

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	)	
	)	
	)	

FINAL DECISION AND ORDER

I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”). It 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

In its Complaint, filed on May 18, 2018, Electrolux² raised two issues: (1) Commerce erred as a matter of law by applying “adverse facts available” (“AFA”) to Electrolux because, among other things, Commerce had allegedly failed to properly serve Electrolux with the

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

² Complainants Electrolux Home Products, Inc.; Electrolux Home Products Corp. N.V.; and Electrolux Home Products de Mexico, S.A. de C.V., a Mexican producer and exporter of the subject merchandise, are collectively referred to herein as “Electrolux.”

AD questionnaire and (2) Commerce’s practice of allowing a law firm that has already missed a filing deadline only “one second chance” to submit untimely filed information is unlawful.

On April 26, 2021, the Panel issued its “Interim Decision and Order” remanding the matter to the Department of Commerce. The Panel held that Commerce had abused its discretion in relying upon the so-called “second chance rule” to remove Electrolux’s responses already admitted to the record.³ Specifically, we found that Commerce could not lawfully base its decision on Electrolux’s counsel having had more than one “second chance based on the counsel’s actions in a different proceeding for a different client.”⁴

However, we also found that Commerce had based its decision on an additional rationale: that Commerce normally only grants a “second chance” in certain circumstances and Electrolux’s case was not one of them.

The Panel, therefore, directed Commerce on remand to reconsider the rejection and removal of Electrolux’s September 1 questionnaire responses “with regard to the second rationale.”

Commerce issued its draft redetermination on July 6, 2021, and received comments from both Electrolux and Whirlpool Corporation, the domestic producer, on July 12, 2021.

On August 9, 2021, Commerce issued its “Final Results of Redetermination Pursuant to Panel Remand” [“Final Remand Results”]. Pursuant to NAFTA Rule 73(2)(b)

³ As for the first issue raised by Electrolux’s Complaint, the Panel found no error by Commerce with respect to the service of the antidumping questionnaire. It also found no error by Commerce for its rejections of Electrolux’s extension requests, untimely submissions of its responses, and related requests for reconsideration through July 2017.

⁴ The second chance rule is a practice that Commerce in its discretion employs. On occasion, Commerce chooses to give a party’s law firm “a second chance” to file a submission if it has missed a deadline. Commerce will not give a law firm another “second chance” afterward.

on September 7, 2021, Electrolux submitted its comments in opposition to the Final Results, and on September 27, 2021, Commerce and Whirlpool Corporation, the domestic producer, submitted comments in support thereof pursuant to Rule 73(2)(c). On December 8, 2021, and at the request of Electrolux, the Panel conducted a hearing and heard oral arguments concerning the remand redetermination.⁵

For the reasons more fully set forth below, and based on the administrative record; the applicable law; the written submissions of Electrolux, Commerce, and Whirlpool; and oral arguments before the Panel, the Panel now affirms Commerce's Final Remand Results.

II. BACKGROUND

Familiarity with the Panel's Interim Decision and Order is presumed here. However, given that this case turns on the sequence of events occurring before the agency, we point out some elements of the procedural history.

After having missed its original deadline to provide information to Commerce, on August 30, 2017, Electrolux and BakerHostetler (the firm representing Electrolux) met with Commerce, which "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."⁶ In a letter filed that same day, BakerHostetler provided the requested information and asked Commerce to authorize Electrolux to resubmit its questionnaire responses.⁷

⁵ The hearing was conducted remotely due to the ongoing COVID-19 pandemic.

⁶ See P.R. Doc. 29.

⁷ See P.R. Doc. 28.

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 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."⁸

On September 7, 2017, Whirlpool filed a request for reconsideration of Commerce's decision to accept Electrolux's responses.⁹ The basis for Whirlpool's request was that Commerce had not found any "extraordinary circumstances" to even consider Electrolux's untimely extension request, nor had Commerce found any "good cause" to grant it, as required by the regulations.¹⁰ 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."¹¹ 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).¹²

Following its own *ex parte* meeting with Commerce, on September 15, 2017, Whirlpool's counsel filed a letter containing legal authorities supporting rejection of

⁸ See P.R. Doc. 30.

⁹ See P.R. Doc. 36.

¹⁰ See *Id.*

¹¹ *Id.* at 5.

¹² See P.R. Doc. 37 (internal quotation marks omitted).

Electrolux’s responses.¹³ 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.¹⁴

On September 25, 2017, Commerce again rejected Electrolux’s questionnaire responses as untimely, “[a]fter further consideration of the Department’s practice and regulations.”¹⁵ 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.¹⁶ Commerce explained that its “practice is to allow a law firm that 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.”¹⁷ 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.’”¹⁸

In the September 25 rejection letter, Commerce stated that it should never have allowed Electrolux’s submission in the first place because its then-law firm had already received a second chance to make a late submission in an unrelated proceeding.¹⁹

¹³ See P.R. Doc. 39.

¹⁴ See P.R. Doc. 41.

¹⁵ P.R. Doc. 42 at 1.

¹⁶ See *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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.”²⁰ 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.²¹

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.²²

III. THE INTERIM DECISION AND ORDER

In our Interim Decision, we rejected Commerce’s application of the second chance rule in the initial determination. We held that Commerce had improperly rejected Electrolux’s responses only a few weeks after having accepted them under its second

²⁰ *Id.*

²¹ *Id.* at 2.

