

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND ORDER

National Nail Corp. et al v. United States,
Slip Op. 18-1 (Jan. 2, 2018), CIT Court No. 16-00052

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the U.S. Court of International Trade's (Court or CIT) remand order in *National Nail Corp. et al v. United States*, Slip Op. 18-1 (Jan. 2, 2018), CIT Court No. 16-00052 (*Remand Order*)¹ concerning the 6th AR *Final Results* of certain steel nails from the People's Republic of China (China).² The CIT remanded the following issue and ordered that: 1) Commerce evaluate the evidence on the record regarding Shandong Oriental Cherry Hardware Group Co., Ltd.'s (Shandong Oriental Cherry) eligibility for a separate rate; and 2) if Commerce determines that Shandong Oriental Cherry is eligible for a separate rate; 3) that a separate rate be determined for Shandong Oriental Cherry.

II. COMMERCE'S DRAFT REMAND

COMMENTS ON DRAFT RESULTS OF REDETERMINATION

We released our draft remand results for comment by parties on March 27, 2018.³ After the issuance of the draft remand, we received comments from National Nail Corp.⁴ and

¹ 279 F. Supp. 3d 1372 (CIT 2018) (*Remand Order*).

² See *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14092 (March 16, 2016) (6th AR *Final Results*) and accompanying Issues and Decision Memorandum (IDM).

³ See Letter to Interested Parties "Draft Remand Determination in the 6th Administrative Review of Certain Steel Nails from the People's Republic of China," dated March 27, 2018.

⁴ See National Nail Corp.'s Letter, "Certain Steel Nails from the People's Republic of China: Comments on DOC's Draft Remand Determination," dated April 4, 2018 (National Nail's Comments).

Shandong Oriental Cherry Hardware Group Co., Ltd.⁵ After reviewing the comments received and the record evidence, pursuant to the *Remand Order*, under respectful protest,⁶ we have reconsidered the 6th AR *Final Results* and have granted a separate rate to the Shandong Oriental Cherry Entity. However, we continue to find that adverse facts available is appropriate in determining the rate for the Shandong Oriental Cherry Entity.

II. BACKGROUND

In the underlying review, Commerce selected Shandong Oriental Cherry as a mandatory respondent. Relying on its response to section A of the questionnaire, and specifically its audited financial statements, we found that it was appropriate to collapse Shandong Oriental Cherry and its five reported Chinese affiliates as a single entity (Shandong Oriental Cherry I&E, Jining Huarong Hardware, Heze Products Co, Jining Dragon Fasteners Ltd., Co. (Jining Dragon Fasteners), and Jining Yonggu Metal, collectively, the Shandong Oriental Cherry Entity).⁷ Commerce issued Shandong Oriental Cherry, and its affiliates, several supplemental questionnaires to sections A, C, and D of the questionnaires during the review.

In the 6th AR *Preliminary Results*, which remained unchanged in the 6th AR *Final Results*, Commerce determined that the Shandong Oriental Cherry Entity's responses were deficient, and that the use of facts otherwise available, pursuant to section 776(a) of the Tariff Act of 1930, as amended, (the Act), was necessary. Specifically, Commerce determined that the Shandong Oriental Cherry Entity did not provide an accurate and reliable factors of production (FOP)

⁵ See Shandong Oriental Cherry Hardware Group Co., Ltd.'s Letter, "Certain Steel Nails from the People's Republic of China: Comments on the DOC's Draft Remand Determination," dated April 4, 2018 (Shandong Oriental Cherry's Comments).

⁶ See *Viraj Group Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

⁷ See *Certain Steel Nails from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013–2014*, 80 FR 53490 (September 4, 2015) (6th AR *Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM) at 12; see also IDM at 60-63.

database, sales reconciliation, or sales and factors of production (FOP) data for one of its affiliates, Jining Dragon Fasteners. Because necessary information was not on the record as a result of the many deficiencies in its questionnaire responses, Commerce found all of the Shandong Oriental Cherry Entity's responses to be unreliable. In addition, Commerce determined that the Shandong Oriental Cherry Entity significantly impeded the proceeding and did not cooperate to the best of its ability and, thus, Commerce applied total adverse facts available (AFA), pursuant to section 776(b) of the Act.⁸ Commerce also specifically identified deficiencies with respect to the Shandong Oriental Cherry Entity's separate rate responses: “{T}he Department continues to find that Shandong Oriental Cherry's failure to demonstrate that Jining Dragon Fasteners is not a producer and exporter of in-scope merchandise not only affects the accurate reporting of Shandong Oriental Cherry's sales and FOPs, it also undermines the Department's ability to conduct a separate rate analysis for Shandong Oriental Cherry.”⁹ As a result, Commerce determined that the Shandong Oriental Cherry Entity was not eligible for separate rate status, and treated it as part of the China-wide entity, subject to a margin of 118.04 percent.

On January 2, 2018, the Court remanded the *6th AR Final Results* with respect to our decision to deny the Shandong Oriental Cherry Entity a separate rate. The Court held that substantial evidence did not support our decision to deny a separate rate because “nothing on the record {suggested} that Shandong was other than truthful when answering questions relating to government control{ }” and “Commerce made no finding that Shandong's separate rate responses were inaccurate or otherwise deficient.”¹⁰ The Court reasoned that Commerce did not “make a

⁸ See *6th AR Preliminary Results* and accompanying PDM, unchanged in *6th AR Final Results*.

⁹ See *6th AR Final Results*, IDM at 57.

¹⁰ See *Remand Order* at 12.

determination as to whether the facts on the record demonstrated an absence of *de jure* or *de facto* government control over” the Shandong Oriental Cherry Entity, nor did Commerce find affirmative deficiencies with respect to the separate rate information submitted by Shandong Oriental Cherry and its affiliates.¹¹ Further, the Court questioned this determination in light of the fact that Commerce found certain of the Shandong Oriental Cherry Entity’s information reliable for purposes of collapsing Shandong Oriental Cherry with its affiliates.¹² Specifically, the Court noted that, although Commerce found the Shandong Oriental Cherry Entity’s responses to be unreliable, applied AFA, and denied the entity a separate rate, Commerce collapsed Shandong Oriental Cherry with its affiliates using information found in its financial statement. Thus, the CIT ordered that Commerce re-evaluate the evidence on the record regarding Shandong Oriental Cherry’s eligibility for a separate rate, and if Commerce determines that the Shandong Oriental Cherry Entity is eligible for a separate rate, *i.e.*, the evidence demonstrates and absence of *de jure* and *de facto* control, that a separate rate be determined for the entity.

In accordance with the *Remand Order*, Commerce reconsidered whether the information provided by the Shandong Oriental Cherry Entity is inaccurate or otherwise deficient in the assessment of a separate rate and whether the information provided demonstrates that the Shandong Oriental Cherry Entity is eligible for a separate rate.¹³ In the Draft Remand Determination, Commerce reviewed the Shandong Oriental Cherry Entity’s separate rate questionnaires and determined that the Shandong Oriental Cherry Entity was not eligible for a separate rate because it did not rebut the presumption of government control. Specifically,

¹¹ *Id.*

¹² *Id.* at 11-12

¹³ *See Remand Order* at 12.

Commerce determined that there were certain deficiencies in Jining Dragon Fastener's separate rate information, including pertinent information on potential export controls and sales processes that caused Commerce to question whether Jining Dragon Fasteners was free from *de jure* and *de facto* government control.¹⁴ Commerce also found that Jining Dragon Fasteners did not demonstrate that its shooting nails were not subject to the order, and therefore Commerce required responses with respect to that merchandise, which Jining Dragon Fasteners did not provide.¹⁵ Moreover, because Jining Dragon Fasteners is part of the Shandong Oriental Cherry Entity, Commerce determined that the Shandong Oriental Cherry, in full, did not rebut the presumption of control.

III. COMMENTS ON DRAFT REMAND

Shandong Oriental Cherry's Comments:

- Commerce should correct its Draft Remand Determination to comply with the CIT's order and grant the Shandong Oriental Cherry entity separate rate status.¹⁶

National Nail's Comments:

- Fundamentally, Commerce's Draft Remand Determination failed to comply with the CIT's remand order and instructions because it fails to provide a reasonable explanation for its denial of the separate rates status for the Oriental Cherry Entity.¹⁷

¹⁴ See Commerce's letter to All Interested Parties, "*Draft Remand Determination in the 6th Administrative Review of Certain Steel Nails from the People's Republic of China*," dated March 27, 2018 (Draft Remand Determination) at 11-14.

¹⁵ *Id.* at 2-4.

¹⁶ See Shandong Oriental Cherry's Comments at 1-2.

¹⁷ See National Nail's Comments at 1.

- Commerce’s Draft Remand Determination provides insufficient analysis of how the separate rate status of Oriental Cherry Entity as a whole is compromised by the omissions of just one affiliate within that collapsed entity.¹⁸
- Commerce also failed to adequately address how Jining Dragon Fasteners’ non-responsiveness affected the separate rates analysis, when this non-responsiveness was entirely due to the non-reporting of the sales and FOP data for what it believed to be a negligible amount of non-subject shooting nails.¹⁹
- Commerce also fails to justify the inconsistency between Commerce’s acceptance of Oriental Cherry’s Section A information for purposes of collapsing and Commerce’s rejection of the same information for purposes of separate rate status.²⁰
- Commerce should correct its Draft Remand Determination and grant the Oriental Cherry Entity separate rate status in order to comply with the CIT’s order.²¹

IV. ANALYSIS

Background

In these final remand results, Commerce reevaluated its Draft Remand Determination, contemplating the *Remand Order*, comments submitted by interested parties, and additional review of the record, and changes its position from that of the draft remand results. For the reasons set forth below, Commerce has determined, under respectful protest, that the Shandong Oriental Cherry Entity is eligible for a separate rate. Therefore, Commerce’s discussion of the specific rate assigned to the Shandong Oriental Cherry Entity is also below.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 1-3 and 5-7.

²⁰ *Id.* at 3-4 and 7.

²¹ *Id.* at 7.

In November 2014, Commerce issued its standard non-market economy (NME) antidumping questionnaire to Shandong Oriental Cherry.²² Section A of the Original Questionnaire requested information regarding the Shandong Oriental Cherry Entity's corporate structure, accounting practices, and general information about sales of the merchandise under review. It also contained a subsection of questions that a company seeking a separate rate had to complete. This subsection included questions about corporate ownership, control, management, and any ownership or control by a provincial or local government.²³ Furthermore, this same information was required for each affiliate.²⁴ Shandong Oriental Cherry submitted its Section A response on December 24, 2014.²⁵ Shandong submitted its first Section A supplemental questionnaire response on May 18, 2015.²⁶ Shandong Oriental Cherry's affiliates submitted Section A responses in response to Commerce's second Section A supplemental questionnaire on June 5, 2015.²⁷ Shandong Oriental Cherry further submitted its third Section A supplemental response on July 20, 2015,²⁸ and its fourth Section A supplemental response on July 22, 2015.²⁹

Separate Rates Framework

Commerce considers China to be an NME country because it does not operate sufficiently on market principles to permit the use of prices and costs in that country for purposes of commerce's antidumping analysis.³⁰ In accordance with section 771(18)(C)(i) of the Act, any

²² See Commerce's November 20, 2014 Original Questionnaire to Shandong (Original Questionnaire).

²³ *Id.* at Exhibits A-1 and A-5.

²⁴ See Shandong Oriental Cherry's June 5, 2015 Second Section A Supplemental Questionnaire response at Exhibits 1-5.

²⁵ See Shandong Oriental Cherry's December 24, 2014 Original Section A response.

²⁶ See Shandong Oriental Cherry's May 18, 2015 First Section A and C Supplemental Questionnaire response.

²⁷ See Shandong Oriental Cherry's June 5, 2015 Second Section A Supplemental Questionnaire response at Exhibits 1-5.

²⁸ See Shandong Oriental Cherry's July 20, 2015 Third Section A Supplemental Questionnaire response.

²⁹ See Shandong Oriental Cherry's July 22, 2015 Fourth Section A Supplemental Questionnaire response.

³⁰ See *Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 FR

designation of a country as an NME remains in effect until it is revoked by Commerce.³¹ None of the parties to this proceeding contested such treatment. Therefore, we continue to treat China as an NME country for purposes of this proceeding.

Separate Rate Analysis

As noted above, the Court held that in the *6th AR Final Results*,

Commerce ... neither discussed Shandong's separate rate responses, nor assessed their accuracy or completeness when deciding to apply AFA to those responses. The denial of a separate rate, then, appears to be based on deficiencies in questionnaire responses unrelated to evidence dealing with whether or not Shandong was part of the PRC-wide entity. This is particularly troublesome since Commerce found that the financial and corporate evidence on the record regarding the relationships between and among Shandong and its affiliates was complete and reliable enough to make its collapsing determination. Despite this finding, the Department declined to make a determination as to whether the facts on the record demonstrated an absence of de jure or de facto government control over Shandong. Therefore, the only possible conclusion is that Commerce based its decision to assign Shandong the PRC-wide rate on the finding that its responses regarding FOP and sales data were unreliable, even though there was nothing on the record to suggest that Shandong was other than truthful when answering questions relating to government control. This Commerce cannot do.³²

We respectfully disagree with the Court's findings. First, as discussed in the *6th AR Final Results*, Commerce identified specific deficiencies with respect to the separate rate reporting of Jining Dragon Fasteners, a member of the Shandong Oriental Cherry Entity. As an initial matter, Commerce first identified that "Shandong Oriental Cherry's failure to demonstrate that Jining Dragon Fasteners is not a producer and exporter of in-scope merchandise not only affects the accurate reporting of Shandong Oriental Cherry's sales and FOPs, it also undermines the

50858, 50861 (November 2, 2017) and accompanying decision memorandum, China's Status as a Non-Market Economy.

³¹ See, e.g., *Brake Rotors from the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2005 Administrative Review and Preliminary Notice of Intent to Rescind the 2004/2005 New Shipper Review*, 71 FR 26736 (May 8, 2006), unchanged in *Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006).

³² See *Remand Order* at 12.

Department's ability to conduct a separate rate analysis for Shandong Oriental Cherry.”³³

Commerce found that Jining Dragon Fasteners' failure to demonstrate that it did not export subject merchandise rendered unreliable certain aspects of its separate rate response.

Specifically, because Jining Dragon Fasteners did not demonstrate that its shooting nails are not subject merchandise and excluded from the order, Commerce required responses with respect to that merchandise.³⁴ Without complete responses addressing all of Jining Dragon Fasteners' merchandise, Commerce found that Jining Dragon Fasteners and, therefore, the Shandong Oriental Cherry Entity, did not rebut the presumption of government control. Moreover, although Commerce requested specific information with respect to Jining Dragon Fasteners' separate rate status, Jining Dragon Fasteners either did not respond, stating that certain questions did not apply, or did not provide complete answers to Commerce's questions. Commerce explained that “the incompleteness and unreliability of information concerning Jining Dragon Fasteners' sales of shooting nails calls into question the ability of the Department to rely on the separate rate information provided by Jining Dragon Fasteners{.}”³⁵ We further explained these deficiencies in the draft remand, noting that because Jining Dragon Fasteners is part of the Shandong Oriental Cherry Entity, the Shandong Oriental Cherry, in full, did not rebut the presumption of control.

Second, as Commerce articulated in the *6th AR Final Results* and the Draft Remand Determination, we found that Shandong Oriental Cherry's submissions were so incomplete and unreliable that we could not use them to calculate a margin. However, we did not find that

³³ See *6th AR Final Results*, IDM at 57.

³⁴ See *6th AR Final Results*, IDM at 49-57; Commerce's July 25, 2015 supplemental questionnaire at question 10 (where Commerce requested that nails which meet the definition of the subject merchandise, even if Jining Dragon Fasteners considers the products to be excluded, be reported the Section C and Section D databases and where Commerce requested information such as product specifications and model diagrams in order to determine if the shooting nails at issue could be used in powder-actuated hand tools).

³⁵ See *6th AR Final Results*, IDM at 57.

Shandong Oriental Cherry's audited financial statements to be unreliable themselves. As Commerce explained, although it found Shandong Oriental Cherry's submissions generally so incomplete and unreliable that they could not be used for other determinations in the review, "the Department finds that the record evidence to which it is citing for the affiliation determination is independent, audited financial statements which were not prepared for purpose{s} of this administrative review and thus may be relied on for purposes of determining that Shandong Oriental Cherry is affiliated with its five reported PRC affiliates."³⁶ In other words, Commerce weighed the reliability of the available record evidence, and determined that the audited financial statements were reliable for the limited purpose of evaluating affiliation and collapsing of the companies at issue, while the record was lacking with respect to information needed to conduct a separate rate analysis.

Notwithstanding our respectful disagreement with the Court on the above points, under protest, and in light of the comments made by the parties on the Draft Remand Determination, we are granting the Shandong Oriental Cherry Entity a separate rate, as discussed in more detail below. Specifically, under protest, we find that the deficiencies identified in Jining Dragon Fasteners' separate rate reporting do not undermine the Shandong Oriental Cherry Entity's entitlement to a separate rate.

A. Absence of *De Jure* Control

Commerce considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government

³⁶ See 6th AR Preliminary Results at 11, unchanged in 6th AR Final Results at 62-63.

decentralizing control of companies. Consistent with the *Remand Order*, we have examined the evidence provided by the Shandong Oriental Cherry Entity regarding the absence of *de jure* government control based on the following: (1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of companies.³⁷ Notwithstanding the deficiencies in the separate rate reporting of Jining Dragon Fasteners discussed above, we find, under respectful protest, that the Shandong Oriental Cherry Entity has demonstrated an absence of *de jure* government control.

B. Absence of *De Facto* Control

Typically Commerce considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices (EPs) are set by, or are subject to, the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.³⁸ Commerce determines that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude Commerce from assign

³⁷ See Shandong Oriental Cherry's December 24, 2014 Original Section A response at 3, 6-7, and Exhibits A-2, A-6.3, and A-20; see also Shandong Oriental Cherry's May 18, 2015 First Section A&C Supplemental Questionnaire response at Exhibits 1 and 4; see also Shandong Oriental Cherry's June 5, 2015 Second Section A Supplemental Questionnaire response at Exhibits 1, 2, 3, 4, and 5.

³⁸ See *Silicon Carbide and Sparklers*)

Consistent with the *Remand Order*, we find that the evidence provided by the Shandong Oriental Cherry Entity does support a finding of an absence of *de facto* government control. Commerce has considered the following: (1) the company set its own EPs independent of the government and without the approval of a government authority; (2) the company has authority to negotiate and sign contracts and other agreements; (3) the company has autonomy from the government in making decisions regarding the selection of management; and (4) there is no restriction on any of the company's use of export revenue.³⁹ Therefore, notwithstanding the deficiencies in the separate rate reporting of Jining Dragon Fasteners discussed above, we find, under respectful protest, that the Shandong Oriental Cherry Entity has established that it qualifies for a separate rate under the criteria established by *Silicon Carbide* and *Sparklers*.

Shandong Oriental Cherry Entity's Rate

Because we have determined, under respectful protest, that the Shandong Oriental Cherry Entity is eligible for a separate rate, we have also evaluated the record evidence with respect to the rate for the Shandong Oriental Cherry Entity. As explained below, Commerce continues to find that the use of facts otherwise available is warranted with respect to the Shandong Oriental Cherry Entity, pursuant to section 776(a) of the Act. We also continue to find that the Shandong Oriental Cherry Entity significantly impeded this proceeding and that the Shandong Oriental Cherry Entity did not act to the best of its ability to comply with Commerce's requests for information, in accordance with section 776(b) of the Act.⁴⁰ Therefore, we continue to find that adverse facts available (AFA) is warranted in determining a rate for the Shandong Oriental Cherry Entity.

³⁹ See Shandong Oriental Cherry's December 24, 2014 Original Section A response at 11-12.

⁴⁰ See section 776(b) of the Act.

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.

Moreover, in selecting from among the facts otherwise available, pursuant to section 776(b) of the Act, an adverse inference in selecting from the facts available is warranted when Commerce has determined that a respondent has “failed to cooperate by not acting to the best of its ability to comply with a request for information.”⁴¹ In such a case, the Act permits Commerce to use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.⁴² Adverse facts available is appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”⁴³ The Court of Appeals for the Federal Circuit (Federal Circuit), in *Nippon Steel*, provided an explanation of the “failure to act to the best of its ability,” stating that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to

⁴¹ See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA); see also IDM at 32 (“The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this {review}.” Thus, Commerce is not changing the standard under which it initially analyzed whether AFA was appropriate).

⁴² *Id.*; see also SAA at 870.

⁴³ See SAA at 870.

do.⁴⁴ The Federal Circuit acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate responses to agency inquiries “would suffice” as well.⁴⁵ Compliance with the “best of its ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries.⁴⁶ The Federal Circuit further noted that, while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.⁴⁷

Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, Commerce may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (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

⁴⁴ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003).

⁴⁵ *Id.*, at 1380.

⁴⁶ *Id.*, at 1382.

⁴⁷ *Id.*

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.

In the underlying review, Commerce determined that the Shandong Oriental Cherry Entity withheld key information in the form and manner requested by Commerce, necessary for calculating an accurate margin for the Shandong Oriental Cherry Entity.⁴⁸ Specifically, the Shandong Oriental Cherry Entity failed to provide in the form and manner requested by Commerce: (1) an accurate, reliable sales reconciliation regarding its reported sales of subject merchandise to the United States during the POR; (2) an accurate, reliable FOP database that is reported on a product-matching control numbers (CONNUMs)-specific basis; and (3) sales data, FOP data, and full product specifications, including supporting documentation regarding the hand tool that the shooting nails are used in, from Shandong Oriental Cherry's affiliate, Jining Dragon Fasteners, regarding its sales of shooting nails⁴⁹ to the United States during the POR.⁵⁰ Consistent with our underlying decision, record evidence demonstrates that Shandong Oriental Cherry, along with its affiliate, Jining Dragon Fastener, significantly impeded the proceeding by not providing accurate or complete responses to Commerce's questions about its U.S. sales data and FOP data regarding its sales of subject merchandise to the United States during the POR.⁵¹

The Shandong Oriental Cherry Entity failed to provide a reliable, accurate database for FOPs on a CONNUM-specific basis. In numerous questionnaires, Commerce asked the Shandong Oriental Cherry Entity to provide updated databases or to explain why it could not

⁴⁸ See section 776(a) of the Act.

⁴⁹ Jining Dragon Fasteners uses the term shooting nails to refer to nails that it stated are used in powder-actuated nail guns.

⁵⁰ See Shandong Oriental Cherry's December 24, 2014 Original Section A response and multiple supplemental questionnaire responses; see also *6th AR Final Results* and accompanying IDM at 25-63.

⁵¹ *Id.*

provide its FOPs on a CONNUM-specific basis, yet the Shandong Oriental Cherry Entity continued to report its FOPs on a single average basis.⁵² Commerce gave the Shandong Oriental Cherry Entity three opportunities to provide its factors of production data on a CONNUM-specific basis and to explain its efforts to report the data on that basis, but it failed to do so.⁵³ Commerce also provided the Shandong Oriental Cherry Entity three opportunities to explain why reporting these data on a CONNUM-specific basis was impossible.⁵⁴ However, the Shandong Oriental Cherry Entity disregarded Commerce's request to report on a CONNUM-specific basis and continuously reported factors of production on a single-average basis, applying the average ratio to more than 100 CONNUMs, despite Commerce's instruction that that it was unacceptable to report FOPs on a single-average basis, and with no explanation detailing the Shandong Oriental Cherry Entity's efforts to provide Commerce with the FOP data in the form and manner requested.⁵⁵

The Shandong Oriental Cherry Entity also failed to provide a reliable, accurate database for U.S. sales. The Shandong Oriental Cherry Entity did not provide the necessary information requested in Commerce's questionnaires, including why certain sales data were not included for two months, when Shandong Oriental Cherry had submitted monthly internal financial statements for the other months that had reported sales data in its original sales reconciliation, or sufficient information showing that Jining Dragon Fasteners produced and sold only non-subject merchandise to the United States during the POR.⁵⁶ Commerce provided the Shandong Oriental Cherry Entity two opportunities to remedy and explain deficiencies in its initial questionnaire

⁵² See IDM at 37-41.

⁵³ *Id.* at 40.

⁵⁴ *Id.*

⁵⁵ *Id.* at 41.

⁵⁶ *Id.* at 45, and 50-55.

response. In its initial questionnaire, Commerce explicitly described the manner in which U.S. sales should be reported, explaining that it compares the price that the subject merchandise “was sold in or to the United States with a constructed value using the factors of production to determine whether the merchandise was sold at less than normal value in the United States during the POR.”⁵⁷ In responding, the Shandong Oriental Cherry Entity did not include two months of sales data from the period of review and failed to provide an explanation for how the sales reconciliation and supporting worksheets tied to its financial statements.⁵⁸

Additionally, the Shandong Oriental Cherry Entity failed to provide requested details regarding sales and FOP data for Jining Dragon Fasteners’ shooting nails, instead claiming that shooting nails were excluded from the scope of the *Order* without substantiating its claim.⁵⁹ As such, Commerce determined that the Shandong Oriental Cherry Entity failed to explain adequately why shooting nails produced and exported by Jining Dragon Fasteners are outside the scope of the *Order*, warranting the application of adverse inferences in selecting from the facts otherwise available. Therefore, pursuant to section 776(a)(2)(A), (B), and (C) of the Act, Commerce finds that the application of facts available is warranted because the Shandong Oriental Cherry Entity failed to provide necessary information requested by Commerce, in the form and manner requested, and significantly impeded our ability to conduct the review. Moreover, because the Shandong Oriental Cherry Entity’s deficiencies were so pervasive, impeding Commerce’s ability to conduct its review, and the Shandong Oriental Cherry Entity did

⁵⁷ See Original Questionnaire at 27.

⁵⁸ See IDM at 45 and 50-55.

⁵⁹ *Id.*

not cooperate to the best of its ability, Commerce determined that total AFA, consistent with section 776(b) of the Act, was warranted.⁶⁰

Commerce issued numerous questionnaires to obtain the above information and offered to assist the Shandong Oriental Cherry Entity, if necessary.⁶¹ Where, as here, the request for information in Commerce's initial Section C, and D and supplemental questionnaires was clear and relates to some of the central issues in an antidumping case, such as accurate sales and FOP databases, the CIT has found that the respondent has "a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce."⁶² Further, the CIT has stated that the terms of sections 782(d) and (e) do not give rise to an obligation for Commerce to permit a remedial response from the respondent where the respondent has not met all of the criteria of 782(e).⁶³ For these reasons, consistent with its final results, Commerce finds that the application of total AFA to the Shandong Oriental Cherry Entity is warranted.

Under section 776(d) of the Act, Commerce may use any dumping margin from any segment of the proceeding when applying an adverse inference to the facts otherwise available,

⁶⁰ See *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) ("total AFA is appropriate 'where none of the reported data is reliable or usable' because, for example, all of the 'submitted data exhibited pervasive and persistent deficiencies that cut across all aspects of the data.'").

⁶¹ See Original Questionnaire; see also Commerce's April 20, 2015 first Section A, C, D supplemental questionnaire; see also Commerce's April 27, 2015 Second Section D supplemental questionnaire; see also Commerce's May 7, 2015 Second Section A supplemental questionnaire; see also Commerce's May 13, 2015, Third Section D supplemental questionnaire; see also Commerce's June 25, 2015, Second Section C, Third Section A, and Fourth Section D supplemental questionnaire; see also Commerce's July 2, 2015 Fourth Section A and Fifth Section D supplemental questionnaire.

⁶² See *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758 (CIT 2001) (*Tung Mung*); *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1332-3 (CIT 2002) (stating that, where the initial questionnaire was clear as to the information requested, where Commerce questioned the respondent regarding the information, and where Commerce was unaware of the deficiency, Commerce is in compliance with 782(d), and it is the respondent's obligation to create an accurate record and provide Commerce with the information requested); see also *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) (holding respondent had a duty to respond to Commerce's questions, further explaining that "{i}t was thus reasonable for Commerce to expect from Mukand more accurate and responsive answers to the questionnaire.").

⁶³ See *Tung Mung*, 25 CIT at 789 (stating that the remedial provisions of 782(d) are not triggered unless the respondent meets all of the five enumerated criteria of 782(e)).

including the highest of such margins.⁶⁴ 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 the “alleged commercial reality” of the interested party. Commerce also need only corroborate a rate determined using secondary information.⁶⁵ When selecting a rate as total AFA, Commerce uses the highest rate on the record of the proceeding, which, to the extent practicable, can be corroborated.⁶⁶ However, pursuant to section 776(c)(2) of the Act, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding. Relying on the investigation, we determine that the appropriate total AFA rate is 118.04 percent, which is the highest rate on the record of this proceeding.⁶⁷ Because we are applying as the AFA rate a dumping margin applied in a prior segment of this proceeding, it is unnecessary to corroborate this margin, pursuant to section 776(c)(2) of the Act.

⁶⁴ See TPEA.

⁶⁵ See IDM at 32; see also *BMW of North America LLC v. United States*, 255 F. Supp. 3d 1342, 1346 n. 4 (“Both the pre-TPEA and post-TPEA versions of the statutory scheme only contemplate the corroboration of secondary information . . . it is evident that Commerce is not required to corroborate the uses of primary information when applying AFA.”) (citing TPEA).

⁶⁶ See section 776(b)(2) of the Act.

⁶⁷ See *Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008) (establishing the China-wide rate of 118.04 percent, which was based on total AFA). This remains the highest dumping margin from any segment of the proceeding.

Conclusion

We determine that the following changes to the 6th AR Final Results are appropriate for purposes of these final results. As noted above, under respectful protest, we are granting a separate rate to the Shandong Oriental Cherry Entity. We also assign the Shandong Oriental Cherry Entity an AFA rate of 118.04 percent. Should the Court affirm these final results, we intend to issue liquidation instructions directing U.S. Customs and Border Protection to assess any entries by the companies comprising the Shandong Oriental Cherry Entity – (1) Shandong Oriental Cherry I&E; (2) Jining Huarong Hardware; (3) Heze Products Co; (4) Jining Dragon Fasteners; (5) Jining Yonggu Metal; as well as (6) Shandong Oriental Cherry Hardware Group Co., Ltd. – at a rate of 118.04 percent.

4/20/2018

X 

Signed by: CHRISTIAN MARSH

Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance