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Administrative Review
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June 27, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Stilbenic Optical Brightening Agents from Taiwan: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review; 2014-2015

SUMMARY

The Department of Commerce (the Department) analyzed the comments submitted by Teh Fong Ming International Co., Ltd. (TFM), the sole mandatory respondent in this administrative review of the antidumping duty (AD) order on certain stilbenic optical brightening agents (OBAs) from Taiwan covering the period of review (POR) May 1, 2013, through April 30, 2014, and the rebuttal brief filed by Archroma U.S., Inc. (Archroma), a domestic producer of merchandise.[1] As a result of this analysis, we continue to find that TFM failed to cooperate by not acting to the best of its ability in providing requested information, and accordingly, continue to apply a margin to TFM based on total adverse facts available (AFA). We did not revise the weighted-average margin for TFM from the *Preliminary Results*.[2] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

Below is the complete list of the issues in this review on which we received a case brief from TFM and a rebuttal brief from Archroma.

Comment 1: Questionnaire Original Deadline
Comment 2: Hindrance of Proceeding
Comment 3: Opportunity to Remedy Under the Statute and Regulations

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[1] *See Certain Stilbenic Optical Brightening Agents From Taiwan: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 77 FR 27419 (May 10, 2012) (*Amended Final and Order*).
[2] *See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 9805 (February 26, 2016) (*Preliminary Results)* and its accompanying decision memorandum (Preliminary Decision Memorandum).

Comment 4: Untimely Extension Request Due to Extraordinary Circumstances
Comment 5: *Per Se* Rule Decision Making
Comment 6: Focus on Adverse Facts Available (AFA) Rate and not on Decision to Apply AFA
Comment 7: Rejection Letter Attachment
Comment 8: Addressing the Facts of the Case
Comment 9: Neutral Facts Available

BACKGROUND

On February 25, 2016, the Department published the *Preliminary Results* in the administrative review of the AD order on OBAs from Taiwan. In accordance with 19 CFR 351.309, we invited parties to comment on the *Preliminary Results*.[3] On March 28, 2016, TFM submitted a case brief. On April 4, 2016, Archroma submitted a rebuttal brief. No other party submitted case or rebuttal briefs. At the request of TFM,[4] we held a hearing on May 11, 2016.[5] Based on our analysis of the comments received, we have not revised the weighted-average margin for TFM from the *Preliminary Results*.

SCOPE OF THE ORDER

The stilbenic OBAs covered by this order are all forms (whether free acid or salt) of compounds known as triazinylaminostilbenes (*i.e.*, all derivatives of 4,4'-bis [1,3,5- triazin-2-yl][6] amino-2,2'-stilbenedisulfonic acid), except for compounds listed in the following paragraph. The stilbenic OBAs covered by this order include final stilbenic OBA products, as well as intermediate products that are themselves triazinylaminostilbenes produced during the synthesis of stilbenic OBA products.

Excluded from this order are all forms of 4,4'-bis[4-anilino-6-morpholino-1,3,5-triazin-2-yl][7] amino-2,2'-stilbenedisulfonic acid, C40H40N12O8S2 ("Fluorescent Brightener 71"). This order covers the above-described compounds in any state (including but not limited to powder, slurry, or solution), of any concentrations of active stilbenic OBA ingredient, as well as any compositions regardless of additives (*i.e.*, mixtures or blends, whether of stilbenic OBAs with each other, or of stilbenic OBAs with additives that are not stilbenic OBAs), and in any type of packaging.

These stilbenic OBAs are classifiable under subheading 3204.20.8000 of the Harmonized Tariff Schedule of the United States (HTSUS), but they may also enter under subheadings 2933.69.6050, 2921.59.4000 and 2921.59.8090. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

[3] *See Preliminary Results* at 9805.
[4] *See* letter from TFM dated March 19, 2016.
[5] *See* hearing transcript, filed on the record May 17, 2016.
[6] The brackets in this sentence are part of the chemical formula.
[7] *Id*.

DISCUSSION OF THE ISSUES

Comment 1: Questionnaire Original Deadline

TFM argues that the Department provided TFM 20 days, one day less than the Department practice of 21 days, to submit its response to section A of the Department's antidumping duty questionnaire (QRA) and that if this alleged deadline error was corrected the public version of the QRA would be timely. TFM cites the Department's E&C Antidumping Manual (AD Manual) as the authority on the Department's practice of providing 21 days to respondents to submit their QRA.[8] TFM, citing *SKF*[9] and *Transactive*[10] argues it is unlawful for the Department to treat similar situations differently and implies that, by giving TFM one day less to submit its QRA than the alleged Department practice, TFM has been treated differently than other respondents in other cases.

Archroma argues that TFM cannot rely on the Department's AD Manual to circumvent the deadlines expressly provided by statute, regulation, and the questionnaire the Department issued to TFM because the AD Manual contains a clear disclaimer that the manual is for internal training and guidance of Enforcement and Compliance personnel only and states that it cannot be cited to establish Department practice.[11] Archroma also argues that even if one were to consider the AD Manual an authority on the Department's practice regarding questionnaire deadlines, the AD Manual, citing relevant regulations,[12] states that the Department is "given the authority to set the time limit for the response" and that "the regulations provide for rejection of untimely-filed documents." Archroma contends that the Department, consistent with its regulatory authority, set a deadline in its antidumping questionnaire and the accompanying cover letter and expressly stated that it would not accept any requested information submitted after the deadline. Archroma concludes that the only relevant fact is that the Department set the deadline for the QRA and TFM failed to file its response or request an extension by the set deadline.

Department's Position: Pursuant to 19 CFR 351.301(c)(1)(i), initial questionnaire responses are due 30 days from the date of the receipt of such questionnaire, and if the Secretary requests a separate response to individual sections of the questionnaire, the time limit for response to individual sections of the questionnaire may be less than the 30 days allotted for the response to the full questionnaire. The Department, in its Questionnaire, gave TFM 20 days to respond to section A of the questionnaire and 38 days to respond to sections B, C, D, and E of the questionnaire.[13] In other words, the Department staggered the due dates for the responses to the

[8] *See* the Department of Commerce Antidumping Manual, Chapter 4 at 17, available at http://enforcement.trade.gov/admanual/2015/Chapter%2004%20Questionnaires.pdf (AD Manual)
[9] *See SKF USA Inc. v. United States*, 263F. 3d 1369, 1382 (Fed. Cir. 2001) (*SKF*).
[10] *See Transactive Corp. v. United States*, 91 F.3d 232 (D.C. Cir. 1996) (*Transactive*).
[11] *See generally* the Department of Commerce Antidumping Manual, available at http://enforcement.trade.gov/admanual/; *see also id.* at Chapter 1, at 1, available at http://enforcement.trade.gov/admanual/2015/Chapter%2001%20Introduction.pdf.
[12] *See* 19 CFR 351.302(c)(2)(ii) (2013) ("In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response…"). The regulation has since been amended, and similar language is now codified at 19 CFR 351.301(c)(1)(i) ("The time limit for response to individual sections of the questionnaire, if the Secretary requests a separate response to such sections, may be less than the 30 days allotted for response to the full questionnaire.").
[13] *See* Letter from Minoo Hatten to TFM dated August 7, 2015 (Questionnaire).

different sections of the questionnaire, requested a separate response to section A, and, as provided for in the regulations, established deadlines for TFM of 20 days to respond to section A of the questionnaire and longer for TFM to submit other sections of the questionnaire response. The Department subsequently granted TFM multiple extensions to file its response to section A of the questionnaire. Ultimately, TFM requested, and the Department granted, 11 additional days to file its business proprietary response to section A of the questionnaire and 12 additional days to file the public version of its section A response, not including the extra day under the one-day lag rule to file the public version.[14] In total, TFM was granted 31 days to submit its business proprietary response to section A of the questionnaire, and 33 days to submit the public version of its section A response. Accordingly, TFM was ultimately granted more than the original 20 days the Department gave TFM to submit its section A response. Indeed, to file its section A response, TFM had even more than the 30 days contemplated by 19 CFR 351.301(c)(1)(i) to provide its complete questionnaire response, despite the Department's ability to set deadlines for individual section responses that are less than 30 days.

TFM's claim that the Department gave TFM one day less than the Department practice to respond to ection A of the questionnaire—thereby treating TFM differently than other respondents in other proceedings—is unsupported by the facts. First, the AD Manual contains a clear disclaimer that the manual is for internal training and guidance of Enforcement and Compliance personnel only and states that it cannot be cited to establish Department practice. TFM's attempt to rely on the AD Manual to establish Commerce's practice is in contravention of this disclaimer, and the Department does not find that TFM can rely on the Department's AD Manual where the Department expressly established a deadline in the cover letter to the questionnaire the Department issued to TFM. Second, even if the AD Manual might be construed as establishing Commerce's practice with regard to setting initial section A response deadlines, TFM requested and was granted several extensions totaling 12 days beyond the initial section A response deadline. Accordingly, any alleged harm TFM may have suffered as a result of confusion over its initial 20-day instead of 21-day deadline was obviated by the granting of multiple extension requests.

Comment 2: Hindrance of Proceeding

TFM argues that, because TFM's business proprietary QRA was timely filed, and the untimely filed public version QRA was filed before the opening of business the next business day after the deadline, TFM's untimely submission did not hinder the Department's review of the submission and, therefore, the Department's rejection of TFM's QRA is an unlawful abuse of discretion.[15] TFM, citing *Artisan*[16] and *Grobest*[17], argues that, under the statute, the Department may not impose "draconian" penalties for minor infractions that do not affect the Department's ability to meet its statutory mandate to calculate a margin.[18] TFM also claims that, because the *Extension*

[14] *See* Letter from Minoo Hatten to TFM dated August 25, 2015, (First Extension). *See also* Letter from Minoo Hatten to TFM dated September 2, 2015, (Second Extension). *See also* Letter from Minoo Hatten to TFM dated September 8, 2015, (Third Extension). *See also* Letter from Minoo Hatten to TFM dated September 11, 2015, (Fourth Extension).
[15] *See* TFM's case brief, dated March 28, 2016, (TFM Case Brief) at pages 6-9.
[16] *See Grobest & I-Mei Indus. (Viet.) Co. v. United States*, 815 F. Supp. 2d 1342 (Ct. Int'l Trade, 2012) (*Grobest).*
[17] *See Artisan Manufacturing Corp. v. United States*, 978 F.Supp.2d 1334 (Ct. Int'l Trade, 2014) (*Artisan*).
[18] *See* TFM Case Brief at page 7.

of Time Limits specifies that for submissions due at 5:00 p.m., if the Department is unable to respond to an extension request prior to 5:00 p.m., the submission would be due by the opening of business (8:30 a.m.) on the next work day,[19] the Department recognizes the fact that the Department is closed and, therefore, the filing of the submission by the opening of business the following business day does not hinder the investigation or review.

TFM, citing *Grobest*, also claims that under the statutory scheme, a questionnaire response filed after the deadline cannot be rejected where the rejection of the respondent's submission as untimely appears to have imposed a substantial hardship upon the company and resulted in an inaccurate dumping margin. TFM also argues that the Court of International Trade (CIT) in *Grobest* concluded that the company and its counsel were diligent in correcting the omission, that there was no significant burden on Commerce from the company and its counsel missing the deadline, and that the company's own claims in prior reviews had been supported and found accurate.

TFM also argues that although its submission was untimely, the Department had sufficient time to complete the questionnaire process in the review within the statutory time limits.[20] TFM, citing the AD Manual, states that it is Department practice to grant extensions of up to 14 days to a respondent to submit its QRA, but that TFM received only 12 days of extensions to submit its QRA.[21] TFM claims that, therefore, the Department could have allowed TFM more time to answer the public version of the QRA and still met its statutory deadlines to satisfy the statutory objective to accurately calculate dumping margins. TFM also cites *Tanjian*[22], claiming that the Department had given the respondent in that case a total of 42 days to submit its QRA and still had enough time to complete the review within the statutory time limits. TFM, citing *NTN*[23] and *Timken*,[24] also claims that the Department has some discretion in accepting filings but that the Department's exercise of such discretion must be in reasonable in light of statutory obligations to calculate accurately a dumping margin with the statutory time limits. TFM claims that a regulation which is not required by statute may be waived where failure to do so would be an abuse of discretion and that, because the deadline was not necessary to satisfy statutory obligations, the Department's failure to waive TFM's public version QRA deadline constitutes an abuse of its discretion. TFM also claims that the WTO Appellate Body has ruled that the Department may not reject information as untimely if the information is submitted within a reasonable period of time.[25] TFM also claims that the Department failed to justify and explain in its preliminary decision memorandum why it was necessary to reject TFM's timely filed business proprietary QRA and response to sections B, C, and D of the questionnaire and could not have fully and efficiently conducted the review within the statutory time frame.

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[19] *See Extension of Time Limits, 19 CFR Part 351*, 78 FR 57790, 57792 (September 20, 2013) (*Extension of Time Limits*).
[20] *See* TFM Case Brief at 13-14.
[21] *See* AD Manual at Chapter 4 at page 7.
[22] *See Tianjin Magnesium International Co., Ltd. v. United States*, 533 F. Supp. 2d 1327 (Ct. Int'l Trade, 2008) (*Tianjian*).
[23] *See NTN Bearing Corp. v. United States*, 74 F.3d. 1204 (Fed. Cir. 1995) (*NTN*).
[24] *See Timken U.S. Corp. v. United States*, 434 F.3d 1345 (Fed. Cir. 2006) (*Timken*).
[25] WTO Appellate Body Report, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* (July 24, 2001) para 83–86 (*WTO HR Japan*).

Archroma argues that the circumstances of the case do not warrant the waiver of the established statutory and regulatory deadlines necessary for the efficient administration of antidumping cases. Archroma claims that the efficient administration of antidumping cases requires that parties provide information by established deadlines set forth in the Department's regulations and that these deadlines exist to provide structure and finality to the review process.

Archroma argues that, contrary to TFM's assertion (that courts have required the Department to waive the regulatory consequences of a party that files an extension request after the deadline), in *Dongtai Peak*[26] the Federal Circuit reinforced the Department's right to enforce its deadlines in order to limiting its administrative burden and promote finality. Archroma claims that in *Grobest,* cited by TFM, the CIT refers to broad principles for when the interest of accuracy and fairness outweigh the burden placed on the Department and the interest of finality. Archroma claims that the interests identified must be weighed on a case-by-case basis. Archroma claims that the fact pattern in this review is more similar to the facts in *Dongtai Peak* than *Grobest*, in that in both *Dongtai Peak* and the current review: 1) the information that was untimely filed was significant in volume and importance to the case; 2) the Department had approximately four months before the preliminary results to review the information; and 3) the record provided evidence that future filings would be untimely and provide insufficient information. Archroma claims that, in the current review, due to the lack of a viable home market, the QRA contained information necessary for the Department to determine the proper third-country comparison market, and that not only was the QRA late but the information TFM provided in the QRA regarding third country markets was so insufficient that the Department could not even adequately begin to determine the appropriate comparison market. Archroma claims that the acceptance of a late submission when a history of late and inadequate filings already exists ensures that the Department would likely face a significant burden to produce an adequate dumping analysis. Archroma also argues that exceptions to the regulations result in unwarranted delays and that the circumstances of TFM's failure in this case are identical to that of the appellant in *Dongtai Peak*. Archroma argues that in *Dongtai Peak*, the respondent filed extension requests two days and ten days after the deadline claiming good cause for making the untimely extension requests; the Department's rejection of both extension requests was upheld by the Federal Circuit. Archroma claims that in the current case, the Department was correct in rejecting an untimely filed extension request and an untimely filed QRA.

Department Position: We continue to find that TFM, by untimely filing its public version QRA and then submitting its Fifth Extension request for the public version QRA several days after the public version QRA was due, hindered the proceeding. The Department appropriately rejected the untimely QRA and based TFM's dumping margin on adverse facts available.[27]

TFM's argument that filing its submission prior to the opening of business on the business day following the deadline does not hinder the investigation or review—relying, in part, on the *Extension of Time Limits* language—is unpersuasive. The Department establishes deadlines so that it can conduct this (and its numerous other trade remedy proceedings) in an efficient manner

[26] *Dongtai Peak Honey Industry Co., Ltd. v. United States of America*, 777 F.3d 1343 (Fed. Cir. 2015) (*Dongtai Peak*).
[27] *See* Letter from TFM to the Secretary of Commerce dated September 13, 2015, (Fifth Extension Request). This letter was also rejected and removed from the record when the Department rejected TFM's section A.

within its statutory and regulatory deadlines. Therefore, it is critical that parties file documents by the established deadline or timely request an extension of such a deadline. Timely filings and timely extension requests contribute to the Department's efficient administration of the numerous cases before it and the antidumping duty laws. Conversely, untimely filings and untimely extension requests hinder the efficient conduct of our proceedings, and lead to the Department needing to devote additional time and resources to addressing such untimely filings and requests. Additionally, although the burden associated with a single late-filed questionnaire response may be perceived as minimal, that burden is not minimal when aggregated across all proceedings. Accordingly, for the efficient conduct of its proceedings, it is critical that parties adhere to the deadlines established by the Department.[28]

The *Extension of Time Limits* excerpt that TFM cites addresses the situation where a party filed a timely extension request prior to 5:00 p.m. on the day the submission is due and the Department did not respond to the extension request by 5:00 p.m. on the day the submission is due:

> Parties should be aware that the likelihood of the Department granting an extension will decrease the closer the extension request is filed to the applicable time limit because the Department must have time to consider the extension request and decide on its disposition. Parties should not assume that they will receive an extension of a time limit if they have not received a response from the Department. For submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day. *See* 19 CFR 351.103(b).[29]

The purpose of this excerpt is to clarify that the lack of a response to the timely extension request by the Department cannot be interpreted as an implicit granting of an extension and, therefore, the submission must be submitted prior to opening of business the following day. The Department cannot automatically grant extension requests precisely because it must evaluate whether, among other things, granting such a request will hinder the Department's administration of the cases before it such that the request may not be granted or not granted in full. The language emphasizes, rather than diminishes, the Department's reluctance to allow parties to self-grant extensions. Therefore, we are not persuaded that this language should excuse the untimely filing of a submission for which the Department has not been given the opportunity to evaluate a timely extension request.

In *Grobest*, the CIT premised its holding on the fact that the company's untimely separate rate certification would not necessarily prompt further inquiry into the company.[30] Contrary to *Grobest*, TFM's prior history in the case underlines the importance of receiving a complete QRA as early as possible in the proceeding. In the less-than-fair-value (LTFV) investigation, the Department determined that TFM did not have a viable home market or viable third-country

[28] At the time, the Department was conducting 99 proceedings.
[29] *Extension of Time Limits* at 57792.
[30] *Grobest*, 815 F. Supp. 2d at 1367 (reasoning that the Department's "further inquiry and investigation of the respondent" was "wholly hypothetical" because "Commerce has not conducted a separate-rate analysis in response to any of {the company's} prior {separate rate certifications}").

market and, therefore, based normal value on constructed value.[31] In TFM's first review, the Department determined that TFM did not have a viable home-market, but that TFM had several third-country markets that needed to be examined as possible bases for normal value, and after examination of each of those third-country markets, determined that Finland was the appropriate third country upon which to base normal value.[32] Being able to determine the basis for normal value early in the proceeding is crucial to a case where the home market is not viable. The Department must review the information submitted in the QRA to determine whether the home market or a third-country market is viable and, dependent on the Department's decision, the respondent submits its response to section B of the questionnaire, which is the section of the response that is dedicated to the comparison market. Frequently the information provided in the QRA will need clarification or additional information will be necessary to determine the appropriate comparison market, and the Department will have to issue supplemental questionnaires before it can make a definitive decision on the appropriate comparison market. If, based on supplemental questionnaire responses, the Department decides that the appropriate comparison market is a market other than the one for which the respondent provided information in the section B response, the Department will request a completely new section B response from the respondent containing information on the third-country market that was determined to be the appropriate comparison market. Therefore, having a complete QRA towards the beginning of the proceeding is crucial to the review of a company, especially when the company's history supports anticipation of the possibility that the home market may not be viable. As stated above, the Department granted TFM several extensions totaling 12 days to submit its QRA because the information contained in the QRA is crucial to the development of the remaining sections of the questionnaire responses and forms the entire basis of the case. Accordingly, unlike in *Grobest*, the burden of accepting TFM's late-filed QRA is not minimal, because the QRA would likely prompt further investigation.

In *Artisan*, the respondent filed an untimely quantity and value response that the court found did not hinder the entire proceeding as there were multiple respondents participating, and the proceeding could move forward in spite of the untimely filed quantity and value response from one respondent.[33] In our current proceeding, TFM is the sole respondent and therefore, the

[31] *See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 FR 68154, 68157 (November 3, 2011) (*Preliminary Determination*), unchanged in *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value* 77 FR 17027 (March 23, 2012), and unchanged in *Amended Final and Order*.

[32] *See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2013-2104*, 80 FR 32085 (June 5, 2015) and accompanying decision memorandum at 6, unchanged in *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Results of Antidumping Duty Administrative Review; 2013-2014* 80 FR 61368, October 13, 2015.

[33] In proceedings with numerous respondents, the Department may choose to issue quantity and value questionnaires to respondents in order to select the companies that it will individually examine in the proceeding based on their quantity and value questionnaire responses. If one company does not submit its quantity and value response by the deadline, the proceeding can generally progress, and the Department makes its respondent selection based on the quantity and value responses that are on the record by the set deadline. Therefore, an untimely response by one company does not paralyze the whole proceeding. This is different from the scenario in this administrative review, where we are individually examining TFM solely. In our current review, TFM was the only company for which a review was requested, the only company for which we initiated an administrative review, and TFM is the sole respondent in the proceeding. Therefore, the progress of the entire proceeding is dependent on TFM's filing, and consequently, the untimely filing of a response by TFM, the sole respondent, hinders the entire proceeding.

progress of the proceeding is dependent solely on the receipt of the necessary information from TFM. As we discussed above, the information contained in the QRA is crucial in defining the basis of the normal value, which in turn will determine, first, whether a response to section B of the questionnaire is necessary based on whether the home market or a third country is found to be a viable comparison market, and second, which market's information TFM would have to provide in section B based on our determination of which of TFM's markets is the appropriate comparison market. Further, in *Artisan*, the CIT, quoting *Nippon Steel*, holds that "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"[34] and that the Department's discretion to "'use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available' applies when a party fails to meet this standard."[35] TFM filed its business proprietary QRA on September 9, 2016, which means that TFM had gathered all of the information necessary to respond to the QRA, compiled it into a finalized business proprietary response, and had identified all the business proprietary information contained in the response by brackets. TFM, however, failed over the course of three business days[36] since it filed the business proprietary QRA to redact properly the information from the business proprietary version of its response and submit it to the Department. This could hardly be characterized as putting forth the maximum effort to ensure a complete and accurate submission. Furthermore, compilation and submission of the public version is vital to the Department's task because, as discussed further under Comment 3, the delay in submission of TFM's public QRA prevented the domestic interested party from receiving information crucial to the appropriate basis of normal value and affected its ability to comment on this information before TFM's section B response was due.

As discussed above, the facts of the current proceeding are distinct from those in *Artisan* and *Grobest*; instead they are very similar to those in *Dongtai Peak.* In *Dongtai Peak*, the Federal Circuit concluded that the Department properly exercised its discretion in rejecting the respondent's untimely filed extension requests and untimely filed supplemental questionnaire response despite the respondent's claim that it encountered debilitating computer system malfunctions and difficulties in overseas communication between the rurally-located respondent and its U.S. based counsel. In *Dongtai Peak*, the Federal Circuit also concluded that the Department reasonably determined that the respondent was capable of at least submitting an extension request on time, but simply failed to do so and, therefore, found that good cause did not exist to extend the deadline retroactively. As in *Dongtai Peak*, TFM's Third Extension Request and Fourth Extension Request indicate that TFM knew of its communication difficulties and of the unscheduled medical leave of the person tasked with filing the public version QRA prior to the date the public version QRA was due, and did not prevent TFM from filing an extension request before that date.[37] As in *Dongtai Peak*, the untimely filed response contained vital information. The QRA contains crucial information for determining the appropriate basis

[34] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*).
[35] *See Artisan* at page 1342.
[36] The three business days were: one day for the one-day lag rule of filing a public version, a second day after TFM requested and received an extension to file the public version of the QRA, and a third day on which the public version was due after the extension was granted.
[37] *See* letter from TFM to the Secretary of Commerce dated September 8, 2015 (Third Extension Request). *See also* letter from TFM to the Secretary of Commerce dated September 10, 2015 (Fourth Extension Request). *See also* letter from Minoo Hatten to TFM dated September 8, 2015 (Third Extension). *See also* letter from Minoo Hatten to TFM dated September 11, 2015 (Fourth Extension).

for the normal value and the deadlines for this information was important because, in both prior proceedings (the LTFV investigation and the first review), TFM did not have a viable home market and the Department had to determine whether a viable third-country market or constructed value were appropriate bases for the normal value. Finally, as in *Dongtai Peak*, our rejection of the untimely-filed extension request and public QRA does not violate TFM's due process rights because TFM had notice of the deadline and the opportunity to respond to our questionnaire or file a timely request for an extension.

Further, prior to initiation of this review, Commerce revised its regulations concerning time limits for the submission of factual information and established a new standard for acceptance of untimely extension requests. In particular, Commerce moved beyond "general" deadlines and established specific deadlines depending on the category of factual information being provided.[38] These changes were intended to ensure that Commerce has sufficient time to review and analyze factual information "at the appropriate stage in the proceeding," and before "it is too late {for Commerce} to adequately examine, analyze, conduct follow-up inquiries regarding, and if necessary, verify the information."[39] Around the same time, Commerce also modified 19 CFR 351.302(c) concerning the filing of extension requests to make clear that untimely extension requests would be accepted only in "extraordinary circumstances." Both of these changes demonstrate that Commerce intended to establish definitive deadlines, and that those deadlines must be observed. TFM was on notice of this renewed commitment to setting and enforcing deadlines; moreover, these changes post-dated the CIT's decisions in *Artisan* and *Grobest*.

Finally, we are not persuaded by TFM's argument that although its submission and extension request were untimely, the Department had sufficient time to complete the questionnaire process in the review within the statutory time limits. As noted under Comment 1, the Department's AD Manual is a training tool and does not establish the Department's practice. However, because TFM cites the AD Manual, we note that the AD Manual also notes that "{e}xtensions are usually granted for no more than 14 days."[40] This recognizes that the Department may determine under the particular facts of a case that an extension of 14 days would unreasonably hinder the Department's inquiry or prevent it from meeting its statutory deadlines. TFM's argument that the Department should have allowed it 14 days essentially requires the Department to ignore the very case-specific circumstances that TFM urges us to consider in granting its untimely-filed extension of time. Finally, that the Department in *Tanjian* gave the respondent additional time to submit its QRA ignores the case-specific circumstances—as discussed above, the extensive inquiry that typically follows TFM's section A responses—that influence the Department's ability to meet its statutory deadlines in this proceeding. TFM's QRA is the first step in a long process. The Department set the deadline for TFM's QRA because that deadline was necessary for it to meet its statutory deadlines. Accordingly, the Department finds that it has reasonably exercised its discretion, in accordance with the guidance of *NTN* and *Timken.*

To the extent that TFM argues that the Department did not, in is preliminary determination, justify its decision to reject TFM's business-proprietary QRA because TFM's public QRA was

[38] *See Definition of Factual Information and Time Limits for Submission of Factual Information; Final Rule*, 78 Fed. Reg. 21,246, 21,247 (Dep't of Commerce Apr. 10, 2013) (*Time Limits*).
[39] *Id.*
[40] *See* AD Manual at Chapter 4 at page 17.

untimely filed, the Department disagrees.[41] Further, contrary to TFM's assertion, the Department did not reject its responses to sections B, C, and D of the questionnaire;[42] however, the Department could not use those sections because of the lack of TFM's QRA.

Comment 3: Opportunity to Remedy Under the Statute and Regulations

TFM argues that the Department did not provide TFM an opportunity to remedy its QRA deficiency as required by the statute. TFM claims that, because TFM timely submitted its business proprietary QRA, all requirements of the section 782(e) of the Tariff Act of 1930, as amended (the Act) were met. Accordingly, as provided by section 782(d) of the Act, the Department must provide TFM the opportunity to remedy any deficiencies in its submission. TFM also claims that the Department also violated the statute because it did not issue a supplemental questionnaire to address any further concerns as to TFM's sections B, C, and D of the questionnaire as provided by section 782(d) of the Act.

TFM also argues that the Department did not provide TFM an opportunity to remedy its QRA deficiency as required by the regulations. TFM claims that, according to 19 CFR 351.304, if a submission is rejected because it did not conform to the requirements of section 777(b) of the Act, the submitting person may correct the problems and resubmit the information within two days of receiving the Department's rejection. TFM claims that, because it filed the public version QRA before the Department rejected the business proprietary QRA as nonconforming due to a lack of a public version, TFM had essentially corrected the problems and resubmitted the information within the two-business day timeframe provided by the regulations to remedy the deficiency and, thus, it should have been accepted by the Department. TFM also argues that, in rejecting TFM's public version QRA, and then rejecting the business proprietary QRA as non-conforming, the Department reversed the statutory and regulatory analysis order. TFM claims that the statutory and regulatory requirement is that the Department notify the respondent of any deficiencies and give the submitting party the opportunity to remedy.

Archroma argues that the two-day rule to remedy nonconforming business proprietary information (BPI) submissions does not apply to TFM's untimely filed submission. Archroma claims that TFM misstates and conflates 19 CFR 351.304(d) and 351.303(c) to argue that the one-day lag rule does not apply and all untimely filings can be cured within the two-day period provided to correct nonconforming submissions of BPI. Archroma claims that untimely filings are not nonconforming submissions. Archroma claims that section 777(b) of the Act covers the requirements and designations of BPI, and that 19 CFR 351.304(d) relates to the time period in which a party may cure issues relating to the designation of BPI. Archroma claims that 19 CFR 351.304(d) has nothing to do with curing untimely filed public versions of questionnaire responses or untimely filed extension requests. Archroma claims that TFM failed to comply with the one-day lag rule mandated by 19 CFR 351.303(c) to file a public version of its QRA and failed to timely file a request for extension prior to the deadline. Archroma claims that under these circumstances, 19 CFR 351.304(d) does not provide relief for untimely filings and, thus, the Department was correct in rejecting TFM's questionnaire response.

[41] *See* Preliminary Determination Memorandum at "Background"; *see also* TFM Case Brief at 12.
[42] *Id.* at "Application of Facts Available With an Adverse Inference".

Department's Position: We are not persuaded by TFM's argument that the Department is legally obligated to provide TFM the opportunity to remedy the untimeliness of a submission.

First, the Department disagrees with TFM's contention that its QRA complied with section 782(e) of the Act. Section 782(e) requires the party to establish that: (i) "the information {was} submitted by the deadline established for its submission;" (ii) "the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority … with respect to the information;" and "the information can be used without undue difficulties." None of this is true with regard to the portion of TFM's QRA that was timely submitted. Both the statute[43] and regulations[44] require that submissions of business proprietary information be accompanied by a public version of that submission. Accordingly, a party's business proprietary submission is not complete if it is missing a public version. Thus, TFM's QRA was not submitted by the deadline established for its submission, because the information—*i.e.* both the public and business proprietary versions of TFM's QRA—were not submitted prior to the deadlines established in 19 CFR 351.303, 19 CFR 351.304, the Department's initial questionnaire cover letter, or the Department's letter granting TFM an extension to file its public QRA until 5:00 p.m. on September 11, 2015. Neither did TFM act the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, because when it became clear that TFM would not be able to file its public version prior to the 5:00 p.m., September 11, 2015, deadline established by the Department, TFM did not request an extension, even though it had the ability to do so. Finally, TFM's timely business proprietary QRA cannot be used without undue difficulties. As discussed above, a public version of documents containing business proprietary information is required under the statute and regulations for the Department to adequately demonstrate its analysis to the public and for other interested parties to review. [45] Specifically, the only parties that have access to the business proprietary versions of a document are the owners of the business proprietary information that created the document and their counsel (here, TFM and TFM's counsel), and the counsel of the other parties involved in the proceeding if they have received permission to access the business proprietary information under an administrative protective order (here, Archroma's counsel). In other words, the public and the domestic interested party itself, here, Archroma, do not have access to the business proprietary version of documents on the record of the proceeding, but must rely on the public version to stay informed of the proceeding and provide comments on issues in the proceeding.

The statute and the regulations do provide the opportunity for parties to remedy non-conforming submissions, but assume the submission was timely-filed under the statute and regulations. The SAA's discussion of section 782(d) of the Act clarifies that the language is "not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit

[43] *See* section 777(b) of the Act ("The administering authority … shall require that information for which proprietary treatment is requested be accompanied by either a non-proprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or a statement that the information is not susceptible to summary….").
[44] *See* 19 CFR 304(c)(1) ("A person filing a submission that contains information for which business proprietary treatment is claimed **must** file a public version of the submission. The public version must be filed on the first business day after the filing deadline for the business proprietary document….") (emphasis added).
[45] *See* 19 CFR 351.104(b) (requiring the Department to "maintain a public record of each proceeding"); *see also* SAA at 197 (amending the statutory language "to ensure that interested parties share nonproprietary information).

continual clarifications or corrections of information or to submit information that cannot be evaluated adequately within the applicable deadlines."[46] Accordingly, we read section 782(d) as, to the extent practicable, permitting parties who have timely submitted factual information, but that factual information is deficient in substance, to remedy those deficiencies. Moreover, 19 CFR 351.304(d) does not permit parties to remedy a business proprietary submission filed without a corresponding public version. That regulation provides that the Department "will reject" submissions that do not comply with section 777(b) of the Act which includes, *inter alia*, not submitting a non-proprietary summary of business proprietary information. The options to remedy available thereafter pertain to the treatment of business proprietary information—*e.g.* where the Department has found that certain information for which a party has claimed business proprietary information treatment is publicly available, where information classified as business proprietary information by one party is not treated as such in another party's submission, where parties have not provided reasons for the necessity of business proprietary treatment of certain information, or where the public version does not reflect or summarize the business proprietary version appropriately. In other words, the opportunity to remedy under the statute and regulations is provided to remedy errors in the treatment of information as business proprietary or the summarization of such information in the public version. The opportunity to remedy under the statue and regulations does not provide an opportunity to remedy the untimeliness of an untimely filed public version because that would amount to a *de facto* extension of the deadline for all public versions.

As we stated in our preliminary results, the lack of the QRA renders the information in the response to sections B, C, and D of the questionnaire unusable as it is without context that the information in the response to section A of the questionnaire would provide and, therefore is unreliable for purposes of calculating a weighted-average dumping margin.[47] The QRA contains important information and several crucial decisions are made based on the information reported in the QRA; it is necessary information that is not on the record of the current review. Therefore, the absence of the QRA from the record requires the use of facts otherwise available pursuant to section 776(a)(1) of the Act. Thus, sending supplemental questionnaires to TFM for its responses to sections B, C, and D of the questionnaire would be meaningless and futile as the information contained in TFM's responses to sections B, C, and D supplemental questionnaires would be as unusable as TFM's response to sections B, C, and D of the questionnaire.

Comment 4: Untimely Extension Request Due to Extraordinary Circumstances

TFM argues that the Department should accept the public version QRA under 19 CFR 351.302(b) and (c), which allows for extension requests after the deadline due to extraordinary circumstances. TFM claims that, due to an unexpected communication loss in the area in which TFM's counsel was located due to travel, in combination with the unexpected medical leave of TFM's counsel's colleague, TFM's public version QRA was filed past the deadline. TFM claims that the unexpected communication loss in combination with the unscheduled medical leave of a colleague of TFM constitutes an extraordinary circumstance warranting the acceptance of an extension request after the deadline. TFM, citing *Dongtai Peak* and *Artisan*, claims that a technical failure supports an untimely filed extension request. TFM claims that the *Extension of*

[46] *See* SAA at 195.
[47] *See* Preliminary Decision Memorandum at 8.

Time Limits specifies that medical emergencies and a technical failure and unavailability of ACCESS[48] continuously before the submission is due for parties located outside of the DC metropolitan area, are extraordinary circumstances. TFM claims that the unavailability of ACCESS is, in essence, the same type of communication problem as the Internet outage TFM's counsel experienced while abroad and should, therefore, be considered an extraordinary circumstance.[49] TFM also claims that the Department has granted extensions that were requested after the deadline in cases less compelling than TFM's situation.

Archroma argues that TFM failed to demonstrate the existence of an extraordinary circumstance requiring the Department to reject TFM's untimely filed extension request. Archroma claims that the sequence of events that TFM deems extraordinary—(1) unexpected medical leave by the individual responsible filing, and (2) unexpected communication difficulties (*i.e.*, phone/Internet down) while traveling on business in China—are events straightforwardly non-extraordinary within the meaning of 19 CFR 351.302(c). Archroma, citing the *Extension of Time Limits*, claims the Department is clear in its definition of what does and does not constitute extraordinary circumstances for the purpose of accepting untimely filings and extension requests, and that the standard is higher than the good cause standard under which timely extensions requests are considered. Archroma claims that the Court in *Dongtai Peak* affirmed this higher standard when it rejected the respondent's arguments to the contrary. Archroma claims that TFM admits in its case brief that the circumstances surrounding the late filing were commonplace by stating that the communication failure happened when counsel was traveling in Nantong City, China, as it does often in the role of counsel in trade remedy cases. Archroma claims that losing telephone and Internet service while traveling in remote locations is certainly not extraordinary and that for the Department to deem the circumstances in this case extraordinary under 19 CFR 351.302(c) would make concessions granted pursuant to this section the rule rather than the exception.

Department's Position: We continue to find that TFM's alleged reasons for the untimely filing of both the public version of the QRA and the extension request do not constitute extraordinary circumstances that would justify the consideration of the untimely filed submissions. As we stated in our *Preliminary Results*, pursuant to 19 CFR 351.302(c), an extension request will be considered untimely if it is received after the applicable time limit expires and an untimely filed extension request will not be considered unless the requesting party demonstrates an extraordinary circumstance. The Department does not consider communication and technology issues to be extraordinary circumstances under 19 CFR 351.302(c)(2): "Examples of extraordinary circumstances include a natural disaster, riot, war, force majeure, or medical emergency. Examples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party's representative to access the Internet on the day on which the submission was due."[50]

Because TFM's Fifth Extension Request was filed after 5:00 p.m. on September 11, 2015, after the deadline expired, and attributed the untimeliness of its filings to communication and technology failures that do not qualify as extraordinary circumstances under 19 CFR

[48] ACCESS is the electronic system maintained by the Department and through which the Department receives the parties' submissions.
[49] TFM does not claim that ACCESS was unavailable continuously before the public QRA was due.
[50] *See Extension of Time Limits*, 78 FR 57790, 57793 (September 20, 3013).

351.302(c)(2), we did not consider whether to accept the untimely filed public versions of the QRA. Further, the record demonstrates that TFM knew of the technical difficulties and of the medical leave days before the expiration of the deadline and did not take appropriate measures to ensure its extension request and public version of the QRA were timely filed. Specifically, TFM requested extensions (which the Department fully granted) on September 8, 2015, due to "email difficulties" while "individuals are travelling abroad" and on September 10, 2015, due to "computer difficulties" and the "unscheduled medical leave" of the "individual responsible for the filings."[51] TFM's argument that its inability to access the Internet is the same as the unavailability of ACCESS, which may, in limited circumstances, be found to constitute an extraordinary circumstance, *e.g.*, if a party and its representative are located outside of the Washington, DC metropolitan area and ACCESS is continuously unavailable before the submission is due, is misplaced. If ACCESS is continuously unavailable, no party can submit documents to the Department due to failure of the Department's own system, and therefore, parties that are not located in the metropolitan area cannot overcome the ACCESS unavailability by manually filing the submissions with the Department.

TFM's argument has two logical flaws when it equates the system of receiving documents to a party's inability to access the Internet. First, while ACCESS has no alternative system that allows parties to submit documents electronically, a party with the inability to access the Internet through its preferred portal can, and is obliged to, find another portal to access the Internet or at the very least timely communicate their inability to do so via other means (*e.g.*, a telephone call) to the Department. Second, the determination that the continuous unavailability of ACCESS may be an extraordinary circumstance for parties located outside of the Washington, DC metropolitan area does not include the situation where a party's counsel is traveling outside that area at the time the filing is due. TFM's counsel's office is located in Washington, DC, so does not fall within the category of being located outside the Washington, DC metropolitan area.

In short, the Department, in limited circumstances, may decide not to impose the consequences of untimely submissions or requests for extension on parties for unavailability of the Department's own systems; however, it is parties' responsibility to manage all other aspects of the filing process to ensure their filings or extension requests are received by the Department prior to the established deadline.

TFM argues that the Department "has granted after-the-deadline extensions requests in cases less compelling than here."[52] To the extent that TFM cites to letters on the record of other proceedings, between the Department and parties of those proceedings, the Department has not considered those documents in the current proceeding. Those letters were not placed on the record of this proceeding,[53] and a mere citation to those letters does not incorporate them onto the record.[54] In any event, the proceedings in the letters cited by TFM were independent of this

[51] *See* Third Extension Request. *See also* Fourth Extension Request. *See also* Letter from Minoo Hatten to TFM dated September 8, 2015 (Third Extension). *See also* Letter from Minoo Hatten to TFM dated September 11, 2015 (Fourth Extension).
[52] TFM Case Brief at 16.
[53] *See* 19 CFR 351.104(a)(1); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1325 (Fed. Cir. 2011) (holding that interested parties bear the burden of developing the administrative record) (*QVD*).
[54] *C.f. Clearon Corp. v. United States*, Slip Op. 2015-91 (Ct. Int'l Trade Aug. 20, 2015) ("That the website addresses are on the record does not mean that all of the data on the websites are on the record. If a party wants evidence from

proceeding, and it is well-established that each Commerce proceeding is independent from others and leads to an independent determination.[55]

Comment 5: *Per Se* Rule Decision Making

TFM argues that the Department, in its Preliminary Determination Memorandum, stated that because TFM missed the deadline for the public version QRA it could not accept the filing, without discussing the pertinent circumstances and law. TFM, citing *Dongtai Peak*, *Artisan*, and the *Extension of Time Limits*, claims that this amounts to a *per se* rule which is unlawful. Archroma did not comment on this issue.

Department's Position: We are not persuaded by TFM's assertion that we improperly applied of the regulation rejecting late submissions as a *per se* rule, because the regulation itself allows for consideration of the circumstances surrounding the untimely filing. Pursuant to 19 CFR 351.302(c), we will consider untimely extension requests if the party demonstrates that extraordinary circumstances existed causing the delay in requesting an extension. When we consider whether extraordinary circumstances exist, we are accounting for differing circumstances rather than strictly refusing to consider any untimely filing or extension request. After considering the circumstances that TFM claims were the reason that both TFM's extension request and public version QRA were untimely filed, we determined that TFM's circumstances were not extraordinary.[56] The fact that we concluded that the circumstances TFM presented were not extraordinary and continued to reject its submissions does not mean we did not consider the particular circumstances delaying its filings or applied the rule in a *per se* fashion. As detailed above, TFM's circumstances here simply did not merit straying from the rule.

Comment 6: Focus on Adverse Facts Available Rate and not on Decision to Apply Adverse Facts Available

TFM argues that the fact that the Department expended substantial hours to decide how to proceed with the lack of information on the record begs the question of whether the information should have been accepted in the first place. TFM claims that the Department could have expended absolutely no time on the issue had it simply accepted the public version QRA without any delay to the proceeding. TFM also claims that, despite the Department expending time to discuss the issue, the Department has not discussed the pertinent law in the preliminary results. TFM, citing *Carpenter*[57] and *Zhejiang*[58], claims that the courts have rejected the Department's claim that it is too busy to follow the statute. Archroma did not comment on this issue.

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a website on the record of a Commerce proceeding, it must submit the appropriate pages from the website; otherwise, the information is not on the record of the proceeding.") (*Clearon*).

[55] *See E.I. Du Pont de Nemours & Co. v. United States*, Slip Op. 98-7 (Ct. Int'l Trade January 29, 1998) (*Du Pont*).

[56] *See* Preliminary Determination Memorandum at "Background" (determining that TFM "attributed the untimeliness of its filings to communication and technology failure that do not qualify as extraordinary circumstances").

[57] *See Carpenter Technology v. United States*, 662 F. Supp. 2d 1337 (Ct. Int'l Trade 2009) (*Carpenter*).

[58] *See also Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 637 F. Supp. 2d 1260 (Ct. Int'l Trade 2009) (*Zhejiang*).

Department's Position: TFM's argument misinterprets the Department's discussion of the substantial number of hours addressing TFM's late filing. As TFM charges, the Department is tasked with administering the Act and our regulations; both permit the Department not to consider untimely filings and filings that are incomplete, *e.g.*, due to a lack of a corresponding public filing.[59] As discussed above and in our Preliminary Determination Memorandum, the Department establishes deadlines in order to conduct all proceedings efficiently within its statutory and regulatory deadlines; the consequences of untimely filings and untimely extension requests detract from the efficient conduct of our proceedings, not just in one proceeding, but across all proceedings. Accordingly, for the efficient conduct of its proceedings, it is critical that parties adhere to the deadlines established by the Department. Because we are tasked with enforcing our statute and regulations, including our deadlines, we do not find it appropriate to avoid addressing TFM's untimely public QRA because doing so would be the less time-consuming path. Instead, we evaluate the circumstances of each proceeding to ensure consistency in the administration of our proceedings.

Finally, the Department was not too busy to follow the statute and did not "rewrite the statute based on its staffing issues."[60] Both *Carpenter* and Zhejiang dealt with interpretation of the statutory term "large number of exporters or producers" in the context of respondent selection; in those cases the Department reasoned that due to staffing levels it could reasonably review only certain potential respondents individually. In contrast, here, the Department has not interpreted the statute in light of its staffing needs. Rather, the Department properly enforced the deadlines it established in a manner consistent with its regulations.

Comment 7: Rejection Letter Attachment

TFM argues that the Department mentions the Rejection Letter Attachment in its Preliminary Decision Memorandum, but does not say that the Rejection Letter Attachment is the basis for its decision.[61] TFM claims that if the Rejection Letter Attachment is not the basis of the Department's preliminary results decision then it is legally irrelevant. TFM also argues that if the Department did base its determination to reject TFM's QRA on the Rejection Letter Attachment, doing so was unlawful because the Rejection Letter Attachment involved a different respondent in a different proceeding, and TFM was not given proper notice of its application to the present proceeding because it was not cited to or attached to TFM's questionnaire. TFM, citing *Artisan*, claims that applying the Rejection Letter Attachment to TFM after the fact imposes stricter consequences than the Department stated would apply in the questionnaire cover letter and subsequent letters it issued to TFM. TFM argues that by law the Department may not reject a respondent questionnaire response based on a standard of acceptance of filing that the Department did not specifically state to the respondent in the questionnaire or prior to the questionnaire response due date. TFM, citing *Borden*[62], *de Cecco*[63], and *Micron*[64], also claims that the Department has an obligation to provide respondents clear notice of all obligations and

[59] *See, e.g.*, section 782(e) of the Act; 19 CFR 351.302.
[60] *See Zhejiang* at 1264.
[61] *See* Letter from Thomas Schauer to TFM dated September 16, 2015 (Rejection Letter) at attachment (Rejection Letter Attachment).
[62] *See Borden, Inc. v United States*, 4 F. Supp. 2d 1221 (1998) *(Borden).*
[63] *See F.lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000) (*de Cecco*)
[64] *See Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001) (*Micron*).

consequences as to their submission. TFM also argues that the Department's questionnaire cover letter had the standard language as to deadlines used in all questionnaires to all respondents with no special limitations, restrictions or conditions on extensions, and did not state that extension requests had to be filed before the deadline.

TFM also claims that the Department's references to time limits in its correspondence with TFM, including in the questionnaire cover letter, is always accompanied by references to the Department's obligation to conduct the review within the time limits required by U.S. law and nothing on the record indicated that the granting of further extensions in this proceeding would hamper the Department's ability to complete the review within the statutory time limits.

TFM also argues that the Rejection Letter Attachment only states that the law should be followed as to questionnaire responses and that, beyond that, the Rejection Letter Attachment only specifically addressed one filing by another company in another case three years earlier that was made minutes after the 5:00 p.m. deadline which the Department accepted.

TFM also claims that in other cases in which the Department has issued memoranda similar to the Rejection Letter Attachment, it has subsequently accepted late filings. TFM also discusses the context surrounding the issuance of the Rejection Letter Attachment.

TFM also argues that applying the Rejection Letter Attachment to TFM violates 19 CFR 351,[65] on attorney/representative conduct. TFM alleges that under the regulation, companies should not be adversely affected by conduct of their attorneys, particularly where that conduct pertained to other cases; the conduct of one attorney should not be imbued on another attorney; and for fairness reasons, those at Commerce deciding any sanctions for attorney misconduct may not be the ones claiming the objectionable conduct. TFM claims that applying the Rejection Letter Attachment to TFM would violate all three of these conditions.

Archroma argues that the Department's consideration of TFM's counsel's past tardiness, along with all other circumstances, was proper. Archroma claims that the Department has gone above and beyond the necessary to assist TFM in an attempt to encourage TFM to timely file documents. Archroma claims that TFM's allegations that it was treated unfairly and subject to harsher consideration due to its history of late filings are misplaced. Archroma claims that all respondents must adhere strictly to submission deadlines and that the Department affirmed that TFM's counsel was aware of the relevant regulations on late filings. Archroma claims that the fact that TFM chose counsel who required such reminders of relevant regulations, whether disclosed or not, is a matter between TFM and TFM's counsel. Archroma claims that the petitioner should not be prejudiced by TFM's or TFM's counsel's failure to follow the Department's regulations. Archroma, citing *SS Sheet and Strip Coils*, *SS Bar*, *Tissue* Paper, and Mushrooms, argues that the use of an adverse inference for the entire response is consistent with Department decisions where respondents have acted to mislead the Department, concealed information from the Department, submitted unreliable information, or failed to submit timely

[65] TFM does not cite a specific provision of 19 CFR 351. *See* TFM Case Brief at 22-24. However, TFM does cite to *Regulation Strengthening Accountability of Attorneys and Non-Attorney Representatives Appearing Before the Department, 19 CFR 351*, 78 FR 22,773 (April 17, 2013) ("*Attorney Accountability"*), which promulgated 19 CFR 351.313.

information requested.[66] Archroma claims that, in all the cited cases, the Department determined that adverse inferences were warranted for the entire response and that the most appropriate information to form the basis of the dumping margin calculation was the source which resulted in the highest possible margin available on the record of the proceeding and Archroma encourages the Department to follow its established practice in the current review.

Department's Position: The Department disagrees that it is holding TFM to a higher standard than what is set in the questionnaire and its cover letter, in the letters granting TFM extensions, and in the regulations.

In this proceeding, TFM was held to the same standard that other parties are held to in regards to deadlines, *i.e.*, submissions that are not received in their entirety by 5:00 p.m. on the day of the deadline are normally untimely and rejected from the record. TFM had notice of the deadline to submit its QRA or a letter requesting an extension and had ample opportunity to comply, but simply failed to file a timely extension request or a timely QRA. The Department agrees with TFM's claim that the questionnaire cover letter included the standard language regarding deadlines used in all questionnaires to all respondents with no special limitations, restrictions or conditions on extensions. The Department disagrees that the standard language does not make clear that filings and extension requests must be received before 5:00 p.m. on the established deadline, or the consequences for an untimely filing.[67] The questionnaire cover letter cites 19 CFR 351.302(c), and explicitly states that:

> If the Department does not receive either the requested information or a written extension request before 5 p.m. ET on the established deadline, we may conclude that your company has decided not to cooperate in this proceeding. The Department will not accept any requested information submitted after the deadline. As required by section 351.302(d) of our regulations, we will reject such submissions as untimely. 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 … which may include adverse inferences….[68] .

This language provided TFM with clear notice of obligations regarding filing and requesting extensions, and the possible consequences of failure to timely submit a response or request an extension. In particular, it makes clear that a response or an extension request will be considered untimely if it is received after the established deadline, and failure to timely request an extension may result in the application of total facts available. This situation differs from *Artisan*, wherein the Department only informed that a failure to respond at all could lead to an adverse inference, without informing submitters that an adverse inference could also be applied if a response was

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[66] *See Stainless Steel Sheet and Strip in Coils from Japan; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 18369 (Apr. 11, 2005) (unchanged in the Final Results, 70 FR 37759 (June 30, 2005)) (*SS Sheet and Strip Coils*). *See also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from the United Kingdom*, 67 FR 3146 (Jan. 23, 2002) and the accompanying Issues and Decision Memorandum and *Firth-Rixson Special Steels Ltd. v. United States*, Slip Op. 03-70 (June 27, 2003) (*SS Bar*).
[67] *See* Questionnaire at 3.
[68] *Id.*

received after the deadline.[69] The language here clearly states the consequences regarding this specific filing's deadline.

The Rejection Letter Attachment similarly memorialized the Department's meeting informing the counsel representing TFM in this segment that "all late submissions … in … any … proceeding before the Department would be rejected," unless the Department was contacted "in accordance with its regulations or extensions of time were requested in the proper manner."[70] Thus, the Department does not agree with TFM's assertion that the Rejection Letter Attachment inflicted upon TFM stricter deadlines or consequences to untimely filings or untimely extension requests than was set forth in the questionnaire cover letter or the Department's regulations.

The Department relied upon the cited statutory and regulatory provisions in rejecting TFM's QRA as untimely. However, to the extent that it is within the Department's discretion to set and enforce its deadlines, or to grant an untimely-filed request for extension, the Rejection Letter Attachment informed the record that TFM's counsel had previously been called in for a meeting to remind TFM's counsel specifically of the regulatory consequences of untimely filings and to ensure that TFM's counsel has full knowledge of the Department's regulations regarding deadlines and the consequences of their violations. TFM's claim that the Rejection Letter Attachment is irrelevant to our current proceeding is misdirected because, while the meeting memorialized in the attachment took place over the course of another proceeding, the information conveyed to, and understood by, TFM's counsel at the meeting was not specific to a case or segment of a proceeding but applied to "any other proceeding before the Department." Further, the Department explained that we would not be accepting late submissions in the future unless the Department was contacted in a timely manner.[71]

The Department disagrees with TFM's characterization of, and arguments regarding, *Attorney Accountability*. The Department did not use the Rejection Letter Attachment to deny TFM's untimely extension request; rather, it relied upon 19 CFR 351.302(d) and the other statutory and regulatory provisions discussed at length in its rejection letters and Preliminary Determination Memorandum. The Department did not sanction TFM for the conduct of its attorney. TFM was aware of the deadline set by the Department in this proceeding. In any event, it is established that parties may "be held accountable for the acts and omissions of their chosen counsel."[72] The Department is not holding the conduct of one attorney against the conduct of another attorney. The attorney representing TFM throughout this proceeding has been the same, and that attorney was present during the meeting memorialized in the Rejection Letter Attachment. Finally, the Department has not violated statements in *Attorney Accountability*, that the Department personnel involved in a prospective disciplinary proceeding should be different than those

[69] *See Artisan*, 978 F. Supp. 2d at 1348.
[70] *See* Rejection Letter Attachment at 2.
[71] *See* Rejection Letter Attachment.
[72] *See Rockwell Automation, Inc. v. United States*, 7 F. Supp. 3d 1278, 1284 (Ct. Int'l Trade 2014) (quoting *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-97(1993)); *see also Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 425 F. Supp. 2d 1374, 1376 n.2 (Ct. Int'l Trade 2006) ("No claim is made that it would be unfair to the Domestic Producers to penalize them for the acts or omissions of their counsel. Indeed, any such claim would be unlikely to succeed. Courts generally have shown little hesitation in visiting the sins of counsel on their clients.").

involved in the underlying administrative proceeding. No disciplinary proceedings have been initiated here.[73]

Finally, the Department considers whether to grant untimely requests for extension on a case-by-case basis. TFM argues that in other cases—including proceedings involving counsel to whom the Department has issued memoranda similar to the Rejection Letter Attachment—the Department has accepted untimely filings or granted untimely requests. To the extent that TFM cites to letters on the record of those other proceedings, the Department has not considered those documents in the current proceeding. Those letters were not placed on the record of this proceeding,[74] and a mere citation to those letters does not incorporate them onto the record.[75] In any event, the proceedings in the letters cited by TFM were independent of this proceeding and it is well-established that each Commerce proceeding is independent from others; those decisions were made based on the individual circumstances of those cases.[76] Similarly, the context surrounding the issuance of the Rejection Letter Attachment,[77] other than what is discussed in the Rejection Letter Attachment itself, is not on the record of this proceeding and has not been considered by the Department.

Comment 8: Addressing the Facts of the Case

TFM argues that the Department has not addressed the pertinent law and facts of the case. TFM claims that such an approach of postponing the discussion of the facts and law has led courts to conclude the Department's actions are an arbitrary effort to reach a desired outcome rather than a reasonable attempt to decide the matter, and that a decision that fails to discuss the pertinent law is neither reasoned nor capable of judicial review. TFM argues that if the Department fails to discuss pertinent law in its final decision, it leaves it to the court to first address legal issues. TFM suggests that if that should happen, the court should direct the Department to either accept the QRA or that TFM's dumping margin from the immediately preceding review be used for this review because the Department's actions have denied TFM a meaningful opportunity to participate in this review. Archroma did not comment on this issue.

Department's Position: Over the course of the review leading to our preliminary determination and in our *Preliminary Results*, our reasons for rejecting TFM's QRA and untimely filed extension request have been consistent, and supplied promptly. In our rejection letter dated September 16, 2015, we stated that: 1) pursuant to 19 CFR 351.302(c) TFM's extension request was untimely and that no extraordinary circumstances existed that would justify our acceptance of the untimely extension request; 2) pursuant to 19 CFR 351.302(d) and 19 CFR 351.104(a)(2)(iii) we rejected both of TFM's untimely filed public version QRAs and removed them from the record; and 3) pursuant to section 777(b)(1)(B) of the Act and 19 CFR 351.304 we rejected the business proprietary version of the QRA because, due to the lack of a public version on the record of the proceeding, the QRA in its entirety was non-

[73] *See Attorney Accountability* at 22,775 (expecting that the Department would institute a disciplinary procedure similar to its APO regulations).
[74] *See* 19 CFR 351.104(a)(1); *see also QVD*, 658 F.3d at 1325.
[75] *C.f. Clearon*, Slip Op. 2015-91 (Ct. Int'l Trade 2015).
[76] *See See Du Pont*, Slip Op. 98-7 (Ct. Int'l Trade 1998).
[77] *See* TFM Case Brief at 25-26.

conforming to our regulations.[78] The Department reiterated its regulations as stated in the questionnaire cover letter and noted that the Department had granted TFM all four of its timely requests for extensions of time to file its complete QRA.

In our *Preliminary Results*, we complied with the statute and regulations in finding that TFM has sold subject merchandise at less than normal value during the period of review, relying on facts available with an adverse inference, and laying out our reasoning for applying adverse facts available.[79] In doing so, we again reiterated our reasons for rejecting TFM's untimely filed QRA.[80] The regulations do not require that the Department consider and specifically respond to each of TFM's comments submitted prior to the preliminary results in the *Preliminary Results*. Further, 19 CFR 351.309(c)(2) requires interested parties to submit, following the preliminary determination, a case brief containing "all arguments that continue in the submitter's view to be relevant to the {Department}'s final … results, including any arguments presented before the date of publication of the preliminary … results." Accordingly, to the extent that TFM considers our response to its specific arguments filed with the Department prior to the *Preliminary Results* to be inadequate, it was still required to submit those arguments in its case brief filed after the *Preliminary Results* in order to preserve them. Per 19 CFR 351.309(b), the Department is now considering and responding to all of TFM's comments and arguments submitted in the case brief.

TFM has had the opportunity to participate meaningfully in this review. TFM had the opportunity to submit a timely QRA, the Department has consistently and promptly explained its rationale for rejecting TFM's QRA (including in its preliminary determination) thereby providing TFM an analysis to comment on, and TFM had the opportunity to present specific arguments advocating for reinstatement of its untimely response, and indeed did submit comments, which we are addressing now in the final determination, as is contemplated by the regulations. In *Dongtai Peak* the Federal Circuit held that the respondent had a meaningful opportunity to participate in the proceeding where the respondent was given notice of a deadline, advised "of the importance of submitting its documents in a timely manner," and "aware of the consequences of its not doing so," and the Department ultimately rejected the respondent's untimely submission.[81] Similarly, in this administrative review, TFM has had a meaningful opportunity to participate in this review.

Comment 9: Neutral Facts Available

TFM argues that the multiple violations of the law in the *Preliminary Results*—due to the fact that the Department unlawfully did not complete the questionnaire process in the review—warrant the imposition of the dumping margin of zero percent that the Department calculated in the most recently completed review as neutral facts available. TFM claims that the zero percent margin, applied as neutral facts available, is also appropriate because it is the only margin calculated for TFM while the company is under the discipline of the antidumping duty order, because TFM has never been found to be dumping when under the discipline of the order. TFM claims that in the preliminary results, the Department erroneously applied as adverse facts

[78] *See* Letter from Thomas Schauer to TFM dated September 16, 2015 (Rejection Letter).
[79] *See* Preliminary Decision Memorandum.
[80] *Id.*
[81] *See Dongtai Peak*, 777 F.3d at 1353.

available the dumping margin from the original LTFV investigation, which was calculated on sales that were made when TFM was not under the discipline of the order.

Archroma argues that the use of an adverse inference from facts otherwise available for the entire response in the current review is appropriate. Archroma claims that, because there is no QRA on the record, under section 782 of the Act, the Department is permitted to disregard all or part of a deficient response and all subsequent responses. Archroma claims that TFM, by withholding and failing to provide information requested in timely manner and in the form required has stalled the proceeding and, therefore, the Department should completely disregard TFM's responses to sections A, B, C, and D of the questionnaire and resort to adverse facts available.

Department's Position: The Department disagrees that neutral facts available is appropriate here. The Department was unable to calculate a margin because TFM failed to submit a timely QRA. As we discussed extensively in the Preliminary Decision Memorandum, TFM's QRA was untimely filed and, accordingly, rejected from the record. Section A of our questionnaire requests information necessary to complete an administrative review. According to section 776(a)(1) of the Act, the Department shall apply "facts otherwise available" if necessary information is not on the record. The QRA is necessary to understand the information reported in TFM's responses to sections B, C, and D of the questionnaire and confirm that TFM has reported the correct information in its response to section B, C, and D of the questionnaire. Thus, the QRA contains important information and several crucial decisions are made based on the information reported in the QRA; it is necessary information that is not on the record of the current review. Therefore, the absence of the QRA from the record requires the use of facts otherwise available, in accordance with section 776(a)(1) of the Act. TFM failed to respond section A of our questionnaire within the established deadlines, in accordance with section 776(a)(2) (B) of the Act. Because TFM failed to provide requested information by the requested date and necessary information is not on the record, the Department continues to find that it must rely on the facts otherwise available to determine the margin for TFM, in accordance with sections 776(a)(1) and (2) of the Act. [82]

Moreover, the Department determined that by failing to timely respond to section A of the Department's questionnaire after having been granted four extensions of the deadline, consistent with section 776(b) of the Act, TFM has failed to cooperate by not acting to the best of its ability in providing the requested information. Accordingly, pursuant to sections 776(a)(1) and (2)(B) and 776(b) of the Act, we continue to find it appropriate to apply a margin to TFM based entirely on the facts available, and to apply an adverse inference.[83] Adverse inferences are appropriate to "ensure that the party does not obtain a more favorable result by failing to cooperate than it if it had cooperated fully."[84] In selecting an adverse inference, the Department may rely on

[82] *See Furniture 2013*, 78 FR at 8494. *See also Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 69546 (December 1, 2006), and accompanying Issues and Decision Memorandum at Comment 1.
[83] *See* Preliminary Decision Memorandum at 6 - 11. *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review*, 72 FR 10689, 10692 (March 9, 2007), unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of the First Administrative Review and First New Shipper Review*, 72 FR 52052 (September 12, 2007).
[84] *Id.*

information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.[85]

The Department's practice is to select an AFA rate that is sufficiently adverse as to effectuate the purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner and that ensures that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.[86]

In the single review that has been conducted since the imposition of the antidumping duty order on OBAs, the Department found that TFM was not dumping. That fact, however, has no bearing on the selection of an appropriate AFA rate. As we stated in *Preliminary Results*, when assigning adverse rates in a review, the Department's practice is to select as AFA the higher of: (a) the highest corroborated rate from the petition; or (b) the highest calculated rate for any respondent from any segment of the proceeding[87] which, under the Trade Preferences Extension Act of 2015, the Department is not required to corroborate.[88] We are unable to corroborate the petition rates, and the rates calculated in this proceeding are 6.19 percent, from the LTFV investigation, and zero percent from the previously completed administrative review.[89] Therefore, for purposes of the final results, we continue to select the highest applied margin in a separate segment of the same proceeding, 6.19 percent, as the AFA rate.[90] According to 776(c)(2) of the Act, this rate does not require corroboration. Because TFM's margin in the immediately preceding administrative review (2013- 2014) was zero percent, this rate achieves the purpose of applying an adverse inference, *i.e.*, it is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.[91]

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[85] *See* section 776(b) of the Act.

[86] *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8911 (February 23, 1998); *see also Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005), and SAA at 870.

[87] *See Diamond Sawblades and Parts Thereof From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011*, 77 FR 73420 (December 12, 2012), unchanged in *Diamond Sawblades and Parts Thereof From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 2010-2011*, 78 FR 36524 (June 18, 2013). *See also Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 77 FR 53856 (September 4, 2012), *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Final Determination of Sales at Less than Fair Value*, 65 FR 5554, 5567 (February 4, 2000), *Emulsion Styrene-Butadiene Rubber From the Republic of Korea: Final Determination of Sales at Less than Fair Value*, 64 FR 14865, 14866 (March 29, 1999), and *Stainless Steel Sheet and Strip in Coils From the Republic of Korea: Final Determination of Sales at Less than Fair Value*, 64 FR 30664, 30687(June 8, 1999).

[88] *See* 776(c)(2) of the Act.

[89] *See Certain Stilbenic Optical Brightening Agents From the People's Republic of China and Taiwan: Initiation of Antidumping Duty Investigations*, 76 FR 23554 (April 27, 2011). *See also Order and Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2013-2104*, 80 FR 32085 (June 5, 2015), unchanged in *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61368 (October 13, 2015).

[90] *See Amended Final and Order.*

[91] *See Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (CAFC 2010).

Recommendation

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

Agree ✓ Disagree _____

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

27 JUNE 2016
(Date)