²² *Id.* (footnotes omitted).

chance rule. In particular, we rejected Commerce’s reasoning that it realized after the fact “that Electrolux’s then-counsel had already been given a ‘second chance’ in an unrelated case involving a different client.”²³ The Panel decided 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.”²⁴

As noted above, however, the law firm’s conduct in the unrelated proceeding was not the only basis that Commerce had relied upon in rejecting the questionnaire responses. The Panel found that:

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 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 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.²⁵

Commerce presented that alternate rationale in the same September 25, 2017 denial letter, albeit as a secondary issue:

We also note that the Department 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

²³ Interim Decision and Order at 2.

²⁴ *Id.* at 34.

²⁵ *Id.* at 35.

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.²⁶

Based on this, the Panel found that, "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."²⁷

The Panel, therefore, remanded the matter to Commerce with directions that Commerce "reconsider the rejection and removal of Electrolux's September 1 questionnaire responses but only to the extent that its September 25 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...."²⁸ (Emphasis in original). We also held that "(t)he facts of the instant review are a relevant factor that Commerce may consider in exercising its discretion about the development of this record."²⁹ "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*."³⁰ (Emphasis in original). The panel emphasized that, "[o]ne factor of significant importance here, which

²⁶ *Supra* note 15; *see also* P.R. Doc. 67 at 15-16.

²⁷ *Supra* note 23 at 36.

²⁸ *Id.* at 37.

²⁹ *Id.* at 36.

³⁰ *Id.* at 37.

Commerce must specifically consider on remand, is that Commerce had already decided to accept Electrolux's responses on record on August 31, 2017."

We also held that "if the second rationale for the September 25, 2017, rescission is arbitrary, as is the first one, then the September 25 decision has no valid basis. We, therefore, remand for an explanation of why the August 31 decision was rescinded on September 25, 2017, limited to the role of the second rationale."³¹

It is within that framework that we turn to Commerce's Final Remand Results.

IV. 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.³²

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."³³ These provisions, therefore, require that a Chapter 19 panel apply the standard of review,

³¹ *Id.* at 39.

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

³³ Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this Panel.

“general legal principles,” and law that a federal court in the United States would otherwise apply in reviewing a Commerce determination.³⁴

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.³⁵ 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.³⁶

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.”³⁷ 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 AD investigations.”³⁸ Courts assess Commerce’s determinations as to the timeliness of submissions under the abuse of discretion standard.³⁹ “An agency abuses its discretion

³⁴ 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 32, at Article 1911.

³⁵ *See Id.* at Annex 1911.

³⁶ 19 U.S.C. § 1516a(b)(1)(B)(i).

³⁷ *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)).

³⁸ *Id.* at 1325.

³⁹ *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)).

when it issues a decision that ‘represents an unreasonable judgment in weighing relevant factors.’”⁴⁰

III. THE FINAL REMAND RESULTS

On remand, Commerce reconsidered its decision to accept and then reject Electrolux’s responses “in light of the circumstances present in this administrative review.” It found that “the facts of this review, including Electrolux’s oversights, omissions, and failures to act, did not warrant an opportunity for acceptance of the untimely response.”⁴¹ Commerce found specifically that Electrolux had:

failed to submit a timely response or request a timely extension request until 15 days after the deadline;

failed to “promptly” contact Commerce after missing the deadline; and

failed to monitor the record of the administrative review despite having requested the review in the first place.

Commerce also noted that Electrolux’s failures in this regard should be viewed in the context that it is “an experienced respondent” having itself requested and participated in other AD/CVD reviews. Therefore, Electrolux should have taken “reasonable measures” to monitor the case, like filing a timely entry of appearance and watching the case record on ACCESS. Commerce also noted that Electrolux’s failure to receive ACCESS notifications was a result of its own failure to file an entry of appearance. And it also should have known that the questionnaires would be issued in the normal course of events within the first month.

Faced with this series of failures, Commerce again held that it has only granted second chances in cases where a party failed to: 1) file a complete submission before the

⁴⁰ *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)).

⁴¹ FINAL REMAND RESULTS at 5.

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.

Commerce, as it had in earlier in the review, notes that Electrolux's case fits none of these scenarios. The respondent had missed the deadline completely — not just the specified hour within the day the response was due. Nor had it filed the confidential version and merely failed to file the public version of the response on time. And, rather than contact Commerce “promptly” about this and request an extension, Electrolux failed to do so for 15 days.

As regards specifically to its decision of August 31, 2017, whereby Commerce had already accepted Electrolux's questionnaire responses, Commerce determined that Electrolux's actions “did not fit the circumstances to warrant a second chance under Commerce's practice in the first instance.”⁴² Commerce further determined that its acceptance was “brief” (*i.e.* a little more than three weeks) and that its subsequent reversal “did not result in any greater prejudice to Electrolux than if Commerce had not permitted Electrolux a 'second chance.'” This is because Commerce did not take any action during the period during which Electrolux's responses were on the record, and “any matter raised prior to the preliminary results [was] subject to further comment from the parties and reconsideration by Commerce.”⁴³

⁴² *Id.* at 7.

⁴³ *Id.* at 8.

IV. OPINION

A. Electrolux's Challenges to the Final Remand Results Lack Merit

Electrolux has raised several arguments to this Panel following remand. First, it asserts that the second chance rule is wholly inapplicable because Electrolux had met a new deadline set by Commerce of September 1, 2017.⁴⁴ It contends that, without a missed deadline, there is no basis or need for Commerce to even consider whether the case fits within those three categories where it has granted a second chance. Accordingly, Electrolux claims that Commerce's reasoning is arbitrary and capricious.

The problem with this argument is that the new deadline of September 1, 2017, was, in fact, granted to Electrolux *as the second chance*. The record is clear that, but for that second chance, Commerce was not allowing the late responses to be filed on any deadline.⁴⁵ The new deadline was set in Commerce's August 31, 2017 letter to BakerHostetler which stated that "Based on the information you have provided in your letter, *including 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."⁴⁶ (Emphasis added).

