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Investigation
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March 1, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Common Alloy Aluminum Sheet from Spain

I. SUMMARY

The Department of Commerce (Commerce) determines that common alloy aluminum sheet (aluminum sheet) from Spain is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is January 1, 2019, through December 31, 2019. The mandatory respondents subject to this investigation are Aludium Transformación de Productos S.L. (Aludium) and Compania Valenciana de Aluminio Baux (Baux).

After analyzing the comments submitted by interested parties, we have made changes to the *Preliminary Determination*.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments from the interested parties:

- Comment 1: Whether Commerce Should Apply Total or Partial Adverse Facts Available (AFA) to Aludium
- Comment 2: Application of Partial AFA to Aludium’s Date of Sale
- Comment 3: Whether Section 232 Duties are “Special Duties”
- Comment 4: Denial of Aludium’s Duty Drawback Adjustment
- Comment 5: Substantial Transformation
- Comment 6: Whether Commerce Should Evaluate Differential Pricing (DP) on a Monthly Basis

¹ See *Common Alloy Aluminum Sheet from Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 65367 (October 15, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).



- Comment 7: Whether Commerce Should Have Deselected Baux as a Mandatory Respondent
- Comment 8: Whether the Number of Countries Commerce Initiated Upon is Contrary to the World Trade Organization (WTO) Antidumping Agreement

II. BACKGROUND

On October 15, 2020, Commerce published the *Preliminary Determination* in this investigation.² On November 20, 2020, Commerce issued a supplemental questionnaire to Aludium in lieu of performing an on-site verification, as required under section 782(i) of the Act, to which Aludium timely responded.³

On December 3, 2020, we invited parties to comment on the *Preliminary Determination*.⁴ On December 15, 2020, we received case briefs from the petitioners,⁵ Aludium,⁶ Baux,⁷ and the Delegation of the European Union to the United States of America (EU Delegation).⁸ On December 23, 2020, we received rebuttal briefs from the petitioners⁹ and Aludium.¹⁰ On January 27, 2021, we held a virtual public hearing.¹¹

III. CHANGES SINCE THE *PRELIMINARY DETERMINATION*

Based on the review of the record and comments received from interested parties, we have revised Aludium's margin SAS program for the final determination as discussed in Comment 1 below.

² *Id.*

³ See Commerce's Letter, "Request for Documentation," dated November 20, 2020 (Verification Letter); *see also* Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Response to the Questionnaire in Lieu of Verification," dated November 30, 2020 (Aludium ILOVQR).

⁴ See Memorandum, "Briefing Schedule," dated December 3, 2020.

⁵ See Petitioners' Letter "Case Brief of Petitioners," dated December 15, 2020 (Petitioners Case Brief). The petitioners are the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members: Aleris Rolled Products, Inc.; Arconic, Inc.; Constellium Rolled Products Ravenswood, LLC; JW Aluminum Company; Novelis Corporation; and Texarkana Aluminum, Inc.

⁶ See Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Case Brief," dated December 15, 2020 (Aludium Case Brief).

⁷ See Baux's Letter, "Common Alloy Aluminum Sheet From Spain: Case Brief," dated December 15, 2020 (Baux Case Brief).

⁸ See EU Delegation's Letter, "Antidumping Investigation of Common Alloy Aluminum Sheet from Spain – Case brief," dated December 15, 2020 (EU Delegation Case Brief).

⁹ See Petitioners' Letter, "Petitioners' Rebuttal Brief for Aludium Transformación de Productos, S.L.," dated December 23, 2020 (Petitioners Aludium Rebuttal Brief); *see also* Petitioners' Letter, "Less-Than-Fair-Value Investigation of Common Alloy Aluminum Sheet from Spain – Petitioners' Letter in Lieu of Rebuttal Brief Regarding Compañía Valenciana de Aluminio Baux S.L.U., and Bancolor Baux S.L.U. and Jupiter Aluminum Corp.," dated December 23, 2020 (Petitioners Baux Rebuttal Brief).

¹⁰ See Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Rebuttal Brief," dated December 23, 2020 (Aludium Rebuttal Brief).

¹¹ See Public Hearing Transcript, dated February 3, 2021.

IV. DISCUSSION OF THE ISSUES

Comment 1: Whether Commerce Should Apply Total or Partial AFA to Aludium

A. Unreliable Cost of Production (COP) and Constructed Value (CV) Data

*Petitioners' Comments*¹²

- Aludium's cost reporting methodology is unreliable because it relies on an internal profit analysis tool for management accounting rather than normal cost accounting, and it is based on its internal product coding systems, one of which contained errors and the other which was not fully defined for the record.
- Aludium failed to explain how its product codes were used to calculate the reported cost.
- Aludium's reported inventory values cannot be traced to the control number (CONNUM)-specific COP based on actual costs. This is exemplified by the single lot batch number for which Commerce sought complete documentation in the questionnaire in lieu of verification. Aludium was unable to reconcile the inventory value based on estimates to the CONNUM-specific actual costs.
- The differences in direct material (DIRMAT) costs for products included within a CONNUM for products of identical physical characteristics demonstrate that it is incorrect for Aludium to report per-unit costs by relying on its internal profit analysis tool.
- Aludium's failure to reconcile the inventory value based on estimates and the reported "actual costs" based on its internal profit analysis tool, both of which are kept in the normal course of business, demonstrates the unreliability of Aludium's reported costs.
- In addition, the material variance calculated by Aludium was not accurate because it was applied to the cost of products produced from both externally-purchased aluminum slab and internally-produced slabs. This was done because Aludium started its cost build-up after the first stage of production and applied a single raw material variance.
- Aludium states that it relied on the internal profit analysis tool, which captures the "actual" costs for each of the aluminum sheet products produced during the POI. However, Aludium never made clear where the "variances" in DIRMAT costs originated and whether its cost reporting methodology captures the "actual" costs of the DIRMAT used in the production process.
- The per-unit costs based on an internal profit analysis tool in no way reflect the actual costs that Aludium incurred for the production of the subject aluminum sheet because they do not reflect product-specific variances.

*Aludium's Comments*¹³

- Aludium's reported COP and CV are derived from its normal books and records and fully reconcile to its financial statements prepared in accordance with Spanish generally accepted accounting principles (GAAP).
- Aludium is not required by the Act to reconcile its actual costs to its estimated costs and mandating it to do so would be inconsistent with Commerce's practice.

¹² See Petitioners Case Brief at 2-12.

¹³ See Aludium Rebuttal Brief at 1-24.

- The petitioners mischaracterize Aludium's reporting of its product coding system, which has been fully explained to Commerce including through cost buildups showing how the product codes relate to product costs in Aludium's internal profit analysis tool.
- In terms of how the product codes relate to production costs in the internal profit analysis tool, Aludium provided cost buildups for selected CONNUMs that included calculation examples of the production costs captured in the internal profit analysis tool.
- Aludium's inventory value reconciliation is consistent with Aludium's reporting of actual, rather than estimated, costs in accordance with the Act and Commerce's practice.
- Aludium's direct materials, which are pulled from its normal books and records and reconcile to its audited financial statements, are properly reported and the petitioners' arguments to the contrary are based on a flawed assumption.
- Aludium's per-unit cost variance is consistent with its books and records and impacts all metal consumption regardless of slab source. As a result of applying the variance, Aludium's reported costs reconcile to the cost of goods sold reported on its income statement.
- Aludium's estimated costs were used for planning purposes rather than to calculate the actual costs of production. Consistent with the Act, Aludium's reported costs derived from the company's normal accounting records, reconcile to Aludium's production records and to the audited financial statements after applying the variance.
- The petitioners' insistence that Aludium reconcile its actual costs to estimated costs is contrary to the Act and Commerce's practice. The petitioners acknowledge that Aludium's estimates are similar to standard costing, yet inexplicably insists that Aludium's cost reporting of actual costs fails because Aludium did not reconcile the reported product-specific actual costs to the product-specific estimated costs.
- By reporting its actual production costs (*i.e.*, estimated costs adjusted by a variance) calculated from its books and records, and reconciling those costs to Aludium's audited financial statements, Aludium has reported its costs exactly as required by the Act.
- Aludium's cost reporting appears to be similar to the cost reporting in *Lined Paper Products from India*, in which Commerce rejected similar arguments for applying total AFA, where the petitioner argued that estimated costs should be used instead of actual costs.¹⁴
- The production costs extracted using Aludium's internal profit analysis tool reflect the actual manufacturing costs incurred and not estimates. Accordingly, the fact that there is no direct link between the inventory values based on estimates and the CONNUM-specific COP based on actual costs is completely irrelevant to this proceeding. Further, there should be no assumption or expectation estimates and actual costs be reconcilable.
- The petitioners' arguments regarding Aludium's reporting of DIRMAT is flawed. The DIRMAT costs values serving as the basis for its argument are not per-unit costs as assumed by the petitioners, but are extended costs. Converting the extended DIRMAT costs to per-unit values demonstrates the error in the petitioners' argument.

¹⁴ *Id.* (citing *Certain Lined Paper Products from India: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 19434 (April 7, 2020) (*Lined Paper Products from India*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1).

- As explained in Aludium June 18, 2020 DQR,¹⁵ Aludium’s accounting records are structured such that metal costs are handled as an inventory transfer between the cast house and rolling area. As such, all cast house costs are captured in the rolling stage costs.
- The petitioners’ claim that the metal variance be applied only to self-produced slab is not warranted as the metal-related variances recorded in the normal course of business impacts all metal consumption regardless of the slab source and, therefore, the cost variance used to calculate the DIRMAT_VAR field is appropriately calculated.

Commerce’s Position: According to section 776(a) of the Act, Commerce shall use the facts otherwise available in reaching a determination if:

- 1) necessary information is not available on the record, or
- 2) an interested party or any other person –
 - A) withholds information that has been requested by the administering authority or the Commission under this title,
 - B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
 - C) significantly impedes a proceeding under this title, or
 - D) provides such information but the information cannot be verified as provided in section 782(i).

Further, section 776(b) of the Act provides that, 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, it may use an inference that is adverse to the interest of that party in selecting from the facts otherwise available. The “best of its ability” standard of section 776(b) of the Act means to put forth maximum effort to provide full and complete answers to all inquiries.¹⁶ In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (CAFC) clarified that, for Commerce to determine that a respondent did not act to the best of its ability, Commerce must demonstrate:

- (1) an objective showing 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 and
- (2) 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

¹⁵ See Aludium’s Letter, “Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.’s Section D Questionnaire Response,” dated June 18, 2020 (Aludium June 18, 2020 DQR).

¹⁶ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).

records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.¹⁷

Due to the proprietary nature of the arguments for this position, we are restricted to discussing them in general terms. *See* the cost calculation memo for a more detailed discussion of the proprietary items.¹⁸

We disagree with the petitioners that Aludium's reported costs are unreliable. Section 773(f)(1)(A) of the Act states that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." Accordingly, Commerce will rely on a company's normal books and records which are kept in accordance with the home country's GAAP if they reasonably reflect the cost to produce and sell the merchandise.¹⁹

Aludium's reported COP and CV were derived from information maintained in its normal books and records and fully reconcile to its financial statements prepared in accordance with Spanish GAAP.²⁰ Aludium uses a particular type of cost accounting methodology, for which Aludium has claimed treatment as business proprietary information. This accounting methodology is described in the Aludium Final Cost Calculation Memo, and cannot be discussed publicly here. However, based on the functioning of Aludium's cost accounting system and the method by which that Aludium tracks its costs, we agree with Aludium that its normal inventory costs did not reasonably reflect the product-specific cost to produce the merchandise. In such instances, Commerce directs the respondent to calculate product-specific costs using the information available within its financial, cost accounting, and production management systems.²¹

Aludium's reported COP and CV value were derived from information maintained in its normal books and records and fully reconcile to its financial statements prepared in accordance with Spanish GAAP. Therefore, no adjustment is warranted. The reported costs were based on the actual costs calculated by Aludium's system, referred here publicly as its "internal profit analysis tool" that it maintains in the normal course of business.²² The production costs extracted using the internal profit analysis tool reflect the actual manufacturing costs incurred and not estimates,

¹⁷ *Id.*, 337 F.3d at 1382-83.

¹⁸ *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Aludium Transformación de Productos, S.L.," dated concurrently with this memorandum (Aludium Final Cost Calculation Memo).

¹⁹ *See Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review*, 74 FR 47201 (September 15, 2009), and accompanying IDM at Comment 5; *see also Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order*, 74 FR 22885 (May 15, 2009) and accompanying IDM at Comment 10.

²⁰ *See* Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s First Supplemental Section D Questionnaire Response," August 10, 2020 (Aludium August 10, 2020 SDQR), at D-17.

²¹ *See Lined Paper Products from India* IDM at Comment 1.

²² *See* Aludium August 10, 2020 SDQR at D-17.

as claimed by the petitioners. We find that the product-specific costs tracked using this tool are reasonable.

We compared the total extended cost calculated for all products in its internal profit analysis tool to the total actual cost in Aludium's financial accounting system to determine a variance which was assigned to all products produced during the POI. We reviewed Aludium's variance calculation,²³ which confirms that the variance is the difference between the total COM calculated in Aludium's internal profit analysis tool and the total COM based on Aludium's financial accounting system.²⁴ Aludium divided the difference by the total cost of direct materials of all products to come up with a direct material variance. By applying the variance to all products produced in the internal profit analysis tool, Aludium has captured all cost in its financial accounting system, and as a result, the cost calculated in the internal profit analysis tool reconcile to the total cost reported in Aludium's financial accounting system. Aludium has reconciled the cost calculated in its internal profit analysis tool to the cost reported on its financial statements.²⁵

While Aludium's inventory values were calculated using estimates, these estimates were not used in Aludium's cost accounting system to calculate actual costs. Instead actual costs were calculated, as noted above, using Aludium's internal profit analysis tool. In this case, the estimates were not used to calculate Aludium's actual costs in its internal profit management tool and, therefore, they will not reconcile to the actual cost of production, nor should they be expected to do so. In *Lined Paper Products from India*,²⁶ the company did not have a cost accounting system that calculates product-specific actual costs.²⁷ Aludium does have a cost accounting system which it uses in the normal course of business to calculate actual costs (*i.e.*, the internal profit analysis tool) and it has relied on those costs for reporting purposes.

We agree with Aludium that the petitioners have mischaracterized Aludium's reporting of its product coding system. Aludium calculated the actual cost of all products produced during the POI in its internal profit analysis tool. For all products produced, Aludium identified those that were considered merchandise under consideration and those that were not. For those that were considered merchandise under consideration, Aludium assigned the products to CONNUMs and calculated the weight-averaged cost of those products. Aludium provided cost buildups for selected CONNUMs that included calculation examples of the production costs captured in the internal profit analysis tool.²⁸

We agree with Aludium that the petitioners' arguments regarding Aludium's reporting of direct material as shown in Exhibit SD-1 of the Aludium ILOVQR is flawed. The DIRMAT values serving as the basis for its argument are not per-unit costs as assumed by the petitioners but are extended costs. Converting the extended direct material costs to per-unit values demonstrates the

²³ *Id.* at Exhibit SD-6.

²⁴ See Aludium's overall reconciliation in Aludium August 10, 2020 SDQR at Exhibit SD-14.

²⁵ *Id.*

²⁶ See Aludium Rebuttal Brief at 19 and 20.

²⁷ See *Lined Paper Products from India* IDM at Comment 1.

²⁸ See Aludium August 10, 2020 SDQR at Exhibits SD-1 and SD-2.

error in the petitioners' argument and further supports the fact that Aludium's actual costs calculated in its internal profit analysis tool are reasonable.

For the foregoing reasons, we disagree with the petitioners that the application of total AFA is appropriate in this investigation. As noted above, we find that Aludium's reported costs are reliable, and there is no basis to disregard these costs for our final determination. Further, no information is missing from the record and Aludium has provided all information requested of it in the form and manner required. Additionally, Aludium did not withhold information or impede the proceeding, and it cooperated to the best of its ability in this investigation. Thus, we find that the application of facts available, pursuant to section 776(a) of the Act, or AFA, pursuant to section 776(b) of the Act, are not appropriate.

For further discussion, *see* the Aludium Final Cost Calculation Memo.

B. Reconciliation of Reported Sales and Production Quantity

*Petitioners' Comments*²⁹

- Aludium failed to provide a reliable reconciliation of its reported sales and production quantity during the POI.
- In accordance with Commerce's normal practice and questionnaire instructions, a respondent is required to calculate the weighted average per-unit COP and CV, using the product CONNUM-specific production quantity, regardless of market sold, as the weighting factor. Accordingly, the accuracy of Aludium's reported CONNUM-specific production quantity – and by extension the reported total production quantity as a whole – for the subject aluminum sheet during the POI is of critical importance to the accuracy of Commerce's dumping calculations. However, substantial evidence demonstrates that Aludium's reported total production quantity, the denominator for its calculated unit COP and CV, is not reliable in multiple respects.
- Aludium's failure to reconcile the sales quantity and production quantity also undermines the accuracy and completeness of its reported sales data. As such, Commerce should not rely on Aludium's reported cost and sales data in preparing the final determination in this investigation.
- Aludium's failure to provide a product-specific inventory movement schedule, coupled with its inability to reconcile the reported DIRMAT to inventory values in its response to Commerce's questionnaire issued in lieu of verification renders Aludium's quantity reconciliation unreliable, which, in turn, undermines the reliability of the sales and cost data submitted by Aludium.

*Aludium's Comments*³⁰

- Aludium's volume reconciliation and sales reporting are reliable and have been reasonably reported in accordance with Commerce's instructions and the statutory requirements.

²⁹ See Petitioners Case Brief at 12-20.

³⁰ See Aludium Rebuttal Brief at 2-25.

- Aludium reconciled the beginning and ending finished goods values to its audited financial statements based on the information it maintains in the normal course of business. That reconciliation tied the reported production quantity to total production and to the quantities reported in Aludium’s home market and U.S. market sales databases. There is no factual basis for the petitioners’ accusation that Aludium failed to provide a reliable production volume reconciliation.

Commerce’s Position: We disagree with the petitioners that Aludium failed to reconcile adequately its production and sales quantities between its sales of aluminum sheet to its affiliate, Aludium France S.A.S. (Aludium France), and Aludium France’s sales to U.S. customers.³¹ Aludium provided the reconciliation of its production quantity to its sales quantity in Exhibit SD-16 to its supplemental section D response.³² Aludium reconciled the beginning and ending finished goods values on these reconciliation worksheets to its audited financial statements.³³ We noted no discrepancies in these reconciliations, and they support Aludium’s assertions that its reported production volume is reliable.

We also agree with Aludium that it appropriately responded to Commerce’s questions in the Verification Letter. Commerce did not request a reconciliation for the difference between the quantity produced and shipped from Spain to France and the quantity produced and sold by Aludium France.³⁴ We did request that Aludium “tie these aforementioned figures to source documents, including relevant invoices, sales ledger entries, and warehousing in/out receipts, from both Aludium and Aludium France,” and based on Aludium’s response, we have no concerns over the accuracy of the reported information.³⁵ We agree that Aludium’s responses cannot be considered deficient for not responding to questions that Commerce did not ask.

The petitioners claim that Aludium’s failure to provide a product-specific inventory movement schedule, coupled with its inability to reconcile the reported DIRMAT to the inventory values in its response to the ILOVQ, renders Aludium’s quantity reconciliation unreliable. As noted in detail in Comments 1A and 1C, we find Aludium reported costs reliable. Aludium included all products that it produced during the POI in its internal profit analysis tool. Further, in Aludium ILOVQR Aludium reconciled the production quantity of aluminum sheet to the inventory movement schedule and the total production quantity reported in the cost database.³⁶ Because Aludium’s reported production quantities and costs fully reconciled with information in the internal profit analysis tool, there is no basis for the petitioners arguments.’ The evidence on the record supports the conclusion that Aludium’s production quantities were reliable.

³¹ See Petitioners Case Brief at 12-20. Commerce granted Aludium’s request to not report these sales. See Aludium’s Letter, “Less-Than-Fair-Value Investigation of Common Alloy Aluminum Sheet from Spain – Second Reporting Exemption Request,” dated June 18, 2020.

³² See Aludium August 10, 2020 SDQR at Exhibit SD-16.

³³ See Aludium ILOVQR at Exhibits CVE-7-1 and CVE-7-2.

³⁴ See Verification Letter at Q.1.

³⁵ See, e.g. Aludium ILOVQR at Exhibit SVE-1-2.

³⁶ *Id.* at CVE-8.

C. Smoothing

*Petitioners' Comments*³⁷

- If Commerce decides to rely on Aludium's reported data, Commerce should make the following partial AFA adjustments, in addition to the adjustments made in the *Preliminary Determination*: (1) mitigate unreasonable conversion cost differences unrelated to the product physical characteristics by weight averaging the reported conversion costs for CONNUMs that have identical product physical characteristics for casting method (CAST), non-mechanical surface treatment (NMSURF), coil (COIL), gauge (GAUGE), mechanical surface finish (MSURF), and temper (TEMPER), as it intended to do in the *Preliminary Determination*; and (2) mitigate the unreasonable material cost difference unrelated to the product physical characteristics, and weight average the reported material costs for CONNUMs that were produced from an identical alloy.
- Commerce correctly recognized at the *Preliminary Determination* that Aludium's reported conversion costs for aluminum sheet could not be used and addressed the unreasonable conversion cost differences unrelated to the product physical characteristics. Commerce failed to carry out intended changes due to a programming oversight (*i.e.*, Commerce applied the variables for the unadjusted conversion cost variables direct labor costs (DIRLAB), variable overhead costs (VOH), and fixed overhead costs (FOH), instead of the adjusted conversion cost variables (*e.g.*, AVERAGE_DIRLAB) in the calculation of total cost of manufacture (COM)). Commerce should correct this error.³⁸
- However, Commerce should revise the preliminary adjustments and, instead, apply the highest, rather than weighted-average, conversion costs among products with identical CAST, NMSURF, COIL, GAUGE, MSURF and TEMPER. Alternatively, Commerce should apply the higher of the weighted-average conversion costs and the conversion costs as reported by Aludium for the products with identical CAST, NMSURF, COIL, GAUGE, MSURF and TEMPER.
- In addition to the adjustments to the conversion costs, Commerce should also adjust Aludium's reported DIRMAT costs that are not appropriately qualified or valued, because there were significant variations in per-unit DIRMAT amounts Aludium reported for each of the alloys.
- The unsubstantiated differences in DIRMAT impair the reliability of Aludium's reported per-unit costs because DIRMAT, on an average basis, accounted for a significant percent of Aludium's reported total COM.
- The vastly different DIRMAT amounts Aludium reported for aluminum sheet made from an identical alloy, if not properly adjusted, would distort the results of Commerce's cost test, DIFMER test, product concordance, and ultimately Commerce's final margin analysis. Therefore, Commerce should apply the highest DIRMAT Aludium reported for the aluminum sheet products made from an identical alloy. Alternatively, Commerce

³⁷ See Petitioners Case Brief at 39-44; and Petitioners' Aludium Rebuttal Brief at 43-45.

³⁸ See Petitioners Case Brief at 38 (citing Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination-Aludium Transformacion de Productos, S.L.," dated October 6, 2020 (Aludium Preliminary Cost Calculation Memo), at 2).

should apply the higher of the weighted-average DIRMAT and the DIRMAT as reported by Aludium for the products made from an identical alloy.

*Aludium's Comments*³⁹

- While Commerce explained that it was weight averaging the reported conversion costs for CONNUMs that have identical product physical characteristics for CAST, NMSURF, COIL, GAUGE, MSURF, and TEMPER and intended to calculate the new total COM (TOTCOM) using the newly-calculated DIRLAB, VOH and FOH, it did not do so. Commerce should make such adjustments for the final determination.
- In the alternative to total AFA, the petitioners argue that Commerce should make additional adjustments relating to Aludium's reported costs. Commerce should reject those arguments. Commerce has already adjusted costs to reflect differences in conversion costs, and no further adjustments are appropriate.

Commerce's Position: Commerce found in the *Preliminary Determination* that there were significant differences in conversion costs between similar CONNUMs and that such differences appeared not to be related to the differences in the physical characteristics of the products. To mitigate the unreasonable conversion cost differences unrelated to the products' physical characteristics, Commerce intended to weight average the reported conversion costs for CONNUMs that have identical product physical characteristics for CAST, NMSURF, COIL, GAUGE, MSURF, and TEMPER.⁴⁰ We have corrected this oversight and calculated weight-average conversion costs for CONNUMs that have identical product physical characteristics for CAST, NMSURF, COIL, GAUGE, MSURF, and TEMPER for the final determination.⁴¹

However, we disagree with the petitioners that we should calculate an average DIRMAT cost for CONNUMs with the same alloy content. We compared per-unit DIRMAT cost differences of each CONNUM with the same alloy content to the average cost of all CONNUMs with the same alloy content.⁴² Based on that analysis, we disagree that there were vastly different DIRMAT amounts reported for aluminum sheet made from an identical alloy. We also disagree with the petitioners' claim that the difference in per-unit DIRMAT for aluminum sheet of identical alloy originated from Aludium's faulty cost reporting methodology that relied on an internal "profit analysis tool" and inaccurate or undefined internal product codes. As stated above, the reported costs were based on the information from Aludium's internal profit analysis tool maintained in the normal course of business. The total cost calculated for all products in the internal profit analysis tool was compared to the total cost in Aludium's financial accounting system to arrive at the variance which was assigned to all products produced during the POI. Commerce did not find that Aludium's reported costs were unreliable. Therefore, we have continued to rely on the per unit DIRMAT costs reported by Aludium.

³⁹ See Aludium Rebuttal Brief at 25-39.

⁴⁰ See Aludium Preliminary Cost Calculation Memo.

⁴¹ *Id.* at Attachment III.

⁴² *Id.*

D. Failure to Support Reported Sales Data

*Petitioners' Comments*⁴³

- Aludium's documentation provided for four of the six selected sales in the in-lieu-of-verification questionnaire reveals omissions and inconsistencies.
- Aludium appears to have double-counted return quantities for one of these transactions (SEQH 12527),⁴⁴ undermining the accuracy and completeness of Aludium's home market sales data.
- Aludium continues to have issues reporting information another transaction (SEQU 1832), for which it provided additional information. These changes raise questions as to whether Aludium accurately reported its sales quantity (QTYU), returned quantity (RETQTYU), and scrap value (GRSUPRU_SCRAP); mischaracterized physical characteristics of the U.S. sales; and omitted other information.⁴⁵
- Aludium failed to capture the costs associated with the defective materials scrapped by Aludium's U.S. customer for a third sale (SEQU 2094), calling into question the reported quantity and net sales price for this transaction.⁴⁶ Further Aludium failed to support the reported commissions for this transaction, with the provided documentation showing that Aludium understated the reported expenses.
- Finally, Aludium failed to report import duties and entry values for a fourth sale (SEQU 3052), and, thus, Aludium withheld documentation required by Commerce.⁴⁷
- The application of AFA is necessary because the deficiencies in Aludium's cost and sales responses are so great that there is no basis to calculate an accurate dumping margin.

*Aludium's Comments*⁴⁸

- On-site verifications enable Commerce to make credibility determinations to accept the new information provided, which cannot be made based on a cold paper record.⁴⁹ Further, Aludium was given less time than in a normal on-site verification to provide

⁴³ See Petitioners Case Brief at 20-39.

⁴⁴ *Id.* at 20-21 (citing Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Section B Questionnaire Response," dated June 18, 2020 (Aludium June 18, 2020 BQR), at Exhibit B-4; and Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Second Supplemental Sections B&C Questionnaire Response (Part I)," dated September 23, 2020 (Aludium September 23, 2020 SBCQR), at Exhibit 2SBC-33).

⁴⁵ *Id.* at 21-25 (citing Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Third Supplemental Section D Questionnaire Response," dated September 21, 2020 (Aludium September 21, 2020 SDQR), at Exhibit 2SBC-23; and Aludium ILOVQR at Exhibit SVE-7-5).

⁴⁶ *Id.* at 25-28 (citing Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Section C Questionnaire Response," dated June 18, 2020 (Aludium June 18, 2020 CQR), at C-50 to 51 and Exhibit C-1; Aludium ILOVQR at Exhibit SVE-7-1; and Aludium September 21, 2020 SDQR at Exhibit 2SBC-24).

⁴⁷ *Id.* at 28-30 (citing Exhibit 3; Aludium September 21, 2020 SDQR at Exhibit 2SBC-34; Aludium ILOVQR at Exhibit SVE-7-6; Aludium June 18, 2020 CQR at C-42; and Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s First Supplemental Section C Questionnaire Response (Part II - Questions 30-43)," dated August 26, 2020 (Aludium August 26, 2020 SCQR), at 8-10).

⁴⁸ See Aludium Rebuttal Brief at 30-45.

⁴⁹ *Id.* at 30 (citing *Jinko Solar Co. v. United States*, 229 F. Supp. 3d 1333, 1358 (CIT 2017); and *De Samo v. Dep't of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985)).

supporting documentation for the six sales requested by Commerce. Nonetheless, Aludium is confident in its reporting.

- Aludium reported an accurate returned quantity for SEQH 12527. This sale was cancelled, and Aludium included it in the list of cancelled sales. The supporting documentation fully links to the reported data.
- Regarding SEQU 1832, Aludium provided information for this sale in response to a supplemental questionnaire, in its sales database at Commerce’s request. Although the petitioners take issue with certain aspects of the reported information, such as the CONNUMs and packing lists, this information ties to the commercial invoice. While Aludium issued a second set of packing lists, this was simply a formality and not an indication that Aludium failed to report packing costs.
- Aludium reported scrap quantity and price for SEQU 2094 consistent with Commerce’s instructions.
- Aludium reported the sale terms for SEQU3052 in accordance with its actual sales terms. Because this sale was of merchandise that was originally sold but then rejected by the U.S. customer after importation, Aludium did not incur import duties related to it. Aludium reported all expenses associated with this sale (and with all other sales of returned merchandise).
- The commissions reported by Aludium are accurate and are supported by invoices on the record.
- There is no “gap” in Aludium’s reporting of U.S. sales data, which is complete and fully reconciles to the reported production quantity. Therefore, AFA is not justified and Aludium’s sales reporting requires no additional adjustments.

Commerce Position: We disagree that application of AFA under section 776(b) of the Act is warranted. Except as discussed in Comment 2, we find that all necessary information is available on the record of this review, and Aludium has not withheld information, failed to provide information, significantly impeded this proceeding, or provided information that cannot be verified.

With regard to the petitioners’ specific arguments, we disagree that Aludium double counted the returned quantities for SEQH 12527, which was part of a sale of two coils of aluminum sheet. Aludium reported the entered quantities of these coils. The record shows that one coil was fully returned and the other partially returned; as a result, Aludium included this transaction in its list of cancelled sales.⁵⁰ Thus, we find no merit to the petitioners’ argument with regard to SEQH 12527.

Regarding SEQU 1832, we disagree that prior revisions to Aludium’s U.S. sales listing raise questions now regarding Aludium’s reported information. Aludium revised its U.S. sales listing for all transactions involving returns/resales, including for SEQU 1832, in response to questions from Commerce. The supporting information that Aludium provided for SEQU 1832 and its corresponding return in the Aludium ILOVQR ties to the information in the U.S. sales listing; this information is also consistent with Aludium’s prior statement in its supplemental questionnaire response that it had revised its credit and debit note linkages for returned/resold

⁵⁰ See Aludium ILOVQR at page 180-189.

merchandise to be on the most specific level possible.⁵¹ Further, record evidence shows that Aludium reported the CONNUM for this transaction as it was reflected on the commercial invoice and in Aludium's books and records.⁵² Finally, while the petitioners alleged that Aludium failed to report packing costs associated with the resale, we disagree that the packing list issued for that resale indicates that Aludium incurred additional packing costs, as the material did not require re-packing. Therefore, we find no merit to the petitioners' arguments with regard to SEQU 1832.

Regarding SEQU 2094, we disagree that Aludium failed to capture the costs associated with defective materials scrapped by its U.S. customer. Aludium reported the returned quantities for this transaction in the REQTYH/U and RETQTYHU_PHYSICAL fields in its U.S. sales listing, and we were able to tie the documents Aludium provided in the Aludium ILOVQR to those fields. Further, we were able to tie the costs associated with the scrapped defective materials in its U.S. sales listing to the documentation provided in its Aludium ILOVQR.⁵³ Additionally, regarding the petitioners' claim that the connection between the scrap price and the POI CONNUM-specific TOTCOM for this transaction is problematic, the petitioners point to no record evidence to support this claim, and we find no basis to accept it. Indeed, we do not view these values as necessarily connected.

Finally, regarding SEQU 3052, we disagree with the petitioners that Aludium reported the terms of sale incorrectly for this transaction. This sale was of merchandise previously sold and shipped to a different U.S. customer, who rejected the merchandise after it had been imported into the United States. Because the original sale (not reported in the U.S. sales database) and the resale (reported as SEQU 3052) are separate transactions, we find that the original terms of sale are not relevant here. In Aludium ILOVQR, Aludium provided all documents requested for both the original sale and the resale, including the import duties (which related to the original sale alone). We tied these documents to the resale reported in Aludium's U.S. sales listing without discrepancy.⁵⁴ Further, Aludium reported the resale as a constructed export price (CEP) transaction and provided the indirect selling expenses (ISE) to the resale; Aludium included the import duties associated with the original sale there.

In summary, we do not find any statutory basis under sections 776(a) or 776(b) of the Act for the use of facts available or AFA based on the above arguments. Except as noted in Comment 2 below, no necessary information is missing from the record, Aludium responded to all our requests for information in a timely manner, and we verified that information via our Verification Letter and Aludium ILOVQR; further, Aludium did not withhold information or significantly impede this proceeding. In light of the foregoing (and except as noted in Comment 2), we find that Aludium fully cooperated to the best of its ability in this investigation. We do not find that AFA, either total or partial, is warranted as we were able to tie the information provided in Aludium's U.S. sales listing to its response in the Aludium ILOVQR. Rather, because we

⁵¹ *Id.* at Exhibit SVE-7-4-1; and Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s First Supplemental Section C Questionnaire Response (Part II - Questions 30-43)," dated August 21, 2020 (Aludium August 21, 2020 SCQR), at 15.

⁵² See Aludium ILOVQR at Exhibit SVE-7-4-1; and Aludium August 21, 2020 SCQR at 6.

⁵³ See Aludium ILOVQR at Exhibit SVE-7-5.

⁵⁴ *Id.* at Exhibit SVE-7-6.

have an obligation to calculate antidumping duty (AD) margins as accurately as possible, we have used the complete, accurate, and verified data on the record to calculate an accurate margin for the final determination.

Comment 2: Application of Partial AFA to Aludium's Date of Sale

Aludium reported that it shipped subject merchandise to U.S. customers on the same day that it issued the invoice to them. However, our analysis of Aludium's response showed that Aludium, in fact, shipped the merchandise prior to invoicing, in some cases by a significant amount. Therefore, in the *Preliminary Determination*, we applied AFA to calculate Aludium's date of sale because Aludium failed to accurately report its actual shipment date.⁵⁵ In addition, because potential sales were not reported during the POI (*i.e.*, sales with shipment date during the POI but invoice dates outside the POI) we applied AFA to determine the margin for these unreported sales.⁵⁶

*Aludium's Comments*⁵⁷

- Aludium explained throughout its responses that Commerce should use its invoice date as the date of sale, consistent with Aludium's internal procedural guidelines which state that the invoice must be issued on the same date as shipment. Commerce's application of partial AFA, using an imputed shipment date, disregards relevant facts on the record.
- Commerce's normal practice is to treat the invoice date as the date of sale. The preliminary determination to use shipment date instead must be supported by satisfactory evidence that the material terms of sale are established at the shipment date.⁵⁸ Aludium consistently stated that the material terms of the sale are established by the invoice. However, Commerce ignored its regulations and used shipment date as the date of sale.
- In describing its sales process, Aludium noted that "the terms and conditions of the sale, *i.e.* the preliminary price, shipping conditions, and order quantity . . . may change based on over/undershipment and the price of input metal based on the {London Metal Exchange(LME)}" and that the "terms and conditions of the sale are finalized in the invoice."⁵⁹ The sales documentation provided for both U.S. and home market sales in Aludium's initial response further illustrates that the "order quantity may also change beyond the agreed upon tolerances (+/- 10%) after the order confirmation is issued," but that there are "no changes after the invoice was issued."⁶⁰ The packing list is not an appropriate surrogate for the date of sale because it does not contain the material terms of sale such as price.
- Regarding the date of shipment, Aludium issues its commercial invoice at the time of shipment so the shipment date is equal to the invoice date for all sales.⁶¹ Although in

⁵⁵ See *Preliminary Determination* PDM at 7-8.

⁵⁶ *Id.*

⁵⁷ See Aludium Case Brief at 15-30.

⁵⁸ *Id.* at 15-16 (citing 19 CFR 351.401(i); *Habas Sinai v. Tibbi Gazlar Istihsal Endustrisi, A.S.*, 361 F. Supp. 3d 1314, 1328-29 (CIT 2019); *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27349 (May 19, 1997) (*Preamble*); and *Toscelik Profil v. Sac Endustrisi A.S.*, 256 F. Supp. 3d 1260, 1263 (CIT 2017)).

⁵⁹ *Id.* at 19 (citing Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos S.L.'s Section A Questionnaire Response, dated May 22, 2020 (Aludium May 22, 2020 AQR), at A-18).

⁶⁰ *Id.* (citing Aludium May 22, 2020 AQR at A-22).

⁶¹ *Id.* (citing Aludium June 18, 2020 BQR at B-26; and Aludium June 18, 2020 CQR at C-24).

some cases, there might be a small difference between the invoice and shipment date, the majority of invoices are issued at shipment date.⁶²

- The application of AFA was not supported by record evidence because Commerce did not notify Aludium that its reporting was deficient, as required under section 782(d) of the Act. Aludium disagrees with Commerce's AFA determination that its reporting as to the date of sale was deficient, and the only question Commerce asked about it arose in the context of the date in which freight is booked in Aludium's system.⁶³ At no time did Commerce notify Aludium that its reporting of invoice date as the date of sale was deficient. Failure to include this inquiry violates Commerce's statutory mandate to "promptly inform the person submitting the response of the nature of {an identified} deficiency."⁶⁴ The record clearly establishes that Aludium cooperated to the best of its ability.
- Commerce's questions (or lack thereof) regarding date of sale provided no indication that Commerce would apply AFA to determine the date of sale. The reviewing courts have found that compliance with the notification requirements of section 782(d) of the Act "ensures that Commerce's data collection does not morph into an administrative guessing game, where the agency punishes parties for giving incomplete answers to cryptic questions," as Commerce attempts to do here.⁶⁵
- Commerce's application of AFA was excessive and unduly punitive. The AFA rate is intended to be a reasonably accurate estimate of a respondent's actual rate with an increase as a deterrent to non-compliance.⁶⁶ Commerce must consider the overall facts and circumstances of each case and consider commercial reality and accuracy to represent reliable guideposts for Commerce's application of AFA.⁶⁷ The use of AFA here is contrary to the underlying intent and purpose of the AFA provision and violates Commerce's statutory mandate to determine dumping margins using the best information available.⁶⁸
- In *CTL Plate from Belgium Final*, cited by Commerce in the *Preliminary Determination*, Commerce only applied AFA to the date of sale after Commerce discovered at verification that the respondent had intentionally manipulated its sales universe.⁶⁹

⁶² *Id.* (citing Aludium August 21, 2020 SCQR at 10-11).

⁶³ *Id.* at 23 (citing Aludium August 21, 2020 SCQR at 34-36).

⁶⁴ *Id.* at 24 (citing section 782(d) of the Act).

⁶⁵ *Id.* at 25 (quoting *Am. Tubular Prod., LLC v. United States*, 36 ITRD 1073 (CIT 2014), *aff'd in part*, 847 F.3d 1354 (Fed. Cir. 2017) (*Am. Tubular*); and citing *Nat'l Nail Corp. v. United States*, 390 F. Supp. 3d 1356, 1382 (CIT 2019) (*Nat'l Nail*); and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (*De Cecco*)).

⁶⁶ *Id.* at 26-27 (citing *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1300 (Fed. Cir. 2019) (*BMW*)).

⁶⁷ *Id.* at 27 (citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010); Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-826(I) (1994), reprinted in 1994 U.S.C.A.N. 4040 (1994) (SAA) at 869; *BMW*; and *Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1380-81 (Fed. Cir. 2016)).

⁶⁸ *Id.* at 28-29 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990); *NSK Ltd. v. United States*, 28 C.I.T. 1535 (2004), *aff'd*, 481 F.3d 1355 (Fed. Cir. 2007); *Jacobi Carbons AB v. United States*, 992 F. Supp. 2d 1360, 1369 (CIT 2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015); and section 782(d) of the Act)).

⁶⁹ *Id.* at 27-28 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 84 FR 16378 (April 4, 2017) (*CTL Plate from Belgium Final*), and accompanying IDM at Comment 4).

- Commerce created a fictional quantity of sales that it added to the margin calculation as a result of its application of AFA. Commerce calculated the average quantity per day and then multiplied that quantity by the number of days between the longest packing list date and invoice date. If Commerce continues to add a fictional quantity, it should use the quantity from the same period in time reported in the POI, *e.g.*, fictional quantities for January 2020 (post-POI) should be based on January 2019 (POI) sales quantities.

*EU Delegation's Comments*⁷⁰

- Resorting to AFA and seeking the most adverse facts rather than representative facts available violates Article 7 of Annex II of the WTO Antidumping Agreement. The company concerned contested the application of AFA.

*Petitioners' Comments*⁷¹

- The record supports Commerce's preliminary approach on the date of sale issue, as Aludium withheld the factory shipment date, the first point when the material terms of sale were fixed. Further, the difference between invoice date and shipment date was not small but significant enough for Commerce to determine that the application of partial AFA was warranted.
- Both Commerce and the courts have held that the application of AFA is appropriate if a respondent withholds one or most of the data factors that are necessary to calculate an AD margin accurately.⁷² Substantial record evidence demonstrates that Aludium withheld important information from Commerce, and that Aludium's incorrect date of sale methodology resulted in an inaccurate and incomplete U.S. sales database.
- Despite record evidence that the terms of sale were determined on the date when Aludium shipped the merchandise, Aludium did not inform Commerce of any difficulties reporting the date of shipment from the factory within the timeframe specified in Commerce's initial AD questionnaire. Moreover, it did not mention that the "shipment date" is considered the "ocean bill of lading date," rather than the date the merchandise left Aludium's factory. In its supplemental section C response, Aludium conceded that there might be a small difference between invoice and shipment date but stated it would be too burdensome to report the date the merchandise actually left the factory.⁷³
- Commerce afforded Aludium two further opportunities to provide the shipment date from the factory; on both occasions Aludium declined to provide the requested information and did not offer a substitute date of sale.
- In accordance with its well-established practice, Commerce relied on the earlier of the date when the subject merchandise left a foreign producer's factory or the invoice date as the date of sale.⁷⁴
- Substantial evidence demonstrates that Aludium issued two types of invoices for its U.S. sales, such that the invoice date could not represent the first point at which the material

⁷⁰ See EU Delegation Case Brief at 4.

⁷¹ See Petitioners Aludium Rebuttal Brief at 16-28.

⁷² *Id.* at 17-18 (citing *Steel Auth. of India v. United States*, 149 F. Supp. 2d 921, 927-928 (CIT 2001) (*SAIL*)).

⁷³ *Id.* at 19-20 (citing Aludium August 21, 2020 SCQR at 10).

⁷⁴ *Id.* at 20 (citing *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 13432 (March 13, 2017) (*LPTs from Korea*), and accompanying IDM at Comment 17).

terms of sale were established. Aludium did not distinguish between these two types of invoices in its initial questionnaire response and record evidence show there were lags between the invoices.

- Given the inaccurate information pertaining to returns and billing adjustments, there is no basis for Aludium to fault Commerce’s preliminary reliance on partial AFA. As a mandatory respondent, Aludium bears the responsibility to compile a reliable record to allow Commerce to conduct a margin analysis as accurately as possible.⁷⁵
- Further, Aludium asserts the packing date Commerce used in Commerce’s application of partial AFA is aberrational but record evidence shows that the packing list best approximates Aludium’s factory shipment date. Aludium provided no evidence that the material terms of sale changed after the merchandise left one of its factories or that the packing list date used by Commerce was an “outlier.” These deficiencies are only one of numerous flaws in Aludium’s reported U.S. sales data.

Commerce Position: We disagree with Aludium and determine that the continued application of partial AFA to Aludium’s date of sale is appropriate.

Section 351.401(i) of Commerce’s regulations states that, “{i}n identifying the date of sale of the subject merchandise or foreign like product, {Commerce} normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the ordinary course of business.” The regulation provides further that Commerce may use a date other than the date of invoice if we are satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.⁷⁶ As the SAA accompanying the Act explains, the date of sale is the “date when the material terms of sale are established.”⁷⁷ Commerce has a long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established.⁷⁸ Commerce’s interpretation of the material terms of sale has evolved over time, and can include (but is not limited to) price, quantity, delivery terms, and payment terms.⁷⁹ In choosing a date of sale, Commerce weighs the evidence presented and determines the significance of any changes to the terms of sale involved.

The U.S. Court of International Trade (CIT) has recognized that “{Commerce} may exercise its discretion to rely on a date other than invoice date for the date of sale” if “the agency provides a

⁷⁵ *Id.* at 23-25 (citing *Essar Steel v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012) (*Essar Steel*); *Certain Corrosion-Resistant Steel Products from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35320 (June 2, 2016) (*CORE from Italy*), and accompanying IDM at Section V; and *Aluminum Wire and Cable from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 58134 (October 30, 2019) (*Aluminum Wire from China*), and accompanying IDM at Comment 4a).

⁷⁶ See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

⁷⁷ See SAA.

⁷⁸ See, e.g., *LPTs from Korea* IDM at Comment 17; and *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004), and accompanying IDM at Comment 10; see also *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying IDM at Comment 2.

⁷⁹ See *Sahaviriya Steel Industries Public Company Limited v. United States*, Court No. 09-00229, Slip Op 10-68 (CIT 2010) at 34.

rational explanation as to why the alternative date ‘better reflects’ the date when ‘material terms’ are established.”⁸⁰ Thus, the regulation makes clear that, while the date of invoice is the preferred date of sale, Commerce will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date.

In accordance with the above practice, Commerce finds that the material terms of sale for Aludium’s sales are established at the earlier of invoice date or shipment date. In the initial questionnaire, Commerce requested that Aludium report the date of shipment from the last facility under its control, *e.g.*, the factory or distribution warehouse to the customer.⁸¹ Aludium replied by stating that “Aludium issues the commercial invoice at the time of shipment. Accordingly, the shipment date is equal to the invoice date for all sales.”⁸² Because Aludium did not specify how it defined the “time of shipment,” Commerce followed up in a supplemental section C questionnaire, requesting that Aludium “ensure that SHPDATH/U {sic} reports the actual date the subject merchandise departed Aludium’s factory.”⁸³ At that point, Aludium disclosed that reporting the actual date the merchandise departed Aludium’s factory would have been too burdensome, and it again stated “the invoice date accurately reflects the date on which the subject merchandise departed Aludium’s factories.”⁸⁴

While Aludium claims that reporting the date of shipment was too burdensome to comply in its questionnaire response, Aludium did not notify Commerce of any difficulties in responding to questions regarding the date of shipment, pursuant to section 782(c)(1) of the Act.⁸⁵ Instead, Aludium failed to provide its actual date of shipment, despite being requested to do so by Commerce twice.⁸⁶ Aludium’s statement that it was “extremely burdensome” to provide the exact shipment date did not exempt Aludium from reporting this information. In fact, Aludium was familiar with Commerce’s procedures regarding exemptions and modifications to the required reporting – it submitted numerous notifications of difficulty throughout this proceeding, to which Commerce responded and accommodated; none of the notifications addressed date of shipment.⁸⁷

⁸⁰ See *SeAH Steel Corp. v. United States*, 25 C.I.T. 133, 135 (CIT 2001).

⁸¹ See Commerce’s Letter, “Initial Questionnaire,” dated April 21, 2020 (Initial Questionnaire), at B-11 and C-9.

⁸² See Aludium June 18, 2020 BQR at B-26; and Aludium June 18, 2020 CQR at C-24.

⁸³ See Commerce’s Letter, “Section C Supplemental Questionnaire,” dated July 30, 2020 (Section C Supplemental), at 3.

⁸⁴ See Aludium August 21, 2020 SCQR at 11.

⁸⁵ The Court has found in *RZBC Group Shareholding Co., Ltd. v. United States* 100 F. Supp. 3d. 1288, 1298 (2015) that “{i}f a party explains why it cannot give the information in the form requested, if it suggests alternative ways to package the data, and if it notifies the agency of its plight within fourteen days of receiving the questionnaire, then Commerce must ‘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.’ ...The idea is to help respondents who face technical barriers to filing their answers. The provision does not excuse parties from submitting data altogether.”

⁸⁶ See Initial Questionnaire at B-11 and C-9; and Section C Supplemental at 3.

⁸⁷ See, *e.g.*, Aludium’s Letters, “Aludium Transformación de Productos, S.L.’s Notification of Potential Difficulties in Responding to the Initial Questionnaire,” dated May 8, 2020 (Aludium May 8, 2020 Notification); “Request to Be Excused from Reporting Sales from Aludium France SAS,” dated May 15, 2020 (Aludium May 15, 2020 Notification); “Aludium Transformación de Productos, S.L.’s Notification of Difficulties and Request for Clarification for Certain Questions in the Supplemental C Questionnaire,” dated August 12, 2020; and “Aludium Transformación de Productos, S.L.’s Notification of Difficulties and Request for Modification for a Certain Question in the Second Supplemental Sections B and C Questionnaire,” dated September 11, 2020.

Commerce continues to find that Aludium's statement that the shipment date is equal to the invoice date for all sales is not supported by the record, and, as a result, the continued application of AFA is warranted. When Commerce noted this discrepancy in a supplemental questionnaire and instructed Aludium to ensure that it reported its factory shipment dates in the "SHPDATH/U" fields in its sales databases, Aludium failed to comply. As discussed further below, there is no basis for Aludium to fault Commerce for our preliminary reliance on partial AFA when the gaps in the record are due to Aludium's withholding of necessary information.

Sections 776(a)(1) and 776(a)(2)(A) of the Act provide that, if necessary information is not available on the record, or if an interested party withholds information requested by Commerce, Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from among 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. In doing so, Commerce is not required to determine, or make any adjustments to, a dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.

In addition, the SAA explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."⁸⁸ Affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference in selecting from the facts available.⁸⁹ It is Commerce's practice to consider, in employing AFA, the extent to which a party may benefit from its own lack of cooperation.⁹⁰

In *Nippon Steel*, the CAFC noted that, while the Act 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."⁹¹ Thus, according to the CAFC, 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. The CAFC indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. 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.⁹² The "best of its ability" standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, "have familiarity

⁸⁸ See SAA at 870; see also *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

⁸⁹ See, e.g., *Nippon Steel*, 337 F.3d at 1382-83; *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and *Preamble*, 62 FR 27296, 27340.

⁹⁰ See SAA at 870; see also *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying PDM at 4; unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476, 14477 (March 14, 2014).

⁹¹ See *Nippon Steel*, 337 F. 3d at 1382.

⁹² *Id.*

with all of the records it maintains,” and “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.⁹³ The Act also makes clear that when selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.⁹⁴

Because Aludium failed to provide its factory shipment date, at our request, necessary information is missing from the record, within the meaning of section 776(a)(1) of the Act, and Aludium withheld information within the meaning of section 776(a)(2)(A) of the Act. In addition, the reporting deficiencies identified above demonstrate that Aludium has failed to cooperate to the best of its ability. Aludium’s reporting behavior warrants application of an adverse inference, because it failed to put forth its maximum effort to provide the requested information.

We disagree with Aludium that we failed to properly notify Aludium that its reported date of sale was deficient under section 782(d) of the Act. As noted above, Commerce notified Aludium that its response was deficient through its section C supplemental questionnaire. Aludium failed to respond to Commerce’s questions regarding shipment date, and, importantly, failed to correct its deficient response. Further, we warned Aludium of the potential consequences of such a failure in our cover letter accompanying the supplemental questionnaire, stating “{i}f Commerce does not receive either the requested information or a written extension request before 5:00 p.m. ET on the established deadline, we may conclude that your company has decided not to cooperate in this proceeding. Therefore, failure to properly request extensions for all or part of a questionnaire response may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.”⁹⁵ Nothing in the Act requires Commerce to make an additional, separate declaration to the respondent that Commerce finds its response deficient and that the application of AFA is warranted if that deficiency is not corrected prior to the preliminary determination. The supplemental questionnaire was sufficient notification to Aludium that Commerce found its response deficient, and Aludium had two opportunities to provide an accurate date of sale for its U.S. sales. It failed to do so both times.

As a result of Aludium’s failure to compile a reliable record, we found that certain sales were “missing” from Aludium’s U.S. sales database. Despite Aludium’s claim to the contrary, Commerce did, in fact, request that Aludium report all U.S. sales with sale dates during the POI, and we asked multiple questions to ensure that Aludium had accurately defined its date of sale (the key information necessary for determining the universe of reported sales). Thus, Aludium’s reliance on *Nat’l Nail* is misplaced.⁹⁶ Unlike in *Nat’l Nail*, where the “missing” sales were provided in a supplemental questionnaire response, in this investigation, Aludium did not provide the information at all. We disagree with Aludium that the record in this investigation contains all information needed for Commerce to perform its dumping calculations without

⁹³ *Id.*

⁹⁴ See sections 776(d)(3)(A) and (B) of the Act.

⁹⁵ See Section C Supplemental at 2.

⁹⁶ See *Nat’l Nail*, 390 F. Supp. 3d at 1382.

relying AFA. Aludium's failure to provide date of shipment created the "missing" sales, and Commerce relied on the record as established by Aludium to determine a margin for it.

We also disagree that our response to Aludium's failure is a "gotcha,"⁹⁷ resulting from "an administrative guessing game."⁹⁸ Commerce gave Aludium an explicit and direct instruction ("ensure that {you}report{} the actual date the subject merchandise departed Aludium's factory in the appropriate shipment date fields"⁹⁹) and Aludium acknowledged this instruction but did not comply because it found the request "extremely burdensome" and would involve a "manual documentation check."¹⁰⁰ Aludium did not claim that it did not understand Commerce's question; rather, it simply declined to responsively answer it. This is the exact behavior Commerce attempts to deter by applying AFA, consistent with the Court's decision in *De Cecco*.¹⁰¹ The fault lies in Aludium's response, and not in the questions asked by Commerce.

Significantly, at no time prior to the *Preliminary Determination* did Aludium propose an alternative, such as the date of the packing list (the date on the shipping documentation Aludium prepared for each shipment when the goods left the factory), as a substitute for the factory shipment date it declined to provide. Aludium instead failed to provide the factory shipment date for the record.¹⁰² As a result of the gap left in the record due to Aludium's withholding of necessary information, Commerce's preliminary reliance on a proxy date (*i.e.*, the packing list date) that approximates the date of shipment from Aludium's factory was reasonable.

Therefore, in the *Preliminary Determination*, as partial AFA, Commerce calculated the date of shipment, which was subsequently applied as the date of sale, using the longest lag between packing list date and invoice on the record. Commerce relied on the record, and utilized Aludium's own information to determine the partial AFA assigned to Aludium:

Commerce reviewed all of Aludium's U.S. sales documents on the record and determined that the date of packing lists are the most appropriate dates to use as the date of shipment because they include "load numbers" which appear to identify either a license plate or shipping container/identifier as provided by the freight provider. Therefore, as partial AFA for the preliminary determination, we calculated Aludium's date of shipment by determining the longest difference between invoice date and packing list for a U.S. sale on the record and deducted those days from the reported invoice date. This resulted in shipment date always preceding invoice date, and, therefore, shipment date was used as the date of

⁹⁷ See, e.g., *Bowe-Passat v. United States*, 17 CIT 335 (CIT May 7, 1993) (finding that a "predatory "gotcha" policy does not promote cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations").

⁹⁸ See *Am. Tubular*, 847 F.3d 1354; see also *BMW* (rejecting use of AFA where Commerce did not address how "irregularities surrounding the administrative review process affected its view of {respondent's} level of culpability").

⁹⁹ See Section C Supplemental at Question 8.a.

¹⁰⁰ See Aludium August 21, 2020 SQR at 11.

¹⁰¹ See *De Cecco*, 216 F.3d at 1032.

¹⁰² See Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s First Supplemental Section B Questionnaire Response (Part II - Questions 1-22, 23e, 25-31, 32c, and 34-47)," dated July 30, 2020, at 48; and Aludium August 21, 2020 SCQR at 10.

sale...as partial AFA, because our calculation of shipment date also resulted in a period of time for which Aludium did not report sales, we included these unreported sales in our analysis using an adverse inference. In order to determine the quantity of such sales, we calculated the average daily sales quantity from Aludium's U.S. sales database and multiplied this daily average by the number of days we calculated above. We then applied Aludium's highest non-aberrational transaction-specific margin for prime merchandise to this quantity to derive the margin for these sales.¹⁰³

Commerce clearly relied on the record information, as provided by Aludium, to determine the partial AFA, and, thus, Commerce's AFA rate had a relationship to the respondent's own dumping. By using Aludium's highest non-aberrational transaction-specific margin for Aludium's missing sales, we are relying on AFA taken from the respondent's own reported sales. Commerce's decision to apply AFA is consistent with the SAA, and Aludium has not provided an alternative methodology for Commerce to consider based on its record information.

Moreover, as a mandatory respondent, Aludium bears the responsibility to compile a reliable record to allow Commerce to conduct a margin analysis as accurately as possible.¹⁰⁴ We agree with the petitioners that Aludium, as the party in possession of the missing date of factory shipment, should have known that its invoice date lags the factory shipment date. In *CORE from Italy*, Commerce applied total AFA to the mandatory respondent because we found the respondent's data unreliable:

Establishing the completeness and accuracy of a respondent's reported total sales in the home, U.S., and third country markets is a significant element of verification which serves as the foundation of not only the verification but also of the respondent's sales information submitted to {Commerce} over the course of the investigation. Only with a complete and accurate sales quantity and value for all markets can {Commerce} be confident that it has a sound foundation on which to accurately perform its analysis, including comparisons of U.S. price with normal value, for the final determination. Because of the inconsistencies in Marcegaglia's quantity and value, {Commerce} finds Marcegaglia's sales data to be unreliable.¹⁰⁵

Similar to *CORE from Italy*, we find that Aludium's failure to provide accurate information concerning its date of shipment calls into question the universe of sales it reported. We note that

¹⁰³ See *Preliminary Determination* PDM at 9-10.

¹⁰⁴ Aludium, as the respondent in possession of all relevant information, bore "the burden to create an accurate record during Commerce's investigation." See *Essar Steel*, 678 F.3d 1268, 1277 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)); and *CORE from Italy* IDM, at Section V and Comment 1; see also *Aluminum Wire from China* IDM at Comment 4a. In its arguments, however, Aludium seeks to reverse the burden of creating an accurate record. Aludium's claim that Commerce did not notify Aludium of the deficiency -- despite that fact that Aludium was provided an opportunity to alleviate it -- effectively places the burden on Commerce to create an accurate record by issuing questionnaire after questionnaire to mitigate inadequate supplemental responses. This is not supported by the Act or Commerce's practice. See *LPTs from Korea* IDM at Comment 17.

¹⁰⁵ See *CORE from Italy* IDM at 16.

the CIT has upheld Commerce's decision to reject respondent's data *in toto* when "it is flawed and unverifiable."¹⁰⁶ As in *SAIL*, in which the CIT found that the deficiencies to respondent's submissions were "pervasive and persistent,"¹⁰⁷ the problems encountered in Aludium's reporting of its date of shipment were extensive and, as noted above, called the integrity Aludium's universe of sales reported. In such instances, Commerce has no assurance that a respondent accurately reported a complete universe of sales in its questionnaire responses, and we find that partial AFA is appropriate as a result.¹⁰⁸

Commerce faced a similar situation in *CTL Plate from Belgium Final*. In that case, the respondent, Industeel, reported its invoice date as the date of sale. Like here, Commerce requested that Industeel revise both its home market and U.S. "sales databases to report a shipment date, separate from the invoice date, which matches the date the shipment left the factory,"¹⁰⁹ and, again like here, Industeel declined to provide the requested information, stating that "Industeel considers shipment date and invoice date to be the same for its export sales."¹¹⁰ Although we preliminarily accepted Industeel's assertions, we examined the documentation for multiple sales at Industeel's verification; in each case, we found that the factory shipment date preceded the invoice date.¹¹¹ Therefore, we determined that the date of shipment from the factory was the appropriate date of sale for Industeel's U.S. sales in accordance with our normal practice because the date of shipment from the factory preceded the date of invoice.¹¹² We further found that:

Industeel has manipulated the sales universe, and date-of-sale based calculations - possibly to its own advantage. Based upon the information viewed at verification, there were numerous shipments with relatively long lag times between factory shipment date and invoice date; though none exceeding the 42 days free storage period at port. Thus, although {Commerce} viewed some additional (previously unreported) shipment information at verification, there may be other shipments outstanding (*i.e.*, beyond the 30 day windows that {Commerce} examined on either side of the POI), which Industeel did not want {Commerce} to analyze as part of its dumping calculations (or, conversely, which Industeel wished to remain

¹⁰⁶ See *SAIL*, 149 F. Supp. 2d at 928 (citing *Heveafil Sdn. Vhd. V. United States*, 25 CIT 147 (2001)).

¹⁰⁷ *Id.*

¹⁰⁸ See *Notice of Final Results and Partial Rescission of Antidumping Administrative Reviews: Heavy Forged Hand Tools from the People's Republic of China*, 65 FR 43290 (July 13, 2000), and accompanying IDM at Comment 2; *Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Magnesium Metal from the People's Republic of China*, 70 FR 9037 (February 24, 2005), and accompanying IDM at Comment 2; and *Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 8907 (February 27, 2009), and accompanying IDM at Comment 5.

¹⁰⁹ See *CTL Plate from Belgium Final* IDM at 33.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 34.

¹¹² See, e.g., *Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2007/2008 Antidumping Duty Administrative Review*, 74 FR 27281, 27283 (June 9, 2009), unchanged in *Certain Polyester Staple Fiber from the Republic of Korea: Final Results of the 2007-2008 Antidumping Duty Administrative Review*, 74 FR 65517 (December 10, 2009); and *Certain Oil Country Tubular Goods from Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 10495 (February 25, 2014), and accompanying PDM at "Date of Sale" section, unchanged in *Certain Oil Country Tubular Goods from Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 41979 (July 18, 2014).

included in the dumping calculation). Additionally...it is impossible to assess what the dumping margins would be, for those unreported sales, without the additional sale-specific factors. Moreover, Industeel neglects to address the fact that, by shifting its universe of sales, there may be additional unreported sales...¹¹³

Because of Industeel's failure to report its factory shipment date on request, Commerce concluded that it did not have complete sales information on the record of that investigation.¹¹⁴ We also found that Industeel's refusal to provide factory shipment dates for its sales, including for all sales with shipment dates during the POI, deprived Commerce of the relevant sales universe to use in this investigation. As in this instant case, we found that the application of partial AFA was appropriate because "the antidumping duty questionnaires issued in this review required that Industeel report: 1) factory shipment date; and 2) all sales made during the POI (pursuant to those shipments). We afforded Industeel multiple opportunities to provide this information, in accordance with section 782(d) of the Act, given that {Commerce} issued a supplemental questionnaire explicitly requesting that Industeel report all shipments during the POI and shipment date from the factory."¹¹⁵

In the instant case, unlike in *CTL Plate from Belgium Final*, Commerce discovered this issue in Aludium's initial questionnaire response and gave Aludium the opportunity to address the deficiency. It failed to do so. Therefore, consistent with our decision in *CTL Plate from Belgium Final*, we have applied partial AFA to Aludium for its refusal to report factory shipment date and, by extension, its complete universe of sales following the methodology used for Industeel.

Commerce also disagrees with Aludium that record evidence demonstrates that the invoice date and the shipment date were identical. In fact, record evidence indicates that there were lags between when the merchandise left the factory and when the invoice was created. Aludium itself admitted that when it stated the invoice date and shipment date were identical, it was referring to the ocean bill of lading date as the shipment date.¹¹⁶ Additionally, Commerce disagrees with Aludium that the terms of sale were clearly only set on the date of the invoice. In fact, record evidence indicates that the terms of the sale were determined on the date when Aludium packed merchandise and prepared the packing list for each shipment.¹¹⁷ While Aludium repeatedly states its position that the material terms of the sale are set upon invoicing, it has provided no evidence that material terms of sale have changed from the date the merchandise left the factory and was stored in an unaffiliated warehouse to the invoice date.

We disagree with Aludium that Commerce impermissibly used an aberrational packing list as the basis of its shipment date calculation. Firstly, record evidence demonstrates that the packing list date best approximates Aludium's factory shipment date. Specifically, Aludium reported that, after it manufactures the aluminum sheet based on its customer's order, "{t}he shipment is prepared and shipped from one of Aludium's plants to an unaffiliated warehouse, where it is

¹¹³ See *CTL Plate from Belgium Final* IDM at 35 (citations omitted).

¹¹⁴ *Id.* at 36.

¹¹⁵ *Id.*

¹¹⁶ See Aludium August 21, 2020 SCQR at 10.

¹¹⁷ See Aludium May 22, 2020 AQR at A-19.

loaded into a container for shipment to the U.S.”¹¹⁸ Aludium provided no evidence that the material terms of sale changed after the merchandise left one of its factories. Secondly, Aludium provided no evidence to demonstrate that the packing list date used by Commerce is an outlier. While the record indicates there is a significant lag between the shipment date and the invoice date for the packing list selected, Commerce relied on information that Aludium itself provided on the record. Under section 776(a) of the Act, Commerce shall use the facts otherwise available in reaching a determination if a party withholds information that has been requested. Section 776(b) of the Act provides that, 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, it may use an inference that is adverse to the interest of that party in selecting from the facts otherwise available. As discussed above, Aludium failed to provide the date of shipment requested by Commerce and the use of an adverse inference, *i.e.*, selecting the date of shipment using the longest lag between packing list date and invoice date that Commerce could find on the record, is a reasonable approach for applying AFA.

We disagree with Aludium that we should revise our partial AFA calculation to use its quantity of sales from January 2019 rather than the methodology we used in the *Preliminary Determination*, *i.e.*, calculating the average quantity per day and then multiplying that quantity by the number of days between the longest packing list date and the invoice date. Because Aludium failed to report its date of sale properly, Commerce was not confident that Aludium’s reported universe of U.S. sales was properly recorded. Our calculation of shipment date as the date of sale resulted in a period of time for which Aludium did not report sales.¹¹⁹ Aludium argues that “Commerce can take administrative notice that production and shipments are affected by end of year holidays and vacations in Spain. The record shows a slowdown in sales/invoices in January 2019 and therefore, the fictional quantity should take this into account to avoid being punitive.”¹²⁰ Aludium had the opportunity to provide the appropriate date of shipment, but failed to avail itself of this opportunity. Commerce relied on AFA to determine that Aludium’s date of shipment is the appropriate date of sale, which resulted in a period of time for which Aludium did not report sales. Commerce relied on Aludium’s own information to determine the quantity of these unreported sales. Aludium points to no record information that leads Commerce to conclude our methodology was punitive or that using its January 2019 sales quantity is a reasonable alternative. There is no evidence on the record that January 2019 provides a representative quantity of the sales missing from Aludium’s U.S. sales listing. While Aludium claims there is a slowdown in sales/invoices in January, the record does not indicate that this occurs every year, or that January 2019 is representative of a typical January – because Aludium failed to compile a complete record. Therefore, we continue to use the average quantity per day to determine the partial AFA rate.

Finally, we disagree with the EU Delegation that our application of partial AFA seeks the most adverse facts rather than representative facts available. Commerce limited its application of partial AFA to Aludium’s deficient response regarding its date of sale, *i.e.*, we are only applying

¹¹⁸ *Id.*

¹¹⁹ See *Preliminary Determination* PDM at 9 (“Aludium reported all sales with an invoice date within the POI. However, as partial AFA, we are finding certain sales with an invoice date after the POI had a date of shipment during the POI, and, therefore, should have been reported in Aludium’s U.S. sales database”).

¹²⁰ See Aludium Case Brief at 29.

these facts to the periods in which sales were either not reported or erroneously included. We also disagree that our application of AFA violates paragraph 7 of Annex II of the WTO Antidumping Agreement. As noted above, Commerce has complied with the Act and regulations in its AFA determination. The provisions of U.S. law are consistent with the international obligations under the WTO Antidumping Agreement.

Comment 3: Whether Section 232 Duties are “Special Duties”

*Aludium’s Comments*¹²¹

- In the *Preliminary Determination*, Commerce deducted section 232 duties imposed on Aludium’s imports of subject merchandise from the U.S. price. This deduction contradicts Commerce’s long-standing policy, upheld by reviewing courts, of excluding adjustments for “special duties,” such as safeguards and AD duties. Section 232 duties, which impose an additional 10 percent duty pursuant to Presidential Proclamation, are undoubtably “special duties” intended to protect the domestic aluminum industry and national security.
- Commerce is statutorily mandated to reduce the price used to establish both export price (EP) and CEP 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.”¹²² Commerce has consistently maintained in past determinations that “special” or remedial remedies, including safeguard duties, should not be treated as U.S. import duties for the purpose of calculating U.S. gross price.¹²³
- The CIT has found there is a distinction between special dumping duties and ordinary customs duties on numerous occasions¹²⁴ and the CAFC has affirmed this interpretation is reasonable.¹²⁵ Support for the distinction is found in the Senate report regarding the Antidumping Act of 1921, which consistently refers to AD duties as “special dumping duties,” while referring to ordinary customs duties as “United States import duties.”¹²⁶
- Since “special duties” are distinct from ordinary customs duties, their deduction from U.S. price in calculating AD margins is not contemplated by the Act and results in double counting.¹²⁷ Therefore, as with other “special” duties, Commerce should not deduct the section 232 duties from its calculation of U.S. price consistent with its past precedent.

¹²¹ *Id.* at 30-32.

¹²² *Id.* at 30 (citing section 772(c)(2)(A) of the Act (emphasis added)).

¹²³ *Id.* at 31 (citing *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153, 19159 (April 12, 2004); and *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404, 18421 (April 15, 1997)).

¹²⁴ *Id.* (citing *Hoogovens Staal v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998); *Bethlehem Steel v. United States*, 27 F. Supp. 2d 208 (CIT 1998); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 898–900 (CIT 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594 (CIT 1997) (*AK Steel*); *Federal Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (CIT 1993); and *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (CIT 1987)).

¹²⁵ *Id.* (citing *Wheatland Tube Co. v. United States*, 495 F.3d 1355 (Fed. Cir. 2007) (*Wheatland Tube*)).

¹²⁶ *Id.* (citing S. Rep. No. 16, 67th Cong., 1st Sess., at 4 (1921)).

¹²⁷ *Id.* (citing section 772(c)(2)(A) of the Act; *AK Steel*, 988 F. Supp. 594, 607 (CIT 1997); and *Wheatland Tube*, 495 F.3d at 1355).

*Petitioners' Comments*¹²⁸

- Section 232 duties are “import duties,” not special duties, and, thus, they must be deducted pursuant to the Act. In recent cases, Commerce has repeatedly rejected the argument that section 232 duties should not be deducted from the U.S. price.¹²⁹ Because section 232 duties are payable when the imported goods enter the U.S. customs territory, they could by no means be included in the “ex-factory prices” (*i.e.*, net U.S. price). Rather, section 232 duties will be included in the gross unit price the seller charges to its customers when the terms of sale (*e.g.*, Delivered Duty Paid) dictate.
- Record evidence shows that section 232 duties are included in Aludium’s sales price charged to its U.S. customers.¹³⁰ Commerce has previously found that this is a basis upon which to deduct section 232 duties from U.S. price.¹³¹

Commerce Position: We disagree with Aludium that section 232 duties are “special duties” that should not be deducted from Aludium’s EP. In March 2018, the President of the United States exercised his authority under section 232 of the Trade Expansion Act of 1962, as amended,¹³² and issued Proclamation 9704 that mandated, to address national security concerns, imposition of a global tariff of 10 percent on imports of aluminum articles in order to reduce imports to a level that Commerce assessed would enable domestic aluminum producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. In considering whether the U.S. price should be adjusted for section 232 duties, we look to section 772 of the Act. In particular, section 772(c)(2)(A) of the Act directs Commerce to adjust EP and CEP for “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties...” Therefore, we find that the analysis here depends on whether section 232 duties constitute “United States import duties,” and whether the duties are “included in such price.”

The CAFC has previously considered whether certain types of duties constitute “United States import duties” for purposes of section 772(c)(2)(A) of the Act. In *Wheatland Tube*, the CAFC sustained Commerce’s determination not to adjust U.S. price in AD proceedings for section 201 safeguard duties under that statutory provision.¹³³ Having acknowledged Commerce’s analysis of the legislative history to the Antidumping Act of 1921, which “referred to ‘United States import duties’ as normal customs duties and referred to AD duties as ‘special dumping duties’

¹²⁸ See Petitioners Aludium Rebuttal Brief at 28-32.

¹²⁹ *Id.* at 29 (citing section 731(c)(2)(A) of the Act; and *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 16613 (March 24, 2020), and accompanying IDM at Comment 1).

¹³⁰ *Id.* at 30-31 (citing Aludium’s Letter, “Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.’s First Supplemental Section A Questionnaire Response,” dated July 6, 2020 (Aludium July 6, 2020 SAQR), at SA-15 to 16; Aludium ILOVQR at Exhibit SVE-7-4-1; and Aludium Case Brief at 30).

¹³¹ *Id.* at 31 (citing *Light-Walled Rectangular Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 21829 (April 20, 2020) (*LWR from Mexico*), and accompanying IDM at Comment 2; *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 41962 (July 13, 2020) (*HWR from Mexico*), and accompanying IDM at Comment 3; and *Circular Welded Carbon-Quality Steel Pipe from Oman: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 22,997 (April 24, 2020), and accompanying IDM at Comment 3).

¹³² See 19 U.S.C. § 1862.

¹³³ See *Wheatland Tube*, 495 F. 3d at 1363.

and that ‘special dumping duties’ were distinguished and treated differently from normal customs duties,” the CAFC in *Wheatland Tube* agreed that “Congress did not intend all duties to be considered ‘United States import duties.’”¹³⁴

The CAFC then found reasonable Commerce’s analysis that section 201 duties were more akin to AD duties than “ordinary customs duties.”¹³⁵ In comparing section 201 duties with AD duties, the CAFC found that: (1) “{l}ike antidumping duties, {section} 201 duties are remedial duties that provide relief from the adverse effects of imports;” (2) “{n}ormal customs duties, in contrast, have no remedial purpose;” (3) “antidumping and {section} 201 duties, unlike normal customs duties, are imposed based upon almost identical findings that the domestic industry is being injured or threatened with injury due to the imported merchandise;” and (4) “{section} 201 duties are like antidumping duties... because they provide only temporary relief from the injurious effects of imports,” whereas normal customs duties “have no termination provision, and are permanent unless modified by Congress.”¹³⁶ In sustaining Commerce’s decision regarding section 201 duties in *Wheatland Tube*, the CAFC also held that “{t}o assess both a safeguard duty and an antidumping duty on the same imports without regard to the safeguard duty, would be to remedy substantially overlapping injuries twice.”¹³⁷

Section 232 duties are not akin to AD or section 201 duties. Proclamation 9704 states that it “is necessary and appropriate to address the threat that imports of aluminum articles pose to the national security.”¹³⁸ The text of section 232 of the Trade Expansion Act of 1962 also clearly concerns itself with “the effects on the national security of imports of the article.”¹³⁹ The particular national security risk identified in Proclamation 9704 is that the “industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs – a situation that is fundamentally inconsistent with the safety and security of the American people.”¹⁴⁰ In other words, section 232 duties are focused on addressing imports that threaten to impair national security, whereas AD and section 201 safeguard duties remedy injury to domestic industries.

¹³⁴ *Id.*, 495 F. 3d at 1361.

¹³⁵ *Id.*, 495 F. 3d at 1362.

¹³⁶ *Id.*, 495 F. 3d at 1362-63.

¹³⁷ *Id.*, 495 F. 3d at 1365.

¹³⁸ See *Adjusting Imports of Aluminum Into the United States*, 83 FR 11619, 11620 (March 15, 2018) (*Proclamation 9704*); and *Adjusting Imports of Aluminum Into the United States*, 83 FR 13355 (March 28, 2018) (*Proclamation 9710*) (“In proclaiming this tariff, I recognized that our Nation has important security relationships with some countries whose exports of aluminum articles to the United States weaken our internal economy and thereby threaten to impair the national security”); see also *Adjusting Imports of Aluminum Into the United States*, 83 FR 20677 (May 7, 2018) (*Proclamation 9739*) (similar); *Adjusting Imports of Aluminum Into the United States*, 83 FR 25849 (June 5, 2018) (*Proclamation 9758*) (similar); and *Adjusting Imports of Aluminum Into the United States*, 83 FR 45019 (September 4, 2018) (*Proclamation 9776*) (similar).

¹³⁹ See section 232(b)(1)(A) of the Trade Expansion Act of 1962 (emphasis added); see also section 232(a) of the Trade Expansion Act of 1962 (explaining that “{n}o action shall be taken... to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security”).

¹⁴⁰ See *Proclamation 9704*, 83 FR at 11620.

Furthermore, the Presidential Proclamation states that section 232 duties are to be imposed in addition to other duties unless expressly provided for in the proclamations.¹⁴¹ The Annex to Proclamation 9739 refers to section 232 duties as “ordinary” customs duties, and it also states that “{a}ll anti-dumping or countervailing duties, or other duties and charges applicable to such goods shall continue to be imposed, except as may be expressly provided herein.”¹⁴² Notably, there is no express exception in the HTSUS revision in the Annex. In other words, section 232 duties are intended to be treated as any other duties for purposes of the trade remedy laws. Had the President intended that AD duties would be reduced by the amount of section 232 duties imposed, the Presidential Proclamation would have expressed that intent.

More recently, the CIT addressed this specific issue and upheld Commerce’s interpretation that 232 duties are “United States import duties” subject to deduction from the U.S. price for purposes of determining the margin of dumping.¹⁴³

For the reasons noted, and consistent with our treatment of section 232 duties in other proceedings,¹⁴⁴ we have determined that section 232 duties should be treated as “United States import duties” for purposes of section 772(c)(2)(A) of the Act and thereby as “U.S. Customs duties,” which are deducted from U.S. price. Our decision to treat section 232 duties as “United States import duties” was also recently upheld by the CIT.¹⁴⁵

We next turn to whether the section 232 duties are included in such prices. Record evidence demonstrates that the amount of section 232 duties are included in Aludium’s sales price charged to its U.S. customers.¹⁴⁶ Commerce has previously found that this is a basis upon which to deduct section 232 duties from U.S. price.¹⁴⁷ Lastly, we note that there is no dispute among parties with regard to record evidence that the amount of section 232 duties were included in the price paid by Aludium’s U.S. customers. Thus, pursuant to section 777(c)(2)(A) of the Act, we find that it is appropriate to deduct this amount from Aludium’s reported U.S. prices to calculate EP. For this final determination, and for the reasons noted above, we treated Aludium’s section

¹⁴¹ *Id.* 83 FR at 11621; *see also Proclamation 9710*, 83 FR at 13357. The proclamations do not expressly provide that section 232 duties receive different treatment.

¹⁴² *See Proclamation 9739*, 83 FR at 20681.

¹⁴³ *See Borusan Mannesmann Boru Sanayi Ve Ticaret A.Ş. v. United States*, 2021 Ct. Intl. Trade LEXIS 18 (CIT 2021) (*Boursan*) (“The AD statute does not expressly differentiate among import duties. While Section 232 duties are “special” in some sense, in that they are temporary, they are still import duties. Given that the statutory term at issue is “import duties” and it appears broad enough to include all import duties except antidumping duties, the court likely would have had little pause in saying that Commerce did not err in treating Section 232 duties...the court sustains Commerce’s decision that the CEP and EP may be reduced by Section 232 duties paid”).

¹⁴⁴ *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Preliminary Results of Antidumping Duty Administrative Review; 2018-2019*, 85 FR 83050 (December 21, 2020), and accompanying PDM at 9-11; *see also Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2018-2019*, 85 FR 83886 (December 23, 2020), and accompanying PDM at 10-12.

¹⁴⁵ *See Borusan*, 2021 Ct. Intl. Trade LEXIS 18.

¹⁴⁶ *See Aludium* July 6, 2020 SAQR at SA-15 to 16; *Aludium ILOVQR* at Exhibit SVE-7-4-1; and *Aludium Case Brief* at 30.

¹⁴⁷ *See, e.g., LWR from Mexico* IDM at Comment 2; *HWR from Mexico* IDM at Comment 3; and *Circular Welded Carbon-Quality Steel Pipe from Oman: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 22,997 (April 24, 2020), and accompanying IDM at Comment 3.

232 duties as U.S. import duties by deducting the reported section 232 duties as U.S. import duties to calculate Aludium's EP.

Comment 4: Denial of Aludium's Duty Drawback Adjustment

*Aludium's Comments*¹⁴⁸

- The Act requires Commerce to make duty drawback adjustment by increasing Aludium's EPs and CEPs "by the amount of any import duties imposed by the country of exportation which have ... not been collected, by reason of the exportation of the merchandise to the United States."¹⁴⁹
- Commerce erred in not granting Aludium a duty drawback adjustment as the loss rates used by Aludium to claim duty exemptions from the Spanish authorities were submitted to, and approved by, the Spanish authorities under the duty drawback program. Once approved, Aludium used these performance coefficients to claim the duty exemption in accordance with the terms of each authorization, and Aludium could not change them based on subsequent production results.¹⁵⁰ Commerce's practice is to accept the "yield/loss ratios that have been approved by the {foreign government administering the duty drawback program to} confirm that the quantity of imported raw materials account for the duty drawback or exemption granted."¹⁵¹
- The Spanish Inward Processing Customs Relieve (RPA) provides a tax exemption to Aludium for import duties by allowing Aludium to import raw materials without payment of customs duties if such imports can be used to produce goods for export. This program is similar if not identical to duty drawback programs at issue in other companion aluminum sheet cases, such as Italy and Turkey.¹⁵²
- During the POI, Aludium claimed and received an exemption under two RPA authorizations.¹⁵³ The underlying applications contain performance coefficients. These performance coefficients must be used to claim exemptions to comply with the terms of the program.¹⁵⁴ Aludium provided guarantees to the Spanish authorities in the amount of

¹⁴⁸ See Aludium Case Brief at 3-15.

¹⁴⁹ *Id.* at 3 (citing section 772(c) of the Act).

¹⁵⁰ *Id.* at 3-4 (citing Aludium June 18, 2020 CQR at Exhibit C-13C).

¹⁵¹ *Id.* at 4 (citing *Carbon and Alloy Steel Wire Rod from Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Negative Determination of Critical Circumstances*, 82 FR 50377 (October 31, 2017) (*Wire Rod from Turkey Prelim*), and accompanying PDM at 10).

¹⁵² *Id.* at 5 (citing Aludium June 18, 2020 CQR at C-43 to 46 and Exhibit C-13A through D; *Common Alloy Aluminum Sheet from Italy: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 65342 (October 15, 2020) (*Aluminum Sheet from Italy Prelim*), and accompanying PDM at 14-15; and *Common Alloy Aluminum Sheet from Turkey: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 65346 (October 15, 2020) (*Aluminum Sheet Turkey Prelim*), and accompanying PDM).

¹⁵³ *Id.* at 5 (citing Aludium June 18, 2020 CQR at Exhibit C-13C; and Aludium September 23, 2020 SBCQR at 4-5).

¹⁵⁴ *Id.* 6-7 (citing Aludium September 21, 2020 SDQR at 14-16 and Exhibits 3SC-4, 3SC-7 and 3SC-8b; and Aludium June 18, 2020 CQR at Exhibit C-13C).

the potential liability.¹⁵⁵ Finally, to prove that exports were made to the authorized imported quantities, Aludium submitted liquidation forms to customs authorities.¹⁵⁶

- Commerce will increase EP to account for the rebated or unpaid import duty if a foreign country would normally impose an import duty on an input used to manufacture subject merchandise but offers a rebate or exemption from the duty if the input is exported to the United States.¹⁵⁷ This is to account for the fact producers subject to the import duties will increase home market sales prices and thereby increase normal value.¹⁵⁸
- Commerce should reverse its decision and grant a duty drawback consistent with the recent CIT decision that “duty drawback must be tied to exported merchandise, not overall domestic production.”¹⁵⁹ The CIT rejected Commerce’s use of a company’s actual yield rates in a duty drawback calculation where there was a government-approved yield ratio.¹⁶⁰ Commerce also consistently used yield rates approved by the government of Thailand in *CWP from Thailand 2010-2011 Final*.¹⁶¹
- Aludium met both prongs of Commerce’s duty drawback test. Commerce’s preliminary determination implied that Aludium met the first prong of the test. With proper consideration for the performance coefficients in the RPA authorizations, Aludium also met the second prong of the test because it demonstrated that there were sufficient imports of materials to account for the duty drawback or exemption granted for the export of the manufactured product.

*Petitioners’ Comments*¹⁶²

- The Act does not require Commerce to grant a duty drawback adjustment automatically. Commerce only makes an adjustment when the agency is satisfied that substantial evidence on the record supports such an adjustment. Aludium was denied a duty drawback because substantial evidence on the record demonstrates that Aludium failed to satisfy Commerce’s two prong test.¹⁶³
- Aludium was unable to provide sufficient documentation to support the information it had submitted to the Spanish customs authority. That inability to provide documentation provides sufficient grounds for Commerce to reject Aludium’s duty drawback claim.¹⁶⁴

¹⁵⁵ *Id.* at 7 (citing Aludium September 21, 2020 SDQR at Exhibit 3SC-6).

¹⁵⁶ *Id.* at 7-8 (citing Aludium August 26, 2020 SCQR at Exhibit SC-39; and Aludium September 21, 2020 SDQR at 3-7 and Exhibits 3SC-4 and 3SC-6).

¹⁵⁷ *Id.* at 8 (citing *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1338 (2011) (*Saha Thai*)).

¹⁵⁸ *Id.* at 9 (citing *Icdas Celik Enerji Tersane Ve Ulasim Sanayi, A.S. v. United States*, No. 18-00143, 2020 WL 5653334, at *3 (CIT Sept. 23, 2020) (*Icdas Celik*)).

¹⁵⁹ *Id.* at 4-5 (citing *Icdas Celik*).

¹⁶⁰ *Id.* at 9-10 (citing *Saha Thai Steel Pipe Co. v. United States*, 33 C.I.T. 1541, 1546-47 (CIT 2009)).

¹⁶¹ *Id.* at 10-11 (citing *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 77 FR 61738 (October 11, 2012) (*CWP from Thailand 2010-2011 Final*), and accompanying IDM at 5).

¹⁶² See Petitioners Aludium Rebuttal Brief at 4-16.

¹⁶³ *Id.* at 4-5 (citing *Low Melt Polyester Staple Fiber from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 83 FR 29094 (June 22, 2018) (*Low Melt PSF from Korea*), and accompanying IDM at Comment 3; and *Saha Thai*, 635 F.3d at 1340-41).

¹⁶⁴ *Id.* at 6-7 (citing Commerce’s Letter, “Less-Than-Fair-Value Investigation of Common Alloy Aluminum Sheet from Spain – Third Supplemental Section C Questionnaire,” dated September 11, 2020 (Aludium September 11, 2020 SCQR)).

Commerce requested Aludium support the information presumably approved by Spanish customs authorities and Aludium failed to comply.

- Moreover, Aludium also failed to provide supporting documentation regarding the reported duty drawback adjustment for selected sales in its response to the questionnaire in lieu of verification.¹⁶⁵
- Aludium’s duty drawback claim is disconnected from its actual duty costs and not imbedded in its COP.¹⁶⁶ Aludium does not include import duties in its record keeping of production costs in the normal course of business. Therefore, there is no basis to consider that Aludium would include the exempted duties in pricing its domestic sales of aluminum sheet.¹⁶⁷
- Aludium is unable to reconcile information regarding its input materials.¹⁶⁸
- Finally, Aludium included the “total duties forgiven” in the calculation for the unit “DUTY,” regardless of whether the forgiven import duties were associated with input materials used for production for domestic or export sales, thus inflating the U.S. price.¹⁶⁹

Commerce Position: Consistent with the *Preliminary Determination*, we are not granting Aludium a duty drawback adjustment. Commerce used the “two-prong” test in its analysis of Aludium’s duty drawback documentation.¹⁷⁰ Commerce has explained this “two-prong” test in multiple proceedings:

Consistent with Commerce’s practice, we applied our two-prong test to determine whether a duty drawback adjustment is appropriate. Specifically, to satisfy section 772(c)(1)(B) of the Act, which states that EP shall be increased by “the amount of any import duties imposed by the country of exportation... which have not been collected, by reason of the exportation of the subject merchandise to the United States,” and to confirm Huvis’ entitlement to a duty drawback adjustment, we employed a two-prong test to ensure that 1) the import duty paid and the rebate payment are directly linked to, and dependent upon, one another (or the exemption from import duties is linked to the exportation of subject merchandise), and 2) that there were sufficient imports of the imported raw material to account for the drawback received upon the exports of the subject merchandise.¹⁷¹

¹⁶⁵ *Id.* at 8-9 (citing Aludium ILOVQR at Exhibits SVE-7-4 and 7-5).

¹⁶⁶ *Id.* at 11-12 (citing *Carbon and Alloy Steel Wire Rod from Turkey: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 83 FR 13249 (March 28, 2018), and accompanying IDM at Comment 1; *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 47355 (July 21, 2016), and accompanying IDM at Comment 3; *Certain Oil Country Tubular Goods from Turkey: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 1240 (January 10, 2018), and accompanying IDM at 4-5; *Diocetyl Terephthalate from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 28824 (June 26, 2017), and accompanying IDM at Comment 6; and *Low Melt PSF from Korea* IDM at Comment 3).

¹⁶⁷ *Id.* at 13 (citing Aludium June 18, 2020 DQR at D-30 and Exhibit D-1).

¹⁶⁸ *Id.* at 14 (citing Aludium August 10, 2020 SDQR at 14-15 and Exhibits SD-2, SD-3, and SD-17; and Aludium August 26, 2020 SCQR at 14).

¹⁶⁹ *Id.* at 14-15 (citing Aludium August 10, 2020 SDQR at 15 and Exhibit SD-17).

¹⁷⁰ See *Preliminary Determination* PDM at VIII.F.

¹⁷¹ See *Low Melt PSF from Korea* IDM at Comment 3.

Based on our analysis, we find that Aludium did not meet the requirements of Commerce's two-prong test for a duty drawback adjustment.

In its first section C supplemental questionnaire, Commerce asked the following:

Please explain whether Aludium imported a sufficient quantity of materials subject to import duties during the POI, to account for the duty drawback Aludium claims for the export of finished goods and provide documentation to support your response.¹⁷²

In response, Aludium pointed to the “Estado Liquidatorios” (Liquidation Status) documents it placed on the record. Aludium then stated, “{t}he Estado Liquidatorio provides a clear link between the imported and exported material and shows (i) that Aludium imported a sufficient quantity of products subject to import duties, and (ii) that Aludium exported the necessary quantity to make up for the import duties exempted.”¹⁷³

Aludium asserts that the information regarding the liquidation forms approved by the Government of Spain are sufficient to support its claim of a duty drawback adjustment. However, Commerce's analysis requires that the documentation on the record, regardless of approval from the Spanish authorities, is supported by Aludium's experience in its production process. Despite multiple requests for that information, Aludium failed to supply the underlying production data used to calculate the yield loss ratios.¹⁷⁴ Therefore, Commerce did not have the information required to fulfill the second prong of Commerce's duty drawback analysis.

Aludium's reliance on *Wire Rod from Turkey Prelim*, *Aluminum Sheet from Italy Prelim*, *Aluminum Sheet from Turkey Prelim*, and *CWP from Thailand 2010-2011 Final* is misplaced, as the facts of those cases are distinct from the facts in the instant investigation. In all of those cases, there is no indication on the record that the respondents were unable to supply information from their production processes. Aludium also provides no evidence that the duty drawback systems in place in these other countries have any relevance or similarity to the operation of Spain's duty drawback program. Commerce analyzed the evidence placed on the record of this investigation to understand how the Spanish duty drawback program operated. Based on our understanding of how the program works in Spain, we requested several times that Aludium provide documentation that would enable us to satisfy our two-prong test.

Further, in *CWP from Thailand 2010-2011*, the CIT made the determination that the “the yield-loss ratios mandated by the {Government of Thailand} are Saha Thai's actual cost and revenue experience.”¹⁷⁵ As discussed above, the record does not support this same conclusion, *i.e.*, that the yield-loss ratios are Aludium's actual cost and revenue. Commerce requested that Aludium provide such information.¹⁷⁶ Aludium failed to provide supporting documentation which would allow Commerce to determine the information supplied to, and approved by, the Government of

¹⁷² See Aludium August 26, 2020 SCQR at 15.

¹⁷³ *Id.*

¹⁷⁴ See Section C Supplemental; and Aludium September 11, 2020 SCQR.

¹⁷⁵ See *CWP from Thailand 2010-2011* IDM at 15.

¹⁷⁶ See Aludium September 11, 2020 SCQR.

Spain matched Aludium's production records. Therefore, Commerce continues to find that Aludium failed to satisfy the second prong of the duty drawback test and that, as a result, Aludium is not entitled to a duty drawback adjustment.

Because we are not granting a duty drawback adjustment, we find the petitioners' remaining arguments regarding the calculation of DUTY to be moot.

Comment 5: Substantial Transformation

*Aludium's Comments*¹⁷⁷

- Substantial evidence on the record shows that aluminum sheet from Spain is substantially transformed into merchandise which has a country of origin of France by Aludium's affiliate, Aludium France. This facility was in operation prior to the filing of the Petition, and France is not a country named in the aluminum sheet investigations.¹⁷⁸ Therefore, the high bright material produced Aludium's facilities in France is non-subject merchandise and outside the scope of this investigation because the country of origin is France.
- In Commerce's Preliminary Scope Determination, Commerce found no basis for excluding bright surface finish products from the scope of this investigation, based on the conclusion that the appropriate time to consider such questions was in the context of a scope ruling request.¹⁷⁹ Aludium's argument here is limited to the third country processing performed by Aludium France. Aludium acknowledges that Commerce has preliminarily deferred to the petitioners' position that high bright material is included in the scope, but that deferral is not inconsistent with Commerce's acknowledgement of the proprietary evidence on the record regarding the complexity of the production process which supports a substantial transformation finding.
- Commerce's substantial transformation determination is based on the totality of the circumstances, and considers "factors such as: (1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) level of investment."¹⁸⁰ Substantial transformation has been found to exist where, "as a result of manufacturing or processing steps ... {,} the {product} loses its identity and is transformed into a new product having a new name, character and use."¹⁸¹
- There are few manufacturers capable of producing high bright materials, as a high bright is a specialty product with niche application. Given high investment cost and low demand, few domestic producers make high bright rolled aluminum, and Commerce has

¹⁷⁷ See Aludium Case Brief at 32-38.

¹⁷⁸ *Id.* at 32-33 (citing *Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Republic of Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and the Republic of Turkey*, 85 FR 19444 (April 7, 2020) (*Initiation Notice*)).

¹⁷⁹ *Id.* at 33 (citing Memorandum, "Antidumping and Countervailing Duty Investigations of Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Republic of Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey; Scope Comments Decision Memorandum for the Preliminary Determinations," dated October 6, 2020 (Preliminary Scope Determination)).

¹⁸⁰ *Id.* at 34 (citing *Bell Supply Co., LLC v. United States*, 888 F.3d 1222, 1228-29 (Fed. Cir. 2018) (*Bell Supply*)).

¹⁸¹ *Id.* (citing *Bell Supply*, 888 F.3d at 1230).

confirmed that it is not produced in the United States in a sufficient and reasonably-available amount or of a satisfactory quantity.¹⁸²

- The processing of products in France requires special production equipment and must be rolled without dirt or oxides.¹⁸³ The properties of high bright rolled aluminum are wholly separate and distinct from the aluminum sheet input and the two products are not interchangeable.

*Petitioners' Comments*¹⁸⁴

- At the outset of the investigation, Commerce granted Aludium's request to exclude its reporting of U.S. sales from Spain that were further manufactured in France and, as a result, there is limited information on the record pertaining to the value-added activities¹⁸⁵ and costs associated with Aludium's U.S. sales shipped from France. The limited information on the record tends to show that the value added in France is not significant.¹⁸⁶
- Aludium acknowledges that Commerce reached a preliminary determination that high bright products are within the scope of this investigation, but it did not contest this determination in any scope comments.¹⁸⁷ Aludium provides no new or compelling information to support its request that Commerce make an exception for Aludium's French sales.
- Further, Aludium is incorrect that the record demonstrates that the high bright rolled aluminum produced in France is transformed. The product is not produced in France but rather manufactured in Spain and sent to Aludium France for surface finish only.¹⁸⁸
- Aludium's argument is also undermined by the product characteristics issued by Commerce which show multiple characteristics (*i.e.*, non-mechanical surface treatment and mechanical surface finish) which contemplate an aluminum sheet product that undergoes a finishing or surface treatment that will affect its brightness.¹⁸⁹ The fact that there are reporting fields for brightness finishing treatments indicates that the processing of aluminum sheet by Aludium France is not substantial transformation but rather a minor finishing.

¹⁸² *Id.* at 35 (citing Aludium's Letter, "Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Republic of Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey: Aludium Transformación de Productos, S.L.'s Scope Comments," dated May 6, 2020).

¹⁸³ *Id.* at 36 (citing Aludium May 22, 2020 AQR at A-5; and Aludium's Letter, "Common Alloy Aluminum Sheet from Spain: Aludium Transformación de Productos, S.L.'s Second Supplemental Section A Questionnaire Response," dated August 28, 2020 (Aludium August 28, 2020 SAQR), at 2-5 and Exhibit 2SA-2 (Parts B and E)).

¹⁸⁴ See Petitioners Aludium Rebuttal Brief at 32-40.

¹⁸⁵ *Id.* at 32 (citing Aludium May 8, 2020 Notification; Aludium May 15, 2020 Notification; Commerce's Letter, "Less-Than-Fair-Value Investigation of Common Alloy Aluminum Sheet from Spain – Reporting Exemption Request," dated May 26, 2020; and Petitioners' Letter, "Petitioners' Comments in Response to Aludium's Request to be Excused from Reporting Certain U.S. Sales," dated May 22, 2020).

¹⁸⁶ *Id.* at 39-40 (citing Aludium August 28, 2020 SAQR at Exhibit 2SA-3; and Aludium September 21, 2020 SDQR at Exhibit 2BC-34).

¹⁸⁷ *Id.* at 33-34 (citing Preliminary Scope Determination at 4 and 9; and *Initiation Notice*).

¹⁸⁸ *Id.* at 34-35 (citing Aludium Case Brief at 33-36).

¹⁸⁹ *Id.* at 35 (citing Commerce's Letter, "Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Republic of Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey: Product Characteristics," dated May 19, 2020 (Product Characteristics Letter)).

- Aludium’s analysis provides only a cursory discussion of the five factors in Commerce’s substantial transformation analysis and the information it does provide is unpersuasive, as it fails to explain whether its other aluminum sheet products are more tolerant to “dirt or oxides” and whether they need to “remove impurities” via a chemical treatment during the production process as well.¹⁹⁰ Further, Aludium failed to report whether high bright products were classified under separate and discrete Harmonized Tariff Schedule (HTS) codes for customs tariff purposes.
- Additionally, there remains a significant gap between the shipment quantity of aluminum sheet produced in Spain prior to the further processing and the sales quantity by Aludium France after further processing during the POI.

Commerce Position: We disagree with Aludium that there is sufficient information on the record of this investigation to make a determination as to whether merchandise further manufactured by Aludium France was substantially transformed and is a product of France.

A substantial transformation occurs where, “as a result of manufacturing or processing steps . . . {,} the {product} loses its identity and is transformed into a new product having a new name, character and use.”¹⁹¹ To determine whether there has been a substantial transformation, Commerce looks to factors such as: (1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the COP/value added; and (5) level of investment.¹⁹²

Regarding the class or kind of merchandise, we have insufficient information on the record to evaluate Aludium’s claim that high bright rolled aluminum sheet is a specialty product due to its surface-critical applications. At the outset of the investigation, Commerce requested reporting characteristics that include the product in question (field 3.4 (Non-Mechanical Surface Treatment) has a reporting characteristic for “20 = Chemical Brightening” and field 3.8 (Mechanical Surface Finish) has a reporting characteristic for “6 = Bright”).¹⁹³ We agree with the petitioners that the fact that there are reporting fields for finishing treatments such as brightness is suggestive that the processing of aluminum sheet by Aludium France for high brightness may not involve a substantial transformation, but rather a minor finishing process for in-scope aluminum sheet.

Commerce preliminarily found no basis to exclude bright surface finished products from the scope of this investigation.¹⁹⁴ Commerce almost invariably determines substantial transformation has not taken place when both products are within the same “class or kind” of merchandise.¹⁹⁵ The merchandise subject to an investigation, *i.e.*, the class or kind of

¹⁹⁰ *Id.* at 37-38 (citing Aludium September 21, 2020 SDQR at Exhibit 2SBC-34; and Aludium ILOVQR at Exhibits SVE-7-4 and 7-6).

¹⁹¹ See *Bestfoods v. United States*, 165 F.3d 1371, 1373 (Fed. Cir. 1999).

¹⁹² See *Bell Supply*, 888 F.3d at 1228.

¹⁹³ See Product Characteristics Letter.

¹⁹⁴ See Preliminary Scope Determination at Comment 3.

¹⁹⁵ See, e.g., *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value*, 79 FR 76966 (December 23, 2014), and accompanying IDM at 19.

merchandise to be investigated, is described in the scope. The scope of this investigation covers high bright rolled aluminum sheet and, thus, high bright rolled aluminum sheet and aluminum sheet are within the same “class or kind” of product. We, therefore, preliminarily determined that there was:

no basis for excluding the bright surface finished products referenced by Aludium and Alanod. The scope includes all products which meet the physical description of the scope and do not otherwise qualify for an exclusion. Bright surface finish products fall within the physical description of “flat-rolled aluminum product having a thickness of 6.3 mm or less, but greater than 0.2 mm, in coils or cut-to-length, regardless of width.”¹⁹⁶

Commerce requested that interested parties submit comments regarding our preliminary scope decision; Aludium did not avail itself of this opportunity. As discussed below, Aludium, instead, requested a substantial transformation finding in this proceeding based on proprietary information on the record of this investigation only. Indeed, Aludium is not arguing that all high bright products, regardless of country of initial production, should be excluded from the scope, nor is it arguing for any modification to the scope language. Instead, Aludium’s argument is limited to the third country processing performed by Aludium France – that such processing is significant such that it qualifies as substantial transformation into the country of origin France and that the high bright material produced at its facilities in France are non-subject merchandise and outside the scope of this investigation because the country of origin is France. However, as the petitioners note, Aludium provides no new compelling information to support its substantial transformation request based on the record in this investigation.

Because Aludium requested to be excused from reporting sales of aluminum sheet further manufactured by Aludium France, there is little to no information on the record regarding: the nature and sophistication of processing in France; the properties, essential components of, and intended end-use of high bright rolled aluminum sheet; the COP of high bright rolled aluminum sheet; or the level of investment at Aludium France. Commerce has no context with which to evaluate the asset information of Aludium France or Aludium’s short description of the further manufacturing process. For example, as support for the COP/value added and level of investment, Aludium only provides the value of Aludium France’s assets and sales values from its 2019 audited financial statements. It fails to provide specific information regarding the amount of assets used for production of high bright rolled aluminum sheet or compare the assets to create high bright rolled aluminum to the assets required to create aluminum sheet.

Therefore, we find there is insufficient information on the record for Commerce to determine whether substantial transformation of Aludium’s Spanish-produced aluminum sheet occurred in France.

¹⁹⁶ See Preliminary Scope Determination at 4.

Comment 6: Whether Commerce Should Evaluate DP on a Monthly Basis

*Aludium's Comments*¹⁹⁷

- The price of subject merchandise may change between the preliminary price and the final price due to the change in the “price of input metal based on the LME {London Metal Exchange}.”¹⁹⁸
- In *Copper Pipe from China 2011-2012 Final*, Commerce used monthly figures in its DP analysis because there was a major contractually-determined portion of the price that changed monthly.¹⁹⁹
- Commerce should use the shorter monthly period of time in its DP analysis due to Aludium’s contractually-determined monthly fluctuations in metal prices that is based on the LME.

*Petitioners' Comments*²⁰⁰

- Commerce correctly applied its DP analysis using quarterly periods in the *Preliminary Determination*.
- Aludium reported making U.S. sales on a “spot basis” and it stated that “{f}or spot sales, the order confirmation sets forth the terms and conditions of the sale, *i.e.*, preliminary price, shipping conditions, and order quantity, which may change based on over/under shipment {sic} and the price of input metal based on the LME.”²⁰¹ Aludium later reported that it hedged its exposure of metal price risk through futures on the LME to “mitigate volatility in earnings due to commodity price changes in aluminum.”²⁰² As a result, Aludium and its U.S. customers were less exposed to the monthly price fluctuations of input metal.
- The sales documentation provided in Aludium’s responses support the application of Commerce’s normal DP practice.²⁰³ There is no evidence indicating that the different metal costs reflected monthly aluminum price fluctuations in the marketplace.
- The unique fact pattern in *Copper Pipe from China 2011-2012 Final* is not present in this investigation. Since Aludium fails to support its proposal that differences in price were somehow related to contractually-determined monthly fluctuations in the metal prices based on the LME, Commerce should continue its normal DP analysis practice.

Commerce’s Position: We disagree with Aludium and have continued to apply our DP analysis using quarterly periods in the final determination in this investigation for the reasons stated below.

¹⁹⁷ See Aludium Case Brief at 39.

¹⁹⁸ *Id.* (citing Aludium May 22, 2020 AQR at A-22).

¹⁹⁹ *Id.* (citing *Seamless Refined Copper Pipe and Tube from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 23324 (April 28, 2014) (*Copper Pipe from China 2011-2012 Final*), and accompanying IDM at 13).

²⁰⁰ See Petitioners Aludium Rebuttal Brief at 40-43.

²⁰¹ *Id.* at 41 (citing Aludium May 22, 2020 AQR at A-22).

²⁰² *Id.* at 41-42 (citing Aludium July 6, 2020 SAQR at SA-13).

²⁰³ *Id.* at 42 (citing Aludium May 22, 2020 AQR at A-9; Aludium July 6, 2020 SAQR at A-13 to A-14; Aludium September 21, 2020 SDQR at Exhibit 2SBC-24; and Aludium ILOVQR at Exhibits SEV-7-4 and 7-5).

When applying its “differential pricing” analysis for determining whether application of average-to-transaction comparisons are appropriate, pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act, Commerce has established quarterly time periods as the baseline standard for temporal analysis. Moreover, Commerce has consistently used quarterly time periods in investigations and reviews.²⁰⁴

As explained in *Large Residential Washers from Mexico 2012-2014 AR*, a benefit of a quarterly analysis is that, where Commerce frequently uses annual comparisons in investigations, and normally uses monthly comparisons in administrative reviews, the use of a quarterly time period provides a uniform and predictable period of time in which Commerce may conduct its analysis across proceedings.²⁰⁵

While it is correct that Commerce may modify the duration of the time periods where it finds a logical basis for doing so, Commerce has found such a basis to do so in only one instance, *Copper Pipe from China 2011-2012 Final*,²⁰⁶ and we find that the situation in that case is not analogous to the circumstances in this investigation. Specifically, we find that, unlike in *Copper Pipe from China 2011-2012 Final*, Aludium has not provided record evidence of contractually-determined monthly fluctuations in aluminum prices or that the major contractually-determined portion of the price changes monthly, such that it is logical to group sales by month when examining whether there are prices that differ significantly among time periods. To the contrary, Aludium appears to have hedged against any volatility in the prices of its inputs.²⁰⁷ Therefore, we see no reason to depart from Commerce’s standard DP quarterly analysis.

Comment 7: Whether Commerce Should Have Deselected Baux as a Mandatory Respondent

In the *Initiation Notice*, Commerce notified interested parties that we intended to select respondents in this investigation using U.S. Customs and Border Protection (CBP) data for U.S. imports of aluminum sheet from Spain during the POI.²⁰⁸ On March 24, 2020, we placed those data on the record and notified parties of the deadline to submit factual information to rebut, clarify, or correct the CBP data and to submit comments on respondent selection.²⁰⁹ On April 10, 2020, the petitioners commented on the data, requesting that Commerce select Aludium and Baux as the mandatory respondents in this investigation.²¹⁰ No other parties commented on the CBP data or provided respondent selection comments. On April 21, 2020, Commerce selected

²⁰⁴ See *Large Residential Washers from Mexico: Final Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 FR 55335 (September 15, 2015) (*Large Residential Washers from Mexico 2012-2014 AR*), and accompanying IDM at Comment 5.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Aludium July 6, 2020 SAQR at SA-13.

²⁰⁸ See *Initiation Notice*, 85 FR at 19448.

²⁰⁹ See Memorandum, “Release of U.S. Customs and Border Protection Data,” dated March 24, 2020 (CBP Data Memo) (noting “Submissions of factual information to rebut, clarify, or correct the attached CBP data are due no later than 5:00 p.m. Eastern Time, three business days after of the publication of the initiation notice in the *Federal Register*,” i.e. April 10, 2020).

²¹⁰ See Petitioners’ Letter, “Petitioners’ Comments on Customs and Border Protection (“CBP”) Import Data and Respondent Selection,” dated April 13, 2020.

Aludium and Baux as the relevant mandatory respondents²¹¹ because they were the two producers/exporters with the largest volume of subject exports during the POI based on the CBP data.²¹² Thereafter, Aludium and Baux responded to Commerce's initial questionnaire, as well as all (in the case of Aludium) or some (in the case of Baux) of Commerce's supplemental questionnaires.

In July 2020, Baux requested to be deselected as a mandatory respondent and asked that, while Commerce considered its request, Commerce suspend all of Baux's pending supplemental questionnaire response deadlines;²¹³ Baux thereafter notified Commerce that it would no longer respond to Commerce's outstanding questionnaires.²¹⁴ However, after considering these requests, Commerce denied them.²¹⁵ In the *Preliminary Determination*, we found that the use of facts available was warranted because Baux failed to provide requested information necessary for Commerce to calculate a dumping margin, in accordance with sections 776(a) of the Act. In accordance with section 776 (b) of the Act, we also preliminarily determined that the use of total AFA was appropriate with respect to Baux because Baux failed to cooperate to the best of its ability in this investigation.²¹⁶

*Baux's Comments*²¹⁷

- Baux is a subsidiary of Jupiter Aluminum Corp. (Jupiter), an American company who supported the petition in this investigation. Jupiter's purchases from Baux did not supplant any domestic producer and its very small volume of imported aluminum sheet did not cause injury to the broader domestic aluminum sheet industry.
- The Act permits Commerce to choose respondents that account for "the largest volume of the subject merchandise from the exporting country that can be reasonably examined."²¹⁸ Commerce has regularly applied this standard in selecting respondents after issuing quantity and value (Q&V) questionnaires.
- In new proceedings, Commerce frequently releases the CBP data and thereafter issues Q&V questionnaires.²¹⁹ In such cases, Commerce uses the total Q&V of reportable sales,

²¹¹ See Memorandum, "Less-Than-Fair-Value Investigation of Common Alloy Aluminum Sheet from Spain: Respondent Selection," dated April 21, 2020 (Respondent Selection Memo).

²¹² *Id.*

²¹³ See Baux's Letters, "Request to Extend/Suspend Deadlines and to be Deselected as Mandatory Respondent," dated July 1, 2020 (Baux July 1 Letter); "Request for Reconsideration to Extend/Suspend Deadlines and to be Deselected as Mandatory Respondent," dated July 6, 2020 (Baux July 6 Letter); and "Response to Denial of Request to be Deselected as Mandatory Respondent," dated July 17, 2020 (Baux July 17 Letter).

²¹⁴ See Baux July 6 Letter at 4.

²¹⁵ See Commerce's Letters, "Extension for all Questionnaire Responses," dated July 2, 2020; "Request to be Deselected as a Mandatory Respondent," dated July 16, 2020 (Commerce's July 16 Response); and "Additional Request to be Deselected as a Mandatory Respondent," dated July 28, 2020 (Commerce's July 28 Response).

²¹⁶ See *Preliminary Determination* PDM at 8.

²¹⁷ See Baux Case Brief at 1-11.

²¹⁸ *Id.* at 3 (quoting section 777A(c)(2)(B) of the Act).

²¹⁹ *Id.* at 4 (citing *Mattresses from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 69591 (November 3, 2020) (*Mattresses from Vietnam*), and accompanying PDM at 2; and *Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof, from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 51015 (August 19, 2020) (*Vertical Shaft Engines from China*), and accompanying PDM at 2-3).

regardless of the associated import into the United States. In some cases, Commerce has even applied a hybrid approach, using CBP data to identify a subset of companies that from which it required a Q&V response. Therefore, there is no bar to relying on information gathered from both CBP and actual respondent-specific information regarding the reportable resales of subject merchandise.

- Imports of aluminum sheet from Spain to the United States during the POI account for only two percent of total aluminum sheet imports into the United States, and Jupiter's imports from Baux represent only one percent of the imports of aluminum sheet from Spain to the United States during the POI.²²⁰ Given this, and considering the number of countries in the petition and the COVID-related shutdowns, it was not anticipated that Commerce had had a need, or the resources, to choose more than one mandatory respondent from Spain.
- By selecting Baux as a mandatory respondent, Commerce did not capture a large volume of sales of subject merchandise. In actuality, Jupiter's POI sales of Baux's aluminum sheet to unrelated customers would not put Baux in the top two Spanish aluminum sheet producers.²²¹
- This disconnect was not apparent until Baux was selected as a mandatory respondent, when Baux prepared the Q&V tables that it submitted with its section A response.²²² Baux notified Commerce of the issue within two weeks of its request that Baux respond to section E of the Initial Questionnaire (*i.e.*, the section related to further manufacturing). Responding to section E would have been too challenging.²²³
- The information provided by Baux remains undisputed, Commerce relied on it in the June 16, 2020 request for a section E response. Commerce is required to consider the whole record when making its determinations.
- Commerce has deselected mandatory respondents in similar situations in the past,²²⁴ and deselecting Baux under these unique facts would not create a problematic precedent, as the facts of this case are unique and unlikely to be repeated.
- Commerce failed to address Baux's multiple requests for deselection in the *Preliminary Determination* when applying AFA, including Baux's core point that record information demonstrated that its volume of subject merchandise was small.²²⁵ Reviewing courts

²²⁰ *Id.* at 6 (citing Petition at Volume I at page 16 and Exhibit GEN-9; and Baux's Letter, "Common Alloy Aluminum Sheet From Spain: Pre-Preliminary Comments," dated September 9, 2020 (Baux Pre-Prelim Comments)). We note that, in arriving at these figures, Baux does not rely on the CBP data on the record, but rather information from its own (adjusted) sales database and data in the Petition.

²²¹ *Id.* at 6-7 (citing Baux's Letter, "Supplemental Section A Questions 1 and 12 Response," dated June 26, 2020, at Exhibit SA-1; and CBP Data Memo).

²²² *Id.* at 7 (citing Baux's Letter, "Common Alloy Aluminum Sheet from Spain: Section A Questionnaire Response," dated May 19, 2020 (Baux May 19, 2020 AQR)).

²²³ *Id.* at 8 (citing Baux July 1, 2020 Letter).

²²⁴ *Id.* (citing Baux July 1, 2020 Letter at 5, which cites Memorandum, "Antidumping Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: Deselection of Xuzhou Eastern International Trading Co., Ltd. as a Mandatory Respondent and Selection of Replacement Mandatory Respondent," dated January 13, 2017).

²²⁵ *Id.* at 10 (citing *Preliminary Determination* PDM at 8).

have stated that Commerce has an obligation to consider and address arguments from interested parties that are raised according to its regulations.²²⁶

- Baux's lack of comment on the CBP data does not signify that Baux waived its right to make subsequent, related arguments using facts which came to light after the decision was made. Baux's arguments are a valid interpretation of the Act because Congress would have no reason to direct Commerce to select companies with a large volume of unreportable sales.
- Commerce cites no provision of the Act or regulations that renders its respondent selection decisions final following the comment period for CBP data. Unlike with industry support, there is no single legal opportunity to comment on this topic in the Act.

*Petitioners' Comments*²²⁷

- There is nothing in the Act to permit the deselection of a mandatory respondent, a highly unusual action.²²⁸ In selecting Aludium and Baux as mandatory respondents, Commerce followed a course consistent with the Act and well-established practice.²²⁹
- Baux cites Commerce's decision to deselect a mandatory respondent in *Hardwood Plywood from China Prelim Determination* but that case is distinct from the facts of this investigation.²³⁰ In that case, consistent with Commerce's practice in non-market economy investigations, Commerce requested Q&V information from Chinese exporters at the outset of the proceeding and used that information to select the two Chinese exporters with the largest U.S. import volumes. Commerce later modified its choice of respondents when one of those producers filed corrected Q&V information that reduced its reported value. Importantly, this action was taken by Commerce at the outset of the investigation, in contrast to Baux's request that Commerce reverse course after the issuance of the *Preliminary Determination*.
- Baux does not contend that the CBP entry data here are inaccurate; rather it urges Commerce to consider other data volumes instead.

Commerce Position: Commerce is not deselecting Baux as a mandatory respondent. In market economy investigations, Commerce's respondent selection practice is to release CBP data related to imports from the country under investigation using the primary HTS subheadings included in the scope of the investigation. Interested parties are then given an opportunity to comment on the CBP data, as well as provide comment on Commerce's respondent selection methodology (such as requesting the use of Q&V data instead of CBP data to select respondents). Commerce considers these comments and determines the largest number of individual exporters/producers it is able to examine in the proceeding. Commerce releases its respondent selection memorandum

²²⁶ *Id.* at 11 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983) (*Motor Vehicle Mfrs.*); see also *Guangzhou Jangho Curtain Wall Sys. Eng'g Co. v. United States*, 181 F. Supp. 3d 1265, 1277 (CIT 2016) (*Guangzhou Jangho Curtain Wall*)).

²²⁷ See Petitioners Baux Rebuttal Brief at 1-4.

²²⁸ *Id.* at 2 (citing section 777A(c)(2) of the Act).

²²⁹ *Id.* at 2-3 (citing Respondent Selection Memo at 5).

²³⁰ *Id.* at 4 (citing *Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 28629 (June 23, 2017) (*Hardwood Plywood from China Preliminary Determination*), and accompanying PDM at 4).

informing parties of the mandatory respondents, and issues initial questionnaires to each selected respondent. As discussed below, Commerce followed its practice in this investigation.

In March 2020, shortly before the initiation of this investigation, Commerce released the CBP data for respondent selection, and we afforded parties 18 days to provide comments on those data, as well as on our respondent selection methodology.²³¹ While we received comments from the petitioners in this proceeding, Baux failed to raise concerns regarding the use of CBP data in the respondent selection process, either with respect to the particular data on this record or related to Commerce's respondent selection methodology more broadly. Importantly, although it had the opportunity to raise such concerns and suggest alternative methods of respondent selection, such as issuing Q&V questionnaires, it failed to do so during the comment period expressly set aside for this purpose. On April 21, 2020, Commerce selected Baux as a mandatory respondent in this investigation, based on the fact that it was one of the two largest exporters of subject merchandise during the POI according to the CBP data.²³²

Baux noted that, because imports of aluminum sheet from Spain to the United States during the POI accounted for only two percent of total imports, and considering the number of countries in the Petitions and the COVID-related shutdowns, it had not anticipated that Commerce would choose more than one mandatory respondent from Spain. However, the particular considerations relied upon by Baux are not relevant to Commerce's respondent selection methodology. Section 777A(c)(2)(B) of the Act does not direct Commerce to take import penetration from the country under consideration into account when determining which mandatory respondents to examine. Instead, any decision to limit the examination is a matter of resource constraints. As we stated in our Respondent Selection Memo:

Ideally, in an investigation, Commerce would examine all known exporters and producers. However, in instances where Commerce must limit its examination due to the large number of potential respondents relative to its resource constraints, Commerce will examine as many exporters and producers as is practicable, consistent with its statutory obligation.²³³

In this investigation, we carefully considered our resources and determined that we did not have the resources to examine individually all known producers and exporters.²³⁴ We, therefore, limited the number of examined companies, following our practice, and selected the top two exporters and/or producers of aluminum sheet during the POI as indicated in the CBP data – Aludium and Baux.²³⁵ While Baux may have assumed that Commerce would have had no need to select a second company given its current resource limitations, it is Commerce, and not Baux, who is best positioned to make that assessment. Because we found, after examining our available resources, that we had the ability to examine two respondents, we selected two respondents for individual examination in this investigation, as required by section 777A(c)(2) of the Act. Significantly, that provision directs Commerce to examine “a *reasonable* number of

²³¹ See CBP Data Memo.

²³² See Respondent Selection Memo (citing section 77A(c)(2) of the Act).

²³³ *Id.* at 3.

²³⁴ *Id.* at 4.

²³⁵ *Id.* at 5.

exporters or producers,” and section 777A(c)(2)(b) of the Act directs Commerce to implement this directive by selecting “exporters and producers accounting *for the largest volume of the subject merchandise that can be reasonably examined*.”²³⁶ This provision makes no exceptions for companies with individually-small sales volumes (in relation to the exports under consideration as a whole or to exports from a collective group of countries).

It is immaterial that Baux believed that Commerce would act differently in this case regarding respondent selection. Commerce notified all interested parties, including Baux, of our intention to rely on CBP data prior to making any determination, and Baux did not object. Further, Baux does not argue that Commerce departed from its intended respondent selection methodology, grounded in its long-standing practice, nor that there was an error in the implementation of that methodology. Baux also does not contend that it was unaware Commerce had selected it as a mandatory respondent. The record clearly indicates that Commerce followed its normal respondent selection methodology in this case, and in so doing followed the directive in the Act to examine the highest volume of exports reasonably possible. Consequently, we find that it would be inappropriate to examine fewer exports than originally intended, merely because the volume of those exports from one of the selected companies was linked to a smaller-than-anticipated volume of resales.

Baux timely submitted responses to sections A through D of the initial questionnaire, including providing information on the Q&V of its sales to unaffiliated parties in its May 19, 2020 AQR. By May 19, 2020, Baux was aware of the difference in the volume of its entries reflected in the CBP data and the volume of its sales to unaffiliated customers, as reflected in Jupiter’s books and records. Despite this, Baux raised no objections for an additional 43 days. Indeed, the opportunity for Baux to comment on the CBP data and on Commerce’s respondent selection methodology had passed more than two months before Baux requested that Commerce deselect it as a mandatory respondent.

Baux now claims that there is no bar to relying on information gathered from both CBP and potential respondents when making respondent selection decisions. In fact, Baux encourages Commerce to loosely follow this approach here by relying on information gathered from both CBP and Baux’s Q&V information in its May 19, 2020 AQR to determine that Baux is not one of the two largest exporter/producers from Spain. However, as noted above, the time for such arguments has long passed, and when Baux belatedly made them, Commerce had already received full questionnaire responses in this case. Even if Commerce accepted Baux’s contention that its exports were too small for examination, a claim which is incorrect on its face, Commerce was under tight statutory deadlines to complete its *Preliminary Determination*²³⁷ and had insufficient time to revisit respondent selection and potentially identify a replacement respondent. Baux’s proposed alternative – to disregard its responses altogether and examine exports by a single company – is not viable, given the statutory mandate above to examine the

²³⁶ See section 777A(c)(2) of the Act (emphasis added).

²³⁷ Notably, as of July 1, 2020, just over three months remained until the statutory deadline for the fully-extended preliminary determination in this investigation.

largest volume of exports that can be reasonably examined (which, in this case, would include those of Baux).^{238,239}

Further, Baux has failed to demonstrate where on the record the reliability of the CBP data is undermined or otherwise supports a reevaluation of Commerce's respondent selection determination. In particular, the fact that there are differences between the CBP import data and sales within the U.S. market (between Jupiter and other U.S. customers) does not indicate that the CBP import data are inaccurate. Therefore, we find nothing on the record that would have caused us to issue Q&V questionnaires for respondent selection purposes, or to use a respondent's Q&V data submitted in the context of its own questionnaire response, to impugn the reliability of the CBP data. We note that the two cases cited by Baux – for the proposition that Commerce may issue Q&V questionnaires even in the absence of comments by the parties relating to reliability of the CBP data – were non-market economy (NME) cases, where Commerce's normal practice is to issue Q&V questionnaires and base respondent selection on the Q&V responses rather than on CBP data.²⁴⁰

Further, we find the facts in *Hardwood Plywood from China* differ significantly from the facts in this investigation. In *Hardwood Plywood from China*, Commerce issued Q&V questionnaires, as is our practice in NME cases.²⁴¹ Shortly after the selection of mandatory respondents, a company submitted a revised Q&V response. While we agree that Commerce deselected one of the chosen companies, we note that we did so a mere *four days* after issuing our initial respondent selection memorandum. In contrast, Baux submitted its May 19, 2020 AQR *four weeks* after Commerce issued its respondent selection memorandum and requested to be deselected as a mandatory respondent *six weeks* after it submitted that response (and, also after it had submitted the remainder of its initial questionnaire response and received several supplemental questionnaires). Not only was Baux's deselection request filed well into the conduct of the proceeding, unlike in *Hardwood Plywood from China*, but it was submitted well past the point that Commerce could reasonably reconsider that decision and select a replacement respondent. Further, unlike in *Hardwood Plywood from China*, here no party is arguing that the data Commerce relied on to make its respondent selection determination contained errors which undermined their validity.

²³⁸ In other words, although Baux's exports may have been small, they were greater than zero and Commerce had already expended significant resources to examine them.

²³⁹ As an aside, we agree with Baux that Commerce can use other data sources, either alone or in conjunction with CBP data, to make respondent select decisions where fact-specific circumstances warrant it. For example, in *Certain Uncoated Groundwood Paper from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 2133 (January 16, 2018), and accompanying PDM at 2-4, unchanged in *Certain Uncoated Groundwood Paper from Canada: Final Affirmative Countervailing Duty Determination*, 83 FR 39414 (August 9, 2018), Commerce based respondent selection on data gathered from responses to Q&V questionnaires after identifying various issues in the CBP data on that record. However, no party argued that the CBP data were similarly unusable for respondent selection purposes here, despite ample opportunity to do so.

²⁴⁰ See, e.g., *Mattresses from Vietnam* PDM at 2; and *Vertical Shaft Engines from China* PDM at 2-3.

²⁴¹ See *Hardwood Plywood from China Preliminary Determination* PDM at 4, unchanged in *Certain Hardwood Plywood Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 53460 (November 16, 2017) (collectively, *Hardwood Plywood from China*).

While Baux continues to assert that its actual sales data indicate that it is not the second largest respondent by volume of POI entries, it offered no new information that would cause us to reconsider our *Preliminary Determination*. The record does not contain company-specific Q&V data from other, non-selected exporters, and, thus, there is no evidence showing that other exporters' import and resale volumes did not follow a similar pattern as Baux's. Further, in accordance with section 777A(c)(2)(B) of the Act and 19 CFR 351.204(c)(2), Commerce will limit its examination to exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can be reasonably examined when a large number of exporters or producers are involved in an investigation.²⁴² Commerce followed the Act and regulations by selecting the top two exporters/producers based on CBP data. As noted above, Baux provided no comments on the CBP data, such as its own Q&V data, for Commerce to consider. By the time such information was on the record, respondent selection had been completed for nearly a month. This, coupled with the tight statutory deadlines for the determinations in this case, also made selection of another company impracticable, if not impossible. As a result, Commerce's decision to retain Baux as a mandatory respondent allows Commerce to meet its statutory mandate in this investigation. It is also not a guarantee that, had Baux provided its Q&V data alone prior to respondent selection, Commerce would not have selected it as a respondent. Baux would have needed to clearly demonstrate how its data supported its claim that the CBP data were unreliable, which it failed to do.

Baux also claims that Commerce failed to address Baux's multiple requests for deselection in the *Preliminary Determination* when applying total AFA.²⁴³ The record shows this to be inaccurate. Baux submitted its first requests for deselection as a mandatory respondent on July 1, 2020, and July 6, 2020.²⁴⁴ Commerce responded to this request on July 16, 2020, indicating that because Baux failed to comment on the CBP data and Commerce's respondent selection methodology within the comment period and because Baux had not shown that the CBP import data are inaccurate, we were not deselecting it as a mandatory respondent.²⁴⁵ Baux submitted another request for deselection as a mandatory respondent on July 17, 2020,²⁴⁶ to which Commerce responded on July 28, 2020, reiterating the reasons for the decision.²⁴⁷ Finally, Baux raised the issue of deselection again in its pre-preliminary comments,²⁴⁸ and Commerce addressed those comments in the *Preliminary Determination* PDM by continuing to find that Baux was a mandatory respondent.²⁴⁹ We agree with Baux that Commerce has an obligation to consider and address arguments from interested parties that are raised according to our regulations.²⁵⁰ However, as the record demonstrates, Commerce timely addressed the arguments posed by Baux in each of its requests.

²⁴² See section 777A(c)(2)(B) of the Act; see also 19 CFR 351.204(c)(2).

²⁴³ *Id.* at 10 (citing *Preliminary Determination* PDM at 8).

²⁴⁴ See Baux July 1 Letter and Baux July 6 Letter.

²⁴⁵ See Commerce's July 16 Response.

²⁴⁶ See Baux July 17 Letter.

²⁴⁷ See Commerce's July 28 Response.

²⁴⁸ See Baux Pre-Prelim Comments.

²⁴⁹ See *Preliminary Determination* PDM at 8.

²⁵⁰ See Baux Case Brief at 11 (citing *Motor Vehicle Mfrs; Guangzhou Jangho Curtain Wall*).

We disagree that Commerce failed to address Baux's claim that its low U.S. sales volume warrants reconsideration of our decision.²⁵¹ Putting aside the fact that Baux did not timely submit comments on the CBP data and respondent selection data, Baux has not demonstrated that the CBP data Commerce relied on in making its respondent selection determination are unreliable. Baux points to the differences between its Q&V data and the CBP import data; however, such differences do not call into question the innate reliability of the CBP data. Respondents' Q&V data often may not match CBP import data for various reasons including a time lag in the data, including a lag between entry date and when respondents record sales in their accounting systems.²⁵² Baux relies solely on this difference in its request for deselection, and for the reasons discussed above, we find this an insufficient basis to grant Baux's request.

Baux claims that, instead of fixating on the failure to comment on the CBP data, Commerce should focus on the fact that the Act requires it to examine the "volume of subject merchandise," which by definition is reportable sales in the United States. While the Act does instruct Commerce to limit its examination to the exporters and producers accounting for the largest volume of the subject merchandise that can be reasonably examined,²⁵³ Commerce typically identifies those exporters and producers using CBP data. This demonstrates why the comment period is so crucial and why Commerce has relied on Baux's lack of comment as an area of concern. If parties do not provide comments during the time period set aside, then Commerce typically has no reason to consider alternatives to the CBP data or respondent selection methodology. Given statutory deadlines, Commerce cannot be continuously reviewing the accuracy of the data used to make respondent selection. In the extremely limited instances where Commerce has deselected mandatory respondents, it has done so only when it was notified of issues close in time to its respondent selection. In this case, Baux only raised concerns about the CBP data and its selection as a mandatory respondent when Commerce directed it to respond to section E of the Initial Questionnaire.

Baux states that its information remains undisputed and is still on the record. As a result, Baux claims that Commerce is required to consider the whole record, including Baux's information, when making its determination. However, Baux fails to note that it informed Commerce that it would no longer respond to outstanding questionnaires in this proceeding.²⁵⁴ Because Baux failed to provide complete information and stopped participating in this proceeding, Commerce was unable to verify Baux's responses as required by section 782(i)(1) of the Act.²⁵⁵ Therefore, we are unable to rely on any of Baux's information in reaching a determination, and instead have relied on AFA in determining Baux's weighted-average dumping margin in this final determination.²⁵⁶

²⁵¹ *Id.* at 5-6.

²⁵² See, e.g., *Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 37321 (June 27, 2011), and accompanying IDM at 3.

²⁵³ See sections 777A(c)(2)(A) and (B) of the Act.

²⁵⁴ See Baux July 6 Letter.

²⁵⁵ See, e.g., *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination*, 81 FR 75037 (October 28, 2016), and accompanying IDM at Comment 1; and *Polyethylene Terephthalate Resin from Brazil: Final Determination of Sales at Less Than Fair Value*, 83 FR 48285 (September 24, 2018), and accompanying IDM at 4-6.

²⁵⁶ See *Preliminary Determination* PDM at 8 for a discussion of our application of AFA to Baux, which remains unchanged in this final determination.

While Commerce is not precluded from reexamining respondent selection later in a proceeding, that decision is made on a case-by-case basis when the facts warrant a reexamination.²⁵⁷ While we agree that our decision may be reviewable outside of the CBP data comment period, Baux has not provided any persuasive evidence that warrants Commerce's reexamination. Without such record information, Commerce declines to revisit its decision. Although Baux claims that it placed subsequent facts on the record that should lead Commerce to reconsider its decision, Baux fails to note that the "facts that came to light" were facts in Baux's possession from the beginning of the proceeding. Baux received the CBP data prior to Commerce's respondent selection, and it therefore knew, or should have known, at that time that its sales data differed from the CBP data. Had Baux presented these facts and explained why the CBP data were, thus, considered to be unreliable, Commerce could have timely considered the request and potentially taken action, if appropriate.²⁵⁸ But Baux failed to take advantage of the opportunity it was presented; it cannot claim down the line that it was unaware of its own sales data until nearly two months into the proceeding.

Baux also claims that its sales to Jupiter did not supplant sales by any domestic producer and that its very small volume of imported aluminum sheet did not cause injury to the broader domestic aluminum sheet industry. Baux's comments are conclusory statements unsupported by evidence on the record to support such claims. We also note that Baux's argument that deselection would not create a problematic precedent is moot, as Commerce is not deselecting Baux as a mandatory respondent. For the foregoing reasons, we continue to find that deselection of Baux as a mandatory respondent is not appropriate.

Comment 8: Whether the Number of Countries Commerce Initiated Upon is Contrary to the WTO Antidumping Agreement

*EU Delegation's Comments*²⁵⁹

- The wide geographic scope of this investigation casts doubts on Commerce's standards of initiation since all aluminum-supplying countries to the United States were targeted. It is doubtful that so many countries are dumping, as evidenced by the fact many of the dumping margins Commerce calculated for the preliminary determinations regarding aluminum sheet were low and close to the *de minimis* level.
- According to the WTO Antidumping Agreement, evidence of dumping and injury are an essential condition for the initiation of an AD initiation. Article 9.1 of the WTO Antidumping Agreement states it is desirable that the AD instrument remains limited to those countries causing injury.²⁶⁰

²⁵⁷ See, e.g., *Certain Fabricated Structural Steel from Mexico: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 84 FR 47487 (September 10, 2019), and accompanying PDM at 4, unchanged in *Certain Fabricated Structural Steel from Mexico: Final Determination of Sales at Less Than Fair Value*, 85 FR 5390 (January 30, 2020) (deselecting a mandatory respondent after a change in the scope of the investigation resulted in the respondent's having no sales of subject merchandise in the POI).

²⁵⁸ As noted above, however, it is not a foregone conclusion that Commerce would have reached a different conclusion or taken different actions.

²⁵⁹ See EU Delegation Case Brief at 3-4.

²⁶⁰ *Id.* at 3 (citing the WTO Antidumping Agreement at Article 9.1).

- The current investigations have a *de facto* effect of a safeguard measure, as they target all countries exporting a product to the United States. This is against the spirit of the WTO Antidumping Agreement, which construes the antidumping instrument as a country-specific tool.
- It is hard to believe that all countries that supply aluminum sheet to the United States are dumping their products. If there was an increase in importation after the imposition of AD duties against the People's Republic of China in 2018, it simply means that there is a strong demand for aluminum sheet that cannot be supplied domestically.
- This is further confirmed by the fact many U.S. importers have relied on section 232 exclusions in order to fulfil domestic demand.

No other party commented on this issue.

Commerce Position: The EU Delegation contends that it is unlikely that a wide geographic scope, and the inclusion of basically all aluminum supplying countries to the United States calls into question Commerce's standards of initiation. We note that U.S. law and regulations are in compliance with the United States' obligations under international agreements, such as the WTO Antidumping Agreement. Further, in this proceeding, Commerce received properly-filed petitions from the respective U.S. industry, that Commerce reviewed and determined met the standards and requirements for initiation as set forth in the U.S. statute and Commerce's regulations, and are a matter of public record. Therefore, the number of countries for which petitions are filed, and the number of petitions on which Commerce initiates an investigation, are determined purely on the basis of the information on the record, as are Commerce's findings that reflect whether all the requirements for initiation under U.S. law are met.

V. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final determination of this investigation and the final dumping margins in the *Federal Register* and will notify the International Trade Commission of our determination.

☒

☐

Agree

Disagree

3/1/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh

Acting Assistant Secretary

for Enforcement and Compliance