

ARTICLE 1904 BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

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In the Matter of:	)	
	)	
Large Residential Washers	)	
From Mexico	)	
	)	
	)	Secretariat File No.:
	)	USA-MEX-2018-1904-04
Final Results of the 2016-2017 Antidumping	)	
Duty Administrative Review	)	
	)	
	)	

INTERIM DECISION AND ORDER

I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”). The Panel was appointed to review the final results of the 2016-2017 administrative review of the antidumping duty (“AD”) order on Large Residential Washers from Mexico (“*Final Results*”) issued by the U.S. Department of Commerce (“Commerce”).¹

On April 18, 2018, Complainants Electrolux Home Products, Inc.; Electrolux Home Products Corp. N.V.; and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, “Electrolux”), a Mexican producer and exporter of the subject merchandise, filed a Request for a Panel Review of those results.

In its Complaint, filed on May 18, 2018, Electrolux raised two issues: (1) Commerce erred as matter of law by applying “adverse facts available” (“AFA”) to Electrolux because,

¹ *Large Residential Washers from Mexico, Final Results of Antidumping Duty Administrative Review Determination 2016-2017*, 83 Fed. Reg. 11,963 (Mar. 19, 2018).

among other things, Commerce failed to properly serve Electrolux with the AD questionnaire issued on April 18, 2017; and (2) Commerce’s practice of allowing a law firm that has missed a filing deadline only “one second chance” to submit untimely filed information is unlawful. Electrolux claims that it was unfairly penalized when Commerce used this practice as a basis for rejecting Electrolux’s questionnaire responses because Commerce determined that Electrolux’s then-counsel had already been given a “second chance” in an unrelated case involving a different client.

For the reasons more fully set forth below, and on the basis of the administrative record; the applicable law; the written submissions of Electrolux, Commerce, and Whirlpool Corp., the U.S. petitioner, (“Whirlpool”); and oral arguments before the Panel, the Panel upholds in part, and remands in part, the *Final Results* of the administrative review.

II. BACKGROUND

On February 15, 2013, Commerce published its Antidumping Duty Order on Large Residential Washers from Mexico (“*Antidumping Duty Order*”).² Imports of the subject merchandise from Electrolux were thereafter assessed cash deposits equal to the estimated dumping margin.

On February 8, 2017, Commerce published in the Federal Register an “opportunity to request administrative review” of the *Antidumping Duty Order*.³ The following day, on February 9, 2017, Electrolux, via its then-counsel Baker Hostetler LLP (“BakerHostetler”), filed a request to be reviewed under the fourth administrative review

² See *Large Residential Washers from Mexico and the Republic Korea, Antidumping Duty Orders*, 78 Fed. Reg. 11,148 (Dep’t Commerce Feb. 15, 2013).

³ *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 Fed. Reg. 9,709 (Feb. 8, 2017).

of the *Antidumping Duty Order*.⁴ Whirlpool also requested such a review of Electrolux.⁵ Commerce accordingly initiated the fourth administrative review of the *Antidumping Duty Order* on April 10, 2017.⁶ Commerce, in its initiation notice, reminded the parties interested in participating in the review that, among other things, they were required to file letters of appearance.⁷

On April 18, 2017, Commerce issued the AD questionnaire to Electrolux by posting it on ACCESS, Commerce's electronic docket.⁸

On May 3, 2017, BakerHostetler, on behalf of Electrolux, filed a formal letter of appearance in the review, along with applications for access to documents subject to the Administrative Protection Order ("APO") for the review.

The deadline for Electrolux's response to Section A of the AD questionnaire was May 9, 2017, a date which came and went without Electrolux filing its response or filing a request for an extension. Electrolux's response to Sections B-D of the questionnaire was due on May 25, 2017.

On May 24, 2017, BakerHostetler submitted, on behalf of Electrolux, an untimely extension request for the Section A response and a timely extension request for the

⁴ See Public Record ("P.R.") Doc. 1.

⁵ See P.R. Doc. 2.

⁶ *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 Fed. Reg. 17,188 (Dep't Commerce Apr. 10, 2017) ("*Notice of Initiation*").

⁷ See *id.* at 17,208 ("Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 C.F.R. § 351.103(d).").

⁸ See P.R. Docs. 4-5. ACCESS stands for Commerce's "Antidumping and Countervailing Duty Centralized Electronic Service System."

Sections B-D response.⁹ In its extension request, BakerHostetler asserted that it had only learned of the questionnaire the prior day after having been informed by its own “consultants” that the questionnaire had been posted on ACCESS.¹⁰ BakerHostetler further asserted that Commerce had not notified BakerHostetler of the issuance of the questionnaire, and that Commerce should have sent the questionnaire to *Electrolux itself* because BakerHostetler had not yet entered an appearance as of April 18, 2017, the date the questionnaire was issued.¹¹ The extension request did not state that Electrolux had satisfied either the “good cause” standard required under 19 C.F.R. § 351.302(b) with respect to the timely request for Sections B-D or the “extraordinary circumstances” standard under 19 C.F.R. § 351.302(c) for the untimely request for Section A.

Commerce denied the extension request, two days later, on May 26, 2017, finding that counsel’s failure to monitor ACCESS did not constitute “extraordinary circumstances” necessary for an untimely extension request.¹² Commerce also stated that the questionnaire had been properly addressed to BakerHostetler because it “requested this review on behalf of [its] client.”¹³ Commerce further noted that BakerHostetler was “familiar with the Department’s procedures in conducting administrative reviews,” including the “normal practice” for Commerce to issue a questionnaire within one month of initiation, and the entry of appearance requirement to receive notifications from

⁹ See P.R. Doc. 9.

¹⁰ See *id.*

¹¹ See *id.*

¹² See P.R. Doc. 11.

¹³ *Id.*

ACCESS.¹⁴ Because Electrolux had failed to submit its Section A questionnaire response, Commerce could not consider the “request for an extension to submit Electrolux’s response to sections B through D of the April 18, 2017 questionnaire.”¹⁵

Thus began an extended dialogue between BakerHostetler and Commerce regarding an extension of time to submit Electrolux’s responses. On May 30, 2017, BakerHostetler filed a request for reconsideration of Commerce’s denial of its extension request, alleging that “extraordinary circumstances” existed “because neither Electrolux, nor its counsel, received an official notification or actual notice of the existence of the questionnaire prior to May 23, 2017.”¹⁶ BakerHostetler claimed, *inter alia*, that Commerce failed to send either of them the usual email notification alerting “the parties” that a document has been filed on the record.¹⁷

On June 5, 2017, Commerce rejected the request for reconsideration on the basis that Electrolux (and BakerHostetler) did not file an entry of appearance until more than three weeks after the *Notice of Initiation* had been published in the Federal Register and nearly three months after BakerHostetler submitted its request for an administrative review on behalf of Electrolux.¹⁸ Commerce stated to BakerHostetler that the “entry of appearance three weeks after the initiation meant that you were not on the e-mail notification list when the Department issued the questionnaire,” that neither BakerHostetler nor Electrolux “should have relied upon receiving e-mail notifications

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ P.R. Doc. 12.