Moreover, in its Interim Decision and Order, this Panel explicitly directed Commerce to reconsider its rejection of the responses "but only to the extent that its September 25 decision was based on the second rationale, *viz.*, that Commerce

⁴⁴ ELECTROLUX'S RULE 73(2)(B) COMMENTS IN OPPOSITION TO THE U.S. DEPARTMENT OF COMMERCE'S FINAL RESULTS OF REDETERMINATION PURSUANT TO PANEL REMAND, 14-15 [*hereinafter* Electrolux's Comments"].

⁴⁵ Commerce makes the same point: "Instead, it was only *because* of Commerce's practice of permitting one second chance that originally Commerce requested Electrolux's responses at all." COMMERCE'S RULE 73(2)(C) RESPONSE IN SUPPORT OF FINAL RESULTS OF REDETERMINATION PURSUANT TO PANEL REMAND, 14 [*hereinafter* "Commerce's Comments"] (emphasis in original).

⁴⁶ *Supra* note 8.

‘generally’ only allows a ‘second chance’ under certain factual circumstances not present in this case.”⁴⁷

Thus, the Panel was *limiting* the remand to the second rationale. Electrolux would have Commerce ignore our directive and refuse to address as relevant “any rationale related to the second chance rule’s application (including the second rationale that the panel remanded for reconsideration).”⁴⁸ This is because Electrolux considers that the new September 1 deadline had “wiped the slate clean” so that “the factual predicate undergirding the application of the second rationale ... ceased to exist” once Electrolux met the new deadline.⁴⁹ But, were that the case, the Panel would never have even remanded the matter to Commerce for reconsideration, as Commerce has recognized.⁵⁰ For that reason, we decline Electrolux’s suggestion that “The Panel can and should reject the Final Remand Results on that basis alone.”⁵¹

Electrolux next argues that Commerce cannot use the second rationale because it fully knew, well before granting the second chance on August 31, 2017, that Electrolux’s case did not fall within any of the three categories. It argues that it was “arbitrary and capricious” for Commerce to reverse course on September 25, 2017, and determine that

⁴⁷ *Supra* note 23 at 37.

⁴⁸ Electrolux, *supra* note 44 at 15.

⁴⁹ *Id.* at 14.

⁵⁰ Commerce, *supra* note 45 at 14.

⁵¹ Electrolux, *supra* note 44 at 14.

Electrolux's case never should have been considered for a second chance if all along its case had fallen outside the three categories.⁵²

The short answer to this argument is that, as the respondent itself posits, Electrolux's case had indeed been outside the usual three circumstances. The *timing* of when Commerce came to that conclusion or realization is not controlling or even relevant. Even if it were, Commerce's September 25 letter states that it came to its conclusion "after further consideration of the Department's practice and regulations." Commerce was free to reconsider its August 31 decision (with or without the advocacy of the parties), regardless of whether its earlier decision had been an oversight or an error.⁵³ The issue is simply whether the second rationale is reasonable.

Electrolux also asserts that the facts did not change between August 31 and September 25, which it claims is all the more reason that Commerce's decision is unreasonable and arbitrary and capricious.⁵⁴

But the problem with Electrolux's argument is that Commerce was free to change its mind or correct its own oversight with or without any intervening facts or new developments. In general, an administrative agency is not barred from changing its mind or correcting what it believes is an error. As the Supreme Court has noted, "An

⁵² Electrolux complains that Commerce "already knew on August 31, 2017 — when it set a new deadline for Electrolux's responses — that Electrolux's previous attempt to meet the old deadlines did not fall within one of the three general categories identified in the second rationale." *Id.*

⁵³ Commerce's September 25, 2017 letter relies mostly on what had been its own apparent oversight: "Moreover, when granting Electrolux's request to accept its untimely response, *we failed to take into consideration* the fact that the Department had already given BakerHostetler its second chance opportunity on August 9, 2017, by accepting BakerHostetler's untimely-filed information in the AD investigation of softwood lumber from Canada." (Emphasis added).

⁵⁴ Electrolux, *supra* note 44 at 15.

administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision....”⁵⁵

And given the amount of discussion, analysis, and lobbying between August 31 and September 25, 2017, as we have set out *supra* at 4-6, the Panel is not convinced that there truly were no intervening developments or changes to the record.⁵⁶ Commerce convincingly asserts that its “reconsideration” of the August 31 decision was “prompted” by the intervening submissions — including Electrolux’s — added to the record.⁵⁷ We accept that Commerce’s revisiting of the issue was related to the arguments and authority presented to it in the interim.

Electrolux relies upon the U.S. Court of International Trade’s (“CIT”) decision in *NEXTEEL*⁵⁸ to argue that Commerce is precluded from reaching a different decision in the final determination from the preliminary unless the evidence has changed in the interim.⁵⁹ The *NEXTEEL* court said that “Commerce found that the record did not support any of Maverick’s four allegations of a particular market situation in Korea. *The court finds it unreasonable that Commerce reversed its position and subsequently found*

⁵⁵ *Nat’l Labor Relations Bd. v. Local Union No. 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978).

⁵⁶ Commerce shows that there *were* intervening developments during those 3 weeks: the submission of papers and arguments by both Electrolux and Whirlpool and the *ex parte* meetings illustrate that the issue was still in play. Commerce, *supra* note 41 at 8, 12-13; Commerce, *supra* note 45 at 15, 20-21. Commerce points in particular to Electrolux’s own briefing and efforts to reverse Commerce’s August 31 decision. *Id.* at 15.

