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Investigation
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April 5, 2021

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

FROM: Scot Fullerton
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Prestressed Concrete Steel from South Africa

I. SUMMARY

The Department of Commerce (Commerce) finds that prestressed concrete steel wire strand (PC strand) from South Africa is, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The petitioners are Insteel Wire Products, Sumiden Wire Products Corporation, and Wire Mesh Corp. (the petitioners). The sole mandatory respondent subject to this investigation is Scaw Metals Group (Scaw). Because Scaw did not respond to Commerce's in-lieu-of-verification (ILOV) questionnaire by the established deadline, Commerce has determined Scaw's margin on the basis of adverse facts available (AFA). The period of investigation (POI) is April 1, 2019, through March 31, 2020.

Below is the complete list of issues in this investigation for which we received comments from interested parties:

- Comment 1: Whether Scaw's Untimely ILOV Questionnaire Response Should be Accepted
- Comment 2: Application of Total AFA for Scaw
- Comment 3: Moot Arguments



II. BACKGROUND

On November 19, 2020, Commerce published the *Preliminary Determination* in this investigation, and invited parties to comment on the decision.¹ On December 17, 2020, Scaw requested a hearing,² but it withdrew its hearing request on March 29, 2021.³

During the course of this investigation, travel restrictions were imposed that prevented Commerce personnel from conducting on-site verification. In the *Preliminary Determination*, Commerce notified interested parties that it was unable to conduct an on-site verification.⁴ In lieu of on-site verification, Commerce sent an ILOV questionnaire to Scaw to collect additional supporting related to information that Scaw had already submitted to the record.⁵ Although Scaw submitted a response to the ILOV questionnaire containing business proprietary information (BPI), it failed to provide a public version of this submission as required by Commerce's ILOV questionnaire cover letter and under 19 CFR 351.303(c)(2)(iii). As a result, we rejected and removed the BPI version of Scaw's response from Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).⁶

Parties submitted case briefs on February 12, 2021,⁷ and rebuttal briefs on February 19, 2021.⁸

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is PC strand. For a complete description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

IV. CHANGES SINCE THE PRELIMINARY DETERMINATION

Based on our analysis of the comments received, we have not calculated an estimated final dumping margin for Scaw and, instead, have based Scaw's final rate on total AFA.

¹ See *Prestressed Concrete Steel Wire Strand from South Africa: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 73674 (November 19, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

² See Scaw's Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Scaw's Hearing Request," dated December 17, 2020.

³ See Scaw's Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Scaw's Withdrawal of Request for Hearing," dated March 29, 2021.

⁴ See *Preliminary Determination*, 85 FR at 73675.

⁵ See Commerce's Letter, In-Lieu-of-Verification Questionnaire, dated January 6, 2021 (ILOV Questionnaire).

⁶ See Memorandum, "Prestressed Concrete Steel Wire Strand from South Africa: Rejection and Removal from ACCESS," dated January 26, 2021 (Rejection Memo).

⁷ See Scaw's Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Scaw South Africa (Pty) Ltd.'s Case Brief," dated February 12, 2021 (Scaw Case Brief); *see also* Petitioners' Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Petitioners' Case Brief," dated February 12, 2021 (Petitioners' Case Brief).

⁸ See Scaw's Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Scaw South Africa (Pty) Ltd.'s Rebuttal Brief," dated February 19, 2021 (Scaw Rebuttal Brief); *see also* Petitioners' Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Petitioners' Rebuttal Brief," dated February 19, 2021 (Petitioners' Rebuttal Brief).

IV. USE OF ADVERSE FACTS AVAILABLE

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 782(e) of the Act states that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.⁹ In doing so, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Section 776(b)(2) provides that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, the SAA explains that Commerce may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹⁰ Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.¹¹

Section 776(c) of the Act provides that, when Commerce relies on secondary information, rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.¹² Further, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.

Finally, under section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding under an antidumping order when applying AFA, including the highest

⁹ See section 776(b)(1)(B) of the Act.

¹⁰ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 870.

¹¹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) (*Nippon Steel 2003*).

¹² See SAA at 870.

of such margins. When selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.

A. *Application of Total AFA for Scaw*

As discussed further in Comments 1 and 2 below, Scaw failed to provide a complete response to the ILOV questionnaire in a timely manner, and, as a result, Commerce rejected the entirety of Scaw’s ILOV questionnaire response from the record. Therefore, for this final determination, we find that necessary information is not on the record, and that Scaw failed to provide information by the deadlines for the submission in the form or manner requested, significantly impeded this investigation, and provided information that cannot be verified. Further, we find that the information reported in Scaw’s sales and cost databases are unreliable for the purposes of calculating an estimated weighted-average dumping margin in this investigation.

Additionally, as discussed below in Comment 2, we find that Scaw failed to cooperate to the best of its ability because Scaw did not comply with the ILOV questionnaire procedures and failed to provide its complete ILOV questionnaire response in a timely manner. Scaw’s failures precluded Commerce from performing the necessary analysis to verify the information provided by Scaw and calculate a weighted-average dumping margin for Scaw based on its own data, as required by the Act. For these reasons, Commerce finds that the application of total facts available is warranted with respect to Scaw, pursuant to sections 776(a)(1), 776(a)(2)(B)-(D) of the Act. Further, because it was within Scaw’s ability to timely submit its ILOV questionnaire response, following proper procedures, the application of adverse inferences is also warranted, pursuant to section 776(b) of the Act.

B. *Selection of the AFA Rate for Scaw*

Section 776(b) of the Act states that Commerce, when employing an adverse inference, may rely upon information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.¹³ In selecting a rate based on AFA, Commerce selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.¹⁴ Commerce’s practice is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition; or (2) the highest calculated rate of any respondent in the investigation.¹⁵

In selecting among facts otherwise available, we have considered the extent of information available on the record. As noted above, Scaw is the sole mandatory respondent in this investigation. Because Scaw failed to comply with the ILOV questionnaire procedures and provide its complete ILOV response in a timely manner, the ILOV response was rejected from

¹³ See also 19 CFR 351.308(c).

¹⁴ See SAA at 870.

¹⁵ See *Welded Stainless Pressure Pipe from Thailand: Final Determination of Sales at Less Than Fair Value*, 79 FR 31093 (May 30, 2014), and accompanying Issues and Decision Memorandum (IDM) at Comment 3.

the record. Without such a response, Commerce was precluded from performing the necessary analysis to verify the information provided by Scaw and calculate a weighted-average dumping margin for Scaw based on its own data. As a result, Commerce cannot rely on Scaw's information for determining the dumping margin based on the data submitted.

The only antidumping margin on the record is the margin alleged in the Petition, *i.e.*, 155.10 percent.¹⁶ Thus, consistent with our practice, we have assigned the dumping margin of 155.10 percent to Scaw for purposes of the final determination.

C. *Corroboration of Secondary Information*

When using facts otherwise available, section 776(c) of the Act provides that, where Commerce relies on secondary information (such as in the petition) rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.¹⁷ The SAA clarifies that “corroborate” means that Commerce will satisfy itself that the secondary information to be used has probative value;¹⁸ however, under 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. To corroborate secondary information, Commerce will, to the extent practicable, examine the reliability and relevance of the information to be used, although under section 776(d)(3) of the Act, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.¹⁹

Therefore, because the AFA rate applied to Scaw, the sole mandatory respondent in this investigation, is derived from the Petition (as well as the supplements thereto), and consequently, is based upon secondary information, Commerce must corroborate the rate to the extent practicable.

We examined evidence supporting the calculation in the Petition to determine the probative value of the dumping margin alleged in the Petition for use as AFA for purposes of this final determination. During our pre-initiation analysis, we also examined the key elements of the export price (EP) and normal value (NV) calculations, and the alleged dumping margin.²⁰ We also examined information from various independent sources provided either in the Petition or, upon our request, in the supplements to the Petition that corroborates key elements of the EP and NV calculations used in the Petition to derive the dumping margin alleged in the Petition.²¹

¹⁶ See Petitioners' Letter, “Prestressed Concrete Steel Wire Strand from South Africa: Petition for the Imposition of Antidumping Duties,” dated April 16, 2020 (Petition) at Volume X; *see also* AD Investigation Initiation Checklist: Prestressed Concrete Steel Wire Strand from South Africa (May 6, 2020) (Initiation Checklist).

¹⁷ See SAA at 870.

¹⁸ *Id.*; *see also* 19 CFR 351.308(d).

¹⁹ See section 776(d)(1)-(2) of the Act.

²⁰ See Initiation Checklist.

²¹ *Id.*

Based on our examination of the information, as discussed in detail in the Initiation Checklist, we consider the petitioner's EP and NV calculations to be reliable. Because we obtained no other information that calls into question the validity of the sources of information or the validity of the information supporting the EP and NV calculations provided in the Petition, based on our examination of the aforementioned information, we consider the EP and NV calculations in the Petition to be reliable. Because we confirmed the accuracy and validity of the information underlying the derivation of the dumping margin alleged in the Petition by examining source documents and affidavits, as well as publicly-available information, we determine that the dumping margin alleged in the Petition is reliable for the purpose of this investigation.

In making a determination as to the relevance aspect of corroboration, Commerce will consider information reasonably at its disposal to determine whether there are circumstances that would render a rate not relevant. In accordance with section 776(d)(3) of the Act, when selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party. Because Scaw failed to comply with the ILOV questionnaire procedures and provide its complete ILOV response in a timely manner, we were unable to verify its reported information. Therefore, we relied upon the dumping margin specified in the *Initiation Notice*, which was based upon information from the Petition and the supplements thereto, which is the only reliable and relevant information regarding the PC strand industry on the record.²² The information underlying the calculations of the margin alleged in the Petition is relevant to Scaw because: (1) the EP was based on an offer for sale of PC strand produced in South Africa during the POI; and (2) the NV was based on a home market price quote obtained through a market researcher specific to the foreign like product.²³

Accordingly, with respect to Scaw, Commerce determines that the dumping margin of 155.10 percent specified in the *Initiation Notice* has probative value.²⁴ Commerce has, thus, corroborated this AFA rate to the extent practicable within the meaning of section 776(c) of the Act by demonstrating that the rate: (1) was determined to be reliable in the pre-initiation stage of this investigation (and we have no information indicating otherwise); and (2) is relevant to the uncooperative mandatory respondent.²⁵

²² See *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 28605, 28608 (May 13, 2020) (*Initiation Notice*).

²³ See Initiation Checklist.

²⁴ See *Initiation Notice*, 85 FR at 28608.

²⁵ See section 776(c) of the Act; see also 19 CFR 351.308(c) and (d); *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 FR 35652, 35653 (June 24, 2008), and accompanying IDM at Comment 1; and Initiation Checklist.

V. DISCUSSION OF THE ISSUES

Comment 1: Whether Scaw's Untimely ILOV Questionnaire Response Should be Accepted

As noted above, Scaw submitted the BPI version of its ILOV questionnaire response without an accompanying public version, contrary to the requirements of Commerce's ILOV questionnaire cover letter and 19 CFR 351.303(c)(2)(iii). Because this submission was not properly filed, Commerce rejected it.²⁶ Therefore, the record does not contain a timely response to the ILOV questionnaire.

Scaw's Comments

- While Commerce's regulations require that the final public version of a submission be filed simultaneously with the filing of the final business proprietary document, Commerce has, in the past, exercised discretion to allow parties to refile (or file for the first time) untimely responses.²⁷
- Commerce's decisions to reject untimely-filed submissions have been remanded by the Court of International Trade (CIT). Under similar circumstances, in *Bosun Tools*, the CIT found that Commerce abused its discretion by rejecting a respondent's attempt to refile a document it previously attempted to file on time but only submitted in part.²⁸ Recent CIT cases, which hold that Commerce has abused its discretion when rejecting certain submissions, should inform Commerce's decision.²⁹
- The burden of incorporating the information is light and the necessity of increasing the accuracy of the calculated dumping margins weigh in favor of accepting Scaw's information.³⁰
- Given that amount of time before the final determination, parties would not be prejudiced if Scaw were permitted to refile its response.³¹

Petitioners' Comments

- Commerce's decision to reject Scaw's ILOV response was reasonable and consistent with its regulations and practice.³²
- As the Court of Appeals for the Federal Circuit (CAFC) held in *Dongtai Peak*, Commerce is not required to justify its rejection of untimely-filed submissions.³³

Commerce's Position: We disagree with Scaw that Commerce should reconsider its decision to reject the ILOV questionnaire response as untimely and remove that response from the record. Scaw failed to follow the procedures required by Commerce's regulations when making this

²⁶ See Rejection Memo.

²⁷ See Scaw Case Brief at 3.

²⁸ *Id.* at 3-4 (citing *Bosun Tools Co., Ltd. v. United States*, 405 F. Supp. 3d 1359, 1365 (CIT 2019) (*Bosun Tools*)).

²⁹ See Scaw Rebuttal Brief at 6-8 (citing *Bosun Tools*, 405 F. Supp. 3d at 1365; and *Pro-Team Coil Nail Enterprise v. United States*, 419 F. Supp. 3d, 1319, 1332 (CIT 2019) (*Pro-Team Coil Nail*)).

³⁰ See Scaw Case Brief at 4-5.

³¹ *Id.* at 5.

³² See Petitioners' Case Brief at 5-8.

³³ See Petitioners' Rebuttal Brief at 5-7 (citing *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343 (CAFC 2015) (*Dongtai Peak*)).

submission, after explicitly being placed on notice that these procedures were required.³⁴ While Scaw argues that there were mitigating circumstances, such as human error, surrounding this failure, we disagree that these circumstances justify a departure from Commerce's well-established filing requirements which are codified in our regulations and of which we specifically reminded Scaw in our request for information.

The facts surrounding this conclusion are as follows. On January 6, 2021, Commerce issued the ILOV questionnaire to Scaw.³⁵ On January 7, 2021, Scaw requested an extension of the deadline to respond to the ILOV questionnaire, which Commerce granted in part,³⁶ making the deadline for the ILOV questionnaire response January 14, 2021. On that date, Commerce received a timely submission from Scaw, filed under the "one-day lag" rule.³⁷ On the following day, Commerce received the final business proprietary version of the response without an accompanying public version.³⁸ Because Scaw did not file a public version, the business proprietary version was not accepted on the record, nor was it electronically served *via* ACCESS on other interested parties in this proceeding.

On January 26, 2021, after conducting an internal review of Commerce's electronic filing system to confirm that Scaw did not file either a full or partial public version and no technical issues existed that prevented Scaw from filing its response, Commerce rejected the incomplete submission,³⁹ pursuant to the requirements of 19 CFR 351.303(c)(2)(iii) and 19 CFR 351.104(a)(2). In our letter to Scaw setting out the reason for the rejection of the submission, we noted that Commerce had provided explicit instructions regarding its filing requirements, including the fact that Scaw was required to: (1) file a complete response to the questionnaire, in its entirety, by the deadline; and (2) provide a public version of that response by the close of business on the following day. Specifically, Commerce's instruction provided that:

Commerce must conduct this investigation in accordance with statutory and regulatory deadlines. Please file your response to this letter electronically using {ACCESS} no later than **5:00 pm, Eastern Time (ET), January 13, 2021**. An electronically-filed document must be received successfully in its entirety by ACCESS by the time and date identified above. **An appropriate public summary of the proprietary data in your response must be received no later than 5:00 p.m. ET on the following business day.**⁴⁰

³⁴ See Commerce's ILOV Questionnaire at Cover Letter.

³⁵ *Id.*

³⁶ See Memorandum, "Prestressed Concrete Steel Wire Strand from South Africa: Extension of Time to Submit In Lieu of Verification Questionnaire Response," dated January 11, 2021.

³⁷ Under the one-day lag rule, interested parties may file submissions containing business proprietary information within the applicable time limit and may file the final business proprietary document and public version simultaneously by close of business on the following business day. See 19 CFR 351.303(c)(2).

³⁸ See Rejection Memo.

³⁹ *Id.*

⁴⁰ See ILOV Questionnaire. As noted above, Commerce granted a one-day extension of this deadline after receiving a timely extension request from Scaw.

On February 4, 2021, Scaw requested that Commerce allow Scaw to refile the rejected submission⁴¹ and then met with Commerce officials.⁴² In its request for reconsideration, Scaw claimed that it had made an inadvertent error by failing to file the public version of its response and believed, in good faith, that its full submission had been timely filed.⁴³ Scaw stated that its failure was inexplicable, but it argued that, because this failure was likely attributable to inadvertent human error, Commerce should accept an untimely extension request and permit Scaw to remedy its error.

After considering Scaw's explanation, Commerce declined to reconsider its rejection of Scaw's untimely and incomplete questionnaire response.⁴⁴ As we noted in the Rejection Memo,⁴⁵ Commerce issued the ILOV questionnaire to Scaw, and provided clear instructions on the deadlines for Scaw to submit the business proprietary and public versions of its response:

Commerce's cover letter to the ILOV questionnaire clearly stated that "{a}n appropriate public summary of the proprietary data in your response must be received no later than 5:00 p.m. ET on the following business day." In addition, 19 CFR 351.303(c)(2)(iii) states that "{s}imultaneously with the filing of the final business proprietary document under paragraph (c)(2)(ii) of this section, **a person also must file the public version of such document** (see §351.304(c)) with {Commerce}." Given that your January 28, 2021 letter did not provide any reasonable explanation why Scaw's submission should be considered complete and timely, Commerce declines to accept the response.⁴⁶

Subsequently, in its case brief, Scaw claimed that it experienced difficulties arising from company officials' unfamiliarity with the questionnaire process, difficulties arising from COVID-19 preventing in-person meetings, and computer/technical issues. However, we are similarly unpersuaded by this additional explanation. The fact remains that Scaw was represented by counsel, and Commerce had already granted extensions in this case to the extent possible as a result of these issues. None of these issues directly caused Scaw to miss the deadline to file the public version of the ILOV response.

In its request(s) for information, Commerce notifies parties of the specific deadline by which the information is to be provided. If the information has not been filed by the established deadline, Commerce will not accept the untimely information absent a timely-filed extension request or an untimely extension request that demonstrates that an extraordinary circumstance exists under 19 CFR 351.302(c).

⁴¹ See Scaw's Letter, "Scaw's Request for Extension to File Out of Time Final BPI and Public Versions of Questionnaire Response in Lieu of Verification," dated January 28, 2021 (Scaw's Reconsideration Request).

⁴² See Commerce's Letter, "Prestressed Concrete Steel Wire Strand from South Africa: Ex Parte Call," dated February 5, 2021.

⁴³ See Scaw Rebuttal Brief at 2; see also Scaw's Reconsideration Request.

⁴⁴ See Commerce's Letter, "Response to Request for Resubmission," dated February 4, 2021 (Response to Resubmission Request).

⁴⁵ *Id.* (citing ILOV Questionnaire at Cover Letter). As noted above, Commerce granted a one-day extension of this deadline after receiving a timely extension request from Scaw.

⁴⁶ See Response to Resubmission Request (emphasis added).

Section 351.302(c) states: “An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists.” The regulation defines “extraordinary circumstance” as “an unexpected event that: (i) could not have been prevented if reasonable measures had been taken, and (ii) precludes a party or its representative from timely filing an extension request through all reasonable means.” The preamble to Commerce’s regulations provides:

Examples of extraordinary circumstances include a natural disaster, riot, war, *force majeure*, or medical emergency. Examples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party’s representative to access the Internet on the day on which the submission was due.⁴⁷

Human error, unfamiliarity with the questionnaire process, difficulties in holding in-person meetings, and computer/technical issues are not extraordinary within the meaning of our regulations. Moreover, Scaw has failed to demonstrate that the circumstances: (1) could not have been prevented if reasonable measures had been taken; or (2) precluded the law firm from timely filing an extension request through all reasonable means within the meaning of 19 CFR 351.302(c)(2). Because Scaw’s extension request was untimely filed and no extraordinary circumstances existed which would have prevented Scaw from timely filing another extension request or the response itself, we find that acceptance of Scaw’s untimely extension request is not warranted.

We recognize that there are a limited number of prior instances in which Commerce has accepted untimely extension requests. Commerce evaluates such requests on a case-by-case basis, based on the circumstances unique to each case. As noted above, 19 CFR 351.302(c) expressly states that an untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists. Commerce evaluated the circumstances described in Scaw’s Reconsideration Request, unique to this case, and found that the extraordinary circumstances standard was not satisfied.

We disagree with Scaw that recent CIT opinions undermine Commerce’s decision to reject Scaw’s ILOV questionnaire response. The holdings in *Bosun Tools* and *Pro-Team Coil Nail* were fact-specific holdings that do not apply to the case at hand. Moreover, they stand in contrast to recent CAFC rulings.

Specifically, Scaw cites *Bosun Tools*, in which the CIT reversed Commerce’s decision to reject an untimely supplemental questionnaire response where the filing party timely filed the final public version of the response but not the entire final business proprietary version. However, *Bosun Tools* is distinguishable from the case at hand. The respondent in *Bosun Tools* failed to timely upload a portion of its final business proprietary version, and ultimately uploaded the entire business proprietary version two days after the relevant deadline expired.⁴⁸ Unlike the respondent in *Bosun Tools*, Scaw did not attempt to file its public version until after Commerce

⁴⁷ See *Extension of Time Limits: Final Rule*, 78 FR 57790, 57793 (September 20, 2013).

