

FINAL RESULTS OF REMAND REDETERMINATION

The Navigator Company, S.A. and Packaging Corporation of America et al. and Domtar Corporation v. United States and Packaging Corporation of America et al.
Consol. Court No. 18-00192, Slip Op. 19-146 (CIT November 22, 2019)

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) in *The Navigator Company, S.A. (Navigator) and Packaging Corporation of America et al. and Domtar Corporation v. United States and Packaging Corporation of America et al.*, Consol. Court No. 18-00192, Slip Op. 19-146 (CIT November 22, 2019) (*Remand Order*). These final remand results concern Commerce’s final results in the administrative review of the antidumping duty order on certain uncoated paper products (paper) from Portugal for the period covering August 26, 2015 to February 28, 2017 (POR).¹ The CIT found that Commerce made a substantive modification to the *Amended Final Results* by changing the adverse facts available (AFA) value it used for determining allocated U.S. brokerage expenses (USBROK2U) after the *Final Results*, that Commerce’s basis for making an adverse inference was the same basis that justified using facts available, and that its use of an adverse inference appeared to be unjustified.² The CIT ordered Commerce either to select a

¹ See *Certain Uncoated Paper from Portugal: Final Results of Antidumping Duty Administrative Review; 2015-2017*, 83 FR 39982 (August 13, 2018) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM), as amended by *Certain Uncoated Paper from Portugal: Final Results of Antidumping Duty Administrative Review; 2015-2017*, 83 FR 52810 (October 18, 2018) (*Amended Final Results*).

² See *Remand Order* at 23.

neutral value to use as facts available or to provide an explanation addressing how Navigator failed to act to the best of its ability that is distinct from Commerce's basis for using facts available.

Consistent with the CIT's remand order, Commerce has selected a neutral facts available value for allocated brokerage expenses by calculating the weighted average of all positive USBROK2U values reported for the POR.

II. BACKGROUND

On August 13, 2018, Commerce published the *Final Results* pertaining to the mandatory respondent, Navigator, in the first administrative review of paper from Portugal. In the *Final Results*, Commerce found that Navigator failed to explain how its method of allocating U.S. brokerage and handling expenses in the reporting field USBROK2U was not distortive, and, therefore, Commerce based the allocated brokerage expenses on AFA. As AFA, Commerce used the highest allocated brokerage expense for any U.S. sale reported with allocated U.S. brokerage and handling expenses.

On August 13, 2018, Navigator alleged that the *Final Results* contained ministerial errors. Specifically, Navigator claimed that Commerce erred in calculating Navigator's allocated U.S. brokerage and handling expenses by: (1) applying AFA because Commerce incorrectly rephrased Navigator's questionnaire responses; (2) applying AFA to all of Navigator's total reported allocated U.S. brokerage and handling expenses (USBROK2U), rather than to the allocation methodology of these expenses; and (3) selecting an AFA expense that resulted in U.S. brokerage and handling expenses being equal to one-third of U.S. sales value.³ In

³ See Navigator's Letter, "Certain Uncoated Paper from Portugal: Ministerial Error Allegation," dated August 13, 2018.

Commerce’s ministerial error memorandum, Commerce agreed with Navigator, stating that it had used incorrect information when applying AFA.⁴ Commerce explained that it erred because it does “not know the full universe of inaccuracies or distortions associated with{Navigator’s reported USBROK2U.}⁵ To correct this error, Commerce selected the highest actual U.S. brokerage expense (USBROKU), instead of the highest allocated brokerage expense (USBROK2U), and applied this amount to all sales with USBROK2U reported. As a result, U.S. brokerage expenses were no longer equal to more than one-third of U.S. sales value.⁶ This correction led to a change in Navigator’s weighted-average dumping margin from 37.34 percent to 1.74 percent.⁷ On October 18, 2018, Commerce published the *Amended Final Results*.⁸

On November 22, 2019, the CIT held that Commerce’s decision to base Navigator’s allocated brokerage expenses on AFA was not supported by substantial evidence, and it remanded the decision made in the *Amended Final Results* to Commerce to either select a neutral value for allocated U.S. brokerage expenses or provide an additional explanation as to why the use of AFA was appropriate.⁹

III. REMAND ISSUE

Consistent with the CIT’s *Remand Order*, Commerce has selected a neutral value to use as facts available. In its opinion, the CIT found that Commerce, after analyzing Navigator’s questionnaire responses, had a reasonable basis to determine that the allocated expenses, as

⁴ See Memorandum, “Administrative Review of the Antidumping Duty Order on Certain Uncoated Paper from Portugal: Ministerial Error Memorandum for the Amended Final Results of the Final Administrative Review,” dated October 9, 2018, at 5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *Amended Final Results*.

⁹ See *Remand Order* at 23-24.

reported, were distortive.¹⁰ In addition, the CIT further found that Commerce's decision to disregard the allocated data, as reported, was supported by substantial evidence.¹¹ However, it held that, given that Navigator's responses were not incomplete and Navigator did not otherwise withhold information, more was required for Commerce to use an adverse inference in applying facts available.¹² Accordingly, the CIT held that Commerce must either articulate a separate reasoning for applying an adverse inference that would explain how Navigator failed to cooperate to the best of its ability or choose a neutral facts available value.¹³

Consistent with the CIT's order, Commerce has applied neutral facts available. Given its concern that the reported allocated USBROK2U expenses contain negative expenses as a result of certain adjustments relating to non-POR expenses, Commerce has now adjusted the reported allocated USBROK2U expenses by removing all brokerage and handling expenses that have been reported to have a zero or negative value. Commerce has used the weighted average of the adjusted USBROK2U expenses, as neutral facts available, for Navigator's allocated U.S. brokerage and handling expenses. Although the full extent of the distortions introduced by Navigator's allocation methodology at the transaction level is unknown, a weighted average of its allocated expenses would eliminate distortions. Therefore, as neutral facts available, Commerce is using the weighted average of all positive, non-zero allocated U.S. brokerage and handling expenses reported for the POR.

¹⁰ *Id.* at 23.

¹¹ *Id.* at 20.

¹² *Id.* at 23.

¹³ *Id.* at 23-24.

IV. Final Remand Results

In accordance with the Court's *Remand Order*, Commerce revised its application of AFA to neutral facts available for Navigator's allocated U.S. brokerage and handling expenses using the weighted average of all positive, non-zero values for USBROK2U in the Draft Results of Remand.¹⁴ We have not changed the neutral facts available value used for USBROK2U in these Final Results of Redetermination. Based on these changes, the estimated POR weighted-average dumping margin for Navigator is listed in the chart below.

Exporter/Producer	Amended Final Results Weighted-Average Dumping Margin	Remand Redetermination Weighted-Average Dumping Margin
The Navigator Company, S.A.	1.75 percent	1.63 percent

V. Summary and Analysis of Comments from Interested Parties

On January 24, 2020, Commerce released the Draft Results of Redetermination and invited parties to comment on the Draft Results of Redetermination.¹⁵ On January 30, 2020, the petitioners and Navigator submitted comments.¹⁶

In their comments, the petitioners disagreed with Commerce's selection of neutral facts available, stating that the *Remand Order* permitted Commerce to either apply neutral facts available or to "provide an explanation addressing how Navigator failed to act to the best of its ability that is distinct from Commerce's basis for using facts available."¹⁷ The petitioners,

¹⁴ See Memorandum, "*The Navigator Company, S.A. and Packaging Corporation of America et al. and Domtar Corporation v. United States and Packaging Corporation of America et al.*," Consul. Court No. 18-00192, Slip Op. 19-146 (CIT November 22, 2019): Draft Results of Redetermination, dated January 23, 2020 (Draft Results of Redetermination).

¹⁵ *Id.*

¹⁶ See Petitioner's Letter, "Comments on Draft Results of Redetermination Pursuant to Court Remand, Slip Op. 19-146," dated January 30, 2020 (Petitioner's Draft Comments); Navigator's Letter, "Comments Upon Commerce's Draft Redetermination Pursuant to Court Remand," dated January 30, 2020 (Navigator's Draft Comments).

¹⁷ See Petitioner's Draft Comments at 2.

therefore, argue that Commerce should return to applying an adverse inference.¹⁸ Navigator stated that “Commerce has complied with the remand opinion from the U.S. Court of International Trade,” but suggested that Commerce “adjust slightly” by capping the amount of the U.S. brokerage and handling expenses applied as facts available by the total amount of brokerage and handling expenses that Navigator reported.¹⁹

Issue 1: Whether Commerce’s Selection of Facts Available is Appropriate

Petitioner’s Comments:

- Commerce’s determination in the *Final Results* and *Amended Final Results* to apply adverse inferences to Navigator’s allocated U.S. brokerage and handling expenses was the correct decision, with only its justification for such an inference lacking.²⁰
- Based on the standard set forth in *Nippon Steel*, an adverse inference consideration begins when a failure to cooperate to the best of the respondent’s ability is identified, which is true of Navigator’s responses.²¹
- Commerce’s supplemental questionnaire asked three questions about the USBROK2U values, asking Navigator to address substantive issues with its values that showed distortions. Navigator did not address these issues nor suggest an alternative reporting method, only explaining that the values were based on adjustments from previous months, lowering cost.²²
- Based on these minimal responses provided by Navigator, Commerce’s original conclusion that Navigator had not put forth the “maximum effort” to comply with its

¹⁸ *Id.* at 2.

¹⁹ See Navigator’s Draft Comments at 2.

²⁰ See Petitioner’s Draft Comments at 2-3.

²¹ *Id.* at 3 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*)).

²² *Id.* at 3-5.

questions was reasonable and should be applied to the final results of the redetermination, with expanded justifications for its application of adverse inferences.²³

Navigator's Comments:

- Commerce complied with the Court's remand instructions in choosing a facts available value. There is no basis to apply adverse facts available. The Court found that Navigator did not withhold information and that a failure to show an allocation is not distortive is not a basis for adverse inferences.²⁴ Therefore, a facts available finding is in line with the Court's order.
- Navigator fully responded to all questions asked by Commerce regarding its allocation methodology of USBROK2U, providing worksheets, calculations and full responses. Thus, there is no basis to apply the standard set forth in *Nippon Steel* regarding Navigator's responses to Commerce's inquiries.²⁵
- There was no dispute on the record regarding the total amount of brokerage and handling expenses that needed to be allocated to sales. As a result, deficiencies with the allocation methodology do not show a lack of cooperation in supplying information to Commerce. There is no substantive evidence that Navigator failed to provide requested information.²⁶

Commerce's Position:

Commerce complied with the Court's remand by choosing neutral facts available to value Navigator's USBROK2U, because the record did not support a finding of AFA.

²³ *Id.* at 5.

²⁴ *See* Navigator's Draft Comments at 2.

²⁵ *Id.* at 3.

²⁶ *Id.* at 4.

In the *Remand Order*, the Court found that there was substantial evidence to support Commerce’s decision to resort to facts available to determine Navigator’s allocated brokerage expenses, but it also found that Commerce’s basis for finding that Navigator did not cooperate to the best of its ability was insufficient.²⁷ Specifically, the Court found that Commerce’s basis for making an adverse inference was the same basis that justified using facts available (*i.e.*, the failure to demonstrate that the allocation methodology was not distortive), and that, in the Court’s view, Commerce’s use of an adverse inference for an otherwise cooperative respondent appeared to be unjustified.

The petitioners argue that Navigator did not address Commerce’s specific concerns regarding its allocation of the expenses listed under the USBROK2U field.²⁸ Commerce’s regulations at 19 CFR 351.308 state that if “an interested party ‘has failed to cooperate by not acting to the best of its ability to comply with requests for information,’ the Secretary may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available.”²⁹

Further, the petitioners state that, in *Nippon Steel*, the Court of Appeals for the Federal Circuit (Federal Circuit) explained that “[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown... While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. “Inadequate inquiries” may

²⁷ See *Remand Order* at 23.

²⁸ See Petitioner’s Draft Comments at 5.

²⁹ See 19 CFR 351.308(a).

suffice. The statutory trigger for Commerce’s consideration of an adverse inference is simply a failure to cooperate to the best of respondent’s ability, regardless of motivation or intent.”³⁰ The petitioners state that Commerce’s original determination to apply AFA in connection with USBROK2U satisfies this standard, namely that Navigator did not address the substantive issues identified in a supplemental questionnaire.³¹ Therefore, according to the petitioners, these minimal responses did not amount to the requested “detailed explanation” and did not address the specific concerns raised by the agency, such that Commerce reasonably concluded (in the *Final Results* and *Amended Final Results*) that Navigator had not put forth its maximum effort to provide Commerce with full and complete answers to all inquiries and, thus, the standard for the application of an adverse inference in the selection of available facts was met.³² The petitioners argue that Commerce should expand on its original explanations for AFA in response to this *Remand Order*.

There is no dispute that Commerce has the authority to apply an adverse inference when a respondent fails to cooperate to the best of its ability. Nor is there any disagreement with the standard that the Federal Circuit articulated in *Nippon Steel*. Despite their contentions, the petitioners merely offer substantially the same reasoning for finding failure to cooperate to the best of its ability which the Court examined and rejected in its remand order.³³ Further, the supplemental questionnaire responses pointed to by the petitioners in their comments are the exact same responses that formed the basis for our original determination that Navigator failed to cooperate to the best of its ability.³⁴ The Court found that these responses were not incomplete

³⁰ See Petitioner’s Draft Comments at 3.

³¹ *Id.* at 4.

³² *Id.*

³³ See *Remand Order* at 22-23.

³⁴ See Petitioner’s Draft Comments at 3-5 (citing *Final Results* IDM, at 6-8).

and that Navigator did not withhold information; therefore, while Commerce was permitted to disregard the allocated data and use facts otherwise available in light of the distortions caused by the allocation methodology, more would be required for Commerce to apply AFA.³⁵ In its remand order, the Court expressly stated that “Commerce must either select a neutral value to use as facts available or provide an explanation addressing how Navigator failed to act to the best of its ability *that is distinct from Commerce’s basis for using facts available.*”³⁶ In compliance with the *Remand Order*, we examined the record and conducted a thorough review of all questionnaire responses on the record regarding this expense.³⁷ We found no additional information on the record that would support a continued finding of failure by Navigator to cooperate to the best of its ability that it distinct from our basis for using facts available. The petitioners themselves did not point to any additional record information nor did they provide any additional basis for finding lack of cooperation and applying AFA beyond the arguments already presented to and rejected by the Court. Thus, on this record, an adverse inference is not warranted.

Commerce, therefore, in compliance with the Court’s order, determined that the use of facts available is warranted regarding these allocated brokerage and handling expenses and applied neutral facts available.

Issue 2: Selection of Facts Available Value

Petitioner’s Comments:

- Commerce should return to its original, highest USBROK2U AFA value used in the *Final Results* as adverse inferences are warranted. Additionally, the value used in the

³⁵ See *Remand Order* at 23.

³⁶ *Id.* at 23-25 (emphasis added).

³⁷ See Navigator Supplemental Section C Questionnaire Response. at 52-53.

Amended Final Results was remanded by the Court due to the reasoning by Commerce that USBROKU values were inappropriate choices for AFA.³⁸

- Commerce’s selection of a weight average of all positive, non-zero USBROK2U values is not neutral since, according to the petitioner’s calculations, it significantly changes the brokerage and handling costs for a large number of sales compared to the AFA rate used in the *Amended Final Results*.³⁹
- Commerce should continue to apply AFA, and select the highest value reported in USBROK2U as the AFA value. Alternatively, Commerce could select a different AFA value as an appropriate alternative to the AFA value used in the *Final Results*, which is a non-aberrational value, for USBROK2U.⁴⁰

Navigator’s Comments:

- Commerce’s choice of a weighted average of all positive, non-zero USBROK2U values still applies adverse inferences by increasing the total brokerage and handling expense for Navigator by more than the brokerage and handling expenses that were actually incurred during the POR.⁴¹
- The total amount of brokerage and handling expenses reported was not challenged by Commerce nor has any reporting deficiency been found with regard to that total. Therefore, Commerce should use this total to recalculate the weighted average of USBROK2U used for facts available.⁴²

³⁸ See Petitioner’s Draft Comments at 6.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 7.

⁴¹ See Navigator’s Draft Comments at 5.

⁴² *Id.* at 5.

- Since any upward adjustment of total brokerage and handling expenses incurred would constitute adverse facts available, Commerce should modify its facts available value to reflect this total in order to remain faithful to the choice of a neutral value.⁴³

Commerce’s Position: As facts available, we are continuing to use a weighted average of all positive values for USBROK2U. Navigator states that the value Commerce has chosen for facts available is unsuitable because the facts available brokerage expenses exceed reported allocated brokerage expenses, and Commerce’s selection is therefore not neutral. We disagree with the characterization of our facts available value. First, Commerce concluded in the *Final Results* that Navigator’s allocated brokerage expenses, as reported, were distortive.⁴⁴ The Court upheld this conclusion, finding that it permitted us to disregard the allocated data and turn to facts otherwise available.⁴⁵ While Navigator argues that the Court took issue with the allocation methodology only, and not the underlying data themselves, we disagree. The Court specifically noted that, by using this methodology, Navigator includes some “adjustments associated with non-POR expenses and excludes some adjustments made after the POR.”⁴⁶ These adjustments impact “Navigator’s calculation of U.S. brokerage expenses,” thereby calling into question the total brokerage and handling amount Navigator reported. Second, it would be illogical to consider the reported allocated expenses distortive and disregard them, while reintroducing the same expenses (*i.e.*, the adjustments that led to the distortions in the data) in our calculation under the guise of a “cap” for facts available.

In contrast, a weighted average of all positive values for USBROK2U gives effect to all positive brokerage and handling expenses actually incurred by the respondent and provides a

⁴³ *Id.* at 5.

⁴⁴ *See Final Results* IDM at 8.

⁴⁵ *See Remand Order* at 23.

⁴⁶ *Id.* at 23.

more accurate facts available value for allocated brokerage and handling expenses for Navigator's sales. Additionally, the value proposed by Navigator as an alternative application of facts available is inherently distortive, since it includes all allocated brokerage values and continues to perpetuate the distortions that led Commerce to apply facts available in the first place, as discussed above.⁴⁷ We therefore do not agree with the use of this reported value as alternative facts available. Instead, we continue to find it reasonable to assign a weighted average of the positive allocated brokerage and handling expenses as the selected neutral value.

The petitioner argues that the facts available value selected are not neutral because they result in a lower cost of brokerage and handling for a large number of sales. We first note that the petitioner did not provide any other neutral facts available value for Commerce to consider. We further find the petitioner's argument unpersuasive because it compares the distorted values that Navigator originally reported – computed by customer and product – to the neutral facts available value selected here. It is unsurprising that certain of the original figures were higher than the one now used in our calculations, since Navigator used a narrower methodology for its allocated brokerage and handling expenses while Commerce is using a global value. This does not negate the neutral nature of Commerce's facts available value.

It is unnecessary to consider the petitioners' argument regarding which AFA value Commerce should select, because Commerce is not applying AFA.

⁴⁷ See Navigator's Draft Comments at 5.

For the reasons described above, we continue to conclude that choice of a neutral facts available value is valid and in compliance with the *Remand Order*.

2/18/2020

X 

Signed by: JEFFREY KESSLER

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