No. 17-171

In the Supreme Court of the United States

PAPIERFABRIK AUGUST KOEHLER SE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the determination of petitioner's antidumping margin, made by the Secretary of the U.S. Department of Commerce in the third administrative review of the Secretary's antidumping order on lightweight thermal paper from Germany, was supported by substantial evidence and otherwise in accordance with law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 843 F.3d 1373. The opinion of the Court of International Trade (Pet. App. 28a-53a) is reported at 7 F. Supp. 3d 1304. The Secretary of Commerce's antidumping determination (Pet. App. 54a-109a) is available at 78 Fed. Reg. 23,220.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2016. A petition for rehearing was denied on March 3, 2017 (Pet. App. 110a-111a). On May 9, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 31, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This appeal concerns the Secretary of Commerce's third annual administrative review of an antidumping duty order covering lightweight thermal paper from Germany. Petitioner is a German producer and exporter of lightweight thermal paper. Petitioner contends that, in three respects, the Secretary exceeded her authority to apply adverse inferences to an uncooperative party.

First, petitioner alleges (Pet. i) that the Secretary erred in applying "adverse facts available," rather than relying on petitioner's reported data, following the Secretary's determination that petitioner had falsified its reporting for the review. Second, petitioner alleges (*ibid.*) that the Secretary erred in selecting the adverse rate she applied to petitioner, which pursuant to statute was based on a 75.36% margin drawn from the antidumping petition. Third, petitioner contends (*ibid.*) that the Secretary failed to corroborate the petition margin to the extent practicable, as required by the statute. The Court of International Trade (CIT) held that the Secretary's case-specific determinations were supported by substantial evidence and otherwise lawful. Pet. App. 28a-53a. The court of appeals affirmed. *Id.* at 1a-21a.

1. The antidumping statute authorizes the Secretary to apply remedial duties to foreign goods that are sold in the United States at less than fair value (known as "dumping") and that cause or threaten material harm to the domestic industry. See 19 U.S.C. 1673, 1677(1). Based on a petition from a domestic producer or on her own initiative, the Secretary is authorized to investigate whether dumping has occurred, while the U.S. Interna-

tional Trade Commission examines whether the domestic industry has been materially harmed (or is threatened) as a result. See 19 U.S.C. 1673a(b), 1673d, 1673e. If both determinations are affirmative, the Secretary issues an antidumping order and imposes duties. *Ibid.*

If she is asked to do so after an order has been issued, the Secretary conducts annual administrative reviews to determine the amount of dumping and resulting duties owed on goods exported to the United States during the previous 12-month period. 19 U.S.C. 1675(a)(1)(B) and (2)(A). The Secretary determines the amount of dumping by calculating a "dumping margin" for each entry of merchandise subject to the order. 19 U.S.C. 1675(a)(2)(A)(ii). A dumping margin is the amount by which "normal value" (home-market price) exceeds the "export price" (United States price). 19 U.S.C. 1677(35)(A). Higher home-market prices as compared to the United States export prices result in higher dumping margins; lower home-market prices produce lower margins.

To calculate the dumping margins, the Secretary uses detailed questionnaires to request information from a foreign producer or exporter about its home-market and United States sales and costs. 19 C.F.R. 351.301(c); see generally 19 U.S.C. 1677m. Both company representatives and counsel must certify the accuracy and completeness of questionnaire responses. 19 U.S.C. 1677m(b); 19 C.F.R. 351.303(g). The Secretary ordinarily relies on these reported data, subject to certain verification procedures, to determine the dumping margin and therefore the antidumping duty rate for the period under review. 19 U.S.C. 1677m(i); 19 C.F.R. 351.301, 351.307.

In certain circumstances where the questionnaire process does not produce complete or reliable information, the Secretary must determine a dumping margin "us[ing] the facts otherwise available" to the agency. 19 U.S.C. 1677e(a).[1] Those circumstances include (1) if "necessary information is not available on the record"; or (2) if an "interested party or any other person" (A) "withholds information that has been requested," (B) "fails to provide such information by the deadlines for submission," (C) "significantly impedes [the] proceeding," or (D) "provides such information but the information cannot be verified." *Ibid.*

In selecting from among the facts otherwise available, the Secretary may apply an "inference that is adverse to the interests of [any interested] party" that the Secretary finds has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. 1677e(b). Such an adverse inference may include relying on information derived from (1) the antidumping petition; (2) a final determination in the investigation; (3) any previous antidumping review or determination; or (4) "any other information placed on the record." *Ibid.*

If the Secretary relies on "secondary information" (such as information from the petition or a prior determination), the Secretary is required to corroborate that information, "to the extent practicable," using independent sources that are "reasonably at [the Secretary's]

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[1] Unless otherwise noted, citations to 19 U.S.C. 1677e refer to the 2012 edition of the statute. In 2015, Congress amended Section 1677e to provide Commerce greater flexibility in applying adverse rates to uncooperative parties. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, § 502, 129 Stat. 383; see also pp. 21-23, *infra*.

disposal." 19 U.S.C. 1677e(c). To corroborate information means that the Secretary determines that the information has "probative value." 19 C.F.R. 351.308(d); see H.R. Rep. No. 316, 103d Cong., 2d Sess. 870 (1994) (House Report) (Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809).[2] "The fact that corroboration may not be practicable in a given circumstance," however, "will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question." 19 C.F.R. 351.308(d).

Under this framework, when the Secretary concludes that an interested party's conduct has undermined the reliability or usability of all of the information that the party has submitted, the Secretary will disregard that party's submissions and determine the party's antidumping duty rate using exclusively adverse facts available—sometimes referred to as "total AFA." *Ad Hoc Shrimp Trade Action Comm.* v. *United States*, 802 F.3d 1339, 1357 (Fed. Cir. 2015). When the Secretary determines that some reported information remains reliable and usable, the Secretary will rely only partially on adverse facts available—referred to as "partial AFA." *Ibid.*

2. a. In this case, after determining that petitioner had intentionally concealed relevant sales destined for its home market by transshipping the merchandise through third-country intermediaries, the Secretary entirely disregarded petitioner's submissions in the third administrative review and relied exclusively on

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[2] The SAA is "regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements," which the antidumping statute implements. 19 U.S.C. 3512(d); see URAA §§ 201-234, 108 Stat. 4842-4901.

adverse facts available to establish an antidumping duty rate.

Petitioner was the sole respondent in the Secretary's third administrative review and submitted multiple questionnaire responses, purporting to provide information regarding the entirety of its home-market sales, while certifying the accuracy and completeness of its reporting. Pet. App. 3a, 29a. On the final day to submit new factual information for the review, domestic-industry producer Appvion, Inc. submitted information publicly alleging that petitioner had "engaged in a scheme to defraud [the Secretary] by intentionally concealing certain otherwise reportable home market transactions * * * [by] selling 48 gram thermal paper that it knows is destined for consumption in Germany through various intermediaries in third-countries." *Id.* at 30a (citations omitted). Appvion alleged that petitioner had undertaken the scheme "to artificially manipulate prices attributable to those sales of 48 gram paper shipped directly to its German customers." *Ibid.* (citation omitted). In support of those allegations, Appvion submitted an affidavit reporting information from a confidential source, stating, again publicly, that petitioner had shifted the value of its prices away from sales made directly to its customers in Germany to those that were transshipped, and that petitioner had engaged in the transshipments "in order to avoid reporting those transactions as sales to Germany in the [United States] antidumping case." C.A. App. 936.

Although petitioner initially denied Appvion's allegations, it subsequently acknowledged the transshipment scheme. Pet. App. 30a-31a. Petitioner later characterized its admission as acknowledging that the public por-

tions of Appvion's allegations were "substantially correct." *Id.* at 63a; C.A. App. 1426. Petitioner also indicated that its employees had undertaken the transshipment scheme to avoid complying with antidumping protocols, and that senior personnel had developed and directed the sales strategy. C.A. App. 1042-1044, 1423; see *id.* at 15E, 15K (confidential version of CIT opinion).[3]

Petitioner asserted that "these acts and omissions were undertaken without the authority or knowledge of the Chief Executive Officer, the Chief Financial Officer, the in-house counsel, or the Board of Directors of [petitioner]." Pet. App. 31a (citation omitted). Nonetheless, it stated that its management was taking "full and complete responsibility for the actions of its employees." C.A. App. 1424. Along with its admissions, petitioner proffered revised home-market sales data that it alleged included all of the previously concealed sales. Pet. App. 4a. The Secretary rejected the revised sales data as untimely and unsolicited. *Ibid.*; see also *id.* at 16a-17a, 77a-78a.

b. When the Secretary published the final results for the third administrative review, she invoked Section 1677e(a) and (b) to use facts otherwise available to calculate petitioner's antidumping margin and to draw adverse inferences against petitioner in selecting those facts. Pet. App. 4a-5a, 63a-91a. Specifically, the Secretary determined that petitioner's actions had satisfied four of the five independent statutory bases for considering such facts by withholding requested information, failing to provide information in a timely manner, sig-

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[3] This information was redacted as business proprietary from the CIT's opinion, but petitioner disclosed it publicly in subsequent litigation.

nificantly impeding the review proceeding, and providing information that could not be verified. *Id.* at 4a-5a, 74a-75a; see 19 U.S.C. 1677e(a)(2). The Secretary further found that she was justified in drawing adverse inferences against petitioner based on petitioner's failure to comply to the best of its ability with the Secretary's requests for information. Pet. App. 5a, 75a; see 19 U.S.C. 1677e(b).

The Secretary explained that petitioner had engaged in an "elaborate scheme to conceal certain otherwise reportable home market sales" that "rendered [petitioner's] questionnaire responses wholly unreliable and unusable." Pet. App. 78a. The Secretary similarly determined that petitioner's actions constituted a "material omission" that prevented the Secretary from "rely[ing] upon any of [petitioner's] submitted information to calculate an accurate dumping margin." *Id.* at 89a. While acknowledging that petitioner had taken certain measures after the allegation was made, the Secretary explained that she "d[id] not find that such actions * * * restore[d the Secretary's] confidence in the reliability of [petitioner's] home market sales data submitted for this review, especially given the extent of the fraudulent activity involved in this transshipment scheme." *Ibid.* The Secretary also noted that petitioner had not revealed its scheme voluntarily, but had done so only after Appvion's allegation, and that the Secretary "believe[d] it unlikely that [petitioner] would have provided information about the transshipment scheme and the omitted sales were it not for [Appvion's] allegation." *Id.* at 86a-87a.

Relying on explicit statutory authority to use information from the original antidumping petition, the Secretary set petitioner's duty rate at 75.36% for the

third review. Pet. App. 91a-109a. The Secretary corroborated that figure by comparing it to the range of transaction-specific dumping margins generated by the sales data that petitioner had reported in the second review (data that Appvion had placed on the record of the third review). *Id.* at 3a, 6a, 91a-92a, 101a-102a.[4] The Secretary determined that the 75.36% rate fell within the range of petitioner's reported margins, including petitioner's highest second-review margin of 144.63%, demonstrating that the petition margin had probative value and was corroborated to the extent practicable. *Ibid.* The Secretary further explained that "[t]he margin calculation data from [the second review] is relevant for purposes of corroboration because it is [petitioner's] own data and thus reflective of its commercial practices in regard to this proceeding." *Id.* at 102a.

3. The CIT upheld the Secretary's determination of petitioner's antidumping duty rate as supported by substantial evidence and otherwise in accordance with law. Pet. App. 28a-53a.

The CIT first concluded that the Secretary's decision to adopt an adverse rate was reasonable based on petitioner's failure to cooperate to the best of its ability with the Secretary's requests for information. Pet. App. 35a-45a. The court rejected petitioner's efforts to blame its transshipment scheme solely on the rogue actions of

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[4] In the course of admitting the truth of Appvion's allegations, petitioner acknowledged that its transshipment scheme had extended back to the completed second review, the results of which were then in litigation before the CIT. The Secretary sought a voluntary remand in the second-review litigation, and she ultimately applied the same adverse rate to petitioner in that review as well. See Pet. 8. The CIT sustained that determination, and the action is currently pending before the court of appeals.

low-level employees without the knowledge of "'senior'" management, explaining that petitioner's characterization was "not supported by the record" and that petitioner was responsible for the entire company's actions in any event. *Id.* at 36a-37a (citation omitted). The CIT rejected petitioner's claims about the allegedly limited impact of its transshipment scheme as "view[ing] its conduct too narrowly." *Id.* at 44a. The court explained that the "effects of [petitioner's] conduct extended beyond the omitted sales" because that conduct had prevented the Secretary from making the comparisons between normal value and United States export prices required to calculate a dumping margin. *Ibid.*

With respect to the Secretary's selection and corroboration of the adverse rate, the CIT held that the Secretary's determination was lawful because the Secretary is authorized by statute to rely on information derived from the antidumping petition when looking to facts otherwise available, and the Secretary had adequately corroborated the rate by comparing it to the range of petitioner's second-review dumping margins. Pet. App. 45a-52a. The court rejected petitioner's contention that the 144.63% margin that constituted the highest margin in the corroboration range was facially aberrational because of its lower price and allegedly lower quantity compared to other sales. *Id.* at 51a-52a. The court noted that petitioner lacked record evidence to support its claim, and that the low numbers alone were insufficient to undermine the reliability of the margin. *Ibid.* The court further explained that the sale established only an upper limit for the range of transaction-specific margins, and that the actual rate chosen was well below that upper limit. *Id.* at 51a. It

further concluded that, "[a]lthough the petition rate exceeded [petitioner's] previous margins, it was not punitive because it was properly corroborated." *Id.* at 52a (footnote omitted).

4. The court of appeals affirmed. Pet. App. 1a-21a. The court held that substantial evidence supported the Secretary's findings that petitioner had engaged in an intentional transshipment scheme that had impeded the Secretary's investigation, and that petitioner had not "cooperate[d] to the best of its ability" with the review. *Id.* at 9a. The court stated that "[t]he kind of misconduct evidenced here is far from the cooperation that standard demands." *Ibid.*

The court of appeals similarly concluded that the Secretary had reasonably found all of petitioner's submitted data to be unreliable and unusable based on that scheme. Pet. App. 9a-10a. The court explained that "fraudulent responses as to part of submitted data may suffice to support a refusal by [the Secretary] to rely on any of that data in calculating the antidumping duty" when the misrepresentations "'may reasonably be inferred to pervade the data in the record beyond that which [the Secretary] has positively confirmed as misrepresented.'" *Id.* at 10a (quoting *Ad Hoc Shrimp Trade Action Comm.* v. *United States*, 992 F. Supp. 2d 1285, 1293 (Ct. Int'l Trade 2014), aff'd, 802 F.3d 1339 (Fed. Cir. 2015)). It found that the Secretary had reasonably taken that approach here, based on her finding that petitioner had "intentionally submitted materially false responses" to the Secretary's request for information. *Ibid.*

The court of appeals also found no reversible error in the Secretary's adoption and corroboration of the 75.36% adverse rate from Appvion's antidumping petition. Pet. App. 10a. The court noted that 19 U.S.C.

1677e(b) authorizes the Secretary to rely on information in an antidumping petition to select an adverse rate. Pet. App. 11a. It concluded that the Secretary's corroboration of the petition margin using petitioner's own second-review data was supported by substantial evidence and otherwise lawful. *Id.* at 10a-16a. The court explained that, although an adverse rate is intended to be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance," the Secretary has "wide, though not unbounded discretion 'to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin.'" *Id.* at 12a (quoting *F.Lii de Cecco di Filippo Fara S. Martino S.p.A.* v. *United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). The court found that the Secretary had permissibly exercised that discretion here.

The court of appeals rejected petitioner's assertion that the 144.63% margin at the top of the corroboration range could not be relied on because it was "aberrational." Pet. App. 14a. The court observed that the "mere fact that a margin is unusually high does not mean that it lacks probative value." *Ibid.* The court further explained that the Secretary could reasonably assume that petitioner's margins throughout the second administrative review period, from which the corroboration range was derived, "were artificially depressed because [petitioner] admitted that it had been engaged in the transshipment scheme during that time as well." *Id.* at 14a-15a. The court also observed that the rate that the Secretary had actually adopted was half the rate that petitioner asserted was aberrational, and that the second-review dataset also contained a sale with a 48.68% margin and 18 sales with margins between 20% and 30%.

Id. at 15a. Finally, the court rejected petitioner's argument that the rate was impermissibly punitive, concluding that as long as a rate is "properly corroborated according to the statute, [the Secretary] has acted within its discretion and the rate is not punitive." *Id.* at 16a.

The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 110a-111a.

ARGUMENT

Petitioner contends (Pet. 12-32) that the Secretary's determination of its antidumping duty rate in the third administrative review was unsupported by substantial evidence or otherwise unlawful. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Any potential ongoing significance the factbound questions presented by this petition might otherwise have is further limited by a recent statutory amendment that expanded the Secretary's discretion to determine antidumping duty rates based on adverse inferences in circumstances like those presented here. Further review is not warranted.

1. Section 1677e requires the Secretary of Commerce to "use the facts otherwise available" to determine a producer's or exporter's antidumping duty rate if one or more of five different circumstances are presented: (1) "necessary information is not available on the record"; (2) a party "withholds information that has been requested by [the Secretary]"; (3) a party "fails to provide such information by the deadlines for submission"; (4) a party "significantly impedes" a review proceeding; or (5) a party "provides such information but the information cannot be verified." 19 U.S.C. 1677e(a). If the Secretary further finds that a party to the proceeding "has failed to cooperate by not acting to the

best of its ability to comply with a request for information from [the Secretary]," she may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. 1677e(b). That inference may be based on, *inter alia*, information that is "derived" from "the petition" or from "any previous [administrative] review," or "any other information placed on the record." *Ibid.* If the Secretary relies on information that was not obtained in the course of the review, she shall, "to the extent practicable, corroborate that information from independent sources that are reasonably at [her] disposal." 19 U.S.C. 1677e(c).

The Federal Circuit has long recognized that this statutory scheme grants the Secretary "broad discretion" in executing the antidumping law. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A.* v. *United States*, 216 F.3d 1027, 1032 (2000) (*De Cecco*) (quoting *Smith-Corona Grp.* v. *United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984)). "In the case of uncooperative respondents" like petitioner, that discretion is "particularly great." *Ibid.*; see *ibid.* ("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 noncooperation with its investigations and assure a reasonable margin.").

The Secretary's discretion is "not unbounded." *De Cecco*, 216 F.3d at 1032. For example, the corroboration requirement precludes the Secretary from "select[ing] unreasonably high rates with no relationship to the respondent's actual dumping margin." *Ibid.* Rather, even an "adverse facts available rate" is intended to be a "'reasonably accurate estimate of the respondent's actual

rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" Pet. 16 (quoting *De Cecco*, 216 F.3d at 1032); see *De Cecco*, 216 F.3d at 1032 ("Congress tempered deterrent value with the corroboration requirement."). An adverse rate meets those criteria if "it is correct as a mathematical and factual matter" and is set in a manner "consistent with the method provided in the statute." *Nan Ya Plastics Corp.* v. *United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016).

In this case, the Secretary reasonably exercised her discretion to adopt an antidumping duty rate that, while drawn from secondary information using an adverse inference against petitioner, was adequately corroborated by petitioner's own data from the immediately prior review. The Secretary found that four of the five statutory triggers for considering "facts otherwise available" were present. Pet. App. 76a. The Secretary reasonably concluded that petitioner's deliberate misrepresentations in response to her requests for information demonstrated that petitioner had not cooperated "to the best of its ability." *Id.* at 90a. And the Secretary chose, from a permissible source ("the petition," 19 U.S.C. 1677e(b)(1))), an antidumping duty rate that was *half* of the highest margin petitioner itself had reported in the previous review. *Id.* at 98a-99a.

The two courts below upheld the Secretary's determinations and findings as supported by substantial evidence and otherwise within the bounds of her discretion. Pet. App. 1a-21a, 28a-53a. This Court's further review of those factbound questions is unwarranted. See *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping

of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.") (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)).

2. Petitioner asserts that three purported errors in the Secretary's determination warrant this Court's review. Those challenges lack merit.

a. Petitioner contends (Pet. 16-21) that the Secretary ignored petitioner's "timely submitted and verifiable information in favor of evidence specifically chosen because it is adverse" to petitioner. Pet. 20. Petitioner asserts that the Secretary may rely on "facts otherwise available" only where "information is missing from the record or cannot be used." Pet. 17. But Section 1677e identifies with specificity the circumstances in which the Secretary may (indeed, must) rely on "facts otherwise available," and only one of them is that "necessary information is not available on the record," 19 U.S.C. 1677e(a). In this case, the Secretary found that each of the *other* four circumstances was present, and those findings were sustained by both lower courts. See Pet. App. 8a-9a, 35a. Although petitioner asserts that the information it submitted was timely and verifiable, it does not even contest (let alone refute) the Secretary's findings that it "with[e]ld[] information" requested by the Secretary and "significantly impede[d]" the administrative review, 19 U.S.C. 1677e(a)(2)(A) and (C).

Petitioner concedes (Pet. 17) that, in such circumstances, the Secretary may disregard reported information that "cannot be used." It argues (Pet. 18), however, that the Secretary should have at least relied on petitioner's originally submitted United States sales data and its home-market sales data for those sales that

were shipped directly to German customers—which it describes as unaffected by the "omitted" transshipped sales. But, as both courts below recognized, the Secretary could reasonably determine that petitioner's deliberate falsification of sales data impeached the *overall* credibility of petitioner's reporting in the review. See Pet. App. 9a-10a, 43a-44a. As the Secretary explained, petitioner's "pattern of concealment regarding its transshipments, combined with the fact that [petitioner] and its counsel certified to the accuracy of responses based on such schemes, significantly undermines the credibility and reliability of [petitioner's] data overall." C.A. App. 1732M; see Pet. App. 89a (discussing the Secretary's additional determination that petitioner's actions constituted a "material omission" that prevented the Secretary from "rely[ing] upon any of [petitioner's] submitted information to calculate an accurate dumping margin").

Petitioner's related argument (Pet. 19) that the Secretary should have conducted a verification of its sales data if she doubted the accuracy of the information is also misplaced. The Secretary is required to verify only the information upon which she relies, not information that she reasonably disregards due to fraud. See 19 U.S.C. 1677m(i). The Secretary's verification procedures are designed to confirm the accuracy of reliably reported data, not to investigate the degree to which information has been concealed or data have been manipulated. See C.A. App. 1732J ("[S]tandard verification procedures were not established to confirm the veracity of this type of sales information, which would require extraordinary measures outside the scope of a typical sales verification."); see also Pet. App. 20a-21a (holding that Commerce did not abuse its discretion by refusing to conduct verification on data infected by fraud).

b. Relying primarily on this Court's decision in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), petitioner contends (Pet. 21-26) that the Secretary improperly adopted a punitive antidumping duty rate. Petitioner did not cite *Mendoza-Martinez* in the proceedings below, and the decision has little bearing on this case.

In the cited passage of *Mendoza-Martinez*, this Court discussed various tests that are "traditionally applied" to determine whether a sanction provided by "an Act of Congress is penal or regulatory in character," such that its imposition requires the "procedural safeguards * * * of a criminal prosecution." 372 U.S. at 167-168. The Court explained that, in making that determination, it had considered such factors as whether "the sanction involves an affirmative disability or restraint," whether it requires "a finding of *scienter*," whether it will "promote the traditional aims of punishment—retribution and deterrence," and whether "it appears excessive in relation to [an] alternative purpose assigned." *Id.* at 168-169.

In this case, the court of appeals was not tasked with deciding whether the Secretary's determination of an antidumping duty rate required the procedural safeguards of a criminal trial. Rather, the question before the court was whether the Secretary had correctly followed the requirements of 19 U.S.C. 1677e, which authorizes the Secretary to "use an inference that is adverse to the interests" of an uncooperative party in setting its antidumping duty rate. 19 U.S.C. 1677e(b). As petitioner recognizes, that provision's purpose is to give parties "an incentive to cooperate" with the Secretary's requests for information, and to ensure that a party does not benefit from being uncooperative. Pet. 22 (citation omitted); see *Essar Steel Ltd.* v. *United States*,

678 F.3d 1268, 1276 (Fed. Cir. 2012) (discussing importance of the Secretary's ability to draw adverse inferences in light of her lack of subpoena power); House Report 870. Deterrence thus is a virtue rather than a shortcoming of an adverse rate selected under Section 1677e. See Pet. 16 (acknowledging that an "adverse facts available rate" should have "'some built-in increase intended as a deterrent to non-compliance'") (citation omitted).

To be sure, the Secretary "must balance the statutory objectives of finding an accurate dumping margin and inducing compliance." Pet. 17 (quoting *Timken Co.* v. *United States*, 354 F.3d 1334, 1345 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004)). But the statutory mechanism for ensuring the proper balance is Section 1677e(c)'s requirement that the Secretary corroborate "to the extent practicable" any secondary information on which she relies for establishing an adverse rate. When that requirement is met, the statute requires nothing more. See Pet. App. 16a ("[W]e have held that as long as a rate is properly corroborated according to the statute, Commerce has acted within its discretion and the rate is not punitive."); see also *id.* at 15a (distinguishing *Gallant Ocean (Thail.) Co.* v. *United States*, 602 F.3d 1319 (Fed. Cir. 2010), as a case where the Secretary "failed to corroborate the rate it chose").

c. Petitioner contends (Pet. 26-32) that the Secretary did not adequately corroborate the 75.36% antidumping duty rate she imposed. But the Secretary derived that rate from a permissible source—the antidumping petition, 19 U.S.C. 1677e(b)(1)—and she corroborated it by analyzing a range of petitioner's own sales data submitted by petitioner during the Secretary's sec-

ond administrative review. Pet. App. 10a. The Secretary concluded that the rate had "probative value" because it fell comfortably below the highest transaction-specific margin petitioner had reported from that second period, and within range of the transaction-specific margins from more than a dozen other sales that petitioner had reported. *Id.* at 14a-15a, 101a-103a.

Petitioner contends (Pet. 28) that the transaction-specific margin at the top of that range was "dubious on its face" because it was significantly higher than the next highest transaction-specific margin. Petitioner argues that the Secretary should have assumed the margin was inaccurate based on its magnitude. Section 1677e, however, expressly authorizes the Secretary to draw the opposite inference when, as in this case, a party has failed to cooperate with an administrative review. See 19 U.S.C. 1677e(b); see also Pet. App. 15a ("Commerce is not required to 'corroborate corroborating data.'") (citation omitted).

In any event, the Secretary's adopted rate was half the margin that petitioner claims (Pet. 29) was "aberrational." Petitioner does not question the reliability of the other 19 transactions (with margins between 20% and 50%) on which the Secretary relied for corroboration. Nor does it dispute that the transaction-specific margins in petitioner's second-review data were likely understated because petitioner's fraudulent scheme reached back into that period too. Petitioner complains (*ibid.*) that the Secretary could only speculate about the extent of that understatement, but that was a problem of petitioner's own making.

Petitioner also argues (Pet. 28) that the adopted antidumping duty rate for the third administrative review was "facially unreasonable" because it was significantly

higher than petitioner's single-digit rates in other segments of the proceeding in which petitioner had cooperated. But antidumping duty rates adopted based on adverse facts available are not supposed to represent a typical dumping margin calculated for cooperating respondents. The point of corroboration is to ensure that an adverse rate is relevant and probative, not to assign a rate to an uncooperative respondent as if it had cooperated. See Pet. 27 (acknowledging that adverse rates are required only to be "reasonably accurate" with some "built-in increase intended as a deterrent to noncompliance") (citation omitted); see also Pet. App. 15a (explaining that petitioner's high-margin transactions did not have the single-digit rates petitioner urged).

3. In any event, the factbound questions presented here have even less ongoing significance in light of Congress's recent amendment to Section 1677e. As petitioner notes (Pet. 27 n.10), after the Secretary's determination in this case, Congress amended 19 U.S.C. 1677e to give Commerce even greater discretion in applying, selecting, and corroborating adverse rates in antidumping proceedings.

Section 502 of the Trade Preferences Extension Act of 2015 (TPEA), Pub. L. No. 114-27, 129 Stat. 383, amended Section 1677e "to provide [the Secretary] flexibility to select appropriate facts available or adverse facts available when a foreign party fails to cooperate with the agency's request for information in a proceeding." S. Rep. No. 45, 114th Cong., 1st Sess. 37 (2015) (Senate Report) (discussing essentially identical precursor to the enacted legislation). The 2015 law authorizes the Secretary, in selecting an adverse rate for an uncooperative party, to apply "any dumping margin from any segment of the proceeding, * * * including

the highest such rate or margin, based on the evaluation by the [Secretary] of the situation." 19 U.S.C. 1677e(d)(1) and (2) (Supp. III 2015). It makes clear that the Secretary need not determine, or make adjustments to, an adverse rate "based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information." 19 U.S.C. 1677e(b)(1)(B) (Supp. III 2015). And in corroborating that rate, the Secretary has no obligation to "estimate what the * * * dumping margin would have been if the interested party * * * had cooperated." 19 U.S.C. 1677e(d)(3)(A) (Supp. III 2015). The new law further specifies that the Secretary need not demonstrate, for corroboration purposes or "any other purpose," that an adverse rate "reflects an alleged commercial reality of the interested party." 19 U.S.C. 1677e(d)(3)(B) (Supp. III 2015). Finally, the law modified Section 1677e's corroboration requirement to exempt any dumping margin applied in a separate segment of the same proceeding. See 19 U.S.C. 1677e(c) (Supp. III 2015).

As petitioner notes (Pet. 27 n.10), these amendments "do not apply here." Contrary to petitioner's contention (*ibid.*), however, they significantly affect the importance of the issues this petition presents and the appropriateness of this case as a vehicle to address the scope of the Secretary's discretion in antidumping proceedings. In light of these substantial revisions, a ruling by this Court regarding the scope of the *former* Section 1677e would have little prospective significance. In amending the law, moreover, Congress clearly sought to provide the Secretary *greater* flexibility in applying adverse rates, contrary to petitioner's core contention that this

Court should grant a writ of certiorari to *curb* Commerce's discretion under the former Section 1677e. Compare Pet. 12-13, with TPEA § 502, 129 Stat. 383, and Senate Report 37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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