⁵⁷ *Id.* Electrolux counters that “attorney argument is not evidence”, but cites an inapposite Federal Circuit patent appeal based on the Manual of Patent Examining Procedure; Electrolux, *supra* note 44 at 15.

⁵⁸ *NEXTEEL Co. v. United States*, 355 F. Supp. 3d 1336 (Ct. Int’l Trade 2019).

⁵⁹ Electrolux, *supra* note 44 at 21-23. In any event, we note NAFTA Chapter 19 Panels are not strictly bound by decisions of the CIT as they are by those of the Court of Appeals for the Federal Circuit. NAFTA, Article 1904.2 (The Panel is to apply the “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 in reviewing a final determination of the competent investigating authority.”)

a particular market situation based on the same evidence. It does not stand to reason that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion.”⁶⁰

Viewed more closely, however, *NEXTEEL* does not really stand for the proposition that Commerce cannot change its position between the preliminary and final determinations without a change in the facts. Rather, the Court held that the original decision had been *unsupported by the facts* as was the final decision. As the same CIT judge recently held in another case, referencing *NEXTEEL*:

The court also rejects Wheatland’s contention that under a totality of the circumstances approach, Commerce can demonstrate the existence of a particular market situation based upon the combination of Korean hot-rolled coil subsidies, imports from China, strategic alliances, and electricity pricing interference, *even though there is a lack of persuasive evidence to support any one of these allegations*.⁶¹

And the court rejected the notion that “a collection of unsubstantiated allegations can be combined into a substantiated one. Not even their collective impact can fill the evidentiary void that has plagued Commerce’s particular market situation finding through the OCTG reviews and now this review.”⁶²

Therefore, the issue in *NEXTEEL* and its related administrative reviews really was that there was insufficient evidence to support the allegations. With this

⁶⁰ *NEXTEEL*, 335 F. Supp. 3d at 1351 (emphasis added).

⁶¹ *HYUNDAI Steel Co. v. United States*, 415 F. Supp. 3d 1293, 1301 (Ct. Int’l Trade 2019) (Choe-Graves, J.) (emphasis added).

⁶² *Id.*; see also *Histeel Co. v. United States*, Slip Op. 21-126 at 23 (Ct. Int’l Trade, 2021) (“[T]his does not mean ‘that under a totality of the circumstances test, a collection of unsubstantiated allegations can be combined into a substantiated one.’”)

understanding, the Panel does not agree that *NEXTEEL* stands for the proposition asserted by Electrolux.

Regardless, Commerce is free to change course and even correct its mistakes during the period between the preliminary and final determinations. The CIT has recognized that Commerce may change positions following the preliminary determination.⁶³ As Commerce succinctly notes, “Otherwise parties would not submit case briefs.”⁶⁴ And, as in this case, in the period *before* the preliminary determination, it has no less flexibility to change its mind.

What is essential is only whether Commerce made a reasonable judgment based on relevant facts.⁶⁵ Here the issue is whether Commerce’s redetermination regarding the “second rationale” is reasonable or a “clear error of judgment” – regardless of when it was made during the review and whether new facts had occurred.

Electrolux also argues that the Final Remand Results do not address why the rationale for the August 31 decision supposedly no longer applies.⁶⁶ That decision had been conditioned on several procedural undertakings made by Electrolux’s then-counsel and agreed to by Commerce to further the policy of improving monitoring, compliance,

⁶³ “Even if Plaintiff’s complaint were properly before the court under 28 U.S.C. § 1581(i), it is unlikely that there is a viable cause of action because Commerce has not yet issued its final determination. *It is possible that Commerce may reconsider challenged aspects of its preliminary determination....*” *Celik Halat ve Tel Sanayi A.S. v. United States*, No. 20-03848 (Ct. Int’l Trade 2020) at 10 (emphasis added).

⁶⁴ Commerce, *supra* note 45 at 21.

⁶⁵ *Bosun Tools Co.*, 405 F. Supp. 3d at 1364-65.

⁶⁶ Electrolux, *supra* note 44 at 24-25.

and timely submissions.⁶⁷ Electrolux asserts that Commerce has failed to even mention the undertakings, much less explain how its September 25 reversal furthered those same policy objectives or why the original decision had to be reversed. This, it concludes, is unreasonable.

Commerce responds that it had only accepted those undertakings as part of its practice of granting a second chance to law firms. We agree: since Commerce subsequently determined that Electrolux's case did not fit within the three circumstances for granting a second chance, and it should never have been offered in the first place, Electrolux's argument is misplaced. Commerce "policy objectives" were only being addressed within the framework of the second chance practice.

B. Commerce's Reconsideration of the "Second Rationale"

The Panel now turns to the "second rationale" itself and whether Commerce's reconsideration of it in the Final Remand Results was reasonable. As noted, Commerce has stated that its practice "generally" is to allow a second chance in three factual scenarios unlike Electrolux's circumstances: where a law firm 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.

The Panel agrees with Commerce that Electrolux's case does not fall within any of these scenarios. Commerce and Whirlpool have cited a handful of investigations and the Panel

⁶⁷ "Based on the information you provided in your letter, including 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." P.R. Doc. 28. Commerce had solicited the undertakings from Electrolux's then-counsel the prior day. P.R. Doc. 29. And second chance recipients are required to "identify the steps it has taken to avoid untimely filings in the future." P.R. Doc. 42.

has reviewed the administrative record in each and agrees that they constitute examples of the limited scenarios of the second rationale.”

