U.S. Court of Appeals for the Federal Circuit

SUNTEC INDUSTRIES CO., LTD., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee MID CONTINENT NAIL CORPORATION, Defendant

Appeal No. 2016–2093

Appeal from the United States Court of International Trade in No. 1:13-cv-00157-RKM, Senior Judge R. Kenton Musgrave.

Decided: May 30, 2017

MARK B. LEHNARDT, Antidumping Defense Group, LLC, Washington, DC, argued for plaintiff-appellant.

STEPHEN CARL TOSINI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BENJAMIN C. MIZER, JEANNE E. DAVIDSON, PATRICIA M. MCCARTHY; MICHAEL THOMAS GAGAIN, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Washington, DC.

Before NEWMAN, TARANTO, and CHEN, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TARANTO.
Dissenting opinion filed by *Circuit Judge* NEWMAN.

TARANTO, *Circuit Judge.*

This case arises from the U.S. Department of Commerce's third administrative review of its antidumping-duty order covering certain steel nails from China. Mid Continent Nail Corporation, a domestic entity, asked Commerce to initiate the third administrative review to determine the proper duty rates for the covered period, but Mid Continent did not serve the request directly on Suntec Industries, a Chinese exporter and producer named in the antidumping order and in the request. As this case comes to us, it is undisputed that Mid Continent thereby violated a service requirement stated in a Commerce regulation. When Commerce actually initiated the review about a month after receiving the request, it published a notice of the initiation in the Federal Register, as provided in 19 U.S.C. § 1675(a)(1), which states that Commerce shall initiate review "if a request for such a review has been received and after publication of notice of such review in the Federal Register." Despite the Federal Register publication, however, Suntec did not participate in the review. Evidently because of a lapse in its relationship with the counsel who had been its representative for years in the steel-nail proceedings, Suntec remained unaware of the review until Commerce announced the final results (or a few days earlier).

Based on the service deficiency regarding the request for the review, Suntec sued in the Court of International Trade to set aside the results of the review at least as applied to Suntec. The court rejected the challenge. It held that Suntec had failed to demonstrate that it was substantially prejudiced by the service error as to the request for the review in this case. In particular, it concluded that the Federal Register notice of initiation of the review constituted notice to Suntec as a matter of law and fully enabled Suntec to participate in the review because Suntec did not show any prejudice from not knowing of the request in the pre-initiation period. We affirm.

I

In 2008, Commerce issued an antidumping-duty order, under 19 U.S.C. § 1673, covering certain steel nails from China. Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008). The Final Determination expressly covers Suntec, which was among the few foreign entities for which Commerce specifically verified information (at Suntec's Shanghai location) pursuant to 19 U.S.C. § 1677m(i). *Id.* at 33,977, 33,980, 33,982, 33,983; *see* J.A. 194. Suntec had established its entitlement to a rate separate from the China-wide rate of 118.04 percent, and Commerce assigned Suntec a rate of 21.24 percent. 73 Fed. Reg. at 33,981, 33,984.

The common annual administrative-review process pursuant to 19 U.S.C. § 1675 then began. In the first two years after issuance of the 2008 order, *i.e.*, the years beginning August 1, 2008, and August 1, 2009, respectively, Commerce published Federal Register notices announcing the opportunity to request, Mid Continent requested, and Commerce then initiated (announced by publication in the Federal Register) administrative reviews of the proper duty rate under the order. In each year, the request and initiation included Suntec. In each year, Mid Continent served the request on a Chinese law firm that Suntec had designated as representing it; the certificates of service list that firm's Shanghai address, not Suntec's own, different Shanghai address. In each year, Suntec participated in the review by filing a "separate rate certification," Mid Continent then dropped its review request as to Suntec, and Commerce in turn rescinded the review of Suntec. *See* J.A. 194–96. The effect was to leave the 21.24 percent rate in place for Suntec. *See* Certain Steel Nails from the People's Republic of China: Notice of Partial Rescission of the First Antidumping Duty Administrative Review, 75 Fed. Reg. 43,149, 43,150 & nn.1–2 (Dep't of Commerce July 23, 2010).

This case concerns the third annual administrative review, for the year beginning August 1, 2010. On August 1, 2011, Commerce published a Federal Register notice of the opportunity to request a review, J.A. 196, and on August 31, 2011, Mid Continent requested such a review, naming Suntec among many other entities, J.A. 196, 208. The certificate of service shows that, as in the first two administrative reviews, Mid Continent mailed a copy of the request to the Suntec-designated Shanghai lawyers' address, not to Suntec's own Shanghai address. J.A. 196. Five weeks later, on October 3, 2011, Commerce published a notice of initiation of the review in the Federal Register. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part, 76 Fed. Reg. 61,076 (Dep't of Commerce Oct. 3, 2011) (Notice of Initiation). The notice of initiation in the Federal Register expressly lists Suntec as a party subject to the administrative review. *Id.* at 61,082.

Commerce conducted the review and issued its final determination on March 18, 2013. Certain Steel Nails from the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010–2011, 78 Fed. Reg. 16,651 (Dep't of Commerce Mar. 18,2013). The final determination recites that Suntec, among other entities, did not apply for a rate separate from the China-wide rate and therefore was assigned the China-wide rate of 118.04 percent. *Id.* at 16,652. As for the reason for Suntec's non-participation, it is now undisputed that Suntec was in fact unaware of the third administrative review until just after, or perhaps nine days before, the final determination issued. J.A. 73, 197, 244.[1]

Thirty-one days after Commerce published the final results, Suntec challenged the initiation of the administrative review in the Court of International Trade, arguing that the initiation was invalid as to Suntec because Mid Continent did not serve Suntec with the request for review as required by 19 C.F.R. § 351.303(f)(3)(ii). The court first denied Commerce's motion to dismiss. The court concluded that it had jurisdiction under 28 U.S.C.§ 1581(i) and that Suntec's complaint allegations, if true, would establish that Mid Continent failed to comply with the service requirements contained in 19 C.F.R. § 351.303(f)(3)(ii). *Suntec Indus. Co. v. United States*, 951 F. Supp. 2d 1341, 1346–48, 1349 (Ct. Int'l Trade 2013).

[1] Suntec participated in the fourth and fifth administrative reviews, seeking and receiving a rate separate from the (still 118.04 percent) China-wide rate. *See* Certain Steel Nails from the People's Republic of China: Final Results of Fourth Antidumping Duty Administrative Review; 2011–2012, 79 Fed. Reg. 19,316, 19,318 (Dep't of Commerce Apr. 8, 2014) (assigning Suntec 10.42 percent rate); Certain Steel Nails from the People's Republic of China: Final Results of Fifth Antidumping Duty Administrative Review; 2012–2013, 80 Fed. Reg. 18,816,18,817 (Dep't of Commerce Apr. 8, 2015) (assigning Suntec 16.62 percent rate).

Subsequently, the court considered and granted Commerce's motion for summary judgment. The court concluded that Mid Continent did violate the service requirement of 19 C.F.R. § 351.303(f)(3)(ii). Under the regulation, "an interested party that files with the Department a request for . . . an administrative review . . . must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request . . . by the end of the anniversary month or within ten days of filing the request for review, whichever is later." *Id.* Mid Continent did not serve a copy of the request on Suntec. *Suntec Indus. Co. v. United States*, No. 13–00157, 2016 WL 1621088, at *1, *4 (Ct. Int'l Trade Apr. 21, 2016).

Nevertheless, the court held that Suntec was not entitled to relief because it had failed to make a showing that would permit a reasonable finding that it was prejudiced by Mid Continent's failure to serve its request for initiation of the administrative review. In particular, the court concluded that the Federal Register notice of initiation sufficed as a matter of law to give Suntec notice of the proceeding upon its initiation, so that, to show prejudicial error, Suntec had to establish prejudice from losing the five-week pre-initiation period to prepare for participation in the review post-initiation. It held that Suntec had made no showing of any such pre-initiation prejudice. On that basis, the court granted Commerce's motion for summary judgment. *Id.* at *7.

Suntec appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

We review the existence of jurisdiction in the Court of International Trade in this case de novo. *Int'l Custom Prods. v. United States*, 467 F.3d 1324, 1326 (Fed. Cir. 2006); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1001 (Fed. Cir. 2003). We review the grant of summary judgment de novo. *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1361 (Fed. Cir. 2011). "When reviewing a Court of International Trade decision in an action initiated under 28 U.S.C. § 1581(i), this court applies the standard of review set forth in 5 U.S.C. § 706." *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374, 1379 (Fed. Cir. 2012); 28 U.S.C. § 2640(e).[2]

A

We begin with the government's contention that the Court of International Trade lacked jurisdiction to hear this case. Suntec's complaint invoked jurisdiction under 28 U.S.C. § 1581(i), whose lan-

[2] Commerce argues that the Court of International Trade misapplied the standard of review when it considered Suntec's extra-record evidence. We need not address that argument because we conclude that affirmance is required even in light of Suntec's evidence.

guage, as relevant here, confers jurisdiction over a civil action arising out of a law providing for duties on the importation of merchandise for reasons other than the raising of revenue or for "administration and enforcement with respect to" such duties. That language covers antidumping duties, and associated administration and enforcement, but to ensure that the statute works as intended, "we have held 'that jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate.'" *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1360 (Fed. Cir. 2016) (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008)). To determine whether another subsection could have been available, "[w]e look to the 'true nature of the action.'" *Id.* (quoting *Hartford Fire Ins.*, 544 F.3d at 1293).

The government argues that this case is outside § 1581(i) because Suntec could have challenged Commerce's final determination under § 1581(c). We disagree. To adopt the government's contention that this case comes within § 1581(c), we would have to conclude that Suntec was or could have been a party to the administrative review. We cannot draw that conclusion.

28 U.S.C. § 1581(c) gives the Court of International Trade exclusive jurisdiction over any civil action commenced under 19 U.S.C. § 1516a. The relevant provisions of § 1516a are those which allow "an interested party *who is a party to the proceeding in connection with which the matter arises*" to "commence an action" to "contest[] any factual findings or legal conclusions upon which" a "final determination" in an administrative review under 19 U.S.C. § 1675 "is based." 19 U.S.C. § 1516a(a)(2)(A), (B)(iii) (emphasis added). The requirement that the plaintiff have been a party in the administrative review is reinforced by 28 U.S.C. § 2631(c) ("A civil action contesting a determination listed in [19 U.S.C. § 1516a] may be commenced . . . by any interested party *who was a party to the proceeding in connection with which the matter arose*.") (emphasis added). *See* 19 C.F.R. § 351.102(b)(36) ("'Party to the proceeding' means any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding.").

Suntec was not a party to the administrative review. And we cannot conclude, in our jurisdictional analysis, that Suntec could have been such a party. We assume the correctness of Suntec's merits contention for the jurisdictional analysis here. *Cf. Rocky Mountain Helium, LLC v. United States*, 841 F.3d 1320, 1325 (Fed. Cir. 2016) (standing analysis assumes correctness of merits allegations). Suntec's claim on

the merits is that it could not have participated because it did not get notice of the proceeding and hence did not know that the proceeding was underway. 28 U.S.C. § 1581(c) is manifestly inadequate where a party is challenging the initiation of an administrative review based on the contention that it did not participate in the review precisely because it did not get the legally required notice. The Court of International Trade therefore had jurisdiction in this case under § 1581(i).[3]

B

The merits question presented to us takes as a given two premises not contested on this appeal. One is that Mid Continent violated a regulation in requesting the third administrative review when it failed to mail a copy of the request to Suntec itself and instead mailed a copy to Suntec's designated legal representatives in Shanghai, as it had done in the first two administrative reviews. The second is that Suntec's non-participation in the third administrative review likely cost it a good deal of money, at least on a per-unit basis. Rather than retaining its earlier 21.24 percent rate, it was assigned the China-wide rate of 118.04 percent. What is at issue here is the connection between the service deficiency and Suntec's non-participation in the review.

The question on appeal is not whether the regulatory service deficiency could be a basis for judicial review under 5 U.S.C. § 706 even aside from whether the deficiency was prejudicial. The Court of International Trade did not rule, and Commerce does not contend on appeal, that Suntec is barred from challenging Commerce's actions (its initiation of and final determinations in the review) because it was only Mid Continent, not Commerce, that was responsible for providing, and failed to provide, service as required by the governing regulation. We may therefore assume that such a service deficiency can be a basis, in a proper case, for setting aside Commerce's actions as, *e.g.*, "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

Section 706, however, does not stop there in prescribing when a court may set aside agency action. Section § 706 commands that, when a court hears a challenge to an agency action, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. The Supreme Court has held that the § 706 "rule of prejudicial error" command requires application of a traditional harmless-error analysis and that the person seeking relief from the error has the burden

[3] The government argues that *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006), demonstrates that § 1581(c) was available to Suntec in this case to challenge the initiation of the review. But *PAM* is unlike this case, because the exporter in *PAM* participated in the administrative review. *See PAM*, 463 F.3d at 1346–47.

of showing prejudice caused by the error. *Shinseki v. Sanders*, 556 U.S. 396, 406, 409 (2009). Accordingly, the question presented here is whether Suntec has met its burden of establishing the connection between the service deficiency and Suntec's absence from the review that is required to constitute a showing of prejudicial error.

The crucial fact here is that there was an intervening event between the request and the review: the Federal Register notice of initiation of the review. If that notice of initiation constituted notice as a matter of law, then Suntec was responsible for its own nonparticipation in the review after that notice, and to show harm from the earlier service defect it would have had to show that it lost an opportunity for pre-initiation preparation that it would have needed to make post-initiation participation effective. Such a showing might be difficult, given that Commerce gave Suntec and others 60 days after initiation to make pertinent filings. *See* Notice of Initiation, 76 Fed. Reg. at 61,077. We need not say, however, what might be required to make such a showing. In this case, Suntec made no such showing based on the pre-initiation period and does not meaningfully argue otherwise in this court.

The question therefore comes down to whether the Federal Register notice constituted effective notice as a matter of law, to be treated as indistinguishable from actual notice. Like the Court of International Trade, we conclude that the Federal Register notice did constitute notice as a matter of law.

Our court and other courts have often recognized that a failure to give a person a required notice can be harmless—*e.g.*, where the person has actual knowledge of the relevant information or the notice defect was cured by a subsequent notice given in time for the person to act on the matter. *See, e.g., United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1329–30 (Fed. Cir. 2013) (denying relief despite Commerce's violation of notice requirement in context of suspension of liquidation); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355–56 (Fed. Cir. 2006) (denying remedy where party did not show that it was prejudiced by agency's failure to provide notice at time required by regulation); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 875–76 (Fed. Cir. 1995) (as *Dixon*, 468 F.3d at 1355, summarized, "holding that failure to timely comply with the notice requirement of 19 C.F.R. §353.25(d) did not deprive the Department of Commerce of the authority to commence an administrative review where the antidumping review was noticed by the agency after the regulatory deadline"); *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394–96 (Fed.

Cir. 1996) (finding lack of required information in notice harmless);[4] *see also U.S. Telecom Ass'n v. Fed. Communication Comm'n*, 825 F.3d 674, 725 (D.C. Cir. 2016) (denying remedy for failure to provide notice where parties had actual knowledge of the final rule); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487–88 (9th Cir. 1992) (denying remedy for failure to provide notice during rulemaking because the parties had actual notice of the proceedings); *Aero Mayflower Transit Co., Inc. v. Interstate Commerce Comm'n*, 711 F.2d 224, 232 (D.C. Cir. 1983) (denying remedy for insufficiently informative agency notice where party contesting decision learned the relevant information in subsequent proceedings in time to present challenges).

We applied that familiar principle, and the requirement to show substantial prejudice of a notice defect, in *PAM, S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006), specifically in the context of the same regulatory service deficiency that is at issue here. In *PAM*, the domestic petitioners failed to serve PAM, a foreign exporter, with their request that Commerce initiate an administrative review, as required by 19 C.F.R. § 351.303(f)(3)(ii). Four weeks later, Commerce initiated the review and published notice of initiation in the Federal Register. PAM, listed in the notice, entered an appearance in the review the next day. *PAM*, 463 F.3d at 1346. When the review was complete, PAM argued that it was entitled to have the review set aside as to it because of the service defect. *Id.* at 1347. This court rejected that contention, reversing the Court of International Trade's contrary ruling. *Id.* at 1346.

The court held that PAM had to show prejudice to secure relief for the service defect. The court explained: "Even if a regulation is intended to confer an important procedural benefit, if the failure of a party to provide notice as required by such a regulation does not prejudice the non-notified party, then we think neither the government, the non-serving party, nor the public should be penalized for such a failure." *Id.* at 1348. Acknowledging the procedural benefit provided by the regulation, the court followed *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), as well as this court's *Kemira* and *Intercargo* decisions, and held that PAM had to "show substantial prejudice" from the service deficiency to secure relief. *PAM*, 463 F.3d at 1347–48.

The court then held that PAM had not shown "that it was substantially prejudiced by [petitioners'] lack of service, which delayed its

[4] We implicitly recognized the point in *Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015), when we held that a notice defect was not cured by eventual notification after the deadline for submission of evidence. *See id.* at 1345 ("At least in this context, a 'cure' of the notice defect must mean some source providing notification of the same opportunity a correct notice would have provided.").

notification by several weeks." *Id.* at 1349. The court relied on the fact that "PAM received constructive and actual notice of the review by publication in the Federal Register" before the review began. *Id.* And while PAM did not have the pre-initiation time to prepare, it did not show prejudice as a result, because Commerce gave it "more than enough time to 'catch up.'" *Id.*

PAM makes clear how a deficiency in service of the request for a review could in some cases be prejudicial not withstanding a fully effective Federal Register notice of initiation of the review. In particular, the un-served person may be able to prove prejudice from loss of pre-initiation time to prepare for effective post-initiation participation in the review. The regulation demanding service of the request is therefore not rendered unenforceable by treating the Federal Register notice of initiation as effective notice. But there was no such (uncured) prejudice in *PAM*. And in the present matter, as we have noted, Suntec has not shown, or even meaningfully argued for, prejudice relating to the pre-initiation period.

Accordingly, this case differs from *PAM* only in that here the Federal Register notice was not actually seen by Suntec, whereas PAM evidently saw the notice in its case. The question is whether the Federal Register notice nevertheless suffices to require the same no-prejudice result as in *PAM*. We conclude that it does, based on the background law regarding Federal Register notices and the specific congressional prescription of Federal Register notice for the initiation of administrative reviews under 19 U.S.C. § 1675(a).

The background law includes two provisions of the Federal Register Act, codified in Title 44 of the U.S. Code. Those provisions establish a broad, non-agency-specific default rule that Federal Register notices are treated as legally effective notices in a wide range of circumstances. *See, e.g., Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) ("It is well settled that when regulations are published in the Federal Register they give legal notice of their contents to all who may be affected thereby."); *Aris Gloves, Inc. v. United States*, 281 F.2d 954, 958 (C.C.P.A. 1958) ("Congress intended a proper publication in the Federal Register to be considered reasonable public notice unless otherwise provided by statute.").

One of the Title 44 provisions says: "Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. § 1507. That provision applies to the initiation notice here. Congress specifically required Commerce to publish the notice in the

Federal Register, 19 U.S.C. § 1675(a)(1), and Commerce did so. Section 1507, standing alone, therefore applies to make the publication "sufficient to give notice of [its] contents . . . to a person subject to or affected by it," 44 U.S.C. § 1507, which includes Suntec.

The second Title 44 provision of relevance is 44 U.S.C.§ 1508, which addresses a narrower situation of certain notices of timing information regarding hearings or opportunities to be heard. The provision says: "A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, . . . shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases when notice by publication is insufficient in law, where the notice is published in the Federal Register" and it satisfies certain timing conditions related to "the date fixed in the notice for the hearing or for the termination of the opportunity to be heard." 44 U.S.C. § 1508. In this case, it is undisputed that the initiation notice at issue gave Suntec an opportunity to be heard by specified dates after the initiation. Notice of Initiation, 76 Fed. Reg. at 61,076–77, 61,082; *see* 19 U.S.C. § 1675(e) (requiring that in administrative reviews, Commerce "shall, upon the request of an interested party, hold a hearing in accordance with section 1677c(b)"); 19 U.S.C.§ 1677(9) ("interested party" includes a "foreign manufacturer, producer, [and] exporter"). But for the fact that Suntec is not a resident of the States or the District of Columbia, 44 U.S.C. § 1508 would supplement section 1507's confirmation that the Federal Register notice of initiation sufficed to give notice.

Section 1508, however, does not apply to Suntec, a foreign firm, and so does not aid Commerce here. On the other hand, section 1508 does not resolve this case against Commerce. The provision merely declares the legal sufficiency of Federal Register notices of opportunities to be heard for the designated domestic firms, as a default rule applicable in a wide range of contexts not specific to any particular statutory regime. It sets a generic background floor of sufficient notice for domestic firms for the hearing-related circumstances covered. Section 1508 does not go further and declare that such notice is legally insufficient for foreign firms, regardless of the statutory context. It does not do so in terms, and it would not be sensible to read this generic, floor-setting provision as doing so impliedly. In particular, section 1508 cannot reasonably be read to deem Federal Register notice of a hearing or opportunity to be heard legally insufficient as to foreign firms where a specific statutory or regulatory regime makes clear that such Federal Register notice provides foreign entities legally sufficient notice. That is the case here.

Under the relevant provisions of Title 19, we must conclude that a Federal Register publication of a notice of a review's initiation is sufficient as a matter of law to give notice to the named foreign exporters and producers. Congress was explicit in prescribing Federal Register publication as the mechanism of notice: Commerce "shall" review the duties "if a request for such a review has been received and after publication of notice of such review in the Federal Register." 19 U.S.C. § 1675(a)(1). It said just that while also guaranteeing "a hearing in accordance with" 19 U.S.C. § 1677c(b) to any "interested party" requesting one. 19 U.S.C. § 1675(e). Congress recognized that it is central, not incidental, to the review process that the "interested parties" typically include foreign firms named in the antidumping order as subject to antidumping duties: in defining "interested party," Congress listed "foreign manufacturer, producer, [and] exporter" first in its covered examples. 19 U.S.C. § 1677(9). And in the "hearing" provision mentioned in § 1675(e), Congress further confirmed that Federal Register notice suffices to give notice: "Any hearing required or permitted under this title shall be conducted after notice published in the Federal Register . . . ." 19 U.S.C. § 1677c(b).[5]

The legal sufficiency of Federal Register notice, we conclude, follows from the statutory provisions at issue. And we do not think that Suntec has identified anything implausible about the congressional scheme when so understood. A foreign exporter or producer that is expressly named in an antidumping order, and is subject to continuing antidumping duties for the protection of U.S. industry, can reasonably be expected to have knowledge of the established mechanism for regular reviews (upon request) to determine the final amount of duties owed, of the potentially severe consequences of non-participation by a foreign entity from a non-market economy, and of the need to maintain representation to monitor developments. Suntec itself had such knowledge, participating in the first two annual reviews and maintaining, until the lapse that caused the problem in this review, a relationship with counsel to provide the necessary monitoring. It is not unreasonable for Congress to provide a simple, familiar Federal Register notice mechanism that deems those in Suntec's position properly notified upon publication.

Suntec argues that it is irrelevant whether it is deemed to have gotten notice of the initiation of the review because Commerce can initiate a review only after receiving a valid request and a request is not valid unless it includes a certification of service. But that argu-

[5] Indicating the distinctive character of the statutorily prescribed "hearing," the same provision declares that the hearing "shall not be subject to" a "procedure" subchapter of the Administrative Procedure Act, 5 U.S.C.§§ 551–559, or to that Act's "right of review" provision, 5 U.S.C. § 702. 19 U.S.C. § 1677c(b).

ment is just a reformulation of the assertion that, under the regulations, there was a service deficiency as to the request; deeming the request invalid changes nothing.[6] The alternative articulation of the same point thus does not alter at all the need to show prejudice from the identified error. Suntec has not made that showing, because the Federal Register notice was effective as to initiation and Suntec showed no prejudice from the pre-initiation deficiency.

III

For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

[6] We note that the statute requires only receipt of a request and Federal Register publication of a notice of initiation, not service of the request on identified exporters. 19 U.S.C. § 1675(a)(1). A regulation requires "[e]ach document filed with [Commerce to] include a certificate of service," with the penalty for failure to do so being that the "Secretary may refuse to accept [the] document." 19 C.F.R. § 351.303(f)(2). Here, the Secretary accepted the request for review. Furthermore, the regulation that addresses the required contents of requests does not mention service on the exporters. *See* 19 C.F.R. § 351.213(b)(1) (stating that an interested party may request review of particular exporters or producers only if it "states why [it] desires the Secretary to review those particular exporters or producers").

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Appeal from the United States Court of International Trade in No. 1:13-cv-00157-RKM, Senior Judge R. Kenton Musgrave.

NEWMAN, *Circuit Judge*, dissenting.

I respectfully dissent. Suntec did not receive the personal service required by regulation; the Court of International Trade held that the regulation was violated. *Suntec Indus. Co. v. United States*, 2016 WL 1621088, at *1, *4 (Ct. Int'l Trade Apr. 21, 2016). And Suntec never had actual notice of the review by Commerce and did not participate in the review. *Id.* at *3 (accepting Suntec's affidavits as true).

The regulatory violation was not harmless, and Suntec was substantially prejudiced, for it did not have the opportunity to participate at all. Constructive notice is not within the statute or rule. Commerce is required to enforce its regulation that requires the requestor to provide service to a party. 19 C.F.R. § 351.303(f)(3)(ii)contemplates that foreign entities may not be readers of the Federal Register and explicitly requires direct notice. *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006), describes the potential harm to a party that had actual notice and actually participated in the proceeding. Suntec had no such notice, and did not participate.

Precedent includes some situations in which notice defects were harmless. In *PAM* and other cases, the person complaining about the lack of required regulatory notice nonetheless had actual notice and appeared to participate in the action. Since the early 1800's, a party who appeared in person or by attorney was deemed to have waived any defects in service. *Knox v. Summers*, 7 U.S. 496, 497 (1806) ("The court were unanimously of the opinion, that the appearance by attorney cured all irregularity of process."); *Pollard v. Dwight*, 8 U.S. 421, 428–29 (1808) ("By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the non-service of process."); *Creighton v. Kerr*, 87 U.S. 8, 12 (1873) ("A general appearance waives all question of the service of process."). The same principle applies here; a party who is un-served but appears anyway waives the issue of defects in service. However, Suntec was not served and did not appear.

The Administrative Procedure Act's prejudice requirement allows for harmless error, but the error here was not harmless. Suntec did not participate because it was, as we must accept, unaware of the proceeding. Suntec was unaware of the proceeding because it was not informed that the request for review had been filed, and therefore had no reason to expect that a review would be instituted.

Without the notice required by Commerce's rule, the request was faulty and Commerce could not institute review of Suntec. By statute, the administering authority *shall* review "*if* a request for such a review has been received." 19 U.S.C. § 1675(a)(1) (emphasis added). Absent a request that was properly served, Commerce cannot institute a review. Commerce requires the requestor of an administrative review to provide actual notice to foreign manufacturers as part of the request for review. Commerce's rule requires:

> Request for review. In addition to the certificate of service requirements under paragraph (f)(2) of this section, an interested party that files with the Department a request for an expedited antidumping review, an administrative review, a new shipper review, or a changed circumstances review must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner by the end of the anniversary month or within ten days of filing the request for review, whichever is later. If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person.

19 C.F.R. § 351.303(f)(3)(ii). This regulation requires that a requestor "must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request." Compliance with 351.303(f)(3)(ii) is not optional. The provision stating that the "Secretary may refuse to accept [the] document" appears in Rule 351.303(f)(2), which generally deals with certificates of service for "documents filed with the Department." Rule 351.303(f)(3)(ii) expressly states that its requirements are "in addition to the certificate of service requirements under paragraph (f)(2)."

Here, there was no personal service, and the Secretary made no finding that the requestor made a reasonable attempt to serve. Without one of those two requirements, the rule is violated and the request is defective.

Commerce brushes off the violation as a harmless procedural defect. But the only way to render the violation harmless is by assuming that Suntec was obligated to appear, although without notice that the request had been filed. The court creates that obligation by charging Suntec with constructive notice by publication of the institution of the review in the Federal Register. Constructive notice is a legal fiction. *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005) ("When a court says that the defendant received 'constructive notice' of the plaintiff's suit, it means that he didn't receive notice but we'll pretend he did").

However, constructive notice is not applicable here. Given Commerce's regulations, Suntec's duty to inquire did not begin until it received the required actual notice of the request. The Federal Register Act does not, by itself, compel foreign entities to monitor the Federal Register. Nor does the Tariff Act. The regulations require actual notice. Commerce assigned the burden to the requestor to provide actual notice to all the foreign manufacturers that a request had been filed. Foreign manufacturers are entitled to rely on the regulations that Commerce has promulgated. "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961).

Commerce cannot, after the fact, nullify the regulatory scheme it created. From the court's contrary holding, I respectfully dissent.

UNITED STATES, Plaintiff-Appellant v. AMERICAN HOME ASSURANCE COMPANY, Defendant-Cross-Appellant

Appeal No. 2016–1088, 2016–1090

Appeals from the United States Court of International Trade in Nos. 1:09-cv-00403-LMG, 1:10-cv-00125-LMG, 1:10-cv-00175-LMG, 1:10-cv-00343-LMG, Judge Leo M. Gordon.

Decided: May 26, 2017

BEVERLY A. FARRELL, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for plaintiff-appellant. Also represented by AMY M. RUBIN; BENJAMIN C. MIZER, JEANNE E. DAVIDSON, Washington, DC; BRANDON ROGERS, Office of Assistant Chief Counsel, United States Customs and Border Protection, Indianapolis, IN; PAULA S. SMITH, New York, NY.

HERBERT C. SHELLEY, Steptoe & Johnson, LLP, Washington, DC, argued for defendant-cross-appellant. Also represented by MARK FREDERICK HORNING.

EDWARD GRAHAM GALLAGHER, The Surety & Fidelity Association of America, Washington, DC, for amicus curiae The Surety & Fidelity Association of America.

Before MOORE, TARANTO, and CHEN, *Circuit Judges.*

MOORE, *Circuit Judge*.

The government appeals from the United States Court of International Trade's ("Trade Court") judgment on the pleadings holding that the government is not entitled to non-statutory equitable interest for unpaid antidumping duties for imported goods. *United States v. Am. Home Assur. Co.*, 100 F. Supp. 3d 1364, 1373 (Ct. Int'l Trade 2015) ("*AHAC II*"). American Home Assurance Company ("AHAC") cross-appeals the Trade Court's decision to award the government interest on the unpaid duties under 19 U.S.C. §§ 580 and 1505(d). *Id.* at 1371. We affirm the Trade Court decision on all issues.

BACKGROUND

This appeal stems from four collection actions in which the government sought to recover unpaid antidumping duties from AHAC, a surety. AHAC secured three different importers' importation of preserved mushrooms and crawfish tail meat from China by issuing numerous single transaction and continuous entry bonds in 2001 and 2002. The issued bonds obligated the importers and AHAC to pay, up to the face amounts of the bonds, "any duty, tax or charge and compliance with law or regulations" resulting from covered activities. Customs liquidated the entries secured by the bonds and assessed antidumping duties on the merchandise. Each importer failed to pay the duties owed. The parties do not dispute that AHAC is liable for the principal amounts of antidumping duties owed on the bonds.

After liquidation, Customs started charging statutory post-liquidation interest on the unpaid duties of two of the collections that

did not exceed the face amount of the bonds pursuant to 19 U.S.C. § 1505(d) ("§ 1505(d) interest"). From 2003 to 2009, Customs issued multiple demands notifying AHAC of the government's intent to seek § 1505(d) interest. AHAC protested the government demands and Customs denied the protest. AHAC could have challenged Customs' denial at the Trade Court under 28 U.S.C. § 1581(a), but elected not to do so. In 2009, the government commenced four suits at the Trade Court for the collection of unpaid duties and interest, which the Trade Court consolidated. After discovery, the parties cross-moved for summary judgment. Relevant to this appeal, the parties disputed the application of equitable prejudgment interest, § 1505(d) interest, and 6% statutory prejudgment interest under 19 U.S.C. § 580 ("§ 580 interest").

The Trade Court granted in part and denied in part both the government's and AHAC's motions. It ordered AHAC to pay § 1505(d) interest up to the face amounts of the bonds. It held that § 1505(d) interest involves "charges or exactions of whatever character" under 19 U.S.C. § 1514(a)(3) and that the statute does not contain an exception for charges or exactions arising after liquidation. It held that the bonds statutorily and contractually serve to secure the payment of duties and any interest—they do not distinguish between pre-and post-liquidation interest. It held that because the § 1505(d) interest determination is "final and conclusive" under § 1514(a)and AHAC failed to contest its denied protest, AHAC was precluded from asserting any defenses regarding its liability for § 1505(d) interest.

The Trade Court also held AHAC liable for § 580 interest, which is 6% statutory prejudgment interest. The Trade Court declined to award equitable prejudgment interest because the 6% rate of the § 580 interest "far exceeds the applicable rates at which the Government would receive equitable interest" and awarding equitable prejudgment interest in these circumstances would overcompensate the government. The government appeals the Trade Court's denial of non-statutory equitable interest, and AHAC cross-appeals the Trade Court's award of § 580 and § 1505(d) interest to the government. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the Trade Court's grant or denial of summary judgment for correctness as a matter of law and we decide de novo "the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *United States v. Am. Home Assur. Co.*, 789 F.3d 1313, 1319 (Fed. Cir. 2015) ("*AHAC I*"). We review the Trade Court's determination not to award equitable pre-

judgment interest for abuse of discretion. *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005).

A. Equitable Prejudgment Interest

The government argues the Trade Court erred in denying the government equitable prejudgment interest because its decision was predicated on the assumption that § 580 interest is compensatory. It argues the purpose of equitable prejudgment interest is to compensate the government for the time value of money, whereas the purpose of § 580 interest is to penalize a noncompliant party. We do not agree with the government's characterization. While we agree that § 580 interest and equitable prejudgment interest are not mutually exclusive, the mere availability of dual sources of prejudgment interest does not mandate their application in every case. The Trade Court retains broad discretion to apply equitable prejudgment interest in accordance with the facts of each case.

Equitable prejudgment interest "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *Princess Cruises*, 397 F.3d at 1367 (quoting *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987)). No statute or regulation explicitly authorizes equitable prejudgment interest; its award is governed by traditional judge-made principles. *Id.* Factors a court may consider in awarding equitable prejudgment interest may include the degree of wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed bringing the action, and other fundamental considerations of fairness. *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1326 (Fed. Cir. 2013).

In its entirety, 19 U.S.C § 580 states: "Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." Section 580 applies to bonds securing the payment of antidumping duties when the government sues for payment under those bonds. *AHAC I*, 789 F.3d at 1324–28.

Generally, equitable remedies are unavailable when a party has an adequate statutory remedy. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *accord West Virginia*, 479 U.S. at 308–09 ("In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due."). AHAC argues that to allow both statutory

prejudgment interest at 6% and equitable prejudgment interest would amount to a windfall to the government and permit double recovery or more. In the current environment where interest rates are less than 6%, the statutory rate chosen by Congress under § 580 amounts to full recovery plus some. This, of course, is Congress' choice and we are bound by the statute.

The availability of statutory interest would normally render equitable interest unavailable. Here, however, Congress expressly indicated the availability of both statutory and equitable prejudgment interest when it enacted the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA"). *See* Pub. L. No. 114–125, 130 Stat. 122. TFTEA provided authority for the government to deposit interest earned on antidumping duties into the special account created by the Continued Dumping and Subsidy Offset Act. 19 U.S.C. § 4401. Congress recognized that interest earned on antidumping duties includes "[e]quitable interest under common law *and* interest under section 580 of this title awarded by a court against a surety under its bond for late payment of antidumping duties." *Id.* § 4401(c)(2)(C) (emphasis added). The plain meaning of this statutory language indicates that Congress recognized that a court may award *both* equitable and § 580 interest. *See also AHAC I*, 789 F.3d at 1330.

That the Trade Court *may*, in its discretion, award dual sources of prejudgment interest does not mean that the Trade Court *must* award dual sources of prejudgment interest when the government brings an action to recover duties. The fact that the plain language of § 580 covers bonds securing the payment of antidumping duties does not transform the statute into one that is punitive in nature. In fact, the statute expressly designates the § 580 monies as "interest." We conclude that the Trade Court retains broad discretion to apply non-statutory prejudgment interest according to traditional equitable principles, which is exactly what it did in this case.

The Trade Court did not abuse its discretion in concluding that equitable prejudgment interest is unnecessary. It recognized our decision in *AHAC I* and noted that an award under § 580 may "alter[] the landscape" with respect to equitable prejudgment relief. *AHAC II*, 100 F. Supp. 3d at 1371 (quoting *AHAC I*, 789 F.3d at 1330).The Trade Court then reviewed various equitable factors, noting that the government did not unreasonably delay bringing this action, although its "timing may not have been optimal," and "AHAC has never paid the outstanding duties, with one exception, despite Customs' numerous requests." *Id.* at 1372–73. Ultimately, the Trade Court determined that "[§] 580 interest more than fairly compensates the Government

for the time value of the unpaid duties" because the 6% rate under § 580 "far exceeds the applicable rates at which the Government would receive equitable interest." *Id.*at 1373. While the government correctly points out that the Trade Court stated that the factors in this case "may favor an award of equitable interest," *id.*, the court has discretion to weigh the factors and is not required to come out in any particular way. *See United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1368–69 (Fed. Cir. 2008) ("[T]he trial court's discretion permits more than simply counting the factors pointing in each direction."). We *see* no abuse of discretion in its weighing of relevant factors and thus affirm the Trade Court's decision not to award equitable prejudgment interest.

B. § 580 Interest

AHAC argues the Trade Court erred by awarding § 580 interest on § 1505(d) interest and by calculating § 580 interest from the date of Customs' first demand, rather than the date of Customs' first demand after denying AHAC's protests. AHAC also argues that the Trade Court abused its discretion by declining to permit AHAC to make a deposit in an interest-bearing account to mitigate the running of § 580 interest. We affirm the Trade Court on all counts.

Customs assesses any duties and fees due for imported merchandise at the time of liquidation, and payment is due "30 days after issuance of the bill for such payment." 19 U.S.C. § 1505(b). If the bill is not paid within the 30 day period, "any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation . . . until the full balance is paid." *Id.* § 1505(d).Because the statute, titled "Payment of Duties and Fees," is directed to the duties and fees due on the merchandise under bond, *id.* § 1505(a), the sum of any § 1505(d) interest and any other duties and fees may not exceed the face amount of the subject bond. In other words, the government is entitled to post-liquidation § 1505(d) interest, which may accrue up to the face amount of the bond, starting thirty days after Customs issues the first post-liquidation bill and ending when the full balance is paid (up to the bond amount). *Accord United States v. Am. Home Assur. Co.*, 113 F. Supp. 3d 1297, 1310–13 (Ct. Int'l Trade 2015) (holding surety liable for § 1505(d) interest up to the face amount of the bond).

The plain terms of § 580 dictate that § 580 interest may be assessed on the entire bond amount, including any applicable § 1505(d) interest. The statute states that interest shall be allowed "upon all bonds" on which the government must bring suit to recover duties. 19 U.S.C. § 580. As we previously recognized, the word "duties" does not modify

"bonds"—the statute calls for interest on "*all* bonds" and does not discriminate between duties, fees, or interest assessed under the bond. *AHAC I*, 789 F.3d at 1325.

19 U.S.C. § 4401 further reinforces that Congress intended that § 580 apply to all duties, fees, and interest assessed under the bond. In describing the various types of interest earned on antidumping duties, Congress identified:

> Equitable interest under common law and *interest under section 580* of this title awarded by a court against a surety under its bond for late payment of antidumping duties, countervailing duties, *or interest* [accrued under section 1505(d) of this title].

19 U.S.C. § 4401(c)(2)(C) (emphases added). This statute expressly anticipates that both equitable interest and § 580 interest can be earned on, inter alia, antidumping duties and § 1505(d) interest. We hold that § 580 interest may be assessed on the bond up to its face value, including applicable § 1505(d) interest.

We are not persuaded by AHAC's argument that the Trade Court erred in awarding § 580 interest from the date of the government's first formal demand for payment because § 1505(d) interest did not become "legally fixed" under 19 C.F.R. § 113.62(a)(1)(ii) until Customs denied AHAC's protest regarding the § 1505(d) interest. The plain language of § 580 dictates that § 580 interest is calculated "from the time when said bonds became due." This language is clear and unambiguous. Since "no interest runs against a surety on the principal amount of a bond unless requisite notice and demand for payment is first made," the time when the bonds became due can be no earlier than the government's first formal demand for payment. *United States v. Reul*, 959 F.2d 1572, 1581 (Fed. Cir. 1992).

The language of § 113.62(a)(1)(ii) is not to the contrary. Section 113.62 sets forth the basic conditions for a bond for importation and entry. It does not dictate the timing when interest must run. It does not mention § 580 or § 1505, nor does it use the word "interest." And in context, the regulation states that the surety must "*[p]ay*, as demanded by CBP, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond." 19 C.F.R. § 113.62(a)(1)(ii) (emphasis added). Even if we interpret "legally fixed" to require that AHAC had an opportunity to protest the charge, this regulation would then merely require AHAC to *pay* the charges after its protest was denied—the regulation does not speak to how to *calculate* interest charges.

The language of § 580 is clear. The Trade Court did not err in holding that § 580 interest runs from the date of the government's first formal demand for payment.

AHAC also argues that the Trade Court abused its discretion by declining to permit AHAC to make a deposit in an interest-bearing account to mitigate the running of § 580 interest and the award of § 580 interest should be reduced by the amount that would have been earned in such an account. AHAC disagrees with the Trade Court's exercise of its discretion. In denying AHAC's motion, the Trade Court articulated a thorough and reasoned analysis explaining its denial. *See United States v. Am. Home Assur. Co.*, 6 F. Supp. 3d 1371, 1374 (Ct. Int'l Trade 2014). Nothing more is required. The Trade Court did not abuse its discretion when it denied AHAC's motion.

C. § 1505(d) Interest

AHAC argues the Trade Court erred in holding that AHAC waived its right to contest the award of § 1505(d) interest because 19 U.S.C. § 1514 applies only to the importer, not the surety, during liquidation. We do not agree. We hold that AHAC waived its opportunity to contest the application of § 1505(d) interest when it failed to contest Custom's denial of its protest and pay the duties and fees owed.

All reviewable determinations and decisions by Customs relating to liquidation, including "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury," are final and conclusive unless a protest is filed "or unless a civil action contesting the denial of a protest" is filed at the Trade Court. 19 U.S.C. § 1514(a)–(b). Once final and conclusive, Customs' decisions are foreclosed from challenge by any party in a collection action. *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1557 (Fed. Cir. 1997) ("The language of section 1514, that a liquidation will be 'final and conclusive' unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit. Moreover, we discern no compelling policy consideration counseling against giving the statutory language its naturally broad reading.").

Challenges to the validity of a liquidation and any findings related to liquidation are subject to § 1514. *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 963 (Fed. Cir. 1992) ("[A] surety may protest the government's demand for payment on its bond provided it files such protest within 90 days of the demand. 19 U.S.C. § 1514(c)."); *Cherry Hill*, 112 F.3d at 1557 ("[T]he issue of the correctness and validity of the liquidation is 'final and conclusive' for purposes of the collection action when the liquidation has not been protested in accordance with the provisions of section 1514."); *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008) ("[T]he

language of § 1514 establishes liquidation as a final challenge able event in Customs' appraisal process. Findings related to liquidation—including valuation—merge with the liquidation."). The finality of liquidation under § 1514 is applicable to importer and surety alike. *See* 19 C.F.R. § 113.62(a)(1)(ii) (surety must agree to joint and several liability with importer to "[p]ay, as demanded by CBP, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by this bond"); *United States v. Utex Int'l Inc.*, 857 F.2d 1408, 1412 (Fed. Cir. 1988) ("The importer, the surety, and the government are bound by and have the right to rely on the finality of liquidation."); *Cherry Hill*, 112 F.3d at 1556 (stating that our case law, which carves out some exceptions, does not stand for the "sweeping proposition that a surety is not bound by unprotested liquidations").

There is no question that § 1505(d) interest is a "charge[] or exaction[] of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3); *accord N. Z. Lamb Co. v. United States*, 40 F.3d 377, 382 (Fed. Cir. 1994) ("We start from the premise that interest on the underpayment of duties is a charge 'within the jurisdiction of the Secretary of the Treasury,' 19 U.S.C. § 1514(a)(3)."). The statutory price for delinquency of payment of the duties and fees determined at liquidation is specified by § 1505(d). Section 1505(d) interest is a straightforward sum that is calculated in the event that the duties and fees at liquidation are not paid in a timely manner. That § 1505(d) interest must inherently be assessed after liquidation (since the surety and importer must have failed to pay the duties and fees assessed at liquidation) changes nothing about the nature of the charge. And as the Trade Court correctly recognized, § 1514 does not distinguish between charges and exactions arising after liquidation or on particular kinds of duties.

AHAC points to no authority that justifies creating a distinction between an importer's and a surety's obligation to protest Customs' notification that it was charging § 1505(d) interest. We have acknowledged a surety may retain the right to assert certain claims or defenses in some situations not applicable here. *See Cherry Hill*, 112 F.3d at 1560 (where liquidation is deemed final as a matter of law and the government later tries to liquidate the entry anew, the surety is not precluded from using the deemed liquidation as a shield against an enforcement action); *St. Paul Fire*, 959 F.2d at 963–64 (surety was not barred under § 1514 from raising claims where it was discovered, after the protest period, that the importer was engaged in fraudulent conduct); *Utex*, 857 F.2d at 1413–14 (surety was not barred under § 1514 from raising defenses for liability for failure to export merchan-

dise as demanded by Customs four years *after* liquidation).

Once Customs notified AHAC that it was denying its protest, the contest period to commence an action at the Trade Court began running. 28 U.S.C. §§ 1581(a), 2636(a). AHAC chose not to exercise its right to contest Customs' decision to deny the protest and Customs' decision thereby became final and conclusive under 19 U.S.C. § 1514(a). We hold that pursuant to § 1514(a), AHAC waived the right to appeal the application of § 1505(d) interest by failing to challenge its liability below.

CONCLUSION

For the foregoing reasons, we affirm the Trade Court's judgment. The Trade Court did not abuse its discretion in declining to award the government equitable prejudgment interest on top of § 580 interest or in declining to permit AHAC to make a deposit in an interest-bearing account. We affirm the Trade Court's award of § 1505(d) interest up to the face amount of the bonds, beginning from the date of Customs' first demand, and the award of § 580 interest. Finally, we affirm the Trade Court's determination that AHAC is precluded from asserting defenses to its liability for § 1505(d) interest because it failed to contest the liability at the Trade Court during the statutory protest period.

AFFIRMED

COSTS

No costs.

MAVERICK TUBE CORPORATION, UNITED STATES STEEL CORPORATION, Plaintiffs-Cross-Appellants BOOMERANG TUBE LLC, ENERGEX TUBE, TMK IPSCO, TEJAS TUBULAR PRODUCTS, VALLOUREC STAR, L.P., WELDED TUBE USA INC., Plaintiffs v. UNITED STATES, Defendant-Appellee v. CAYIROVA BORU SANAYI VE TICARET A.S., TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., Defendants-Appellees BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN ISTIKBAL TICARET, Defendants-Appellants

Appeal No. 2016–1649, 2016–1656, 2016–1689

Appeals from the United States Court of International Trade in Nos. 1:14-cv-00214-RKM, 1:14-cv-00229-RKM, 1:14-cv-00233-RKM, 1:14-cv-00240-RKM, Senior Judge R. Kenton Musgrave.

Decided: May 30, 2017

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Before PROST, *Chief Judge,* LOURIE and TARANTO, *Circuit Judges.*

LOURIE, *Circuit Judge*.

Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. and Borusan Istikbal Ticaret (together, "Borusan") appeal from the final judgment of the Court of International Trade ("the Trade Court") sustaining the determination of the U.S. Department of Commerce ("Commerce") on remand to apply adverse facts available ("AFA") after Borusan did not report input purchases for two of its steel mills. *See Maverick Tube Corp. v. United States*, No. 1400229, 2016 WL 703575 (Ct. Int'l Trade Feb. 22, 2016) ("*Borusan II*"); Final Results of Remand Determination, *Maverick Tube Corp. v. United States*, No. 14–00229, ECF No.

92, slip op. at 19–28 (Ct. Int'l Trade Aug. 31, 2015) ("*Remand Results*"). Maverick Tube Corporation and U.S. Steel (together, "Maverick") cross-appeal, arguing that the Trade Court should not have vacated Commerce's original finding that the Turkish market for hot-rolled steel ("HRS") was distorted by government involvement. *See Borusan Mannesmann Boru Sanai Ve Ticaret v. United States*, 61 F. Supp. 3d 1306, 1327–31 (Ct. Int'l Trade 2015) *("Borusan I"); Certain Oil Country Tubular Goods From the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep't of Commerce July 18, 2014) ("*Original Results*"). In the alternative, Maverick challenges the Trade Court's sustaining of Commerce's refusal to apply AFA to the government of Turkey ("GOT") for failing to provide data on the Turkish market for HRS or to adequately explain its lack of data. *See Borusan II*, 2016 WL 703575, at *2–3. For the reasons that follow, we *affirm*.

BACKGROUND

On July 2, 2013, certain domestic producers of oil country tubular goods ("OCTG") filed a petition with Commerce alleging that GOT was providing countervailable subsidies to domestic exporters. *Borusan I*, 61 F. Supp. 3d. at 1310–11. Commerce subsequently instituted a countervailing duty investigation. *Certain Oil Country Tubular Goods from India and Turkey*, 78 Fed. Reg. 45,502 (Dep't of Commerce July 29, 2013). Although myriad arguments were presented to Commerce and the Trade Court prior to the present appeal, we recount only those facts relevant to the appealed issues.

After institution, Commerce selected Borusan and GOT as mandatory respondents. Because HRS is an input used in the manufacture of OCTG, Commerce then issued each a questionnaire relating to the provision of HRS in Turkey. As Borusan and GOT's responses implicate different issues, we provide further factual and procedural background relating to each in turn.

A. Borusan

In its initial questionnaire, Commerce asked Borusan to report its purchases of HRS during the period of investigation ("POI"), "regardless of whether [Borusan] used the [HRS] to produce [OCTG]" during that period. Joint Appendix ("J.A.") 1645. Borusan responded that it had three production facilities during the POI: Gemlik, Halkali, and Izmit. J.A. 1645. During the POI, Borusan averred that (1) only Gemlik produced subject OCTG; and (2) no HRS purchased for the other facilities was transferred to Gemlik. J.A. 1645. Borusan only provided data for the Gemlik location because only that location

"could have benefitted from subsidies attributable to the production or sale of the OCTG subject merchandise." J.A. 1645.

Borusan noted that it had difficulties compiling that information. Specifically, Borusan contended that (1) the process of gathering the requested data was "extremely time consuming and burdensome," resulting in "well over 300 printed pages"; and (2) gathering the requested data required Borusan to "extract the data from two different data systems." J.A. 1645 & n.2. Accordingly, Borusan argued that requiring data for the other two locations "would impose great burdens on [Borusan] for no purpose." J.A. 1645.

Commerce saw the matter differently. In a supplemental questionnaire, Commerce noted that Borusan "did not . . . report HRS purchases for [Borusan]'s two other mills," despite the original questionnaire asking for that information. J.A. 4393. Thus, Commerce asked Borusan to "please report all of [Borusan]'s purchases of HRS, including its purchases for the Halkali and Izmit mills." J.A. 4393. Commerce did indicate, however, that if Borusan was "unable to provide this information," it should "explain in detail why [Borusan could] not provide this information and the efforts [Borusan] made to provide it to [Commerce]." J.A. 4393.

In response, Borusan did not provide data for the Halkali and Izmit locations. Instead, Borusan further detailed its difficulties in compiling data for the Gemlik location. Borusan reiterated its statements from its initial response, explained that it had to separate expenses manually, and that the process for Gemlik alone "took over two weeks of preparation by numerous members of [Borusan]'s staff." J.A. 5975–76. Thus, Borusan asked Commerce to "take into consideration the significant burdens associated with gathering" information relating to the Halkali and Izmit mills. J.A. 5976.

Borusan then attempted to invoke 19 U.S.C. § 1677m(c)(1) and (2), J.A. 5976–77, which provide that if an interested party notifies Commerce promptly after receiving a request that it is "unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms," then Commerce "shall consider the ability of the interested party" and "may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." Borusan explained that it had informed Commerce of the burdens associated with producing the requested information, and expanded on those burdens in response to the supplemental questionnaire. J.A. 5977. Borusan indicated that it believed that the Gemlik data was sufficient because, in its view, the Gemlik data allowed Commerce to capture "any possible benefit from [Borusan]'s . . . purchases that may have ben-

efitted the production or sale" of the subject OCTG. J.A. 5977–78. Nevertheless, Borusan indicated "its intention []to fully cooperate" with Commerce's investigation and "to respond to all reasonable requests for information." J.A. 5978. If Commerce "insist[ed] on full reporting of all hot-coil purchases from every facility" then Borusan indicated that it was "ready to provide that information with the understanding that it will require several weeks to do so." J.A. 5978.

Commerce did not respond directly to Borusan's response to the supplemental questionnaire. Instead, in its preliminary determination, and again in its post-preliminary calculation memo and final determination, Commerce determined that it was appropriate to apply AFA to Borusan because Borusan did not provide data relating to the Halkali and Izmit locations. *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41,964, 79 ITADOC 41,964, Issues & Decision Memorandum, at 9–12 (Dep't of Commerce July 18, 2014) ("*Original Results Memo*"). Commerce noted that it had twice requested data relating to all purchases of HRS and that Borusan did not provide those data or provide evidence that they were unavailable. *Id.* at 10–11. Thus, Commerce determined that Borusan "failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension." *Id.* at 12. Borusan appealed the application of AFA to the Trade Court, which remanded to Commerce for further justification of why it needed data for the Halkali and Izmit locations. *Borusan I*, 61 F. Supp. 3d at 1348–49.

On remand, Commerce determined that data on the Halkali and Izmit locations were necessary, and again determined that it was appropriate to apply AFA given that Borusan did not provide such data. *See Borusan II*, 2016 WL 703575, at *3–8 (discussing Commerce's determination on remand). Borusan appealed again, and the Trade Court determined that Commerce's application of AFA was supported by substantial evidence because "Commerce's request for that information was still outstanding by the time Commerce reached its preliminary determination." *Id.* at *8. Accordingly, the Trade Court determined that "substantial evidence supports that Borusan at least shared if not bore responsibility for the state of the record, and the state of the law does not, apparently, require more of Commerce." *Id.*

B. GOT

Commerce's questionnaire to GOT focused more on the general state of the Turkish HRS industry. Specifically, Commerce asked GOT

to provide "[t]he total volume and value of Turkish domestic consumption of [HRS] and the total volume and value of Turkish domestic production of [HRS]," as well as data relating to the "percentage of domestic consumption accounted for by domestic production," the "total volume and value of imports of [HRS]," and other data relevant to determining whether companies owned or effectively owned by GOT constituted a significant share of the market. J.A. 4401–04. GOT responded that data relating to HRS were not available, and so provided figures relating to "flat steel products." J.A. 4401. GOT indicated that the flat steel data included "hot-rolled coils, cold-rolled coils, stainless coils, etc." and referred to those numbers to answer Commerce's questions. *See* J.A. 4401–03. In responding to another question, however, GOT stated that "the Erdemir Group . . . produces [a] majority of HRS in Turkey." J.A. 4404.

In its response, GOT also referenced a number of documents that appeared to describe government aid to the steel industry. *See* J.A. 16724–25. Accordingly, Commerce asked to review those documents. J.A. 16724. GOT responded that the documents were produced as a result of bilateral trade agreements between Turkey and the European Union ("EU"), and the process was conducted "on condition of confidentiality." J.A. 16724. Moreover, GOT claimed that the documents requested by Commerce included proprietary information of companies not subject to the investigation, and that GOT therefore was not able to share those documents. J.A. 16724.

In its final determination, Commerce found that GOT exercised meaningful control over Erdemir Group and its subsidiary Isdemir (together, "Erdemir"), and therefore that it was appropriate to treat them as government bodies. *Original Results Memo*, 79 Fed. Reg. 41,964, 79 ITADOC 41,964, at 21–22. Borusan's data indicated that it had purchased HRS from Erdemir; accordingly, Commerce turned to analyzing whether Borusan had received a benefit in making those purchases by comparing the price Borusan paid to other prices. *Id.* at 22–23.

Commerce generally prefers to compare prices paid to actual transactions in the country in question. *See* 19 C.F.R. § 351.511(a)(2)(i). If the market in that country is distorted by government involvement, however, then Commerce will consider the prices paid in that country as not an appropriate basis of comparison, *Preamble; Countervailing Duties; Final Rule*, 63 Fed. Reg. 65348, 65377 (Dep't of Commerce Nov. 25, 1998) (the "*Preamble*"), and will instead look to world market prices, 19 C.F.R. § 351.511(a)(2)(i).

Commerce began here by determining whether the Turkish HRS market was distorted. Commerce noted that GOT averred that HRS production and consumption data were unavailable for the POI, and that the flat steel data included many non-HRS products. *Original Results Memo*, 79 Fed. Reg. 41,964, 79 ITADOC 41,964, at 23. Commerce relied upon import statistics for hot-rolled coil and proprietary business information, however, to find that domestic Turkish production of HRS "accounted for a majority of the total supply (inclusive of imports) in Turkey during the POI and previous two years." *Id.* Commerce also noted that GOT had admitted that Erdemir "accounts for the majority of HRS production in Turkey." *Id.* at 24. Because domestic production accounted for a majority of total supply and Erdemir accounted for a majority of domestic production, Commerce found that Erdemir accounted for, at a minimum, a substantial portion of the domestic market, and so "the level of government involvement in the market was such that prices would be significantly distorted." *Id.*

In reaching that conclusion, Commerce cited the *Preamble*, which states that Commerce recognizes that while "government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." *Preamble*, 63 Fed. Reg. at 65377. Accordingly, Commerce determined that prices paid in Turkey could not be independent of the government price, and used world prices to determine that Borusan had received "a countervailable subsidy of 15.58 percent." *Original Results Memo*, 79 Fed. Reg. 41,964, 79 ITADOC 41,964, at 24–26.

Along with the application of AFA, Borusan appealed to the Trade Court Commerce's finding that the Turkish market was distorted. The Trade Court vacated Commerce's finding of distortion and remanded for further explanation. *Borusan I*, 61 F. Supp. 3d. at 1327–31. The Trade Court explained that Commerce's finding required further explanation because (1) the *Preamble* indicates that "distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market"; (2) Commerce had concluded that Erdemir only controlled a substantial portion of the market; and (3) Commerce had not cited any actual evidence of market distortion or explained the "certain circumstances" giving rise to its finding. *Id.* at 1328–31 (citing *Preamble*, 63 Fed. Reg. at 65,377). The case was consolidated for remand with another case involving Toscelik Profil ve Sac Endus-

trisi A.S. and Cayirova Boru Sanayi ve Ticaret A.S. (together, "Toscelik"), other Turkish companies subject to similar claims by domestic industry litigants. *Borusan II*, 2016 WL 703575, at *2.

On remand, Commerce agreed that the language in the *Preamble* "does suggest a possible limitation on Commerce's analysis to 'certain circumstances' when 'a substantial portion of the market' is at issue," but "does not suggest the same constraint when the government 'constitutes a majority of the market.'" *See Remand Results*, slip op. at 13. In the present case, however, Commerce averred that the data "suggest the possibility that the government provider in this case might, in fact, have constituted a majority of the market." *Id.* Commerce noted that "the record evidence on this point is incomplete because GOT did not respond fully and comprehensively to Commerce's requests for information," *id.* at 13–14, and argued that it never found that Erdemir accounted for less than a majority of the Turkish HRS market; instead, it was "Commerce's cautious conclusion based on the limited data on the record," *id.* at 14. Thus, Commerce indicated that it was conducting its distortion analysis on remand under protest for two reasons. First, because the situation was "different from one in which the record information shows definitely that government providers account for less than the majority of the market for a good." *Id.* at 14. Second, Commerce did not have relevant information because GOT did not provide it. *Id.* at 15.

Even though Commerce noted that the GOT was being "rewarded for not providing relevant information," *id.* at 15, Commerce refused to apply AFA to GOT, *id.* at 29–32. Commerce noted that GOT stated that documents containing other relevant information could not be shared because of confidentiality agreements. *Id.* at 30. As to the HRS production information, Commerce expressed that although "it seems highly unlikely that the GOT would be unable to gather information on domestic steel production in Turkey, there is no evidence on the record which would contradict the GOT's claim." *Id.* at 30–31. Commerce also concluded that reassessing GOT's failure to provide data was outside of the scope of the remand order from the Trade Court. *Id.*

When it performed its analysis, Commerce determined that there was insufficient evidence to support a finding that Erdemir accounted for a majority of the HRS market. *Id.* at 15–16. Commerce also determined that there was no evidence of the type of government controls that had led it to a conclusion of market distortion in past cases. *Id.* at 16–17. As it found that there was no evidence of market distortion in the record, Commerce then recalculated Borusan's countervailable subsidy using Turkish transactions to be 2.08 percent. *Id.* at 18.

The Trade Court affirmed. *Borusan II*, 2016 WL 703575, at *2–3. It reasoned that, notwithstanding Commerce's protests, neither Commerce nor Maverick could identify any dispositive evidence of market distortion, and nothing indicated that GOT was not being truthful regarding its access to data or the confidentiality requirements. *Id.* at *3. Given the evidence in the record, the Trade Court concluded that substantial evidence supported Commerce's finding of no distortion and its decision not to apply AFA to GOT. *Id.*

Borusan timely appealed and Maverick timely cross-appealed. We have jurisdiction pursuant to 28 U.S.C.§ 1295(a)(5).

DISCUSSION

In appeals from the Trade Court, we apply the same standard of review that it applies, upholding Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). A finding is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding. *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). Although we review the decisions of the Trade Court *de novo*, "we give great weight to the informed opinion of the [Trade Court] . . . , and it is nearly always the starting point of our analysis." *Ningbo Dafa Chem. Fiber Co. v. United States,* 580 F.3d 1247, 1253 (Fed. Cir. 2009) (internal quotation marks, brackets, and citations omitted).

A. Borusan's Appeal

Borusan argues that Commerce's decision to apply AFA is unsupported by substantial evidence and contrary to law because Commerce must consider difficulties encountered by an interested party in responding to requests and modify requirements to avoid imposing an unreasonable burden. *See* Borusan's Br. 19 (citing 19 U.S.C. § 1677m(c)(1)). Borusan contends that it cooperated with Commerce's requests to the best of its ability because Commerce never unconditionally instructed Borusan to supply the information from the Halkali and Izmit locations; instead, Commerce's supplemental questionnaire asked Borusan to provide the information or else explain why it could not do so. Because Borusan provided more detail explaining why production of the information relating to the Halkali and Izmit locations was unduly burdensome, Borusan argues, it directly responded to Commerce's requests and thus cooperated to the best of its ability. Finally, Borusan contends that if Commerce determined that

its supplemental response was insufficient, it was required to give Borusan "an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d).

Maverick and the United States respond that Commerce's application of AFA is supported by substantial evidence. They contend that by failing to provide the data for the Halkali and Izmit locations in its first response, and again failing to provide those data in response to the supplemental questionnaire, Borusan did not cooperate to the best of its ability. Moreover, Maverick and the United States contend that Borusan never triggered 19 U.S.C.§ 1677m(c)(1) or gave a proper response to Commerce's supplemental questionnaire because it never indicated that it was unable to provide the requested information. They contend that Borusan was on notice that its initial response was deficient because Commerce issued the supplemental questionnaire seeking the same information.

We agree with Maverick and the United States that substantial evidence supports Commerce's decision to apply AFA. Commerce requested information from Borusan, which Borusan did not provide and never claimed that it was unable to provide.

"If [Commerce] . . . 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 [Commerce], [then Commerce] . . . 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)); *see Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337– 38 (Fed. Cir. 2016) (discussing burdens of proof in administrative proceedings before Commerce). "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum efforts to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

"Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). Thus, "[t]he purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation." *Id.* (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

Borusan does not dispute that it had access to information relating to the Halkali and Izmit locations, and that it did not provide that information. Moreover, although Borusan challenged before the Trade Court whether that information was necessary for Commerce's determination, it does not raise that challenge before us. Accordingly,

Borusan has waived any argument that the information from the Halkali and Izmit locations was unnecessary for Commerce's investigation. *See Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371, 1377 (Fed. Cir. 2014).

Thus, Borusan effectively concedes that it possessed information necessary to Commerce's investigation, that Commerce requested that information, and that Borusan did not provide that information. Such behavior cannot be considered "maximum effort to provide Commerce with full and complete answers." *Nippon Steel Corp.*, 337 F.3d at 1382.

Borusan's arguments do not convince us otherwise. First, although Commerce's supplemental request required it only to provide the information or explain why it was unable to do so, Borusan did neither. Borusan admits it did not provide the information, and the explanation of its difficulties does not constitute a statement that it was unable to provide the information.

Borusan's invocation of § 1677m(c) in its supplemental response also does not change the outcome. By its own terms, § 1677m(c)(1) only applies where a party notifies Commerce "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 . . . ." Borusan never indicated that it was unable to provide the relevant information. Indeed, Borusan admitted that it *could* provide that information. Borusan also never suggested an alternative for the requested information; instead, its "alternative" was not providing the information at all.

Finally, we are not convinced by Borusan's argument relating to § 1677m(d). Borusan had already failed to provide the information requested in Commerce's original questionnaire, and the supplemental questionnaire notified Borusan of that defect. § 1677m(d) does not require more. *See NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007) ("Commerce . . . satisfied its obligations under section 1677m(d) when it issued a supplemental questionnaire specifically pointing out and requesting clarification of [the] deficient responses.").

Accordingly, Commerce's application of AFA to Borusan is supported by substantial evidence and in accordance with law.

B. Maverick's Cross-Appeal

Maverick's cross-appeal raises two issues. First, it argues that the Trade Court should not have vacated Commerce's original determination that the Turkish market for HRS was distorted. Second, it

argues in the alternative that Commerce's decision not to apply AFA to GOT is not supported by substantial evidence. We take each issue in turn.

Maverick argues that Commerce's original determination was supported by substantial evidence because there was evidence that (1) Erdemir produced the majority of domestic HRS; (2) domestic production of HRS constituted a majority of the total supply; and (3) the share of domestic production of HRS was greater than the shares calculated for the flat-steel data provided by GOT. Because the evidence establishes that Erdemir controls at least a substantial portion, and possibly a majority, of the market, Maverick contends, this case is different from those where the government certainly controlled less than a majority. Although the Trade Court faulted Commerce for not explaining the "certain circumstances" leading to a finding of distortion, Maverick argues that the Trade Court ignored the role that GOT played in creating the deficient record.

Borusan and Toscelik respond that Commerce's original determination of distortion was not supported by substantial evidence. They aver that there was no evidence that Erdemir controlled a majority of the Turkish market for HRS, and that even if Erdemir controlled a substantial portion of the market there was no evidence of circumstances which would suggest distortion. Instead, they contend, Commerce applied a *per se* rule that is inconsistent with the *Preamble*.

We agree with Borusan and Toscelik that Commerce did not adequately support its original finding of market distortion. Under the *Preamble*, which all parties treat as binding, government involvement "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." 63 Fed. Reg. at 65377. Commerce's analysis did not purport to find that Erdemir constituted a majority of the market and instead only found that Erdemir was the majority domestic producer and domestic production accounted for a majority of the Turkish market, and so "at a minimum, Erdemir . . . account[ed] for 'a substantial portion of the market.'" *Original Results Memo*, 79 Fed. Reg. 41,964, 79 ITADOC 41,964, at 24 n.181 (quoting *Preamble*, 63 Fed. Reg. at 65377). From there, Commerce jumped to the finding that the market was distorted, without addressing or finding any circumstances which would actually suggest distortion. *See id.* at 24. Although it does appear *possible* that GOT controlled a majority of the market, neither Commerce nor Maverick cite any record evidence establishing that fact, and they also do not cite any record evidence of any indicia of distortion. We thus agree with Borusan, Toscelik, and

the Trade Court that Commerce applied what amounted to a *per se* rule of market distortion after finding GOT controlled a substantial portion of the market, despite the *Preamble*'s language to the contrary. Therefore, Commerce's original finding was not supported by substantial evidence.

Maverick next argues that Commerce erred on remand by not applying AFA to GOT. Maverick contends that because GOT failed to cooperate fully with Commerce's investigation by not providing data for HRS production and not supplying requested documents, it did not act to the best of its ability. Maverick argues that not applying AFA frustrates the purpose of the statute by allowing GOT to benefit from its lack of responsiveness.

Borusan and Toscelik respond that Commerce's determination not to apply AFA to GOT is discretionary, not mandatory, and is supported by substantial evidence. They contend that Commerce never found that GOT failed to respond to the best of its ability or withheld information, and in fact noted that GOT had provided timely responses to all of its questionnaires. Moreover, they assert that Commerce correctly determined that there was no evidence contradicting GOT's claim that it did not possess production data for HRS or that requested documents could not be disclosed due to confidentiality agreements.

We agree with Borusan and Toscelik that Commerce's decision not to apply AFA is supported by substantial evidence. Maverick's argument that GOT withheld relevant information assumes that GOT had access to that information; as Commerce noted, however, there was no evidence that GOT had access to or maintained the HRS data that it claimed that it was unable to provide. *Remand Results*, slip op. at 30–31. Moreover, nothing contradicted GOT's claim that the documents sought by Commerce could not be shared due to confidentiality agreements. *See id.* at 30.

CONCLUSION

We have considered the remaining arguments, but find them unpersuasive. For the foregoing reasons, the decision of the Trade Court is affirmed.

AFFIRMED

COSTS

No costs.