¹⁷ *Id.*

¹⁸ P.R. Doc. 13.

regarding submissions prior to the date on which you filed an entry of appearance,” and that, upon requesting an administrative review of Electrolux, “you are responsible for your participation in that case, and it is reasonable to expect that a requestor of an administrative review will familiarize itself with all case activity to date.”¹⁹

Despite Commerce’s denials of the extension request and request for reconsideration, on June 8, 2017, Electrolux submitted its Section A questionnaire response.²⁰ On June 9, 2017, Commerce rejected the submission and removed it from the record of the review.²¹

On June 13, 2017, BakerHostetler requested a reconsideration of that rejection, again arguing that the extraordinary circumstances standard had been met and that Commerce had failed to properly notify Electrolux that the questionnaire had been issued.²² BakerHostetler also cited the service procedures set forth in Commerce’s own Antidumping Manual with respect to the “procedure for the analyst to follow when issuing an initial questionnaire when counsel has not yet entered an appearance[.]”²³ The following day, Commerce summarily denied the request, finding that none of the facts had changed.²⁴

On June 22, 2017, BakerHostetler submitted Electrolux’s response to Sections B-D of the questionnaire.²⁵ The following day, Commerce rejected that submission and

¹⁹ *Id.*

²⁰ *See* P.R. Doc. 14.

²¹ *See id.*

²² *See* P.R. Doc. 16.

²³ *Id.*

²⁴ *See* P.R. Doc. 17.

²⁵ *See* P.R. Doc. 18.

removed it from the record because Electrolux had missed the May 25, 2017, deadline, and Commerce again found that “the facts . . . have not changed.”²⁶

Undaunted, on July 18, 2017, BakerHostetler filed yet another request for Commerce to accept Electrolux’s questionnaire responses, on the grounds that Commerce had recently granted an untimely extension request in a different investigation where the party had not shown “extraordinary circumstances.”²⁷ On July 28, 2017, Commerce rejected this request, citing “significant differences in the circumstances” underlying the investigation cited by BakerHostetler and the current administrative review.²⁸ Commerce also noted that in contrast to the investigation BakerHostetler cited, “counsel for Electrolux has provided no information regarding any revised procedures to ensure the timely submission of its future submissions to the Department.”²⁹

On August 28, 2017, BakerHostetler again requested that Commerce accept Electrolux’s questionnaire responses.³⁰ In this letter, BakerHostetler detailed the “revised procedures” it had put into place “as an added precaution,” such as checking ACCESS every day and ensuring that responses are completed for filing earlier in the day, to ensure that all future responses would be completely filed on time.³¹ BakerHostetler also offered to meet with Commerce officials to discuss its revised procedures.³²

²⁶ *Id.*

²⁷ *See* P.R. Doc. 22.

²⁸ P.R. Doc. 24.

²⁹ *Id.*

³⁰ *See* P.R. Doc. 26.

³¹ *Id.*

³² *Id.*

On August 30, 2017, Electrolux and BakerHostetler met with Commerce, who “requested that Baker & Hostetler file a letter on the record of the instant administrative review to explain that it understood the Department’s requirements, and to detail the steps it will take, or has already undertaken internally, to meet the Department’s requirements.”³³ In a letter filed that same day, BakerHostetler provided the requested information and asked Commerce to authorize Electrolux to resubmit its questionnaire responses.³⁴

The following day, on August 31, 2017, Commerce stated in a letter to BakerHostetler that based on the information provided in BakerHostetler’s August 30, 2017 letter, including BakerHostetler’s revised procedures to prevent missed deadlines, Commerce “will allow Electrolux to submit its response to sections A through D of the questionnaire.”³⁵ Commerce further stated that, “from this point forward, if [counsel] (or your firm) miss an established deadline in this or any other proceeding before the Department, you will not be permitted to submit information at a later date.”³⁶ On September 1, 2017, Electrolux submitted its Sections A-D responses.³⁷

On September 7, 2017, Whirlpool filed a request for reconsideration of Commerce’s decision to accept Electrolux’s responses.³⁸ The basis for Whirlpool’s request was that Commerce had not found any “extraordinary circumstances” to even

³³ P.R. Doc. 29.

³⁴ See P.R. Doc. 28.

³⁵ See P.R. Doc. 30.

³⁶ *Id.*

³⁷ See P.R. Docs. 31-35.

³⁸ See P.R. Doc. 36.

consider Electrolux's untimely extension request, nor had Commerce found any "good cause" to grant it, as required by the regulations.³⁹ Whirlpool asserted that Commerce's acceptance of the questionnaire responses "without any findings of fact was contrary to the Department's regulations and unduly prejudicial to Whirlpool."⁴⁰ On September 11, 2017, Electrolux countered that Commerce had not really granted "an untimely extension request" at all and defended Commerce's decision as an appropriate use of its discretion to "request any person to submit factual information at any time" under 19 C.F.R. § 351.301(a).⁴¹

Following its own *ex parte* meeting with Commerce, on September 15, 2017, Whirlpool's counsel filed a letter containing legal authorities supporting rejection of Electrolux's responses.⁴² On September 21, 2017, Electrolux filed a letter attempting to distinguish those authorities and reasserting that Commerce had discretion to request the factual information at any time.⁴³

On September 25, 2017, Commerce again rejected Electrolux's questionnaire responses as untimely, "[a]fter further consideration of the Department's practice and regulations."⁴⁴ Commerce indicated that it had only allowed Electrolux's submission on August 31, 2017 because it had given BakerHostetler "a second chance" to submit untimely information.⁴⁵ Commerce explained that its "practice is to allow a law firm that

³⁹ *See id.*

⁴⁰ *Id.*

⁴¹ P.R. Doc. 37 (internal quotation marks omitted).

⁴² *See* P.R. Doc. 39.

⁴³ *See* P.R. Doc. 41.

⁴⁴ *See* P.R. Doc. 42.

⁴⁵ *See id.*

misses a filing deadline one second chance to submit the information, if that law firm has: 1) not previously been afforded such an opportunity; and 2) identified the steps it has taken to avoid untimely filings in the future.”⁴⁶ Commerce asserted that this “second chance” practice “is grounded in 19 C.F.R. 351.301(a), which states that the Department ‘may request any person to submit factual information at any time during a proceeding or provide additional opportunities to submit factual information.’”⁴⁷

In the September 25, 2017 rejection letter, Commerce stated that it should never have allowed Electrolux’s submission in the first place because its law firm had already received “a second chance” to make a late submission in an unrelated proceeding.⁴⁸ Commerce added that “it is the Department’s practice to make the above-mentioned ‘second chance’ opportunity available only once for a law firm, and the Department will not allow the firm another opportunity to file untimely information.”⁴⁹ Commerce further stated:

When we allowed BakerHostetler to file untimely information in the softwood lumber AD investigation, we had not yet requested BakerHostetler to file Electrolux’s originally untimely-submitted investigation response in this administrative review. Thus, pursuant to our practice, we should not have requested BakerHostetler to file its untimely response to the Department’s questionnaire because the Department had already afforded BakerHostetler a second chance to submit untimely information and informed the firm that we would not accept any further late filings from it.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Commerce also noted that it “generally” has only allowed a “second chance” in three factual scenarios not present in this case:

where a party failed to: 1) file a complete submission before the specified hour on the date of the deadline; 2) timely file the public version of the response; or 3) respond on the date of the deadline, but promptly contacted the Department. BakerHostetler completely missed the deadline for Electrolux to file its response to section A of the Department’s AD questionnaire, and it did not contact the Department about missing the deadline for 15 days.⁵¹

On October 6, 2017, in an *ex parte* meeting with Commerce, BakerHostetler laid out a timeline comparing the instant administrative review against the *Softwood Lumber* investigation.⁵² On October 25, 2017, however, Commerce rejected that analysis, reasoning that “[t]he fact still stands that the Department already afforded [BakerHostetler] a second opportunity to submit untimely-filed information in another proceeding on August 9, 2017; therefore, we find it inappropriate to accept your untimely-filed information in this proceeding on August 28, 2017, pursuant to our practice and our regulations.”⁵³

On October 31, 2017, Commerce issued the preliminary results of this administrative review.⁵⁴ Due to Commerce’s rejection of Electrolux’s Sections A-D questionnaire responses, Commerce assigned Electrolux an AFA margin of 72.41% *ad*

⁵¹ *Id.* (footnotes omitted).

⁵² See P.R. Doc. 46.

⁵³ See P.R. Doc. 51.

⁵⁴ *Large Residential Washers from Mexico, Preliminary Results of Antidumping Duty Administrative Review Determination 2016-2017*, 82 Fed. Reg. 51,810, 51,811 (Dep’t Commerce Nov. 8, 2017) (“*Preliminary Results*”).

valorem, based on the highest margin assigned to another respondent in the original investigation.⁵⁵

Electrolux and Whirlpool each filed case briefs with Commerce commenting on the preliminary results.⁵⁶ Electrolux raised three claims, the following two of which have been presented before this Panel:⁵⁷

- 1) Commerce should not have applied AFA based on Electrolux's untimely Section A questionnaire response because:
 - Commerce failed to serve the questionnaire properly on Electrolux;
 - Commerce abused its discretion in rejecting the untimely Section A response by failing to balance fairness and accuracy against any burden on the agency;
 - Electrolux cooperated to the best of its ability when its counsel sought extensions of the deadlines, which were timely as to the rest of its responses, immediately after it learned of the existence of the questionnaire and filed Electrolux's responses as quickly as possible thereafter; and
 - Commerce failed to provide Electrolux with an adequate opportunity to explain or correct its deficiency.
- 2) Commerce should not have employed the "second chance rule" because:
 - The rule is unlawful because Commerce has no authority to impose it, and its application is an abuse of discretion;
 - Application of the rule results in a party bearing the adverse consequences of its law firm's error in an unrelated proceeding on behalf of a different party; and

⁵⁵ See *id.*

⁵⁶ See P.R. Docs. 61-62.

⁵⁷ The third issue that Electrolux raised before Commerce, but not here, was that the AFA rate of 72.41 % *ad valorem* imposed on Electrolux was "punitive and aberrational and uncorroborated." P.R. Doc. 61.

- The rule violates administrative due process under 5 U.S.C. § 706 because it has never been subject to a notice and comment period under the Administrative Procedure Act.⁵⁸

On March 12, 2018, Commerce issued the *Final Results*, rejecting Electrolux’s arguments, and assigning an AFA margin of 72.41% to Electrolux.

Electrolux filed its Request for Panel Review on April 18, 2018. On February 20, 2020, this Panel issued its Order granting the Commerce’s motion for more time to file its brief.⁵⁹ The Panel hearing was held virtually on November 10, 2020.⁶⁰

III. STANDARD OF REVIEW

The applicable standard of review is specified by NAFTA Articles 1904(2)-(3) and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904(3) to apply:

the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.⁶¹

NAFTA Article 1904(2) states that the “antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials.”⁶²

⁵⁸ *See id.*

⁵⁹ *See Consent Motion for Extension of Time*, USA-MEX-2018-1904-04 (No. 8); *Motion of Extension of Time on behalf of DOC*, USA-MEX-2018-1904-04 (No. 9); and *Motion to Extend Time to File Rule 57(2) and Rule 57(3) Briefs on behalf of DOC*, USA-MEX-2018-1904-04 (No. 10).

⁶⁰ Due to the COVID-19 pandemic and with the Parties’ agreement, the Panel hearing was conducted virtually “on-line” rather than in-person.

⁶¹ North American Free Trade Agreement, Can.-Mex.-U.S., art. 1904(3), Dec. 17, 1992, 32 I.L.M. 289 (1993) (“NAFTA”).

⁶² Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this panel.

These provisions therefore require that a Chapter 19 panel apply the standard of review, “general legal principles,” and law that a federal court in the United States would otherwise apply in reviewing a Commerce determination.⁶³

Annex 1911 defines the standard of review to be applied in a Panel review as the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended.⁶⁴ Section 516A(b)(1)(B), in turn, defines that standard of review as:

The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.⁶⁵

The U.S. Supreme Court has stated that “[s]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. ‘It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]’”⁶⁶ The U.S. Court of Appeals for the Federal Circuit and the

⁶³ Article 1911 defines such “general principles” as, for example, “standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies.” NAFTA, *supra* note 61, at Article 1911.

⁶⁴ See *id.* at Annex 1911.

⁶⁵ 19 U.S.C. § 1516a(b)(1)(B)(i).

⁶⁶ *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); see also *Consol. v. Fed. Mar. Comm’n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Court of International Trade have applied the same interpretation of “substantial evidence” in reviewing international trade determinations.⁶⁷

Panel review of a final antidumping determination is to be conducted “upon the administrative record.”⁶⁸ The requirement that a review be “on the record” means that a Panel’s review must be limited to only “information presented to or obtained by [Commerce] . . . during the course of an administrative proceeding. . . .”⁶⁹ Consideration of information that was not presented to, or obtained by, Commerce during the course of an administrative review at issue here would be beyond the jurisdiction of this Panel.

In accordance with general principles of administrative law, U.S. federal courts have recognized that “Commerce generally has the discretion to create its own rules of procedure related to the development of record information.”⁷⁰ In particular, “Commerce has significant discretion in determining the procedures by which it will gather and analyze information necessary to meet the statutory deadlines imposed for

⁶⁷ See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 1289 (Ct. Int’l Trade 1993); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 806 F. Supp. 1008, 1013 (Ct. Int’l Trade 1992); *Tehnoimportexport, UCF Am. Inc. v. United States*, 783 F. Supp. 1401, 1404 (Ct. Int’l Trade 1992); *Minebea Co., Ltd. v. United States*, 782 F. Supp. 117, 119 (Ct. Int’l Trade 1992), *aff’d* 984 F.2d 1178 (Fed. Cir. 1993); *Armco Inc. v. United States*, 733 F. Supp. 1514, 1518 (Ct. Int’l Trade 1990).

⁶⁸ NAFTA Art. 1904(2). Section 516A(b)(1)(B) of the Tariff Act of 1930 *as amended*, 19 U.S.C. § 1516a(b)(1)(B), similarly limits the Panel’s review to information placed on the record during the administrative proceeding.

⁶⁹ 19 U.S.C. § 1516a(b)(2)(A)

⁷⁰ *Bebitz Flanges Works Private Ltd., v. United States*, 433 F. Supp. 3d 1309, 1316 (Ct. Int’l Trade, 2020) (hereinafter “*Bebitz (AD)*”) (citing *PSC VSMPO–Avisma Corp.*, 688 F.3d at 760-61); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-44 (1978)).

AD investigations.”⁷¹ Courts assess Commerce’s determinations as to the timeliness of submissions under the abuse of discretion standard.⁷² “An agency abuses its discretion when it issues a decision that ‘represents an unreasonable judgment in weighing relevant factors.’”⁷³

IV. OPINION

As noted above, the application of AFA to Electrolux in Commerce’s *Final Results* was predicated on Commerce’s earlier rejection of Electrolux’s Sections A-D questionnaire responses. As explained below, the Panel finds no error by Commerce with respect to service of the questionnaire or Commerce’s rejections of Electrolux’s extension requests for its responses, untimely submissions of its responses, and related requests for reconsideration through July 2017.

The Panel, however, finds that Commerce’s decision to reject Electrolux’s responses on September 25, 2017, after having agreed to accept them on August 31, 2017, was an abuse of discretion because it was an unreasonable judgment based primarily on an irrelevant factor — Electrolux’s law firm’s actions in a different proceeding involving a different client. In particular, to the extent that it had relied upon the law firm’s unrelated actions elsewhere, Commerce’s rescission on September 25, 2017 of its August 31, 2017

⁷¹ *Bebitz (AD)*, 433 F. Supp. 3d at 1325 (citing *PSC VSMPO-AVISMA Corp.*, 688 F.3d at 760).

⁷² *See, e.g., Xiping Opeck Food Co. Ltd. v. United States*, 378 F. Supp. 3d 1340, 1344 (Ct. Int’l Trade 2019) (citing *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 26 C.I.T. 98, 123, 815 F. Supp. 2d 1342, 1365 (2012); *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) (internal discussions omitted)).

⁷³ *Bosun Tools Co. v. United States*, 405 F. Supp. 3d 1359, 1364-65 (Ct. Int’l Trade 2019) (quoting *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) (citation omitted)).

decision to accept the responses, was an abuse of discretion. However, Commerce had also cited in its September 25, 2017 recission letter a second basis for its decision: that it “generally” only allows a “second chance” opportunity under certain factual circumstances allegedly not present here.

Accordingly, the Panel remands for Commerce to reconsider its decision to reject Electrolux’s September 1, 2017 responses from the record by addressing *only* that second basis on the record of this proceeding. Therefore, the Panel at this time does not reach the issue of whether the application of AFA to Electrolux was appropriate.

A. Commerce Was Not Required to Serve the Questionnaire on Electrolux Where It Properly Published the Notice of Initiation of the Review in the Federal Register and Posted the Questionnaire on ACCESS.

Electrolux argues that the use of AFA was unlawful in this case because Commerce had failed to properly “serve” the questionnaire on Electrolux. This, in turn, arguably prevented Electrolux from being aware that the response was even due, much less responding in time.

It is clear that neither Electrolux nor its counsel had yet filed an entry of appearance on April 18, 2017, when Commerce posted the questionnaire and letter electronically on ACCESS. Electrolux’s counsel filed an entry of appearance on May 3, 2017. The legal significance of these events (and the timeline thereof) is disputed by the parties.

Electrolux asserts that, since *its counsel* had not yet entered an appearance, Commerce should have sent the questionnaire to *Electrolux itself* by express mail rather than posting it electronically on ACCESS. Commerce notes, however, that Electrolux

itself on April 18, 2017, had not yet entered an appearance either.⁷⁴ Commerce also asserts that it was under no obligation to send a questionnaire by express mail to an entity that had not entered an appearance in the review.⁷⁵ This Panel agrees.

The Panel disagrees with Electrolux’s conclusion that “[t]hat is the beginning and end of the analysis — whether based on the AD Manual’s instructions or basic principles of fairness and common sense, the Department was obligated to serve the questionnaire on *someone*.”⁷⁶ It is this Panel’s view that Commerce is not obligated to directly serve the questionnaire on anyone — whether represented by counsel or not — who has not entered an entry of appearance in the review.

In its initiation notice, Commerce specified that “Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).”⁷⁷ Therefore, the entry of appearance — whether submitted by a respondent itself or by its counsel — is a requirement of participating in the review. The Panel agrees that by not filing such an entry, Electrolux had not yet appeared and therefore, was not participating in the review. As Whirlpool succinctly states, “[i]n other words, Electrolux

⁷⁴ Electrolux, as opposed to its counsel, never filed an entry of appearance on its own.

⁷⁵ See Rule 57(2) *Brief of Investigating Authority United States Department of Commerce* (“Commerce Brief”) at 35, A-201-842 (No. 11).

⁷⁶ Rule 57(3) *Reply Brief of Complainant* (“Electrolux Reply Brief”) at 4, A-201-842 (No. 13) (emphasis in the original).

⁷⁷ *Notice of Initiation*.

simply failed to participate in the review.”⁷⁸ Even Electrolux recognizes that “the filing of a review request is not and had never been a proxy for an entry of appearance.”⁷⁹

More to the point, Electrolux had formally requested this fourth administrative review. Thus, Electrolux was well aware of the review; it claims that it was unaware only of *the questionnaire deadline*. The reviewing courts do not agree that a respondent is entitled to more notice than the published Federal Register notice of initiation — even where someone else has requested the review and the respondent is not even aware of the entire proceeding.

In *Suntec Industries Co. v. United States*, 857 F.3d 1363 (Fed. Cir. 2017), a foreign party had not been served by the domestic petitioner with the review request and, accordingly, was unaware of the entire proceeding, including the questionnaires. Nonetheless, the Federal Circuit held that:

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).⁸⁰

⁷⁸ *Rule 57(2) Brief of Whirlpool Corporation* (“*Whirlpool Brief*”) at 15, A-201-842 (No. 12).

⁷⁹ *Rule 57 Complaint* (“*Complaint*”) at 7, A-201-842 (No. 7). However, for its own part, Commerce mistakenly asserts that because Electrolux’s counsel had filed the request for a review, it was “representing” its client at that point, even though it had not filed an appearance. *Commerce Brief* at 36. Commerce makes this point to try to rebut Electrolux’s argument that the AD MANUAL requires service on parties not represented by counsel.

⁸⁰ *Suntec*, 857 F.3d at 1371. The Court went on to state:

It said just that while also guaranteeing “a hearing in accordance with” 19 U.S.C. § 1677c(b) to any “interested

The Federal Circuit’s prior decision in *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006), similarly involved a domestic petitioner’s failure to serve the foreign respondent with notice of its request to initiate a review.⁸¹ This time, the respondent was well-aware of the proceeding as it had seen the Federal Register notice of initiation, and entered an appearance the following day. The Federal Circuit held that PAM had not shown “that it was substantially prejudiced by [petitioner’s] lack of service, which delayed its notification by several weeks” between the notice and the publication of initiation.⁸² The court relied on the fact that, like Electrolux, “PAM received constructive and actual notice of the review by publication in the Federal Register” before the review began.⁸³

And the courts have taken note of the overall familiarity that respondents such as Electrolux have with the AD procedures. Electrolux appeared in the original AD investigation, had already gone through three annual administrative reviews, and had requested the fourth. The initiation notice’s publication in the Federal Register is sufficient and “proper notification” in and of itself. In *Suntec*, the Federal Circuit found that:

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).

⁸¹ See *PAM*, 463 F.3d at 1348.

⁸² *Id.* at 1349.

⁸³ *Id.* (quoted in *Suntec*, 857 F.3d at 1371).

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, . . . 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.*⁸⁴

Electrolux disputes this holding and would limit “the actual and constructive notice” only to the initiation of the review and not the questionnaire which follows in due course later.⁸⁵ Electrolux also asserts that only the ACCESS email notification constitutes official notice to an interested party of the questionnaire. And for a party which has not entered an appearance, like Electrolux, only service by express mail constitutes service.⁸⁶ The Panel disagrees.

Electrolux makes much of Commerce's guidance to its staff in its “AD Manual,”⁸⁷ particularly the directions on how and when to mail submissions, notify parties, serve questionnaires, *etc.* Electrolux refers to Commerce's “long established practice” and “rule” set out in the AD Manual, but provides no legal support for such a conclusion. Regardless, the AD Manual on its face merely constitutes internal operational guidance to

⁸⁴ *Suntec*, 857 F.3d at 1372 (emphasis added).

⁸⁵ *Electrolux Reply Brief* at 6-8.

⁸⁶ *Id.* at 7.

⁸⁷ International Trade Administration, ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL, Chapter 4 at 10 (Mar. 16, 2015) (“Releasing the Questionnaire”).

staff and does not have the effect of binding law, regulation, or policy.⁸⁸ In any event, contrary to Electrolux’s contention, Chapter 4 of the AD Manual clarifies that a notification via express mail is required only when a party does not have representatives (counsel or a company representative) in Washington, DC. These circumstances were not present in the instant review because Electrolux’s representative, BakerHostetler, had offices in Washington, DC.⁸⁹

For our purposes here, the AD Manual introduces the relevant section cited by Electrolux with the following: “Release the questionnaire to the interested parties. There are several steps to be taken. Refer to the public service list.” Thus, the AD Manual expressly limits service of the questionnaire to parties “on the public service list.” Those, like Electrolux, that have not yet entered an appearance are not to be sent a questionnaire or an email notification of same.⁹⁰

Therefore, Electrolux’s assertion that Commerce was required to serve either it or its counsel with the questionnaire, regardless of whether they had entered an appearance, is incorrect as a matter of law. Regardless, Commerce’s posting of the questionnaire on

⁸⁸ As Commerce notes in its Brief, “the AD Manual ‘exists for the internal training and guidance of Enforcement and Compliance (E&C) personnel only, and . . . cannot be cited to establish DOC practice.’” *Commerce Brief* at 35 (quoting AD MANUAL at Ch. 1 and ISSUES AND DECISION MEMORANDUM at 9 (Mar. 12, 2018) (P.R. 67); accord *Bebitz (AD)*, 433 F. Supp. 3d at 1323; *Bebitz Flanges Works Private Ltd. v. United States*, 433 F. Supp. 3d 1297, 1305 n. 9 (Ct. Int’l Trade 2020) (hereinafter “*Bebitz (CVD)*”) (Manual provides mere “guidelines”); *Koenig & Bauer-Albert AG v. United States*, 90 F. Supp. 2d 1284, 1292 n.13 (Ct. Int’l Trade 2000) (“Antidumping Manual is not a binding legal document”).

⁸⁹ *Commerce Brief* at 36.

⁹⁰ Electrolux misinterprets this provision to suggest that, even though its *counsel* had not entered an appearance, Electrolux itself would still be entitled to receive the questionnaire where it, too, had not entered an appearance.

ACCESS did make it fully available to Electrolux and/or its counsel who were then free and able to respond to it within the deadline if they had taken note of it.

B. Commerce Did Not Abuse Its Discretion by Rejecting Electrolux’s Extension Requests, Untimely Questionnaire Responses, and Requests for Reconsideration Through July 2017.

Under its regulations Commerce is not required to waive its deadlines and accept out-of-time extension requests. Pursuant to its regulations, Commerce “has broad discretion” with respect to time limits,⁹¹ and may, “for good cause, extend any time limit.”⁹² Untimely submissions such as Electrolux’s “will not be considered” unless “extraordinary circumstances” exist for the tardiness.⁹³ “An extraordinary circumstance is an unexpected event that: (i) [c]ould not have been prevented if reasonable measures had been taken, and (ii) [p]recludes a party or its representative from timely filing an extension request through all reasonable means.”⁹⁴

We agree with Commerce that Electrolux’s inattentiveness and lack of diligence, and not any unspecified “extraordinary circumstance,” prevented compliance with the deadlines. Under the regulation, if “reasonable measures” by the respondent could have prevented the “unexpected” event that precluded compliance, “extraordinary circumstances” do not exist and Commerce need not accept the submission.⁹⁵ Those were the facts here.

⁹¹ *Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1331 (Ct. Int’l Trade 2015) (quoting *Reiner Brach GmbH v. United States*, 26 C.I.T 549, 559, 206 F. Supp. 2d 1323, 1334 (2002) (internal quotation marks omitted).

⁹² 19 C.F.R. § 351.302(b)).

⁹³ *Id.* § 351.302(c).

⁹⁴ *Id.* § 351.302(c)(2).

⁹⁵ *Id.*

Electrolux also argues that Commerce had improperly denied it the opportunity to “remedy” its late submissions under 19 U.S.C. § 1677m(d), which requires that:

If the administering authority . . . determines that a response to a request for information under this subtitle does not comply with the request, *the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency* in light of the time limits established for the completion of investigations or reviews under this subtitle.⁹⁶

However, this provision, with the heading “Deficient Submissions,” applies to those situations where a response has already been received and is on the record, but it is still somehow “deficient” or lacking because it does not substantively “comply” with Commerce’s request. (For instance, the information has not been provided “in the form or manner requested.”) The agency then has to identify the “deficiency” and allow the respondent to correct the record with either a “remedy” of the deficiency or at least an explanation on the record.

The provision does not apply to the situation before the Panel, where the alleged “deficiency” is simply that the response was procedurally late, rejected, and removed from the record. In the cases relied upon by Electrolux, the respondents had originally submitted incorrect, inadequate, or misleading data *on time*, and were asked by Commerce to correct it.⁹⁷ Here, Commerce never had a *substantive* issue with Electrolux’s responses; they were simply out-of-time as a matter of procedure and were apparently never even

⁹⁶ 19 U.S.C. § 1677m(d) (emphasis added).

⁹⁷ See, e.g., *China Kingdom Imp. & Exp. Co., Ltd. v. United States*, 31 C.I.T. 1329, 507 F. Supp. 2d 1337 (2007) (original response contained inaccurate data); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 37 C.I.T. 256, 896 F. Supp. 2d 1313 (2013).

considered or read. The “remedy” for any untimely response cannot be to require the agency to waive the deadline.⁹⁸

Commerce properly denied Electrolux’s first two requests for an extension since they were untimely (and were based on the lack of service issue). Electrolux’s subsequent submission of an out-of-time Section A response was also properly rejected because (1) there had been no timely extension request and no extension had been granted, and (2) per its regulations, Commerce cannot accept late or unsolicited responses.⁹⁹

As noted above, U.S. courts have recognized that “Commerce has significant discretion in determining the procedures by which it will gather and analyze information necessary to meet the statutory deadlines imposed for AD investigations.”¹⁰⁰ Commerce’s regulation indicates that Commerce has the discretion, not the obligation, to grant

⁹⁸ This is illustrated by section 1677m(d)(2) *Id*, which provides that the information submitted to “remedy” the original submission can be disregarded by Commerce if submitted after a deadline. Moreover, the *original* “deficient” submission, even if it had been timely, can also be disregarded if the “remedy” is submitted late.

⁹⁹ See 19 C.F.R. §§ 351.302(d), 351.104(a)(2)(iii); *see also* *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) (“Commerce generally does not consider untimely filed factual information.” 19 C.F.R. § 351.302(d)(1) (“[T]he Secretary will not consider or retain in the official record of the proceeding . . . untimely filed factual information. . . .”)); *PSC VSMPO-AVISMA Corp. v. United States*, 688 F.3d 751, 761 n.7 (Fed. Cir. 2012); *Dongtai Peak Honey Industry Co., Ltd. v. United States*, 777 F.3d 1343, 1352 (Fed. Cir. 2015) (“Thus, Commerce reasonably determined Dongtai Peak was entirely capable of at least submitting an extension request on time, but simply failed to do so; therefore, good cause did not exist to retroactively extend the deadline. . . . [S]ee 19 C.F.R. § 351.302(b), (c). Having properly denied the extension requests, Commerce also reasonably determined the Supplemental Response was untimely and removed it from the record pursuant to 19 C.F.R. § 351.302(d).”).

¹⁰⁰ *Bebitz (AD)*, 433 F. Supp. 3d at 1325 (citing *PSC VSMPO-AVISMA Corp.*, 688 F.3d at 760).

extensions of time.¹⁰¹ We are to uphold Commerce’s exercise of its discretion to set and enforce the timelines of its investigations unless that discretion has been abused.¹⁰²

Further, as a general proposition, the Federal Circuit held in *Dongtai Peak Honey*, and we agree, that “Commerce’s rejection of untimely-filed factual information does not violate a respondent’s due process rights when the respondent had notice of the deadline and an opportunity to reply.”¹⁰³ In this regard, the Federal Circuit has noted that Commerce also “routinely rejects untimely-filed submissions.”¹⁰⁴

Here, Commerce properly exercised its discretion in rejecting Electrolux’s extension requests, untimely responses, and requests for reconsideration. Electrolux had the requisite notice and opportunity to reply after the notice of initiation of the review was published in the Federal Register and the questionnaire was posted on ACCESS, as detailed in Section III.A *supra*. Electrolux, however, submitted its extension request for its Section A response after the established deadline in violation of 19 C.F.R. § 351.302(c), and Commerce did not find “good cause” or “extraordinary circumstances” for an untimely extension as required by 19 C.F.R. §§ 351.302(b)-(c).¹⁰⁵

Electrolux argues that its initial request for an extension to file Sections B-D was indeed timely. But the Panel agrees that Commerce was within its discretion to reject that

¹⁰¹ See 19 C.F.R. § 351.302(b).

¹⁰² See *Dongtai Peak*, 777 F.3d at 1351; *Bebitz (AD)*, 433 F. Supp. 3d at 1325.

¹⁰³ *Dongtai Peak*, 777 F.3d at 1353.

¹⁰⁴ *Id.* at 1351.

¹⁰⁵ See *id.* at 1353 (“Here, Commerce properly exercised its discretion in rejecting Dongtai Peak’s extension requests and Supplemental Responses because (1) the extension requests were submitted after the established deadline in violation of 19 C.F.R. § 351.302(c), and (2) Appellant failed to show ‘good cause’ for an extension as required by § 351.302(b).”).

request, as well as Electrolux’s untimely Sections B-D submission on June 22, 2017, because Electrolux’s Section A response had already been excluded from the record and Commerce reasonably felt that it was not going to be able to make proper use of Sections B-D without it. “It is not for [respondent] to establish Commerce’s deadlines or to dictate to Commerce whether and when Commerce actually needs the requested information.”¹⁰⁶

Additionally, Electrolux asserts that Commerce should have engaged in a balancing of fairness and accuracy against any burden otherwise placed on the agency and its interest in the finality of its proceedings. Here, the balancing standard neither saves Electrolux’s untimely questionnaire responses nor demonstrates that Commerce abused its discretion in rejecting them.

First, in *ArcelorMittal USA LLC v. United States*, 399 F. Supp. 3d 1271 (Ct. Int’l Trade 2019), the Court of International Trade recently noted that its decisions that set forth the balancing standard Electrolux describes “were issued prior to the Federal Circuit’s precedential decision in *Dongtai Peak Honey*.”¹⁰⁷

Second, Electrolux seemingly fails to recognize that the balancing standard involves a case-by-case analysis that “is necessarily case specific.”¹⁰⁸ The facts of this

¹⁰⁶ *Id.* at 1352.

¹⁰⁷ *Arcelor Mittal USA LLC*, 399 F. Supp. 3d at 1281.

¹⁰⁸ *Grobest & I-Mei Indus. (Vietnam) v. United States*, 815 F. Supp. 2d 1342, 1365 (Ct Int’l Trade 2012); *see also Timken U.S. Corp.*, 434 F.3d at 1353 (discussing the abuse of discretion standard described in *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)); *Celik Halat ve Tel Sanayi A.S. v. United States*, 483 F. Supp. 3d 1370, 1378-79 (Ct. Int’l Trade 2020) (citing the abuse of discretion standard set out in *Grobest*).

case do not demonstrate that Commerce abused its discretion in rejecting the untimely questionnaire responses submitted on June 8 and 22, 2017.

Third, and importantly, as detailed above, Electrolux failed to demonstrate that extraordinary circumstances existed to warrant Commerce’s acceptance of the untimely questionnaire responses or extension requests. In fact, Electrolux did not mention, let alone discuss, the “extraordinary circumstance” regulatory requirement in its initial (untimely) extension request. At this point, Electrolux’s *post hoc* argument that extraordinary circumstances existed is unpersuasive.

For all of these reasons, the Panel finds that Commerce had properly rejected Electrolux’s repeated requests for extensions to file its responses, Electrolux’s untimely submissions of its responses on June 8 and 22, 2017, and Electrolux’s requests for reconsideration submitted through July 18, 2017.

C. Commerce Abused Its Discretion by Rejecting Electrolux’s Questionnaire Responses Based Primarily on Commerce’s Application of the “Second Chance” Practice.

On August 31, 2017, however, Commerce reversed course and decided to *allow* Electrolux to submit responses to Sections A-D of the questionnaire.¹⁰⁹ Electrolux submitted the responses on the following day.¹¹⁰ As explained *infra*, the record is very clear that Commerce based this decision on what Commerce itself referred to as a “‘second chance’ opportunity” that it grants to law firms seeking to submit untimely material.¹¹¹ Thus, despite Commerce’s discretion to continue to reject Electrolux’s late submissions,

¹⁰⁹ P.R. Doc. 30.

¹¹⁰ See P.R. Docs. 31-35.

¹¹¹ P.R. Doc. 42; *see also* P.R. Doc. 30.

Commerce chose to set aside its concerns and accept all of them by giving BakerHostetler a “second chance.”

But on September 25, 2017, Commerce reversed course yet again, and informed Electrolux that “[a]fter further consideration of the agency’s practice and regulations,” Commerce was “rejecting the response as untimely.”¹¹² Commerce’s September 25, 2017 letter made clear that the primary reason for the rejection was that Commerce had discovered in the interim that Electrolux’s law firm, BakerHostetler, had already been given an earlier “second chance” to file an untimely document in an unrelated Commerce proceeding where BakerHostetler had represented an unrelated client. Commerce explained that its practice was to allow only one “second chance” per law firm, and therefore Commerce should not have permitted BakerHostetler to file Electrolux’s untimely responses.

Commerce abused its discretion by invoking its “second chance” practice to reject Electrolux’s questionnaire responses after Commerce had allowed Electrolux to file them. As we noted *supra*, “Commerce generally has the discretion to create its own rules of procedure related to the development of record information.”¹¹³ “Commerce’s exercise of its discretion, however, must be reasonable in light of Commerce’s statutory

¹¹² P.R. Doc. 42.

¹¹³ *Bebitz (AD)*, 433 F. Supp. 3d at 1316 (citing *PSC VSMPO–Avisma Corp.*, 688 F.3d at 760-61 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-44 (1978) (“Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”))).

obligations.”¹¹⁴ Commerce “abuses its discretion when it issues a decision that ‘represents an unreasonable judgment in weighing relevant factors.’”¹¹⁵

Commerce’s September 25, 2017 rejection of Electrolux’s September 1, 2017 questionnaire responses was an unreasonable judgment primarily based on an entirely irrelevant factor, *i.e.*, Electrolux’s law firm’s prior actions, taken in an unrelated proceeding, for an unrelated client. Since the basis and rationale for the September 25, 2017 rejection had absolutely nothing to do with Electrolux or this proceeding, Commerce’s decision was an abuse of discretion and therefore unsupported by law.

As we set out in our chronology in Section II, *supra*, BakerHostetler wrote to Commerce on August 28, 2017, explaining how it had now taken corrective measures and procedures within the firm to ensure that it would remain aware of developments and deadlines and make timely submissions¹¹⁶ (BakerHostetler also pointed to other trade law firms having recently been allowed to make late submissions.).¹¹⁷

On August 30, 2017, Electrolux’s lawyers met with Commerce officials and followed up with a letter the same day.¹¹⁸ In that letter, BakerHostetler set out the circumstances surrounding the untimely submissions.¹¹⁹ More to the point, though, BakerHostetler also explained “the remedial actions that we have *implemented at Baker*

¹¹⁴ *Bebitz (AD)*, 433 F. Supp. 3d at 1316 (citing *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994)).

¹¹⁵ *Bosun Tools*, 405 F. Supp. 3d at 1364-65 (quoting *Star Fruits*, 393 F.3d at 1281 (internal citation omitted)).

¹¹⁶ P.R. Doc. 26.

¹¹⁷ *Id.*

¹¹⁸ See P.R. Docs. 28-29.

¹¹⁹ See P.R. Doc. 28.

Hostetler to ensure that we do not miss Department deadlines in the future.”¹²⁰ This assurance was only made on behalf of the law firm, not Electrolux, with regard to any of the firm’s Commerce proceedings for any client.

The very next day, on August 31, 2017, Commerce wrote to BakerHostetler that “[b]ased on . . . your description of the procedures you now have in place to prevent missed deadlines, we will allow Electrolux to submit its response to sections A through D of the questionnaire.”¹²¹ The only other condition that Commerce imposed in that letter was that “from this point forward, if you (or your firm) miss an established deadline in this or any other proceeding before the Department, you will not be permitted to submit the information at a later date.”¹²² It is important to note that Commerce referred only to future filings handled by the law firm or the lawyer in “any other proceeding before the Department,” presumably on behalf of any and all clients.¹²³ It did not impose any restriction or condition at all on the actual interested party in this proceeding, Electrolux.

Thereafter, Whirlpool promptly requested reconsideration of Commerce’s acceptance of Electrolux’s questionnaire responses; submitted two letter arguments on the law; and held its own *ex parte* conference with Commerce on September 15, 2017.¹²⁴ Electrolux submitted two filings in response to Whirlpool’s arguments.¹²⁵

¹²⁰ *Id.*

¹²¹ P.R. Doc. 30.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See P.R. Docs. 36, 39-40.

¹²⁵ See P.R. Docs. 37, 41.

On September 25, 2017, Commerce rescinded its earlier acceptance of Electrolux’s late submissions after “further consideration of the Department’s practice and regulations.”¹²⁶ Commerce plainly stated that it had given BakerHostetler a “second chance” on August 31, and that law firms can only have the “second chance” if they have “not previously been afforded such an opportunity.”¹²⁷ Commerce stated that “it is the Department’s practice to make the aforementioned ‘second chance’ opportunity available only once for a law firm.”¹²⁸

Commerce specified that when it had granted Electrolux’s request to file an untimely response on August 31, 2017, Commerce “had failed to take into consideration that fact that the Department had already given BakerHostetler its ‘second chance’ opportunity on August 9, 2017” in another, unrelated AD proceeding, *Softwood Lumber from Canada*.¹²⁹ In other words, BakerHostetler had already exhausted its “second chance.”

Commerce explained that:

When we allowed BakerHostetler to file untimely information in the softwood lumber AD investigation, we had not yet requested BakerHostetler to file Electrolux’s originally untimely-submitted questionnaire response in this administrative review. Thus, pursuant to our practice, on August 31, 2017 we should not have requested BakerHostetler to file its untimely response to the Department questionnaire because the Department had already afforded BakerHostetler a *second chance* to submit

¹²⁶ P.R. Doc. 42.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

untimely information and informed the firm that we would not accept any further late filings from it.¹³⁰

In plain language: Commerce said that it only gives one “second chance” to any law firm. It had already given one to BakerHostetler in the *Softwood Lumber* proceeding on August 9, 2017. Commerce then gave the law firm another “second chance” in the instant *Washers* review on August 31, 2017. That second “second chance” in *Washers* therefore had to be rescinded and Electrolux’s late responses rejected.

In the view of the Panel, Commerce abused its discretion through its reliance on facts and activity outside the record of this administrative review when Commerce invoked its “second chance” practice as a basis for its decision to reject Electrolux’s responses. The abuse of discretion here is not that only one “second chance” is generally allowed by Commerce, but rather that Commerce primarily based its decision to rescind its earlier acceptance of Electrolux’s late submission on the number of times its *law firm* — not Electrolux itself — had missed a deadline and been given a “second chance” in the past. Worse still, Electrolux’s submission was rejected primarily based on what its law firm had done in an unrelated case — *Softwood Lumber* — for a different client. Electrolux had nothing to do with that case, which involved unrelated merchandise and an entirely different exporting country. Commerce’s rejection of Electrolux’s responses only a few weeks after accepting them under its “second chance” practice, on the basis that Commerce realized that Electrolux’s law firm had already received a “second chance” in an unrelated proceeding for a different client, cannot stand.

¹³⁰ *Id.* (emphasis added).

This issue was noted in two recent cases before the Court of International Trade. Specifically, in an investigation of *Steel Flanges from India*, Commerce rejected a late submission and referred, among other things, to respondent's counsel having already received a "second chance" in *Solid Urea from the Russian Federation*. While the Court of International Trade upheld the rejection of the late submission, concluding that "Commerce's rejection was reasonably based on the facts under investigation," the Court signaled that Commerce's utilization of the "second chance" practice may be discouraged:

Nevertheless, the court would encourage Commerce to maintain a clear distinction between its efforts to address a respondent's failure to cooperate in a proceeding and its efforts to discipline counsel for their actions distinct from the actions of their clients.¹³¹

Moreover, in *Bosun Tools*, the Court signaled that Commerce may abuse its discretion when it relies on the "second chance" practice to reject a submission in an unrelated proceeding involving an unrelated client.¹³² In that case, the respondent (Chengdu) had timely filed the unredacted version of its supplemental response but failed to file part of the redacted version by the deadline.¹³³ Two days later, the respondent filed the complete redacted version of its submission, after receiving notifications from Commerce staff.¹³⁴ Nevertheless, Commerce rejected the respondent's supplemental

¹³¹ *Bebitz (CVD)*, 433 F. Supp. 3d at 1306 n.11.

¹³² *See* 405 F. Supp. 3d at 1366 & n.12.

¹³³ *See id.* at 1364-67.

¹³⁴ *Id.* at 1365.

response on various grounds.¹³⁵ The Court found those grounds unpersuasive and inadequate, however, and ordered the response to be added to the record, noting:

Commerce invokes an incident from an unrelated investigation where the law firm representing Chengdu made an untimely filing on behalf of another one of its clients. See Commerce’s Rejection Mem. at 2, App. 1. No evidence on this record links Chengdu to the unrelated proceeding or the client on whose behalf the law firm was acting.¹³⁶

The Panel now holds that it was an abuse of discretion for Commerce to base its decision in the instant proceeding on an action taken by Electrolux’s law firm for a different client in a different proceeding. There must be some substantive nexus between the two proceedings besides the law firm. Electrolux is the interested party here, not its law firm. The actions of the law firm in a different proceeding are factually and legally irrelevant to this proceeding. Commerce is not obligated to allow a response in reliance on the “second chance” practice. But it also cannot use the practice as a basis for removing responses already admitted to the record. And while we understand Commerce’s apparent concerns about late filings by attorneys, this Panel cannot allow attorney conduct in one proceeding to be the essential grounds for a decision in another.¹³⁷ Therefore,

¹³⁵ No compliance with the regulations and filing requirements; certain materials failed to upload on ACCESS before the deadline; no timely request for an extension; *etc.* *See id.* at 1364-67.

¹³⁶ 405 F. Supp. at 1366 n.12.

¹³⁷ Electrolux raises the argument that the “second chance” practice is an invalid rule since it was never subject to notice and comment under the APA. *See Complaint* at 14-15. Commerce, for its part, argues that it has no such “second chance” rule and therefore cannot be bound by it — even though it referred to a “practice” of allowing a “second chance” in its letters to Electrolux. *See Commerce Brief* at 41-42; P.R. Docs. 42, 51. Petitioner Whirlpool also denies the existence of any “second chance” rule, but proceeds to cite several proceedings where the practice had been employed and tries to distinguish them from here. *See Whirlpool Brief* at 27, *et seq.*

Commerce's September 25, 2017, decision to reject and remove Electrolux's responses from the record on the basis of Electrolux's law firm's irrelevant actions in another proceeding was an unreasonable judgment based on an irrelevant factor. Such action by Commerce constitutes an abuse of discretion.

D. On Remand, Commerce Must Reconsider Its Decision to Reject Electrolux's September 1, 2017, Questionnaire Responses by Addressing the Other Basis for its Decision.

Although Commerce's September 25, 2017, letter makes clear that this irrelevant factor was the primary basis for Commerce's decision to reject and remove Electrolux's September 1 responses from the record, it should be noted that Commerce's September 25, 2017 letter also provides an alternative rationale that may reflect a relevant factor supporting its decision. Specifically, Commerce suggested, in passing, that it should not have decided on August 31, 2017 to accept Electrolux's responses because the circumstances in which Commerce typically grants such a "second chance" opportunity for an untimely filing were nowhere close to being met in this review. Commerce noted that:

[Commerce] generally only allows a "second chance" opportunity where a party failed to: 1) file a complete submission before the specified hour on the date of the deadline; 2) timely file the public version of the response; or 3) respond on the date of the deadline, but promptly contacted the Department. BakerHostetler completely missed the deadline for Electrolux to file its response to section A of the Department's AD questionnaire, and it did

We need not resolve whether the rule exists or whether it is valid. We are not requiring that Commerce employ it. Rather, we are reversing Commerce's determination for having unreasonably relied on it as the primary reason for rejecting Electrolux's September 1 responses and referring explicitly to it as a "practice" that governed here. Where an agency relies upon an irrelevant proposition, we need only reject its unreasonable reliance on that irrelevant proposition and not confirm the legal status of the proposition itself.

not contact the Department about missing the deadline for 15 days.¹³⁸

Accordingly, there is an indication that Commerce, upon reconsideration, found that the facts of this review, including the respondent's oversights, omissions, and failures to act, did not warrant an opportunity for acceptance of the untimely responses. The facts of the instant review are a relevant factor that Commerce may consider in exercising its discretion about the development of the record.

In *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014), the Federal Circuit found that Commerce had relied on “two rationales in combination, not on either one as an independent ground,” and that “Commerce’s ruling cannot stand” because the first rationale failed. The Federal Circuit, however, remanded Commerce’s determination after concluding that “a reversal is also not appropriate because[] . . . Commerce’s second rationale provides a possible factor supporting the rate that Commerce adopted.”¹³⁹ Here, as in *Mueller*, Commerce’s ruling cannot stand because one of Commerce’s rationales fails, but a reversal is also not appropriate because Commerce cited a second rationale that provides a possible relevant factor supporting Commerce’s decision.

Accordingly, we remand the determination to Commerce with directions that Commerce: (1) reconsider the rejection and removal of Electrolux’s September 1, 2017 questionnaire responses but only to the extent that its September 25, 2017 decision was based on the second rationale, viz., that Commerce “generally” only allows a “second chance” under certain factual circumstances not present in this case ; and (2) no later than

¹³⁸ P.R. Doc. 42 (footnotes omitted); see also P.R. Doc. 67 at 15-16.

¹³⁹ *Mueller*, 753 F.3d at 1233.

90 days after the date of this Interim Decision and Order, inform the Panel of Commerce's Redetermination on Remand.

As the development of the agency record is a matter committed to agency discretion, we remand to afford Commerce an opportunity to exercise its discretion properly. On remand, Commerce must reconsider its decision to reject and remove Electrolux's September 1, 2017, questionnaire responses from the record by making a reasonable judgment in weighing *only* the relevant factors, including the applicable law, regulations, and facts of *this proceeding with regard to the second rationale*. One factor of significant importance here, which Commerce must specifically consider on remand, is that Commerce had already decided to accept Electrolux's responses on the record on August 31, 2017. Other factors may include Electrolux's conduct in this review, the fact that the three limited circumstances in which Commerce typically grants a "second chance" opportunity were not met in this review, and the relevant arguments raised by Whirlpool in its submissions of September 7 and 15, 2017, and by Electrolux in its submissions of September 11 and 21, 2017.

We also note that nowhere in its Issues and Decision Memorandum did Commerce address or even mention either the August 31, 2017 decision or the September 25, 2017 recission of it. Rather, Commerce addressed only that it had no *obligation* to ever grant a "second chance" to Electrolux¹⁴⁰ – a proposition with which we do not necessarily disagree. But if the second rationale for the September 25, 2017 recission is arbitrary, as is the first one, then the September 25, 2017 decision has no valid basis. We therefore

¹⁴⁰ P.R. Doc. 67 at 15-16.

remand for an explanation of why the August 31, 2017 decision was rescinded on September 25, 2017, limited to the role of the second rationale.

If Commerce determines that it should not have rescinded its August 31, 2017 decision, then Commerce must reopen the record, accept Electrolux's responses, and conduct any further proceedings necessary to calculate an accurate dumping margin for Electrolux for the instant review. The Panel recognizes that if Commerce takes these actions, extension of the 90-day period for Commerce's remand results may be necessary. The parties may request such an extension.

If Commerce determines that rejection and removal of Electrolux's September 1, 2017, questionnaire responses is appropriate, then Commerce must provide a reasoned explanation why, in accordance with our directions herein.

ORDER

Therefore, upon considering all papers and proceedings herein to date, as well as the arguments presented at the Hearing conducted on November 10, 2020, it is hereby:

ORDERED that this matter is remanded to the U.S Department of Commerce; and it is further

ORDERED that the U.S. Department of Commerce reconsider its decision to reject and remove Electrolux's September 1, 2017, questionnaire responses from the record based on the applicable law, regulations, and facts of the record of this proceeding only, in accordance with the specific instructions as contained in Section IV.D in this Interim Decision of the Panel; and it is further

ORDERED that within 90 days after the date of this Interim Decision and Order, the U.S. Department of Commerce inform the Panel of Commerce's Redetermination on Remand; and it is further

ORDERED that the U.S Department of Commerce's holdings with respect to the other issues addressed herein are, hereby, **AFFIRMED**.

SO ORDERED.

Issue Date: April 26, 2021

Signed in the original by:

/s/ Gustavo A. Uruchurtu
Gustavo A. Uruchurtu, CHAIRMAN

/s/ Mateo Diego Fernandez
Mateo Diego Fernández, PANELIST

/s/ Robert E. Ruggeri
Robert E. Ruggeri, PANELIST

/s/ Alejandro Sanchez Arriaga
Alejandro Sanchez Arriaga, PANELIST

/s/ Jennifer M. Smith
Jennifer M. Smith, PANELIST