Turning to the first scenario, it is clear that Electrolux had not merely missed a deadline of “a specified hour” with the day the response was due. The deadline for Electrolux’s response to Section A of the AD questionnaire was May 9, 2017. It was only on May 24, 2017 that BakerHostetler submitted, on behalf of Electrolux, an untimely extension request for the Section A response. It had missed the deadline for Section A entirely and only contacted Commerce about it 15 days later.

By contrast, Commerce cites *Certain Softwood Lumber Products from Canada* (A-122-857).⁶⁸ In that investigation it granted a respondent’s request to accept a questionnaire response that had been delayed due to technical difficulties. The respondent had submitted the response at 5:34 pm on the day that it was due; the response was therefore a half hour late. The respondent’s counsel explained the measures it was putting in place to avoid missing further deadlines.⁶⁹ There was no reference to a second chance *per se*.

In its Final Remand Results, Commerce also points to *Certain Cold-Rolled Steel Flat Products from the Republic of Korea* (A-580-881). There Commerce accepted a late questionnaire response that had been due at noon on the date in question but was filed only several hours later. While not referring explicitly to a second chance, Commerce accepted the submission after counsel for the respondent “detail[ed] the steps [they] will take internally to ensure that all future submissions, in this proceeding or others, are filed

⁶⁸ Commerce, *supra* note 45 at 7 (*citing* September 25, 2017 rejection letter at 2 n.1.)

⁶⁹ Letter from Gibson Dunn to Acting Secretary of Commerce, (March 1, 2017).

in a timely manner”.⁷⁰

While Commerce cites only two investigations, Electrolux does not take issue with this first scenario or either of the cases cited.⁷¹

As for the second scenario, Electrolux’s situation certainly does not involve the failure to timely file a public version of a response (after filing the confidential one). Commerce cites only the example of the antidumping investigation in *Steel Concrete Reinforcing Bar from the Republic of Turkey* (A-489-829). There, the respondent’s counsel had inadvertently omitted the public version of its Section B response from its submission. While not referencing the second chance practice explicitly by name, Commerce allowed the respondent to file the public version “[b]ased on steps outlined in your letter to prevent a recurrence of such errors (i.e., the failure to submit a portion of the public version of a proprietary document, in this case.)”⁷² And this is the same language Commerce used in its August 31, 2017, letter to BakerHostetler granting them in effect a second chance. Electrolux again neither objects nor offers any contradictory precedent.

In support of the third scenario (“promptly contacting Commerce”), in its Final

⁷⁰ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Memorandum to The File from Robert M. James, Program Manager (January 11, 2017).

⁷¹ Electrolux *does*, however, challenge Whirlpool’s Subsequent Authority filing which discussed *Trinity Mfg. v. United States*, Slip Op. 2021-153 (Ct. Int’l Trade Nov. 8, 2021). We agree with Electrolux that *Trinity* was based on whether the “extraordinary circumstances” requirement for an untimely filing was met and therefore is not on point. Compare this with *Narrow Woven Ribbons with Woven Selvedge from Taiwan* (discussed *infra*) where, after making a similar fruitless “extraordinary circumstances” argument, the respondent’s counsel met *ex parte* with Commerce and ultimately agreed to a series of remedial actions that the law firm would be taking in the future to avoid a recurrence.

⁷² Commerce Letter to Arent Fox LLP (January 27, 2017).

Remand Results Commerce cites to four investigations.⁷³ In *Narrow Woven Ribbons with Woven Selvage from Taiwan* (A- 583-844) respondent's counsel had contacted Commerce within 2 days of missing a deadline for a questionnaire response⁷⁴ compared to Electrolux's 15 days. After an initial unsuccessful argument raising "extraordinary circumstances", respondent's counsel met *ex parte* with Commerce which solicited, as here, a series of remedial actions that the law firm would henceforth be making. The remedial actions were set out, as in the instant case, in a written request for reconsideration. Using the same language employed in Electrolux's case, Commerce granted in effect a second chance (the practice which apparently dares not speak its name): "Based on the information you provided in your letter, including your description of the procedures you now have in place to prevent missed deadlines, we will allow Rong Shu to submit its response to section D of the questionnaire."⁷⁵

Commerce also cites *Certain Cold-Rolled Steel Flat Products from the Republic of Korea* (A-580-881) where the respondent's counsel had filed its extension request less than only 5 hours after missing a noon deadline.⁷⁶

The third example for this scenario is *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* (A-552-801) where the petitioners submitted their request for an extension on the same day that it was due. Another example is *Welded Line Pipe*

⁷³ Commerce, *supra* note 41 at 7 (citing Commerce's September 25 letter at 2 n.3). Commerce also cited Whirlpool's Letter (September 15, 2017) which cited three of the other investigations as examples of this scenario.

⁷⁴ Akin Gump Letter to Commerce (February 18, 2017). Actually, the respondent's counsel also had made an even earlier extension request, well before the deadline, but had omitted one section of the response. *Id.* at 2; *see also* Commerce September 25, 2017 Letter, *supra*, note 15 at 2.

⁷⁵ Letter from Commerce to Akin Gump (February 27, 2017).

⁷⁶ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Memorandum to The File from Robert M. James, Program Manager (January 11, 2017).

from Turkey (A-489-822) where the respondent filed the response after hours on the due date and requested an extension the following day.⁷⁷

Electrolux did not challenge the specifics of these first two scenarios, but it does object to the third one. It takes issue with Commerce's criteria of a respondent having "promptly contacted the Department." Electrolux objects to Commerce not having defined the term "promptly" or explained what it considers to be 'prompt' outreach." We do not agree. While it is true that Commerce has not set a fixed number of days as the outer limits for receiving a second chance, Electrolux's 15 days is well beyond 2 days, the longest delay in the cited examples. And it is not unreasonable for Commerce to consider 15 days as less than "prompt" for these purposes.⁷⁸ Moreover, since Commerce cannot be forced to grant a second chance, its determination of how many days it will tolerate as prompt is within its discretion, which we will not disturb. Without a showing that Electrolux has been treated differently from other parties, this objection fails.

We have not been shown any court decisions or agency actions contradicting Commerce's second rationale for granting a second chance.⁷⁹ We agree with Commerce

⁷⁷ The Panel would add to that *Softwood Lumber Products from Canada* (A-122-857), where respondent's counsel contacted Commerce before the close of the day on which the response was due.

⁷⁸ Electrolux also asserts that it was actually "diligent" in reaching out to Commerce within 24 hours of realizing that the questionnaire had been issued weeks before. Electrolux, *supra* note 44 at 16. We do not agree. Commerce is entitled to consider how promptly a respondent reaches *out after the deadline has been missed*, not after the respondent becomes aware of it.

Electrolux also objects to Commerce referring to it as an "experienced respondent" who, having requested the review, should have taken reasonable measures to monitor the record. Electrolux claims that Commerce is reaching outside the official record to make that observation. However, the Panel itself has held that "the courts have taken note of the overall familiarity that respondents such as Electrolux have with the AD procedures." *See generally* Interim Order at 20-21 and cases cited therein.

⁷⁹ Electrolux raises *Truck and Bus Tires from the PRC* where a separate rate respondent had filed its supplemental questionnaire response 43 days late. Electrolux, *supra* note 44 at 14. However, in that case (which did not even involve the second chance criteria) the respondent had not been on the service list, was not expecting the supplemental questionnaire, and had not even been notified of it. Electrolux, on the other hand, had requested the review and should have been monitoring the record.

that the differences between Electrolux's case and the criteria of the second rationale are sufficient to support its Final Remand Results.⁸⁰

The Panel, therefore, affirms Commerce's redetermination that Electrolux's situation does not fall within the three scenarios of the second rationale.

We note again that Commerce was never required or obligated to grant a second chance. Our Interim Decision noted that Commerce would have been well within its rights never to have granted the August 31 second chance at all. The issue remanded was whether the second rationale for the September 25 reversal was reasonable, irrespective of other cases or administrative determinations based on a different regulation than 19 C.F.R. 351.301(a), the authority for the second chance practice.⁸¹

Electrolux has raised various other points. It complains that Electrolux is being made to pay for the shortcomings of its prior counsel since there are no findings that "Electrolux itself failed to monitor the record" or "itself did anything wrong." Electrolux argues that Commerce is once again doing what this Panel already overruled: basing its decision on the actions of the law firm and not the respondent itself.⁸² The short answer is respondent's own acknowledgment that "Electrolux is well aware that parties act through their counsel." The parties are therefore responsible for their representatives' shortcomings in any particular case where they act for them. For example, the Panel upheld Commerce's rejections of Electrolux's responses before July 2017 based on its

⁸⁰ Commerce, *supra* note 41 at 7.

⁸¹ 19 C.F.R. 351.301(a) 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."

⁸² Electrolux, *supra* note 44 at 17-18.

then-counsel's actions.⁸³ But, more to the point, what the Panel had overruled in its Interim Decision was Commerce basing its September 25 decision on the law firm's action *in a different, unrelated proceeding for a different client*.⁸⁴

Commerce has raised the issue of whether Electrolux was “prejudiced” by the September 25 reversal. The Panel had instructed that: “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.”⁸⁵ In response, Commerce stated that “We find that Electrolux is not any more prejudiced by our accepting and later reconsidering and rejecting its responses than if we had continued to reject the responses.”⁸⁶ This hypothetical counterfactual statement is irrelevant to the issue on remand, which was whether Commerce’s *rescission* of the August 31 second chance — based on its second rationale — was reasonable. As discussed *supra*, Commerce has indeed addressed the issue and redetermined to our satisfaction that the August 31 decision was not unreasonably reversed according to the second rationale. Although the Panel disagrees with Commerce’s articulation regarding prejudice, we do not believe that the redetermination of the September 25 decision is affected by or in any way dependent upon it. The Panel affirms the redetermination, which otherwise stands on its own.

More broadly, the Panel recognizes that in *AG der Dillinger Huttenwerke v. United States*, the CIT stated that “once Commerce has accepted a submission, in certain

⁸³ *Supra* note 23 at 23-28.

⁸⁴ *Id.* at 32-33.

⁸⁵ *Id.* at 37.

⁸⁶ Commerce, *supra* note 41 at 8; Commerce, *supra* note 45 at 11.

cases it may be improper and/or prejudicial for it to remove the submission from the record.”⁸⁷ However, none of the facts or circumstances that the CIT found to render removal of the submission improper or prejudicial in that case are present here. Electrolux has not cited any, and Electrolux conceded at the hearing that that case had different facts and is of limited utility here.

For its part, Electrolux argues that because the Panel had held that the August 31 approval was significant, Commerce failed to properly “square it with the other relevant facts.”⁸⁸ But Electrolux incorrectly asserts that the August 31 decision had “wiped the slate clean” and “created a blank slate.”⁸⁹ Electrolux’s missed deadlines before August 31 are still part of the record and are available for Commerce to factor in as it reconsiders the criteria of the second rationale.

Similarly, Electrolux challenges Commerce’s emphasis on the respondent having missed the deadline to submit the Section A questionnaire responses. It was that deadline that Electrolux had requested an extension for 15 days later.⁹⁰ It argues that Commerce focused too much on that missed deadline for Section A to the exclusion of other “record facts.”⁹¹ Electrolux argues as well that its “diligence” after the missed deadline has been

⁸⁷ 26 C.I.T. 298, 321, 193 F. Supp. 2d 1339, 1363 (2002).

⁸⁸ Electrolux, *supra* note 44 at 22.

⁸⁹ *Id.* at 21-22.

⁹⁰ It is true that on May 24, 2017, BakerHostetler also submitted, on behalf of Electrolux, a *timely* extension request for the Sections B-D response. However, as we held in our Interim Order, “Commerce was within its discretion to reject that 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 Commerce chose to deny that on the reasonable grounds.” *Supra* note 23 at 26 (*quoting Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343, 1352 (Fed. Cir. 2015)).

⁹¹ Electrolux, *supra* note 44 at 21.

ignored in the analysis.⁹² In addition, Electrolux argues that Commerce has failed to factor in the sufficient time remaining before the preliminary determination and whether “the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality.”⁹³

The problem with these arguments is that, while they focus on facts in the record, they are not relevant to the specific criteria of the second rationale for a second chance. The second chance practice is, in our view, different from other Commerce regulations and practices and other bases for accepting late submissions. Commerce is not required, under our remand to do a holistic review of Electrolux and its lawyers’ conduct throughout this case. While it must address all relevant facts, Commerce need only assess whether Electrolux’s case falls within any of the three scenarios of the second rationale.

C. Commerce Properly Applied Total Adverse Facts Available to Electrolux

The final issue before the Panel is whether Commerce properly applied total AFA in determining Electrolux’s dumping margin. It was premature for the Panel to address this issue in the Interim Decision. As we now uphold Commerce’s decision in the Final Remand Results that the questionnaire responses were properly rejected on September 25, 2017, we address this issue now.

Where “necessary information is not available on the record,” or an interested party “fails to provide...information by the deadlines for submission of the information” or “significantly impedes a proceeding,” section 776(a) of the Tariff Act requires

⁹² *Id.* at 16-18.

⁹³ *Id.* at 23 (citing *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342 (Ct. Int’l Trade 2012)). But that balancing is not part of the second chance practice or analysis which is based on a different regulation.

Commerce to use “facts otherwise available” to reach its determination.⁹⁴ Section 776(b) provides that where a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that adverse to the interests of that party in selecting from among the facts otherwise available.”⁹⁵

Commerce found that Electrolux had not acted “to the best of its ability to comply” with the requests for information. Commerce cited a litany of oversights and missteps by Electrolux: Electrolux’s counsel waited 23 days after the initiation publication to enter its appearance; it failed to review the record at that point or it would have known of the questionnaire; it also failed to note in the record that the deadline was May 9, 2017; it failed to note that it still had 6 days after entry to file a timely response; it failed to file such a timely response within that time; it also failed to file a timely request for an extension; and it waited almost 3 weeks later before someone else (its consultant) called the questionnaire to its attention.⁹⁶ Commerce attributed Electrolux’s failure to submit the response on time to its failure to monitor the record for some two months after it had requested the review and six weeks after the review’s initiation (in a review which, after all, it had requested in the first place). Commerce considers that Electrolux “failed to participate in the proceeding for over three months prior to that deadline” of May 9, thereby also “impeding the proceeding”.⁹⁷ Commerce also contrasts this effort with Electrolux’s close attention to dates and events that it had shown in the prior three reviews.

⁹⁴ 19 U.S.C. § 1677e(a).

⁹⁵ *Id.* § 1677e(b).

⁹⁶ ISSUES AND DECISION MEMORANDUM at 9-11 (Mar. 12, 2018) (P.R. 67).

⁹⁷ *Id.* at 11.

Electrolux does not dispute the dates and events, but attributes its ignorance of the questionnaire to Commerce’s own failure to have served it, an argument that this Panel did not find compelling and rejected in our Interim Decision.

Both Electrolux and Commerce agree, and we also concur, that the use of “facts otherwise available” under section 776(a)(2)(B) is required when a party fails to provide information by the deadline, regardless of the cause. They also agree on the distinction, with which we also concur, that the “focus” of AFA is “*respondent’s failure to cooperate to the best of its ability*, not its failure to provide the requested information.”⁹⁸

Electrolux asserts that Commerce has failed to make that distinction in this case and is essentially penalizing it for having merely failed to provide the information. It relies on the Federal Circuit’s explanation in *Nippon Steel* that an “adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.”⁹⁹ We do not disagree with this recitation of the rule, nor with Commerce’s own citation of *Nippon Steel* for the proposition that “an adverse inference is simply a failure to cooperate to the best of respondent’s ability, regardless of motivation or intent.”¹⁰⁰ The statutory mandate for “best of its ability” “requires the respondent to do the maximum it is able to do.”

Compliance with the ‘best of its ability’ standard is determined by assessing whether the respondent has put

⁹⁸ Commerce, *supra* note 41 at 26; Electrolux, *supra* note 44 at 12 (*quoting Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

⁹⁹ *Nippon*, 337 F.3d at 1381.

¹⁰⁰ Commerce, *supra* note 41 at 32.

forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.¹⁰¹

It would be faint praise indeed to suggest that the efforts between February 9 and May 9, 2017 by Electrolux and its experienced then-counsel in the fourth review constituted the “best of their ability” and the “maximum they were able to do”. As noted above, Commerce lists the respondent’s numerous oversights, omissions, and failures to act.¹⁰² By contrast, Commerce also detailed on the record the respondent’s *careful* attention to dates and deadlines demonstrated in the first three reviews, thereby suggesting that Electrolux’s ability was there all along.¹⁰³

The admitted failure to have paid any attention to the official record in the case until shortly before the response deadline — or after someone else alerted Electrolux’s counsel to it — clearly is the sort of “inattentiveness” that the *Nippon Steel* court envisaged. The subsequent missing of the May 9 deadline, failing to request a timely extension, and waiting 15 days after the deadline to do so, are also clear evidence of Electrolux’s “inattentiveness” and “carelessness.”

Electrolux’s response, aside from the service issue, is that the type of nonfeasance by respondents meriting AFA in the CIT and Federal Circuit decisions cited by Commerce was far more severe than its own which does not merit the application of

¹⁰¹ *Nippon*, 337 F.3d at 1382.

¹⁰² *Supra* note 96 at 9-11.

¹⁰³ *Id.* at 11; Electrolux, *supra* note 44 at 30-31.

AFA.¹⁰⁴ That may well be, but it does not change the fact that Electrolux’s efforts still were demonstrably below its maximum ability and, at least before June 8 when it submitted its response, careless and inattentive.

As examples of the requisite “full cooperation” needed to avoid AFA, Electrolux points to its own “extraordinary effort” made after May 23, once it became aware of the questionnaire, to assemble full responses “in a remarkably short period of time”. And, it argues that, on balance, it eventually attempted to submit to Commerce the full range of data requested to make a determination, and did so even sooner than it had in previous reviews. The problem with this argument is that this purported “extraordinary effort” at “full cooperation” came later in the proceeding after the response deadline had been missed. Commerce had already rejected the untimely May 24 request for an extension, and Commerce denied as untimely all the subsequent extension requests.

Under its regulations Commerce is not required to waive its deadlines and accept out-of-time extension requests. Untimely submissions such as Electrolux’s “will not be considered” unless “extraordinary circumstances” exist for the tardiness.¹⁰⁵ We agree with Commerce that Electrolux’s “inattentiveness” and lack of diligence, far below its demonstrated level of ability, and not any unspecified “extraordinary circumstance”, prevented compliance. Under the regulation, if “reasonable measures” by the respondent could have prevented “the unexpected” event that precluded compliance, “extraordinary

¹⁰⁴ Commerce, *supra* note 45 at 12 *et seq.* (citing *Nippon Steel* (respondent denied that requested information was needed by Commerce, then denied that data even existed, provided data after AFA was applied); *Dongtai Peak*, 777 F.3d at 1347 (after receiving a last-minute extension — and a warning to plan ahead — respondent tried to submit two more untimely extension requests); and *Shenzhen Xinboda Industrial Co. v. United States*, 180 F. Supp. 3d 1305, 1313-14 (Ct. Int’l Trade 2016) (respondent missed a deadline but then also provided incomplete and accurate information)).

¹⁰⁵ 19 C.F.R. § 351.302(c).

circumstances” do not exist and Commerce need not accept the submission. Those were the facts here.

Electrolux also argues that the application of AFA was unlawful because Commerce had improperly denied it the opportunity to “remedy” its late submissions as the statute requires. The statutory section authorizing “facts otherwise available” provides that “the administering authority ... shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.”¹⁰⁶ Section 1677m(d), in turn, 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.

(Emphasis added). Thus, Commerce’s use of “facts otherwise available” is conditioned on giving the respondent the chance to “remedy” its “deficient” submission.

However, this provision, with the heading “Deficient Submissions,” applies to those situations in section 1677e(a) where a response has already been received, is on the record, but it is still somehow “deficient” or lacking because it does not substantively “comply” with the Commerce’s request. (For instance, the information has not been provided “in the form or manner requested”.) The agency has to identify the “deficiency” and allow the respondent to correct the record by either “remedying” the deficiency or at least providing an explanation on the record.

The provision does not apply to the situation before us where the alleged

¹⁰⁶ 19 U.S.C. § 1677e(a).

“deficiency” is simply that the response was procedurally late and consequently rejected and removed from the record. Commerce never had a *substantive* issue with Electrolux’s responses; they were simply out-of-time as a matter of procedure. On the other hand, in the cases relied upon by Electrolux, the respondents had originally submitted incorrect, inadequate, or misleading data on time and were asked to correct it.¹⁰⁷ The respondent’s remedy for any untimely response cannot be to require the agency to waive the deadline.¹⁰⁸

Accordingly, Commerce’s decision to apply total AFA to Electrolux is supported by substantial evidence and in accordance with law.

For these reasons, we affirm the Final Remand Results.

¹⁰⁷ *China Kingdom Import & Export Co. v. United States*, 507 F. Supp. 2d 1337 (2007) (original response contained inaccurate data); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, Slip Op. 11-123 (2011).

¹⁰⁸ This is illustrated by section 1677m(d)(2) itself. That 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.

ORDER

Therefore, upon considering all papers and proceedings herein to date, as well as the arguments presented at the Hearing conducted on December 8, 2021, it is hereby:

ORDERED that the “Final Results of Redetermination Pursuant to Panel Remand” are hereby **AFFIRMED, 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; and** it is further

ORDERED that on the 11th day hereafter, the U.S. Trade Agreements Secretariat shall issue a Notice of Final Panel Action.

SO ORDERED.

Issue Date: January 26, 2022

Signed in the original by:

/s/Gustavo Uruchurtu

Gustavo A Uruchurtu, CHAIRMAN

/s/Mateo Deigo-Fernandez

Mateo Diego-Fernandez, PANELIST

/s/Robert Ruggeri

Robert E. Ruggeri, PANELIST

/s/Alejandro Sanchez Arriaga

Alejandro Sanchez Arriaga, PANELIST

/s/Jennifer Smith

Jennifer M. Smith, PANELIST