's argument that it did not fail to report its Q&V of sales by affiliates either to the United States or home market,⁹⁹ we disagree. BlueScope argues that the Q&V sales data reported for its individual affiliated companies were for sales in the home market, and were not for sales to the United States, as only AIS had any exports of subject merchandise to the United States.¹⁰⁰ However, contrary to BlueScope's claim, the Q&V charts submitted for its individual affiliates include information for both sales in the United States and home market.¹⁰¹ Indeed, during the review, we informed BlueScope that the information reported in the Q&V charts submitted for its individual affiliates was inconsistent with its narrative response that only AIS had any exports of subject merchandise to the United States.¹⁰² In response, BlueScope stated that it had "updated {its Q&V} chart at Exhibit SA3-1 to include the line 'Constructed Export Price (Sales Entered during POR)' for AIS." However, Commerce found that AIS's Q&V chart was not updated to account for its exports of subject merchandise and remains inconsistent with BlueScope's consolidated Q&V chart and narrative response.

BlueScope contends that it submitted a reconciliation on the record that included invoice numbers which tied to the U.S. sales database, and should have allowed Commerce to understand AIS's Q&V reporting.¹⁰³ However, as discussed in the *Preliminary Results*, our ability to accurately tie the affiliate information reported in BlueScope's quantity and value charts to its narrative description is particularly necessary in this review because BlueScope claims that its sales are made through a single channel of distribution, whereas in the original investigation, BlueScope claimed that its sales were made through multiple channels of distribution.¹⁰⁴ Accordingly, we requested that BlueScope report its Q&V for its individual affiliates in a specific form and manner to confirm BlueScope's claims regarding its channels of distribution. BlueScope cannot evade Commerce's requests by choosing the form and manner in which it submits information. BlueScope failed to update its individual affiliate Q&V chart for AIS in the form and manner requested by Commerce, despite contending that it made such an update. This was particularly concerning to Commerce in light of BlueScope's statement to Commerce that "providing separate quantity and value reconciliations for every affiliate under these circumstances would be a meaningless exercise."¹⁰⁵ Further, the information submitted in AIS's individual Q&V chart was not consistent with BlueScope's narrative response. Accordingly, Commerce requested on multiple occasions BlueScope's Q&V information

⁹⁹ See BlueScope's Case Brief at 13.

¹⁰⁰ See BlueScope's Case Brief at 17.

¹⁰¹ See e.g., BlueScope's 2nd SSAQR at Exhibit SA3-1.

¹⁰² *Id.* at 2.

¹⁰³ See BlueScope's Case Brief at 18.

¹⁰⁴ See BlueScope's SSAQR at 5; see also *Certain Hot-Rolled Steel Flat Products from Australia: Final Determination of Sales at Less Than Fair Value*, 81 FR 53406 (August 12, 2016), and accompanying Issues and Decision Memorandum at Comment 4.

¹⁰⁵ See BlueScope's Letter, "BlueScope Steel Ltd.'s Rebuttal to and Refutation of US. Steel's Request for Application of Total AFA," dated September 6, 2018 (BlueScope's AFA Response), at 5.

separated by affiliate, but BlueScope continually failed to report the Q&V in the manner and form requested.

Regarding BlueScope's argument that it fully explained that the Q&V chart does not reconcile to the U.S. sales database because BlueScope removed sales that had been returned by the customer after the close of the POR,¹⁰⁶ the record also does not support BlueScope's allegation. During the review, BlueScope stated that certain invoices were fully returned, and that it correctly removed the sales associated with these invoices from its U.S. sales database, and reported the net quantity for one additional batch which had a partial return.¹⁰⁷ However, BlueScope's reporting in its U.S. sales database does not support BlueScope's explanation that these certain invoices were fully returned and the sales associated with these invoices were removed from the U.S. sales database.¹⁰⁸ Further, the record lacks any documentation to support BlueScope's claim that these sales were returned. Even taking BlueScope's explanation into consideration, the quantity associated with these invoices does not reconcile the difference between the total quantity that BlueScope reports in its Q&V chart and the quantity BlueScope reports in its U.S. sales database.¹⁰⁹ As explained in the *Preliminary Results*, in certain cases, we may tolerate a difference between the amount reported in the sales reconciliation and the amount reported in the sales database where a company provides a sufficient explanation for the difference.¹¹⁰ Here, however, BlueScope yet again refused to comply with our reporting instructions regarding its Q&V information and failed to provide a sufficient explanation for the difference. Accordingly, Commerce finds that BlueScope's explanation regarding its claim of returned sales lacks record support and does not reconcile the Q&V chart to the U.S. sales database.

We find unavailing BlueScope's argument that the changes it made to its databases were made in accordance with Commerce's instructions and were fully explained by BlueScope.¹¹¹ As explained in the *Preliminary Results*, BlueScope made significant unsolicited and unexplained changes to its fourth consolidated home market sales database.¹¹² Contrary to BlueScope's assertion, these changes were not requested by Commerce. In a supplemental questionnaire, Commerce requested that BlueScope report all home market sales in the two months following the last month of its U.S. sales.¹¹³ In response, BlueScope submitted its fourth consolidated

¹⁰⁶ See BlueScope's Case Brief at 19.

¹⁰⁷ See BlueScope's AFA Response.

¹⁰⁸ See BlueScope's Letter, "BlueScope Steel Ltd.'s Response to Questions 41 and 42 of the Department's Supplemental Section A-C Questionnaire Hot-Rolled Steel Flat Products from Australia," dated July 24, 2018, at Exhibit SR-20.

¹⁰⁹ Compare BlueScope's 2nd SSAQR at Exhibit SA3-1, with BlueScope's Letter, "BlueScope Steel Ltd.'s Response to Section C of the Department's Antidumping Questionnaire Hot-Rolled Flat Products from Australia," dated January 23 2018.

¹¹⁰ See Preliminary Decision Memorandum at 9.

¹¹¹ See BlueScope's Case Brief. at 22.

¹¹² See Preliminary Decision Memorandum at 9; Memorandum, "Proprietary Information for Preliminary Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Steel Flat Products from Australia; 2016-2017," dated concurrently with this Memorandum, (BPI Memorandum) at Note 7.

¹¹³ See Commerce's Letter, "Antidumping Duty Administrative Review of Certain Hot Rolled Steel Flat Products

home market sales database, and this database contained significant changes to the consolidated home market sales data that had been previously submitted on the record.¹¹⁴ While Commerce may have requested that BlueScope submit an additional two months of home market sales data, we did not request that BlueScope make changes to the home market sales data already submitted on the record. Further, BlueScope provides no citation to the record indicating where it explained these changes. Although BlueScope contends that Commerce’s conclusion in note 7 of its BPI memorandum contradicts the clear facts of record,¹¹⁵ it fails to provide any citations to the record where an explanation for the changes listed in note 7 of the BPI memorandum can be found.¹¹⁶ Accordingly, BlueScope’s significant, unsolicited and unexplained changes in the fourth consolidated home market sales database were not in response to Commerce’s instructions.

Regarding BlueScope’s argument that its databases contain a separate variable that tied to the previously submitted database, and that the comparison made it possible for Commerce to see which sales had been added in the database,¹¹⁷ it was the understanding of both Commerce and BlueScope that the datasets would be reviewed on a consolidated basis.¹¹⁸ Contrary to BlueScope’s assertion, BlueScope’s fourth consolidated home market sales database did not contain a separate variable that tied to the previously submitted databases. Accordingly, Commerce was never able to tie the consolidated home market sales database to the previously submitted databases during this review.

Finally, we continue to find that BlueScope failed to cooperate by not acting to the best of its ability within the meaning of section 776(b) of the Act, and that it is appropriate to rely on adverse inferences in selecting from among the facts otherwise available in determining its dumping margin in this review. In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (CAFC) noted that while the statute does not provide an express definition of the “failure to act to the best of its ability” standard, the ordinary meaning of “best” is “one’s maximum effort.”¹¹⁹ Thus, according to the CAFC precedent, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do. While the CAFC noted that the “best of its ability” standard does not require perfection, “it does not condone inattentiveness, carelessness, or inadequate record keeping.”¹²⁰

As explained in the *Preliminary Results*, the record lacks a usable total consolidated U.S. sales quantity for the POR and a usable U.S. sales reconciliation. The record also lacks accurate and

from Australia: Supplemental Section A-C Questionnaire,” dated July 2, 2018.

¹¹⁴ See BPI Memorandum at Note 7.

¹¹⁵ See BlueScope’s Case Brief at 24.

¹¹⁶ “{T}he burden of creating an adequate record lies with {interested parties} and not with Commerce.” See *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318 (Fed. Cir. 2011).

¹¹⁷ *Id.*

¹¹⁸ See Letter re: “Antidumping Duty Administrative Review of Certain Hot Rolled Steel Flat Products from Australia: Supplemental Sections B-E Questionnaire,” dated April 9, 2018, at Question 1 (“Please ensure that any changes made to AIS’s home market sales database are also incorporated into the BlueScope’s consolidated home market sales database, if applicable.”).

¹¹⁹ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).

¹²⁰ *Id.* at 1382.

usable home market sales data. We find that these substantial issues are exacerbated by BlueScope's failure to cooperate to the best of its ability. Indeed, rather than responding to Commerce's requests for Q&V information in the form and manner requested, BlueScope twice directed Commerce to the Q&V chart exhibit we had previously found deficient. BlueScope also failed to update its Q&V charts for Steelscope and AIS, despite stating that it had done so in its narrative response. We find that BlueScope could have reported its Q&V information in the form and manner requested by Commerce had it put forth its maximum effort. That BlueScope failed to put forth its maximum effort is encapsulated by its statement that providing separate quantity and value reconciliations for every affiliate under these circumstances would be a meaningless exercise. Regarding the home market sales data, over eight months into this review, BlueScope submitted a new home market sales database, with such significant changes that we could not link it to the previously submitted consolidated home market sales databases. We find that BlueScope could have accurately reported its home market sales data had it put forth its maximum effort. Accordingly, consistent with our decision in the *Preliminary Results*, we continue to find that BlueScope failed to cooperate by not acting to the best of its ability to comply with our requests for information regarding its reporting of its quantity and value, and by not acting to the best of its ability to provide complete and accurate information regarding its home market sales.¹²¹

Regarding BlueScope's argument that Commerce's application of total AFA to BlueScope is a departure from past practice and differs from the approach taken for other respondents in the concurrent hot-rolled steel administrative reviews,¹²² each administrative review presents a unique set of facts, which we examine on a case-by-case basis. The concurrent hot-rolled administrative reviews cited by BlueScope are factually distinct from this review. As we explained in the *Preliminary Results*, in this case, the record lacks a usable total consolidated U.S. sales quantity for the POR, a usable U.S. sales reconciliation, a usable home market sales reconciliation, and usable home market sales data which distinguishes it from the cases it relies on. Further, in this case, BlueScope refused to comply with our reporting instructions and failed to provide complete and accurate information regarding its home market sales. Accordingly, Commerce finds it appropriate to apply total AFA based on the totality of the facts of this case record.

BlueScope argues that the information submitted on the record could and should have been verified,¹²³ but Commerce cannot conduct verification when the record is missing necessary information and verification is not an opportunity to provide new information.¹²⁴ In its verification request, BlueScope stated that Commerce's conclusions in the *Preliminary Results* may have been based on a misunderstanding or misreading of the information that BlueScope

¹²¹ See Preliminary Decision Memorandum at 11.

¹²² See BlueScope's Case Brief at 6-8.

¹²³ *Id.* at 5.

¹²⁴ See *Özdemir Boru San. ve Tic Ltd. Sti v. United States*, 273 F. Supp. 3d 1225 (CIT 2017) ("The purpose of verification is not to 'continue the information-gathering stage of {Commerce's} investigation.' . . . 'Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response.'") (internal citations omitted).

has submitted.¹²⁵ BlueScope stated that, “verification will demonstrate the earnestness and completeness of BlueScope’s responses, as well as confirming the reliability of its information, and will provide further evidence of BlueScope’s full cooperation in this review.”¹²⁶ Commerce disagrees with BlueScope that questions regarding the Q&V information for U.S. sales, sales reconciliations for U.S. and home market sales, and the home market sales data could have been addressed through verification. Verification is not a forum for Commerce to resolve issues that have not been resolved in questionnaire responses, especially when these issues pertain to the integrity and accuracy of the totality of the data.¹²⁷ The purpose of verification is not to develop accurate and reliable U.S. and home market sales data for the first time, but rather, to test the accuracy of the information already submitted on the record. Accordingly, verification would not have provided BlueScope with an opportunity to submit further evidence.

Regarding BlueScope’s argument that Commerce should reverse its preliminary determination and use the information BlueScope has submitted, we disagree. As explained above and in the *Preliminary Results*, BlueScope withheld information that had been requested by Commerce by failing to provide it in the form and manner requested which significantly impeded the proceeding under sections 776(a)(2)(A)-(C) of the Act, respectively. As a result, the record is missing information with regards to BlueScope’s home market and U.S. market sales quantities and values, which is information that is necessary to Commerce’s ability to calculate BlueScope’s dumping margin. BlueScope’s reliance on *Certain Frozen Warmwater Shrimp from India* is misplaced. In *Certain Frozen Warmwater Shrimp from India*, we reversed our application of AFA to a respondent because we found that the respondent provided a compelling explanation as to why it did not respond to Commerce’s Q&V questionnaire in a timely manner (*i.e.*, it did not receive it), and provided documentation to substantiate this explanation.¹²⁸ Here, unlike in *Certain Frozen Warmwater Shrimp from India*, BlueScope did receive Commerce’s questionnaires, and nonetheless BlueScope failed to provide usable U.S. and home market sales information in the form and manner requested by Commerce. Accordingly, Commerce continues to find that application of AFA is warranted to BlueScope based on the facts of this record.

We also find unavailing BlueScope’s argument that Commerce should limit its application of facts available to BlueScope to partial facts available in areas where Commerce determines that

¹²⁵ See Letter from BlueScope re: “BlueScope Steel Ltd.’s Request for Verification of Responses and Information Submitted in the First Administrative Review: Certain Hot-Rolled Steel from Australia,” dated November 9, 2018.

¹²⁶ *Id.*

¹²⁷ See, *e.g.*, *Certain Steel Nails from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14092 (March 16, 2016) and accompanying Issues and Decision Memorandum at Comment 4.

¹²⁸ See *Certain Frozen Warmwater Shrimp from India* and accompanying Issues and Decision and Memorandum at Comment 10 (respondent certified that the person listed on the FedEx delivery confirmation as having received its Q&V questionnaire was never employed by respondent and unknown to company officials, documentation related to the sale of the respondent company dated prior to the initiation of the administrative review, and an affidavit from the owner of the building housing respondent’s offices attesting to the fact that the property had been leased to a new tenant).

BlueScope's information is usable and verifiable.¹²⁹ In support of its argument, BlueScope relies on *Certain Hot-Rolled Steel Flat Products from Japan*, where Commerce reversed its decision to apply AFA in order to apply partial facts available.¹³⁰ However, BlueScope's reliance on *Certain Hot-Rolled Steel Flat Products from Japan* is misplaced. In that case, in the preliminary determination, we treated respondents JFE Steel Corporation (JFES) and JFE Shoji Trade Corporation (JFE Shoji) as a single entity and applied AFA on the basis that the companies did not supply certain cost information on a collapsed basis.¹³¹ In the final determination, Commerce found that JFES and JFE Shoji had never requested to be collapsed or stated that they believed they should be treated as a single entity, and that JFES and JFE Shoji's understood that the collapsed cost information was only necessary to submit if they believed they were a single entity.¹³² Accordingly, we reversed our decision to apply AFA and found that because we did not request the cost information at issue after we determined to treat JFES and JFE Shoji as a single entity, we did not have a basis to find non-cooperation.¹³³ Those record facts that led to Commerce's change from preliminary to final with respect to AFA are not present here and therefore reliance on *Certain Hot-Rolled Steel Flat Products from Japan* is misplaced.

For the reasons explained above, Commerce continues to find that based on the totality of the record, the record lacks usable and necessary information under sections 776(a)(1) of the Act. Specifically, the record lacks a usable total consolidated U.S. sales quantity for the POR, a usable U.S. sales reconciliation, and a usable home market sales reconciliation, because BlueScope provided inconsistent narrative responses, and filed multiple, inconsistent versions of databases without any explanation for the inconsistencies, thereby calling into question the reliability of all of the submissions. Further, we continue to conclude that BlueScope withheld information that had been requested by Commerce by failing to provide it in the form and manner requested which significantly impeded the proceeding under sections 776(a)(2)(A)-(C) of the Act, respectively. Finally, we continue to conclude that BlueScope failed to cooperate by not acting to the best of its ability and thus application of an adverse inference to facts otherwise available is warranted under section 776(b) of the Act.

Comment 2: Whether Using the Petition Rate as the AFA Rate was Appropriate

BlueScope's Comments:

- Commerce's application of an AFA rate of 99.2 percent to BlueScope is based solely on an allegation in the original petition, which did not rely on a single actual BlueScope sale in either Australia or the United States.¹³⁴

¹²⁹ See BlueScope's Case Brief at 26.

¹³⁰ *Id.* (citing *Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 53409 (Aug. 12, 2016) (*Certain Hot-Rolled Steel Flat Products from Japan*), and accompanying Issues and Decision Memorandum).

¹³¹ See *Certain Hot-Rolled Steel Flat Products from Japan* and accompanying Issues and Decision Memorandum at Comment 22.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See BlueScope's Case Brief at 3, 27.

- Commerce should base the AFA rate on actual sales data.¹³⁵ Commerce’s authority to apply information from the petition assumes that it has no other actual information from any current or prior segment of the proceeding to base its calculation.¹³⁶ Here, Commerce has all of BlueScope’s sales data from the investigation and this review.¹³⁷

Petitioners’ Comments:

- While BlueScope does not contest the legality of Commerce’s use of the petition rate, it claims that the rate is overcome by more recent information developed in the investigation or this administrative review.¹³⁸ However, the only individually calculated margin in the history of the proceeding is BlueScope’s current rate from the investigation.¹³⁹ Continuing to apply the investigation rate would not further the purpose of an AFA rate.¹⁴⁰
- The petition rate is based upon secondary information corroborated in Commerce’s pre-initiation analysis of the petition, and Commerce should continue to use the petition rate of 99.2 percent, since this is the only rate that satisfies the statutory purpose of AFA.¹⁴¹

Commerce’s Position:

For purposes of the final results, we continue to select the petition rate of 99.20 as the AFA rate for BlueScope. BlueScope contends that Commerce’s authority to apply information from the petition assumes that it has no other actual information from any current or prior segment of the proceeding to base its calculation, and that Commerce should base the AFA rate based on BlueScope’s actual sales data from the investigation or this review.¹⁴² We disagree. As explained in the *Preliminary Results*, section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.¹⁴³ In doing so, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on assumptions about information an interested party would have provided if the interested party had complied with the Commerce’s request for information, or to demonstrate that the information used as AFA reflects an “alleged commercial reality” of the interested party.¹⁴⁴

¹³⁵ *Id.* at 27.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See* Petitioners’ Rebuttal Brief at 22.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See* BlueScope’s Case Brief at 27.

¹⁴³ *See* Preliminary Decision Memorandum at 6.

¹⁴⁴ *Id.* at 11.

Furthermore, there is no requirement that the AFA rate assigned in this review be within the range of margins calculated for the respondent in prior investigations or reviews.¹⁴⁵ Commerce's general practice with respect to the assignment of AFA rates is to assign the higher of the highest rate in the petition or the highest margin rate calculated in any segment of a given proceeding, to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce the respondent to provide {Commerce} with complete and accurate information in a timely manner."¹⁴⁶

In this case, the only individually calculated dumping margin in the history of the proceeding is BlueScope's current rate of 29.58 percent from the investigation,¹⁴⁷ which was a calculated rate, and, as we explained in the *Preliminary Results*, this rate is not sufficient to induce cooperation from BlueScope.¹⁴⁸ Commerce's selection of the 99.20 percent rate is sufficiently adverse so as to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated, and consistent with the purpose of AFA. Furthermore, we are unable to use the actual sales data from this review to calculate an adverse margin. As explained above and in the *Preliminary Results*, the record of this review lacks a usable total consolidated U.S. sales quantity for the POR, a usable U.S. sales reconciliation, a usable home market sales reconciliation, and usable home market sales data.¹⁴⁹ Reliable and accurate U.S. and home market sales information is necessary to calculate a margin. Accordingly, we continue to select 99.20 percent as BlueScope's AFA rate for the final results.

¹⁴⁵ See *KYD, INC. v. United States*, 607 F.3d 760, 765-66 (Fed. Cir. 2010) ("Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question.").

¹⁴⁶ See, e.g., *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082, 65084 (November 7, 2006).

¹⁴⁷ See *Order*, 81 FR at 67965.

¹⁴⁸ See Preliminary Decision Memorandum at 11.

¹⁴⁹ *Id.* at 9-10.

V. CONCLUSION

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review and the final weighted-average dumping margin in the *Federal Register*.



Agree



Disagree

4/23/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance