



A-489-805  
Administrative Review  
POR: 07/01/2015-06/30/16  
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February 6, 2018

**MEMORANDUM TO:** Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

**FROM:** James Maeder  
Associate Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations  
performing the duties of Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results and  
Rescission of Antidumping Duty Administrative Review: Certain  
Pasta from Turkey; 2015-2016

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## SUMMARY

The Department of Commerce (Commerce) has analyzed the comments submitted by the interested parties following publication of the *Preliminary Results*<sup>1</sup> in the administrative review of the antidumping duty (AD) order on certain pasta (pasta) from Turkey covering the period of review (POR) July 1, 2015, to June 30, 2016. This review covers one respondent, Mutlu Makarnacilik Sanayi ve Ticaret A.S. (Mutlu). The petitioners are the American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company (the petitioners). Based upon our analysis of the comments received, we made no changes to our determination from the *Preliminary Results*. We continue to find that Mutlu had no *bona fide* U.S. sales during the POR. For detailed information regarding our *bona fides* analysis, which involves business proprietary information, please see the *Bona Fides* Analysis Memorandum.<sup>2</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of issues for which we received comments from parties. If our recommendation is approved, consistent with our finding that Mutlu had no *bona fide* U.S. sales during the POR, we will rescind the administrative review.

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<sup>1</sup> See *Certain Pasta from Turkey: Preliminary Results of Antidumping Duty Administrative Review*, 82 FR 36737 (August 7, 2017) (*Preliminary Results*).

<sup>2</sup> See Memorandum, “2015-2016 Antidumping Duty Administrative Review of Certain Pasta from Turkey: Final *Bona Fides* Sales Analysis for Mutlu Makarnacilik Sanayi ve Ticaret A.S.,” dated concurrently with this memorandum.



Comment 1: Whether “*Bona Fides*” Testing is Applicable Only to New Shipper Reviews, and Not Administrative Reviews

Comment 2: Whether Record Evidence Confirms that Mutlu’s Sale Was Not a *Bona Fide* Sale

Comment 3: Whether Rescinding the Administrative Review Amounts to an Imposition of Adverse Facts Available Based on the Failure to Cooperate of an Unaffiliated Third Party

## BACKGROUND

Commerce published the *Preliminary Results* in the *Federal Register* on August 7, 2017.<sup>3</sup> In accordance with 19 CFR 351.309(c), we invited parties to comment on our *Preliminary Results*.<sup>4</sup> On September 6, 2017, we received case briefs from Mutlu and the petitioners.<sup>5</sup> However, on September 21, 2017, Commerce rejected Mutlu’s case brief because it contained new factual information after the deadline for such information.<sup>6</sup> Mutlu then removed the new factual information from its case brief, and resubmitted its case brief on September 23, 2017.<sup>7</sup> On September 18, 2017, we received rebuttal briefs from the petitioners and Mutlu.<sup>8</sup>

Commerce has conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

## SCOPE OF THE ORDER<sup>9</sup>

Imports covered by this order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions. Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. The merchandise subject to review is currently classifiable under item 1902.19.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

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<sup>3</sup> See *Preliminary Results*, and accompanying Memorandum, “Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Pasta from Turkey,” dated August 1, 2017 (Preliminary Decision Memorandum).

<sup>4</sup> See *Preliminary Results*, 82 FR at 36737.

<sup>5</sup> See Petitioners’ Case Brief, “Petitioners’ Case Brief for Mutlu Makarnacilik Sanayi ve Ticaret A.S.,” dated September 6, 2017 (Petitioner Case Brief).

<sup>6</sup> See Commerce Letter dated September 21, 2017.

<sup>7</sup> See Mutlu’s Case Brief, “Case Brief of Mutlu Makarnacilik Sanayi ve Ticaret A.S.,” dated September 23, 2017 (Mutlu Case Brief).

<sup>8</sup> See Petitioners’ Rebuttal Brief, “Petitioners’ Rebuttal Brief for Mutlu Makarnacilik Sanayi ve Ticaret A.S.,” dated September 18, 2017 (Petitioner Rebuttal Brief); Mutlu’s Rebuttal Brief, “Rebuttal Brief of Mutlu Makarnacilik Sanayi ve Ticaret A.S.,” dated September 18, 2017 (Mutlu Rebuttal Brief).

<sup>9</sup> See *Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value*:

## DISCUSSION OF THE ISSUES

### Comment 1: Whether “*Bona Fides*” Testing is Applicable Only to New Shipper Reviews, and Not Administrative Reviews

#### Mutlu’s Case Brief<sup>10</sup>

- Commerce’s conduct of a *bona fides* analysis in this administrative review was contrary to law. The statutory provision for the *bona fides* analysis is section 751(a)(2)(B) of the Act, but it applies only to new shipper reviews (NSRs). Commerce’s application to this administrative review of standards and statutory provisions that are explicitly applicable to only NSRs is contrary to law and an abuse of discretion.
- Unlike NSRs, where Commerce is statutorily required to make a *bona fides* determination, in an administrative review the only criteria for review is that a sale was made, and that it was made during the POR. These criteria are met in this administrative review, and there has been no allegation that the sale at issue was fraudulent or executed in bad faith.
- Limiting the *bona fides* analysis to NSRs has a practical and commonsense explanation.
  - If an exporter were to make a low-quantity, high-price sale to a colluding importer just to get a low NSR rate, that exporter would, under the old law, obtain the benefit of one year (approximately) of sales with no actual cash deposit requirements because of the bonding option. That exporter could then start making sales at the artificially low rate. In the past, importers took advantage of that benefit long enough to make significant sales, but then when the bond became due, they would vanish, and never pay. Thus, there was a benefit in “gaming the system” with a bad-faith sale.
  - In an administrative review, by contrast, if an exporter and importer decided to make a single artificial sale at a ridiculously high price, they would be acting to their own detriment since the importer would have to pay the high all-other rate on the initial test sales and on any sales made during the review, since no bonding is possible. Furthermore, if the importer tried to import subject merchandise with such an ill-gotten low rate, the petitioners would immediately request a review, the retroactive system would impose a duty increase on the entries, and the importer would have to pay the increased antidumping duties. Therefore, in an administrative review there is no incentive for an importer and exporter to artificially increase the U.S. price to an unsustainable level, since the importer will never obtain any benefit of low-margin imports, and will later have to pay the calculated antidumping duty margin.
- In numerous cases, Commerce has conducted administrative reviews of small, test sales, and has explicitly stated that in administrative reviews, the fact that a sale is a test sale executed with an eye to reducing a dumping margin does not invalidate the review.<sup>11</sup>

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*Certain Pasta from Turkey*, 61 FR 38545 (July 24, 1996).

<sup>10</sup> See Mutlu Case Brief at 2-8.

<sup>11</sup> See Mutlu Case Brief at 2, citing *Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 2655 (January 15, 2011); *American Silicon Techs. v. United States*, 110 F.Supp. 2d 992, 998 (CIT 2000).

- The cases to which Commerce cites in its Preliminary Decision Memorandum and *Bona Fides* Memorandum<sup>12</sup> all pertain to NSRs, and not administrative reviews. Moreover, the few other recent administrative reviews in which Commerce has introduced *bona fides* analysis also rely on precedent in previous NSRs or on administrative reviews that, in turn, relied on citations to NSRs.
- Since the purpose of antidumping law is to drive prices higher than the market alone would yield, it is not a crime for parties to price their sales with an eye toward the antidumping order. A higher-than-normal price is not necessarily an indication of bad faith or collusion.
- Previous court decisions in which the Court of International Trade (CIT) has allowed Commerce to exclude U.S. sales from administrative reviews relate to removing an anomalous or distortive sale (like a sample sale, a distressed sale, or the like).<sup>13</sup> They are unrelated to the *bona fides* analysis that Commerce undertook here because they do not speak to the question of terminating an entire administrative review by application of the separate NSR statutory standards.

#### **Petitioners' Rebuttal Brief<sup>14</sup>**

- Mutlu has cited to no authority for its claim that Commerce may not analyze the *bona fides* of a sale in administrative reviews.
- While Mutlu is correct that Commerce may conduct a review of a small-quantity sale, Commerce does not conduct a review based on an artificial sale that is not reflective of normal business practices between an exporter and its customer. Contrary to Mutlu's claims, Commerce often conducts *bona fides* sales analysis in administrative reviews, and the CIT

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<sup>12</sup> See Memorandum, "2015-2016 Antidumping Duty Administrative Review of Certain Pasta from Turkey: Preliminary *Bona Fides* Sales Analysis for Mutlu Makarnacilik Sanayi ve Ticaret A.S.," dated August 1, 2017 (*Bona Fides* Memorandum).

<sup>13</sup> See Mutlu Case Brief at 4, n. 3 (citing *FAG U.K. v. United States*, 945 F. Supp. 260, 265 (CIT 1996) (*FAG*); *Ipsco, Inc. v. United States*, 714 F. Supp. 1211, 1217, (CIT 1989) (*IPSCO*), rev'd in part on other grounds, 965 F.2d 1056 (Fed. Cir. 1992); *American Permac v. United States*, 783 F. Supp. 1421, 1423 (CIT 1992) (*American Permac*)).

<sup>14</sup> See Petitioner Rebuttal Brief at 2-9.

has specifically approved the practice.<sup>15</sup> Commerce even conducted a *bona fides* analysis in a prior administrative review of this very order.<sup>16</sup>

- Mutlu incorrectly states that *FAG*, *IPSCO*, *American Permac* are unrelated to Commerce’s *bona fides* analysis. These cases serve as the foundational elements of Commerce’s evolving practice to ensure the integrity of its proceedings and that the law is administered to achieve a fair and accurate result. While these cases did not employ the term “*bona fides*,” they established the proposition that Commerce will not rely on unrepresentative, atypical or distortive sales to calculate antidumping margins, regardless of the segment or proceeding under review.

### Commerce’s Position:

We disagree with Mutlu. As an initial matter, we note that Mutlu has cited to no legal authority that forbids Commerce from conducting a *bona fides* analysis in the context of an administrative review. Mutlu also ignores Commerce’s long-standing practice with respect to *bona fides* analyses of sales under review if the circumstances so warrant. Indeed, Commerce has previously explained that in conducting an administrative review, if a producer’s or exporter’s transactions involve price, quantities, and overall circumstances that do not call into question the commercial viability of those sales, generally, it will not analyze in great detail the *bona fides* of those sales.<sup>17</sup> However, Commerce will evaluate the *bona fides* of a sale in an administrative review if it determines that information on the record warrants such an analysis.<sup>18</sup> This is because “a U.S. sale must be a *bona fide* commercial transaction to be a basis for a dumping margin, and, therefore, we apply the same test in administrative reviews and new shipper reviews.”<sup>19</sup> Further, the CIT has

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<sup>15</sup> See Petitioner Case Brief at 5-6 (citing *Glycine from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind, In Part; 2013-2014*, 80 FR 18814, 18814 (April 8, 2015) (*Glycine Preliminary Results*), unchanged in *Glycine from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 62027 (October 15, 2015) (*Glycine Final Results*) and accompanying Issues and Decision Memorandum at Comment 5, sustained in *Evonik Rexim (Nanning) Pharm. Co. v. United States*, 253 F. Supp. 3d 1364 (CIT 2017); *Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Antidumping Duty Administrative Review*, 75 FR 6631 (February 10, 2010) (*SSSS in Coils from Japan*), and accompanying Issues and Decision Memorandum at Comment 1; *Certain Tissue Paper Products from the People’s Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58,642 (October 16, 2007) (*Tissue Paper from China*), and accompanying Issues and Decision Memorandum at Comment 4a; *Prestressed Concrete Steel Wire Strand from Thailand: Preliminary Results of Antidumping Duty Administrative Review; 2015*, 82 FR 9197 (February 3, 2017) (*Wire Strand from Thailand Preliminary Results*); *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75660 (December 3, 2015) (*Silicomanganese from India*)).

<sup>16</sup> See Petitioner Case Brief at 8 (citing *Certain Pasta from Turkey; 2010-2011; Final Results of Antidumping Duty Administrative Review*, 78 FR 9672 (February 11, 2013) and accompanying Issues and Decision Memorandum at Comment 6).

<sup>17</sup> See *Tissue Paper from China*, IDM at Comment 4a.

<sup>18</sup> See *Wire Strand from Thailand Preliminary Results*, and accompanying PDM at 3, unchanged in *Prestressed Concrete Steel Wire Strand from Thailand: Final Results of Antidumping Duty Administrative Review; 2015*, 82 FR 25240 (June 1, 2017); *Glycine Preliminary Results*, and accompanying Preliminary Decision Memorandum at 3, unchanged in *Glycine Final Results*, IDM at Comment 5; *SSSS in Coils from Japan*, IDM at Comment 1; *Tissue Paper from China*, IDM at 4a.

<sup>19</sup> See *Silicomanganese from India*, IDM at Comment 1.



recognized Commerce's authority to conduct a *bona fides* analysis in an administrative review.<sup>20</sup> Thus, we disagree with Mutlu that the only criteria that need be met for Commerce to conduct an administrative review is that a sale be made, and that such sale be made during the POR.

We do not agree with Mutlu that Commerce's *bona fides* determination in the preliminary results of review was contrary to law because it constituted an unlawful application of the NSR *bona fides* criteria to an administrative review. Although section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, applies to NSRs, Commerce's long-standing practice is to rely on the same criteria for making a *bona fides* determination as guidance in an administrative review.<sup>21</sup> Our application of these criteria when examining the *bona fides* of a sale within the context of administrative reviews has been affirmed by the CIT.<sup>22</sup>

Furthermore, we do not agree with Mutlu that the only factors that would render a sale non-*bona fide* in an administrative review are such factors as whether it was fraudulent, made in bad faith, or involved collusion. In a prior rescission of an administrative review, Commerce found a sale non-*bona fide* even while acknowledging it was not fraudulent.<sup>23</sup> Upon appeal, Commerce argued before the CIT that "although there can be no question that fraudulent sales are not *bona fide*, it does not necessarily follow that all non-fraudulent sales are *bona fide*."<sup>24</sup> In that case, the CIT upheld Commerce's determination, stating that it disagrees with the plaintiff's contention that "Commerce is limited to finding a sale non-*bona fide* only if Commerce determines that sale is fraudulent."<sup>25</sup> It also upheld Commerce's use of "commercial reasonableness" criterion in making the *bona fide* determination in that case.<sup>26</sup>

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<sup>20</sup> See, e.g., *Evonik Rexim (Nanning) Pharm. Co. v. United States*, 253 F. Supp. 3d 1364, 1370-71 (CIT 2017) ("Commerce may exclude sales that would otherwise be included in the calculation of the export price if Commerce determines that the sales are not bona fide."); *Catfish Farmers of Am. v. United States*, 641 F. Supp. 2d 1362, 1396 (CIT 2009) ("If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or the transaction has been so artificially structured as to be commercially unreasonable, Commerce excludes the non-bona fide transaction from review." (emphasis added)); *Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1306-07 (CIT 2002); *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 996-98 (CIT 2000) (*Am. Silicon Techs*); see also *FAG U.K. Ltd. v. United States*, 945 F. Supp. 260, 265 (1996); *Chang Tieh Indus. Co. v. United States*, 840 F. Supp. 141, 146 (CIT 1993).

<sup>21</sup> See e.g., *Polyethylene Retail Carrier Bags from Malaysia: Final Results of the Antidumping Administrative Review*, 81 FR 75378 (October 31, 2016) and accompanying Issues and Decisions Memorandum at Comment 1; see also *Glycine Final Results*, IDM at Comments 2 and 6; see also *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*, 80 FR 55333 (September 15, 2015) and accompanying Issues and Decisions Memorandum at Comment 1; and see *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review*, 63 FR 47232.

<sup>22</sup> See *Evonik*, 253 F. Supp. 3d 1364, 1370-71 (CIT 2017) (sustaining Commerce's application of *bona fides* criteria in the administrative review of glycine from China.); see also *Windmill*, 193 F. Supp. at 1312-14 (sustaining Commerce's application of totality of the circumstances test and rescission of an administrative review after finding the single sale not *bona-fide*).

<sup>23</sup> See *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review*, 63 FR 47232 (September 4, 1998).

<sup>24</sup> See *Windmill*, 193 F. Supp. 2d at 1310.

<sup>25</sup> *Id.* at 1312.

<sup>26</sup> *Id.* at 1313.

The CIT has ruled, “{i}n the absence of a statutory mandate to the contrary, Commerce’s actions must be upheld as long as they are reasonable.”<sup>27</sup> Therefore, because there is no statutory mandate to the contrary, and in light of our long-standing practice and the CIT’s history of upholding Commerce’s authority to make *bona fides* determinations in administrative reviews, we determine that, it was appropriate and within our authority to examine the *bona fides* of the single Mutlu sale subject to this administrative review.

## **Comment 2: Whether Record Evidence Confirms that Mutu’s Sale Was Not a *Bona Fide* Sale**

### **Mutlu’s Case Brief<sup>28</sup>**

According to Mutlu, even if its sale were to be analyzed under the *bona fides* test established by Congress for NSRs, Commerce incorrectly concluded that Mutlu’s sale was non-*bona fide*. Mutlu discusses, in turn, each of the criterion upon which Commerce based its determination.

- Commerce cited the fact that a U.S. sale made by Mutlu subsequent to the POR, and thus not covered by this administrative review, had a higher price than the sale during the POR.
  - This factor might be relevant if the circumstances of the second sale were unknown, but that is not the case in this administrative review. In its submissions, Mutlu explained exactly why the second sale had a lower price, and it is entirely because of normal commercial considerations.<sup>29</sup> Specifically, the importer was in the process of negotiating an agreement with an Italian distributor in the United States who was going to buy 15 containers of pasta per month. If Mutlu was to be the supplier of those containers of pasta, then Mutlu would be supplying larger quantities and continuous orders to the U.S. importer. Thus, it was entirely normal and commercially reasonable for Mutlu to lower the price to the U.S. importer customer for the second sale.
  - Furthermore, the market moved in general between the first and second sales, and the overall market-price reduction is very close to the price reduction of the second Mutlu sale as compared to the first.
  - Contact between Mutlu and its U.S. customer was first established through a reference from the brother of the U.S. customer who was a good friend of Mutlu’s foreign trade director. Thus, the familial relationship and friendship among the parties set the stage for the negotiation. It is common practice everywhere that people do business with others they know and trust. Companies prefer to buy from a reliable and sustainable source, even if the price is a little bit higher than the other potential sources.
  - Analysis of the sales prices of other entries of subject merchandise during the POR shows that the entries that are priced higher are considerably higher for a similar quantity than is Mutlu’s sale. This fact shows that there is considerable room in the market for prices well above the level set by Mutlu and its customer.
  - While it is true that many entries were priced lower than Mutlu’s price, the differences in the majority of cases is quite small. In fact, Mutlu’s price is in a cluster of similarly priced sales that differ in price by only a few cents, and therefore cannot be considered anomalous or unusual.

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<sup>27</sup> See *NTN Bearing Corporation v. United States*, 248 F. Supp. 2d 1256, 1296 (CIT 2003).

<sup>28</sup> See Mutlu Case Brief at 9-19.

<sup>29</sup> *Id.* at 9, citing Mutlu’s June 30, 2017, importer questionnaire response (Mutlu June 30, 2017 IQR) at Exhibit SI-4.

- Commerce noted the fact that the quantity of the second shipment was smaller than that of the first shipment, but this fact only confirms that the first shipment was not an unusual size. The second shipment was the first of what was expected to be a large number of additional shipments. The second sale of smaller quantity is not indicative of collusion; it is merely the normal variation in a healthy and apparently improving relationship between the importer and Mutlu. Moreover, the POR entry data that Commerce obtained from CBP and placed on the record shows that shipment quantities vary widely, even shipments from the same exporter.
- Commerce noted the fact that Mutlu failed to provide information regarding the expenses the importer incurred on the sale, including, but not limited to warehousing, transportation, and selling expenses. However, this statement by Commerce overstates the missing information. Mutlu incurred all the expenses up to the U.S. port, which was provided in responses to Commerce's questionnaires. The only missing information is the importer's potential inland freight, warehousing, and other selling expenses. This is information that Mutlu does not have, and can therefore not be faulted for not providing it to Commerce. The only reasonable, non-adverse inference that can be drawn from the information available on the record is that the importer is an experienced distributor who will have considered the likely expenses in negotiating the price. That the same buyer returned shortly after the POR sale to make a second, even larger purchase, strongly suggests that it incurred no extraordinary expenses that would delegitimize the POR transaction here, at issue.
- Commerce noted that Mutlu had failed to provide information on whether Mutlu's importer made a profit on its re-sale of the merchandise, and determined that Mutlu's failure to provide this information weighed against a finding that Mutlu's sale was *bona fide*.
  - That a customer in a normal commercial transaction would be reluctant to share information about his eventual profits on the deal is not at all remarkable. It would be unreasonable and unjust to blame Mutlu for the missing information because Mutlu did all it could to persuade the customer to provide the information, and was refused. Since Mutlu fully cooperated with the review, and is innocent so far as missing information is concerned, Commerce must make a reasonable non-adverse inference from the information on the record. What is known is that Mutlu's U.S. customer has been in business for a long time, has considerable commercial experience, and can be expected to have reasonably calculated the product costs and expenses in negotiating his resale prices to downstream U.S. customers, and thus can be assumed to have made a reasonable profit. The fact that he desired to continue and even increase the business further weighs in favor of an inference that the sale was *bona fide*.
- Commerce noted that it issued an importer questionnaire to the importer, and that the importer failed to respond.
  - Issuing an importer questionnaire to a party unaffiliated with the respondent is an unusual procedure in an administrative review. Commerce's *bona fides* memorandum cites to no precedent or authority for such a practice.
  - While the information requested from the importer remains unknown, information from virtually all unaffiliated customers in virtually all administrative reviews is similarly unknown. The various questions asked in the importer questionnaire are only customer details the answers to which would add only interesting color and an understanding of the importer and its business. The lack of information from the importer is not fatal to the



review, since Commerce can readily compute a margin using the complete sales information submitted on the record.

- Commerce cannot demand the importer's information from Mutlu because Mutlu does not possess the information and has no way of obtaining it. Mutlu cannot compel the importer to cooperate.
- Where Commerce is missing information, it may not automatically presume the worst. It must fill in the gaps with the best available and neutral information under the antidumping statute. Here, a neutral inference from the information on the record (*e.g.*, that the importer was an experienced trader, it was referred to Mutlu by mutual business acquaintances, the initial sales was apparently successful) would be that the relationship in general, and the transaction in particular, was on an entirely normal and commercial basis. There is nothing on the record from which we can infer any scheme to circumvent the antidumping laws, concoct a fraudulent sale, or otherwise act in bad faith.
- Mutlu fully cooperated to the best of its ability. It would be unjust to punish Mutlu because its importer failed to respond to the importer questionnaire, particularly when the importer's information is not essential to the antidumping analysis and there is ample information supporting the *bona fides* of the transaction.

### **Petitioners' Rebuttal Brief<sup>30</sup>**

- The post-POR sale was lower in price than the POR sale, which suggests that the POR sale was not likely to be typical of those the exporter or producer will make after the completion of the review.
- Only a small percentage of entries of subject merchandise had unit prices higher than Mutlu's reported sale. Mutlu's explanation that the importer accepted the price by considering the prevailing retail shelf price of pasta is unconvincing in light of the importer's ability to successfully negotiate a lower price for the post-POR sale.
- If, as Mutlu claims, "familial relationship and friendship" set the stage for the negotiations, the *bona fide* nature of the transaction becomes even more suspect because the vast majority of arm's-length transactions do not involve familial relationships.
- The sales negotiations for the sale at issue that Mutlu provided in its submissions indicate that the sale was not a *bona fide* commercial transaction negotiated at arm's length by parties considering their own interests, but was a collaborative effort to artificially lower Mutlu's antidumping rate. The so-called negotiation between Mutlu and the U.S. customer referred only to the antidumping duty process and the price necessary to affect the desired result. The parties' only focus was on the antidumping process and the expected refund of duties upon successful completion of the review.
- The smaller quantity of the post-POR sale as compared to the POR sale is a further indication that the POR sale was not *bona fide*. For a sale to be *bona fide*, it must be typical or comparable to future sales. The substantial drop in quantity suggests, based on the totality of the circumstances, that the POR sale was not typical. Mutlu, in its case brief, dismisses the smaller quantity as "merely the normal variation in a healthy and apparently improving relationship." However, a decrease in quantity and price is not a sign of an improving relationship as far as a seller is concerned.

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<sup>30</sup> See Petitioner Rebuttal Brief at 9-20.

- Mutlu’s sale was made just prior to the end of the POR. The determination is made on the totality of the evidence, and the timing of a sale made at the end of the POR, standing alone, might not be suggestive of a non-*bona fide* transaction. However, coupled with other record facts (discussed above), the timing of the sale suggests the sale was made to establish a basis for an administrative review.
- Mutlu’s assertion that Commerce “overstates the missing information” mischaracterizes Commerce’s finding. The record is incomplete and deficient with respect to important information on the actual expenses incurred by the importer, and without that information, Commerce is not able to fully analyze and evaluate the *bona fides* of the reported sale. The respondent bears the burden of establishing a complete and accurate record. Mutlu failed to do so in this case.
- Commerce is not alleging that if the missing profit information had been provided it would have indicated that the sale was anomalous or fraudulent. Commerce is simply saying that absent this information, it cannot determine the *bona fides* of the reported sale. Commerce should, however, make clear in the final results that its non-*bona fides* finding is based on the totality of the evidence, and would be the same even without consideration of the missing importer’s questionnaire data.
- Mutlu is engaging in hyperbole when it states that the customer is a “long-term business with considerable commercial experience...and thus can be assumed to have made a reasonable profit.” There is no record evidence to support such a self-serving conclusory statement. Commerce cannot “assume” facts. Given the U.S. customer’s refusal to cooperate in this review and provide information related to its resale information, Commerce properly concluded that any resales were not made at a profit – or the U.S. customer would have provided the information.

### **Petitioners’ Case Brief<sup>31</sup>**

- Overwhelming record evidence supports Commerce’s finding that Mutlu failed to establish the *bona fide* nature of its sole reported U.S. sale. Because this alleged sale provided the sole predicate for Mutlu’s requested review, Commerce properly determined that Mutlu had no reviewable entries during the POR.
- The narrative Mutlu provided regarding how the U.S. sales price was determined demonstrates that the price was not established according to normal commercial considerations, but was a collaborative effort on the part of Mutlu and its importer to circumvent the antidumping order. For example:
  - The narrative indicates the price was determined by Mutlu’s antidumping consultant.
  - The narrative indicates that the first discussions between Mutlu and the importer concerning the sale focused on the 51.49 percent antidumping duty deposit rate, and not the type, quality, or price of the pasta to be sold.
  - The narrative indicates that the importer’s acceptance of the offer was based on Mutlu’s assurance to the importer that the antidumping deposit would be refunded, thereby making the price of little consequence.

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<sup>31</sup> See Petitioner Case Brief at 2-20.

- The only written communication regarding the sale between Mutlu and the importer that Mutlu placed on the record reveals that the parties' only focus was on the antidumping process and the expected refund of duties upon successful completion of the review.
- Comparison of the volume and value of Mutlu's U.S. sale with its home market sales and cost of production provide further evidence that the sale was orchestrated to obtain a favorable dumping margin and cash deposit rate.
- The price paid by the U.S. importer is aberrational compared with U.S. price benchmarks on the record, including those charged by other Turkish exporters of subject merchandise to the United States.
- The timing of Mutlu's sale suggests it was made to establish a basis for an administrative review.
- The high movement expenses paid by the importer reveal the non-*bona fide* nature of the U.S. sale. The U.S. customs duties and the import processing fees alone may have come to as much as sixty percent of the entered value of the subject merchandise.
- There is no evidence that the subject merchandise was resold in the United States at a profit. Commerce requested that Mutlu provide certain information to establish that the sale was resold at a profit, but Mutlu did not provide it, claiming that the importer refused to provide it. Furthermore, record evidence shows that the importer requested and received a 90-day extension on the already-extended payment term of 50 days from the bill of lading date. That the U.S. customer needed an additional three months to pay Mutlu is further evidence that the pasta was not resold at a profit (if it was resold at all).
- The terms of sale were not in accordance with normal commercial considerations. Specifically, Mutlu shipped the sale to the importer (a first-time customer) without any payment protection (*e.g.*, a letter of credit). It defies normal commercial sense and price to assume that two parties, previously unknown to each other and unrelated, would conduct business on an open account and with payment terms for such an extended period of time.
- The legitimacy of the U.S. importer as a distributor of food products is questionable.
  - Mutlu's director of foreign trade claims that the principal owner of the importer is a friend of his brother, but Mutlu nonetheless claims to be unclear about the business scope of the company. Mutlu stated in its response that "To the best of Mutlu's knowledge," the importer is "an importer of foodstuff and other products."<sup>32</sup> However, when asked about its history, ownership, customer base, main lines of business, and sales made during the POR, Mutlu professes no knowledge, and its customer refused to answer. Commerce can only conclude, therefore, that answers to these questions would be detrimental to a finding the importer is a legitimate buyer of pasta and that the single sale in this review is a legitimate, arm's-length transaction.
  - There are no documents or other information on the record that indicate the importer is involved in the importation, sale, or distribution of the subject merchandise, or any other food products.
- Mutlu produced to order for a new and unknown U.S. customer. Specifically, Mutlu reported that in the normal course of business it made sales from the factory warehouse, but for this

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<sup>32</sup> See Petitioners' Case Brief at 16, citing Mutlu's June 21, 2017 Supplemental Questionnaire Response (Mutlu June 21, 2017 SQR) at 7.

customer Mutlu produced the merchandise to order.<sup>33</sup> For Mutlu to produce to order for this particular customer represents a deviation from Mutlu's normal business practice.

- Mutlu failed to respond to Commerce's importer questionnaire. Mutlu was instructed in Commerce's importer questionnaire to respond to the questions or, if it is unable to respond fully, to forward the questionnaire to the importer.<sup>34</sup> Mutlu forwarded the questionnaire to the importer, but failed to receive any answers. Thus, Mutlu provided no information about the importer with respect to either history, organization, ownership, affiliation, sales process, pricing practice, downstream customers, or profit.

### **Mutlu's Rebuttal Brief<sup>35</sup>**

- The petitioners are seeking to establish a test for "*bona fides*" that goes far beyond any reasonable understanding of the term. They are proposing a standard under which any sale made with the intention of complying with an antidumping order by ensuring that a product is not dumped, automatically becomes suspect and fails the *bona fides* test. Under the petitioners' test, virtually no respondent could ever enter, or re-enter, the U.S. market when an antidumping order is in place. The petitioners' rule suggests that a *bona fide* sale must be made blindly, by parties who are oblivious to the antidumping laws of the United States, ignorant of relative prices, and careless of the impact of their pricing decisions.
- In arguing their position, the petitioners have cited the NSR statute and various NSR decisions to support the imposition of the NSR *bona fides* test into the administrative review context. The few administrative reviews the petitioners mentioned did not cite any statutory authority for doing so, and instead, rely on NSR precedent.
- The petitioners have falsely characterized normal aspects of normal commercial transactions as fraudulent and in bad faith.
  - The petitioners claim that the price of the sale was not based on market forces or commercial practices. However, their evidence shows the opposite. Unlike the generic, standard brands upon which the petitioners apparently rely in their analysis, "Mutlu is a high-end premium brand," and Mutlu's products can reasonably command an above-average price. Furthermore, that there were also many sales priced higher than Mutlu's sale proves that Mutlu's price was not unreasonable. Furthermore, even where sales by other exporters during the POR were priced lower than Mutlu's sale, the difference was usually just a few cents per kilogram, proving that Mutlu's price was located within a cluster of similarly-priced sales that differ in price by only a few cents, and cannot be considered anomalous or unusual.
  - The petitioners reference the fact that the buyer and the seller discussed the existence of the dumping order, as if this were proof of fraud. However, the dumping order on pasta from Turkey has been in existence for twenty-one years, and among pasta exporters its existence was hardly a secret.
  - The petitioners reference the fact that the buyer had the seller's assurance that under U.S. dumping law, the importer's excess dumping deposit would be refunded after the administrative review. The petitioners portray this fact as an act of bad faith, but it actually shows only that the importer made the effort to understand and comply with the

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<sup>33</sup> *Id.* at 18, citing Mutlu's July 5, 2017 Supplemental Questionnaire Response at 8.

<sup>34</sup> *Id.* at 18, citing Commerce Letter, dated June 19, 2017 (Importer Questionnaire) at 1.

<sup>35</sup> See Mutlu Rebuttal Brief at 2-13.

antidumping law. The importer should not, as a result of this effort, be accused of “hatching a plan” of collusion, conspiracy, and fraud.

- The petitioners claim that the volume of the sale at issue was “clearly aberrational” with reference to Commerce’s customs data extract.<sup>36</sup> However, in the *Bona Fides* Memorandum, Commerce stated that Mutlu’s shipment size was typical and usual for this product, and not at all aberrant.<sup>37</sup>
- The petitioners try to denigrate the legitimacy of the sale based on its timing. However, every sale has to be made in some month, and some months are necessarily closer to the end of the POR than others. Thus, Commerce’s *Bona Fides* Memorandum correctly concluded that there was nothing suspicious about the timing of the sale.
- The petitioners assert that by paying transport insurance, brokerage charges, and import fees, including the high antidumping duty deposit, the importer “revealed” that its purchase was not *bona fide*. However, paying the high antidumping deposit does not suggest anything as to the legitimacy of the sale. On the contrary, it demonstrates that the importer was aware of, and had confidence in, Commerce’s fair and reasonable application of the administrative review process. Contrary to the petitioners’ suggestion, there is no indication that any expenses, whether the duty paid by the importer, or the reported expenses incurred by Mutlu, were in any way deficient, aberrational, or unusual, or that they in any way suggested any deceit or disingenuousness in the U.S. sale.
- The petitioners argue that because Mutlu did not require advance payment of the sale, but allowed the purchaser to pay for the sale after it received and inspected the goods, the sale must have been an artificial and non-commercial transaction. However, the petitioners must know that Commerce sees hundreds of cases every year where ordinary sales are made by legitimate sellers who extend some credit to the customers. Particularly here, where this was the first purchase by this customer from this supplier, it is perfectly reasonable for the buyer to insist upon inspection prior to payment. There is nothing on the record to suggest that an agreed extension of the payment date until after the goods were received and inspected proves that the transaction was conducted in bad faith.
- The petitioners find it suspect that Mutlu’s home market sales are typically sold from warehouse, whereas its U.S. sale in this administrative review was produced to order. However, Mutlu’s domestic sales and most export sales of pasta are produced in 500-gram packages, and contain no vitamins. By contrast, U.S. sales of Turkish pasta are generally made in one-pound (454 gram) packages, and are enriched with vitamins. Therefore, the requirement to produce to order may have been in response to the requirement to produce to U.S. package sizes or enrichment specifications. There is certainly nothing on the record to suggest that producing the U.S. product to order proves that the transaction was conducted in bad faith.
- The petitioners’ accusations are mere assumptions based on information that Mutlu did not have and could not obtain regarding Mutlu’s unaffiliated customer and its profits, ownership, other business, and similar information. However, the refusal of an independent and unaffiliated customer to cooperate cannot be held against Mutlu.
  - The petitioners make much of the fact that we do not know whether the customer made a profit on the sale.

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<sup>36</sup> See Mutlu Rebuttal Brief at 7, citing Petitioners’ Case Brief at 13.

<sup>37</sup> *Id.*, citing *Bona Fides* Memorandum at 4.



- However, since this is an administrative review, and not a NSR, the profitability of the resale is of no legal relevance.
- Moreover, the customer's profits are not known to Mutlu, and are not knowable because Mutlu and its customer are unaffiliated parties with their own interests and confidential business information.
- Since Mutlu fully cooperated with Commerce, and is innocent so far as missing profit information is concerned, Commerce must make a reasonable non-adverse inference from the record information.
- What is known is that the customer is an experienced business with considerable commercial experience, and can be expected to have reasonably calculated the product costs and expenses in negotiating his resale price, and thus can be assumed to have made a reasonable profit. That it desired to continue and even increase its business with Mutlu weighs in favor of an inference that the sale was *bona fide*.
- The petitioners claim that the customer is not a legitimate pasta dealer, and that various types of information about the customer remain unknown. While Mutlu was not able to provide all the information requested (e.g., the customer's ownership and history, its employee's relationship with other importers, its purchases from other suppliers), such information is not within the knowledge of Mutlu.
- The petitioners complain that Mutlu did not respond to the importer questionnaire.
  - However, Mutlu did provide as much information to which it had access, and also attempted to persuade the importer to respond. The importer did not respond, but this fact does not indicate bad faith on the part of Mutlu. Furthermore, the lack of information is not fatal to the review since Commerce can readily compute a margin using the information Mutlu submitted to the record.
  - The question is, where information requested from the importer is missing from the record, with what information should Commerce use to fill in the gaps. Commerce's *Bona Fides* Memorandum seems to conclude that because there is missing information, the sale must automatically be deemed not *bona fide*. But that is not the case. Rather, where there is missing information, Commerce must fill the gap with the best available and neutral information under the antidumping statute, in accordance with 19 USC 1677e(a). A neutral inference from the information on the record is that the relationship between Mutlu and its customer and the transaction in particular, were on an entirely normal and commercial basis. There is nothing on the record from which one can reasonably infer any scheme to circumvent the antidumping laws, to concoct a fraudulent sale, or otherwise act in bad faith. Thus, as required by the law, Commerce must fill in the missing information with neutral information.

### **Commerce's Position:**

We disagree with Mutlu that its U.S. sale was *bona fide*, and continue to find that in examining the totality of the circumstances, the weight of the evidence on the record supports Commerce's determination that Mutlu's sale was not *bona fide*.

We explained our practice with respect to *bona fides* determinations in administrative reviews in *Wind Towers Vietnam Final*:

{W}e consider the following factors when determining if a sale is bona fide: (1) timing of the sale; (2) price and quantity; (3) expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made at arm's length. Thus, we consider a number of factors in our bona fide analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." In *TTPC*, the court affirmed the Department's practice of considering "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant," and that "the weight given to each factor investigated will depend on the circumstances surrounding the sale." In *New Donghua*, the court stated that the Department's practice makes clear that the Department "is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an AD order."<sup>38</sup>

With respect to price, we continue to find that the price of Mutlu's post-POR U.S. sale weighs against a finding that the POR sale was *bona fide*. As we have explained in the *Bona Fides* Analysis Memorandum, the price of the post-POR sale suggests that the POR sale is not likely to be typical of those the exporter or producer will make after the completion of the review. Although Mutlu argues that price for the post-POR sale is commercially reasonable and, thus, does not detract from the *bona fides* of the POR sale, we find no evidence that such is the case.

First, we are not persuaded that the lower price of Mutlu's post-POR sale can be explained by reference to an agreement into which the U.S. importer entered with an Italian distributor located in the United States. If the U.S. importer reached an agreement with an Italian distributor in the United States, the record does not establish that the importer ever communicated that information to Mutlu or that it had any impact on the price of Mutlu's subsequent sales to the importer. Indeed, in a supplemental questionnaire response in which Mutlu explained the circumstances of the post-POR sale, Mutlu never mentioned the existence of an agreement under which Mutlu would provide the U.S. importer with continuous orders. Instead, Mutlu attributed the price of the post-POR sale to the importer's having requested a lower price because the U.S. market was very competitive.<sup>39</sup> Furthermore, the quantity involved in the post-POR sale differs considerably from the quantity involved in the alleged agreement between the U.S. importer and the Italian distributor.<sup>40</sup> Also, an "improving relationship" with the importer as allegedly exemplified by the lower price of the post-POR sale in anticipation of continuing sales thereafter seems contradicted by other information Mutlu stated on the record regarding its relationship with the importer. Specifically, Mutlu stated in the importer questionnaire response that there were no

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<sup>38</sup> See *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 55333 (September 15, 2015) and accompanying IDM (*Wind Towers Vietnam Final*) at Comment 1 (citations omitted).

<sup>39</sup> See Mutlu's June 30, 2017 Supplemental Questionnaire Response (Mutlu June 30, 2017 SQR).

<sup>40</sup> *Id.* at Exhibit SI-6.

changes in the relationship between Mutlu and the importer since the purchase of the POR sale.<sup>41</sup> Therefore, we find that the weight of the evidence on the record does not support Mutlu's assertion that the price of the post-POR sale resulted from an alleged agreement between the U.S. importer and an Italian distributor. The record substantiates only that the POR sale had a significantly higher price than the post-POR sale.

Second, we do not find persuasive Mutlu's argument that the higher price of its sale cannot be considered anomalous or unusual because it is in a cluster of similarly priced sales that differ in price by only a few cents. Commerce has found that where a sales price is higher than other POR sales entering under the same HTS number, the price may be artificially high, and it may indicate that the sale under consideration is not likely to be typical of those made in the future.<sup>42</sup> The price of Mutlu's sale is at the higher end of the price distribution of entries of subject merchandise from Turkey during the POR. Therefore, because Mutlu's price is at the high end of the price distribution, we determine that the price supports finding Mutlu's sale non-*bona fide* because it may be artificially high. Furthermore, we note that in the past Commerce has found that even where a respondent's sale price is no higher than that of other POR sales, the sales price nonetheless supports a non-*bona fide* determination if the circumstances indicate that the price is not likely reflect the respondent's commercial behavior under normal commercial conditions.<sup>43</sup> Here, because the price (and quantity, as discussed below) of the post-POR sale are lower than those of the POR sale, we determine that Mutlu's POR sale is unlikely to accurately represent future selling practices.

Third, we do not find that the familial relationship and friendship among the parties to which Mutlu cites as setting the stage for the negotiations (*i.e.*, that the brother of the U.S. customer was a good friend of Mutlu's foreign trade director), speaks in favor of the *bona fides* of the sale. We agree with the petitioners that the vast majority of international transactions do not involve such personal or familial relationships. Commerce has found that such personal relationships constitute a basis to question the arm's-length nature of the transaction. For instance, in *Tapered Roller Bearings* Commerce found that a single sale "to a company headed by a longstanding acquaintance willing 'to act as an importer of record'...is evidence of a non-arm's-length transaction, and a non-*bona fide* sale, in an administrative review."<sup>44</sup> Further, the CIT has recognized that Commerce's *bona fide* analysis may consider whether a sale was an arm's length transaction by examining whether parties to that sale had negotiated based on independent

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<sup>41</sup> See Mutlu June 30, 2017 IQR at 3.

<sup>42</sup> See *Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049, (September 12, 2007) and accompanying IDM at Comment 16; see also *Multilayered Wood Flooring from the People's Republic of China: Rescission of Antidumping Duty New Shipper Reviews; 2014-2015*, 81 FR 74393, October 26, 2016, and accompanying IDM at Comment 1 ("When a new shipper's price is at the high end of a price distribution, the Department has considered this to be a key factor in supporting a finding that the sale was not bona fide").

<sup>43</sup> See *Certain Preserved Mushrooms from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review; 2015*, 82 FR 1317 (January 5, 2017) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>44</sup> See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2014-2015*, 82 FR 4844 (January 17, 2017) and accompanying Issues and Decision Memorandum at Comment 6.

interests.<sup>45</sup> Because of the relationship between Mutlu and its importer, and the lack of record evidence supporting that the parties negotiated the terms of sale based on independent interests, we find that the sale was not an arm's-length transaction. Therefore, because of the questionable arm's-length nature of the transaction, we find that Mutlu's shipment in this POR may not be representative of its future shipments.

Fourth, we are not persuaded that the high price of the POR sale can be attributed to Mutlu's brand reputation. As Commerce stated in its *Bona Fides* Memorandum, this argument is unconvincing in light of the importer's ability to successfully negotiate a lower price for the post-POR sale.<sup>46</sup>

Fifth, Mutlu's argument that the market moved between the first and second sales, and that this movement accounts for the lower price of the post-POR sale, is unsubstantiated by any evidence on the record. Therefore, Mutlu's argument does not substantiate its contention that the sales price of its U.S. sale is that of a *bona fide* transaction.

With respect to the quantity of the sale, we disagree with Mutlu. Mutlu attributes the quantity of the post-POR sale to the expectation of its making additional shipments to the U.S. importer because of an alleged agreement between the U.S. importer and an Italian distributor. However, as explained above, we find no connection between any such agreement and the post-POR sale. We do agree with Mutlu that the quantity of the sale, as compared to other shipment quantities during the POR, does not raise any concerns with respect to *bona fides*, which we stated in the *Bona Fides* Memorandum.<sup>47</sup> Nevertheless, in making a *bona fide* determination, Commerce may also consider sales from the respondent to the same U.S. customer made subsequent to the POR to determine whether such sales are typical or atypical of its normal business practice with that customer.<sup>48</sup> Here, we find that the substantial change in quantity between the POR sale and the post-POR sale suggests that the POR sale is not likely to be typical of the quantities that Mutlu will sell after completion of the review.<sup>49</sup>

With respect to the terms of sale, we disagree with Mutlu. While Mutlu is correct that there are hundreds of cases every year in which a seller extends some credit to the buyer, including until after the goods are received and inspected, the payment terms here are more than just the 50 days which Mutlu noted in its rebuttal brief.<sup>50</sup> The payment terms include an additional 90 days, which were requested by the importer.<sup>51</sup> Furthermore, as the petitioners have noted, these payment terms were extended without any letter of credit. We find these sales terms unusual for

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<sup>45</sup> See *Am Silicon Tech.* 110 F. Supp. 2d at 996 (sustaining Commerce's determination that the sale was not commercially reasonable because parties to the transaction failed to negotiate at arm's length).

<sup>46</sup> See *Bona Fides* Memorandum at 4.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review*, 63 FR 47232 (September 4, 1998); *Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews*, 71 FR 58579 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 1a.

<sup>49</sup> See *Bona Fides* Memorandum at 5.

<sup>50</sup> See Mutlu Rebuttal Brief at 8.

<sup>51</sup> See Mutlu June 30, 2017, IQR at 4.

two parties who have never before engaged in business transactions with one another. In combination with the other factors noted above, these sale terms lend further support to the conclusion that Mutlu's sale was not a *bona fide* transaction.

With respect to the information missing from the record because of the importer's failure to respond to the importer questionnaire, we disagree with Mutlu. As an initial matter, while Mutlu is correct that the *Bona Fides* Memorandum did not cite to any precedent for our issuing an importer questionnaire in an administrative review, there is nonetheless, case precedent for issuing such a questionnaire to importers in an administrative review.<sup>52</sup> Furthermore, we disagree with Mutlu's characterization of the missing information as "not essential to the dumping analysis." The validity of a dumping analysis is predicated upon the reviewed sale(s) being *bona fide*. Without adequate information on the record, Commerce is not able to determine that a sale is *bona fide*. For this reason, and because a *bona fides* determination is based upon the "totality of the circumstances,"<sup>53</sup> the information requested from the importer, is more than just "interesting color," as Mutlu asserts.<sup>54</sup> This includes the profitability of the resale. Accordingly, we disagree with Mutlu that the profitability of the resale is "of no legal relevance."<sup>55</sup>

Moreover, we disagree with Mutlu's claim that the importer's alleged experience as a trader constitutes a sufficient basis to make any findings with respect to the costs and expenses incurred by the importer, or any profit made by the importer on the sale. As an initial matter, because Commerce's determinations must be supported by substantial evidence, Commerce cannot assume or infer anything about what is included in a price, or whether the price would result in a profit, from the price alone. This is the reason why we request information from the relevant party. Further, even if the experience of the importer might somehow inform our analysis, we disagree with Mutlu's characterization of the importer as "an experienced trader in the business of importing and reselling commodities including pasta."<sup>56</sup> There is no record evidence indicating that the importer had ever imported any pasta prior to its purchase of pasta from Mutlu. (We note too that Mutlu itself elsewhere described the importer as an "experienced trader that desired to *enter* the Turkish pasta business, and selected a well-established and popular Turkish brand to *begin* its business."<sup>57</sup>) Furthermore, Mutlu's assertion that the importer was "an experienced trader"<sup>58</sup> is contradicted by record evidence that is not susceptible to public

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<sup>52</sup> See *Petroleum Wax Candles from the People's Republic of China: Preliminary Results of the 2004-2005 Administrative Review*, 71 FR 35613 (June 21, 2006) ("On January 4, 2006, the Department issued an importer questionnaire to {respondent's} importer"); *Honey from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 27633 (May 14, 2015) and accompanying IDM at 4 ("On July 2, 2014, the Department issued another supplemental questionnaire ("SSCQ2") containing questions for both {respondent} and its U.S. importer.")

<sup>53</sup> See *Multilayered Wood Flooring from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review; 2013-2014*, 81 FR 46906 (July 19, 2016) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>54</sup> See Mutlu Case Brief at 16.

<sup>55</sup> See Mutlu Rebuttal Brief at 10.

<sup>56</sup> *Id.* at 12.

<sup>57</sup> *Id.* at 11 (emphasis added).

<sup>58</sup> *Id.* at 12.



summary.<sup>59</sup> Therefore, we do not agree with Mutlu that based on the importer’s alleged experience, we can assume the importer “reasonably calculated the product costs and expenses in negotiating his resale prices, and thus can be assumed to have made a reasonable profit.”<sup>60</sup>

Mutlu contends that Commerce cannot consider the lack of record information resulting from the importer’s failure to participate as part of its analysis, and that a finding that its sale is non-*bona fide* on the basis of such a factor would be improper because there is purportedly ample information supporting the *bona fides* of the transaction. We disagree. As explained in the *Bona Fides* Analysis Memorandum and above, we have reached our determination based on our consideration of the totality of the circumstances, and not one any one factor alone. The record demonstrates that the sales price and quantity of Mutlu’s POR sale were the atypical, that there is reason to question the arm’s-length nature of the transaction, and that the sales terms were atypical. These factors are a sufficient basis to find Mutlu’s sale to be non-*bona fide*. However, we have also found that additional factors – including the lack of record information normally considered in making a *bona fides* determination due to the importer’s failure to respond to the importer questionnaire (*e.g.*, whether a profit was realized on the resale of the subject merchandise, whether there were any unusual expenses), and the limited history from which to infer the respondent’s future selling practices due to there being only one sale during the POR – are additional factors that support our non-*bona fides* finding.

Where, as here, multiple factors exist for finding a sale to be non-*bona fide*, Commerce has also considered a lack of cooperation from an importer to constitute additional support to its determination under its “totality of the circumstances” test, and the CIT has upheld its doing so.<sup>61</sup> Therefore, we also find that the fact there is information missing from the record due to the importer’s failure to respond to the importer questionnaire lends additional support to our determination that the sale in question is non-*bona fide*.

**Comment 3:** Whether Rescinding the Administrative Review Amounts to Imposition of Adverse Facts Available Based on the Failure to Cooperate of an Unaffiliated Third Party

**Mutlu’s Case Brief**<sup>62</sup>

- The information Commerce has identified as “missing” is information that Mutlu’s importer failed to provide, not information that Mutlu failed to provide. Mutlu fully cooperated by responding to Commerce’s numerous questionnaires and supplemental questionnaires, and provided all the information requested that was within its possession and ability to provide.
- By declaring that Mutlu withheld information, Commerce essentially declared that Mutlu had failed to cooperate, and thus, deserved the application of adverse facts available (AFA) by

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<sup>59</sup> See Petitioners’ Letter “Administrative Review of Certain Pasta from Turkey – Petitioners’ Comments on Mutlu’s Supplemental Responses and Comments for the Upcoming Preliminary Results,” dated July 11, 2017, at 14 and Attachment 4.

<sup>60</sup> See Mutlu Case Brief at 16.

<sup>61</sup> See *Zhengzhou Huachao Indus. Co., Ltd. v. United States*, No. 11-00139, slip op. 13-61 (CIT May 14, 2013) (*Zhengzhou*) (finding that Commerce could consider the deficiencies in responses and missing importer information in determining that the sale was commercially unreasonable).

<sup>62</sup> See Mutlu Case Brief at 19-22.

terminating the review and refusing to calculate a dumping margin. However, Commerce's governing statute allows the imposition of adverse facts available only when a respondent fails to cooperate to the best of its ability and thereby impedes the review. It is not permissible to impose AFA on a fully cooperative respondent like Mutlu who has demonstrated its complete cooperation and willingness to provide all information within its possession.

- The Federal Circuit has warned that where, as here, a “cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party.”<sup>63</sup>
- Here, Mutlu has no influence or control over the independent importer, and does not command such market power or dominance that it could force the importer to cooperate by threatening a commercial boycott or the like. Moreover, the situations involving the above cases speak of cooperative and uncooperative “parties” – and in this case, the importer is not a party to the review, but is an unaffiliated third person, whose information would have been helpful, but by no means essential, to the review, as described above. Furthermore, that the U.S. importer was unwilling to share its internal expenses and profit with Mutlu is not remarkable, and speaks to the independence between the parties. Thus, there is no justification for imposing the ultimate penalty on Mutlu in the form of termination of the review and denial of a calculated rate.
- In this case, Commerce must fill in the gaps left by the U.S. importer's failure to cooperate, but it must do so making reasonable and neutral inferences based on the record as a whole.<sup>64</sup> If information is missing through no fault of Mutlu, Commerce cannot impose adverse or punitive inferences. Commerce may draw inferences that are adverse to Mutlu only if Commerce makes a separate finding that Mutlu “has failed to cooperate to cooperate by not acting to the best of its ability to comply with a request for information.”<sup>65</sup> Such a finding cannot possibly be made here.

### Petitioners' Rebuttal Brief<sup>66</sup>

- Mutlu has mischaracterized Commerce's determination in the *Preliminary Results*. Commerce did not mention AFA in the *Preliminary Results* because Commerce did not make an adverse inference. “Adverse inferences” are used if Commerce determines that a respondent “failed to cooperate by not acting to the best of its ability to comply with a request for information.”<sup>67</sup> Adverse inferences may play a role in the determination of an antidumping margin, but are not part of the *bona fide* sales analysis framework.
- Mutlu's repeated references to “adverse inferences” are misplaced even considering Commerce's determination with respect to the *bona fides* of Mutlu's sale. If Commerce

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<sup>63</sup> See Mutlu Case Brief at 19, citing *Mueller*, 753 F.3d at 1235 (citing *SKF USA Inc.*, 630 F.3d 1365, 1375 (Fed. Cir. 2011)); *Xiping Opeck*, where the CIT explained (at 28) that Commerce may impose an adverse inference on a cooperating party only if the “cooperating respondent is in a position to induce a non-cooperating party to comply with Commerce's requests for information during a review, and has failed to do so.”

<sup>64</sup> *Id.*, citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003); *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1378, 1379–80 (Fed. Cir. 2013).

<sup>65</sup> *Id.*, citing 19 USC 1677e(b).

<sup>66</sup> See Petitioner Rebuttal Brief at 20-23.

<sup>67</sup> *Id.*, at 21, citing 19 USC 1677e(b); *Zhengzhou* at 40 n. 10, 2013 CIT LEXIS 84 at \*69-70 n. 10 (May 14, 2013).

affirms the *Preliminary Results*, and finds that Mutlu’s sole POR sale is not *bona fide*, it will rescind the review for Mutlu, and assign a cash deposit and assessment rate to Mutlu equal to the “all others” rate of 51.49 percent, which is the same rate under which Mutlu shipped subject merchandise at the time it requested this administrative review. Commerce’s decision to rescind this administrative review is in effect a neutral decision that makes no change to Mutlu’s status as a shipper of pasta from Turkey under the “all others” category, the rate of which is a calculated rate for a cooperative respondent from the original investigation.<sup>68</sup>

- Mutlu has argued that Commerce should treat the importer’s non-cooperation “neutrally.” However, Commerce has ruled in numerous prior cases that without evidence of profit on resale, Commerce’s ability to assess whether the sale is actually reflective of a respondent’s future commercial behavior in the U.S. market is limited.<sup>69</sup> Mutlu’s insistence that the sale was in every way reasonable, commercial, and *bona fide* cannot be given credence given the importer’s non-cooperation.

### Commerce’s Position:

We disagree with Mutlu that rescinding (referred to as “terminating” by Mutlu) the review amounts to the imposition of adverse facts available (AFA) based on the non-cooperation of an unaffiliated third party. First, rescinding a review based on the absence of a *bona fide* sale does not constitute the imposition of AFA. It simply reflects the fact that there is no sale upon which to base a margin calculation. Thus, Commerce has stated, “When the respondent under review makes only one sale and the Department finds the transaction atypical, ‘exclusion of that sale as non-*bona fide* necessarily must end the review, as no data will remain on the export price side of (the Department’s) antidumping duty calculation.’”<sup>70</sup>

Use of AFA, in contrast, along with the ensuing margin, has a different rationale. Commerce has stated that the purpose of using AFA is “to induce respondents to provide Commerce with complete and accurate information in a timely manner,” and the selection of an AFA rate is intended to ensure “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>71</sup> Here, because we are rescinding the review, we are not determining a new rate for Mutlu. Thus, “use of AFA” does not apply. Mutlu’s rate as a result of our rescinding this review will continue to be the rate to which it was subject prior to the rescission of this review, which is the 51.49 percent “all-others” rate.

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<sup>68</sup> *Id.* at 22, citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Turkey*, 61 FR 30309 (June 14, 1996); *Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value*, 61 FR 38545 (July 24, 1996).

<sup>69</sup> *Id.*, at 22, n. 53, citing *Multilayered Wood Flooring from the People’s Republic of China: Rescission of Antidumping Duty New Shipper Review; 2013-2014*, 81 FR 46906 (July 19, 2016) and accompanying Issues and Decision Memorandum at Comment 3; see also *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d, 1333, 1342 (CIT 2005).

<sup>70</sup> See *Fresh Garlic from the People’s Republic of China: Preliminary Results, Preliminary Rescission, and Final Rescission, in Part, of the 22nd Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Reviews; 2015-2016*, 82 FR 57718, (December 7, 2017), citing *Tianjin Tiancheng Pharmaceutical Co. v. United States*, 366 F. Supp. 2d 1246, 1249 (CIT 2005) (TTPC).

<sup>71</sup> See *Aluminum Extrusions from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 52265 (November 13, 2017), and accompanying Issues and Decision Memorandum.

Second, our non-*bona fides* determination is not solely based on an unaffiliated third-party's failure to cooperate. As explained above, our determination that Mutlu's sale is non-*bona fide* is based on information Mutlu submitted to the record, as well as the fact that the record lacks information that we would normally use in our *bona fides* analysis, and we have determined that the available record evidence does not support Mutlu's claim that the sale is *bona fide*.

## RECOMMENDATION

We recommend following the above methodology for these final results.



\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

2/6/2018

X 

Signed by: GARY TAVERMAN

Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance