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THE U.S. DEPARTMENT OF COMMERCE’S “PRELIMINARY DETERMINATION IN THE LESS-THAN-FAIR-VALUE INVESTIGATION OF 100- TO 150-SEAT LARGE CIVIL AIRCRAFT FROM CANADA”: THE USE OF ADVERSE INFERENCE IN ANTIDUMPING INVESTIGATIONS AND PRELIMINARY DETERMINATIONS

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INTRODUCTION

The Tariff Act of 1930, now codified as 19 U.S.C. Chapter 4, and also known historically as the Hawley-Smoot Act (“the Act”), is the legal authority that the U.S. Department of Commerce (“the Department”) and the U.S. International Trade Commission (“the Commission”) use to investigate and determine trade violations involving U.S. industries and to provide and administer trade remedies. The Department and the Commission jointly administer

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antidumping\textsuperscript{2} and countervailing duty\textsuperscript{3} laws codified under the Act, with each possessing different responsibilities as to the administration of these laws.\textsuperscript{4}

Under the Act, interested parties\textsuperscript{5} may file an antidumping or countervailing duty petition with the Department and the Commission alleging that a U.S. industry is either materially injured or threatened with material injury from imports sold in the U.S. at less-than-fair-value ("LTFV").\textsuperscript{6} If the Department makes a finding that a foreign product or merchandise sold in the U.S. at LTFV and is, or is likely to

\textsuperscript{2} 19 U.S.C. § 1677(34) (1930) (defining “dumping” as the sale or likely sale of goods at less than fair value. In more specific terms, dumping is defined as selling of a product in the U.S. at a price that is lower than the price for which it is sold in the home market. Antidumping is the administration of duties (taxes) or laws that combat and discourage dumping activities); Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-4, U.S. (Jun. 2015).

\textsuperscript{3} Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-3, U.S. (Jun. 2015) (defining “countervailing duty” as a duty levied on an imported good to offset subsidies to producers or exporters of that good in the exporting country).


\textsuperscript{5} 19 U.S.C. § 1677(9) (1930) (“interested party” includes a foreign manufacturer, producer, or exporter, the government of a country in which the merchandise in question is produced or manufactured, a certified union which is representative of an industry engaged in the manufacture or production of the merchandise in question, a trade or business association a majority of whose members manufacture or produce the merchandise in question). See also Antidumping and Countervailing Duty Handbook, USITC Pub. 4540 at A-5, U.S. (Jun. 2015).

\textsuperscript{6} THE FINANCIAL DICTIONARY, The Free Dictionary, https://financial-dictionary.thefreedictionary.com/Less+Than+Fair+Value (“Less-than-fair-value” is defined as the deliberate sale of an export so that the export is significantly less expensive than a domestically produced good. A less-than-fair-value sale is not simply less expensive, but is determined to be anti-competitive. Selling products at less than fair value is synonymous with dumping).
be, injurious to a U.S. industry, then the Department may impose an antidumping duty on that product or merchandise.\footnote{19 U.S.C. § 1673 (1930).}

This article will discuss and evaluate a recent Department preliminary determination, finding that a Canadian civil aircraft manufacturer was selling its products in the U.S. at LTFV over a period of twelve months.\footnote{See Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada from the Office of Antidumping and Countervailing Duty Operations, Int’l Trade Admin., U.S. Dep’t. of Commerce to Carole Showers, Exec. Director, Office of Policy (Oct. 4\textsuperscript{th}, 2017).} In the Department’s investigation and ultimate preliminary determination, it used adverse facts available (“AFA”) or adverse inference to fill gaps and draw necessary information for its LTFV determination.\footnote{Id.} Under the Act, the Department has the option to use facts otherwise available, or an adverse inference, when the Department finds that an interested party has failed to comply with a request for information.\footnote{See 19 U.S.C. § 1677e (1930).} In this case, the Department found the Canadian aircraft manufacturer, an interested party, failed to cooperate with the investigation by not complying with a request for information, despite multiple opportunities to do so.\footnote{U.S. Dep’t. of Commerce, \textit{supra} note 8 at II.} Consequently, the Department was permitted to use, at its discretion, an adverse inference in its determination of a preliminary estimated-weighted-average dumping margin to be applied to the Canadian products under consideration.\footnote{Id.}

Part I of this article will provide background information on the Tariff Act of 1930 and its current role as the authority on antidumping and countervailing duty investigation proceedings conducted by the U.S. Department of Commerce and other U.S. based trade bodies today. More specifically, this part will explain the procedural use of
“adverse inference” in antidumping cases under investigation by the Department of Commerce and what qualifies for its usage.

Part II will lay out the facts of the case at issue, specifically the Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada. Part III will analyze and discuss the contents of the case, focusing on the Department’s use of adverse inference to arrive at its LTFV preliminary determination and its correlating estimated-weighted-average dumping margin.

Part IV will discuss the controversial implications and practical effects of adverse inference in practice today. Part V will conclude by summarizing the key findings and highlights of adverse inference as it was used in both the case discussed here and in daily practice.

I. BACKGROUND

The Tariff Act of 1930, or “the Act,” was developed in accordance with trade protectionist policies under the Hoover Administration during the Great Depression.13 The Act was intended to protect American jobs and businesses, particularly in the agricultural sector, from imports by placing duties on imported goods.14 After several additions and amendments to the statute over the last eighty-plus years, the Act today serves as an authority on trade and customs and is used by the Department and the Commission to administer laws, investigate trade violations, and provide trade remedies.15

Until 1979, the U.S. Department of the Treasury was responsible for administering antidumping laws under the Antidumping Act of

14 Id.
15 Id.
The Trade Agreements Act,\(^\text{17}\) with roots in the General Agreement on Trade & Tariffs (“GATT”),\(^\text{18}\) repealed the Act of 1921, making significant substantive and procedural changes to antidumping laws that were added to the Tariff Act of 1930 and ultimately shifted the responsibility of antidumping administration from the Department of the Treasury to the Department of Commerce.\(^\text{19}\)

Today, the Act permits the use of a controversial tool that is subject to “hotly contested litigation” and controversy known as adverse inference.\(^\text{20}\) Under U.S. antidumping and countervailing duty laws, AFA (or adverse inference) is available for the Department’s use if an interested party in an investigation fails to comply with information requests in trade proceedings.\(^\text{21}\) Non-cooperative parties are not a new challenge in international trade investigations as “[p]arties have refused to cooperate with agency requests for information since the inception of the trade laws, and the agencies have

\(^{16}\) Id. at IV-4.

\(^{17}\) See id., (The Trade Agreements Act of 1979 governs trade agreements negotiated between the U.S. and other countries; it implemented GATT antidumping codes into American antidumping laws under the Tariff Act of 1930 and repealed the Antidumping of 1921.).

\(^{18}\) International Trade Commission, supra note 13, at IV-3; see The GATT Years: From Havana to Marrakesh, World Trade Organization, (The General Agreement on Tariffs and Trade or the GATT was established after WWII in conjunction with the failed attempt to create the International Trade Organization (ITO), which would eventually be replaced by the World Trade Organization (WTO), to develop and establish strong rules for a prosperous multilateral trading system. The GATT was eventually replaced by the WTO in 1994, but Article VI of the GATT on antidumping serves as a model for antidumping laws worldwide.).

\(^{19}\) International Trade Commission, supra note 13, at IV-3.


been forced to resolve cases despite that noncooperation.” The option to use adverse inference was added to the Act through the Uruguay Round Agreements Act (“URAA”) with the goal of inducing cooperation of interested parties and deterring non-compliance. The Department is permitted to draw facts that are adverse to the non-cooperating party in its determination of a dumping margin rate so that the non-cooperating party does not receive a favorable outcome (i.e. is not rewarded) when it fails to comply with the Department’s requests for information that are pertinent to the investigation.

Under the Act, anytime the Department resorts to adverse inference and consequently draws on secondary information, as opposed to information that is attained through a trade investigation, “it must corroborate to the extent practicable, information from independent sources that are reasonably at its disposal.” This essentially requires the Department to ensure that the secondary information being used is reasonably reliable and relevant.

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23 See id. at 305 (The Uruguay Round Agreement or URAA was an act enacted by U.S. in 1994 that implemented the Marrakesh Agreement into U.S. law.).

24 Id. at 304.

25 See U.S. Dep’t of Commerce, supra note 8, at 7 (“Secondary Information is defined as 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 of the Act concerning subject merchandise.”).

26 Id.

27 Id.
II. Facts

On April 27, 2017, the Boeing Company ("Boeing") filed an antidumping duty ("AD") petition with the Department against Canadian aircraft manufacturer, Bombardier, Inc. ("Bombardier").

The Department initiated an investigation into these allegations on May 17, 2017. Shortly after, “On June 9, 2017, the Department issued the AD Questionnaire to Bombardier” and informed both parties about their opportunity to comment on the physical characteristics (i.e. the scope) of the merchandise under consideration.

On June 19, 2017, the parties submitted their comments to the Department regarding the physical characteristics of the merchandise, and the Department incorporated them into the investigation at their discretion. While Bombardier submitted commentary regarding the physical characteristics of the merchandise described in the petition, Bombardier never submitted the required AD Questionnaire issued by the Department on June 9.

On October 4, 2017, the Department announced its preliminary finding: Bombardier imported and sold its merchandise in the U.S. at LTFV and determined a dumping margin rate of 79.82% for these products. Because Bombardier did not comply with the Department’s request for information, the Department resorted to adverse facts in its preliminary LTFV determination and subsequent preliminary estimated weighted average dumping margin. The Department selected the alleged rate in Boeing’s petition–specifically

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28 Id. at 1.
29 Id.
30 Id. at 2.
31 Id.
32 Id.
33 Id. at 2, 5.
34 Id. at 1, 7.
35 Id. at 5.
choosing not to calculate a rate for the “individually-examined respondent” (i.e. Bombardier).\textsuperscript{36} Rather, the Department chose the only rate or dumping margin mentioned in the investigation.\textsuperscript{37} The Department sufficiently validated the petition, thereby fulfilling the statutory requirements for drawing an adverse inference to make a preliminary determination.\textsuperscript{38}

### III. CASE ANALYSIS

#### A. ANALYSIS OF THE DEPARTMENT’S USE OF ADVERSE INference

In its LTFV investigation, the Department determined that Bombardier “failed to cooperate by not acting to the best of its ability to comply with a request for information” and, under the authority of Section 776(b) of the Act, resorted to facts adverse to Bombardier’s interests in determining a weighted-average dumping margin for their products.\textsuperscript{39} The Act provides the guidelines for utilizing secondary facts.\textsuperscript{40} If an interested party: “(A) withholds information requested by the Department; (B) fails to provide such information by the deadlines for submission of the information; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified,” the Department shall use facts otherwise available in reaching the applicable determination.\textsuperscript{41}

The Act also goes on to say that the Department must consider the ability or fitness of the interested party to provide the requested information, provided the interested party promptly gives notification “that such party is unable to submit the information requested in the

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 7.
  \item Id.
  \item U.S. Dep’t of Commerce, supra note 8, at 9.
  \item Id. at 6.
  \item 19 U.S.C. § 1673, supra note 7, at 776(a)(1); 776(a)(2)(A)-(D) (1930).
  \item 19 U.S.C. § 1677e (1930).
\end{enumerate}
\end{footnotesize}
requested form and manner, together with a full explanation and suggested alternate forms in which such party is able to submit the information."\textsuperscript{42} This consideration provision also relies upon the assumption that the interested party completely submits the information by the deadline.\textsuperscript{43}

In this case, the Department had provided Bombardier with numerous opportunities to comply with their information request. After not receiving the requested information by the deadline along with no notification or explanation for why the party was unable to provide the requested information, the Department preliminarily determined that Bombardier withheld the requested information, failed to provide the requested information by the specified deadline, and significantly impeded the proceeding. Thus, the Department was able to rely on adverse facts available in its determination of Bombardier’s preliminary estimated weighted-average dumping margin in the LTFV investigation.\textsuperscript{44}

According to the Act, the Department is free to employ an adverse inference that is “derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.”\textsuperscript{45} In using an adverse inference to select a rate, as is the case here, the Department selects a rate that “is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.”\textsuperscript{46} In practice, the norm is to select “the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation.”\textsuperscript{47} Here,

\begin{itemize}
\item \textsuperscript{42} 19 U.S.C. § 1677m(c)(1) (1930).
\item \textsuperscript{43} Id. at (e)(1).
\item \textsuperscript{44} See U.S. Dep’t of Commerce, supra note 8, at 5.
\item \textsuperscript{45} Id. at 7.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.; See also 19 U.S.C. § 1677e, supra note 10, at (d)(2).
\end{itemize}
the Department opted to use the only dumping margin that Boeing, the petitioner, alleged in its petition – 79.82%.\textsuperscript{48}

\textbf{B. \textit{Analysis of DOC’s AFA Corroboration}}

After drawing the dumping margin from secondary information (Boeing’s petition), the Department was required under the statute to “corroborate, to the extent practicable” the “reliability and relevance of the information to be used.”\textsuperscript{49} To satisfy the reliability requirement, the Department analyzed “evidence supporting the calculations in the petition” which included export price, constructed value, and normal value among other key elements of the margin calculation;\textsuperscript{50} the Department found the evidence to have probative value and to be reliable.\textsuperscript{51}

Under the statute, the Department was also required to determine the relevance of the secondary information used to draw the adverse inference.\textsuperscript{52} The Act makes it clear that the Department “is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated,” nor is it required to “demonstrate that the dumping margin reflects an ‘alleged commercial reality’ of the interested party.”\textsuperscript{53} The Department determined the rate derived from the petition to be relevant because “it is derived from information about prices and accounting methodologies used in the aircraft industry.”\textsuperscript{54}

The Department was therefore able to preliminarily determine that the dumping margin alleged by Boeing in the petition was acceptable.

\textsuperscript{48} U.S. Dep’t of Commerce, \textit{supra} note 8, at 7.
\textsuperscript{49} \textit{Id.} at 8.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 9.
under the statute because the Department had corroborated the alleged rate to the extent practicable by demonstrating that the rate was both reliable and relevant.\textsuperscript{55}

IV. DISCUSSION

A. \textit{Efficiency/Resource Allocation Rationale}

One of the primary rationales behind the use of adverse inference is to promote efficiency and preserve Department resources.\textsuperscript{56} While the statute requires the Department to provide parties to the investigation with sufficient time to amend or edit responses that are incomplete or inadequate, the statute does not articulate the number of opportunities the Department is required to give parties to respond to requests for information.\textsuperscript{57} In many antidumping and countervailing duty cases, it is not uncommon for the Department to have to send information requests to foreign producers multiple times and afterwards to have to go through a series of back-and-forth responses with the producer because their responses are insufficient, incomplete, or altogether incorrect.\textsuperscript{58} These insufficient responses to information are often strategically withholding and not only waste Department resources, but also impede Department proceedings.\textsuperscript{59}

One criticism: when a non-cooperating foreign producer fails to submit required information to the Department during an investigation, that producer often ends up expending resources arguing

\begin{itemize}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} See Cannon & Caryl, \textit{supra} note 22, at 302.
\item \textsuperscript{57} Id. at 309.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\end{itemize}
against the use of or final determination from the AFA rate that should have been devoted to supplying the requested information.60

**B. IS ADVERSE INFERENCE TOO HARSH?**

The adverse inference option has been criticized for being too intentionally punitive or harsh.61 Section 776(b) of the Act specifically states that when the Department sets about determining a rate that is based on adverse facts available, the Department should select a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.62

Though often the non-cooperating respondent in an investigation fails to provide any of the information requested by the Department, the AFA can be applied in cases where the respondent merely fails to provide all of the requested information or provides the incorrect information, even by mistake—which makes the usage of the AFA option seem somewhat severe and contributes to its surrounding controversy in courts today.63 This is exemplified in *Mukand, Ltd. v. United States*, which stems from an administrative review of the Department’s standard approach to adverse inference in antidumping cases.64 In *Mukand*, the Court upheld the Department’s determination to use AFA was proper because the respondent, an Indian company that exports stainless steel into the U.S., had failed to sufficiently respond to the Department’s request for specific information related to

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60 Id. at 307.
61 See generally id. at 310.
62 See 19 U.S.C. 776(b); Id. at 305.
63 See generally, *Mukand, Ltd. v. United States*, 767 F. 3d. 1300 (demonstrating that partial, mistaken, and other forms of noncooperation are equally as liable to AFA treatment in antidumping cases as full noncooperation is).
64 Id.
production costs. In *Mukand*, the Indian company responded to every information request initiated by the Department, including requests that asked for supplemental or explanatory information. The Court stated that “[t]he proper inquiry for AFA is not whether Mukand intended to thwart [the Department] in its efforts to complete the record” but whether it “fail[ed] to cooperate to the best of its ability, regardless of motivation or intent.” The Court went on to state that the Department made its dissatisfaction with Mukand’s responses known repeatedly and explained to Mukand both the rationale for their request and what it would be used for, concluding that Mukand’s responses “consistently avoided the substance” of the Department’s questions.

As demonstrated by the example above, there is no bad faith requirement in the statute, nor is there a good faith exception. There is only a standard to determine the “best of its ability” which simply requires “the respondent put forth its maximum effort to investigate and obtain full and complete answers to [the Department’s] inquiries.” This means that even if a respondent timely responds to every request for information (including requests for additional and supplemental information) and supplies all information it believes required in good faith, the Department may still choose to resort to an adverse inference as it would in a case where the respondent never responds to any request for information. This anomaly leads to the inevitable and questionable outcome where a fully cooperative party receives the same negative result as a non-cooperative party. This inconsistency points out a marked and inherent degree of unfairness in the statute, begging the question of whether the Department should

65 *Id.* at 1302.
66 *Id.* at 1303-04.
67 See Kurland, *supra* note 20 (quoting *Mukand*, 767 F.3d. at 1304).
68 *Id.*
69 *Id.*
distinguish the non-cooperative parties from cooperative parties in its AFA treatment and subsequent dumping margin determination. Currently, there is nothing in the statute to suggest that AFA treatment and rate determination for parties subject to an investigation should differentiate between cooperating and non-cooperating parties.

C. TOO MUCH DEPARTMENT DISCRETION

Another criticism contributing to the controversial nature of the use of adverse inference in investigations is that the Department has too much discretion in its determination of applicable dumping margin rates in cases involving non-cooperating foreign producers and that such rates have been too high.\textsuperscript{71} Indeed, the Federal Circuit has acknowledged that in such cases, “the discretion granted by the statute appears to be particularly great, allowing [the Department] to select among an enumeration of secondary sources as a basis for its adverse factual inferences.”\textsuperscript{72} In anti-dumping cases involving a non-cooperating foreign party, if the Department invokes an adverse inference to determine a dumping margin, they are free to select from any of the secondary information submitted during the proceeding, including the petition containing the allegations against that foreign party.

Alternatively, courts have determined that the application of an AFA rate cannot be punitive and have elaborated that a rate drawn from adverse inference must be “based on facts.”\textsuperscript{73} Responding to fears and criticisms of potentially punitive behavior, courts have remanded the Department on several occasions when the AFA rate in investigations exceeds 100%.\textsuperscript{74} This was seen in a recent case involving a Chinese exporter of furniture where the Department’s AFA rate determination of 216.01% was found unreasonable by the

\textsuperscript{71} Cannon and Caryl, supra note 22, at 309-10.
\textsuperscript{72} Id. at 310.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
U.S. Court of International Trade. The court in this case expounded that, “as the rate becomes larger and greatly exceeds the rates of cooperating respondents, [the Department] must provide a clearer explanation for its choice and ample record support for its determination.” In this particular case, the Department ultimately was remanded three times for determining an AFA rate for a non-cooperating foreign party that was too high.

In keeping with the resource allocation and efficiency criticisms, time-consuming remands, such as these, have been criticized for encouraging foreign parties involved in such investigations to withhold information during the investigation and instead use their resources to argue against the final margin determination, alleging that it is punitive in nature. The most blatantly non-cooperative foreign parties, even ones who submit fraudulent information to the Department, will impose litigation to argue over what the rate should be, often appealing several times, taking the issue to the Court of International Trade. The issues of why the party simply did not submit the requested information accurately and timely in the first place often get lost in the litigation. This negative incentive to litigate is not only a waste of Court and Department resources but is also time-consuming and counter to the purpose of the Department to administer trade investigations and remedies efficiently. These types of resource-wasting scenarios give rise to the practical and ethical questions of whether foreign parties who blatantly refuse to cooperate with government agencies or worse, knowingly submit false information to the government, should be permitted to take their claims to court. Further, should the number of resources potentially

75 Id.
76 See id.; see also, Lifestyle Enterprise v. United States, 768 F.Supp. 2d 1286, 1298 (Ct. Int’l Trade 2011).
77 See generally, id.
78 Cannon and Caryl, supra note 22.
79 Id. at 310.
80 Id. at 303.
81 Id.
wasted in such cases be taken into consideration at all when these cases arise?

V. CONCLUSION

While the Department of Commerce plays an important role in protecting American industry from foreign competitors dumping goods into the U.S. at LTFV, the ruling body of laws that govern anti-dumping and the Department’s application of these laws are not without controversy and criticism. The Tariff Act of 1930 provides the Department with broad discretion and power for dealing with non-cooperating foreign parties in its investigations into anti-dumping cases with the goal of efficiently and expeditiously resolving these issues, saving valuable resources and time. However, these goals are often frustrated in modern practice and the applicable laws that are intended to promote efficiency and expediency in dealing with such parties sometimes have the opposite desired effect: encouraging unnecessary and excessive litigation, wasting Department resources, and inadvertently treating cooperating parties in the same punitive manner as non-cooperating parties. Nevertheless, as seen in the Department’s recent Preliminary Determination in the Less-Than-Fair-Value Investigation of 100- to 150-Seat Large Civil Aircraft from Canada and application of adverse inference to determine the applicable anti-dumping margin rate, this tool is still very much in use and continues to reinforce the message that non-cooperating foreign parties in anti-dumping investigations will not go unpunished.