A-412-801
Remand
POR: 2010-11
Court # 15-00052
Public Document
E&C OI:TES

RESULTS OF REMAND REDETERMINATION
BMW of North America LLC v. United States
Court No. 2018-1109 (CAFC May 9, 2019)

Summary

The Department of Commerce (Commerce) has prepared these results of redetermination pursuant to the remand order of the United States Court of International Trade (CIT) on July 3, 2019, for proceedings consistent with the opinion issued by the U.S. Court of Appeals for the Federal Circuit (CAFC) in the same case.[1] In its opinion, the CAFC questioned the appropriateness of the particular rate Commerce selected for Bayerische Motoren Werke AG (BMW) based on adverse facts available (AFA) (*i.e.*, the highest transaction-specific dumping margin that forms part of the closely-connected range of transaction specific dumping margins).[2] Specifically, although the CAFC held that the selected rate of 126.44 percent was "in a literal sense, 'non-aberrational,'" the CAFC panel, in a split decision, found that "Commerce did not consider or address BMW's argument regarding its mitigating circumstances or explain why it

[1] *See BMW of North America LLC v. United States*, Court No. 2018-1109 (Fed. Cir. May 9, 2019) (*BMW 2019*); *BMW of North America LLC v. United States*, Court No. 15-00052 Order at 1 (CIT July 3, 2019) (*Remand Order*) ("this case is remanded to the U.S. Department of Commerce ('Commerce') for further proceedings in conformity with the U.S. Court of Appeals for the Federal Circuit's opinion in BMW . . . ").

[2] *See Results of Remand Redetermination*, BMW of North America LLC v. United States, Court No. 15-00052, Slip Op. 17-22, dated May 11, 2017 (*First Redetermination*); s*ee also Ball Bearings and Parts Thereof from Japan and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 80 FR 4248 (January 27, 2015) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM); and *Ball Bearings and Parts Thereof from the United Kingdom: Amended Final Results of Antidumping Duty Administrative Review; 2010-2011*, 80 FR 9694 (February 24, 2015) (*Amended Final Results*).

determined that the 126.44 percent rate was appropriate given the unique factual circumstances surrounding BMW's failure to return the quantity-and-value questionnaire."[3] Accordingly, the CAFC held that "Commerce must explain its consideration of the particular factual circumstances surrounding BMW's failure to cooperate with Commerce's request for information when considering whether its selected AFA rate of 126.44 percent was unduly punitive."[4]

In these results of remand redetermination, Commerce has determined a new AFA rate for BMW consistent with *BMW 2019* and the CIT's *Remand Order*.

Background

Revocation and Reinstatement of the *Order*

On June 28, 2011, Commerce initiated the underlying administrative review.[5] In July 2011, while the administrative review was underway but not yet completed, Commerce revoked the underlying antidumping duty order on ball bearings and parts thereof from the United Kingdom,[6] and discontinued the ongoing administrative review, following a CIT decision affirming the International Trade Commission's (ITC) negative injury redetermination in the second sunset review of ball bearings and parts thereof from the United Kingdom.[7] On May 16,

[3] *See BMW 2019* at 17-18.
[4] *See BMW 2019* at 18-19.
[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 FR 37781 (June 28, 2011).
[6] *See Antidumping Duty Orders and Amendments to the Final Determinations of Sales at Less Than Fair Value: Ball Bearings, and Cylindrical Roller Bearings and Parts Thereof from the United Kingdom*, 54 FR 20910 (May 15, 1989) (*Order*).
[7] *See Ball Bearings and Parts Thereof from Japan and the United Kingdom: Revocation of Antidumping Duty Order*s, 76 FR 41761 (July 15, 2011) (*Revocation Notice*).

2013, the CAFC reversed the CIT's decision and ordered the CIT to reinstate the ITC's affirmative material injury determination.[8] Subsequently, on November 18, 2013, the CIT issued final judgment reinstating the ITC's affirmative injury determinations.[9] As a result, Commerce reinstated the *Order* and resumed the underlying administrative review.[10]

Final Results

As described in detail in the *Final Results*, Commerce assigned BMW a weighted-average dumping margin based on AFA.[11] Commerce selected the highest dumping margin alleged in the petition (254.25 percent) as the weighted-average dumping margin for BMW.[12] In the *Amended Final Results*, Commerce recalculated the weighted-average dumping margin for NSK Europe Ltd. and NSK Bearings Europe Ltd. (collectively, NSK) to correct a ministerial error.[13] This change did not have an impact on the AFA rate applied to BMW.

First Remand

Before the CIT, BMW argued that: (1) Commerce did not have the authority to resume a discontinued administrative review; (2) Commerce should not have applied an adverse inference in assigning a weighted-average dumping margin to BMW; and (3) Commerce's use of the petition rate of 254.25 percent as an adverse inference was not supported by substantial

[8] *NSK Corp v. United States International Trade Commission*, 716 F.3d 1352 (Fed. Cir. 2013) (*NSK May 2013*).
[9] *NSK Corp. v. United States International Trade Commission*, Court No. 06-334, Slip Op. 2013-143 (CIT November 18, 2013).
[10] *See Ball Bearings and Parts Thereof from Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resumption of Administrative Reviews, and Advance Notification of Sunset Reviews*, 78 FR 76104 (December 16, 2013) (*Reinstatement Notice*).
[11] *See Final Results* IDM at Comment 3.
[12] *Id.*, at Comment 4.
[13] *See Amended Final Results*, 80 FR at 9694-5.

evidence.[14] The CIT found that Commerce acted in accordance with law in resuming the discontinued administrative review and that Commerce's determination to apply an adverse inference in assigning a weighted-average dumping margin to BMW was supported by substantial evidence.[15] However, the CIT agreed with BMW that Commerce did not adequately corroborate the petition rate of 254.25 percent, which rendered use of that rate unsupported by substantial evidence.[16] The CIT, thus, remanded the *Final Results* to Commerce to either: (1) provide a new corroboration analysis for the selected petition rate that is consistent with Commerce's obligations and the CIT's opinion; or (2) determine a new AFA rate consistent with Commerce's obligations and the CIT's opinion.[17]

In its results of redetermination, Commerce selected an AFA rate for BMW of 126.44 percent, which is one of the transaction-specific dumping margins that Commerce calculated for NSK, a respondent in the review.[18] The CIT subsequently affirmed the *First Redetermination.*[19]

CAFC's Remand

BMW appealed the CIT's decision to the CAFC, arguing that: (1) Commerce unlawfully reinstated the administrative review after it had been terminated; and (2) Commerce's selection of the 126.44 percent AFA rate was unduly punitive and unsupported by substantial

[14] *See BMW of North America LLC v. United States*, Court No. 15-00052, Slip Op. 17-22 (CIT March 2, 2017) (*CIT Remand*) at 7 and 12.
[15] *Id*., at 7-12.
[16] *Id.*, at 15.
[17] *Id*., at 12-17.
[18] *See First Redetermination.*
[19] *See BMW of North America LLC v. United States*, 255 F. Supp. 3d 1342, 1347 (CIT 2017).

evidence.[20] The CAFC, based on its *de novo* review, found that Commerce acted in accordance with law in resuming the discontinued administrative review.[21]

However, in a sharply split decision, the CAFC panel's Majority vacated the judgment of the CIT and remanded the *First Redetermination* for Commerce to "explain its consideration of the particular factual circumstances surrounding BMW's failure to cooperate with Commerce's request for information when considering whether its selected AFA rate of 126.44 percent was unduly punitive."[22] The panel's Majority found that "Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party" but that, in this case, "Commerce did not address how the procedural irregularities surrounding the administrative review process affected its view of BMW's level of culpability" and, therefore, found that "on this record, it cannot ascertain whether Commerce properly selected an AFA rate that was not unduly punitive."[23]

In contrast, the Dissent expressed the view that "the Majority has erred by imposing new extra-statutory limits on the discretion that Congress granted to Commerce" to select an AFA rate and "{w}orse yet, those limits are ill-defined and amorphous, making Commerce's job harder and our review function difficult, if not impossible."[24] Among other things, the Dissent stated that the CAFC "should not impose conditions that are not present in or suggested in the

[20] *See BMW 2019* at 10 and 12.
[21] *Id.*, at 10-14.
[22] *Id.,* at 19.
[23] *Id.*, at 18.
[24] *BMW 2019* Dissent at 2.

statute's text" and wondered "what are the subjective criteria to be applied in assessing whether one AFA rate versus another is 'unduly punitive?'"[25]

Draft Redetermination

On September 6, 2019, we released the draft results of redetermination to interested parties for comment.[26] We received comments from BMW on September 13, 2019.[27]

Discussion

In accordance with *BMW 2019* and the *Remand Order*, in selecting a rate to use as AFA, Commerce has considered the totality of circumstances, including, in particular, the unique procedural circumstances of the underlying administrative review. For the reasons explained below, Commerce determined a new AFA rate consistent with *BMW 2019* for these results of redetermination.

Legal Framework

When one or more of the conditions described in section 776(a)(1)-(2) of the Tariff Act of 1930, as amended (the Act), exist and also an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes Commerce to use an adverse inference in selecting from among the facts otherwise available. When using an adverse inference in selecting from among the facts available, Commerce may rely on information derived from the petition, a final determination, or any

[25] *BMW 2019* Dissent at 2.
[26] *See Draft Results of Remand Redetermination*, BMW of North America LLC v. United States, Court No. 2018-1109, dated September 6, 2019.
[27] *See* BMW's Letter, "BMW's Comments on Draft Remand Redetermination - Twenty-Second Administrative Review of the Antidumping Duty Order on Ball Bearings and Parts Thereof From The United Kingdom (POR 5/1/10 - 4/30/11)," dated September 13, 2019 (BMW Comments).

previous administrative review—*e.g.*, secondary information—or "any other information placed on the record."[28]

In instances where Commerce bases AFA on secondary information, section 776(c) of the Act specifies that in general Commerce shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. To "corroborate" means that Commerce satisfies itself that the secondary information to be used has probative value.[29] Under the Trade Preferences Extension Act of 2015 (TPEA),[30] Commerce need not corroborate any dumping margin applied in a separate segment of the same proceeding.[31]

Further, Commerce considers information reasonably at its disposal as to whether there are circumstances that would render a selected AFA rate inappropriate. Where circumstances indicate that a selected rate is not appropriate as AFA, Commerce may disregard the rate and determine an appropriate AFA rate.[32] Nonetheless, under the TPEA, Commerce is not required in selecting an AFA rate to estimate what the weighted-average dumping margin "would have

[28] *See* section 776(b)(2) of the Act; *see also* 19 CFR 351.308(c)(1) and (2).
[29] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994)(SAA) at 870; *see also* 19 CFR 351.308(d).
[30] On June 29, 2015, the TPEA was signed into law. The TPEA made numerous amendments to the antidumping and countervailing duty law. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, Commerce published an interpretive rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained in section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015). Pursuant to that interpretive rule, amendments to section 776 of the Act apply to "all determinations made on or after August 6, 2015." *Id.*, 80 FR at 46794.
[31] *See* section 776(c)(2) of the Act.
[32] *See, e.g.*, *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (where Commerce disregarded the highest calculated margin as AFA because the margin was based on a company's uncharacteristic business expense resulting in an unusually high margin).

been if the interested party found to have failed to cooperate . . . had cooperated," or to demonstrate that the weighted-average dumping margin reflects an "alleged commercial reality of the interested party."[33] In this regard, the CAFC stated that it relied on case law that interprets the statutory language that is identical in both versions of the statute--those both pre- and post-dating the TPEA amendments to section 776 of the Act.[34] Accordingly, the CAFC did not address whether the TPEA would apply to determinations made in a subsequent remand proceeding. The CAFC did, however, reference the TPEA language as supporting its own reasoning and analysis.[35] And because the TPEA amendments to section 776 of the Act apply to "all determinations made on or after August 6, 2015,"[36] Commerce considers that the amendments apply to this remand redetermination.

Analysis of the Totality of Circumstances

We start our analysis with the text of the statute. When an interested party fails to cooperate to the best of its ability, section 776(b) of the Act provides that Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Section 776(b) of the Act also lists potential sources of information that Commerce may use in applying an adverse inference, including information from the petition, investigation and prior administrative reviews, as well as any other information on the record.

[33] *See* section 776(d)(3)(A) and (B) of the Act.
[34] *See Remand Order* at 16 n.3 (stating that its decision "relied on case law that interprets statutory language that is identical in both versions of the statute pre- and post-dating the amendments made by Congress" in the TPEA).
[35] The CAFC declined to address BMW's argument that Commerce improperly applied the TPEA in its May 2017 determination, but the CAFC stated that the TPEA amendments support its own decision and analysis. *Remand Order* at 16, n.3 (stating that "the amended version of the statute further supports our view. . . .").
[36] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793, 46794 (August 6, 2015).

Section 776(c) of the Act, subject to a limited exception for dumping margins or countervailing duty rates applied in a separate segment of the same proceeding, requires Commerce, to the extent practicable, to corroborate secondary information. With respect to antidumping proceedings, section 776(d)(1)(B) of the Act allows Commerce to use any dumping margin from any segment of the proceeding under the applicable antidumping duty order. Further, section 776(d)(2) of the Act, titled "Discretion to apply highest rate," provides that Commerce may apply the highest dumping margin, "based on the evaluation of the administering authority of the situation that resulted in the administrative authority using an adverse inference in selecting among the facts otherwise available."

Our review of the Majority opinion suggests that when faced with the unique procedural circumstances of the underlying administrative review, we should evaluate the totality of circumstances, including (if relevant) the seriousness of conduct of the uncooperative party, in considering whether a particular rate may be unduly punitive.[37]

Consistent with the CAFC decision, we have considered the totality of the circumstances in this case. As an initial matter, the CIT affirmed Commerce's finding in the *Final Results* that BMW failed to cooperate to the best of its ability in the underlying administrative review, and

[37] *BMW 2019* at 18-19. Also, the CAFC stated that "Commerce did not address how the procedural irregularities surrounding the administrative review process affected its view of BMW's level of culpability." *Id.* at 18. The term "culpability" does not appear in the AFA provisions of the statute. Nor did our research reveal use of this term by the CAFC in prior decisions examining Commerce's use of AFA until its recent decision in this case. In light of the sentence preceding the CAFC's use of the term "culpability" we read the Majority's "culpability" language as illustrating one consideration Commerce may consider "if relevant." *Id.* ("Our case law establishes that Commerce must consider the totality of the circumstances in selecting an AFA rate, *including, if relevant,* the seriousness of the conduct of the uncooperative party.") (emphasis added).

BMW did not appeal that aspect of the CIT's decision to the CAFC.[38] On December 12, 2013, Commerce had emailed counsel for all parties (including BMW) that had previously requested an administrative review that it was "sending out a quantity-and-value-questionnaire to all respondents in the 5/1/2010-4/30/2011 administrative reviews of ball bearings and parts thereof from Japan and the United Kingdom."[39] Further, on December 16, 2013, Commerce published a notice in the *Federal Register*, indicating that it was "hereby resuming the administrative reviews" covering the same period and set the deadline for withdrawing requests for review within 90 days after the date of publication of the notice.[40] BMW did not submit the quantity-and-value questionnaire, or request to withdraw from the review, or otherwise respond to Commerce's communications.[41]

Responses to quantity-and-value questionnaires are important, because they provide information that is necessary for selecting respondents for individual examination. If a respondent with a large volume of exports could simply refuse to provide its response to a quantity-and-value questionnaire, it could avoid individual examination when it otherwise could be selected for examination and Commerce might be forced to individually examine other, smaller exporters. Without an obligation to respond to the quantity-and-value questionnaires, a

[38] *BMW of North America LLC v. United States*, 208 F. Supp. 3d 1388 (CIT 2017).
[39] *See* Memorandum, "Ball Bearings and Parts Thereof from the United Kingdom – Delivery of the Quantity-and-Value Questionnaire," dated September 17, 2014.
[40] The CAFC has previously held that "{u}nder the relevant provisions of Title 19, we must conclude that a *Federal Register* publication of a notice of a review's initiation is sufficient as a matter of law to give notice to the named foreign exporters and producers." *See Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1371 (Fed. Cir. 2017). We find that this same logic applies to a *Federal Register* notice resuming a previously-discontinued administrative review.
[41] Every other respondent in this review responded to our quantity-and-value questionnaire or withdrew its request for review prior to the deadline for submitting a response to our quantity-and-value questionnaire.

producer or exporter could benefit from its non-cooperation, knowing that Commerce would not be able to individually examine its pricing data and, thus, adopt more aggressive pricing behavior that would lead to increased dumping that cannot be remedied effectively. As a result of BMW's failure to provide the quantity-and-value questionnaire response, the necessary information was withheld from Commerce and is not on the administrative record. By withholding information regarding the quantity and value of its exports during the period of review, BMW effectively avoided the possibility of being selected for individual examination, while remaining in the review.

Additionally, consistent with *BMW 2019*, we consider the unique procedural circumstances of this case resulting from ITC-related litigation that was on-going at the time of the underlying administrative review[42] combined with consequences that flowed from the CAFC's December 2010 decision in *Diamond Sawblades Manufacturers Coalition v. United States*.[43] As a result of the litigation challenging the ITC's sunset review determination, in July 2011, Commerce revoked the antidumping duty order and discontinued this administrative review.[44] Also as a result of the litigation against the ITC, over two years later in December 2013, Commerce subsequently reinstated the order and resumed this administrative review.[45]

[42] *See, e.g.*, *NSK v. United States*, CIT Court No. 06-334; and *NSK May 2013*.
[43] *See Diamond Sawblades Manufacturers Coalition v. United States*, 626 F. 3d 1374 (Fed. Cir. 2010) (requiring Commerce to publish antidumping duty orders upon notice of a final affirmative injury determination on remand); *Final Results* IDM at Comment 2 (explaining that Commerce revoked the antidumping duty order on ball bearings from the United Kingdom pursuant to the CIT's decision in the ITC-related litigation, section 751(d) of the Act and the CAFC's decision in *Diamond Sawblades*).
[44] *See Revocation Notice*.
[45] *See Reinstatement Notice*.

Commerce had not previously encountered this procedural scenario.[46] Further, the CAFC found that "BMW's stated belief that the revocation notice terminated the administrative review was not unreasonable," that at the time "Commerce did not have guidelines on the process for conducting an administrative review in the event of reinstatement of a revoked antidumping duty order," that "the word 'discontinue' does not have a clear meaning in this context, and the term is not itself defined in any relevant statute or regulation," and that it "is unclear that Commerce even contemplated the possibility of resuming the reviews at the time the revocation notice was written."[47] We find that at the time, these circumstances were unique and, especially given the CAFC's clarification that Commerce has authority to resume a discontinued review, will not be similarly novel should they occur in the future.

The antidumping duty laws, including the AFA provisions of the statute, are not punitive, but rather are remedial in nature.[48] Furthermore, as described above, the procedural irregularities experienced during the underlying administrative review—namely, the order having been revoked and the underlying administrative review discontinued as a result of at-that-time on-going litigation, and then years later the order having been reinstated and the administrative review resumed as a result of the same litigation—were unique at the time. Accordingly, we read the CAFC's language in the context of this at-the-time very unique factual scenario. In light of the foregoing, and having considered the totality of circumstances (the unique procedural

[46] *See Final Results* IDM at Comment 2 ("BMW also asserts that it was not aware of any other cases in which we have automatically reinstated a review. BMW is correct. This is the first case, after the *Diamond Sawblades* decision, where we had to revoke an AD order following a CIT decision, and then subsequently reinstate that order after the Federal Circuit reversed the decision by the CIT.").
[47] *See BMW 2019* at 13.
[48] *See NTN Bearing Corp. v. United States*, 74 F. 3d 1204, 1208 (Fed. Cir. 1995).

circumstances of this case, in particular), we determine upon remand to apply a rate of 61.14 percent, which is the highest calculated rate for a cooperating respondent in this proceeding, a rate that Commerce previously has applied as AFA. This rate is higher than the all-others rate of 54.27 percent that BMW was subject to before this administrative review. Also, this rate is not punitive because it was calculated for a cooperating respondent in this proceeding and was previously corroborated, when applied as AFA.[49] In fact, the TPEA does not require re-corroboration of such rates. Nevertheless, this rate could be corroborated by information from the individually-examined respondent in the underlying administrative review, who had transaction-specific margins in excess of this rate.[50]

Upon reconsideration of this issue in light of the CAFC's opinion, Commerce has selected a new AFA rate for BMW.

Comment 1: The Trade Preferences Extension Act (TPEA) and this remand redetermination.

According to BMW:

- The courts have ruled that the TPEA may not have retroactive effect; the CIT expressly rejected the application of the TPEA to decisions on remand, where the underlying matter pre-dated the TPEA.[51]

[49] *See Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Reviews*, 70 FR 25538, 25539-40 (May 13, 2005), unchanged in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 FR 54711 (September 16, 2005).

[50] *See, e.g.*, *First Redetermination.*

[51] *See*, *e.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F. 3d 1339 (CAFC 2015) (*Ad Hoc Shrimp*); and *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1328-1329 (CIT 2015) (*Fresh Garlic*).

- As a result, Commerce is still required to follow pre-TPEA statutory requirements concerning the corroboration of secondary information and is required to consider pre-TPEA requirements established by judicial precedent to estimate what the weighted-average dumping margin would have been had BMW cooperated, or to demonstrate that the selected margin reflects an alleged commercial reality of BMW.
- Should Commerce reject BMW's position regarding the nonapplicability of the TPEA, the post-TPEA statute also supports BMW's position that Commerce must consider the specific circumstances leading to the imposition of a given AFA rate in order to determine if the rate imposed as AFA is appropriate.

Commerce's Position: We disagree with BMW that the TPEA amendments do not apply to the Commerce's determination in this remand proceeding. As noted above, Commerce published an interpretive rule, in which it announced the applicability date for TPEA amendments to section 776 of the Act. Pursuant to that interpretive rule, amendments to section 776 of the Act apply to "all determinations made on or after August 6, 2015." The CIT stated that the TPEA did not apply to its review of Commerce's *Final Results*, which predated the enactment of the TPEA.[52] However, this remand redetermination is not the *Final Results*. Rather, this remand redetermination that is being made now pursuant to *BMW 2019* and the *Remand Order*, is being made more than four years after the August 2015 *Final Results* and constitutes a new "determination" that is made after August 6, 2015. Therefore, the statutory amendments to section 776 of the Act made by section 502 of the TPEA apply to this determination.

[52] *See BMW of North America LLC v. United States*, 208 F. Supp. 3d at 1396 n.6.

BMW does not address Commerce's interpretive rule, but instead quotes from two CIT decisions that considered whether the TPEA applies to a remand redetermination and found that it did not.[53] However, neither of those cases are binding on Commerce in the context of this litigation. Below we explain why the TPEA amendments apply to this remand redetermination.

In *Ad Hoc Shrimp*, the CAFC stated that, "applying normal rules of statutory construction, it is evident that Congress intended section 502 of the {TPEA} to apply only to Commerce determinations made on or after the date of enactment."[54] "Left open by the Court of Appeals for the Federal Circuit is the question of whether the {TPEA}, specifically the standard for corroboration under Section 502 of the {TPEA}, is applicable to administrative redeterminations made after the enactment of the law concerning facts that occurred prior to that date."[55] Our reliance on the TPEA amendments to the Act in this remand redetermination is consistent with the application of TPEA amendments to in "Commerce's determinations made on or after the date of enactment." The TPEA amendments to section 776 of the Act are specifically directed at the standards governing Commerce's decision-making.[56] This remand determination is an example of Commerce's decision-making post-dating the TPEA's date of enactment.

[53] *See* BMW Comments at 7-9 (citing *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313 (CIT 2015); and *Shenzhen Xingoda Indus. Co. v. United States*, 361 F. Supp. 3d 1337 (CIT 2019)).
[54] *See Ad Hoc Shrimp*, 802 F. 3d at 1350.
[55] *See Tai Shan City Kam Kiu Aluminum Extrusion Co., Ltd. v. United States*, 125 F. Supp. 3d 1337, 1342 n.5 (CIT 2015) (not examining the question of whether the TPEA would apply on remand where "{t}hat question {was} not before the court and {had} not been briefed by the parties.").
[56] *See Ad Hoc Shrimp* 802 F. 3d at 1352 (finding that the conduct being regulated by the TPEA is "Commerce's decision-making standards").

Comment 2: The appropriateness of the 61.14 percent AFA rate

- Commerce has not explained why the rate selected is appropriate for the given circumstances, not punitive, and sufficiently adverse to ensure that BMW is not benefiting from its lack of cooperation.
- Commerce does not explain why a rate higher than 54.27 percent is not punitive, given the circumstances that led to BMW's non-compliance.
- Commerce does not address the specific circumstances surrounding BMW's roll in this review and the appropriateness of the selected AFA rate given "BMW's level of culpability."
  - The unique procedural circumstances of this administrative review which Commerce has acknowledged.
  - BMW itself was the only party which filed the request for the subject administrative review in order to obtain what it believed would be a substantially lower rate than the 54.27 percent all-others cash deposit rate tendered on its bearing entries where BMW had nothing to gain by not cooperating with Commerce.
  - Had BMW simply filed its quantity and value questionnaire response, it would have received a rate of 1.43 percent – a fact that demonstrates that it had no incentive not to cooperate with Commerce.
  - In a concurrent administrative review of the German ball bearing antidumping duty order for the same period of time as the UK review, BMW received a rate of zero percent, which was the same rate as the mandatory respondent in that case.

- The fact that BMW received a rate of zero percent in the German case, and would have been subject to a rate of 1.43 percent in the UK review had it simply filed its quantity and value questionnaire response demonstrates that these rates reflect BMW's actual commercial reality.
- The only failure, of not providing the quantity and value information requested by Commerce, was due to an "inadvertent mistake" by BMW's counsel and was not a failure on the part of BMW who should not be penalized by a rate that is 42 times greater than that which it would have otherwise deserved.

- Commerce has provided no explanation of what deterrence factor would be warranted under the circumstances of this proceeding, given that the underlying antidumping duty order had already been revoked at the time Commerce made its original AFA decision in the underlying review, and there were no subsequent annual reviews.
- In light of these circumstances, the 61.14 percent rate assigned by Commerce has no connection to BMW's actions and the specific circumstances of this case.

Commerce's Position: We continue to find the 61.14 percent rate to be appropriate and we do not find it to be punitive.

BMW contends that we did not explain why a rate higher than 54.27 percent is not punitive, given the circumstances that led to BMW's non-compliance. However, we have examined the unique circumstances of this review, including BMW's conduct, and selected a lower AFA rate than the AFA rate that we originally selected. Further, as BMW itself acknowledged before the CAFC, it should not receive a rate lower than all-others rate of 54.27

percent. In oral argument, "BMW concede{d} that it should not receive a rate lower than the all-others rate."[57] Having never been subject to a review since the imposition of this order prior to the instant review, the weighted-average dumping margin applicable to BMW prior to this administrative review was the all-others rate, which is 54.27 percent. Thus, applying the all-others rate of 54.27 percent to BMW, in this review as a non-cooperating respondent, would not be adverse, as it would apply to BMW the same rate which was already, and has always been, applicable to BMW.

As a general matter, allowing a non-cooperating respondent to remain subject to the same rate it was subject to prior to its noncompliance, as if the review never happened, would encourage future non-compliance and provide no deterrence. Similarly, applying a lower rate would effectively reward BMW for failing to respond to our request for information by putting BMW in a better position—having not cooperated—than had it not requested a review at all. In light of the above considerations, neither a rate of 54.27 percent nor a lower rate is adverse to BMW in this review, and assigning such a rate could incentivize non-cooperation, whether by BMW or more generally. Therefore, we do not perceive that the 61.14 percent rate we selected on remand, having taken into consideration the unique procedural circumstances of the underlying administrative review, is in any way punitive. Rather, the 61.14 percent rate reflects the rate applicable to BMW prior to this administrative review as well as some amount as a deterrent when considered in light of the unique procedural circumstances in the underlying administrative review. Further, this rate was previously calculated as the weighted-average

[57] *BMW 2019* Dissent at 7.

dumping margin for a cooperating respondent, was previously applied as total AFA in a prior review, was corroborated consistent with the statutory requirements when applied as total AFA in a prior review, and includes a relative increase of only 12.7 percent over the all-others, and BMW's existing, rate. Therefore, this rate is on its face not punitive, particularly given BMW's complete failure to provide the critical information requested by Commerce at the outset of the resumption of the administrative review, where BMW's omission of such information precluded BMW's possible examination as part of this review.

BMW's failure to respond to Commerce's request for information precluded Commerce from considering BMW in its analysis of which respondent(s) to individually examine. BMW foreclosed that entire analysis as it related to BMW by failing to provide the requested information. Moreover, as discussed below in Comment 4, below, BMW's assertion that it would not have been selected for examination (and therefore would have received a 1.43 percent rate) is purely speculative.

BMW contends that we have not explained why the rate selected is the only rate sufficiently adverse to ensure that BMW is not benefiting from its lack of cooperation. We have not taken the position that this is the only rate that is sufficiently adverse to ensure that BMW is not benefiting from its non-cooperation. Certainly, Commerce previously established other AFA rates which it found were sufficiently adverse to ensure that BMW did not benefit from its non-cooperation. Further, as described in our response to Comment 3, below, there are many transaction-specific and control-number-specific[58] dumping margins that we calculated for NSK

[58] Commerce defines the "control number" for each product as the concatenation of the physical characteristics reported by the respondent for each product.

which exceed the AFA rate selected for BMW in this redetermination – rates that would be sufficiently adverse to ensure that BMW does not benefit from its lack of cooperation – but in light of *BMW 2019* and the unique procedural circumstances of the underlying administrative review, we selected a lower rate than many other available rates, which further underscores that the rate is not punitive.

BMW contends that we do not address BMW's claim that the failure to respond was due to an "inadvertent mistake" made by BMW's counsel as a result of what Commerce has acknowledged as the unique procedural circumstances of this case. BMW is saying, in essence, that because the failure to respond was its counsel's fault, BMW itself should be excused. However, as the CIT held, "it makes sense not to distinguish between a respondent's and its counsel's actions because counsel acts on behalf of the respondent. If this Court were to sanction a 'bad counsel' defense, it might create an incentive to hire ineffective counsel."[59] We similarly decline to distinguish between the respondent's actions and those of its counsel because counsel acts on behalf of the respondent. As we stated in the *Final Results*, "it does not matter whether the failure to respond was due to BMW's personnel or the counsel hired by BMW to represent it before Commerce. Indeed, if we were to make such a differentiation, any respondent with counsel could attempt to evade our requests for information by claiming fault on the part of its counsel."[60] As noted above, while the procedural circumstances of this review were unique, BMW was the only company that did not either respond to our quantity-and-value questionnaire

[59] *See PAM v. United States*, 495 F. Supp. 2d 1360, 1370 (Ct. Int'l Trade 2007).
[60] *See Final Results*, 80 FR 4248, and IDM at 11.

or withdraw its request for review. All of the other companies for which this review was initiated were able to manage these unique circumstances.

BMW contends that we did not explain what benefit BMW may have had by failing to file a quantity-and-value questionnaire response when it was the only party that requested its review. It is immaterial whether BMW was the only party that requested its review. Once the review was initiated and we issued a quantity and value questionnaire to all companies subject to the review, including BMW, all such companies, including BMW, had an obligation to respond to our request for information. BMW failed to respond, thereby not cooperating with a Commerce request for information. Commerce will not speculate as to what specific benefit BMW may get from its non-cooperation but, rather, has taken steps so that BMW would not benefit from its non-cooperation.

For example, in this review, although BMW claims that the reasons for its non-compliance are "well-documented,"[61] in fact, the record does not indicate what BMW's rate would have been had it cooperated. Rather, the record contains BMW's assertions that blame its counsel. During the proceeding, BMW's counsel claimed it does not "recall" having seen the email in which Commerce sent the quantity-and-value questionnaire, but did not dispute that the email address was correct and appears to acknowledge that the electronic filing in ACCESS was received, but misfiled by its staff.[62] Even if we were to accept these claims as true, they do not

[61] *See* BMW Comments at 18.
[62] *See* BMW's Letter, "BMW's Direct Case Brief: Antidumping Duty Administrative Review on Ball Bearings and Parts Thereof From The United Kingdom (POR 5/1/10 - 4/30/11)," dated October 23, 2014, at 6-7.

undermine the AFA rate we have selected, which was selected based on our having taken into account the unique procedural circumstances in the underlying administrative review.

With respect to BMW's arguments regarding the parallel administrative review of the German ball bearing antidumping duty order, we find that the circumstances and factual record of that review are irrelevant to the factual record of this review. That is a different proceeding, concerning a different country and different exporters, with other circumstances different from those which existed in this review. Thus, we find that we can draw no inferences or conclusions in this review based on what happened with respect to respondent selection or the final results in an administrative review of a different antidumping duty order. BMW's arguments to connect BMW's final results of the German review and NSK's final results in the U.K. review are inapposite. As an intial matter, BMW cooperated in one proceeding, but did not cooperate in another proceeding. Furthermore, the universe of potential mandatory respondents in German review is different from that in the U.K. review of bearings.[63] Thus, respondent selection determinations would have been based on different facts and involved different interested parties. More importantly, dumping determinations are inherently country-specific, because the pricing behavior of exporters from one country has no bearing on the pricing behavior of exporters from another country. Furthermore, it makes no sense to determine the rate of a U.K. exporter based on the pricing behavior of German exporters that are not subject to this

[63] *See Ball Bearings and Parts Thereof from France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part*, 77 FR 33159, 33160 (June 5, 2012), which shows that we rescinded the review with respect to Audi AG, Kongskilde Limited, Volkswagen AG, and Volkswagen Zubehor GmbH, companies which we considered in our selection of respondents in the German review but which withdrew their requests for review after we selected respondents (unchanged in final; 77 FR 73415, December 10, 2012).

antidumping duty proceeding, particularly where the margins of the cooperating mandatory respondent in this review support Commerce's determination.

Finally, BMW contends that we provided no explanation of what deterrence factor would be warranted under the circumstances of this proceeding, given that the underlying antidumping duty order had already been revoked. The possibility that Commerce may rely on an adverse inference when a party fails to cooperate serves as a deterrent to non-cooperation or, stated another way, an inducement to cooperate, in the on-going as well as future segments of antidumping and countervailing duty proceedings. The immediate deterrent to a respondent's non-cooperation in an antidumping duty administrative review is the possibility that, if Commerce finds that the statutory criteria for relying on AFA are met, Commerce can assign a weighted-average dumping margin based on adverse facts and, as a result, the respondent would owe a greater amount of money for antidumping duties than had it cooperated.[64] The fact that Commerce's possible use of AFA did not deter BMW from non-compliance in the underlying administrative review does not mean that Commerce should not apply AFA where the requisite conditions for applying AFA were met or somehow undermine Commerce's application of a 61.14 percent AFA rate in this case. BMW's contention that there is no deterrence factor at issue, even though BMW did not cooperate, turns the purpose of the AFA statute on its head. Furthermore, to the extent that BMW contends that the revocation of the order has extinguished the need to deter future non-compliance, we disagree. BMW has exported merchandise subject to an antidumping duty order to the United States in the past and could do so in the future. For

[64] The additional deterrent in the future is that the cash deposit for estimated antidumping duties could be higher than they otherwise might be.

these reasons, we find that the revocation of this order does not obviate the need for the deterrent function of AFA.

Comment 3: Commerce has failed to corroborate BMW's 61.14 percent AFA rate

- Under the pre-TPEA version of the statute, rates based on secondary sources must be corroborated even if selected from a separate segment of the same proceeding; both the SAA and Commerce's regulations explain that corroborating information means determining that a selected rate has probative value.
- Commerce has not demonstrated that the AFA rate which it selected has probative value given BMW's specific circumstances.
- The pre-TPEA statute does not afford Commerce the discretion to use any rate it chooses merely because it is from a prior segment.
  - In the entire history of the investigation and administrative reviews of the UK antidumping duty order, the calculated deposit rates, with minor exceptions, were considerably lower than both of the individually calculated rates determined during the original investigation.
  - Commerce has recognized that all calculated rates in prior segments of this proceeding not involving the use of zeroing were zero.
- Although Commerce argues that the rate was corroborated in a previous review when applied as AFA, the circumstances of that review, which was decided 15 years ago, have nothing to do with the administrative record of this review.

- The rate selected by Commerce was the same rate that SKF, the respondent, itself received during the original investigation.
- In contrast, the rate of 61.14 percent has no relation to BMW, and Commerce has placed no information related to the respondent from the original investigation and the fifteenth administrative review on the record of this proceeding relative to the applicability of that rate to BMW.
- The circumstances leading to BMW's non-compliance are well-documented and were significantly different than SKF's decision not to respond in the fifteenth administrative review.

- Although Commerce argues that the rate could be corroborated from the individually examined respondent in the underlying administrative record which had transaction-specific margins in excess of this rate, any such transaction-specific margins are aberrational given that the final weighted-average dumping margin calculated for NSK, the only individually-examined respondent in this review, was 1.43 percent.

Commerce's Position:

As explained above, the TPEA amendments apply to Commerce's determination in this remand proceeding, because this remand determination is a determination made after August 6, 2015. As such, we are not required under the TPEA to corroborate the 61.14 percent rate that we selected to determine BMW's weighted-average dumping margin based on AFA.

We do find, however, that even when examining the experience of NSK, a cooperative respondent in this review, there are numerous individual transaction-specific (*i.e.*, based on an average-to-transaction comparison) or control-number-specific (*i.e.*, based on an average-to-

average comparison) dumping margins during the instant period of review that have rates which exceed 61.14 percent.[65] Moreover, the sales associated with NSK's individual dumping margins were made in commercial quantities and comprised a meaningful proportion of the total quantity of sales by NSK.[66] These factors further demonstrate that the 61.14 percent rate is not inappropriate, as 61.14 percent is below the individual dumping margins of a meaningful portion of the total quantity of sales made by the cooperating mandatory respondent, NSK, during the period examined in the underlying administrative review.

BMW argues that, in the history of this proceeding, the calculated weighted-average dumping margin, with certain exceptions, were considerably lower than both of the individually calculated rates determined during the original investigation, and asserts, with no evidence, that all calculated rates in prior segments of this proceeding not involving the use of zeroing were zero. However, even if we were to accept BMW's assertions as true for the sake of argument, these circumstances do not speak to whether the AFA rate selected for BMW is relevant to this review. As discussed above, the record of this review demonstrates that numerous individual transaction-specific or control-number-specific dumping margins for NSK, a cooperating respondent in the underlying administrative review, exceeded the AFA rate selected for BMW, a non-cooperating respondent, thereby undermining BMW's claim that the selected AFA rate has no relevance to the review. Furthermore, the AFA rate of 61.14 percent that we assigned to

[65] *See* Memorandum, "Results of Redetermination (Consol. Court No 15-00052) in the 2010-11 Remanded Administrative Review of Ball Bearings and Parts Thereof from the United Kingdom: Analysis Memorandum," dated concurrently with this redetermination (Analysis Memorandum).
[66] *Id*.

BMW represents a relatively modest increase over the all-others rate of 54.27 percent, which BMW was subject to before this administrative review.

With respect to BMW's argument that any individual transaction-specific dumping margins greater than or equal to 61.14 percent are aberrational given that the final weighted-average dumping margin assigned to NSK was 1.43 percent, the CAFC has already held that the 126.44 percent rate we selected in the *First Redetermination* was "in a literal sense, 'non-aberrational.'"[67] Given the CAFC's finding that even a much higher AFA rate was not aberrational, and in light of the many transactions that we calculated for NSK that have dumping margins that are higher than 61.14 percent,[68] we find BMW's argument unpersuasive.

Comment 4: The record does not support that BMW would have been a mandatory respondent

- Commerce's assumption that BMW would have been selected for examination in this review is not supported by the record.

[67] *See BMW 2019* at 17-18.
[68] *See* Analysis Memorandum.

- Commerce should allow BMW to provide its quantity and value data for the relevant period or obtain that data from Customs and Border Protection for the period of review. This data will demonstrate that it did not have more shipments to the United States during the POR than NSK, and that BMW would not have been selected as a mandatory respondent.
- If not for this "inadvertent mistake" of failing to file a response to the quantity and value questionnaire, BMW would have received the weighted-average dumping margin determined for non-examined companies, 1.43 percent. Commerce has not explained why an aberrational and punitive 61.14 percent AFA rate, a deterrent factor of over 42 times, is warranted by BMW's actions.

Commerce's Position: We did not and will not speculate whether BMW would have or would not have been selected as a mandatory respondent. BMW prevented us from making this determination by failing to provide its response to our quantity-and-value questionnaire. BMW's self-serving assertion that we necessarily would not have selected it as a mandatory respondent had it submitted a timely response is speculative. BMW's speculation is not an appropriate basis for making our determination.

BMW argues that we should re-open the record to allow it to now submit a response, more than five years have passed since the time when we requested the information from BMW. However, submitting such information five years later would not be within the deadline Commerce established for quantity-and-value questionnaire responses. Furthermore, accepting a quantity-and-value response at this point would be untenable from the perspective of the efficient

conduct of the underlying antidumping duty administrative review. For Commerce to be able to reasonably administer the antidumping duty law, Commerce must be allowed to determine, and adhere to, the deadline it establishes for quantity-and-value questionnaire responses because these deadlines affect subsequent deadlines during the conduct of the review. Allowing BMW to sidestep the deadlines established in the underlying administrative review and submit a response after Commerce already selected its mandatory respondent(s) and completed the review would be inconsistent with the efficient administration of the underlying review. Moreover, the CIT has already ruled that our determination to apply an adverse inference in assigning a weighted-average dumping margin to BMW was supported by substantial evidence,[69] and we do not intend to reconsider that issue, which has already been resolved in this litigation. Accordingly, we do not find it to be appropriate to re-open the record for BMW to submit a quantity-and-value questionnaire response under these circumstances.

Results of Redetermination

Commerce has determined a revised weighted-average dumping margin, based on AFA, for BMW, consistent with *BMW 2019* and the CIT's *Remand Order*. In these remand results, Commerce determines, based on AFA, that a weighted-average dumping margin of 61.14 percent exists for merchandise produced or exported by BMW for the period May 1, 2010 through April 30, 2011.

[69] *See CIT Remand* at 7-12. BMW did not appeal this aspect of the CIT's decision, which sustained our determination.

These results of redetermination are pursuant to *BMW 2019* and the remand order of the CIT.

10/1/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance