SALVAGING COURT, AGENCY AND PRIVATE LITIGANT RESOURCES WHEN FACED WITH NON-COOPERATIVE PARTIES*

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I. INTRODUCTION

The challenge of reaching decisions in international trade investigations at the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC") when companies whose data are needed fail to cooperate is not a new one. Parties have refused to cooperate with agency requests for information since the inception of the trade laws, and the agencies have been forced to resolve cases despite that non-cooperation. What is new is the amount of agency, court and cooperating party resources being spent on cases as a result of non-cooperation by subject companies. In the current state of seemingly-constant budget cuts and resource constraints, the question must be asked whether these substantial resource expenditures to compensate for non-participation by targeted companies is required by law and is warranted.

In investigations, reviews and appeals involving U.S. antidumping or countervailing duty proceedings, three specific areas of agency practice are worth examining on this resource allocation issue. First, substantial Commerce, court and cooperating party resources have been devoted to repeatedly following up with foreign producers who fail to submit requested information and then to determining the rate that should be applied to the non-cooperating company. Second, at the ITC, similar resources are devoted to the analysis and determination of whether injury has been caused (in an original investigation), or whether injury is likely to

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continue or recur (in a five-year review), when foreign parties refuse to cooperate. Third, ITC decisions to conduct a "full" rather than "expedited" sunset review when foreign producers do not participate is a questionable use of resources. Although these issues differ in terms of the nature of the analyses used, they all share a common feature – the agencies, the courts and cooperating parties are forced to incur significant time and expense to "backfill" and compensate for the outright refusal of subject companies to submit information in the proceeding.

This paper discusses the evolution of approaches to uncooperative parties in these three areas of U.S. trade remedy proceedings before Commerce, the ITC and the courts, and explores how these approaches could be revised – without legislation and within current precedent – to promote administrative and judicial efficiency and avoid wasting scarce resources.

II. IS THE EXPENDITURE OF SUBSTANTIAL RESOURCES IN CALCULATING RATES FOR NON-COOPERATING PARTIES WARRANTED?

Although it might seem intuitive that a company that fails to cooperate and, essentially, thumbs its nose at the agency when asked to provide information in a trade case should not have the right to argue about the resulting dumping or subsidy rate, the opposite is true. Despite refusing to cooperate with the agency and, in some cases, submitting fraudulent information to Commerce, foreign producers often file briefs arguing to the agency what their margin should be, costing time and resources of Commerce and opposing parties. When the resulting margin is issued by Commerce, the non-cooperating party wastes further resources of the agency, opposing parties and the judiciary by appealing the Commerce decision to the court, claiming that the rate Commerce applied was "too high." Left on the cutting room floor is the question of why the company did not cooperate so that its actual rate could be assessed, or how anyone would know that the resulting margin is "too high" when the company refused to submit the data to calculate that margin in the first place.

The legal analogy to this scenario that comes to mind is that of exhaustion of administrative remedies. The doctrine of exhaustion of administrative remedies holds that a party challenging an agency decision must have exhausted all administrative remedies by raising any issues with the agency prior to seeking judicial review, or it waives the right to challenge those issues on appeal.[2] The exhaustion doctrine is designed to advance the dual purposes of promoting agency authority and promoting judicial efficiency.[3] Given that parties are not permitted to waste the resources of the court by appealing an issue when they failed to raise that issue at the agency level, it must be questioned why parties that refuse to cooperate with the agency by providing requested information are allowed to task the resources of the court and the agency by arguing about the rate applied to them. Does the law really require the amount of resources the agency, the courts and the cooperating parties are expending under these circumstances?

As detailed below, the authors believe the answer is no. The amount of resources spent by the agency, the courts and cooperating parties in analyzing, defending and calculating rates for companies that refuse to play ball is astonishing and is not required by the statute or a proper interpretation of case law.

A. Congress Has Authorized the Use of Adverse Inferences When Parties Fail to Cooperate

The U.S. antidumping ("AD") laws and countervailing duty ("CVD") laws authorize Commerce to use "adverse facts available" ("AFA") if an interested party fails to cooperate with

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[2] See Sandvik Steel Co. v. United States, 164 F.3d 596, 599-600 (Fed. Cir. 1998) and McKart v. United States, 395 U.S. 185, 193 (1969).

[3] Woodford v. Ngo, 548 U.S. 81, 89 (2006); 28 U.S.C. § 2637(d). "Although that statutory injunction {28 U.S.C. § 2637(d)} is not absolute, it indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." Corus Staal BV v. United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

information requests in trade remedy proceedings.[4] The overall purpose of applying AFA is to induce cooperation of interested parties with agency requests for information and to ensure that a party does not obtain a more favorable result by failing to cooperate.[5] Proper use of AFA should also promote administrative efficiency, but that result has rarely been the case in recent years. The time-consuming nature of the inquiry generally is not related to whether to apply AFA to a recalcitrant respondent, but to how the dumping or subsidy rate for the non-cooperating party should be determined.

Under the "best information available" ("BIA") law—the predecessor to today's facts available law – Commerce presumed that the highest prior margin was the best information of current margins because, if it were not so, the respondent would submit current information showing margins to be less.[6] Commerce's implementing regulations allowed the agency to take into account a respondent's failure to cooperate with information requests in determining what was the "best information."[7] Commerce's rebuttable presumption and resort to adverse BIA was its primary means of inducing respondents to respond to questionnaires.[8] Commerce used the BIA rule as "'an investigative tool, which {Commerce} may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest,'" and the courts sustained this practice.[9]

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4 19 U.S.C. § 1677e(b).

5 See F. Lii De Cecco Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("De Cecco"); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316(I) at 869-70 ("SAA"), reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99.

6 See, e.g., Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990).

7 Id. at 1191 ("Where a party . . . refuses to provide requests information, that fact may be taken into account in determining what is the best available information.") (quoting 19 C.F.R. § 353.51 (1988)).

8 Id.

9 Id. at 1191 (quoting Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984)).

The Uruguay Round Agreements Act ("URAA") largely tracked the prior BIA law it replaced. Specifically, the URAA amended section 776(a) of The Tariff Act of 1930 ("the Act") to direct Commerce and the Commission to apply "facts otherwise available" if necessary information is not available on the record.[10] Although there is a common misperception that the AFA law is significantly different from the BIA law, the legislative history suggests otherwise. The Statement of Administrative Action ("SAA"),[11] in describing the international agreements that led to enactment of section 776 of the new law, begins by recognizing that "{t}he Agreements largely track current law, but use different terminology."[12] The SAA further states that new section 776 continues to require Commerce to make decisions based on the facts available where requested information is missing for whatever reason and that Commerce need not "prove that the facts available are the best alternative information." Id. Indeed, as the SAA correctly notes, "proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done."[13] Despite this recognition, the courts appear to be more frequently requiring the agency to prove precisely this point, even in contexts when there has been a refusal to cooperate by the subject company and where adverse inferences are authorized by the statute.

Section 776(b) of the new law, like its predecessor, permits the agency to draw an adverse inference when a party has "failed to cooperate by not acting to the best of its ability to

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[10] 19 U.S.C. § 1677e(a).

[11] Pursuant to the statute, the SAA is the United States' "authoritative expression" on the interpretation and application of the Uruguay Round Agreements Acts. 19 U.S.C. § 3512(d).

[12] SAA at 869, reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99.

[13] Id. at 870, reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99 (emphasis added).

comply with the request for information."[14] The purpose of this provision is "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[15] Such adverse inferences may include reliance on information derived from (1) the petition, (2) the final determination in the investigation, (3) any previous review, or (4) any other information placed on the record.[16] Despite the lack of any real substantive change to the statute's authorization of the use of adverse inferences, there are an increasing number of cases in which the magnitude of the margin applied due to respondent's noncooperation is challenged as "too high" or "punitive."

Arguments attempting to differentiate the old and new laws and agency practice regarding the use of AFA have generally focused on the requirement in the new law that when the agency relies on "secondary" information, the agency "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal."[17] The SAA further elaborates on the concept of corroboration:

> Consistent with Annex II, paragraph VII of the Agreement, section 776(c) requires Commerce and the Commission to corroborate secondary information where practicable using independent sources. Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise. Secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegations, or as in the case of information from prior section 751(a) reviews, it concerns a different time frame than the one at issue. Independent sources may include, for example, published

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[14] 19 U.S.C. § 1677e(b). "{T}he statute does not contain an intent element . . . . 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." Nippon Steel Corp. v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003).

[15] SAA at 870 reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99.

[16] Id.

[17] 19 U.S.C. § 1677e(c).

> price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review.
>
> Corroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value . . . .
>
> The fact that corroboration may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference under subsection (b).[18]

Mirroring the SAA, the Department's regulations explain that "corroboration" involves confirming that secondary information has "probative value."[19] "The fact that corroboration may not be practicable in a given circumstance will not prevent" Commerce from applying an adverse inference.[20]

Although the SAA and the agency regulations make clear that corroboration is only required to the extent practicable, and is merely to ascertain if the information used has some "probative value," this requirement has led to the agency, courts and private parties expending unnecessary resources trying to "corroborate" information where no party cooperates and where adverse inferences are authorized.

B. Commerce's Approach to Non-Cooperation and the Courts' Review Thereof

When parties refuse to cooperate in submitting requested information, Commerce first undertakes the issuance of a series of deficiency letters, asking repeatedly for submission of information from the foreign producer. This process itself is time-consuming and resource draining. When the foreign producer fails to submit the requested information – and, often, fails to submit any information or to permit verification of information that was submitted – the

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[18] SAA at 870 reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99.

[19] 19 C.F.R. § 351.308(d).

[20] Id.

agency then expends substantial resources determining the rate that should be applied. Further resources are devoted to this effort on appeal. Having failed to submit required information to the agency, the non-cooperating foreign producer expends resources that should have been devoted to submitting the requested information instead to battling the agency in court regarding the AFA rate applied.

Under the prior "BIA" and adverse inferences laws, Commerce generally applied to the uncooperative company a rate chosen from among the highest rates assigned during any segment of the proceeding, the highest transaction- or model-specific margins available on the administrative record, or the highest rates alleged in the petition. The use of these rates was consistent with the statutory purpose of not rewarding companies that failed to cooperate. More recently, however, in response to appeals and remands from the Court, Commerce has often been forced to reexamine the rates applied and instead attempt to derive rates that reflect "commercial reality," rates that are not too high or "punitive," rates that are not "aberrational" or rates that the Court finds otherwise to be justifiable under close scrutiny.

The U.S. Court of Appeals for the Federal Circuit has held that Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin."[21] Despite this recognition, in practice the appellate court has often rejected the agency's chosen AFA rate. In several cases, the Court interpreted the new corroboration requirement much more strictly than the statutory terms, and required Commerce to demonstrate that the selected AFA rate reflects "commercial reality" and is a "reasonably accurate estimate" of the uncooperative respondent's actual dumping margin, albeit with "some

[21] Timken Co. v. United States, 354 F.3d 1334, 1345 (Fed. Cir. 2004) (quoting De Cecco, 216 F.3d at 1032).

built-in increase intended as a deterrent to non-compliance."[22] Notably, nothing in the statute or legislative history has a commercial reality requirement.

Based on this precedent, the CIT has ordered multiple remands for Commerce to reconsider and/or recalculate (downward) AFA margins for uncooperative foreign producers. The focus of these remands has included the magnitude of the margin, the corroboration issue, and the size of the dataset used to calculate the AFA rate.

Cognizant of the courts' interpretations and approach to AFA rates, many respondents (and their counsel) make a strategic decision to not respond to Commerce requests for information necessary to calculate a dumping or subsidy margin based on that respondent's actual sales during the relevant period. Respondents instead participate in the investigation or reviews only by submitting limited information or only insofar as attacking Commerce's selected AFA rate or arguing that corroborating information is aberrational, punitive or otherwise unreasonable. If Commerce selects an AFA rate that the uncooperative respondent considers is "too high," then that respondent frequently challenges the AFA rate at the courts. The resources devoted to addressing these challenges are substantial.

1. Resources Devoted to Attempting to Gather Information

The first area in which non-cooperating foreign producer drain agency and cooperating domestic producer resources is in repeatedly refusing to respond to questions asked or to provide information requested. Although the statute requires the agency to give parties an opportunity to amend and correct responses that are incomplete or inadequate[23] the statute does not require the number and extent of opportunities to amend responses that Commerce provides. In many

[22] Gallant Ocean (Thailand) Co. v. United States, 602 F.3d 1319, 1323-24 (Fed. Cir. 2010) ("Gallant Ocean"); De Cecco, 216 F.3d at 1032.

[23] 19 U.S.C. § 1677m(d).

antidumping and countervailing duty cases, it is the norm to have multiple rounds of "deficiency" questionnaires, as foreign producers submit "responses" that fail to provide the critical information requested by the agency. These repeated rounds of questionnaires exhaust resources of the agency and of domestic producers, who are forced to wade through piles of pages that purport to respond but that withhold requested data. This superficial "response" of a foreign producer, which avoids the actual submission of information requested, is a huge resource drain, particularly when the use of adverse inferences could thwart such behavior.[24]

The appellate court recently recognized the need for adverse inferences when a foreign producer deliberately withholds requested data in the hope of a better result: "{a}bsent the threat of an adverse inference, respondents could sit out the preliminary phase of the investigation and submit requested data only when the resulting preliminary antidumping rates are higher than the rate that would have been established with the withheld data."[25] Based on this recognition, the Federal Circuit sustained Commerce's application of AFA to the complaining foreign producer, who refused to provide requested information until late in the investigation, when it determined it was to its advantage to do so.[26] That Commerce was sustained in applying AFA under these circumstances should encourage the agency to move more quickly in applying AFA in other cases where it faces similar recalcitrant behavior, saving substantial time and money for the agency and the cooperating domestic parties.

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[24] See, e.g., Gerber Food (Yunnan) Co. v. United States, 491 F. Supp. 2d 1326, 1337 (Ct. Int'l Trade 2007) ("{A} party's unresponsiveness and failure to cooperate prior to providing the needed and verifiable information might significantly and unnecessarily impede the proceeding and waste the Department's resources.").

[25] Mukand, Ltd. v. United States, Appeal No. 13-1425, 2014 U.S. App. LEXIS 17,747, at *14 (Fed. Cir. Sept. 16, 2014) (to be reported at 767 F.3d 1300).

[26] Id. at *12-14.

2. When is a Margin is "Too High"?

A second issue that has resulted in the expenditure of huge resources by the agency, cooperating domestic producers and the courts is in determining whether the rate applied to a non-cooperating foreign producer is too high. On the one hand, the Federal Circuit has recognized that "{i}n the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences."[27] On the other hand, the appellate court has held that Commerce cannot apply an AFA rate that is "punitive."[28] An AFA rate has been described as punitive if it is not "based on facts" and "has been discredited by the agency's own investigation."[29]

Based on concerns with a potentially punitive rate, courts have frequently remanded Commerce AFA rates when those rates exceed 100 percent.[30] For example, in Lifestyle Enterprise, the Court of International Trade initially found Commerce's 216.01 percent AFA rate unreasonable, stating that "{a}s the rate becomes larger and greatly exceeds the rates of cooperating respondents, Commerce must provide a clearer explanation for its choice and ample record support for its determination."[31] After the second remand, the court found Commerce's

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[27] Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002) (citing De Cecco, 216 F.3d at 1032).

[28] De Cecco, 216 F.3d at 1032.

[29] Id. at 1033.

[30] See, e.g., Qingdao Taifa Group Co. v. United States, 760 F. Supp. 2d 1379, 1386 n.7 (Ct. Int'l Trade 2010) ("Qingdao Taifa") (holding unreasonable Commerce's corroboration of total AFA rates of 383.60 percent and 227.73 percent), appeal after third remand, 780 F. Supp. 2d 1342 (Ct. Int'l Trade 2011) (sustaining Commerce's corroboration of lower revised total AFA rate of 145.90 percent).

[31] 768 F. Supp. 2d 1286, 1298 (Ct. Int'l Trade 2011).

new AFA rate of 130.81 to still be unreasonable.[32] Only after the third remand—three years after the appeal began—did the court sustain Commerce's revised 83.55 percent AFA rate.[33] Such remands encourage foreign producers who may in fact be facing a very high calculated rate to withhold such data and to instead use their resources to argue against the allegedly punitive nature of the resulting margin.

Before rejecting margins as potentially "too high" when faced with a company that does not cooperate, the agency and the courts should recognize that very high margins – in excess of 100 percent – have been calculated in cases in which parties cooperated. There appears to be a perception that a margin exceeding 100 percent is simply too high and is unrealistic.[34] Yet, there have been a number of cases in which Commerce has obtained data from, and calculated antidumping rates for, foreign producers in excess of 100 percent.

For example, in a recent final determination in an original investigation of a chemical product from China, the agency calculated a rate of 280.67 percent.[35] Similarly, in Xanthan Gum from China, Commerce calculated a dumping rate of 128.32 percent based on submitted data.[36] Administrative reviews of Certain Preserved Mushrooms from China yielded calculated rates of 102.11 percent, 223.74 percent and 308.33 percent.[37] These triple-digit calculated rates found for

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[32] Lifestyle Enterprise, 865 F. Supp. 2d 1284, 1290-92 (Ct. Int'l Trade 2012).

[33] Lifestyle Enterprise, 896 F. Supp. 2d 1297, 1301-02 (Ct. Int'l Trade 2013).

[34] Qingdao Taifa, 760 F. Supp. 2d at 1386 n.7 ("When rates are in multiples of 100%, one might assume a bit more corroboration or record support is warranted.").

[35] 1,1,1,2-Tetrafluroethane From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 79 Fed. Reg. 62,597, 62,598 (Dep't Commerce Oct. 20, 2014).

[36] Xanthan Gum from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 78 Fed. Reg. 43,143, 43,144 (Dep't Commerce July 19, 2013) ("Xanthan Gum").

[37] Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 34,037, 34.038 (Dep't Commerce June 6, 2013); and Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 77 Fed. Reg. 55,808, 55,809 (Dep't Commerce Sept. 11, 2012).

cooperating companies indicate that it should not be assumed that a rate or above 100 percent is suspicious, punitive or aberrational. Given that triple-digit rates and very high double-digit rates are frequently calculated for cooperating parties, it is not unreasonable to find that applying rates of that magnitude to non-cooperating parties as an adverse inference reflects a punitive or "too high" rate.

The case of Yangzhou Bestpak Gifts & Crafts Co. v. United States ("Bestpak")[38] demonstrates that dumping margins over 100 percent can be reasonable and highlights the amount of resources spent on remanding Commerce's AFA rates. In Bestpak, a separate rate respondent challenged a 123.83 percent rate (derived by simply averaging the de minimis and 247.65 percent AFA rates of the two mandatory respondents) before the courts. The Federal Circuit vacated and remanded the case for Commerce to calculate a non-punitive (i.e., lower) separate rate.[39] On the second remand, Commerce chose to calculate an actual individual rate for the separate rate respondent and issued the respondent the standard questionnaire. Despite maintaining throughout the course of the litigation that it deserved a zero percent rate,[40] the separate rate respondent voluntarily dismissed the litigation rather than be individually reviewed, conceding that all of its entries would be covered by the 123.83 percent separate rate.[41] Thus, after two remands and three years of draining court, agency and domestic industry resources, the

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[38] 783 F. Supp. 2d 1346, 1350-53 (Ct. Int'l Trade 2011), after remand, 825 F. Supp. 2d 1346 (Ct. Int'l Trade 2012), vacated by 716 F.3d 1370 (Fed. Cir. 2013) ("Bestpak").

[39] Bestpak, 716 F.3d at 1378-80.

[40] Bestpak, 825 F. Supp. 2d at 1350; Bestpak, 716 F.3d at 1381-82.

[41] See Form 8 Notice of Dismissal, Yangzhou Bestpak Gifts & Crafts Co. v. United States, Ct. No. 10-00295 (Ct. Int'l Trade Nov. 13, 2013) (ECF No. 76) ("Yangzhou Bestpak will remain subject to the antidumping duty order on narrow woven ribbon with woven selvedge from the People's Republic of China at the antidumping duty rate of 123.84%, and all of Bestpak's entries suspended in this action will be liquidated at that rate").

victorious separate rate respondent decided that it was better off with a 123 percent margin than in submitting its actual data to Commerce in the remand proceeding.[42]

3. Should the Rates of Non-Cooperating Companies Mirror Those of Cooperating Companies?

Another factor the courts have pointed to in questioning the magnitude of the dumping margin assigned to a non-cooperating party is the difference between that rate and the rate calculated for cooperating parties. This issue has arisen in the corroboration context as well as in the context of assessing whether the assigned rate is too high because it significantly exceeds other company rates. Nothing in the law, however, requires or suggests that rates of different companies subject to an investigation or review are or should be in relatively close proximity to one another and, indeed, in many cases, calculated rates vary widely between companies.

In examining rates applied to non-cooperating parties, some courts have examined whether the rate reflects "commercial reality" or is "reliable" as the basis of determining whether to sustain the rate or to assess whether the rate is corroborated. Notably, the term "commercial reality" is not found in either the statute or the legislative history. The problem with an overly restrictive interpretation of the corroboration standard is that Commerce may not have a reasonable basis to estimate a respondent's "actual rate," because the information required for such a calculation (cost and sales data) has not been provided to Commerce.

In Gallant Ocean, for example, the appellate court suggested that Commerce look to margins for cooperating respondents of similarly-sized and similarly-situated exporters to

[42] See Hubscher Ribbon Corp. v. United States, 979 F. Supp. 2d 1360, 1364 and 1368 (Ct. Int'l Trade 2014) ("Hubscher") (In an administrative review of the same order at issue in Bestpak, another respondent challenged Commerce's assignment of a 247.65 percent AFA rate. The CIT, after summarizing the history of the Bestpak case (discussed above), found that the 123.83 percent separate rate may actually have been more accurate than the Federal Circuit found in Bestpak).

determine an AFA rate.[43] On remand, Commerce pointed out that the record was insufficient to enable it to undertake the analysis and calculate the more tailored rate the Court appeared to believe was possible.[44] Commerce lacked data for Gallant Ocean because of the company's refusal to respond to the agency and also lacked data that would allow it to determine whether cooperating respondents were "similarly situated" to Gallant.[45] The court placed Commerce in a "catch-22 situation," by demanding that Commerce compare Gallant to similarly-situated companies to assess commercial reality and by requiring that Commerce identify a relationship between cooperative respondent transaction margins and Gallant's actual dumping rate to "corroborate" the data, when Gallant's own non-cooperation precluded the assessment of either.[46]

A decision issued by the appellate court shortly after Gallant Ocean, however, appeared to return to a more administrable approach. In KYD, Inc. v. United States, 607 F.3d 760 (Fed. Cir. 2010) ("KYD"), the appellate court sustained Commerce's application of an AFA rate of 122.88 percent, expressly recognizing that "{t}he fact that current dumping margins for other companies in the same industry are lower than the rate applied to King Pac does not invalidate Commerce's determination." Id. at 766.

The court has also recognized that, without more information, there is no reason to assume that a cooperative respondent's calculated rate reflects the "commercial reality" of the

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[43] Gallant Ocean, 602 F.3d at 1324.

[44] Final Results of Redetermination Pursuant to Court Remand: *Gallant Ocean (Thailand) Co. v. United States*, CAFC Court No. 09-1282 (Dep't Commerce Oct. 20, 2010), available at http://enforcement.trade.gov/remands/cafc-2009-1282.pdf.

[45] Id. at 7-9.

[46] Id.; see also Michele D. Lynch, et al., Practitioner Commentary: 28 U.S.C. § 1581(c): Judicial Review of Antidumping and Countervailing Duty Determinations Issued by the Department of Commerce, 42 Geo. J. Int'l L. 65, 74 (Fall 2010).

industry as a whole, or of an uncooperative respondent.[47] Corroboration is particularly difficult when the record of the current segment of a proceeding does not contain sufficient sources to estimate a uncooperative respondent's "commercial reality"—for example, the situation in which there are no verified sales data on the record for the relevant period and there is only one, non-cooperative respondent. "'Under such circumstances, Commerce's corroboration may be less than ideal because the uncooperative act of the respondent has deprived Commerce of the very information that it needs to link an AFA rate to {respondent's} commercial reality.'"[48] Commercial reality is a test found neither in the statute nor the SAA.

As the Court of International Trade has held, both the statute and the legislative history's use of the term "to the extent practicable" and "reasonably at their disposal" indicate that "the corroboration requirement is not mandatory when not feasible."[49] The SAA explicitly states that "{t}he fact that corroboration may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference under subsection (b)."[50] Thus, if a respondent provides none of the information necessary to calculate an accurate margin, the court has held that the statute does not require Commerce to speculate concerning the actual rate for the specific product had the respondent cooperated,[51] much less to somehow replicate the uncooperative

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47 See, e.g., Hubscher, 979 F. Supp. 2d at 1368.

48 Hubscher, 979 F. Supp. 2d at 1369 (quoting Qingdao Taifa, 780 F. Supp. 2d at 1349).

49 NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1336 (Ct. Int'l Trade 2004) ("NSK"); 19 U.S.C. § 1677e(c) (Commerce "shall, *to the extent practicable*, corroborate that information from independent sources that are reasonably at their disposal") (emphases added).

50 SAA at 870.

51 Id. at 869-70 ("Similarly, where Commerce uses the facts available to fill gaps in the record, proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done.").

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respondent's exact business activities in selecting an AFA rate.[52] It is an unnecessary waste of time and resources for Commerce to be required to demonstrate a rational relationship to the "commercial reality" of a respondent that chose to not submit information necessary to calculate a dumping margin – i.e., information that would reflect its commercial reality.

In fact, there is often wide variation in calculated rates of cooperating companies subject to an investigation or review of the imports of the same product during the same time period. For example, in a recent investigation of oil country tubular goods from Turkey, Commerce found that one company was not dumping the product at all, and assigned it a zero duty rate, while finding that another cooperating company's data resulted in a dumping rate of 35.86 percent.[53] The Xanthan Gum from China investigation last year yielded a 12.9 percent margin for one company and a 128.32 percent margin for another.[54] An administrative review of graphite electrodes from China resulted in a calculated margin of 1.1 percent for one company and 39.83 percent for another.[55]

Although the above cases are but a few examples of the variances found, they demonstrate that a rate calculated for one company is not necessarily indicative of the dumping rate of another company. The reasons for the rate variance can be widespread – different costs

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[52] See Nat'l Candle Ass'n. v. United States, 366 F. Supp. 2d 1318, 1326 (Ct. Int'l Trade 2005) ("The Court is aware of no statute or regulation requiring Commerce to apply product-specific margins," i.e., based upon the precise merchandise produced by the non-cooperating respondent); Reiner Brach GMBH & Co. KG v. United States, 206 F. Supp. 2d 1323, 1338 (Ct. Int'l Trade 2002) (rejecting argument that respondent's adverse rate must take into account its product line and annual sales revenue that differed from those of other respondents).

[53] Certain Oil Country Tubular Goods From the Republic of Turkey: Final Determination of Sale at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part, 79 Fed. Reg. 41,971, 41,973 (Dep't Commerce July 18, 2014).

[54] Xanthan Gum, 78 Fed. Reg. at 43,144.

[55] Small Diameter Graphite Electrodes From the People's Republic of China: Amended Final Results of the First Administrative Review of the Antidumping Duty Order, 77 Fed. Reg. 15,042, 15,042 (Dep't Commerce Mar. 14, 2012).

that result from different pricing practices in the U.S. or in the home market, different sourcing decisions, different types of products sold, etc. Many factors affect dumping margin calculations and many factors drive the commercial pricing and sourcing decisions of companies. Those factors can lead to dramatically varying results in a dumping case.

Further, these variances in calculated rates for companies that cooperate in an investigation or review do not even take into account a major reason that companies refuse to cooperate with the agency. Once a trade action is filed, subject foreign companies often do a quick calculation and estimation of the dumping margin they might face if they cooperate and submit information. For those companies that calculate a high margin, there is little if any incentive to cooperate with the agency by submitting data to prove the high margin. Instead, if the company simply refuses to cooperate, it can hope that other companies less vulnerable to a charge of dumping prove lower rates to which it can point later as an indication of its likely margin of dumping as well. Given that a number of court cases have looked to rates of other companies when considering the reasonableness of the rate assigned to the non-cooperating company, it is a strategy with a strong upside for the dumping foreign producer, but a huge downside to the injured domestic industry.[56]

4. Is Corroboration Needed When Data Relied Upon Are Not "Secondary Information"?

As discussed above, the corroboration requirement of the statute is limited to Commerce's reliance on "secondary information." The statute expressly states that when Commerce "relies on secondary information rather than on information obtained in the course of

[56] While Commerce must "to the extent practicable" corroborate secondary information, "{u}ltimately, respondents have the responsibility of creating an adequate record." NSK, 346 F. Supp. 2d at 1333 (citing Tianjin Mach. Imp. & Exp. Corp. v. United States, 16 CIT 931, 936, 806 F. Supp. 1008 (1992)).

an investigation or review, {Commerce} . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at {its} disposal."[57] Based on the plain language of the statute, when an AFA margin is based on data obtained in the course of the investigation or review, no corroboration is required. The court has in several instances recognized that this plain statutory language renders corroboration inapplicable under these facts.[58]

Despite this seemingly straightforward exception to the corroboration requirement, the agency has on some occasions gone beyond what it is required to do, resulting in a closer scrutiny by the court. In Nan Ya Plastics Corp. v. United States, despite what the court characterized as a "fairly airtight argument" that the corroboration requirement was not applicable, the Court observed that Commerce had nonetheless proceeded to "follow{} its standard corroboration playbook to tie the selected AFA rate (chosen from another party's data) to the uncooperative respondent, Nan Ya."[59] Given the "fairly airtight" nature of the agency's argument that corroboration is not required in such circumstances, and the unequivocal, plain language of the statute, the agency should not expend resources attempting to corroborate rates that need no corroboration. Where secondary information is not used, the inquiry should terminate, saving resources of cooperating parties (in commenting on the information), of the agency in undertaking the corroboration "playbook," and of the court in reviewing such claims.

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[57] 19 U.S.C. § 1677e(c).

[58] See iScholar Inc. v. United States, 2011 Ct. Intl. Trade LEXIS 3 at *8-9 (Jan. 13, 2011); Ass'n of Am. Sch. Paper Suppliers v. United States, 32 CIT 1196, 1200-04 (2008).

[59] 6 F. Supp. 3d 1362, 1367 (Ct. Int'l Trade Aug. 14, 2014).

C. Conclusion

Like the principles of the exhaustion doctrine, court deference to Commerce AFA rates should apply with special force when "frequent and deliberate flouting of administrative process" (i.e., uncooperative respondents' appeals of AFA rates) could "weaken an agency's effectiveness by encouraging disregard of its procedures."[60] Commerce's resort to AFA more promptly when parties refuse to cooperate, and the court's deference to Commerce's selected AFA rates in such circumstances, would promote administrative and judicial efficiency by not wasting scarce resources to assist parties that have refused to cooperate.[61]

III. SHOULD THE ITC APPLY AFA WHEN PARTIES DO NOT COOPERATE?

The ITC does not face the issue of calculating margins as Commerce does, but does confront the difficulty of making a decision when necessary information from companies to whom questionnaires were sent is not submitted. Although the statute authorizing the use of adverse inferences is identical for proceedings before the ITC and the Commerce Department,[62] the ITC's practice (other than in rare circumstances)[63] has not been to apply adverse inferences when parties refuse to cooperate.[64] Although the ITC has subpoena power pursuant to 19 U.S.C.

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[60] See McCarthy v. Madigan, 503 U.S. 140, 145 (1992) ("McCarthy") (quoting McKart, 395 U.S. 185, 193 (1969)).

[61] See McCarthy at 146 (requiring exhaustion serves judicial efficiency by promoting development of the agency record that is adequate for later court review and giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution).

[62] 19 U.S.C. § 1677e(b).

[63] Cases in which the ITC has drawn adverse inferences against uncooperative parties are extremely limited and, generally, dated. In Polychloroprene Rubber from Japan, the ITC applied adverse inferences to an uncooperative respondent that had originally stated it would cooperate – leading the ITC to conduct a full sunset review – respondent abruptly withdrew from the case and did not submit the data as promised. Inv. No. AA1921-129 (Review), USITC Pub. 3212 (July 1999) at 12-14, n.83, and n.97. Adverse inferences were applied under similar facts in a sunset review of forklift trucks. Internal Combustion Industrial Forklift Trucks From Japan, Inv. No. 731-TA-377 (Review), USITC Pub. 3287 (Apr. 2000) at 12-13 and n.68.

[64] See, e.g., Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico, Inv. Nos. 701-TA-477 and 731-TA-1180-1181 (Final), USITC Pub 4318 (May 2012) at 34 n.246 ("Refrigerators"); Utility Scale Wind

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§ 1333 and 19 C.F.R. § 207.8 to elicit information from parties located in the United States, it rarely uses that power. As the SAA states, "the requirement to use BIA is important because issuing and enforcing subpoenas often is not a practical use of the Commission's investigative resources." SAA at 570.

Instead of drawing adverse inferences, the ITC has stated that it "prefers to 'strive {for} the most reasonable estimate' and rely upon the most accurate data available."[65] Based on the express statutory authorization for the use of adverse inferences in these circumstances, the impact that this ITC policy may have on foreign producers' decisions as to whether to cooperate, and the burden and resource drain on both cooperating parties and the ITC by virtue of this approach, this ITC practice should be reexamined.

First, as noted, the statute is clear in authorizing the ITC to apply adverse inferences in the event of non-cooperation by targeted companies. Further, the ITC's subpoena power cannot be used as a defense against the ITC's failure to use AFA, given that the ITC rarely issues subpoenas and cannot do so when non-cooperating foreign producers are at issue.

Second, the ITC's reticence to use AFA often results in defeating one of the purposes of AFA, which is to elicit the cooperation of parties subject to a case. Foreign producers aware of the ITC's non-application of adverse inferences, and perhaps in the hopes of obtaining a better result by withholding information that could be harmful to them, may make a strategic choice not to participate in ITC proceedings. As the ITC recognized in one case:

> We note that, despite extensive participation at Commerce, there was virtually no cooperation by Chinese producers here and that

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Towers from China and Vietnam, Inv. Nos. 701-TA-486 and 731-TA-1195-1196 (Final), USITC Pub. 4372 (Feb. 2013) at 45 n.87.

[65] Geo Specialty Chemicals, Inc. v. United States, 33 CIT 125, 135-36 (2009) ("Geo Specialty").

> (as Petitioners claim) we have no reason to believe that this failure to respond to Commission requests for information was anything other than a strategic choice on the part of Chinese producers. While they have not actively impeded the investigation, they have purposely deprived us of the requested information they could have provided. We have conducted as thorough an investigation as possible, using the facts available including public data sources and information about the Chinese industry provided by domestic producers.[66]

Although the ITC conducted "as thorough an investigation" as it could given the respondents' deliberate non-cooperation, the ITC did not apply adverse inferences even in this circumstance. Notably in a case involving a non-cooperating foreign producer at the ITC, appellate court Senior Judge Nichols captured the purpose of the AFA law well:

> The Japanese exporters evidently wanted to get the order lifted "on the cheap," without really divulging any relevant information in return. I do not think Congress ever intended to give them such a power. Had they wanted the lifting badly enough to be willing to come and testify in person, or by deposition, or even by affidavit, we might have had a different case.[67]

The ITC has justified its non-application of adverse inferences with the argument that, because it decisions affect all subject companies, the application of adverse inferences would unfairly penalize cooperative parties. For example, in its investigation of Refrigerators, the Commission rejected petitioner's request that the ITC draw adverse inferences against an uncooperative respondent by assuming that subject imports undersold the domestic like product because doing so would penalize a cooperative respondent who submitted reliable pricing data.[68]

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[66] See, e.g., Circular Welded Carbon Quality Steel Line Pipe from China, Inv. No. 701-TA-455 (Final), USITC Pub. 4055 (Jan. 2009) at 22, n.129.

[67] Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 937 (Fed. Cir. 1984) (Additional Views); see also id. at 936 n. 14 ("The additional views of Judge Nichols have not been incorporated into the majority opinion only because they read so well as separately stated.").

[68] Refrigerators, USITC Pub 4318 at 34 n.246 (internal citations omitted).

The rationale that AFA should not be applied where doing so might negatively affect a cooperating respondent is unjustifiable. In Commerce cases when a similar argument has been raised against Commerce's application of AFA, the appellate court has rejected the argument. In KYD, the Federal Circuit recognized that there is no exception in the statute to applying AFA simply because doing so has a collateral impact on a cooperating party.[69] The appellate court recently reiterated this principle in Fine Furniture (Shanghai): "Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce's questions, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court's precedent."[70] The Federal Circuit also highlighted the fact that a remedy that collaterally reaches a cooperating party could potentially induce cooperation by the non-cooperating party.[71]

In order to promote administrative efficiency and better resource allocation, the ITC should apply adverse inferences to respondents that do not cooperate to the best of their ability. Applying adverse inferences to uncooperative and unresponsive parties would save the ITC and cooperative parties (typically domestic producers) significant time and resources in attempting to uncover data or estimates of the subject foreign industry's sales, production, capacity, pricing, etc. When there is poor or no response to the ITC's foreign producer questionnaires,

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69 KYD, 607 F.3d at 768.

70 Fine Furniture (Shanghai) Ltd. v. U.S., 748 F.3d 1365, 1373 (Fed. Cir. 2014) ("Fine Furniture (Shanghai)"); see also Mueller Comercial de Mex. v. United States, 753 F.3d 1227, 1236 (Fed. Cir. 2014) (stating that under 19 U.S.C. § 1677e(b), "we do not bar Commerce from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party").

71 See KYD, 607 F.3d at 768 ("In the aggregate, however, the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products."); and Fine Furniture (Shanghai), 748 F.3d at 1373 (holding that "a remedy that collaterally reaches {the foreign producer} has the potential to encourage the government of China to cooperate so as not to hurt its overall industry.").

Commission staff and domestic producers spend significant resources researching the foreign industry and attempting to derive such data.[72] A revision to the ITC practice whereby adverse inferences were applied when foreign producers refuse to participate would reduce the costs incurred by the ITC and by the domestic producers under current practice, as well as encourage better cooperation in future cases.

IV. SHOULD THE ITC CONDUCT FULL SUNSET REVIEWS WHEN PARTIES REFUSE TO PARTICIPATE?

Another area in which the expenditure of government and private-party resources must be questioned is the ITC decision to conduct "full" five–year sunset reviews when parties do not respond to a notice of institution and do not state that they will cooperate by submitting information to the ITC if a full review is conducted. By law, if either domestic or respondent parties submit inadequate responses to the ITC at the outset of a sunset review, the ITC is authorized to conduct an expedited review.[73] While generally the ITC conducts expedited reviews in those circumstances, saving itself and cooperating parties the expenditure of significant resources, in some cases the ITC has decided to conduct a "full" review notwithstanding the lack of cooperation by foreign producers. This practice warrants further scrutiny.

In a sunset review, if no domestic producer responds to the Commerce Department's notice of initiation, the order is automatically revoked.[74] If interested parties submit inadequate responses, the agencies are authorized to conduct an expedited review and to issue, "without

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[72] On some occasions, the ITC purchases, or requests that domestic producers purchase, subscription-based industry data from proprietary sources to fill the gap in the record. Many such sources are very expensive. Even when purchased data are not needed, the time and resources spent to try to fill in the gaps in the record left by the non-cooperating parties are substantial.

[73] 19 U.S.C. § 1675(c)(3)(B).

[74] Id. at § 1675(c)(3)(A).

further investigation, a final determination based on the facts available, in accordance with section 776," rather than conduct a full sunset review.[75] A full review includes fact-gathering in the form of a public hearing, submission of briefs, completion of questionnaires and other procedures similar to an original investigation. An expedited review consists of no further information gathering by the ITC, other than permitting the filing of comments by cooperating parties, and is based on the facts available.[76]

The SAA explains that the statutory provision allowing expedited sunset reviews is intended precisely to promote efficiency and conserve resources:

> This section will *promote administrative efficiency and ease the burden on the agencies by eliminating needless reviews* while meeting the requirements of the Agreements. If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, where there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review.[77]

The ITC's decision to conduct an expedited or full sunset review is not judicially reviewable.[78]

Despite this express authorization in the statute for the ITC to conduct an expedited review "without further investigation" when parties do not cooperate, the ITC in a number of cases has conducted a full review despite the non-cooperation of foreign producers.[79] An

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75 Id. at § 1675(c)(3)(B).

76 19 C.F.R. §§ 207.60(a)-(c) and 207.62(d)-(e).

77 SAA at 880 (emphasis added).

78 See 19 U.S.C. § 1516a(a).

79 See, e.g., Electrolytic Manganese Dioxide From Australia and China; Notice of Commission Determination to Conduct Full Five-Year Reviews and Scheduling of Full Five-Year Reviews Concerning the Antidumping Duty Orders on Electrolytic Manganese Dioxide From Australia and China, 79 Fed. Reg. 30,163 (ITC May 27, 2014); (Explanation of Commission Determinations on Adequacy in Electrolytic Manganese Dioxide from Australia and China) (dated Jan. 8, 2014) ("The Commission found that circumstances warranted conducting full reviews notwithstanding the inadequate respondent interested party group response. In particular, the Commission finds it

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examination of these cases does not suggest that the time and resources the agency devoted to the full reviews were warranted or yielded different results than had an expedited review been conducted. In Persulfates from China, despite finding inadequate responses by the foreign producers, a full sunset review was conducted. The respondent parties continued to refuse to participate in that review, and an affirmative determination was issued, but at the cost of significant expense to the government and to the domestic industry.[80] A similar result ensued in several other cases.[81] The ITC recently conducted a hearing on electrolytic manganese dioxide in a full sunset review in which no opposing parties appeared as, indeed, their original lack of response to the ITC notice of institution indicated would occur.[82]

In each of these cases, the domestic industry was forced to complete questionnaires, submit briefs, prepare witnesses for the ITC hearing, participate in the hearing and submit supplemental comments and responses to Commission questions. The ITC itself was forced to

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necessary to further examine current and likely conditions of competition in the U.S. market for EMD, and pertaining to the subject countries, especially as there are apparently no operational EMD facilities producing commercial quantities of EMD in Australia.") (Three commissioners did not find any circumstances that would warrant conducting full reviews and thus voted to expedite the reviews).

[80] See Persulfates from China, Inv. No. 731-TA-749 (Third Review), USITC Pub. 4456 at 1-3 (Mar. 2014)

[81] See, e.g., Solid Urea from Russia and Ukraine, Inv. Nos. 731-A-340-E and 340-H (Third Review) ("Solid Urea"), USITC Pub. 4279 at 3-4 and Appendix B (Dec. 2011); Glycine From China, Inv. No. 731-TA-718 (Third Review), USITC Pub. 4255 at 3-4 and Appendix B (Aug. 2011) ("Glycine"); Pressure Sensitive Plastic Tape From Italy, Inv. No. AA1921-167 (Third Review), USITC Pub. 4128 at 4 (Mar. 2010) ("Pressure Sensitive Plastic Tape"); Ferrovanadium From China and South Africa, Inv. Nos. 731-TA-986 and 987 (Review), USITC Pub. 4046 at 3 (Nov. 2008) ("Ferrovanadium"); Certain Welded Stainless Steel Pipe From Korea and Taiwan, Inv. Nos. 731-TA-540 and 541, USITC Pub. 3877 at 3 and Appendix B (Aug. 2006) ("Certain Welded Stainless Steel Pipe"); Raw In-Shell Pistachios From Iran, Inv. No. 731-TA-287 (Review), USITC Pub. 3824 at 3-4 (Dec. 2005) ("Raw In-Shell Pistachios"; Carbon Steel Butt-Welded Pipe Fittings From Brazil, China, Japan, Thailand, and Taiwan, Inv. Nos. 731-TA-308-310, 520 and 521 (Second Review), USITC Pub. 3809 at 3 (Oct. 2005) ("Carbon Steel Butt-Welded Pipe Fittings"); Petroleum Wax Candles From China, Inv. No. 731-TA-282 (Second Review), USITC Pub. 3790 at 3 (July 2005) ("Petroleum Wax Candles"); Polychloroprene Rubber From Japan, Inv. No. AA-1921-129 (Second Review), USITC Pub. 3786 a 3 (June 2005) ("Polychloroprene Rubber"); and Greige Polyester/Cotton Print Cloth From China, Inv. No 731-TA-101 (Second Review), USITC Pub. 3776 at 3-4 and Appendix B (May 2005) ("Greige Polyester/Cotton Print Cloth").

[82] See ITC Witness List dated Oct. 20, 2014.

expend resources aggregating data, compiling prehearing and final staff reports, participating in the hearing and analyzing submitted data and briefs. Given the statute's express authorization for the ITC to conduct expedited reviews and not undertake any further investigation when the parties' response is inadequate, the justification for proceeding with such a review must be questioned.

Notably, the mere fact that the ITC conducts a full review and issues questionnaires generally does not result in the participation of foreign producers who indicated at the outset that they were opting not to participate.[83] Moreover, in most "full" reviews that are conducted without the participation of the opposing foreign producers, an affirmative decision is issued, albeit following the expenditure of significant resources.[84]

It also should be questioned what is to be gained by conducting a full review when the affected parties express no interest in the case. To the extent circumstances have changed that could warrant revocation of the order, respondents would be in the best position to provide that information. Yet if the company or companies at issue have chosen not to participate, the Commission will not obtain the necessary information even if a full review is conducted. Moreover, if the non-cooperating party cared about the result, presumably it would cooperate. Conducting a full review when the affected company or companies do not care enough about the outcome of the review to submit needed information appears to be an exercise in futility, separate and apart from the resource allocation issue.

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[83] See, e.g., Solid Urea, USITC Pub. 4279 at 3-4 and Appendix B; Glycine, USITC Pub. 4255 at 3-4 and Appendix B; Pressure Sensitive Plastic Tape, USITC Pub. 4128 at 4; Ferrovanadium, USITC Pub. 4046 at 3; Welded Stainless Steel Pipe, USITC Pub. 3877 at 3 and Appendix B; Raw In-Shell Pistachios, USITC Pub. 3824 at 3-4; Carbon Steel Butt-Welded Pipe Fittings, USITC Pub. 3809 at 3; Petroleum Wax Candles, USITC Pub. 3790 at 3; Polychloroprene Rubber, USITC Pub. 3786 a 3 (June 2005); and Greige Polyester/Cotton Print Cloth, USITC Pub. 3776 at 3-4 and Appendix B.

[84] Id.

Given the express statutory authority provided to avoid going down this path, and to conserve resources of both the cooperating private parties and the ITC, the ITC should reconsider the wisdom of conducting a full review when inadequate (or no) responses are submitted by foreign producers. Such an approach would promote administrative efficiency and ease the burden on the ITC and on cooperative domestic parties.

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