C-821-823
Remand
POI: 01/01/2014 – 12/31/2014
Segment Specific Indicator: Court No. 16-00168
Public Document
E&C OFIII: KJ & SM

ArcelorMittal USA LLC et al., and Novolipetsk Steel Public Joint Stock Company v. United States and PAO Severstal et al.
Consol. Court No. 16-00168, Slip Op. 18-121
(CIT September 19, 2018)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (CIT or the Court), issued on September 19, 2018, in *ArcelorMittal USA LLC et al., v. United States*, Consol. Court No. 16-00168, Slip Op. 18-121 (CIT 2018) (*Remand Order*).[1] These final remand results concern the final determination in the countervailing duty (CVD) investigation of certain cold-rolled steel flat products (cold-rolled steel) from the Russian Federation (Russia).[2] The period of investigation (POI) is January 1, 2014, through December 31, 2014.

In accordance with the *Remand Order*, Commerce has explained why the application of the program-specific rate for Novolipetsk Steel Public Joint Stock Company (NLMK) to POA Severstal (Severstal) and Severstal Export GMBH (Severstal GMBH) (collectively the Severstal Companies) under section 776(b) of the Tariff Act of 1930, as amended (the Act), was a

[1] *See ArcelorMittal USA LLC et al., and Novolipetsk Steel Public Joint Stock Company v. United States and PAO Severstal et al.*, Consol. Court No. 16-00168, Slip Op. 18-121 (CIT Sept. 19, 2018) (*Remand Order*).
[2] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016) (*Final Determination*) and accompanying Issues and Decision Memorandum (Final Decision Memorandum).

reasonable adverse facts available (AFA) rate for the Severstal Companies' unreported use of the tax deduction program for mining exploration expenses and sufficiently deters future non-cooperation. Additionally, in accordance with the *Remand Order*, Commerce has evaluated the record facts to support its AFA finding of *de facto* specificity for the provision of natural gas for less than adequate remuneration (LTAR), pursuant to section 776(c) of the Act. Commerce has explained the factual basis for its *de facto* specificity finding and has demonstrated that Commerce's conclusion was supported by substantial evidence and in accordance with law.

II. BACKGROUND

On July 28, 2015, AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, Steel Dynamics Inc., and the United States Steel Corporation (collectively, the petitioners) filed with Commerce antidumping duty and CVD petitions concerning imports of cold-rolled steel from Russia.[3] On August 17, 2015, Commerce initiated a CVD investigation of cold-rolled steel from Russia,[4] examining such programs as tax incentives for mining operations and the provision of natural gas, produced by Gazprom, for LTAR.[5]

On September 14, 2015, Commerce determined to individually examine as mandatory respondents Novex Trading (Swiss) S.A. (Novex Trading) and Severstal Export GMBH (Severstal Export) in this investigation.[6] On September 14, 2015, Commerce issued the initial

[3] *See* "Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Cold-Rolled Steel Flat Products from Brazil, the People's Republic of China, India, Japan, the Republic of Korea, Netherlands, Russia, and the United Kingdom," dated July 28, 2015 (Petition); and Letter from the Petitioners regarding "Response to the Department's July 31, 2015 Questionnaire Regarding Volume XIII of the Petition for the Imposition of Countervailing Duties on Imports of Cold-Rolled Steel from the Russian Federation," dated August 4, 2015 (Russia CVD Supplement).

[4] *See Certain Cold-Rolled Steel Flat Products from Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Initiation of Countervailing Duty Investigations*, 80 FR 51206 (August 24, 2015) (*Initiation Notice*) and accompanying checklist (Initiation Checklist).

[5] *See* Initiation Checklist at 11-14.

[6] *See* Memorandum regarding, "Countervailing Duty Investigation on Certain Cold-Rolled Steel Flat Products from the Russian Federation: Selection of Mandatory Respondents," September 14, 2015.

questionnaire to the Government of Russia (GOR), Novex Trading, and Severstal Export.[7] The GOR and the mandatory respondents submitted questionnaire responses to Commerce. NLMK responded on behalf of Novex Trading, its wholly-owned affiliate, and other responding cross-owned affiliates (collectively, the NLMK Companies). Severstal responded on behalf of Severstal Export, its wholly-owned affiliate, and other responding cross-owned affiliates (collectively, the Severstal Companies).

On December 22, 2015, Commerce published the *Preliminary Determination* of this investigation.[8] Subsequently, between April 18, 2016, and April 29, 2016, Commerce conducted verification of the questionnaire responses submitted by the GOR, the NLMK Companies, and the Severstal Companies. We released the verification reports on May 11, 2016 (the NLMK Companies), May 16, 2016 (the GOR) and May 26, 2016 (the Severstal Companies).[9]

Contrary to the Severstal Companies' claim of non-use in its questionnaire responses, at verification Commerce discovered evidence that indicated the company had used the income tax deduction for mining exploration expenses program.[10] Consistent with Commerce's long-standing practice and the Court's precedent concerning verification findings that contradict a respondent's non-use claims,[11] the verifiers did not collect the amount of exploration deductions

[7] *See* Commerce's Letter, "Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Countervailing Duty Questionnaire," September 14, 2015 (Initial Questionnaire).
[8] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 80 FR 79564 (December 22, 2015) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.
[9] *See* Memorandum regarding "Verification of the Questionnaire Responses of the NLMK Companies," dated May 11, 2016 (NLMK Companies Verification Report); Memorandum regarding "Verification of the Questionnaire Responses of the Government of the Russian Federation," dated May 16, 2018 (GOR Verification Report); and Memorandum regarding "Verification of PAO Severstal and cross-owned affiliates," dated May 26, 2016 (Severstal Companies Verification Report).
[10] *See* Severstal Companies Verification Report at 2 and 6-7.
[11] *See, e.g., Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) and accompanying Issues and Decision Memorandum at 15-16. *See also Ozdemir Boru San. ve Tic. Ltd. v. United States*, 273 F. Supp. 3d 1225, 1241 (Ct.

the Severstal Companies claimed under the program on the tax return filed during the POI, or any other information pertaining to the use of the program.[12]

With regard to the provision of natural gas for LTAR, both in the verification instructions to the GOR and at verification, Commerce officials "asked the Gazprom representatives to provide data to support the composition of domestic sales reported in the company's annual reports for 2012, 2013, and 2014."[13] In the verification outline, Commerce requested that the GOR/Gazprom be prepared to provide "supporting records (such as print-outs from Gazprom's database or sales reports) which were used to build-up the annual natural gas sales data and to compute the percentages reported" in Gazprom's 2014 annual report.[14] However, at verification, the Gazprom representatives did not allow the Commerce verifiers to review the specific data contained in the company's completed quarterly sales reports for 2012, 2013, and 2014, which is the source of the consumption percentages reported in the annual reports.[15] The Gazprom representatives claimed that "the forms are confidential and cannot be examined."[16] Instead, the Gazprom representatives provided to the Commerce verifiers a blank copy of an internal form that the sales departments within Gazprom purportedly complete on a quarterly basis.[17]

Int'l Trade 2017) ("At verification, Commerce discovered that {Ozdemir's questionnaire response} was not accurate, as Ozdemir had taken advantage of the EFPT program, . . . Commerce's resulting conclusion that Ozdemir had withheld requested information, pursuant to 19 U.S.C. § 1677e(a)(2)(A), by failing to report use of the EFPT program was reasonable and supported by substantial evidence."). "Commerce . . . is under no obligation to request or accept substantial new factual information from respondent after discovering that a response cannot be corroborated during verification." *Id.* (citing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F. Supp. 2d 1294, 1304 (2005), *aff'd*, 146 Fed. Appx. 493 (Fed. Cir. 2005)).

[12] *See* Severstal Companies Verification Report at 2 and 6-7.

[13] *See* GOR Verification Report at 7; *see also* Letter to the GOR regarding, "Verification of the Questionnaire Responses Submitted by the Government of the Russian Federation for the Provision of Natural Gas for Less Than Adequate Remuneration," dated February 29, 2016 (GOR Verification Outline) at 4.

[14] *See* GOR Verification Outline at 4.

[15] *See* GOR Verification Report at 7.

[16] *Id.*

[17] *Id.*

On July 29, 2016, Commerce published its *Final Determination*.[18] In the *Final Determination*, Commerce determined as AFA under sections 776(a) and (b) of the Act that the Severstal Companies received a countervailable subsidy under the income tax deduction for mining exploration expenses program.[19] To determine the AFA rate to be applied to the Severstal Companies under the income tax deduction for mining exploration expenses program, Commerce applied its CVD AFA hierarchy.[20] For CVD investigations, the first level of the CVD AFA hierarchy examines whether, in the context of the instant investigation, there is a calculated program subsidy rate for the identical program at issue. If so, Commerce will use the calculated program rate for that particular program as the basis of the AFA rate.[21] Consistent with the CVD AFA hierarchy for investigations, Commerce, therefore, utilized the subsidy rate calculated for the NLMK Companies for the tax deduction for exploration expenses program, which was 0.03 percent *ad valorem*.[22]

With respect to the natural gas for LTAR program, in the *Final Determination*, Commerce found that the metallurgy sector (which includes the steel industry) is a predominant user of natural gas provided by Gazprom for LTAR within the meaning of section 771(5A)(D)(iii)(II) of the Act. On this basis, Commerce determined that the provision of natural gas for LTAR is *de facto* specific. Commerce made this *de facto* specificity determination by applying AFA due to the GOR's refusal to permit Commerce to verify documentation and data to support the composition of domestic natural gas sales reported in Gazprom's annual reports.[23]

[18] *See Final Determination*, 81 FR 49935.
[19] *See* Final Decision Memorandum at 14-15, 19-21 and Comment 21.
[20] *Id.*
[21] *See, e.g., Non-Oriented Electrical Steel from Taiwan: Final Affirmative Countervailing Duty Determination*, 79 FR 61602 (October 14, 2014) and accompanying Decision Memorandum at 10.
[22] *See* Final Decision Memorandum at 14-15, 19-21 and Comment 21.
[23] *See* Final Decision Memorandum at 48-51.

III. REMAND OPINION AND ORDER

In its *Remand Order*, the Court held that Commerce did not sufficiently explain its selection of a program-specific AFA rate for Severstal's unreported use of the tax deduction program for mining-exploration expenses. Specifically, the Court found that we did not adequately explain why the application of NLMK's program-specific rate was sufficiently adverse to deter future non-cooperation.[24] Thus, the Court issued its *Remand Order*, requiring that we explain why NLMK's program-specific rate is sufficiently adverse to deter future non-cooperation. However, in remanding the issue, the Court added that we are not "obligated to deviate from our hierarchy or produce a program-specific rate that necessarily results in an affirmative overall rate."[25]

In its *Remand Order*, the Court also held that, while Commerce's decision to apply AFA for the provision of natural gas for LTAR was appropriate, our *de facto* specificity finding was improper because we did not provide any specific factual basis for the specificity conclusion. The Court determined that Commerce provided no citation to any facts on the record in finding that the GOR's provision of natural gas was *de facto* specific. Thus, in accordance with the *Remand Order*, Commerce has re-examined the record evidence and analyzed the legal and factual basis concerning the facts that resulted in the application of AFA with regard to *de facto* specificity for the provision of natural gas for LTAR.

[24] *See Remand Order* at 20, citing Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. No. 103–316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. at 4199 (*SAA*): "one factor {Commerce} will consider is the extent to which a party may benefit from its own lack of cooperation;" *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1348 (Federal Circuit 2016) (*Nan Ya*): "the statute's 'expectation' is that Commerce's selected AFA rate will have a deterrent effect;" and *Final Results of Antidumping Duty Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico*, 76 FR 36086 (June 21, 20110 and accompanying Decision Memorandum at Comment 4.

[25] *See Remand Order* at 22.

IV. DRAFT REMAND RESULTS

On November 15, 2018, Commerce issued the Draft Remand Results and provided parties until November 26, 2018, to comment.[26] On November 26, 2018, ArcelorMittal USA LLC (AMUSA), and with the concurrence of AK Steel Corporation, United States Steel Corporation, Nucor Corporation, and Steel Dynamics, Inc. filed comments.[27]

V. ANALYSIS

A. Explanation as to Why the Program-Specific Rate Selected Pursuant to AFA Was Sufficiently Adverse to Deter Future Non-Cooperation

As described above, in the *Remand Order*, the Court ordered us to explain why the AFA rate selected for the tax deduction program for mining-exploration expenses was sufficiently adverse to satisfy the underlying statutory purpose of AFA. The Court quoted the SAA for the proposition that one purpose of AFA is to ensure that a party does not benefit from its own lack of cooperation.[28] The Court found that Commerce did not adequately explain why the application of NLMK's program-specific rate to the Severstal Companies was sufficiently adverse to deter future non-cooperation.

As an initial matter, we note that the statute was amended in 2015[29] to make clear that when there is non-cooperation from a party, Commerce is not required to guess at what the result would have been if there had been cooperation. Specifically, section 776(b)(1)(B) of the Act states that Commerce is not required to determine, or make any adjustments to, a countervailable

[26] *See* Letter from Eric B. Greynolds, Program Manager, to All Interested Parties regarding "Draft Results of Redetermination Pursuant to Remand in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation," dated November 15, 2018 (Draft Remand Results).
[27] *See* Letter from Kelley Drye & Warren LLP on behalf of ArcelorMittal USA LLC, and with the concurrence of AK Steel Corporation, United States Steel Corporation, Nucor Corporation, and Steel Dynamics, Inc. regarding, "Certain Cold-Rolled Steel Flat Products from the Russian Federation – Petitioners' Comments on Draft Remand Redetermination," dated November 26, 2018 (AMUSA Comments).
[28] *See Remand Order* at 20.
[29] In 2015, section 776 of the Act was amended in accordance with the Trade Preferences Extension Act of 2015 (TPEA), Pub. L. No. 114-27, § 502, 129 Stat. 362, 383-84 (2015).

subsidy rate based on any assumptions about information the party would have provided if the party had complied with the request for information. Similarly, section 776(d)(3)(A) of the Act states that Commerce is not required to estimate what the countervailable subsidy rate would have been if the party had cooperated. Therefore, although the Court is correct that one purpose of AFA is to ensure that a party does not obtain a more favorable result than if it cooperated, Commerce assesses this purpose in light of the 2015 revisions to the Act. Here, we do not know, and per the statute, we are not required to determine or estimate what the result would have been had the Severstal Companies cooperated fully. Because we cannot know what the result would have been had the Severstal Companies cooperated fully, it is impossible to truly know whether any AFA rate is sufficient to ensure that the Severstal Companies do not obtain a more favorable result than if they had cooperated. Hence, Commerce employs the CVD AFA hierarchy to address a party's non-cooperation. And, in this regard, the Court did not require us to depart from that hierarchy.[30]

For purposes of this remand determination, and with the above statutory constraints in mind, Commerce finds that the 0.03 percent rate attributed to the Severstal Companies under the tax deduction for exploration expense program is sufficiently adverse to deter future non-cooperation. The selected AFA rate is based on Commerce's application of the CVD hierarchy,

[30] *See Remand Order* at 22, "Commerce thus has wide latitude in its selection of an appropriate AFA rate. However, Commerce's discretion is not without limit. The Federal Circuit in *IPSCO*, 899 F.2d at 1195, noted that a Court cannot uphold an agency's 'exercise of administrative discretion if it contravenes statutory objectives.' In other words, Commerce has discretion to select an AFA rate by any means permissible under the statute, so long as the rate it produces does not contravene the purposes of the statute. Furthermore, ArcelorMittal identifies no authority that requires Commerce to consider the aggregate effect on a company's overall subsidy rate in selecting AFA for a particular program-specific rate. Consequently, whether or not Severstal's overall rate is affirmative or *de minimis* does not necessarily affect whether the program-specific rate it selects is sufficiently adverse. Therefore, on remand Commerce is not obligated to deviate from its AFA hierarchy or produce a program specific rate that necessarily results in an affirmative overall rate, but it must provide adequate explanation as to why the program-specific rate it selected was sufficiently adverse to satisfy the underlying statutory purposes."

which is designed to deter non-cooperation. The hierarchy deters non-cooperation because only companies with the highest rate or higher for that same program are incentivized not to cooperate; all other companies have an incentive to cooperate.[31] Although in this particular investigation the overall subsidy rate for the Severstal Companies is *de minimis*, the program-specific rate applied to the program identified above is the highest rate calculated for any cooperating respondent under that same program. When respondents, such as the Severstal Companies, know that they likely will receive the highest possible subsidy rate for a program if they fail to cooperate, this deters non-cooperation from any respondent that knows it is subsidized at a lower rate.

The fact that the CVD program rate in question is, by itself, not sufficiently high to result in an overall subsidy rate for the Severstal Companies that is above *de minimis* is not determinative of whether the program rate itself is sufficiently adverse. Commerce does not examine the numerical value of the actual program rate in question to determine whether it is too low or too high. Rather, it must be presumed – absent record evidence to the contrary – that application of the CVD AFA hierarchy results in a program rate that is sufficiently adverse. Adjusting the hierarchy rate upward or downward could result in arbitrary and speculative outcomes and could be contrary to sections 776(b)(1)(B) and 776(d)(3) of the Act. Furthermore, to engage in such a speculative exercise would undermine the purpose of Commerce's CVD AFA hierarchy, which is to use AFA rates that reflect the subsidization behavior of the foreign government in the country under investigation and that may also be corroborated under section 776(c) of the Act.[32] In this respect, we note that the Court rejected as "speculative"

[31] It is impossible to deter all non-cooperation. The CVD AFA hierarchy is designed to deter most non-cooperation.
[32] *See Essar Steel Limited* v. *United States*, Slip Op. 13–48, Court No. 09–197 (Court of International Trade) (April 9, 2013) at 7-8, citing Results of Redetermination Pursuant to Court Remand, *Essar Steel Limited v. United States*,

ArcelorMittal's assertion that the Severstal Companies benefited from application of NLMK's program-specific rate under the hierarchy.[33]

In short, we find that NLMK's program-specific rate remains sufficiently adverse. There is no information on the record to indicate that NLMK's program-specific rate is not sufficiently adverse to the Severstal Companies with regard to that program. This rate was properly selected pursuant to the CVD AFA hierarchy. Such a rate fulfills the statutory purpose of deterring future non-cooperation, and, therefore, is sufficiently adverse because it is the highest subsidy rate available for the program at issue. Adjusting this rate, or selecting another rate in place of it, would be a highly speculative endeavor and could contravene the statute.

On the basis of the additional explanation above, we find that the program-specific rate Commerce selected for the Severstal Companies pursuant to AFA was sufficiently adverse to satisfy the underlying statutory purposes.

AMUSA's Comments

- In the Draft Remand Results, Commerce explained that it was impossible to truly know whether any AFA rate is sufficient to ensure that the Severstal Companies do not obtain a more favorable result than if they had cooperated, the CVD AFA hierarchy is "designed to deter non-cooperation," and, thus, use of the hierarchy in selecting an AFA rate effectuates the purpose of the statute.[34]

Court Number 09–00197, Slip Op. 12–132 (CIT October 15, 2012) at 11 where the Court upheld Commerce's application of a CVD AFA hierarchy that "relies on the premise that the behavior of the government . . ." with regard to investigated companies "provides a reasonable estimate of the level of subsidization provided by the government" with regard to the program at issue." *See also SolarWorld Ams., Inc. v. United States*, 229 F. Supp. 3d 1362, 1367 (CIT 2017) (*SolarWorld*) (explaining that Commerce's CVD AFA hierarchy "attempts to balance three variables: inducement, program relevancy, and industry relevancy").

[33] *See Remand Order* at 20.

[34] *See* AMUSA Comments at 4, citing the Draft Remand Results at 8-9.

- However, Commerce's analysis rests entirely on the presumption that the AFA hierarchy results in a program rate that is sufficiently adverse. This presumption ignores important aspects of the *Remand Order* and other factual elements that undermine the deterrent effect of Commerce's reliance on the program-specific rate calculated for NLMK as the basis of the AFA "plug" applied to the Severstal Companies.
- At oral argument, Commerce stated that the 0.03 percent program rate it applied to the Severstal Companies was sufficiently adverse because: (1) it was higher than the rate that would have been applied pursuant to the Severstal's Companies' claim of non-use (which was 0.00 percent); and (2) it was higher than the rate Commerce determined for the Severstal Companies in the *Preliminary Determination*, which was 0.01 percent.[35] The Court rejected both of those explanations.[36]
- The Draft Remand Results do not provide any alternative explanation other than rote insistence that an AFA rate comporting with the CVD AFA hierarchy must inherently be adverse.[37] Thus, the issue noted by the Court in the *Remand Order* remains unaddressed, that Commerce's reliance on the CVD AFA hierarchy in the first place to arrive at Severstal's AFA rate is not sufficient.[38]
- Specifically, the Draft Remand Results failed to address why the 0.03 percent rate generated by the CVD AFA hierarchy will deter the future non-cooperation of the Severstal Companies (or other Russian firms). To comply with the Court's holding, Commerce must modify the Draft Remand Results and specifically address the issues raised by the Court.

[35] *See* AMUSA Comments citing *Remand Order* at 21.
[36] *Id*.
[37] *See* Draft Remand Results at 9.
[38] *See Remand Order* at 20-21.

- In the Draft Remand Results, Commerce failed to consider the circumstances of the instant investigation that undermine the deterrent effect of the AFA rate applied to the Severstal Companies. In the *Preliminary Determination*, Commerce calculated a 0.02 percent rate for NLMK for the tax program in question.[39] However, even with the knowledge of the subsidy rate calculated for NLMK, the Severstal Companies elected not to disclose or otherwise correct their claim of non-use of the program at any point after the *Preliminary Determination*. Thus, the Severstal Companies' subsequent inaction demonstrates that Commerce's CVD AFA hierarchy does not induce future cooperation.
- The AFA rate assigned to the Severstal Companies for the tax program at issue was not sufficiently adverse to encourage the Severstal Companies to report accurately their use of the program. Commerce's Draft Remand Results do not fulfill the requirements of the *Remand Order*, which was for Commerce to explain how the AFA rate applied to the Severstal Companies satisfies the deterrence requirement of the statute beyond the fact that it resulted from the CVD AFA hierarchy.
- If Commerce cannot provide such an explanation, as required by Court, then "it must select another rate that can be justified under the statute's purpose."[40]

Commerce's Position: In accordance with Commerce's CVD AFA hierarchy, we have continued to rely upon the 0.03 percent subsidy rate calculated for NLMK under the tax deduction for exploration expenses program as the basis for the AFA rate assigned to the Severstal Companies under the same program.

[39] *See* Preliminary Decision Memorandum at 21.
[40] *See* AMUSA Comments, citing *Remand Order* at 22.

In the investigation, Commerce discovered at verification that the Severstal Companies, in fact, used the tax deduction for exploration expenses program.[41] As a result, in the *Final Determination*, Commerce resorted to the use of AFA to derive the program subsidy rate it assigned to the Severstal Companies.[42] In deriving the AFA rate, Commerce, consistent with its CVD AFA hierarchy, selected an above *de minimis* net subsidy rate that was equal to the subsidy rate calculated for NLMK under the same program.[43]

Notably, while the 0.03 percent subsidy rate utilized in the *Final Determination* did not, by itself or in conjunction with other calculated subsidy rates, result in the Severstal Companies exceeding the one percent *de minimis* threshold, the Court did not find fault with this outcome. Rather, the Court found that such a result does not render Commerce's CVD AFA hierarchy to be unreasonable or unlawful:

> . . . ArcelorMittal identifies no authority that requires Commerce to consider the aggregate effect on a company's overall subsidy rate in selecting AFA for a particular program-specific rate. Consequently, whether or not Severstal's overall rate is affirmative or *de minimis* does not necessarily affect whether the program-specific rate it selects is sufficiently adverse. Therefore, on remand Commerce is not obligated to deviate from its AFA hierarchy or produce a program specific rate that necessarily results in an affirmative overall rate . . .[44]

However, in the *Remand Order*, the Court instructed Commerce to explain how the 0.03 percent AFA rate assigned to the Severstal Companies under the program at issue adhered to its practice of selecting AFA rates that are intended to ensure future cooperation.[45] Contrary to AMUSA's claims, Commerce provided such an explanation in the Draft Remand Results. Specifically, as explained in the Draft Remand Results, when respondents, such as the Severstal

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[41] *See* Severstal Companies Verification Report at 2 and 6-7.
[42] *See* Final Decision Memorandum at 14-15, 19-21 and Comment 21.
[43] *Id.*
[44] *See Remand Order* at 22.
[45] *See Remand Order* at 7, citing to *Ozdemir Boru San. ve Tic. Ltd. Sti. v. United States*, 273 F. Supp. 3d at 1233 (*Ozdemir*) (quoting Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. No. 103–316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. at 4199 (SAA)).

Companies, know that they likely will receive the highest possible subsidy rate for a program if they fail to cooperate, this deters non-cooperation from any respondent that knows it is being subsidized at a lower rate through a particular program. AMUSA disagrees with this explanation, arguing that the Draft Remand Results did not explain how the Severstal Companies in particular, are deterred from future non-cooperation. However, the statute's goal of deterrence is a general goal. Commerce's authority to use adverse inferences when there is non-cooperation exists to deter non-cooperation in general. As we stated above, it is impossible to deter all non-cooperation for every particular respondent in every case, and for each individual subsidy program under investigation. Therefore, AMUSA's arguments are premised on a misunderstanding of the statutory goal of deterrence. Congress authorized the use of adverse inferences to deter non-cooperation in general in antidumping and CVD proceedings.[46]

Further, in the *Remand Order*, the Court noted that "Commerce has discretion to select an AFA rate by any means permissible under the statute, so long as the rate it produces does not contravene the purposes of the statute."[47] Thus, when determining the AFA rate to be applied, Commerce must not only select a rate with the deterrence of future non-cooperation in mind, it must also ensure that the AFA rate it selects adheres to the provisions of the statute that govern Commerce's application and derivation of AFA rates. For example, section 776(b)(1)(B) of the Act, which deals with the application of AFA, states that Commerce is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information the party would have provided if the party had complied with the request for information, and section 776(d)(3)(A) of the Act states that Commerce is not required to estimate

[46] The Court in the *Remand Order* appears to agree. In the three instances on pages 20 and 21, and the one instance on page 36, where the Court used the phrase "deter future non-cooperation," it did not follow that phrase with the words "of the Severstal Companies." *See Remand Order* at 20, 21, and 36.
[47] *See Remand Order* at 22.

what the countervailable subsidy rate would have been if the party had cooperated. Additionally, section 776(c)(1) requires that any such AFA rate be corroborated, to the extent practicable. Further, sections 776(d)(1)(A)(i) and (ii) state that when determining the CVD AFA rate to be applied, Commerce may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or if there is no same or similar program, use a CVD rate for a subsidy program from a proceeding that Commerce considers reasonable to use. Thus, Commerce's practice of applying an AFA rate that deters future non-cooperation cannot be applied in isolation.

Accordingly, consistent with sections 776(b)(1)(B) and 776(d)(3)(A) of the Act, in deriving the AFA rate, Commerce did not speculate as to what the Severstal Companies' CVD rate would have been under the income tax deduction for mining exploration expenses program had they cooperated to the best of their ability. To select any other rate, outside of the CVD AFA hierarchy, would necessarily require Commerce to make some assumption as to what the actual program rate would have been. As Commerce stated in the Draft Remand Results, it would not be appropriate to examine the actual numerical value of the program rate at issue in order to assess, and potentially adjust the rate if it is too low or too high because to do so would result in arbitrary and speculative outcomes, and would be contrary to the Act.[48] Instead, pursuant to its obligation under section 776(c)(1) of the Act to corroborate AFA rates to the extent practicable, Commerce utilized an AFA program rate that reflected the subsidization behavior of the Russian Government regarding benefits it provided to another Russian producer of subject merchandise under the same program. And, in keeping with section 776(d)(1)(A)(i) of the Act, Commerce, per its CVD AFA hierarchy, used the net subsidy rate calculated for NLMK

[48] *See* Draft Remand Results at 9.

under the income tax deduction for mining exploration expenses program as the basis of the AFA rate assigned to the Severstal Companies under the same program. On this basis, Commerce exercised its discretion to select an AFA rate that was consistent with its practice and adhered to the provisions of the statute that govern the use of AFA and the derivation of AFA rates.

We also disagree with AMUSA's argument that the AFA program rate applied to the Severstal Companies does not sufficiently deter future non-cooperation because the Severstal Companies' failed to correct their inaccurate claim of non-use of the income tax deduction for mining exploration expenses program between the issuance of the *Preliminary Determination* and *Final Determination*. AMUSA's argument on this point is premised on its assumption of the Severstal Companies' intent (*i.e.*, the assumption that the Severstal Companies purposefully concealed their use of the income tax deduction for mining exploration expenses program and, upon learning of the 0.02 percent program subsidy rate calculated for NLMK in the *Preliminary Determination*[49] and taking Commerce's CVD AFA hierarchy into account, decided not to correct the record ahead of its impending verification). There is no evidence on the record regarding the Severstal Companies' intent with respect to the information they submitted concerning the income tax deduction for mining exploration expenses program and no evidence on the record indicating that the Severstal Companies would have reported their use of the tax program at issue if NLMK's subsidy rate under the tax program had been higher or if Commerce's CVD AFA hierarchy was different. Moreover, the Federal Circuit held in *Nippon Steel* that Commerce need not consider the respondent's intent when applying AFA under

[49] *See* Preliminary Decision Memorandum at 21. In the Final Determination, Commerce revised the subsidy rate NLMK received under the income tax deduction for mining exploration expenses program from 0.02 percent to 0.03 percent. *See* Final Decision Memorandum at 14-15, 19-21 and Comment 21.

section 776(b) of the Act.[50] AMUSA's argument on this point suffers from the same flaw described above, *i.e.*, that Commerce must ensure that every particular AFA rate deters non-cooperation from every particular respondent and every particular subsidy program under investigation. This is not what the law requires. AMUSA's argument in this respect is very similar to an argument the Court rejected in *SolarWorld Americas, Inc. v. United States*, when the petitioner in that case argued that application of the CVD AFA hierarchy was unreasonable because it led to a lower AFA rate in an administrative review than in the investigation for the same program.[51] Just as the petitioner's concern for deterrence of the particular respondent at issue in that case did not undermine the reasonableness of the CVD AFA hierarchy as a general deterrent, we find that AMUSA's arguments regarding deterrence of the Severstal Companies in this case do not justify departure from the hierarchy.

For these reasons, we continue to apply the 0.03 percent AFA rate to the Severstal Companies for the tax deduction program for mining exploration expenses.

B. Evidence to Support Commerce's Affirmative Specificity Finding for the Provision of Natural Gas for LTAR

As detailed above, in the *Final Determination*, we found that the provision of natural gas was *de facto* specific.[52] We based our finding on the application of AFA when, at verification, we were unable to verify Gazprom's 2012, 2013, and 2014 annual reports. Specifically, Commerce asked for supporting documentation that was used to generate the natural gas sales data that would substantiate the percentages reported in Gazprom's 2014 annual report. Because Gazprom officials did not allow Commerce officials to review the specific data, Commerce

[50] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-1383 (Fed. Cir. 2003) (*Nippon Steel*), "The ordinary meaning of 'best' means 'one's maximum effort,' as in 'do your best.' . . . While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element."
[51] *See SolarWorld*, 229 F. Supp. 3d at 1370.
[52] *See* Final Decision Memorandum at 15-16 and Comment 2.

could not verify the information reflected in the annual reports. Commerce explained that this was necessary to verify the consumption percentages that form part of the analysis to determine specificity. Lacking reliable information, Commerce applied AFA and determined the provision of natural gas to be *de facto* specific.

The Court found that the natural gas consumption percentages in the Gazprom annual reports were not verified by the materials produced by the GOR at verification, and thus the GOR did not act to "the best of its ability." The Court determined that Commerce reasonably applied AFA.[53] However, even though Commerce's decision to apply AFA was appropriate, the Court found that our *de facto* specificity finding was improper because we did not provide any specific factual basis for the specificity conclusion. The Court reasoned that Commerce provided no citation to any facts on the record in finding that the GOR's provision of natural gas was *de facto* specific.[54] The Court stated that Commerce rested its specificity finding on the proposition that because it may use an adverse inference, it therefore may find that the GOR's provision of natural gas was *de facto* specific. The Court, however, held that Commerce provided no authority to support this proposition or explain why it satisfies the statutory standard. The Court stated that both the statute's language and prior decisions of the Court[55] are clear that Commerce must rely on actual record facts in applying adverse inferences.[56] The Court, therefore, remanded the *Final Determination* to Commerce to identify the record facts supporting the *de facto* specificity determination for the provision of natural gas for LTAR.

[53] *See Remand Order* at 25.
[54] *Id*. at 31-33.
[55] *See, e.g., Changzhou Trina Solar Energy Co., Ltd. et al. v. United States*, 40 CIT 195 F. Supp. 3d 1334, 1350 (2016).
[56] *See Remand Order* at 31-33.

Commerce's Evaluation of the Record Facts

When applying an adverse inference, Commerce may rely on information from the petition, a final determination in the investigation, a previous administrative review, or any other information placed on the record.[57] When we initiated this investigation, we found that the petitioners provided sufficient evidence to support the allegation that the GOR is providing natural gas for LTAR to a select group of enterprises/industries and that cold-rolled steel producers are likely to be significant consumers of natural gas because of the high energy demands for steel production.[58] That evidence was contained within Gazprom's 2013 annual report, which the petitioners submitted to Commerce.[59]

After initiation, Commerce requested from the GOR data which could be used to evaluate natural gas purchases.[60] The GOR referred Commerce to Gazprom's 2014 annual report.[61] Commerce analyzed the data contained in the annual report and preliminarily found that the predominant user of natural gas is a group of industries composed of agro-chemistry, cement, and metallurgy (which includes the steel industry).[62] Thus, Commerce preliminarily determined that the provision of natural gas by Gazprom is *de facto* specific under section 771(5A)(D)(iii)(II) of the Act.[63] However, subsequently, at verification, the GOR refused to allow Commerce to examine underlying records to confirm the accuracy and completeness of the annual domestic sales of natural gas by consumer group contained within Gazprom's 2014

[57] *See* section 776(b)(2) of the Act and 19 CFR 351.308(c).
[58] *See* Initiation Checklist at 12-14.
[59] *Id*.
[60] *See* Commerce Letter to the GOR, regarding "First Supplemental Questionnaire to the Government of the Russian Federation," dated November 12, 2015 at Provision of Natural Gas for LTAR (question 9).
[61] *See* Letter from the GOR regarding, "Response to First Supplementary Questionnaire," dated November 19, 2015 at 7; and Letter from the GOR regarding, "Primary Questionnaire Response," dated October 26, 2015 at Exhibit III-38.
[62] *See* Preliminary Decision Memorandum at 14-15.
[63] *Id*. at 15.

annual report.[64] Therefore, at the *Final Determination*, Commerce determined that it could not rely on the unverified 2014 annual report for its specificity analysis, and applied AFA.[65]

On the basis of the record, the evidence to support Commerce's AFA *de facto* specificity finding for the provision of natural gas for LTAR is Gazprom's 2013 annual report. Evidence within Gazprom's 2013 annual report, which is part of the Petition, indicates that: (1) the metallurgy industry "heavily used" natural gas and accounted for four percent of Gazprom's total sales in 2013; (2) the metallurgy sector is one of the top six sectors that accounted for Gazprom's 2013 domestic natural gas sales; and (3) the metallurgy sector is the only industrial manufacturing sector whose consumption of Gazprom's natural gas is separately listed in the annual report.[66] This information regarding Gazprom's natural gas sales, contained within Gazprom's 2013 annual report, is the record evidence on which Commerce is relying for our *de facto* specificity finding that the metallurgy sector is a predominant user of natural gas provided by Gazprom. Use of that information provides a factual basis for the specificity finding and demonstrates that Commerce's conclusion was supported by substantial evidence and in accordance with the law. Further, we note that no interested party brought litigation against Commerce arguing that it should not have initiated on the allegation of the provision of natural gas for LTAR because of inadequate support for specificity.

AMUSA's Comments

- Commerce identified record information that supports its AFA *de facto* specificity finding for the provision of natural gas to NLMK for LTAR, as required by the Court. Therefore, Commerce should make no changes to the Draft Remand Results with respect to the *de facto*

[64] *See* Final Decision Memorandum at 15-16 and Comment 2.
[65] *Id*.
[66] *See* Russia CVD Supplement at Exhibit-45 (Gazprom's 2013 annual report at page 67).

specificity finding for the program and should adopt the conclusions set out in the Draft Remand Results.

Commerce's Position: In the absence of comments to the contrary, our findings in the Draft Remand Results remain unchanged.

VI. FINAL RESULTS OF REDETERMINATION

Consistent with the *Remand Order*, we have explained why the 0.03 percent AFA assigned to the Severstal Companies adheres to Commerce's practice to utilize an AFA rate that deters future non-cooperation and that adheres to the provisions of the statute that governs the use and derivation of AFA rates. Consistent with the *Remand Order*, we have also examined the record and identified evidence supporting the AFA *de facto* specificity determination for the provision of natural gas for LTAR.

12/17/2018

X 

Signed by: GARY TAVERMAN

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