RESPONDING TO AGENCY REQUESTS FOR FACTUAL INFORMATION: RESPONSIBILITIES, BURDENS AND CONSEQUENCES

I. DETERMINATIONS ON BASIS OF FACTS AVAILABLE

A. ***Statement of Administrative Action to the Uruguay Round Agreements Act***, H.R. Rep. No. 103-316 at 869-70 (1994):

> ….at the outset of an investigation or administrative review, Commerce and the Commission will give notice to each interested party from whom the agency requests information concerning: (1) the information the party will be required to submit; (2) the form and manner in which the party must submit the information (for both electronic and written submissions); (3) the deadlines for submitting information; and (4) the potential use of facts available if a party does not submit requested information in the requested form and manner by the date specified. These requirements are consistent with the agencies' current practice.
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> New section 776(a) [19 U.S.C. 1677e(a)] requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not provide the information. Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agencies will be required, consistent with new section 782(e) [19 U.S.C. Section 1677m], to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.
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> Commerce and the Commission use the facts available in different ways. In general, the Commission makes determinations by weighing all of the available evidence regarding a multiplicity of factors relating to the domestic industry as a whole and by drawing reasonable inferences from the evidence it finds most persuasive. Therefore, new section 776(a) generally will require the Commission to reach a determination by making such inferences as the evidence of record supports even if that evidence is less than complete. In contrast, Commerce generally makes determinations regarding specific companies, based primarily on information obtained directly from those companies. Section 776(a) generally will require Commerce to reach a determination by filling gaps in the record due to deficient submissions or other causes.

Therefore, neither Commerce nor the Commission must prove that the facts available are the best alternative information. Rather, the facts available are information or inferences which are reasonable to use under the circumstances. As noted above, the Commission balances all record evidence and draws reasonable inferences in reaching its determinations. It is not possible for the Commission to demonstrate that its inferences are the same as those it would have made if it had perfect information. 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.

In conformity with the Antidumping Agreement and current practice, new section 776(b) [19 U.S.C. Section 1677e(b)] permits Commerce and the Commission to draw an adverse inference where a party has not cooperated in a proceeding. A party is uncooperative if it has not acted to the best of its ability to comply with requests for necessary information. Where a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation. Information used to make an adverse inference may include such sources as the petition, other information placed on the record, or determinations in a prior proceeding regarding the subject merchandise.

B. 19 U.S.C. § 1677e. Determinations on basis of facts available

(a) In general

If--

(1) necessary information is not available on the record, or

(2) an interested party or any other person--

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title, the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse Inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination in the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(4) any other information placed on the record.

(c) Corroboration of secondary information

When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

C. **19 U.S.C. § 1677m. Conduct of investigations and administrative reviews**

(c) Difficulties in meeting requirements

(1) Notification by interested party

If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

(2) Assistance to interested parties

The administering authority and the Commission shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the administering authority or the Commission in connection with investigations and reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information.

(d) Deficient submissions

If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or
(2) such response is not submitted within the applicable time limits,
then the administering authority or the Commission (as the case may be) may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

(e) Use of certain information

In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
(5) the information can be used without undue difficulties.

(f) Nonacceptance of submissions

If the administering authority or the Commission declines to accept into the record any information submitted in an investigation or review under this subtitle, it shall, to the extent practicable, provide to the person submitting the information a written explanation of the reasons for not accepting the information.

D. Five-Year Reviews

(1) 19 U.S.C. §1675(C)(3)(B) Inadequate response

If interested parties provide inadequate responses to a notice of initiation, the administering authority, within 120 days after initiation of the review, or the Commission within 150 days after such initiation, may issue, without further investigation, a final determination based on the facts available, in accordance with section 1677e of this title.

(2) 19 CFR Section 207.61 Responses to notice of institution ...

(c) When requested information cannot be supplied. Any interested party that cannot furnish the information requested by the notice of institution in the requested form and manner shall, promptly after issuance of the notice, notify the Commission, provide a full explanation of why it cannot furnish the requested information, and indicate alternative forms in which it can provide equivalent information. The Commission may modify its requests to the extent necessary to avoid posing an unreasonable burden on that party.

(3) 19 CFR Section 207.62 Rulings on adequacy and nature of Commission review.

(e) Use of facts available. The Commission's determination in an expedited review will be based on the facts available, in accordance with section 776 of the Act.

(4) 63 Fed. Reg. 30599, 30606 (June 5, 1998) Rules of Practice and Procedure.

Sets forth an explanation of what facts are "available" to the Commission, pursuant to 19 CFR § 207.62(e), in expedited five-year reviews:

> The facts available may include information submitted on the record in the five-year reviews by parties and non-parties, other information the Commission may compile before the record closes, material from the record of the original investigation and subsequent Commission reviews, if any, and available information from Commerce proceedings. (As stated in the NOPR [Notice of Proposed Rulemaking] Preamble, the material from the record of the original investigation that the Commission will release to the parties will include the Commission opinion(s) in the original investigation and staff reports and non-privileged memoranda, where available.) The facts available may also include reliance on adverse inferences against interested parties that do not cooperate with information requests, as authorized by section 776(b) of the Act.[1]

II. EXCERPTS FROM KEY RECENT CASES

Essar Steel Ltd. v. United States, 678 F.3d 1268, 1276-79 (Fed. Cir. 2012):

> Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The purpose of the adverse facts statute is "to provide respondents with an incentive to cooperate" with Commerce's investigation, not to impose punitive damages. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). An appropriate decision based on adverse facts is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *Id*. at 1032. A decision based on adverse facts is not punitive when determined in accordance with the statutory requirements, as Commerce did here. *KYD, Inc. v. United States*, 607 F.3d 760, 767–68 (Fed.Cir.2010).
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> The imposition of adverse facts can be inappropriate if it is overly punitive. For example, in *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed.Cir.2010), Commerce imposed an unreasonably high antidumping margin, which was "more than ten times higher than the average dumping margin for cooperating respondents." *Id.* at 1324. That rate was "punitive, aberrational, or uncorroborated."*Id.* In this case, however, the countervailing duty imposed for Essar's participation in the CIP was on par with similar subsidy programs and therefore not punitive. Commerce did not err in its

[1] Section 1677m(d) applies to *attempted* responses, and not to the situation where no response is made at all. Three conditions precedent for taking an adverse inference: (1) There is an outstanding request for information; (2) Information request be directed to an interested party; and (3) Interested party failed to cooperate by not acting to the best of its ability to comply with information requested.

application of adverse facts, and no party argues that the application of adverse facts based on the record before the remand was punitive.[2]

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It is Essar's burden to create an accurate record during Commerce's investigation. *See Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1583 (Fed.Cir.1993). Commerce must consider all information timely filed by interested parties. 19 C.F.R. § 351.301 (C)(3)(ii)….The record on review included Essar's repeated dishonest denials of a facility in Chhattisgarh, as well as Commerce's questionnaire including a press release contradicting those statements….

We have carved out a small number of exceptions when we allow supplementation of an agency record. One exception is to allow a remand to supplement the record when "the original record was tainted by fraud." *Home Prods. Int'l, Inc. v. United States,* 633 F.3d 1369, 1379 (Fed.Cir.2011). We have also made an exception and allowed supplementation when the underlying agency decision was based on "inaccurate data" that the "agency generating those data indicates are incorrect." *Borlem S.A.–Empreedimentos Industriais v. United States,* 913 F.2d 933, 937 (Fed.Cir.1990). The present case does not fall into one of these exceptions, nor does it merit the creation of a new exception.[3]

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Commerce's application of adverse facts against Essar was appropriate. We have recognized Commerce's authority to apply adverse facts, even when a party provides relevant factual information if a party has not acted to the **best of its ability** to provide the information. In *Nippon Steel,* Nippon Steel withheld relevant information from Commerce after Commerce asked for it twice during the investigation. 337 F.3d at 1383. Nippon Steel provided the information to Commerce only after Commerce published its preliminary results, which applied adverse facts against Nippon Steel. *Id.* at 1378. Because Nippon Steel did not timely file the information, Commerce chose not to accept it, and instead upheld its application of adverse facts against Nippon Steel in its final results. *Id.* The Court of International Trade, after several remands to Commerce, ordered Commerce to use the late-filed information, instead of adverse facts. *Id.* at 1379. We reversed the Court of International Trade's decision, and held that Commerce's decision to apply adverse facts was supported by substantial evidence. *Id.* at 1385.

The only difference between *Nippon Steel* and this case is that here, it was the trial court, not Essar, who identified the late-filed documents. That does not change the fact that Commerce's application of adverse facts was supported by substantial evidence and should have been upheld. The Court of International Trade exceeded its authority when it

[2] 678 F.3d at 1276.
[3] 678 F.3d at 1277.

ordered Commerce to reopen and expand the agency record. Article III courts are different from Article I agencies, and we must be ever mindful that we not usurp their role in this process.[4]

KYD, Inc. v. United States, 607 F.3d 760, 765–67 (Fed.Cir.2010):

This court has made clear, however, that Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question.[5]

……..……..

KYD asserts that because there is no evidence of any sales during the period of review for the second administrative review at margins above or near the 122.88 percent mark, it was improper for Commerce to assign that rate to King Pac in the second administrative review. However, the fact that current dumping margins for other companies in the same industry are lower than the rate applied" to the respondent in question "does not invalidate Commerce's determination. In its initial dumping determination and in the first administrative review, Commerce used evidence that accompanied the petition as well as evidence Commerce obtained in the course of its investigation and review to calculate a range of dumping margins. Because King Pac failed to participate in the first administrative review, Commerce acted within its discretion in drawing an adverse inference against King Pac and assigning it the highest calculated rate. *See F. lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1029, 1033-34 (Fed. Cir. 2000) (an uncooperative party may be assigned the "highest verified margin" of the cooperating companies, even though it was "highly likely that the real dumping margin for [that company] would be well under" the AFA rate)….[6]

……..……..

During the second administrative review, Commerce was unable to calculate a dumping margin for King Pac directly because King Pac chose not to cooperate with Commerce's review. Commerce therefore decided to continue the 122.88 percent AFA rate that was assigned to King Pac in the prior administrative review. Significantly, we have held that Commerce is permitted to use a "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) (emphasis in original)…..[7]

……..……...

[4] 678 F.3d at 1278-79.
[5] 607 F.3d at 765.
[6] 607 F.3d at 766.
[7] 607 F.3d at 766.

> The presumption that a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent administrative review distinguishes this case from this court's recent decision in *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010). In that case, in which the AFA margin far exceeded the calculated margin for cooperating respondents, we overturned an AFA margin as unsupported by substantial evidence. In *Gallant Ocean*, however, Commerce had not previously determined an antidumping duty against the exporter in question, and thus there was no occasion for the court to consider the presumption that an exporter's prior margin continues to be valid if the exporter fails to cooperate in a subsequent proceeding. That presumption applies in this case, and it was not rebutted.[8]

Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States, 807 F. Supp. 2d 1361, 1366-71 (Ct. Int'l Trade 2011):

> When selecting an appropriate AFA rate, "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed.Cir.2004). Under 19 U.S.C. § 1677e(b), the Department may select "secondary information" as facts otherwise available in determining AFA rates, which "includes '[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise.'" *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (citations omitted).
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> It is undisputed that Commerce's usual practice is to assign an uncooperative respondent the highest overall rate from any segment of the proceeding as AFA [footnote omitted].[9]
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> ……
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> Here, Commerce has not adequately explained its reasons for departing from its established practice of assigning the highest previous rate to an uncooperative respondent as AFA. This is because it has failed to support its findings with respect to the antidumping duty rate to which Mueller's entries were subject prior to the POR. [10]
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> ……
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> A respondent's failure to cooperate, however, does not relieve the Department of its responsibility to assign a rate sufficient, but no more than sufficient, to insure cooperation. *Timken*, 354 F.3d at 1345; *F.lli De Cecco Di Filippo Fara S. Martino*,

[8] 607 F.3d at 767.
[9] 807 F. Supp. 2d at 1366. In the Final Results, Commerce assigned Mueller the AFA rate of 48.33%, which was greater than the highest overall rate determined in either the original investigation or any subsequent review. *Id.* at 1365.
[10] 807 F. Supp. 2d at 1368.

S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.").[11]

The Department's practice of applying the highest previously determined overall rate to an uncooperative respondent as AFA is based on the presumption that such a rate is inherently adverse. This practice is longstanding, frequently used, and has been held, in most circumstances, to be lawful. *See, e.g., Rhone Poulenc,* 899 F.2d at 1190; *NSK Ltd. v. United States*, 28 CIT 1535, 1561, 346 F.Supp.2d 1312, 1335 (2004); *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199, 360 F.Supp.2d 1339, 1348 (2005). Thus, any decision to abandon the application of this rate in favor of the highest transaction specific rate for another respondent in a previous review must be fully explained and based on substantial evidence. *See Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064 n. 7, 980 F.Supp. 1268, 1274 n. 7 (1997) ("A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence."); *see also SKF USA Inc. v. United States,* 263 F.3d 1369, 1382 (Fed.Cir.2001) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.") (internal quotation and citation omitted).[12]

Hyosung Corp. v. United States, 33 ITRD 1307, 2011 WL 1882519 at *5-8 (Ct. Int'l Trade 2011):

It was incumbent on Hyosung to supply the requested information because it has the burden of evidentiary production, as it possesses the necessary information. *See Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (stating that the "burden of production should belong to the party in possession of the necessary information"). Nonetheless, Hyosung did not supply the requested information. Accordingly, pursuant to 19 U.S.C. § 1677e(a), Commerce proceeded with the review on the basis of facts available.

Furthermore, Commerce applied an adverse inference because Hyosung did not act to the best of its ability in complying. *See* 19 U.S.C. § 1677e(b). Hyosung had two opportunities to inform Commerce that it did not have shipments. However, Hyosung did not submit a no-shipments letter, did not request an extension of time to respond to the Q & V questionnaire, did not contact Commerce for clarification of the questionnaire

[11] 807 F. Supp. 2d at 1370.
[12] 807 F. Supp. 2d at 1371.

because of its alleged unfamiliarity with Commerce's procedures, and failed to respond to the Q & V questionnaire in a timely fashion. Thus, Commerce reasonably determined that Hyosung had failed to act to the best of its ability in complying with its request for information.

Therefore, Commerce's determination to assign Hyosung an AFA rate is supported by substantial evidence and otherwise in accordance with law.[13]

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Pursuant to its statutory and regulatory authority, Commerce selected the AFA rate it assigned to Hyosung based on information from a previous review. 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.308(c)(1). Specifically, Commerce selected an AFA rate of 32.70 percent the highest product-specific antidumping rate calculated for a cooperative respondent in the 2006–2007 administrative review of CTLP from Korea. [footnote omitted].[14]

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Since Hyosung did not cooperate, Commerce acted within its discretion and assigned it the highest calculated rate from a previous review.

….However, the fact that Hyosung did not participate in a prior review, and thus never assigned a rate, does not make *KYD* inapplicable. Notably, in *KYD,* the court did not state that the highest calculated rate applicable must be the highest rate calculated for the particular respondent."[A]n uncooperative party may be assigned the 'highest verified margin' of the cooperating companies, even though it was 'highly likely that the real dumping margin [for the party] would be well under' the AFA rate."*KYD,* 607 F.3d at 766 (citing *F.lli de Cecco di Filippo Fara S. Martina S.p.A. v. United States,* 216 F.3d 1027, 1029, 1033–34 (Fed.Cir.2000)); *see also, Shanghai Taoen Int'l Co. v. United States,* 29 CIT 189, 195–99, 360 F.Supp.2d 1339, 1345–48 (2005) (upholding a 223.01 percent AFA rate because there was no prior dumping margin for the company and it was the highest rate determined in the current or any previous segment of the proceeding and reflected recent commercial activity by a different exporter of the same goods from the same country). Thus, Commerce's selection of the highest margin of a cooperating company was appropriate.[15]

……

In sum, because there was no prior dumping margin for Hyosung, Commerce reasonably selected a product-specific dumping margin for a cooperative respondent during a recent review, and corroborated the rate using transaction-specific margins from the preceding administrative review. Therefore, the Court rejects Hyosung's claim that the margin does

[13] 2011 WL 1882519 at *5-6.
[14] 2011 WL 1882519 at *6.
[15] 2011 WL 1882519 at *7.

not relate to commercial reality. Also, despite Hyosung's contentions, the rate is not punitive because "the antidumping laws are remedial," and "an AFA dumping margin determined in accordance with the statutory requirements is not a punitive measure...." [*KYD, Inc.*] at 767–68 (citations omitted).[16]

III. EXCERPTS FROM CASES INVOLVING THE U.S. INTERNATIONAL TRADE COMMISSION

AWP Industries, Inc. v. United States, 783 F.Supp.2d 1266, 1276, n. 25 (Ct. Int'l Trade 2011):

> To the extent that Plaintiffs suggest that adverse inferences should have been drawn, under the statute, the Commission is not required to make adverse inferences in this circumstance, where no finding of a failure to cooperate has been made, and it is unusual in any case for Commission to do so.

Geo Specialty Chemicals, Inc. v. United States, 33 C.I.T. 125, 2009 WL 424468 at *6 (Ct. Int'l Trade 2009):

> GEO's assertion that the Commission usually draws adverse inferences against non-responsive parties is incorrect. The Commission is not required to draw an adverse inference against a party who "has failed to cooperate by not acting to the best of its ability to comply with a request for information," although it may do so. 19 U.S.C. § 1677e(b). The Commission prefers to "strive [for] the most reasonable estimate" and rely upon the most accurate data available. *Asociacion De Productores De Salmon y Trucha De Chile AG v. ITC*, 180 F. Supp. 2d 1360, 1368 (CIT 2002) (internal quotations and citation omitted); *see Lawn and Garden Steel Fence Posts from China*, USITC Pub. No. 3598, Inv. No. 731-TA-1010, at n.96 (June 2003), *available at* 2003 WL 21494593 ("While the Commission has the discretion to take adverse inferences against all of the non-responding Chinese producers, we have frequently stated that the ability to take adverse inferences does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination and to draw reasonable inferences from all the record evidence."). Unlike the Department of Commerce, which often draws adverse inferences against particular non-cooperative companies when calculating dumping margins…, the Commission rarely draws adverse inferences because its decisions affect all industry participants, *see Statement of Administrative Action to the*

[16] 2011 WL 1882519 at *8.

Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198-99.[17]

Alberta Pork Producers Mktg. Bd. v. United States, 669 F. Supp. 445, 459 (Ct. Int'l Trade 1987):

> The Court holds that the Commission has discretion in deciding whether or not to draw an adverse inference with respect to injury based upon a party's failure to participate in the administrative proceeding, but the decision in either event must be based upon a sound rationale. In investigations where the Commission is able to gather the necessary information through its subpoena power or other independent sources, there is very little reason to draw adverse inference for failure to respond to questionnaires.[18]

[17] 2009 WL 424468 at *6. *See also Brake Rotors from China*, Inv. No. 731-TA-744 (Second Review), USITC Pub. 4009 (June 2008) at 5, n. 23 ("The statute does not authorize the Commission to take an adverse inference where, for example, an interested party chooses not to avail itself of opportunities to present arguments to the Commission through the submission of case briefs or through argument at a public hearing but, nevertheless, responds to the Commission's questionnaires and cooperates with requests for data. Accordingly, we decline to take adverse inferences with respect to Affinia's failure to submit a prehearing brief or to appear at the Commission's hearing in this review.").

[18] *See also Elkem Metals Co. v. United States*, 276 F. Supp. 2d 1296 (Ct. Int'l Trade 2003) (discussing use of adverse inferences by the Commission under pre-URAA "adverse inferences" provision of statute); *Chung Ling Co. v. United States*, 805 F. Supp. 45, 48-49 (Ct. Int'l Trade 1992) (remanding matter to Commission to explain, among other things, why it did not take adverse inferences).