UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-583-854
Administrative Review
POR: 7/1/18 – 6/30/19
Public Document
E&C/VIII: IG

November 20, 2020

MEMORANDUM TO: Jeffrey I. Kessler
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 Results of the Antidumping Duty Administrative Review: Certain Steel Nails from Taiwan; 2018-2019

I. SUMMARY

The Department of Commerce (Commerce) published the *Preliminary Results* of the administrative review of certain steel nails from Taiwan on April 6, 2020.[1] The period of review (POR) is July 1, 2018 through June 30, 2019. Commerce has analyzed the case and rebuttal briefs that interested parties submitted on the record. As a result of our analysis, we made no changes from the *Preliminary Results*, as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

II. BACKGROUND

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[2] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days.[3] The deadline for the final results of this review is now November 23, 2020.

[1] *Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019*, 85 FR 19138 (April 6, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
[2] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19," dated April 24, 2020.
[3] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.

On June 25, 2020, Liang Chyuan Industrial Co., Ltd. (LC),[4] Huttig Building Products (Huttig),[5] Quick Advance, Inc. and Ko's Nail Inc. (Quick/Ko),[6] and Romp Coil Nails Industries Inc. *et al*. (Romp *et al.*)[7] filed case briefs. Also on June 25, 2020, PrimeSource Building Products Inc. (PrimeSource) filed a letter in lieu of a case brief, wherein it supported and incorporated the arguments filed by the producers, exporters, and importers in this review, with additional commentary on the issue discussed in Comment 1 below.[8] On July 13, 2020, Mid Continent Steel & Wire, Inc. (the petitioner) filed a rebuttal brief.[9] On July 16, 2020, Huttig filed a letter of subsequent authority to notify Commerce of a Court decision that Huttig claims impacts these final results.[10] On July 20, 2020, the petitioner responded to Huttig's notice of subsequent authority, rebutting Huttig's comments.[11]

III. SCOPE OF THE ORDER

The merchandise covered by this order is certain steel nails having a nominal shaft length not exceeding 12 inches.[12] Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and may have any type of surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, including but not limited to electroplating or hot dipping one or more times), phosphate, cement, and paint. Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted.

Screw-threaded nails subject to this order are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point. Certain steel nails may be sold in bulk, or they may be collated in any manner using any material.

Excluded from the scope of this order are certain steel nails packaged in combination with one or more non-subject articles, if the total number of nails of all types, in aggregate regardless of size, is less than 25. If packaged in combination with one or more non-subject articles, certain steel nails remain subject merchandise if the total number of nails of all types, in aggregate regardless

[4] *See* LC's Letter, "Case Brief," dated June 25, 2020 (LC Case Brief).
[5] *See* Huttig's Letter, "Case Brief," dated June 25, 2020 (Huttig Case Brief).
[6] *See* Quick/Ko's Letter, "Case Brief," dated June 25, 2020 (Quick/Ko Case Brief).
[7] *See* Romp *et al.* Letter, "Case Brief," dated June 25, 2020 (Romp *et al.* Case Brief). The companies that collectively filed this case brief include: Romp Coil Nails Industries Inc.; Create Trading Co., Ltd.; Hor Liang Industrial Corp.; Yu Chi Hardware Co. Ltd.; Zon Mon Co. Ltd.; UJL Industries Co. Ltd.; Trim International Inc.; China Staple Enterprise Corporation; Cheng Ch International Co., Ltd., Hoyi Plus Co., Ltd.; and De Fasteners Inc.
[8] *See* Primesource's Letter, "Letter in Lieu of Case Brief," dated June 25, 2020 (Primesource Letter).
[9] *See* Petitioner's Letter, "Rebuttal Brief," dated July 13, 2020 (Petitioner Rebuttal Brief).
[10] *See* Huttig's Letter, "Notice of Subsequent Authority," dated July 6, 2020.
[11] *See* Petitioner's Letter, "Comments on Huttig's Notice of Subsequent Authority," dated July 20, 2020.
[12] The shaft length of certain steel nails with flat heads or parallel shoulders under the head shall be measured from under the head or shoulder to the tip of the point. The shaft length of all other certain steel nails shall be measured overall.

of size, is equal to or greater than 25, unless otherwise excluded based on the other exclusions below.

Also, excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article falls into one of the following eight groupings: (1) builders' joinery and carpentry of wood that are classifiable as windows, French windows and their frames; 2) builders' joinery and carpentry of wood that are classifiable as doors and their frames and thresholds; 3) swivel seats with variable height adjustment; 4) seats that are convertible into beds (with the exception of those classifiable as garden seats or camping equipment); 5) seats of cane, osier, bamboo or similar materials; 6) other seats with wooden frames (with the exception of seats of a kind used for aircraft or motor vehicles); 7) furniture (other than seats) of wood (with the exception of (i) medical, surgical, dental or veterinary furniture; and ii) barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements); or 8) furniture (other than seats) of materials other than wood, metal, or plastics (*e.g.*, furniture of cane, osier, bamboo or similar materials). The aforementioned imported unassembled articles are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

Also, excluded from the scope of this order are steel nails that meet the specifications of Type I, Style 20 nails as identified in Tables 29 through 33 of ASTM Standard FI667 (2013 revision).

Also, excluded from the scope of this order are nails suitable for use in powder-actuated hand tools, whether or not threaded, which are currently classified under HTSUS subheadings 7317.00.20.00 and 7317.00.30.00.

Also, excluded from the scope of this order are nails having a case hardness greater than or equal to 50 on the Rockwell Hardness C scale (HRC), a carbon content greater than or equal to percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

Also, excluded from the scope of this order are corrugated nails. A corrugated nail is made up of a small strip of corrugated steel with sharp points on one side.

Also, excluded from the scope of this order are thumb tacks, which are currently classified under HTSUS subheading 7317.00.10.00.

Certain steel nails subject to this order are currently classified under HTSUS subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Certain steel nails subject to this order also may be classified under HTSUS subheadings 7907.00.60.00, 8206.00.00.00 or other HTSUS subheadings. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

IV. DISCUSSION OF THE ISSUES

Comment 1: Commerce's Calculation of the Review-Specific Rate for Non-Examined Companies

Non-Examined Companies' Case Briefs:[13]

Huttig

- The attribution of a total adverse facts available (AFA) rate to the all-others respondents is illogical, arbitrary, unreasonable, and contrary to law.
- Section 735(c)(5)(A) of the Tariff Act of 1930, as amended (the Act), provides that margins for non-examined, cooperative respondents should be the weighted average of the rates assigned to all respondents individually investigated, excluding rates assigned to mandatory respondents that are either based on total AFA or *de minimis*.
- Section 735(c)(5)(B) provides alternative guidance in situations where all respondents individually investigated receive either total AFA or *de minimis* rates, thus making it impossible for Commerce to weight average rates of the mandatory respondents. In those cases, Commerce "may use any reasonable method" to establish the all-others rate.
- The Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (Federal Circuit) have held that when Commerce determines margins for non-examined, cooperative respondents under section 735(c)(5), it must calculate rates that are reasonable reflections of the non-examined, cooperative respondent's actual dumping margin. The Federal Circuit has stated that "{a}ccuracy and fairness must be Commerce's primary objectives in calculating a separate rate for cooperating exporters."[14]
- Commerce is not allowed to apply a punitive AFA rate to a company which was not individually examined, and which did not itself partake in conduct which would allow application of an AFA rate to its shipments.[15]
- In addition to *Bestpak*, the Courts made similar findings in other litigation such as *Changzhou Wujin*, *Baroque*, *Xinboda*, *SKF*, and *Navneet*.[16] Commerce cannot "blindly apply a punitive AFA rate to cooperative, 'all-others' respondents, without affirmatively establishing, by substantial evidence that this AFA rate bears some relationship to the 'all-

[13] Where identical arguments and case citations appeared in all case briefs, Commerce summarized the argument once to avoid redundancy.

[14] *See* LC Case Brief and Romp *et al.* Case Brief at 4 and 3, respectively (citing *Albemarle Corp. v. United States*, 821 F. 3d 1345, 1354 (Fed. Cir. 2016)).

[15] *See* Huttig Case Brief at 4 (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F. 3d 1370, 1375 (Fed. Cir. 2013) (*Bestpak*). Huttig also notes that "after *Bestpak* was decided, 19 U.S.C. § 1677e(b)(1)(B) and § 1677e(d) were modified to allow {Commerce} to ignore 'commercial reality' in calculating AFA rates. The law was not modified to allow {Commerce} to ignore commercial reality and to apply punitive margins, untethered from reality, to companies whose actions did not justify resort to AFA.").

[16] *See* Huttig Case Brief at 5-8 (citing *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F. 3d 1367, 1378-79 (Fed. Cir. 2012) (*Changzhou Wujin*); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 971 F. Supp. 2d 1333, 1345 (CIT 2014) (*Baroque*); *Shenzhen Xinboda Industrial Co. Ltd. v. United States*, 180 F. Supp. 3d 1305, 1321 (CIT 2016) (*Xinboda*); *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264 (CIT 2009) (*SKF*); and *Navneet Publications (India) Ltd. v. United States*, 999 F. Supp. 2d 1354, 1362–66 (CIT 2014) (*Navneet*)).

others' respondents' actual dumping margins. In this case, no such attempt was made, and no such evidence exists."[17]

- Commerce had a longstanding practice of following the statutory mandate and the judicial precedent, and of applying a rate calculated in a prior segment of a proceeding, rather than a contemporaneous AFA rate, to companies not selected for individual examination.[18]
- Commerce also used prior-segment rates in other determinations in 2017 and 2018.[19] Notwithstanding its practice in these cited proceedings, Commerce "abandoned" this practice and assigned 78.17 percent because *Albemarle* "required this result."[20] However, Commerce "misrepresented that holding and reasoning, and, just as egregiously, ignored a more recent Federal Circuit decision," wherein the Court "expressly rejected {Commerce's} application of *Albemarle* to AFA scenarios."[21]
- There is not a scintilla of record evidence that a 78.17 percent rate reasonably reflected the all-others dumping margin. The 78.17 AFA rate reflected a rate obtained from data placed on the record by the petitioner in the initial investigation. The U.S. price for that margin was based on a sale in 2013, from a U.S. distributor/trading company to its downstream customer in the United States in 2013.[22]
- In the administrative review segments of this proceeding, Commerce has calculated dumping margins ranging from zero to 27.69 percent, which renders the 78.17 percent rate aberrational and punitive.[23] Commerce also recently revised a dumping margin from AFA to zero in a remand redetermination regarding *AR1*.[24]

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[17] *See* Huttig Case Brief at 8.

[18] *Id.* (citing *Certain Steel Nails from Taiwan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015–2016*, 83 FR 6163 (February 13, 2018) (*AR1*), and accompanying Issues and Decision Memorandum (IDM)).

[19] *See* Huttig Case Brief at 9 (citing *Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016-2017*, 83 FR 658 (January 5, 2018), unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review; 2016-2017*, 83 FR 23424, 23426 (May 21, 2018) (collectively, *Sinks*); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2015-2016*, 83 FR 1238 (January 10, 2018) (*TRBs*); *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 82 FR 57951 (December 8, 2017) (*Aluminum Extrusions CVD 2017*).

[20] *See* Huttig Case Brief at 10.

[21] *Id*. (citing *Changzhou Hawd Flooring Co. v. United States*, 848 F. 3d 1006 (Fed. Cir. 2017) (*Changzhou Hawd*)).

[22] *See* Huttig Case Brief at 14 (citing *Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 79 FR 36019 (June 25, 2014)).

[23] *See* Huttig Case Brief at 15-16 (citing *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015) (*Investigation Final*); *AR1*; *Certain Steel Nails from Taiwan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2016-2017*, 84 FR 11506 (March 27, 2019) (*AR2*); and *Certain Steel Nails from Taiwan: Final Results of Antidumping Duty Administrative Review and Determination of No Shipments; 2017-2018*, 85 FR 14635 (March 13, 2020) (*AR3 Final*)).

[24] *See*, *e.g.*, *Final Results of Redetermination Pursuant to Court Remand Certain Steel Nails from Taiwan; Pro-Team Coil Nail Enterprise, Inc., et al. v. United States*, Consol. Court No. 18-00027, Slip Op. 19-169 (CIT December 19, 2019) (*AR1 Remand*) available on ACCESS under Barcode 3957872-01. However, as of the time of completion of these final results, the Court has issued a second remand order, affirming Commerce's determination to apply AFA to Unicatch, but remanding Commerce's corroboration of the AFA rate. *See Pro-Team Coil Nail Enterprise, Inc. v. United States*, Consol. Court No. 18-00027, Slip Op. 20-163 (CIT November 16, 2020).

- Evidence of record supports a lower rate. Commerce should recalculate the all-others margin at a realistic rate (*e.g.*, no greater than 12.90 percent). Alternatively, Commerce should reopen the record to allow the all-others respondents to submit additional information substantiating why any rate greater than 12.90 percent would be a reasonable rate for the non-examined companies in this review. The 78.17 percent rate is significantly higher than all prior margins calculated for cooperative respondents subject to the *Order*.[25]

LC

- The Federal Circuit stated that "{r}ate determinations for non-mandatory, cooperating separate rate respondents must … bear some relationship to their actual dumping margins."[26] In this proceeding, the rate attributed to the non-examined cooperative respondents bears no relationship to any actual dumping margin calculated from any reported sales and cost information, and so is questionable as a matter of law.
- While the Trade Preferences Extension Act of 2015 (TPEA) frees Commerce from any obligation to demonstrate that the margin selected for a non-cooperative respondent reflects an alleged commercial reality, the amendment cannot reasonably free Commerce from its obligation to do so when it comes to non-examined, cooperative respondents.[27]
- In *Albemarle*, the Federal Circuit found that Commerce erred in assigning a non-examined respondent a rate from a prior review when there was evidence on the record that this rate was not reflective of the non-examined respondent's commercial reality.[28] This rationale is also supported by the statute, which mandates that total AFA rates are not included in the calculation of a non-examined company rate, pursuant to section 735(c)(5)(A) of the Act.
- Commerce's reliance on *Albemarle* in support of its total AFA treatment of the non-examined cooperative respondents in this proceeding is unwarranted, and should be overturned in favor of applying the 2.54 percent calculated for LC in *AR3*, which is more "reasonable" and reflective of LC's actual sales and cost information from the prior review.

Romp Coil et al.

- The requirement that rates be reasonable reflections of non-examined, cooperating respondents' actual margins applies to determinations made under sections 735(c)(5)(A) and (B) of the Act.[29]
- Commerce's blanket reliance on the *Albemarle* decision in support of its total AFA treatment of the non-examined cooperative respondents in this proceeding is unwarranted and should

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[25] *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 FR 39994 (July 13, 2015) (*Order*).
[26] *See* LC Case Brief at 4 (citing *Bestpak*).
[27] *Id.* (citing *Albemarle*, 821 F. 3d at 1358 ("A presumption used to encourage some companies to submit more accurate information may not reasonably be transposed onto companies which are expressly prevented from submitting more accurate information.") (quoting *Amanda Foods (Vietnam) Ltd. v. United States*, 714 F. Supp. 2d 1282, 1294 (CIT 2010)); *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F. 3d 1227, 1234 (Fed. Cir. 2014) (*Mueller*) (holding that Commerce's obligation to "arrive at 'a reasonably accurate estimate of the respondent's actual rate'" is "{a}ll the more so for a cooperating party, for which the equities would suggest greater emphasis on accuracy in the overall mix.")).
[28] *See* LC Case Brief at 4 (citing *Albemarle*, 821 F. 3d at 1359).
[29] *See* Romp *et al.* Case Brief at 3 (citing *Xiamen Int'l Trade and Indus. Co., Ltd. v. United States*, 953 F. Supp. 2d 1307, 1327 (CIT 2013) (*Xiamen*)).

be overturned in favor of applying the non-examined cooperative respondent rate of 12.90 percent from *AR3*.

Primesource

- The CIT has found that "{t}he representativeness of the investigated exporters is the essential characteristic that justifies an 'all others' rate based on a weighted average for such respondents."[30]
- Further, a rate must be a reasonably accurate estimate of the respondent's actual rate.[31]
- The instant review is fundamentally distinct from the proceeding considered in *Albemarle*. In *Albemarle*, the rates underlying the all-others rate were the result of calculations flowing from cooperating respondents.
- In the instant review, no mandatory respondent participated, and both of the selected companies received AFA. This aspect of Commerce's decision bears directly on the representativeness of the rate assigned to the all-others companies. Rates based on an adverse inference are inherently unrepresentative. This is why those "rates are disfavored by the statute."[32]
- In the instant review it is unreasonable for Commerce to apply AFA to the entire nails industry in Taiwan based on the fact that the only companies selected for individual examination by Commerce did not cooperate. The rate applied includes no calculated information. This review presents a situation where Commerce must rely on another reasonable method to meet its broader objectives of accuracy and representativeness.

Petitioner Rebuttal Brief:[33]

- Commerce should make no changes to the calculation of the review-specific rate calculated for the non-examined companies. The statute, the Statement of Administrative Action (SAA), and judicial precedents all support basing the all-others rate on the total AFA rates calculated for the mandatory respondents in this review.
- The SAA allows for Commerce to rely on the expected method, which allows for the inclusion of zero and *de minimis* rates and rates based on facts available in the calculation of the all-others rate.
- Contrary to the arguments presented, *Albemarle* and *Changzhou Hawd* support, not oppose, Commerce's reliance on section 735(c)(5)(B) of the Act. Although both *Albemarle* and *Changzhou Hawd* deal with situations where all mandatory respondents received *de minimis* rates, the underlying rationale should apply with equal force where all mandatory respondents receive total AFA rates.
- Contrary to Huttig's claim, the Federal Circuit did not find that the expected method should not be applied where all mandatory respondents receive total AFA margins. The Federal Circuit found (*in dictum*) that Commerce may deviate from the expected method and use a higher margin from a previous administrative review as a source for the AFA margin to deter non-cooperation from respondents.[34]

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[30] *See* Primesource Letter at 1 (citing *Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 559, 779 F. Supp. 1364, 1373 (CIT 1991)).
[31] *Id.* (citing *Gallant Ocean (Thailand) Co., v. United States*, 602 F. 3d 1319, 1323 (Fed. Cir. 2010)).
[32] *Id.* at 2 (citing *Changzhou Wujin*, 701 F. 3d at 1379).
[33] *See* Petitioner Rebuttal Brief at 2-12.
[34] *Id*. at 5-6.

- The non-selected companies did not present any substantial evidence that the review-specific rate is not reasonably reflective of their potential dumping margins. The cases presented in affirmative case briefs to support this claim by these parties are distinguishable from this review.
- In *Changzhou Wujin*, the Federal Circuit held that Commerce acted arbitrarily in calculating a separate rate based on an average of the *de minimis* rate calculated for one mandatory respondent and a hypothetical AFA rate based on U.S. price data from a non-cooperating respondent.[35] However, the AFA rate in this review is not hypothetical.
- In *Xinboda*, the CIT held that Commerce reasonably deviated from the "expected method" because volume data were not available and record evidence demonstrated that such a method would not yield a margin reasonably reflective of the separate rate respondents' behavior. This case is also distinguishable because the non-selected companies did not provide substantial evidence demonstrating the expected method results in a rate that is not reasonably reflective of their potential dumping margins.[36]
- In *Navneet*, the CIT pointed to record evidence supporting a lower all-others rate such as dumping margins calculated in previous reviews, the two zero margins calculated for two mandatory respondents in the contemporary review, and a rough comparison of respondents' average-unit values.[37] Here, non-selected companies did not demonstrate with record evidence that the expected method would result in an all-others rate that is not reasonably reflective of their potential dumping margins.
- In *Solianus*, the CIT affirmed Commerce's all-others' rate calculation based on a simple average of a *de minimis* margin calculated for one respondent and the AFA rate assigned to two other mandatory respondents, the expected method. Similar to the plaintiffs in *Solianus*, non-selected companies here have "failed to allege any specific error in {Commerce}'s application of the methodology to the facts of this case. That is, {they} have offered no reason why the resulting {78.17} percent all-others rate failed to 'reflect{ } economic reality' of the 'all-other' firms. The court need not (and will not) take {nonselected companies} at their word that '{o}n its face, this rate does not bear a connection to the actual production experience and sales costs of an actual cooperating... producer or exporter.'"[38]
- The closest that non-selected companies come to present any such evidence is when Huttig argues that the 78.17 percent all-others rate is much higher than dumping margins calculated in previous administrative reviews, and thus is "aberrational and punitive."[39] However, the CIT rejected a similar argument in *Mid Continent*, stating, among other things, that "'{w}hile the Federal Circuit has identified circumstances where it may, nonetheless, be reasonable to use information from prior segments, those circumstances are not present here.'"[40]

[35] *Id*. at 6-7 (citing *Changzhou Wujin*, 701 F.3d. at 1379).
[36] *Id*. at 7 (citing *Xinboda*, 180 F. Supp. 3d at 1321-1322).
[37] *Id*. at 8 (citing *Navneet*, 999 F. Supp. 2d at 1364-66).
[38] *Id*. at 8-10 (citing *Solianus, Inc. v. United States*, 391 F. Supp. 3d 1331, 1339 (CIT 2019) (*Solianus*)).
[39] *Id*. at 11 (citing Huttig Case Brief at 15-16).
[40] *Id*. at 11 (citing *Mid Continent Steel & Wire, Inc. v. United States*, 321 F. Supp. 3d 1313, 1323-24 (CIT 2018) (*Mid Continent*)).

Commerce's Position:

We find that the expected method is reasonable here because the record evidence does not rebut the presumption that the mandatory respondents are representative.

Background

In this review, Commerce selected mandatory respondents "accounting for the largest volume of subject merchandise that can be reasonably examined, consistent with section 777A(c)(2)(B) of the Act.[41] No party argued that Commerce should select respondents for limited examination pursuant to 777A(c)(2)(A) (*i.e.*, based on sampling)."[42] Commerce initially selected Bonuts Hardware Logistics Co., LLC (Bonuts) and Create Trading Co., Ltd. (Create) as mandatory respondents because, based on the CBP data, these two companies were the largest exporters, by volume, during the POR.[43] As we stated in the *Preliminary Results*, Bonuts[44] did not respond to Commerce's AD questionnaire.[45] Additionally, Create claimed, and submitted evidence supporting its claim, that it had no reviewable sales because its unaffiliated producers had knowledge of the final destination of the subject merchandise that they produced and sold to Create, and which Create resold to U.S. customers during the POR.[46]

Consequently, Commerce selected an additional mandatory respondent, Pro-Team Coil Nail Enterprise, Inc. (PT), the next largest exporter by volume.[47] The combined volume of exports from Bonuts and Create, which is business proprietary data, already represented the majority of exports of subject merchandise entries during the POR, even before Commerce selected PT as an additional mandatory respondent. Combined, the mandatory respondents that Commerce selected for individual examination, represent the substantial majority of all subject merchandise entries during the POR. The remaining 75 companies under review represent a negligible fraction of that volume.[48] Subsequently, PT notified Commerce that it would not respond to the AD questionnaire.[49] Therefore, pursuant to sections 776(a) and (b) of the Act, Commerce assigned to Bonuts and PT the highest margin applied in any segment of the proceeding, 78.17 percent, the petition margin.[50]

[41] *See* Memorandum, "Administrative Review of Certain Steel Nails from Taiwan: Respondent Selection," dated October 22, 2019 at Attachment (Respondent Selection Memo); *see also* Memorandum, "Customs Data of U.S. Imports for the Period 7/1/2018 through 6/30/2019," dated September 10, 2019 (CBP Data Memo).
[42] *See* Respondent Selection Memo at 4.
[43] *Id*. at Attachment and CBP Data Memo.
[44] Bonuts has a history of non-cooperative behavior in this proceeding. *See*, *e.g.*, *AR1* and *AR2*, wherein Commerce assigned total AFA to Bonuts.
[45] *See Preliminary Results*, 85 FR at 19139.
[46] *Id*.
[47] *See* Memorandum, "Administrative Review of Certain Steel Nails from Taiwan: Selection of Additional Mandatory Respondent," dated January 17, 2020 (Second Respondent Selection Memo); *see also* CBP Data Memo.
[48] *See* Respondent Selection Memo at Attachment and CBP Data Memo.
[49] *See Preliminary Results* PDM at 8.
[50] *Id*. at 9.

Legal Framework

The statute is silent with respect to the calculation of the rate for companies not selected for individual examination in an administrative review. Generally, we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for these respondents. Section 735(c)(5)(A) of the Act instructs that we do not calculate an all-others rate using any zero or *de minimis* weighted-average dumping margins or any weighted-average dumping margins based entirely on facts available. Accordingly, Commerce's normal practice has been to average the rates for the selected companies, excluding rates that are zero, *de minimis*, or based entirely on facts available.[51] However, based on the circumstances of this case, Commerce cannot rely on section 735(c)(5)(A) of the Act in its calculation of the review-specific rate for the non-examined companies. Thus, any arguments suggesting that Commerce adhere to this section of the statute are moot, as Commerce must rely on the exception to section 735(c)(5)(A) of the Act, which Congress expressly provided for the scenario that has occurred in this review.

Specifically, section 735(c)(5)(B) of the Act provides that, where all rates are zero, *de minimis*, or based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected companies. One method contemplated by section 735(c)(5)(B) of the Act is averaging the estimated weighted-average dumping margins determined for the exporters and producers individually investigated. The SAA accompanying the Uruguay Round Agreements Act, expressly allows for an exception to section 735(c)(5)(A) of the Act, with section 735(c)(5)(B) of the Act, which states that if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*, Commerce may use any reasonable method to calculate the all-others rate. The SAA states that the expected method in such cases will be to weight average the zero and *de minimis* margins *and margins determined pursuant to the facts available*, provided that volume data is available.[52] Thus, in this case, Commerce followed the expected method, which has been repeatedly upheld by the Courts, including *Albemarle*.[53] Consistent with *Albemarle* and our practice, Commerce applied the expected method under section 735(c)(5)(B) of the Act, to determine a review-specific, simple-average margin for those companies that were requested, and initiated, for review, but were not selected for individual examination.[54]

There is a well-established basis both in law and Commerce's practice to "calculate the non-selected respondents' dumping margin based on the mandatory respondents' rates."[55] Moreover,

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[51] *See*, *e.g.*, *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Revocation of Order (in Part); 2011-2012*, 78 FR 42497 (July 16, 2013) (*Shrimp from Thailand*), and accompanying IDM at Comment 3 (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 FR 52823, 52824 (September 11, 2008) (*Bearings*), and accompanying IDM at Comment 16).

[52] *See SAA*, H.R. Doc. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 at 4201 (emphasis added).

[53] *See*, *e.g.*, *Albemarle*, 821 F. 3d 1345, 1352 ("The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.").

[54] *See Preliminary Results*, 85 FR at 19139, and accompanying PDM at 9-10.

[55] *See Shrimp from Thailand* IDM at Comment 3.

in this case, and consistent with our practice and the prevailing law, Commerce has applied the "expected method" as intended by Congress.[56] For the reasons stated below, we find that the expected method is appropriate here.

The Expected Method Is Lawful

Huttig *et al* mischaracterizes Commerce's application of the expected method as an unlawful application of AFA to cooperative respondents. As discussed above, Commerce may apply section 735(c)(5)(A) of the Act, inclusive of AFA rates, as a matter of law. Moreover, courts have consistently upheld the use of the expected method, which may include AFA rates, as lawful.

With regard to Huttig *et al.*'s reference to *Bestpak*, we disagree; *Bestpak* did not deny the legal applicability of the expected method.[57] *Bestpak* affirmed that Commerce's methodology could include averaging *de minimis* and AFA rates, and that "{section 735(c)(5)(B) of the Act} and the SAA explicitly allow Commerce to factor both *de minimis* and AFA rates into the calculation methodology."[58] Although *Bestpak* ultimately found the rate applied in that case unreasonable, it was not because of the use of an AFA rate in the average to determine the separate rate.[59] As such, here, there is no evidence on this record, as examined below, that the application of the expected method is unlawful unreasonable.

Similarly, Huttig *et al.'s* reliance on *SKF*, as support for departure from the expected method, is unpersuasive. *SKF* is distinguishable from the instant review because the issue in *SKF* was Commerce's treatment of the mandatory respondent and its supplier, not the non-examined companies under review and the review-specific rate applied.[60] Huttig *et al.'s* argument that Commerce "cannot, as a matter of law … apply a punitive AFA rate to cooperative, 'all-others' respondents, without affirmatively establishing, by substantial evidence that this AFA rate bears some relationship to the 'all-others' respondents' actual dumping margins" is misplaced.[61] The SAA's permissibility of the expected method under section 735(c)(5)(B) of the Act is not precluded by the Court's opinion in *SKF*. As explained below, Commerce selected the largest exporters and producers by volume under section 777A(c)(2) of the Act and found no evidence

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[56] *See*, *e.g.*, *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 11679 (March 16, 2018), and accompanying IDM at Comment 5A ("As stated in section 735(c)(5)(A)-(B) of the Act, SAA, and upheld in *Albemarle*, Commerce may use the average of two AFA margins in assigning the rate to non-selected respondents. We believe that this is a reasonable method and the expected method of calculating such a margin, as set forth in the SAA…") (internal citations omitted)*; see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, Final Results of No Shipments, and Partial Rescission of the Antidumping Duty Administrative Review; 2015-2016*, 83 FR 12717 (March 23, 2018) (*Fish Fillets 2018*), and accompanying IDM at Comment 2 ("The logic of the CAFC is in no way distinguished just because it had before it two *de minimis* rates rather than two rates based on facts available.").

[57] *See Bestpak*, 716 F. 3d at 1378.

[58] *Id.*

[59] *Id.* ("Although Commerce may be permitted to use a simple average methodology to calculate the separate rate, the circumstances of this case renders a simple average of a *de minimis* and AFA China-wide rate unreasonable *as applied*. Similarly, a review of the administrative record reveals a lack of substantial evidence showing that such a determination reflects economic reality.") (emphasis added).

[60] *See SKF*, 675 F. Supp. 2d at 1272-79.

[61] *See* Huttig Case Brief at 8.

to suggest that these mandatory respondents are not representative of the non-examined companies.

The Application of the Expected Method Is Reasonable

Non-examined respondents argue that the Commerce's application of the expected is unreasonable as applied because the rate bears no relation to an actual calculated dumping margin and is not reasonably reflective. However, as demonstrated below, the evidence supports a finding that the mandatory respondents were reasonably representative, in accordance with the expected method under the SAA.

With regard to Huttig *et al*'s reference to *Baroque*, the Court ruled that "it is not *per se* unreasonable for Commerce to use a simple average of zero and AFA rates to calculate the separate rate."[62] Commerce recognizes that the Court also requires that the chosen method be reasonable based on the record evidence. In *Qihang Tyre*, the court held that "Commerce … had a basis, grounded in substantial record evidence and according to a statutorily-authorized method, to conclude that the *two largest exporters were representative of all exporters and producers for which review had been requested*."[63]

Pursuant to section 777A(c)(2) of the Act, we limited our examination of exporters or producers accounting for the largest volume of the subject merchandise, based on the CBP data we placed on the record.[64] Specifically, we first considered section 777A(c)(1) of the Act, which requires Commerce to determine an individual weighted-average dumping margin for each known exporter and producer of subject merchandise. However, Commerce is permitted to limit its examination to a reasonable number of exporters under section 777A(c)(2) of the Act if it determines that it is not practicable to determine individual weighted-average dumping margins because of the large number of exporters or producers involved in the administrative review. Thus, because Commerce initiated the review covering 83 companies, which we determined to be a large number, we limited our examination as permitted by the law.[65]

Subsequently, we considered section 777A(c)(2) of the Act, which permits Commerce to determine the weighted-average dumping margins for a reasonable number of exporters or producers, by limiting its examination to the exporters or producers accounting for the largest volume of the subject merchandise from the exporting country that Commerce determines can be reasonably examined.[66] In doing so, we relied on the CBP data on the record to determine the largest exporters or producers, by volume. Commerce found that an individual examination of two companies was a reasonable basis upon which to conduct this administrative review because examining the two companies originally selected balanced our resource constraints, while accounting for the largest volume of imports of the subject merchandise during the POR.[67]

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[62] *See Baroque*, 971 F. Supp. 2d at 1341.
[63] *See Qingdao Qihang Tyre Co. v. United States*, 308 F. Supp. 3d 1329, 1363 (CIT 2018) (*Qihang Tyre*) (emphasis added).
[64] *See* Respondent Selection Memo.
[65] *Id*. at 2-3.
[66] *See* section 777A(c)(2)(A) and (B) of the Act.
[67] *See* Respondent Selection Memo at 5. As one of two companies selected for individual examination demonstrated

As the case in *Qihang Tyre*, the CBP data on the record here demonstrate that the largest exporters, by volume, "were not only the two largest … but also accounted for a substantial portion of the subject merchandise exports of all exporters and producers for which Commerce had remaining requests for review."[68] Commerce therefore had a basis, grounded in substantial record evidence and according to a statutorily-authorized method, to conclude that the two largest exporters were representative of all exporters and producers for which a review had been requested.[69] The mandatory respondents in this case, Bonuts and PT, represent the vast majority of exports of subject merchandise, by volume, during the POR.[70] In *Albemarle*, the Court opined that "the very fact that the statute contemplates using data from the largest volume exporters suggests an assumption that those data can be viewed as representative of all exporters."[71] The Court further stated that "the statute assumes that, absent such evidence, reviewing only a limited number of exporters will enable Commerce to reasonably approximate the margins of all known exporters."[72] As Primesource noted, the CIT stated that, "{t}he representativeness of the investigated exporters is the essential characteristic that justifies an 'all others' rate based on a weighted average for such respondents."[73] In the instant review, under section 777A(c)(2), we examined the largest exporters, by volume, which also account for the vast majority of the total volume of subject exports during the POR. Thus, the rates assigned to the mandatory respondents are representative unless substantial evidence shows otherwise, whether we had calculated a zero rate, a *de mininis* rate, or assigned to them a rate based entirely on facts available.

The Record Evidence Does Not Undermine the Representativeness of the Mandatory Respondents

Huttig *et al.* rely on *Bosun II*; however, we note our disagreement with the Court's findings in *Bosun II* which is not final and is subject to a remand which Commerce is conducting under protest. In *Bosun II*, the Court remanded Commerce's reliance on the expected method because Commerce "failed to consider evidence indicating that the 41.025 rate is not reasonably reflective of the separate rate respondents' dumping …{and that} Commerce fails to address evidence which detracts from its determination to use the expected method."[74] Here, Commerce has reviewed all the rates assigned in this proceeding and analyzed that data from segment to segment.

In considering whether there was record evidence showing that the mandatory respondents' rates are not representative,[75] we reviewed the information proffered by Huttig *et al*., which is a listing

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it had no reviewable sales of subject merchandise during the POR, Commerce then selected the next largest producer and/or exporter, by volume, based on the CBP data on the record. *See* Second Respondent Selection Memo; *see also Preliminary Results* PDM at 2-3.

[68] *See Qihang Tye* at 1363.

[69] *Id.*

[70] *See* Respondent Selection Memo and CBP Data Memo.

[71] *See Albemarle*, 821 F. 3d 1345, 1353.

[72] *Id.*

[73] *Id*. (citing *Nat'l Knitwear & Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 15 C.I.T. 548, 559 (1991).

[74] *See Bosun Tools Co. v. United States*, Slip Op. 2020-97 (CIT 2020) (*Bosun II*)).

[75] *See, e.g.*, *Bosun II; Albemarle*, 821 F. 3d at 1353; and *Changzhou Hawd*, 848 F. 3d. at 1012.

of the calculated rates throughout this proceeding, including the investigation. The only analysis accompanying the submitted rates was a statement that the calculated margins have ranged from zero percent to 27.69 percent, which Huttig *et al.* consider to be "low" margins.[76] However, Huttig *et al.*, in their arguments, omitted any mention of the rates assigned in the history of the proceeding that were based on the 78.17 percent AFA rate. In any event, Huttig *et al*., have not provided any evidence that the 78.17 percent margins assigned in various segments of this proceeding have no probative value.[77] Absent any analysis of the rates from segment to segment nor acknowledgement of the behavior of the mandatory respondents from segment to segment, Huttig *et al.*'s arguments appear to portray an alternative and inaccurate history of this proceeding.

The history of the margins assigned in this proceeding does not include only zero and "low" margins as alleged by Huttig *et al.*; Commerce also assigned AFA in three out of five segments. In fact, the history of margins in this proceeding shows that more than half of the reviews contained determinations based on sections 776(a)-(b) of the Act. Therefore, if there is any pattern from segment-to-segment of the behavior of examined respondents, that pattern demonstrates that, most of the time, the mandatory respondents have failed to cooperate and have been assigned a rate based on AFA. For example, PT, a mandatory respondent in every segment, including the investigation, has been assigned margins ranging from zero to 78.17 (based on AFA) since 2015. PT has been selected as a mandatory respondent in each segment because Commerce determined there to be a large number of companies subject to investigation or review, and PT represented the largest volume of exports.[78] Additionally, prior to issuing the *Preliminary Results* in this segment (assigning AFA to PT), Commerce issued its *AR3 Final*, wherein PT was a cooperative mandatory respondent and received a calculated rate. In this review, for purposes of the final results we continue to assign PT a rate based on AFA. Moreover, we note that another mandatory respondent in this segment, Bonuts, has a history of uncooperative behavior, having been assigned AFA in *AR1*, *AR2* and this review. Like PT, Bonuts has been selected as a mandatory responding in numerous segments of the proceeding

[76] *See* Huttig Case Brief at 15-16.
[77] *Id.* at 15.
[78] *See* Second Respondent Selection Memo; *see also* (1) *Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 84 FR 48116 (September 12, 2019), and accompanying PDM at 2 ("Pursuant to section 777A(c)(2) of the Act, we limited our examination of exporters or producers accounting for the largest volume of the subject merchandise, based on the CBP data we placed on the record … Commerce selected LC, PT, and Unicatch for individual examination in this administrative review …"), unchanged in *AR3 Final*; (2) *Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2016-2017*, 83 FR 39675 (August 10, 2018) (*AR2 Prelim*), and accompanying PDM at 2 ("we issued our Respondent Selection Memorandum for this administrative review, in which we selected Bonuts, PT, and Unicatch as mandatory respondents."), unchanged in *AR2* (final results); (3) *Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015-2016*, 82 FR 36744 (August 7, 2017) (*AR1 Prelim*), and accompanying PDM at 2-3 ("… we issued our Respondent Selection Memorandum for this administrative review, in which we selected Bonuts and PT Enterprise, Inc. as mandatory respondents …"), unchanged in *AR1* (final results); (4) *Certain Steel Nails from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 78053 (December 29, 2014), and accompanying PDM at 2 ("As stated in the Respondent Selection Memorandum, {Commerce} based its selection of mandatory respondents on U.S. Customs and Border Protection (CBP) entry data for the …(HTSUS) subheadings listed in the scope of the investigation … {Commerce} selected PT and Quick Advance as mandatory respondents …"), unchanged in *Investigation Final*, 80 FR at 28959.

because Commerce determined there to be a large number of companies subject to review, and Bonuts represented the largest volume of exports.[79]

We also examined the history of rates for another frequent mandatory respondent, not under review in the instant segment. Commerce assigned AFA to Unicatch in *AR1*.[80] Commerce also examined Unicatch in *AR2* and *AR3* and calculated margins for it in both reviews (*i.e.*, 6.16 percent and 27.69 percent, respectively).[81] While Huttig *et al* claim that 27.69 percent is "low," the fact is the percentage increase in Unicatch's margin from *AR2* to *AR3* is 350 percent.[82] That is, Unicatch was found to have dumped 350 percent more in *AR3* than it did in *AR2*.

There has been no indication in the history of the proceeding that the selected mandatory respondents were not representative of the experience of the non-selected companies, even when the rates of the mandatory respondents were based on AFA. Indeed, in each segment of the proceeding, except for *AR2* where the only companies under review were the mandatory respondents, the rate of the mandatory respondents has been the basis for the non-selected rate, pursuant to section 777A(c)(1) or (2) of the Act.[83] The non-examined companies have not supported their allegation that the review-specific rate in this review would not be reflective of a calculated rate with another such increase.

Essentially, Huttig *et al.*'s listing of the calculated margins as "substantial evidence" lacks acknowledgement of the consistently upward trend of those margins, review to review, especially the 350 percent increase for Unicatch. Additionally, the non-examined companies argue that the review-specific rate assigned to them is not a "commercial reality." However, as 73 of 75 of the non-examined companies have never been examined in any segment of the proceeding, there is no evidence on this record or any other record that the 78.17 percent rate does not reflect their commercial reality. Their claim is not substantiated by any record evidence. Huttig *et al.* argues that the *Solianus* decision does not support the record in this review because "the 'sanctioned methodology was improperly applied in this administrative proceeding' and {Huttig} has provided substantial evidence establishing that the 78.17 percent 'all-others' rate is unreasonably high or unrepresentative of 'all other' exporters."[84] Based on Commerce's analysis of *all* the assigned rates, segment to segment, it is apparent that there is no pattern of "low" margins in this proceeding, as claimed by Huttig *et al.* Thus, the evidence on the record does not show that the assumed representativeness (as recognized in *Albemarle*) for mandatory respondents should not apply. We find that the facts here do not present a situation where our methodology is unreasonable.

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[79] *See*, *e.g.*, Respondent Selection Memo (instant review); *AR1 Prelim*; and *AR2 Prelim*.
[80] *See AR1*, 83 FR at 6164 ("we find that the application of adverse facts available, pursuant to section 776(a)-(b) of the Act, is warranted with respect to Bonuts, PT/Pro-Team, and Unicatch") (*AR1* is pending litigation).
[81] *See AR2*, 83 FR at 11507; *see also AR3*, 85 FR at 14636 (pending litigation).
[82] *See AR2*, 83 FR at 11507; and *AR3*, 85 FR 11507.
[83] *See Investigation Final*, 80 FR at 28961; *AR1*, 83 FR at 6164; *AR2*, 83 FR at 11507 (Commerce determined final rates for the only companies under review, which were the three mandatory respondents); and *AR3*, 85 FR at 14636.
[84] *See* Huttig Case Brief at 16 (citing *Solianus*, 391 F. Supp. 3d at 1340).

Parties' Cited Court Cases Do Not Support Departure from the Expected Method

Parties cited to several different cases as to why Commerce should depart from the expected method, but these cases are distinguishable.

Huttig *et al.*'s reference to *Changzhou Wujin* and *Navneet*, as support for departure from the expected method, is unpersuasive. In *Navneet*, the Court specifically addressed reliance on the expected method stating that the Federal Circuit never found that Commerce was legally barred from using an AFA rate calculated for and assigned to an uninvestigated respondent in its separate rate calculations" … but rather, "the court found that Commerce could not elevate the averaging methodology of § 1673d(c)(5)(B) above other, more reasonable methods when the AFA rate at issue was only applied to adversely increase the margin for cooperative respondents{.}[85] Here, Commerce did not elevate the averaging methodology of section 735(c)(5)(B) of the Act above other, more reasonable methods because the AFA rate at issue was lawfully applied to individually-investigated mandatory respondents pursuant to sections 776(a) and (b) of the Act, and Commerce's use of these rates to calculate the non-examined companies' review-specific rate was a function of the permissible expected method. We also note that the CIT stated that "the all-others rate statute expressly permits the inclusion of facts available rates."[86] The CIT further noted that "… the Federal Circuit has already rejected the argument that AFA rates may not be incorporated into the all-others rate."[87] Had Congress intended to disallow AFA rates in this context, it would not have specifically authorized the use of such rates.[88] Moreover, the crux of the Court's decision in *Navneet* focused on the argument of the existence of quantity and value data on the record and whether review-specific rates in prior reviews versus the review-specific rate in the litigated review were aberrational due to the fluctuation segment-to-segment. None of those conditions are present in this case as the evidence here does not demonstrate that any rates calculated or assigned in this review or any other segment of this proceeding have been "aberrational."

Further, as Commerce has not applied a "hypothetical" AFA rate, as in *Changzhou Wujin*,[89] to any exporters under review, the circumstances under which the Court found the expected method unreasonable in *Changzhou Wujin* do not exist here. Here, Commerce properly applied, as AFA,

[85] *See Navneet*, 999 F. Supp. 2d at 1361-2.
[86] *Id.*, 999 F. Supp. 2d 1354, 1359.
[87] *Id*. (citing *Bestpak*, 716 F. 3d at 1378 ("rejecting a similar argument because {section 735(c)(5)(B) of the Act} and the SAA explicitly allow Commerce to factor both *de minimis* and AFA rates into the calculation methodology")).
[88] *Id*., 999 F. Supp. 2d at 1359.
[89] The term "hypothetical" AFA rate refers to a case-specific circumstance where Commerce relied on record information to create a basis for a calculated separate rate. *See Changzhou Wujin*, 701 F. 3d at 1373 ("As a preliminary step in recalculating the separate rate, Commerce calculated a new, hypothetical AFA rate of 30.94 {percent}, which it based on Wujin Water's verified normal value data and unverified U.S. price data obtained from the noncooperating respondent BWA. Commerce did not assign this hypothetical AFA rate to any party; rather, it was used solely as the predicate for calculating the new separate rate for Wujin Fine Chemical and Jiangsu Jianghai. Commerce determined that because the hypothetical AFA rate was based on information obtained during the course of the investigation, corroboration was unnecessary. Averaging the hypothetical AFA rate of 30.94 {percent} with Wujin Water's *de minimis* rate, Commerce obtained a separate rate of 15.47 {percent}, which it assigned to Wujin Fine Chemical and Jiangsu Jianghai.") As *Changzhou Wujin* is a NME case with alternative calculations performed for NME-specific separate rate companies, the arguments or facts in that case are not analogous to those in this case.

to the mandatory respondents the highest rate from any segment of the proceeding, consistent with section 776(d) of the Act.[90] Further, in the *Preliminary Results*, we stated that "pursuant to section 776(c)(2) of the Act, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding."[91] As previously explained, the mandatory respondents are representative of all exporters under review, and, as such, it is reasonable for Commerce to use their assigned rates to calculate the review-specific rate for the non-examined companies when that is the case.

Huttig *et al.*'s reference to *Xinboda*, as support for departure from the expected method, is also unpersuasive. In *Xinboda*, the CIT acknowledged that the Federal Circuit, in *Albemarle*, held that the application of information, including duty rates, from a prior review may be reasonable under at least two circumstances: (1) "where there is evidence that the overall market and the dumping margins have not changed from period to period," and (2) "where Commerce is constructing an AFA rate."[92]

Employing Other "Reasonable" Methods

The non-examined companies argue that Commerce should "pull forward" the review-specific rate of 12.90 percent from *AR3 Final*. LC further argues that Commerce should "pull forward" LC's 2.54 percent rate calculated for it in *AR3 Final* and assign that rate to it in this review. Based on the above analysis, we decline to adopt the non-examined companies' suggestion to pull rates forward from prior reviews and also decline LC's suggestion that Commerce should apply the margin calculated for LC in *AR3 Final* as its dumping margin in this review.[93] The Federal Circuit opined on this issue in *Albemarle*, stating that:

> In light of this established doctrine, it is not open to Commerce to argue that prior review data is reliable simply because it is 'temporally proximate.' The government's rationale contravenes this fundamental premise of periodic administrative reviews that each 'administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record.' That the prior rates were near in time cannot in and of itself justify their use in a subsequent review.[94]

The act of "pulling forward" a company-specific rate or a calculated review-specific rate for non-examined companies from a "temporally proximate" review contravenes the Federal Circuit's explicit opinion in *Albemarle*. While Huttig *et al.* claim that Commerce's normal practice is to "pull forward" rates, citing to *Aluminum Extrusions CVD 2017*,[95] this so-called "practice" is not Commerce's normal practice. *Aluminum Extrusions CVD 2017*, which occurred after *Albemarle*

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[90] *See AR2*, 84 FR at 11507 (While Commerce listed the AFA margin as 78.13 percent, Commerce believes this to be a typographical error, because the PDM in the second administrative review correctly identifies 78.17 percent as the AFA margin).
[91] *See Preliminary Results* PDM at 9.
[92] *See Xinboda*, 180 F. Supp. 3d at 1322, n.21 (citing *Albemarle*, 821 F. 3d at 1357).
[93] *See* LC Case Brief at 2 (citing *AR3 Final*).
[94] *See Albemarle*, 821 F.3d 1345, 1357 (citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F. 3d 1378, 1387 (Fed. Cir. 2014)).
[95] *See* Huttig Case Brief at 10 (citing *Aluminum Extrusions CVD 2017*).

(May 2016) and *Changzhou Hawd* (February 2017), cited to two cases that pre-dated *Albemarle*, in 2014 and 2009, wherein Commerce "pulled forward" prior rates.[96] However, there was no justification provided for departing from the "expected method" in *Aluminum Extrusions CVD 2017*. Absent any reasoning for departing from the expected method in *Aluminum Extrusions CVD 2017*, and with a preponderance of other cases that *have* relied on the expected method, we have not relied on *Aluminum Extrusions CVD 2017*.

Further, Huttig *et al.'s* reliance on *Sinks* and *TRBs* as support for departing from the expected method is not analogous to the instant review and, thus, is unpersuasive here. As we stated in *Fish Fillets 2018*, "{i}n both those reviews {(*Sinks and TRBs*)}, Commerce neither calculated any individual rates nor assigned any rates based on facts available. Those two situations are therefore not analogous to this proceeding, where Commerce has assigned a rate to the mandatory respondents based on facts available."[97] The Courts have opined that "pulling forward" rates is an exception to the "expected method" rule and must be justified by the record evidence. By and large, apart from *Aluminum Extrusions CVD 2017*, Commerce has adhered to *Albemarle*, where the Federal Circuit disallowed the "pull forward" method and has consistently reiterated that:

> After the Court of International Trade rendered its decision in this case, our court made clear that the 'separate rate' method {of pulling forward rates} used by Commerce here *is a departure from the congressionally approved 'expected method'* applicable when all of the individually investigated firms have a zero or *de minimis* rate, which is the case here, and that certain findings are necessary to justify such a departure. Under the 'expected method, ' appellants would be entitled to a *de minimis* rate. *Because Commerce did not make the findings needed to justify departing from the expected method, we vacate the Court of International Trade's judgment*, and we remand.[98]

While both *Albemarle* and *Changzhou Hawd* contemplated *de minimis* rates, and this review contemplates the inclusion of rates based entirely on facts available, the congressionally approved "expected method" allows for zero, *de minimis* and rates based entirely on facts available, with no prejudice of one type of rate over another. Thus, the argument from non-

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[96] *See Aluminum Extrusions from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2015*, 82 FR 26438 (June 7, 2017), unchanged in *Aluminum Extrusions CVD 2017* (citing *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2012 and Rescission of Countervailing Duty Administrative Review, in Part*, 79 FR 51140, 51141 (August 27, 2014); and *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191, 47194-95 (September 15, 2009)).

[97] *See Fish Fillets 2018* IDM at Comment 2*; see also Sinks*, 83 at FR 23426 ("we preliminarily assigned the non-selected companies a weighted-average dumping margin of 1.78 percent (*i.e.*, the most recently assigned separate rate in this proceeding) because we did not calculate any individual rates *or assign a rate based on facts available* during this review."); *see also TRBs*, 83 FR at 1239 ("For these final results, we have not calculated any individual rates or *assigned a rate based on facts available*. Therefore, consistent with our recent practice, we determine to assign to the non-individually examined separate rate companies the rate assigned to the separate rate companies in the most recently-completed administrative review of the order, which is zero.") (emphasis added).

[98] *See Changzhou Hawd Flooring Co. v. United States*, 848 F. 3d 1006, 1008 (Fed. Cir. 2017) (citing *Albemarle*, 821 F. 3d 1345, 1348 (emphasis added)).

examined companies to segregate *de minimis* and zero rates within the expected method from rates based on facts available is without merit. Congress did not create a discrete "expected method" for rates based on facts available; Congress included rates based on facts available, as the Courts have now consistently acknowledged.

As discussed above, and emphasized in both *Albemarle* and *Changzhou Hawd*, the concept of the mandatory respondents' "representativeness of the market" has been met in this case, because following section 777A(c)(2) of the Act, Commerce has selected the respondents that accounted for the largest volume of the subject merchandise that can reasonably be examined, according to the CBP data on the record.[99] Importantly, in *Changzhou Hawd* the Court stated that "the mandatory respondents in this matter are assumed to be representative. Under *Albemarle*, Commerce could not deviate from the expected method unless it found, based on substantial evidence, that the separate-rate firms' dumping is different from that of the mandatory respondents."[100] Likewise, here, Commerce has no substantial evidence on this record that the non-examined companies would behave differently from the mandatory respondents or that the mandatory respondents cannot reasonably be representative of the market.[101]

Finally, Commerce also disagrees with LC's argument that Commerce ought to apply to it a rate from a prior review. LC argues that Commerce should pull forward the rate calculated and assigned to LC in the immediately preceding review because LC's participation in that review demonstrates cooperation.[102] Commerce's long-standing practice is to treat each administrative review as a separate reviewable segment of the proceeding involving different sales, adjustments, and underlying facts. What transpired in previous reviews or in other cases is not binding precedent in later reviews or other cases and thus, each administrative review or case must stand alone.[103] LC is not entitled to a special dumping margin in this review on the basis of having been previously examined. Moreover, LC's argument is contrary to its actions, or lack thereof, in ensuring a chance at individual examination.[104] For example, LC did not request an administrative review of itself nor did it participate in the respondent selection process by filing respondent selection comments or requesting voluntary respondent status.

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[99] *See* CBP Data Memo and accompanying CBP data.
[100] *See Changzhou Hawd*, 848 F. 3d 1006, 1012.
[101] *See Fish Fillets 2018* IDM at Comment 2 ("With respect to the separate rate respondents' proposal to 'pull forward' a margin from a prior segment of the same proceeding, they point to no convincing evidence that the 'underlying facts or calculated dumping margins' have remained the same throughout prior proceedings, or that there is 'consistency' from prior reviews with respect to the margins of the individually examined exporters. This proceeding likewise does not implicate any of the exemptions that the CAFC carved out from the prohibition on 'pulling forward.'").
[102] *See* LC Case Brief at 2.
[103] *See Shandong Huarong Mach. Co. v. United States*, 29 CIT 484 (CIT 2005) ("… each administrative review is a separate segment of proceedings with its own unique facts."); *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002), and accompanying IDM at Comment 3 ("What transpired in previous reviews is not binding precedent in later reviews.").
[104] *See*, *e.g.*, *Union Steel Mfg. Co. v. United States*, 837 F. Supp. 2d 1307, 1330-31 (CIT 2012) (holding that because the party did not take the necessary actions to pursue voluntary respondent status it had failed to exhaust its administrative remedies).

As we stated in the *Preliminary Results*,[105] LC has no basis to consider itself eligible for individual examination because it was not among the largest exporters, by volume, within the CBP data used for respondent selection.[106] Further, there is no record evidence substantiating LC's claim that it would have received the same result in this review as it did in a previous review, had it been selected for individual examination.[107] LC had ample opportunity to request voluntary respondent status, but did not do so or follow the statutory directive under section 782(a) of the Act, to present itself as a voluntary respondent. When Commerce limits the number of exporters and producers examined in an investigation, section 782(a) of the Act directs Commerce to establish an individual antidumping rate for any exporter or producer not initially selected for individual examination that voluntarily submits the information requested from mandatory respondents, if: (1) the information is submitted by the due date specified for exporters or producers initially selected for examination; and (2) the number of exporters and producers subject to the investigation is not so large that any additional individual examination of such exporters and producers would be unduly burdensome and inhibit the timely completion of the investigation.[108] Rather than following the statutory requirements for requesting voluntary status, LC filed a letter, well after the deadlines established under section 782(a) of the Act passed, stating it was "willing and able to submit a response to the … antidumping duty questionnaire in this segment of the proceeding.."[109] As we already stated in the *Preliminary Results*, LC's "letter of willingness" to be a respondent was an unacceptable substitute for the requirements established under section 782(a) of the Act.[110]

Consequently, based on the above responses to arguments, Commerce continues to determine that it is reasonable to rely on the "expected method" to assign a review-specific dumping margin to the non-examined companies under review.

Comment 2: Quick Advance Inc. and Ko's Nail Inc. Exclusion from the *Order*

Quick/Ko's Case Brief:

- In the underlying investigation, Commerce calculated a zero margin for Quick Advance Inc (Quick) and its affiliated producer Ko's Nail Inc. (Ko's), and thus, excluded them from the *Order*.[111] Commerce instructed CBP to not suspend any entries of subject merchandise produced and exported by Quick and Ko's.[112] Commerce echoed this same instruction in the *Order*, stating that the specific producer-exporter chain of Quick and Ko's were excluded from the *Order*.
- Upon initiating its review, Commerce incorrectly instructed CBP to suspend liquidation

[105] *See Preliminary Results* PDM at 3.
[106] *See* CBP Data Memo.
[107] *See Qihang Tyre*, 308 F. Supp. 3d at 1363-1364 ("It is unavailing for Trelleborg to assert that it would have been assigned a margin between 1.79 {percent} and 2.03 {percent} had it been individually examined.").
[108] *See* section 782(a)(1)(A) and (B) of the Act.
[109] *See* LC's Letter, "Comments on Sampling Determination," dated February 3, 2020.
[110] *See Preliminary Results* PDM at 3 and n.18 ("in order to be treated as a voluntary respondent at the very latest, LC should have submitted its Section A response by November 18, 2019 and its Sections B-D response by December 4, 2019.").
[111] *See* Quick/Ko Case Brief at 3 (citing *Order*, 80 FR at 39996).
[112] *Id.*

of Quick and Ko's entries for this POR. Commerce also incorrectly included Quick and Ko's in the draft cash deposit and liquidation instructions released with the *Preliminary Results*.

- Commerce should follow its reasoning and practice in *Brake Rotors* and re-affirm the fact that the Quick/Ko's exporter-producer combination is excluded from the *Order* pursuant to section 351.204(e)(1) and that Quick/Ko's nails were not subject to this administrative review.[113]
- Commerce should revise the instructions and instruct CBP not to suspend liquidation of entries of subject merchandise produced by Ko's and exported by Quick. Without this proposed modification, CBP officials will not realize that subject merchandise produced by Ko's and exported by Quick are not subject to the *Order*.

No interested parties rebutted this issue.

Commerce's Position:

Commerce agrees with Quick and Ko's regarding its channel-specific exclusion from the *Order*. In the *Order*, Commerce stated that it:

> calculated its dumping margin during its investigation based on sales of Quick Advance, Inc. that were produced by Ko Nails, Inc. Therefore, Quick Advance Inc.'s exclusion from antidumping duty liability and any cash deposit requirement pertains **only** to the channel(s) of sales that were examined by {Commerce} in the investigation.[114]

Thus, we have amended the draft cash deposit instructions to CBP for the final results to instruct CBP not to suspend liquidation and collect cash deposits for entries of subject merchandise where Quick is the exporter *and* Ko's is the producer,[115] as stated in the *Order*.[116] We have also amended the draft liquidation instructions to instruct CBP to liquidate entries of subject merchandise exported by Quick and produced by Ko's without regard to AD duties.

With regard to the automatic liquidation instructions issued on September 26, 2019, paragraph 3 states that "entries of merchandise of the firms listed below should not be liquidated until specific instructions are issued."[117] Thus, because Commerce will instruct CBP to liquidate Quick and Ko's suspended entries, if any exist, without regard to AD duties, in the specific sales channel identified above, the inclusion of Quick and Ko's in the automatic liquidation instructions will be superseded by the liquidation instructions issued after the final results, which are released in draft form, accompanying this memorandum and *Federal Register* notice.

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[113] *See* Quick/Ko Case Brief at 5 (citing *Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006), and accompanying IDM at Comment 13).
[114] *See Order*, 80 FR at 39996, n.8 (emphasis added).
[115] *See* Memorandum, "Draft Customs Instructions," dated concurrently with this memorandum.
[116] *Id*. at n.10.
[117] *See* AR4 Automatic Liquidation Instructions; Message 9269302, dated September 26, 2019, available on ACCESS under barcode: 3900180-01.

V. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the administrative review and the final dumping margins in the *Federal Register*.

☒	☐
Agree	Disagree

11/20/2020

X

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance