Public Version

MacLean Fogg Company, et. al.
v. United States
Court No. 11-00209; Slip Op. 12-47 (CIT 2012)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or the "Court"), issued on April 4, 2012, in *MacLean Fogg Company, et. al. v. United States*, Court No. 11-00209, Slip Op. 12-47 (CIT 2012) ("*MacLean Fogg*"). These final remand results concern *Aluminum Extrusions from the People's Republic of China: Final Affirmative Determination of Countervailing Duty Investigation*, 76 FR 18521 (April 4, 2011) ("*Final Determination*").

In these final remand results, pursuant to the Court's remand order, we have examined the relevant data on the record, including the voluntary respondents' rates, and we explain how the calculation of the all others rate using the mandatory respondents' rates satisfies the statutory reasonableness requirement given the facts in this case. We explain how we have considered the important aspects of the problem presented, including alternatives based on information available on the record, and why our calculation of the all others rate excluding the voluntary respondents' rates is reasonable in this case.

B. BACKGROUND

1. *The Final Determination*

In the countervailing duty investigation of aluminum extrusions from the People's Republic of China ("PRC"), due to the large number of respondents, the Department determined

to individually examine those respondents accounting for the largest volume of aluminum extrusions from the PRC.[1] The Department determined that the office assigned to the investigation had the resources to investigate no more than three mandatory respondents. The Department selected the three largest exporters based on data obtained from U.S. Customs and Border Protection (CBP).[2] These data indicate that the three mandatory respondents account for [ ] percent of exports of aluminum extrusions by volume.[3]

The three mandatory respondents did not respond to the initial questionnaires, and therefore the Department determined in the *Final Determination* that the mandatory respondents failed to cooperate by not acting to the best of their ability. The Department applied facts available with an adverse inference to the mandatory respondents pursuant to section 776 of the Tariff Act of 1930, as amended ("the Act").[4] Meanwhile, two exporters timely requested treatment as voluntary respondents, and the Department determined to establish individual subsidy rates for these voluntary respondents.[5]

Pursuant to sections 705(c)(5)(A) and 777A(e) of the Act, the Department applied the rate calculated for the three mandatory respondents as the all-others rate. The Department excluded the rates calculated for two voluntary respondents from the calculation of the all-others rate, pursuant to 19 CFR 351.204(d)(3).

2. *The Court's Holding*

Numerous importers challenged our use of the mandatory respondents' rates in the

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[1] *See* Memo to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Respondent Selection" (May 18, 2010).
[2] *Id.*
[3] *See* Memo to the File, "Release of Query Results of Customs and Border Patrol (CBP) Database" (April 23, 2010) ("CBP Query Results").
[4] *See Final Determination*, 76 FR at 18522.
[5] *See* Memo to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Acceptance of Requests for Treatment As Voluntary Respondents," (July 21, 2010); *see also Final Determination*, 76 FR at 18522.

calculation of the all-others rate at the Court of International Trade. In its decision, the Court held that the statutory provision concerning whether the Department is required to base the all-others rate on rates calculated for mandatory respondents is ambiguous, and therefore the Department's determination, in its regulation and as applied to this case, to exclude the voluntary respondents' rates from the calculation of the all others rate, is reasonable.[6]

The Court next turned to whether "Commerce's determination to calculate the all others rate using the weighted average of the rates determined for the mandatory respondents, all of whom were non-cooperative and therefore received AFA rates, is reasonable."[7] First, the Court considered other determinations in which the Department calculated the all-others rate using the weighted-average of AFA rates determined for the mandatory respondents. Because those investigations did not include voluntary respondents, the Court ruled that those cases did not provide support for the Department's determination.[8] The Court also noted that the Department could have identified other respondents for mandatory investigation in order to have additional rates on which to rely in calculating the all others rate.[9] In the Court's view, the Department was faced with "the difficult task of selecting an all-others rate with limited information before it" but that "there is nothing in Commerce's decision which indicates a logical connection between the AFA rate and Commerce's conclusion to apply that rate to the remaining parties."[10] The Court ruled that "Commerce is required to make a reasonable decision, considering the important aspects of the problem presented, and explain why that decision complies with the statutory reasonableness requirement. We remand to give it the opportunity to do so."[11]

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[6] *See MacLean Fogg*, Slip Op. 12-47 at 12-13.
[7] *See id.* at 14-15.
[8] *See id.* at 15.
[9] *See id.* at 16.
[10] *See id.* at 17.
[11] *See id.* at 18-19.

3. *Draft Results of Redetermination Pursuant to Court Remand*

On May 22, 2012, the Department issued the Draft Results of Redetermination Pursuant to Court Remand ("Draft Remand") and provided parties until May 29, 2012 to comment. On May 29, 2012, the Department extended the period for providing comments to June 5, 2012. On June 5, 2012, On June 5, 2012, Ningbo Yili Import & Export Co., Ltd. and Eagle Metal Distributors, Inc.,[12] Evergreen Solar Inc.,[13] MacLean-Fogg Company,[14] Fiskars Brands Inc.[15] and the Aluminum Extrusions Fair Trade Committee ("Petitioner")[16] filed comments.

C. ANALYSIS

1. *Exclusion of the Voluntary Respondents' Rates from the Calculation of the All Others Rate*

In the *Final Determination*, the Department excluded the voluntary respondents' rates from the calculation of the all others rate to prevent manipulation of the all others rate. As described below, the threat of such manipulation is a very real possibility given the facts of this case. This decision was consistent with the Department's regulation, 19 CFR §351.204(d)(3), promulgated in May 1997.[17] The regulation provides that, in calculating the all others rate, the Department will "exclude weighted-average dumping margins or countervailing subsidy rates calculated for voluntary respondents."[18] In its *Preamble*, the Department explained that "the purpose of this provision was to prevent manipulation and to maintain the integrity of the all-

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[12] *See* "Comments of Ningbo Yili Import & Export Co., Ltd., And Eagle Metal Distributors, Inc., on Draft Results of Redetermination," (June 5, 2012) ("Ningbo Yili and Eagle Metal's Comments").
[13] *See* "Comments of Evergreen Solar, Inc. Regarding the May 22, 2012 Draft Results of Redetermination Pursuant to Court Remand," (June 5, 2012) ("Evergreen Solar's Comments").
[14] *See* "Aluminum Extrusions from the People's Republic of China," (June 5, 2012) ("MacLean-Fogg's Comments").
[15] *See* "Aluminum Extrusions from the People's Republic of China," (June 5, 2012) ("Fiskars Brands Inc.'s Comments").
[16] *See* "Comments Regarding Draft Results of Redetermination Pursuant to Court Remand," (June 5, 2012) ("Petitioner's Comments").
[17] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27310 (May 19, 1997) ("Preamble")
[18] 19 CFR §351.204(d)(3).

others rate."[19] Further, those companies most likely to request voluntary treatment "are those with reason to believe that they will obtain a lower margin by volunteering than they would obtain by being subject to the all-others rate" and so the inclusion of such rates in the all others rate "would be expected to distort the weighted-average for the respondents selected by the Department on a neutral basis."[20]

In *MacLean Fogg*, the Court held that section 705(c)(5)(A)(ii) of the Act does not require the Department to include the rates calculated for voluntary respondents in the calculation of the all-others rate.[21] The Court also held that the Department's basis for promulgating and applying its regulation is reasonable.[22]

The policy reasons for enacting this regulation are illustrated by the facts of this investigation, and continue to support the Department's exclusion of the voluntary respondents' rates from the calculation of the all others rate. The three mandatory respondents that were selected for individual examination were responsible for [ ] percent of exports of aluminum extrusions by volume.[23] These respondents did not participate in any way in the countervailing investigation of aluminum extrusions, despite their large volume of exports during the period of investigation. The Act is very clear on this point: should a party withhold information, and should the Department find that the party failed to cooperate by not acting to the best of its ability, the Department may apply facts available with an adverse inference.[24] In addition, the Department has a longstanding practice of calculating adverse facts available rates in the manner in which the rates were calculated here: using program-specific rates calculated for cooperating

[19] *Preamble* at 27310.
[20] *Id.*
[21] *See MacLean Fogg* at 11.
[22] *See id.* at 13.
[23] *See* CBP Query Results.
[24] *See* section 776 of the Act.

respondents in the current investigation or calculated in prior countervailing duty investigations of products from the PRC.[25]

Whatever the reasons for the mandatory respondents' failure to cooperate, the two voluntary respondents, who together were responsible for [ ] percent of exports of aluminum extrusions by volume,[26] requested voluntary treatment presumably "knowing their own commercial practices."[27] Because these companies are self-selected and represent a very small percentage of exports, we find the voluntary respondents' rates to not be probative of the level of subsidization for typical aluminum extrusions producers/exporters. In other words, the use of these companies' rates in the all others rate would lead to precisely the distortion and manipulation of the all others rate that lies behind the policy reasons for our regulation, as illustrated by the facts of this case.

2. *The Representativeness of the All Others Rate*

In *MacLean Fogg*, the Court held that "there is nothing in Commerce's decision which indicates a logical connection between the AFA rate and Commerce's conclusion to apply that rate to the remaining parties."[28] A further explanation of the facts on the record, as well the Department's respondent selection in this case, demonstrates such a connection. As discussed above, the Department selected the three largest exporters by volume, which collectively exported [ ] percent of aluminum extrusions from the PRC during the period of investigation. First, as further explained below, the Department finds that the actions of such a large percentage of the exporters are highly representative of the industry. This is in contrast to the voluntary respondents, which collectively exported [ ] percent of aluminum extrusions

[25] *See Final Determination,* 76 FR at 54,305.
[26] *See* CBP Query Results.
[27] *See MacLean Fogg* at 13.
[28] *See id.* at 17.

during the period. As a result, the fact that the voluntary respondents received calculated rates of 9.94 and 8.02 percent does not demonstrate that the mandatory respondents' rates are unrepresentative.[29] The voluntary respondents' rates of subsidization do not indicate that the other aluminum extrusions companies which exported during the period of investigation would have received rates more similar to those calculated for the voluntary respondents – as discussed above, these voluntary respondents were self-selected and represent a very small percentage of exports.

Next, pursuant to section 705(c)(5)(A)(i) of the Act, if the mandatory respondents had participated and the Department had calculated rates which were not based entirely on facts available with an adverse inference, the Department would have used these rates in its calculation of the all others rate, regardless of whether those rates were lower than the voluntary respondents' rates or higher than the voluntary respondents' rates. The statute also expressly permits, in the exception provision, as a reasonable method, the averaging of the mandatory respondents rates where those rates are zero, *de minimis*, or determined entirely on facts available. The fact that the statute contemplates, as one method, the averaging of zero, *de minimis*, or facts available margins, (and therefore expressly considers the use of total AFA margin reasonable in these circumstances), supports the Department's use of this method here. Furthermore, and as the Court noted, in other cases in which all of the mandatory respondents received rates based entirely on facts available, we applied the mandatory respondents' rates as the all others rate.[30] We do not see a meaningful distinction between the facts of this case and

[29] The Department also notes that these rates are currently being litigated in separate court proceedings. *See* Court Nos. 11-00181 and 11-00197.

[30] *See Sodium Nitrate From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 38981 (July 8, 2008) ("*Sodium Nitrate*"), *Raw Flexible Magnets from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 39667 (July 10, 2008) ("*Magnets*"), and *Certain Potassium Phosphate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Termination of Critical Circumstances Inquiry*, 75 FR 30375 (June 1, 2010) ("*Salts*"); *see also Final Affirmative*

the facts of cases such as *Magnets* and *Salts*, because the voluntary respondents' rates are representative only of companies that self-selected participation.

Consistent with the statute, the Department's ordinary practice when limiting the selection of respondents is to select those exporters/producers that have the largest volume of exports. The Department recognizes that the statute also provides the option of statistical sampling.[31] The Department notes that, to date, it has not limited the pool of respondents by sampling in any countervailing duty investigation or administrative review, and has only determined a single-country wide subsidy rate in one proceeding, that of *Softwood Lumber Products from Canada*.[32] More importantly, in this case, the all others rate is based on the rates applied to three companies which represent nearly [ ] of exports; thus we find that this is highly representational of the activity of Chinese aluminum extrusions producers/exporters during the period of investigation. We have previously articulated the reason why the Department includes mandatory respondents' rates that are based entirely on the AFA in the calculation of the all others rates.[33] In *LWS*, the Department determined to include rates based on AFA in the calculation of the all others rate, because "it would be inappropriate to ignore the fact that adverse facts available had to be applied to all four of the mandatory

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Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Argentina, 66 FR 37007 (July 16, 2001) and *Final Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand From India*, 68 FR 68356 (December 8, 2003).

[31] *See MacLean Fogg* at 18; *see also* section 777A(e)(2)(A)(i) (limiting investigation to a sample of exporters or producers that the Department determines is statistically valid based on the information available at the time of selection) and section 777A(e)(2)(B) (determining a single country-wide subsidy rate to be applied to all exporters and producers).

[32] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) and *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (Dec. 12, 2005).

[33] *See Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008) ("*LWS*").

company respondents. These were the very companies selected as representative of all producers/exporters. As such, it is reasonable to include their rates in the all others rate."[34]

The Court also observed that "nothing prevented Commerce from identifying other respondents for mandatory investigation."[35] The Department's determination not to select additional mandatory respondents was reasonable given the facts of this case. First, the selected companies did not inform the Department that they would not be participating at a point in the proceeding which would have made it feasible to select other mandatory respondents; rather, the mandatory respondents simply did not respond to our questionnaire. Second, even if it had been feasible, there is no indication that these new respondents would have cooperated in the investigation. Finally, even assuming *arguendo* that the Department could have "converted" the two voluntary respondents into mandatory respondents when it became clear that the three mandatory respondents were not cooperating, it would not have alleviated the Department's concern about the potential for manipulation because these companies were self-selected as voluntary respondents.

Concerning the Court's holding that an AFA rate must be remedial, not punitive,[36] the Department does not consider that the AFA rate in this case is punitive, as calculated for the mandatory respondents or as applied as the all others rate. The AFA rate was determined in accordance with the statute, and so the Department does not consider that it can be a punitive measure.[37]

In conclusion, in this case, the respondents selected for individual examination accounted for nearly [ ] percent of exports by volume of aluminum extrusions from the PRC, as opposed

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[34] *Id.*
[35] *See MacLean Fogg* at 16.
[36] *See id.* at 18.
[37] *See KYD, Inc. v. United States*, 607 F.3d 760, 767-68 (Fed. Cir. 2010).

to the voluntary respondents, which only account for [ ] percent of exports. Thus, the Department's use of the mandatory respondents' rates, even though those rates were calculated based on facts available, to calculate the all others rate results in an all others rate that is more representational than a rate based on the self-selected voluntary respondents' rates. The Department's respondent selection methodology in this case did not prevent the Department from obtaining a representative class of respondents; rather, its method resulted in coverage of nearly [ ] percent of exports by volume.

3. *Alternative Methods for Calculating the All Others Rate*

In light of the Court's holding that the Department failed to consider important aspects of the problem, and failed to explain how its decision comports with the statutory reasonableness requirement, the Department has evaluated alternative methods as a means of considering all aspects of the case. The Act provides the Department with flexibility in determining, where the rates calculated for mandatory respondents are all zero, *de minimis*, or based entirely on facts available, the rate to apply as the all others rate; however, and as the Court held, this method must be "reasonable."[38] The Department is faced with a limited amount of record information concerning subsidy rates of aluminum extrusions producers/exporters in the PRC, which results in a limited number of alternative methods. These methods are discussed in full below.

As discussed in the Issues and Decision Memorandum, the Department has previously departed from its regulation, 19 CFR 351.204(d)(3), and averaged the rates calculated for the voluntary respondents with the rates calculated for the mandatory respondents to determine the all others rate.[39] The Department explained its rationale as follows:

> Given the unusual circumstances of this case, in which the subsidy rate for all four of the mandatory company respondents has been based entirely on adverse

[38] *See MacLean Fogg* at 16; *see also* section 705(c)(5)(A)(ii).
[39] *LWS.*

> facts available and there is a single calculated rate for a voluntary respondent, we have determined that the most reasonable method for establishing the all others rate, pursuant to section 705(c)(5)(A)(ii), is to average all of the rates determined in this investigation. In the Department's view, it would be inappropriate to ignore the fact that adverse facts available had to be applied to all four of the mandatory company respondents. These were the very companies selected as representative of all producers/exporters. As such, it is reasonable to include their rates in the all others rate. We find that it is also reasonable to include the rate for the voluntary respondent in establishing the all others rate. Although the regulations state that voluntary respondents' rates will not be included in the calculation of the all others rate, here, we are not "calculating" the all others rate because we have no calculated rates for mandatory respondents upon which to rely. Rather, we are searching for a reasonable method to establish the all others rate. It is the Department's view that a simple average of all five rates – the adverse facts available rates for the four mandatory company respondents as well as the calculated rate for the voluntary – is reasonable because that average reflects the total average subsidization found to be attributable to the manufacture, production and exportation of LWS from the PRC.[40]

Due to the similarity of the facts in this investigation and *LWS*, the Department considered using this method to calculate the all others rate. However, the approach taken in *LWS* does not obviate the Department's concern about manipulation, and the reasons for promulgating 19 CFR §351.204(d)(3). In addition, a simple average of mandatory and voluntary respondents' rates gives undue weight to the rates calculated for the voluntary respondents, which were responsible for only [ ] percent of exports during the period of investigation. Because there were two voluntary respondents and three mandatory respondents, the weights of the small voluntary producers would combine to make up 40 percent of a simple average.[41] In addition to the potential for distortion from self-selection that arises from including voluntary respondents' rates in the calculation of the all others rate, the result of a simple average is distorted due to the non-representational weight given to the voluntary respondents. We rejected this method because a simple average is not reasonable: it is not representative of the reality of the industry based on the facts on the record.

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[40] *See LWS* and accompanying Issues and Decision Memorandum at Comment 9.
[41] Simple averaging using this method would result in an all others rate of 228.08 percent.

Another alternative considered by the Department was to weight-average the mandatory and voluntary respondents' rates based on their percentage of exports by volume, according to the CBP Query Results, during the period of investigation. As with the first method, this alternative does not address the Department's concern that including voluntary respondents' rates in the calculation of the all others rate could lead to manipulation. However, this alternative is more appealing than a simple average because it gives proportional weight to the amount of exports for which the voluntary respondents are responsible, resulting in a more representational all others rate. It is thus a more accurate alternative than the simple average method. A weighted-average of the mandatory and respondents' rates results in an all others rate of 368.14 percent.

The Department continues to have concerns with this approach. It allows for manipulation and distortion of the all others rate, which could be more apparent in a case in which the mandatory respondents did not account for as large a percentage of exports as they do here. However, due to the fact that it is contrary to our regulation, we rejected this alternative in favor of a method which excludes the voluntary respondents' rates from the calculation of the all others rate.

D. SUMMARY AND ANALYSIS OF INTERESTED PARTY COMMENTS ON DRAFT RESULTS

In its comments, Petitioner argues that the Draft Results fully complied with the Court's Order in *MacLean Fogg*, and that the Department should adopt the Draft Results without any modification in its final remand redetermination.

In their comments, MacLean-Fogg and Fiskars Brand, Inc. stated that they agree with the comments submitted by Evergreen Solar, Inc., Eagle Metal Distributors, Inc., and Ningbo Yili Import & Export Co., Ltd. and incorporate them by reference.

1. *The Department Must Use the Voluntary Respondents' Rates in Its Calculation of the All Others Rate*

Ningbo Yili Import & Export Co., Ltd. and Eagle Metal Distributors, Inc.[42]

The SAA describes the Department's activities vis-à-vis voluntary respondents as "investigation" and thus considers voluntary respondents to be individually investigated.[43] Thus, voluntary respondent rates must be used to calculate the all-others rate.[44] The Court failed to address the SAA in its opinion, and the Department cannot ignore the SAA in its remand redetermination.

Citing language in the *Preamble*, in the Draft Results the Department pins its ability to interpret the statute on the alleged ambiguity in the word "investigate." But, if statutory language is not ambiguous, an administrative agency may not interpret Congress' authoritative direction.[45] Because of the authoritative interpretation expressed in the SAA, there is no ambiguity in section 705(c)(5)(A)(i) and (ii) that allows the Department to interpret the statute. Thus the contrary rationale for excluding the rates of voluntary respondents set forth in the *Preamble*, are invalid, as is the regulation, 19 C.F.R. § 351.204(d)(3). Similarly, while the Department reiterates the purpose for the regulation (the possibility of distortion and manipulation) in the Draft Results, an agency's articulated purpose for a regulation does not propose an ambiguity in the statute, and thus may not overcome the clearly-expressed intent of Congress.[46] Thus, the purpose repeated frequently by the Department fails to justify its deviation from the statutory command.

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[42] For ease of reference, these parties are referred to together as "Ningbo Yili."
[43] Statement of Administrative Action (Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 (1994) ("SAA"), reprinted in 1994 U.S.C.C.A.N at 4201.
[44] 705(c)(5)(A)(i) of the Act.
[45] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("*Chevron*") (explaining that if Congress has clearly expressed its intent on the issue, then the court must give effect to this unambiguous intent).
[46] *See Chevron,* 467 U.S. at 842.

The Act does not permit the Department to use the exception – calculating the all-others rate by "any reasonable method" – unless "all" rates for individually investigated exporters are zero, de minimis, or based entirely upon facts available.[47] Contrary to the Court's opinion, the statute contains the word "all" when defining what rates must be zero, *de minimis*, or based entirely upon facts available before "any reasonable method" may be used.[48] Further, per the SAA, voluntary respondents are individually investigated. Thus, because the voluntary respondents were individually investigated, and their rates were not zero, *de minimis*, or based entirely upon facts available, the Department may not resort to "any reasonable method."

The Department has unlawfully used total AFA rates to establish the all others rate in this case. Congress never intended that an all others rate be based entirely upon total AFA because it can never be "reasonably reflective" of the all others companies. In the exception to the general rule for calculating the all-others rate, Congress permits the Department to "average{e} the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated."[49] This language implicitly authorizes the Department to use rates calculated exclusively under section 776 of the Act. Section 776 of the Act provides for the use of both neutral facts available and total AFA when establishing a countervailing duty margin.[50] The SAA makes plain, however, that Congress did not anticipate an all-others rate based solely on facts available. Instead, the SAA explains that when using the "exception to the general rule 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*," then "{t}he expected method in such cases will be to weight-average the zero and de minims margins and

[47] Section 705(c)(5)(A)(ii) of the Act.
[48] *See MacLean Fogg* at 10; section 705(c)(5)(A)(ii) of the Act.
[49] *See* section 705(c)(5)(A)(ii) of the Act.
[50] *See* section 776(a) and (b) of the Act.

margins determined pursuant to the facts available, provided that volume data is available."[51] Thus, Congress expected that, before any rate based entirely upon facts available could be part of an all others rate, it would be lowered by zero and *de minimis* rates.

Further, even in the instance of weight-averaged zero, *de minimis* rates and facts available rates, the SAA limits the Department's discretion by prohibiting the Department from using a methodology that "results in an average that would not be reasonably reflective of potential {countervailing duty} margins for non-investigated exporters or producers."[52] In addition, total AFA rates must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non- compliance."[53] The built-in increase pushes any partial or total AFA rate outside of the realm of rates that are a "reasonably accurate estimate of the respondent's actual rate."[54] Such rates are no longer "reasonably reflective of potential {CVD} margins for non-investigated exporters or producers."[55]

Although the Department was careful to call the total AFA rates used in the investigation "facts available" rates throughout the Draft Remand, the Department cannot hide its use of an adverse inference when selecting among facts available to calculate the total AFA rates for the mandatory respondents. These total AFA rates do not lose their total-AFA nature simply by changing names from "total AFA" to "all others."

Further, there is no record evidence indicating that any all-others company specifically refrained from seeking to be a voluntary respondent so that it could manipulate the all-others rate. Rather than manipulation, the reason for not requesting voluntary respondent status likely had more to do with the [ ] of the exporter than anything else. If the United States is [

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[51] SAA at 4201.
[52] *Id.*
[53] *F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).
[54] *Id.*
[55] SAA at 4201.

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The Department's only support for its conclusion is its statements that "the threat of such manipulation is a very real possibility given the facts of this case," and that voluntary respondents are self-selecting with reason to believe their rate will be lower.[56] In the total AFA context, however, voluntary respondents are likely to be those who believe they should not be penalized for someone else's failure to cooperate. Voluntary respondents thus present a more real picture of the industry than non-cooperative entities. Accordingly, neither rationale for excluding the calculated rates of voluntary respondents in the calculation of the all others rate provides any valid basis for doing so.

Evergreen Solar, Inc.[57]

The countervailing duty statute recognizes only two categories of subsidy rates: (1) those that are determined for companies "individually investigated" (based on their own data and circumstances); and (2) the all others rate, which is based on the rates calculated for the individually investigated respondents. Although the individually investigated companies may be selected to participate on a "mandatory" or "voluntary" basis, they are both "individually investigated" within the meaning of the Act, and section 705(c)(5)(A) of the Act does not distinguish between the two for purposes of calculating the all others rate. Although the Court has concluded that the statute is ambiguous on this point, the Court based this conclusion principally on the reference to mandatory respondents in a separate provision, section 777A(e) of

[56] *See* Draft Remand at 4.
[57] Evergreen Solar, Inc. is referred to as "Evergreen" for purposes of this remand.

the Act. Evergreen respectfully disagrees that section 777A(e) of the Act injects ambiguity into the plain language of section 705(c)(5)(A) of the Act. By requiring that mandatory respondent rates be used in calculating the all-others rate, section 777A(e) simply acknowledges the fact that mandatory respondent rates are "individually investigated" rates and therefore must be used in determining the all-others rate (subject to the proviso contained in section 705(c)(5)(A)). However, this does not mean that voluntary rates are not also "individually investigated" as, indeed, they are. Section 777A(e) of the Act does not state that "only" mandatory rates may be used in determining the all others rate. Moreover, there is no definitional provision or cross-reference in section 705(c)(5)(A) of the Act to rates determined under section 777A(e), as one would expect to find if the statute had the restrictive meaning ascribed to it by the Department. In the final remand redetermination, the Department should set the all others rate equal to the weighted, or simple, average of Guang Ya and Zhongya's rates.

Even if the statute were to permit the Department to exclude voluntary rates from the all others calculation, there is no indication that the statute prohibits the Department from using those rates if doing so is reasonable under the circumstances. That is clearly the case here: there are strong independent indicia of reliability to the individually-calculated voluntary respondent rates, in stark contrast to the self-evidently unreasonable 374.15 percent AFA rate imposed by the Department.

The Department's argument against using the voluntary rates boils down to two points: (1) that Guang Ya and Zhongya represent a very small percentage of exports; and (2) that these respondents were "self-selected."[58] Neither of these points justifies excluding these rates from the all others rate. First, the Department's concern that the voluntary respondents are not representative is contradicted by the Department's actions in the companion antidumping

[58] *See* Draft Remand at 6.

investigation. Guang Ya was selected to participate as a mandatory respondent in the companion antidumping investigation.[59] Furthermore, the Department obtained and verified extensive information concerning the structure and operations of Guang Ya during the countervailing duty investigation. If there is any evidence to conclude that Guang Ya is not "probative" of the uninvestigated companies, the Department should identify and disclose that information so that the parties can comment on it.

The Department also claims that threat of manipulation "is a very real possibility given the facts of this case."[60] But there are no facts on the record to indicate why the mandatory respondents did not participate in the investigation. Rather than seeking to avoid an unfavorable result, as the Department assumes, it could just as likely be that the absence of a response was attributable to circumstances unconnected with the investigation. At the outset of the investigation Petitioner expressed the view that one of the mandatory respondents, Dragonluxe, may not even have been "a going concern."[61] The mere fact that a mandatory respondent did not participate in an investigation does not, without more, establish the likely existence of a plan to manipulate rates.

The subsidy information obtained (and successfully verified) from Guang Ya and Zhongya remains the only information specific to the aluminum extrusions industry that is on the record of this investigation. As the Court has observed, that there are no other calculated rates for individually investigated mandatory respondents on the record of this case is "a situation of Commerce's own making. Nothing prevented Commerce from identifying other respondents for

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[59] *See Aluminum Extrusions from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, and Preliminary Determination of Targeted Duming*, 75 FR 69,403, 69,406 (Nov. 12, 2010) ("*Antidumping Investigation Prelim*").

[60] *See* Draft Remand at 4.

[61] *See* Memo to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Respondent Selection" (May 18, 2010) at 2.

mandatory investigation."[62] The Court also correctly observed that the voluntary respondent data, at a minimum, demonstrates that "the AFA rate was not attributable to all respondents."[63]

Even if using the voluntary respondent rates in the calculation of the all others rate is less than ideal, those rates clearly have the superior virtues of being: (1) company-specific; (2) verified; (3) product and industry specific; and (4) contemporaneous. In contrast, the 374.15 percent AFA rate is: (1) not company-specific; (2) is not verified or even corroborated; (3) is not product- or industry specific; and (4) is based on rates calculated in unrelated CVD proceedings conducted as much as five years ago. Thus, the only reasonable alternative is for the Department to rely on the voluntary respondent rates to calculate the all others rates.

Department's Position

In the final remand redetermination, the Department continues to find that it is not reasonable to base the all others rate on the voluntary respondents' rates. Concerning Ningbo Yili and Evergreen's arguments about statutory interpretation, each of these arguments has been squarely addressed, and rejected, by the Court. In *MacLean Fogg*, the Court considered the argument that the statute requires the inclusion of voluntary respondents' rates in the calculation of the all others rate, and held that it does not.[64] The Court affirmed the Department's determination to exclude voluntary respondents' rates from the all others rate, holding that, in light of the statute as a whole, "Plaintiffs' contention that section {705 of the Act} unambiguously refers to all individually investigated respondents, whether mandatory or voluntary, fails."[65] This is consistent with the Department's interpretation of section 705(c)(5)(A) of the Act as excluding voluntary respondents, which are not individually

[62] *See MacLean Fogg* at 16.
[63] *See id.*
[64] *See id.* at 10-11.
[65] *See id.* at 11, citing *Union Steel v. United States*, Slip Op. 12-24 (Feb. 27, 2012) at 17-19.

investigated.[66] Contrary to Ningbo Yili's claim, the Court did not "ignore" the SAA in *MacLean Fogg*, and in fact expressly discussed it.[67] The Court also reaffirmed this holding in its denial of Ningbo, Evergreen and other plaintiffs' motion for reconsideration on this issue.[68]

Because the Court properly affirmed the Department's interpretation that the statute is ambiguous, and that its regulation prohibiting the inclusion of voluntary respondents' rates in the calculation of the all others rate was validly promulgated,[69] the Department did not restate its position in the Draft Remand, nor is it necessary to do so in its final remand redetermination.

Furthermore, Ningbo Yili's argument that section 705(c)(5)(A)(ii) of the Act does not permit the Department to calculate the all others rate based only on adverse facts available rates is contradicted by the language of the Act, which states that, if the rates are zero or *de minimis*, or based entirely on facts available, the Department may use any reasonable method "including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated."[70] In addition, the SAA states that "the expected method ... will be to weight-average the zero and de minimis margins and margins determined pursuant to the facts available."[71] Contrary to Ningbo Yili's claim that this statement indicates that the Department would not average only facts available rates, neither the relevant provision of the Act nor the SAA contain a prohibition on averaging these rates if all of the rates are based entirely on adverse facts available.

Concerning Ningbo Yili's argument that the all others rate must be reasonably reflective of potential margins for non-investigated companies, the Department continues to find that the

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[66] *See Final Determination,* and accompanying Issues and Decision Memorandum at Comment 8.
[67] *Id.* at 10.
[68] *See MacLean Fogg* at 7 (holding "Thus, in this particular section of the SAA, 'investigate' does refer to voluntary respondents, but it does not follow that a neutral verb such as 'investigate' therefore subsequently always include voluntary respondents in its scope.")
[69] *See MacLean Fogg* at 12-13.
[70] *See* section 705(c)(5)(A)(ii) of the Act.
[71] SAA at 4201.

adverse facts available rates calculated for the mandatory respondents are highly representational of the activity of Chinese aluminum extrusions producers and exporters during the period of investigation because the mandatory respondents represent nearly [ ] percent of exports. This determination is supported by the evidence on the record, as opposed to Ningbo Yili's speculation that the two voluntary respondents' rates are more representational.

Ningbo Yili also states that the Department characterized the mandatory respondents' rates as "facts available" but that it in fact used total adverse facts available to calculate the rate for these companies, and that the Department cannot hide this simply by referring to the rate as the "all others rate." The Department has no intention of masking the fact that the mandatory respondents' rates are based entirely on adverse facts available, as this determination is readily apparent from the *Final Determination*. Pursuant to section 705(c)(5)(A)(ii) of the Act, in this case, the rates calculated for the non-cooperating mandatory respondents became the all others rate, and so it is correct to refer to this rate as the all others rate.

Evergreen argues that the Act does not prohibit the Department from using the voluntary respondents' rate in the calculation of the all others rate if it is reasonable to do so. However, as the Department explained in the *Preamble*, "the purpose of {the regulation} was to prevent manipulation and to maintain the integrity of the all-others rate"[72] and thus it is not reasonable to include voluntary respondents' rates in the calculation of the all others rate.

Ningbo Yili argues that there is no evidence on the record indicating that any of the companies subject to the all others rate attempted to manipulate the all others rate by refraining from becoming voluntary respondents. This, however, is not the Department's concern: the concern is that, if the Department selects voluntary respondents, the inclusion of the voluntary respondents' rates in the calculation of the all others rate will distort that rate. This distortion

[72] *See Preamble* at 27310.

will result if firms with the lowest levels of subsidization select themselves for voluntary examination, while firms with higher levels of subsidization decline to cooperate.

Evergreen argues that there is no evidence on the record indicating why the mandatory respondents failed to cooperate, and thus the Department cannot use the potential for manipulation as a basis for excluding the voluntary respondents' rates from the all others rate. The Department found that, given the fact that the three mandatory respondents accounted for nearly [ ] percent of exports by volume, but all chose not to participate, manipulation and distortion was a real possibility. This is consistent with the *Preamble*, which does not require an "affirmative finding {of manipulation} in order to exclude voluntary respondents from the all others rate ... Rather, the Department has reasonably concluded that voluntary respondents are 'expected' to be those firms with the lowest levels of subsidization and, thus, their inclusion will lead to the distortion of the all others rate calculation."[73] Moreover, concerning Evergreen's reliance on the Petitioner's statement in the investigation that perhaps one of the mandatory respondents was not a "going concern," CBP data indicated that this company had exports during the period of investigation, and thus Petitioner's thoughts on its viability were not relevant to the Department's respondent selection.

Ningbo Yili argues that, where the mandatory respondents receive rates based on total AFA, it is more likely that voluntary respondents volunteer so that they will not be penalized for a mandatory respondent's failure to cooperate, rather than to attempt to manipulate the all others rate. Nevertheless, the possibility that respondents volunteer knowing that their rates of

[73] *See Final Determination,* and accompanying Issues and Decision Memorandum at Comment 9; *see also* Preamble at 27310. In addition, the periods of investigation for the antidumping and countervailing duty investigations are different; the period of investigation for the antidumping investigation is July 1, 2009, through December 31, 2009, while the period of investigation for the countervailing duty investigation is January 1, 2009, through December 31, 2009.

subsidization will be lower, as discussed in the *Preamble*, serves as a valid basis for excluding the voluntary respondents' rates from the all others rate.[74]

Evergreen argues that the Department's concern that Guang Ya and New Zhongya's rates are not representative of the aluminum extrusions industry is belied by the fact that the Department selected Guang Ya for individual investigation in the antidumping duty investigation. In the *Antidumping Investigation Prelim*, the Department selected the largest exporters by volume using the responses to quantity-and-value questionnaires, rather than by CBP data, as here.[75] Thus, the fact that Guang Ya and New Zhongya were found to be the "two largest exporters" is based on responses to questionnaires which were sent to 49 exporters/producers.[76] In other words, Guang Ya and New Zhongya were the largest based on these data, rather than export volume. Evidence on the record of the countervailing duty investigation demonstrates that the voluntary respondents were not the largest exporters by volume, but in fact only account for [ ] percent of exports.

Evergreen argues that if there is evidence on the record that Guang Ya's rate is not probative of the all others companies, the Department should identify that information. The Department made clear the basis for its determination to exclude Guang Ya and New Zhongya's rates from the calculation of the all others rate: the potential for distortion and manipulation and because the two voluntary respondents account for a very small percentage of imports. This continues to be the basis of the Department's determination in the final remand redetermination.

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[74] *See MacLean Fogg* at 13.
[75] *Antidumping Investigation Prelim*, 75 FR at 69406. In addition, the periods of investigation for the antidumping and countervailing duty investigations are slightly different; the period of investigation for the antidumping investigation is July 1, 2009 through December 31, 2009, while the period of investigation for the countervailing duty investigation is January 1, 2009 through December 31, 2009.
[76] *Id.*

In conclusion, the Department disagrees with Ningbo Yili and Evergreen that the voluntary respondents' rates should be used to calculate the all others rate. We continue to find, as in the Draft Remand, that the potential for manipulation of the all others rate is too great, and that the mandatory respondents' rates, although based entirely on adverse facts available, is more probative of the Chinese aluminum extrusions industry than the voluntary respondents' rates.

2. *The Total AFA Rate Assigned as the All Others Rate is Not Representative of the All Others Companies*

Ningbo Yili

Contrary to the Court's Order in *MacLean Fogg*, the Draft Remand does not provide a logical connection between the 137.65 percent and 374.15 percent rates and the all others companies. First, the total AFA rate assigned to the mandatory respondents is not representative, because the mandatory respondents are [ ] companies than the all others companies.

The mandatory respondents [ ], with [ ] percent coverage by three companies and [ ] percent coverage by [ ].[77] This undermines the Department's finding that the three mandatory respondents are representative of the all others companies. Because the three exporters represent such a large volume of exports, they are [ ] qualify for subsidy programs in multiple provinces.[78] Further, due to [ ] they are [ ] favorable loans, direct grants, and other [ ] considerations from the local, provincial, and national government.

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[77] *See* CBP Query Results.

[78] *See Aluminum Extrusions from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 75 FR 54302, 54305 (September 7, 2010) (stating, "we are making the adverse inference that the three non-cooperative companies, Dragonluxe, Miland, and the Zhongwang Group, had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs on which the Department initiated").

In contrast, the voluntary respondents are [ ] qualify for subsidy programs in multiple provinces or [ ] favorable loans, direct grants, and other [ ] considerations from the local, provincial, and national government. Thus, in terms of [ ], the mandatory respondents are unlikely to be representative of the all others companies, while the voluntaries are much more likely to be representative of the all others companies.

Furthermore, the statute indicates that selection of the exporters with the largest volume of exports is not a representative slice of the industry. Under section 777A(c)(2)(A) of the Act, when there are numerous potential respondents, the Department may choose either the largest volume respondents or a representative sample. Although both alternatives may be objectively fair, only one is explicitly "representative" of the industry. The Court in *MacLean Fogg* alluded to this point when it held that, although Commerce's choice of respondent selection methods is permitted by law, the Department "cannot then claim that the rates determined for the large volume respondents are representative of other exporters/producers."[79] Thus, the fact that the mandatory respondents may be the largest the Department could reasonably examine does not support the Department's suggestion that the largest respondents must also be representative of the industry.

Next, the total AFA rates calculated for the mandatory respondents are not representative of calculated rates for cooperative respondents in other countervailing duty investigations of merchandise from the PRC. According to a chart attached to Ningbo Yili's Comments, a review of the 26 CVD orders issued to date on Chinese imports demonstrates that the average all others rate is 16.01 percent. The highest all others rate without any total or partial AFA element is 37.22 percent. The range of all metals industry all others rates is from 1.10 percent to 37.22

[79] *See MacLean Fogg* at 18.

percent. Moreover, the all others rate in this case is the highest all others rate in a countervailing duty investigation of merchandise from the PRC.

Further, the preliminary total AFA rate is based upon the sum of 29 program specific total AFA rates.[80] The final determination AFA rate includes an additional 24 subsidy programs for a total of 54 subsidy programs.[81] These 54 programs include 29 programs with program rates of 10.54 percent. In contrast, the two voluntary respondents were found to participate in only 8 and 16 subsidy programs (or 15 percent and 30 percent of alleged programs), respectively.[82] Of these programs, 13 had program-specific rates of 0.1 percent or lower, and only two programs for each voluntary respondent had program-specific rates greater than 1 percent. A survey of cooperative mandatory respondent rates in other China CVD proceedings indicates a similar trend: approximately half or fewer of alleged programs are found to be used. Despite institutional knowledge of this fact (memorialized in *Federal Register* publications), the Department included every one of the 54 alleged programs in the all-others rate calculation. Thus, by including the sum of all 54 program-specific rates in the all others rate, the Department has calculated a rate that is not "reasonably reflective of potential {CVD} margins for non-investigated exporters or producers."[83]

As a matter of law, total AFA rates are not representative of actual rates. Total AFA rates are intentionally higher than the rate the Department believes that a cooperative respondent would receive.[84]

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[80] *See Final Determination,* and accompanying Issues and Decision Memorandum at "Application of Adverse Inferences: Non-Cooperative Companies."
[81] *Id.*
[82] *Id.* at "Programs Determined to be Countervailable."
[83] SAA at 4201.
[84] *F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032.

Furthermore, pursuant to the Court's Opinion in *MacLean Fogg*, the Department must ensure that the application of its methodology to the facts of this case is reasonable.[85] Thus, a methodology which may be considered reasonable in certain contexts may still be unreasonable as applied if the individual program-specific rates add up to a rate that is unreasonable.

The all others rate cannot be reasonable as an all others rate if the bases for that rate are unlawfully punitive.[86] As a general principle, the Federal Circuit questions disproportionately high total AFA rates.[87] Although Commerce has discretion under section 776(b) of the Act when selecting among sources for adverse information, the Federal Circuit has set forth the principles limiting that discretion.[88] These principles demonstrate that Commerce is required to evaluate an overall AFA margin for reasonability, regardless of whether the margin was based upon total or partial AFA. The Federal Circuit explained that Congress could not have intended to provide the Department with unlimited discretion when it enacted section 776(b) of the Act.[89] AFA may be used "to provide an incentive to cooperate, {but} not to impose punitive, aberrational, or uncorroborated margins."[90]

The Department may not jettison the objective of finding an accurate margin to "select a rate based solely on Commerce's interest in inducing foreign exporters to cooperate with Commerce's investigations. Rather, the rate must have some relationship to commercial

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[85] *See MacLean Fogg* at 14.
[86] *Id.* at 18.
[87] *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032 (noting that the purpose of adverse facts available is "to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins"); *see also Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (holding that an adverse facts available rate that was more than ten times higher than the average dumping margin for cooperative respondents was punitive, aberrational, or uncorroborated, and excessive in view of the cooperative respondents' dumping rates).
[88] *See PAM, S.p.A. v. United States*, 582 F. 3d. 1336, 1340 (Fed. Cir. Sept. 24, 2009) ("there is a limit to Commerce's discretion").
[89] *Id. See also Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004).
[90] *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032; *Krupp Thyssen Nirosta GmbH v. United States*, 25 CIT 793, 797 (2001).

practices in the particular industry."[91] Here, it appears the Department focused solely on inducement.[92]

Moreover, this Court has held that the Department is required to evaluate the overall AFA margin for reasonability, independent of the section 776(c) of the Act's requirement to corroborate secondary information.[93] This independent requirement is in harmony with the Federal Circuit's precedent that margins based upon AFA cannot be "unreasonable," "punitive, aberrational, or uncorroborated," but rather must be a "reasonably accurate estimate of the respondent's actual rate."[94]

The Department has not sought to establish the reasonability of the overall 137.65 percent and 374.15 percent total AFA rates. The limitations applied to the calculation of the AFA rate must also apply to any AFA margins the Department determines should be used as the all others rate, in addition to the adjustment required for the built-in increase.

The Department has not backed up its claim that the all others rate is in accordance with law with any relevant discussion of the industry or of CVD rates of cooperating respondents in China CVD investigations. In addition, it is of little import that the AFA rate is not directly challenged in this appeal by any of the mandatory respondents, because it is indirectly challenged as the adopted all others rate.

Moreover, the Department's observation that it "has a long-standing practice of calculating adverse facts available rates in the manner in which the rates were calculated here,"[95]

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[91] *See Ta Chen*, 298 F.3d at 1339; *see also Ferro Union, Inc. v. United States*, 44 F.Supp. 2d 1310, 1335 (Ct. Int'l Trade 1999) ("Commerce cannot select a rate which focuses only on inducing the exporter to cooperate and ignores the interest in selecting a margin which relates to past practices of the industry.").
[92] *See Final Determination* and accompanying Issues and Decision Memorandum at "Application of Adverse Inferences: Non-Cooperative Companies."
[93] *See Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1631-32 (2004).
[94] *See Timken Co. v. United States*, 354 F.3d 1334, 1345; *Ta Chen*, 298 F.3d at 1338-40; *F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032.
[95] *See* Draft Remand at 8.

does not provide support for the Department's rationale. The Department does not cite to any court case affirming this practice. To the contrary, the Department quietly settled at least two judicial challenges to this practice, which indicates that it is not confident that its practice would be upheld by a court.

Evergreen

Even where the Department is authorized to apply adverse inferences, there are limits on how far the Department can go before AFA rates become unlawfully punitive.[96] The methodology adopted by the Department to determine the AFA rate in this case clearly crossed that line. It does not comport with any rational sense of commercial reality to accept as plausible that the Government of China would bestow subsidies at such absurdly high rates. The Department is unable to point to any evidence to corroborate the reasonableness of the 347.15 percent rate. In fact, a survey of the Department's past all others rate, as included in Ningbo Yili's comments, demonstrates that outside of the application of total AFA, the Department has never calculated an individually investigated rate exceeding 62.46 percent (and even that rate included 44.91 percent of partial AFA). However, even if the establishment of the 374.15 percent subsidy rate could be accepted as striking a reasonable balance between finding an accurate margin and inducing compliance, this still does not mean that it is appropriate to apply that same rate to the all others companies. Inducing compliance is not a relevant factor in determining that rate.

The Court has already decided that exporter size does not equate to representativeness.[97] If the Department chooses to rely on the volume of exports as the decisive index of representativeness, it cannot reasonably ignore that Guang Ya was treated by the Department as

[96] Citing, *e.g., Timken Co.*, 354 F.3d at 1345; *F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032; *Saha Thai Steel Pipe Co., Ltd. v. United States*, 828 F. Supp. 57, 61-2, 64 (CIT 1993).
[97] *See MacLean Fogg* at 18.

representative, based on relative size, in the antidumping investigation. As a matter of consistency, the Department must accept that Guang Ya is also representative of the domestic industry's activities. There is no logically consistent basis for excluding Guang Ya's rate from the calculation.

Lastly, even if evidence could be found demonstrating that the three mandatory respondents are "representative" of the activities of the remaining 111 Chinese producers/exporters (and no such evidence has been identified), it does not follow that the specific rate the Department chose to assign to the three mandatory respondents is representative of the level of subsidies received by the uninvestigated companies. The AFA rate assigned to the three mandatory respondents was not intended to represent the actual level of subsidization received by the mandatory respondents or the uninvestigated companies. Instead, the rate was calculated in response to the failure of the three mandatory respondents to cooperate. To induce cooperation, the Department chose to apply harsh and unrealistic assumptions concerning the subsidy programs used and the levels of benefits received by the mandatory respondents. The Department assumed: (1) that every one of the 54 identified subsidy programs was used by each company, regardless of the applicable eligibility criteria or circumstances of the company; and (2) that benefits were received under this multitude of programs at the "highest non-*de minimis* rate" ever calculated for the same or similar program in another PRC CVD investigation.

Department's Position

Ningbo Yili and Evergreen argue that the three mandatory respondents are not representative of the aluminum extrusions industry in the PRC because although there are many [ ] aluminum extrusions producers/exporters, the mandatory respondents are all [ ]. The Department continues to draw the opposite conclusion from these data, and finds that the

mandatory respondents' [ ] share of the industry makes them highly representational of the industry as a whole. This is in contrast to the voluntary respondents which only account for [ ] percent of exports by volume, and which are self-selected. Thus, these self-selected companies are not probative of the level of subsidization for other aluminum extrusions producers/exporters. Ningbo Yili engages in speculation that [ ] companies would be able to [ ] favorable loans, grants, or other programs, but this speculation is beside the point. The statute provides for the calculation of an all others rate without regard to whether that rate precisely reflects the actual subsidies received by non-investigated firms. In any event, Ningbo Yili's speculative argument ignores the record evidence that many of the programs which the Department determined to be countervailable were available to, for instance, "productive" foreign-invested enterprises operating in the PRC and have nothing to do with a company's [ ].[98] Programs such as these, supported by evidence provided by the Government of China, cut against Ningbo Yili's speculations about whether the [ ]. In addition, as the Department has already explained, the voluntary respondents were self-selected volunteers, which implies that they considered their rates of subsidization to be considerably lower than other aluminum extrusions companies in the PRC.

Ningbo Yili argues that the Department cannot claim that its chosen respondent selection methodology, pursuant to section 777A(e)(2)(A)(ii), results in a "representational" all others rate, because "while both alternatives {in the respondent selection provision} may be objectively fair, only one is explicitly 'representative' of the industry."[99] In fact, the other methodology, sampling, discussed in section 777A(e)(2)(A)(i), is not described by the Act or the SAA as

[98] *See, e.g., Final Determination,* and accompanying Issues and Decision Memorandum at "Two Free, Three Half Income Tax Exemptions for FIEs."
[99] *See* Ningbo Yili's Comments at 19.

"explicitly 'representative;'" the SAA only states that the sampling methodology must be *designed to give representational results*. It is true that sampling must be representative, but the Act does not provide that *only* sampling may be considered representative. But the issue here is not about sampling but is in response to the Court's concern: whether the rates determined for the large volume respondents are representative of other exporter/producers. As articulated above, the Department has explained that an all others rate based on the rates applied to three companies which represent nearly [ ] of exports is highly representational of the activity of Chinese aluminum extrusions producers/exporters during the period of investigation.

Evergreen argues that, if the Department chooses to rely on the volume of exports as an indication of representativeness, it cannot ignore that Guang Ya was selected for being one of the largest exporters by volume in the antidumping investigation. As discussed above, in the antidumping investigation, Guang Ya was determined to be one of the largest exporters by volume based on responses to quantity and value questionnaires, which were not answered by all aluminum extrusions producers.[100] So even if Guang Ya was large in relation to the other companies which responded to the Department's questionnaire, this does not mean that Guang Ya is one of the largest exporters of aluminum extrusions in the PRC as a whole.

Ningbo Yili and Evergreen argue that the AFA rates calculated for the mandatory respondents are not representative because the average calculated rates for mandatory respondents, and all others rates, in other countervailing duty investigations on merchandise from China are significantly lower than the rates calculated here. Of course, the all others rates in the other countervailing duty investigations are based on different combinations of alleged subsidies, concerning different products, different periods of investigation, and different respondents in different industries, and so can hardly be used to undermine the Department's calculation here.

[100] *See Antidumping Investigation Prelim*, 75 FR at 69406.

In addition, in all countervailing duty investigations, the Department investigates alleged subsidies based on information presented by the petitioner and obtained from the Government of China and the respondents.[101] In other words, each of the rates on which Ningbo Yili and Evergreen rely for evidence that the rates here are unrepresentative is based on a defined, wholly separate universe of information for each investigation, which is unrelated to the facts on the record of this case.

Ningbo Yili argues that the mandatory respondents' AFA rates were based on 29 program-specific rates in the *Preliminary Determination* and 54 program-specific rates in the *Final Determination*, but the voluntary respondents, and all other respondents in other investigations, were not determined to use the majority of the programs alleged. Therefore, AFA rates which involve that many programs cannot be said to be representative of the industry. First, and as discussed above, the voluntary respondents were self-selected; therefore, the number of programs which they were found to use is not evidence of the normal behavior of the industry as a whole. In addition, the Department's practice in countervailing duty investigations is to calculate the AFA rate using program-specific rates calculated for cooperating respondents in the current investigation or calculated in prior countervailing duty investigations of products from the PRC, as the Department did here.[102] Ningbo Yili argues that Commerce has settled other challenges to this practice which Ningbo Yili alleges indicates that the Department does not have faith in its practice. However, Ningbo Yili cannot purport to know the motivation for decisions made by the Department and outside parties in the course of settlement discussions.

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[101] *See* section 702(b)(1) of the Act, providing that petitioners must allege the elements necessary for the imposition of the duty imposed by section 701(a) of the Act.

[102] *See Final Determination*, 76 FR at 54305. Ningbo Yili argues that the Department has settled other challenges to this practice which it alleges indicates that the Department does not have faith in its practice. Ningbo Yili cannot purport to know the motivation for decisions made by the Department and outside parties in the course of litigation. In addition, the Department continues to apply this practice in countervailing duty investigations, which undermines Ningbo Yili's argument.

Parties settle cases for a plethora of reasons, many of which are unrelated to the merits of a particular claim. If relevant at all to the matter at hand, which it is not, the Department's "faith in its practice" is demonstrated by the fact that it continues to apply this practice of using program-specific AFA rates in countervailing duty investigations. Furthermore, the Department had no basis to depart from this practice, because neither the Government of China nor the mandatory respondents demonstrated that any of the properly alleged subsidy programs was not used.

Contrary to Ningbo Yili's argument, the Department does not find that the application of its normal practice, including its respondent selection methodology and calculation of an all others rate, leads to an unreasonable outcome in this case. The three mandatory respondents, which account for a large volume of exports, did not participate in the Department's investigation, in contrast to two voluntary respondents which account for a [ ] volume of imports. As the Department stated in *LWS*, "it would be inappropriate to ignore the fact" that the Department had to apply AFA to the mandatory respondents, because these were the very companies that the Department selected to investigate concerning subsidization in the aluminum extrusions industry in the PRC.[103] "As such, it is reasonable to include their rates in the all others rate."[104]

Ningbo Yili and Evergreen argue that the AFA rates calculated for the mandatory respondents, and as applied to the all others companies, are punitive, disproportionately high, and uncorroborated.[105] Ningbo Yili also concedes that none of the mandatory respondents are directly challenging the AFA rate, but argues that the plaintiffs in *MacLean Fogg* are indirectly challenging it by means of their challenge to the all others rate. The Department agrees with

[103] *See LWS*, and accompanying Issues and Decision Memorandum at Comment 21.
[104] *Id.*
[105] *See* Ningbo Yili's Comments at 12-19 and Evergreen's Comments at 8-11.

Ningbo Yili that the mandatory respondents are not challenging the AFA rate, and that certain all others companies have limited their challenge to the all others rate. Therefore, if the Court decides that the Department has not complied with its Order in *MacLean Fogg*, its decision must be based on whether the all others rate was reasonable, not whether the AFA rate applied to the mandatory respondents was reasonable.

Ningbo Yili and Evergreen argue that the rate applied to the all others companies cannot be representative because an AFA rate necessarily includes a "built-in increase for deterrence."[106] However, the Act expressly contemplates that an all others rate may be based entirely on rates calculated using the facts available or adverse facts available.[107] In addition, in this case, all of the mandatory respondents chose not to participate, and as a result, received total AFA rates. The Department continues to find that this, coupled with the fact that the mandatory respondents account for a large percentage of exports by volume, indicates that the mandatory respondents' actions are highly representational of the industry.

3. *The Alternatives in the Draft Remand Should Be Rejected*

Ningbo Yili

The Department's two "alternatives" - rates of 228.08 percent and 368.14 percent - are simply disconnected from the reality in the PRC for any industry. These alternatives produce unreasonable results, and must be rejected. If the Department determines not to base the all others rate on the voluntary respondents' rates, the Department should calculate the all others rate based upon the average of PRC CVD all others rates without any AFA element; that is, 16.01 percent. This proposal is the best alternative because it is a rate reflective of cooperative companies across industries in the PRC. Some less reflective proposals include: the highest

[106] *F.Lii de Cecco di Filippo Fara S. Martino S.p.A*, 216 F.3d at 1032.
[107] *See* section 705(c)(5)(A)(ii) of the Act.

PRC CVD all-others rate without any AFA element (37.22 percent), or the average of the PRC CVD all others rates not including any with total-AFA element (52.76 percent). One other proposal is to use an average rate (rather than the highest rate ever calculated) for program-specific rates, and calculate rates for all others companies based on the historic percentage of programs used out of programs alleged.

All of these proposals are free from any concern about manipulation or distortion because they are based on averages for cooperating companies over all industries investigated to date. They are reflective of what the Department would generally expect of any cooperating mandatory respondent, and thus are suitable for uses as an all others rate in any investigation that lacks cooperating mandatory respondent rates.

Evergreen

Neither alternative proposed by the Department is appropriate. The only representative and reliable rates on the record are the voluntary respondents' rates. Even if there were evidence that the voluntary respondents' rates were lower than the average in the industry, these rates are nevertheless more reasonable than total AFA.

If the Department insists on constructing an all others rate based upon information concerning identical or similar programs examined in past PRC CVD cases, it must at a minimum make reasonable adjustments to that methodology to ensure that the rates are reasonably accurate and relate to the aluminum extrusions companies. First, the Department should ensure that the all others companies are minimally eligible for the programs being countervailed, rather than adversely assuming every company in China was eligible and in fact used every one of the 54 programs identified by the Petitioner in every geographic location in the PRC. The Department can achieve this objective by requesting basic information on the

geographic location of the participating companies, the nature of the ownership of each cooperative interested party, and other simple information. If the Department is unwilling to undertake the effort to obtain the information necessary to adjust the all others rate to more accurately reflect the actual circumstances of the uninvestigated aluminum extrusions companies, it should alternatively apply the average of the non-AFA all-others rates determined in past PRC CVD investigations (16.01 percent).

Alternatively, the Department should not continue to unreasonably assume that the uninvestigated companies received the highest non-*de minimis* rate calculated for the same or similar program in another PRC CVD investigation. If it uses this methodology, the Department must instead use a neutral measure of the potential benefit.

Petitioner

The Department's consideration of alternative methods for calculating the all others rate further demonstrates the reasonableness of its methodology and demonstrates that it fully considered important aspects of the issues identified by the Court. The Department evaluated alternative methods to calculate a representative rate based on facts on the record. The Department reasonably concluded, consistent with the statute and its regulations, that inclusion of the rates for the voluntary respondents (either as a simple or weighted average) in the calculation of the all others rate would not be representative and, therefore, would not be appropriate. After full consideration of alternative methods, the Department appropriately concluded its method was reasonable in this case. The Department's determination should be unchanged in the final remand redetermination.

Department's Position

In the Draft Remand, the Department developed and analyzed alternative methods for calculating the all others rate in this case. The Department explained that it is "faced with a limited amount of record information concerning subsidy rates of aluminum extrusions producers/exporters in the PRC, which results in a limited number of alternative methods."[108] However, in contrast to Ningbo Yili's proposed alternative methods, the Department's alternative methods relate to the aluminum extrusions industry. Ningbo Yili's proposed alternatives are entirely divorced from the industry at issue – the proceedings from which Ningbo Yili derives its alternatives range from investigations of ribbons, pressure pipe, and laminated woven sacks, which involve different manufacturers, programs, and periods of time. The Department does not find that using the rates from these investigations would produce a more representational rate than, for instance, the weight-average of the mandatory respondents and voluntary respondents' rates, which were calculated in this investigation based on programs alleged to be used by aluminum extrusions producers during the period of investigation.

Although the previously calculated rates are free from distortion or manipulation, the method of reaching back to unrelated investigations to calculate an all others rate would open up the Department's proceedings to manipulation, because respondents may choose not to cooperate based on their preference to receive a (presumably lower) all others rate which is based on rates calculated in other investigations. If these rates were in fact lower than the rates of subsidization in the investigated industry, the respondents would have no incentive to participate in the Department's investigation. Thus, a similar concern about manipulation would arise if the Department accepted Ningbo Yili and Evergreen's alternatives. This is also the case for Ningbo Yili and Evergreen's proposal of calculating a "neutral" facts available rate for the all others

[108] *See* Draft Remand at 10.

companies, because potential respondents may opt not to participate if they could receive a better rate than if they did participate. Such a result would be contrary to established law.[109]

Evergreen argues that the only representative all others rate would be based upon the voluntary respondents' rates, but as discussed above, these rates are not properly included in the all others rate due to the potential for distortion and manipulation. Evergreen asserts that, at a minimum, the Department must make reasonable adjustments to the all others rate so that it relates to aluminum extrusions companies. Evergreen claims this can be done, for instance, by requesting basic information on the geographic location of the companies, as was in fact suggested by one company subject to the all others rate in the investigation.[110]

Although this information may be "simple," the practicalities of requesting such information from hundreds of aluminum extrusions companies would be anything but simple. The Department would need to obtain the addresses of all of the companies, send questionnaires to hundreds of companies once their location was determined and, assuming the companies cooperated and provided the information, once the information was received, analyze it and presumably calculate separate rates for all aluminum extrusions companies depending on their responses.[111] Because this amounts to an investigation of all producers/exporters of aluminum extrusions in the PRC, it would eviscerate the Department's ability to conduct countervailing duty investigations within the statutory deadlines, and would render null the Department's ability to limit its investigation of respondents to a reasonable number. To impose such a requirement would necessarily create a new and very significant consideration that the Department would

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[109] *See, e.g., Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States*, Ct. No. 09-216; Slip Op. 2010-85 (Aug. 5, 2010).

[110] *See* Evergreen's Comments at 12 n 4.

[111] Unlike the Department's non-market economy antidumping practice, the Department does not calculate "separate rates" for non-investigated cooperating companies in countervailing duty proceedings. However, even under the antidumping separate rate practice, the Department does not calculate individual separate rates for all companies, and does not request information concerning potential dumping levels from these companies.

need to take into account in choosing the number of mandatory respondents and whether or not to accept voluntary respondents.

E. CONCLUSION

For these reasons, the Department has determined that the record evidence in this case supports a finding that it is reasonable to calculate the all others rate in this case using the rates calculated for the mandatory respondents. Specifically, the record evidence support a finding that the mandatory respondents' rates are more representative than the voluntary respondents' rates, and that continuing to adhere to our regulation against including voluntary rates in the calculation of the all others rate is reasonable. Although the mandatory respondents' rates are based entirely on adverse facts available, the exception provision in the Act expressly permits averaging the rates determined for exporters and producers individually investigated to calculate the all others rate. The Department has also considered alternative methods but concludes, after consideration of these methods, that the calculation of the all others rate based only on the rates calculated for mandatory respondents is reasonable in this case.

Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

6/22/12
Date