⁴⁸ See *Bosun Tools*, 405 F. Supp. 3d at 1365.

notified it of the missing documents, more than 10 days after the expiration of the deadline.⁴⁹ Scaw itself describes its failure to provide the required information as inexplicable.⁵⁰ Therefore, we find *Bosun Tools* to be inapposite. In addition, we note that while Scaw filed on ACCESS the business proprietary version of its ILOV questionnaire response and not the public version, Commerce never received a complete copy of the response.

The CAFC's ruling in *Dongtai Peak* is more relevant to this investigation. In that case, the CAFC held that Commerce properly rejected the respondent's untimely-filed extension requests and untimely-filed supplemental questionnaire response, despite the respondent's claim that it encountered debilitating computer system malfunctions and difficulties in overseas communication between the rurally-located respondent and its U.S.-based counsel.⁵¹ The CAFC also concluded that Commerce reasonably determined that the respondent was capable of at least submitting an extension request on time, but simply failed to do so and, therefore, found that good cause did not exist to extend the deadline retroactively.⁵²

As in *Dongtai Peak*, the untimely-filed response filed by Scaw contained vital information.⁵³ The ILOV questionnaire requested crucial information regarding the sales in the home market and to the United States under investigation, source documents linking individual home market and U.S. sales to Scaw's financial statements, details regarding Scaw's direct materials and production quantity, and support for its cost reconciliation.⁵⁴ As the CAFC held in *Dongtai Peak* with respect to the need for fairness and accuracy, Commerce's rejection of an untimely-filed questionnaire response does not violate any due process rights of a respondent such as Scaw, because the respondent had notice of the deadline and the opportunity to respond to the ILOV Questionnaire in a timely manner, or file an earlier request for an extension.⁵⁵ The ILOV Questionnaire emphasized the importance of submitting the response in a timely manner, and highlighted that the consequences for failing to do so might result in the application of AFA.⁵⁶ As such, Scaw was afforded notice regarding the consequences of its actions.

The CAFC issued a similar opinion in *PSC VSMPO*.⁵⁷ In that case, the CIT ordered Commerce to accept untimely factual information because the circumstances were "not typical." However, the CAFC reversed this decision and explained:

The {CIT} improperly intruded upon Commerce's power to apply its own procedures for the timely resolution of antidumping reviews. The role of judicial review is limited to determining whether the record is adequate to support the administrative action. A court cannot set aside application of a proper

⁴⁹ See Rejection Memo; see also Scaw's Reconsideration Request.

⁵⁰ See Scaw Case Brief at 2.

⁵¹ See *Dongtai Peak*, 777 F.3d at 1350.

⁵² *Id.* at 1352.

⁵³ *Id.*

⁵⁴ See ILOV Questionnaire.

⁵⁵ See *Dongtai Peak*, 777 F.3d at 1352.

⁵⁶ See ILOV Questionnaire.

⁵⁷ See *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012) (*PSC VSMPO*).

administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered.⁵⁸

Thus, *PSC VSMPO* indicates that maintaining Commerce's ability to set and enforce time limits supersedes any concern over ensuring increased accuracy in computed dumping margins. Commerce must weigh its duty to administer all its trade remedy proceedings with calculating accurate dumping margins.

Finally, we disagree with Scaw that *Pro-Team Coil Nail* applies here.⁵⁹ In that case, the CIT remanded Commerce's decision to assign total AFA to a respondent after it failed to timely provide a small amount of updated information which was requested in a supplemental questionnaire. Unlike here, *Pro-Team Coil Nail* involved a situation that arose early in the proceeding, still in the preliminary stage, which allowed Commerce far more latitude to consider the untimely information, which was extremely limited in scope.⁶⁰ In contrast, Scaw's failure to respond to the ILOV questionnaire occurred in the final stage of the proceeding and involved extensive information which is fundamental to Commerce's analysis.

Scaw has argued that allowing Scaw to refile its untimely submission would not prejudice any parties due to the length of time until the final determination. In Scaw's view, the timing of its questionnaire response, combined with the postponed final determination, provided more than enough time for Commerce to continue to conduct its investigation. We are not persuaded by this argument. Commerce establishes deadlines so that it can conduct this and, simultaneously, numerous other trade remedy proceedings in an efficient manner within its statutory and regulatory deadlines. Therefore, it is critical that parties file documents by the established deadline, or timely request an extension of such a deadline so that Commerce can provide a considered response. Timely filings and timely extension requests contribute to Commerce's efficient administration of the numerous cases before it and the antidumping and countervailing duty laws. Conversely, untimely filings and last-minute extension requests hinder the efficient conduct of our proceedings, and require that Commerce devote additional time and resources to addressing such untimely filings and last-minute requests. Additionally, although the burden associated with a single untimely-filed questionnaire response may be perceived as minimal, that burden is not minimal when aggregated across all proceedings and respondents.

Further, due to Scaw's failure to comply with our regulations and timely file a public version, Commerce had the added burden of tracing the filing logs of Scaw's submissions, confirming that neither E&C's Central Records Unit nor the ACCESS technical team had received any communication from Scaw that it experienced technical filing difficulties, and conducting an internal review of what had transpired. These activities diverted valuable resources, significantly impeding the investigation process. Accordingly, the efficient conduct of Commerce's proceedings requires that parties adhere to the deadlines established by Commerce. For the

⁵⁸ *Id.*

⁵⁹ See *Pro-Team Coil Nail*.

⁶⁰ *Id.*, 419 F. Supp. 3d, 1332 (indicating that the information in question consisted of a "Q&V Schedule which summarized information already on the record" and remanding the issue to Commerce to reconsider its "refusal to consider corrective information (including . . . information to correct an omission) submitted early in the proceeding").

foregoing reasons, we are not revisiting our decision to reject Scaw's untimely-filed ILOV questionnaire response for this final determination.

Comment 2: Application of Total AFA for Scaw

Scaw's Comments

- Even if Commerce does not reverse its decision to reject Scaw's ILOV questionnaire response, Commerce can apply neutral facts available.⁶¹
- Over the last year, where operations have significantly changed because of COVID-19, Commerce did not always require ILOV questionnaire responses.⁶²
- Assigning the petition rate as the rate for Scaw is inappropriate because an AFA rate is meant to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.⁶³

Petitioners' Comments

- Because Scaw significantly impeded this investigation and failed to provide a complete response to Commerce's verification questionnaire, Commerce should apply AFA in determining the dumping margin for Scaw.⁶⁴
- Because the rejected response was intended to provide the information necessary to verify the completeness and accuracy of Scaw's other responses, and verification is required by the Act in investigations, Commerce cannot rely on Scaw's unverified response for the final determination.⁶⁵

Commerce's Position: Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 782(e) of the Act states that Commerce shall not decline to consider submitted information if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In selecting a rate to use as AFA, Commerce selects a rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce

⁶¹ See Scaw Case Brief at 6-8.

⁶² See Scaw Rebuttal Brief at 2-3.

⁶³ *Id.* at 4-6.

⁶⁴ See Petitioners' Case Brief at 8-16.

⁶⁵ See Petitioners' Rebuttal Brief at 7-9.

respondents to provide Commerce with complete and accurate information in a timely manner.”⁶⁶

As explained above in the “Use of Adverse Facts Available” section, we find that the application of total AFA is warranted with respect to Scaw. As explained above and in Comment 1, Scaw failed to provide a complete response to Commerce’s ILOV questionnaire in a timely manner, and, as a result, Commerce rejected the entirety of Scaw’s ILOV response from the record. Therefore, necessary information is not on the record. Further, Scaw failed to provide information by the deadlines for submission in the form or manner requested, significantly impeded this investigation by failing to timely provide a complete response to the ILOV questionnaire, and provided information that cannot be verified. Additionally, we find that because we were unable to verify information provided by Scaw, the information reported in Scaw’s sales and cost databases are unreliable for the purposes of calculating an estimated weighted-average dumping margin in this investigation. For these reasons, Commerce finds that the application of facts available is warranted with respect to Scaw, pursuant to sections 776(a)(1) and 776(a)(2)(B)-(D) of the Act.

We also find that Scaw failed to cooperate by not acting to the best of its ability because Scaw did not comply with the ILOV questionnaire procedures and failed to provide its complete ILOV response in a timely manner. Scaw’s failures precluded Commerce from performing the necessary analysis to verify the information provided by Scaw and to calculate a weighted-average dumping margin for Scaw based on its own data, as required by the Act. Adverse inferences are, therefore, warranted under section 776(b) of the Act to determine Scaw’s dumping margin. Scaw was fully aware of the established deadlines in this case, as evidenced by its multiple extension requests, and it was advised of the potential consequences of failing to provide the information requested in the ILOV questionnaire in a timely manner, including the potential application of AFA. The fact that Scaw put forth some effort does not detract from our finding that it failed to act to the best of its ability.

Scaw notes that, during the COVID-19 pandemic, Commerce has not always required responses to ILOV questionnaires. However, in this proceeding, Commerce notified Scaw of its intent to take additional steps in lieu of on-site verification and, we issued the ILOV questionnaire to Scaw consistent with this stated intention.⁶⁷ Further, in the questionnaire cover letter, we explained that we issued this “request for documentation, in lieu of performing an on-site verification, to collect additional or supporting documentation related to information that {was} already submitted in this investigation.”⁶⁸ Scaw ultimately failed to cooperate with this important verification process. While Scaw argues that an untimely questionnaire submission does not equal a failure to cooperate, the CIT stated in *Nippon Steel 2000*:

At a minimum, Commerce must find that a respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. Commerce must also find either a willful

⁶⁶ See SAA at 870; see also, e.g., *Notice of Final Determination of Sales at Less than Fair Value: Large Residential Washers from the Republic of Korea*, 77 FR 75988, 75990 (December 26, 2012).

⁶⁷ See *Preliminary Determination* at “Verification.”

⁶⁸ See ILOV Questionnaire.

decision not to comply or behavior below the standard for a reasonable respondent. Insufficient attention to statutory duties under the unfair trade laws is sufficient to warrant adverse treatment. It implies an unwillingness to comply or reckless disregard of compliance standards. Commerce must be in a position to compel meaningful attention to and compliance with its requests.⁶⁹

Here, Scaw could have complied if it had paid sufficient attention to the ILOV questionnaire requirements and its own filing process, including by confirming that all parts of its response had been filed on ACCESS by the deadlines. We do not believe that our decision to apply AFA in this case is inconsistent with the facts discussed in *Nippon Steel 2000*. Scaw's failure to submit its questionnaire response by the deadline led to a failure to comply with the established ILOV questionnaire procedures. This further resulted in the absence of information necessary to verify information on the record, impeded Commerce's ability to verify information on the record pursuant to 782(i) of the Act, and demonstrated Scaw's failure to cooperate to the best of its ability, which warrants the application of AFA.

Additionally, in *Nippon Steel 2003*, the CAFC explained that for a party to comply with Commerce's request to the best of its ability, it must:

... put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.⁷⁰

The CAFC goes further, noting that the focus of section 776(a) "is a respondent's *failure to provide information*. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information – for any reason – requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination" (emphasis in original).⁷¹ The CAFC continues, "{section 776(b) of the Act} permits Commerce to 'use an inference that is adverse to the interests of {a respondent} in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*..." (emphasis in original).⁷²

We determine that Scaw did not put forth the "maximum effort" required of it. Scaw retained and was represented by counsel throughout this proceeding, and, therefore, it had the ability to understand Commerce's requests for information at the time such requests were issued. In addition, it was Scaw's responsibility to comply with the ILOV questionnaire procedures so that Commerce could verify the record information and calculate an accurate estimated weighted-average dumping margin. The failure to comply with Commerce's request in a timely manner lies with Scaw.

⁶⁹ See *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d. 1366, 1379 (CIT 2000) (*Nippon Steel 2000*).

⁷⁰ See *Nippon Steel 2003*, 337 F.3d at 1382.

⁷¹ *Id.*, 337 F.3d at 1381.

⁷² *Id.*

Under section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding under an antidumping duty order when applying an adverse inference, including the highest of such margins. Because we were unable to verify Scaw's data, there is only one reliable source of information on the record to use as AFA, which is the sole margin from the Petition. Therefore, for this final determination, Commerce finds that the application of AFA to Scaw is warranted in establishing its final antidumping duty margin, is supported by evidence on the record, and is in accordance with Commerce's practice under sections 776(a) and (b) of the Act. Further, Commerce concludes that the sole margin in the Petition is the only information available to apply to Scaw as the AFA rate for this final determination.

Comment 3: Moot Arguments

Parties raised a number of issues related to Scaw's margin calculations, including a circumstance of sale adjustment for supplier rebates received by Scaw, Scaw's general and administrative expenses, and Scaw's scrap offset.

Commerce's Position: Because we did not calculate a final dumping margin for Scaw, these issues are moot and we did not address them here.

VI. RECOMMENDATION

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

☒

Agree

☐

Disagree

4/5/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance