No. 18-384

In the Supreme Court of the United States

PAPIERFABRIK AUGUST KOEHLER SE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 710 Fed. Appx. 889. The opinion of the Court of International Trade (Pet. App. 3-45) is reported at 180 F. Supp. 3d 1211. The Department of Commerce's antidumping determination (Pet. App. 48-128) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2018. A petition for rehearing was denied on April 25, 2018 (Pet. App. 129-130). On July 13, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This appeal concerns the Department of Commerce's second annual administrative review of its antidumping duty order covering lightweight thermal paper from Germany. Petitioner is a German producer and exporter of lightweight thermal paper. Petitioner contends that the Department exceeded its statutory authority to apply adverse inferences to an uncooperative party. The Court of International Trade (CIT) held that the Department's determinations were supported by substantial evidence and otherwise lawful. Pet. App. 3-45. The court of appeals affirmed in an unpublished summary order. *Id.* at 1-2.

1. The antidumping statute authorizes the Department of Commerce to apply remedial duties to foreign goods that are sold in the United States at less than fair value (known as "dumping") and that cause or threaten material harm to a domestic industry. See 19 U.S.C. 1673, 1677(1) and (34). Based on a petition from a domestic producer or on its own initiative, the Department is authorized to investigate whether dumping has occurred, while the U.S. International Trade Commission (ITC) examines whether the domestic industry has been materially harmed (or is threatened with such harm) as a result. See 19 U.S.C. 1673a, 1673d, 1673e. If both determinations are affirmative, the Department issues an antidumping order and imposes duties. *Ibid.*

After it has issued such an order, the Department, if asked to do so, conducts annual administrative reviews to determine the amount of dumping and resulting duties owed on goods exported to the United States during the previous 12 months. 19 U.S.C. 1675(a)(1)(B) and (2)(A). To determine the amount of duties owed, the agen-

cy calculates a "dumping margin" for each entry of merchandise subject to the order. 19 U.S.C. 1675(a)(2)(A)(ii). A dumping margin is the amount by which the "normal value" (home-market price) exceeds the "export price" (United States price). 19 U.S.C. 1677(35)(A). Higher home-market prices compared to the United States export prices result in higher dumping margins; lower home-market prices produce lower margins.

To calculate dumping margins, the Department uses detailed questionnaires to request information from a foreign producer or exporter about its home-market and United States sales and costs. 19 C.F.R. 351.301(c); see generally 19 U.S.C. 1677m (2012 & Supp. V 2017). Company representatives and counsel must certify the accuracy and completeness of questionnaire responses. 19 U.S.C. 1677m(b); 19 C.F.R. 351.303(g). Subject to certain verification procedures, the agency ordinarily relies on these reported data to determine the dumping margin and the resulting antidumping duty rate for the period under review. 19 U.S.C. 1677m(i); 19 C.F.R. 351.301, 351.307.

In certain circumstances when the questionnaire process does not produce complete or reliable information, the Department may determine a dumping margin "us[ing] the facts otherwise available" to the agency. 19 U.S.C. 1677e(a).[1] The Department may calculate dumping margins in that manner (1) if "necessary information is not available on the record"; or (2) if

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[1] Unless otherwise noted, citations to 19 U.S.C. 1677e refer to the 2012 edition of the statute. In 2015, Congress amended Section 1677e to provide the Department greater flexibility in calculating duty rates for uncooperative parties. See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, § 502, 129 Stat. 383-384; see also pp. 21-22, *infra*.

an "interested party or any other person" (A) "withholds information that has been requested," (B) "fails to provide such information by the deadlines for submission," (C) "significantly impedes [the] proceeding," or (D) "provides such information but the information cannot be verified." *Ibid.*

In selecting from among the facts otherwise available, the Department may apply an "inference that is adverse to the interests of [any interested] party" that it finds has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. 1677e(b). Such an adverse inference may include relying on information derived from (1) the antidumping petition; (2) a final determination in the investigation; (3) any previous antidumping review or determination; or (4) "any other information placed on the record." *Ibid.* The information from which the agency may draw such an inference is often referred to as "adverse facts available" or "AFA." *Ad Hoc Shrimp Trade Action Comm.* v. *United States*, 802 F.3d 1339, 1345 (Fed. Cir. 2015).

If the agency relies on "secondary information" (such as information from the petition or a prior determination), it must corroborate that information, "to the extent practicable," using independent sources that are "reasonably at [the Department's] disposal." 19 U.S.C. 1677e(c). To "corroborate" information in this context means that the Department determines that the information has "probative value." 19 C.F.R. 351.308(d); see H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994) (SAA) (Statement of Administrative Action accompanying the Uruguay Round Agreements Act, Pub. L. No.

103-465, 108 Stat. 4809).[2] "The fact that corroboration may not be practicable in a given circumstance," however, "will not prevent [the agency] from applying an adverse inference as appropriate" and using the secondary information. 19 C.F.R. 351.308(d); SAA 870.

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

2. In this case, based on a petition by domestic-industry producer Appvion, Inc. and findings by the Department and the ITC, the Department published an antidumping duty order on lightweight thermal paper from Germany in 2008, requiring a 6.50% antidumping duty rate on such imports. 73 Fed. Reg. 70,959 (Nov. 24, 2008). During the second administrative review of that order, the Department determined that petitioner had intentionally concealed relevant sales destined for its home market by transshipping merchandise through third-country intermediaries. In light of that determination, the Department disregarded petitioner's submissions for that review period and relied exclusively

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[2] The SAA is "regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements," which the antidumping statute implements. 19 U.S.C. 3512(d); see Pub. L. No. 103-465, §§ 201-234, 108 Stat. 4842-4901.

on adverse facts available to establish an antidumping duty rate.

a. Petitioner was the sole respondent in the second administrative review and submitted multiple questionnaire responses. Those responses purported to provide information about all of petitioner's home-market sales, while repeatedly certifying the accuracy and completeness of its reporting. Pet. App. 8. Among the issues raised in the second review, Appvion alleged that petitioner had manipulated its home-market sales data by failing to report certain sales. *Id.* at 28. Petitioner again certified, however, that it had "'reported all sales of the subject merchandise during the [period of review] with a "ship-to" address within Germany,'" and that "there were no sales with a shipment address within Germany for which the billing address or country code was outside of Germany." *Id.* at 28-29 (citation omitted); Confidential C.A. App. 7209-7210 (C.A. App.). Following these submissions, in 2012, the Department published the final results of the second review, calculating a dumping margin for petitioner of 4.33% (after correcting a ministerial error) based on the data that petitioner had reported and certified. Pet. App. 9.

b. The Department later learned that petitioner had falsified its sales reporting to the agency during an extended period that stretched back into the second administrative review. During the third administrative review, Appvion submitted information publicly alleging that petitioner had "engaged in a scheme to defraud the Department by intentionally concealing certain otherwise reportable home market transactions * * * [by] selling 48 gram thermal paper that it knows is destined for consumption in Germany through various intermediaries in third-countries." C.A. App. 8091-8092; see

Pet. App. 10-11, 58-59. Appvion alleged that petitioner had undertaken the scheme "to artificially manipulate prices attributable to those sales of 48 gram paper shipped directly to its German customers." C.A. App. 8091. In support of those allegations, Appvion submitted an affidavit reporting information from a confidential source. The affidavit stated (again publicly) that petitioner had manipulated its sales prices by lowering the prices of its direct sales to Germany, while raising the prices of the transshipped sales, and that petitioner had engaged in the transshipments "to avoid reporting those transactions as sales to Germany in the [United States] antidumping case." *Id.* at 8099-8100.

Although petitioner initially denied Appvion's allegations, it eventually acknowledged that the transshipment scheme existed and had extended back to the second review period. Pet. App. 11. Petitioner characterized its admission as acknowledging that the public portions of Appvion's allegations were "substantially correct." *Ibid.* (citation omitted). Petitioner indicated that its employees had undertaken the transshipment scheme to avoid complying with antidumping protocols, and that "senior * * * personnel" had developed and directed the sales strategy. C.A. App. 8112-8114. Petitioner asserted that "these acts and omissions were undertaken without the authority or knowledge of the Chief Executive Officer, the Chief Financial Officer, the in-house counsel, or the Board of Directors." *Id.* at 8110. Petitioner nonetheless stated that its management accepted "full and complete responsibility for the actions of its employees." *Id.* at 8144.

Based on these admissions, the Department applied total AFA to petitioner for the third administrative review. Pet. App. 11-12. It explained that petitioner had

engaged in an "elaborate scheme to conceal certain otherwise reportable home market sales," and that this conduct "rendered [petitioner]'s questionnaire responses wholly unreliable and unusable." C.A. App. 8545. It similarly determined that petitioner's actions constituted a "material omission" that prevented Commerce from "rely[ing] upon any of [petitioner]'s submitted information to calculate an accurate dumping margin." Pet. App. 65-66 (citation omitted).

Relying on its statutory authority to use information from the original antidumping petition, the Department set petitioner's duty rate for the third review at 75.36%. Pet. App. 12. It corroborated that figure by comparing it to the range of transaction-specific dumping margins generated by the sales data that petitioner had reported in the second review (which Appvion had placed on the third-review record). *Id.* at 66. It also determined that the 75.36% rate fell within the range of petitioner's reported margins, including its highest second-review margin of 144.63%, and that the rate therefore had probative value and was corroborated to the extent practicable. *Id.* at 84.

The CIT upheld the Department's determination of petitioner's antidumping duty rate for the third review. *Papierfabrik August Koehler SE* v. *United States*, 7 F. Supp. 3d 1304 (2014) (*Koehler I*). The Federal Circuit issued a published opinion affirming the CIT's judgment. *Papierfabrik August Koehler SE* v. *United States*, 843 F.3d 1373 (2016) (*Koehler II*). Petitioner filed a petition for a writ of certiorari, which this Court denied. *Papierfabrik August Koehler SE* v. *United States*, 138 S. Ct. 555 (2017).

c. Meanwhile, the Department sought a voluntary remand from the CIT of proceedings in the second

review—the period at issue here—to reconsider its determination for that period in light of the discovery of petitioner's fraudulent scheme. Pet. App. 12. Petitioner initially opposed the request for a remand unless the Department would permit it to submit its previously concealed sales data. After a court hearing, however, petitioner ultimately agreed to a remand. In January 2014, the CIT granted the remand request. *Ibid.*

In March 2014, the Department released a draft redetermination and reopened the second-review record for the limited purpose of including evidence from the third review and reconsidering the second review results to examine whether and to what extent the information affected the second review. See Pet. App. 13-14. As in the third review, the Department determined that petitioner had "provided incomplete and misleading information on the record of th[e] [second] review," and that the agency was "unable to rely upon any of [petitioner]'s submitted information in th[e] review." C.A. App. 8085-8086. The Department proposed to apply total AFA to petitioner, resulting in an antidumping duty rate of 75.36%, the highest margin calculated in the petition and the same rate that the agency had imposed on petitioner during the third review. Pet. App. 14. It corroborated this rate using the same range of petitioner's transaction-specific sales margins that the Department had used to corroborate the same antidumping duty rate in the third review. *Ibid.*

The Department set a schedule for comments on the draft redetermination, inviting parties to submit limited new factual information "specifically related to the rate being applied and the corroboration of this rate." Pet. App. 15 (citation omitted). It stated that it would "not

accept any information that could be considered responsive to the [agency]'s initial questionnaire or supplemental questionnaires from the underlying [second] administrative review proceeding, including additional sales data for the period of review." *Ibid.* (citation omitted). Petitioner nonetheless attempted to submit sales information responsive to the underlying questionnaires, including information about the concealed sales and information seeking to revise the data producing the 144.63% margin in the corroboration range. *Ibid.* The agency rejected petitioner's submission. In accordance with 19 C.F.R. 351.104(a)(2)(ii), the agency retained a copy solely to establish and document the basis for that rejection. Pet. App. 15; C.A. App. 8711-8714.[3]

d. In the final redetermination, the Department found that the proceedings had been "tainted" by petitioner's misconduct, and it "reach[ed] the same findings and conclusions with respect to [petitioner]'s transshipment scheme in [the second review] as [it] did in [the third review]." Pet. App. 69 (citation omitted). The agency determined that petitioner had engaged in an "elaborate scheme" to conceal certain home-market sales, through which petitioner had "knowingly submitted inaccurate and incomplete sales data which are essential for the Department to calculate a dumping margin for [petitioner] in the [second review] proceeding."

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[3] In support of various claims about the extent and materiality of the sales that petitioner had concealed, and the propriety of the 144.63% margin, petitioner repeatedly cites information from its rejected submission. See, *e.g.*, Pet. 14-15. That submission, however, is not part of the administrative record. See *Koehler I*, 7 F. Supp. 3d at 1318 n.9 (rejecting claim that similar submission was part of record).

Id. at 69-70. It explained that petitioner's actions in deliberately providing false information, while certifying its accuracy and completeness, had rendered unreliable the entirety of petitioner's second-review reporting. *Id.* at 50, 79, 103-104, 110. It further observed that, "although [petitioner] 'volunteered' information about its [second review] reporting, it only did so well after the [second review] *Final Results* were issued, and only as a direct result of [Appvion]'s allegations." *Id.* at 103.

That course of conduct "le[d] [the Department] to believe that the[] alleged small number of missing sales [we]re not necessarily the only unreliable information in [petitioner]'s questionnaire response." Pet. App. 103. The agency added that, just as the Department could not "trust the veracity of [petitioner]'s underlying questionnaire responses," it could not "trust [petitioner]'s self-serving statements in this proceeding." *Id.* at 103-104. The Department further determined that petitioner's assertions about the perpetrators of its scheme, and the remedial measures that petitioner claimed to have taken, did not restore the agency's confidence in petitioner's second-review reporting. *Id.* at 104-105. The Department thus confirmed its proposed antidumping rate of 75.36% for the second review.

3. The CIT upheld the Department's determination of petitioner's antidumping duty rate as supported by substantial evidence and otherwise in accordance with law. Pet. App. 3-47.

The CIT concluded that the Department was authorized to establish petitioner's antidumping margin "based entirely on facts otherwise available"—*i.e.*, to apply total AFA. Pet. App. 21 (citation omitted); see *id.* at 18-22. The court noted that it was "undisputed" that peti-

tioner had "intentionally engaged in a scheme to underreport its home market sales," and that "the home market sales database [petitioner] reported to Commerce during the second review was affected by this scheme." *Id.* at 19. The court upheld, as supported by substantial record evidence, the Department's findings that petitioner had "withheld complete and accurate information" and had thereby "impeded the review." *Id.* at 21 (citations omitted); see 19 U.S.C. 1677e(a)(2)(A) and (C). The CIT concluded that the antidumping statute "provided Commerce ample authority to disregard entirely the falsified home market sales database [petitioner] reported." Pet. App. 20.

The CIT further held that the Department's selection and corroboration of the 75.36% adverse rate was lawful. As an initial matter, the court noted that the agency was not required to accept petitioner's revised home-market sales data or the information that petitioner had submitted about the omitted sales on remand. Pet. App. 22-26. The court explained that "[t]he remand proceeding d[id] not give [petitioner] a second chance to comply with the duties imposed upon it by statute." *Id.* at 23. It observed that "[n]othing in the statute, the Department's regulations, or the Department's administrative practice" required the agency "to give [petitioner] the mitigating benefit of the very information [petitioner] acknowledges it fraudulently withheld." *Id.* at 24.

The CIT concluded that the Department's selection of the 75.36% adverse rate was supported by substantial evidence in the antidumping petition and was sufficiently corroborated by the range of transaction-specific dumping margins submitted by petitioner during the second

review. Pet. App. 29-44. With respect to the corroboration analysis, the court rejected the Department's reliance on the 144.63% margin, concluding that this rate was not probative because it was "aberrant when viewed against a weighted average of all individual margins." *Id.* at 36; see *id.* at 35-38.[4] The CIT nevertheless concluded that other high-margin transactions reported by petitioner had provided "some, albeit limited, probativity on th[e] issue," *id.* at 38, and that this "minimal extent of corroboration [wa]s sufficient to support the Department's decision to impose a rate of 75.36% as an adverse inference," *id.* at 39-40.

The CIT explained that Section 1677e(b) "provides Commerce the authority to use an inference adverse to the interests of [a noncooperating] party in order to deter future noncompliance," while Section 1677e(c) requires the agency to corroborate "to the extent 'practicable'" secondary information used to select such an adverse rate, in order "to ensure that Commerce * * * does not 'overreach.'" Pet. App. 40 (citation omitted). It recognized the tension between these purposes, describing this case as involving "the rare factual circumstance in which the objectives of the two provisions come into direct conflict." *Id.* at 41. The court also noted that, in some cases, "were a court to insist that

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[4] When it reached this conclusion, the CIT did not have the benefit of the court of appeals' subsequent decision in the third-review litigation. In that decision, the Federal Circuit upheld the Department's imposition of the identical 75.36% adverse rate corroborated by the identical second review data, including the 144.63% margin, on the ground that "the mere fact that a margin is unusually high does not mean that it lacks probative value and hence cannot be used for corroboration." *Koehler II*, 843 F.3d at 1381 (citation omitted).

Commerce confine its discretion to the use of a rate constituting secondary information that is *fully* corroborated, i.e., a rate the [merchant] likely would have received" had it "cooperated fully and in good faith," such a rate would "never be sufficiently 'adverse' * * * as to provide any meaningful deterrent." *Ibid.* The court "decline[d] to construe the corroboration requirement so as to eliminate the discretion Commerce must possess to confront the serious misconduct it encountered in this case, in which [petitioner] undermined the integrity of the proceeding Commerce conducted and prevented Commerce from fulfilling its statutory responsibility." *Id.* at 43.

4. After briefing and oral argument, the court of appeals affirmed the CIT's decision by summary order. Pet. App. 1-2. The court subsequently denied rehearing en banc without recorded dissent. *Id.* at 129-130.

ARGUMENT

Petitioner challenges (Pet. 19-29) the Department of Commerce's imposition of a 75.36% antidumping duty rate in the second administrative review. The court of appeals correctly upheld the Department's determination, and its unpublished summary affirmance of the CIT's judgment does not conflict with any decision of this Court or of another court of appeals. Any potential ongoing significance the factbound question presented here might otherwise have is further limited by a recent statutory amendment that expanded the Department's discretion to determine antidumping duty rates based on adverse inferences in circumstances like those presented here. The Court recently denied petitioner's request for review of the Department's selection of the same duty rate in a different administrative-review period. *Papierfabrik August Koehler SE* v. *United States*,

138 S. Ct. 555 (2017). There is no reason for a different result here.

1. Section 1677e requires the Department to "use the facts otherwise available" to determine an antidumping duty rate if one or more of five circumstances are present: (1) "necessary information is not available on the record"; (2) a party "withholds information that has been requested by the [Department]"; (3) a party "fails to provide such information by the deadlines for submission"; (4) a party "significantly impedes" a review proceeding; or (5) a party "provides such information but the information cannot be verified." 19 U.S.C. 1677e(a). If the Department further finds that a party to the proceeding "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. 1677e(b). That inference may be based on information "derived" from "the petition" or from "any previous [administrative] review," or on "any other information placed on the record." *Ibid.* If the agency relies on information that was not obtained in the course of the review, it shall, "to the extent practicable," "corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. 1677e(c).

The Federal Circuit has long recognized that this statutory scheme grants the Department "broad discretion" in implementing the antidumping law. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A.* v. *United States*, 216 F.3d 1027, 1032 (2000) (*De Cecco*) (quoting *Smith-Corona Grp.* v. *United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984)).

"In the case of uncooperative respondents" like petitioner, that discretion is "particularly great." *Ibid.* Because the agency lacks subpoena power to compel responses from foreign companies, Section 1677e(b) provides a critical incentive to cooperate with the Department's proceedings. See *Essar Steel Ltd.* v. *United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). "Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032.

The Department's discretion is "not unbounded." *De Cecco*, 216 F.3d at 1032. For example, the corroboration requirement precludes the agency from "select[ing] unreasonably high rates with no relationship to the respondent's actual dumping margin." *Ibid.* Even an "adverse facts available rate" is intended to be a "'reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" Pet. 26 (quoting *De Cecco*, 216 F.3d at 1032); see *De Cecco*, 216 F.3d at 1032 ("Congress tempered deterrent value with the corroboration requirement."). An AFA rate meets those criteria if "it is correct as a mathematical and factual matter" and is set in a manner "consistent with the method provided in the statute." *Nan Ya Plastics Corp.* v. *United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016).

In this case, the Department reasonably exercised its discretion to adopt an antidumping duty rate that, while drawn from secondary information using an adverse inference against petitioner, was adequately corroborated by petitioner's data from the second review.

The agency found that at least three of the five statutory triggers for considering "facts otherwise available" were present. 19 U.S.C. 1677e; see Pet. App. 73-74 (finding that petitioner had "withheld information requested by the Department"; that, as a result, "certain necessary information [wa]s not available on the record"; and that petitioner had "intentionally concealed certain otherwise reportable home market transactions, and thereby significantly impeded the review"). It also reasonably concluded, based on petitioner's fraudulent transshipment scheme and deliberate concealment of essential information, that petitioner had not cooperated "to the best of its ability." Pet. App. 77-78. The agency chose, from a permissible source ("the petition," 19 U.S.C. 1677e(b)(1)), an antidumping duty rate that was *half* of the highest margin that petitioner had reported in the second review and that was further supported by petitioner's other high-margin transactions in the review period. Pet. App. 84-85, 124; *Koehler II*, 843 F.3d 1373, 1382 (Fed. Cir. 2016), cert. denied, 138 S. Ct. 555 (2017) (recognizing same in third-review litigation).

The courts below upheld the Department's determinations and findings as supported by substantial evidence and otherwise within the bounds of its discretion. Pet. App. 1-2, 3-47. This Court's further review of those factbound questions is not warranted. See *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard

appears to have been misapprehended or grossly misapplied.") (quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951)) (brackets omitted).

2. a. Petitioner does not contend that the decision below conflicts with any decision of this Court concerning the antidumping statute. Rather, petitioner contends (Pet. 21-26) that the decision "[o]penly [f]louts" decisions of this Court articulating general principles of statutory interpretation. That claim lacks merit.

The Federal Circuit's decision was an unpublished, summary order. The court of appeals did not state its reasoning, and its affirmance of the CIT's judgment did not imply endorsement of every aspect of the CIT's reasoning. In any event, there is no sound basis for petitioner's contention (Pet. 26) that the CIT "eliminate[d] the effect of" the corroboration provision. Rather, that court recognized the Department's duty to corroborate secondary information "to the extent practicable," 19 U.S.C. 1677e(c), and found that the agency had satisfied that obligation here. See Pet. App. 33-34, 38-40. To be sure, the CIT determined—contrary to the Federal Circuit's published opinion in *Koehler II*—that the agency could not rely on petitioner's 144.63% margin to meet that requirement, describing that reported margin as "aberrant." *Id.* at 36. Contrary to petitioner's repeated assertions (Pet. i, 3, 6, 19, 22-23), however, the CIT never described the 75.36% duty rate in that way. The CIT instead determined that, even absent the 144.63% margin, other high-margin transactions in petitioner's second-review data were "sufficient to support the Department's decision to impose a rate of 75.36% as an adverse inference." Pet. App. 39-40; see *id.* at 38-44; see also *Koehler II*, 843 F.3d at 1381-1382 (relying on the same high-margin transactions).

Petitioner faults the CIT for characterizing the Department's adverse-inference authority as being in "direct conflict" with the corroboration requirement in the circumstances of this case. Pet. 24 (citation omitted). Petitioner recognizes, however, that "'[i]n selecting a reasonably adverse facts-available rate, Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance.'" Pet. 26-27 (quoting *Timken Co.* v. *United States*, 354 F.3d 1334, 1345 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004)). In refusing to require "*full*[] corroborat[ion], i.e., a rate [petitioner] likely would have received had it" not engaged in fraud, Pet. App. 41, the CIT was simply recognizing the need to strike that balance. See *id.* at 43 (declining to "construe the corroboration requirement so as to eliminate the discretion Commerce must possess to confront the serious misconduct it encountered in this case"); *Nan Ya Plastics Corp.*, 810 F.3d at 1344 (recognizing that the statutory interest in "accuracy" does not require Commerce to replicate a party's precise "commercial reality" in assigning an AFA rate).

b. Petitioner suggests (Pet. 26-29) that the Department erred in applying total AFA and adopting the antidumping margin in the antidumping petition, rather than calculating a margin based on petitioner's data. Petitioner asserts (Pet. 27-28) that the home-market sales "originally omitted from [its] data constituted only a discrete category of information," and that "[t]here is no evidence that [petitioner]'s other timely submissions were incomplete or otherwise unusable." But the Department reasonably found, and the CIT agreed, that petitioner's falsification of its certified reporting through an elaborate scheme rendered its overall second-review sales reporting unreliable and unusable for calculating

an antidumping duty rate. See Pet. App. 50, 79, 103-05, 110; *id.* at 18-22 (sustaining findings as supported by substantial evidence based on petitioner's admissions of Appvion's allegations and false certifications of its reporting). As the Department explained, petitioner's "pattern of concealment regarding its transshipments, combined with the fact that [petitioner] and its counsel certified to the accuracy of responses despite such schemes, further significantly undermines the credibility and reliability of [petitioner]'s data overall." *Id.* at 79.

Petitioner's related argument (Pet. 28) that the Department should have verified petitioner's sales data if it doubted the accuracy of the information is also unpersuasive. See *ibid.* Commerce is required to verify only the information upon which it relies, not information that it reasonably disregards due to fraud. See 19 U.S.C. 1677m(i). The Department's verification procedures accordingly are designed to confirm the accuracy of reliably reported data, not to investigate the degree to which information on which the agency declines to rely has been concealed or data have been manipulated. As the Department explained during the third review, "confirm[ing] the veracity of th[at] type of sales information * * * would require extraordinary measures outside the scope of a typical sales verification" and beyond the capabilities of the Department's standard procedures. C.A. App. 8179.

c. Petitioner suggests (Pet. 30-33) that the Federal Circuit acted inappropriately by entering a summary affirmance without opinion. But the court of appeals had previously issued a published opinion in *Koehler II* that affirmed Commerce's application of the identical AFA rate in the third review period, corroborated by the identical range of petitioner's second-review sales

data. See 843 F.3d at 1375. The fact that the court held oral argument and asked "pointed" questions (Pet. 30) does not cast doubt on the propriety of the ultimate summary disposition.

3. Finally, Congress's 2015 amendment to Section 1677e (see Pet. 33 n.6) further reduces the prospective importance of the factbound question presented here. After the Commerce Department determination in this case, Congress amended 19 U.S.C. 1677e to give the Department even greater discretion in applying, selecting, and corroborating adverse rates in antidumping proceedings.

Section 502 of the Trade Preferences Extension Act of 2015 (TPEA), Pub. L. No. 114-27, 129 Stat. 383-384, amended Section 1677e to provide "flexibility to select appropriate facts available or adverse facts available when a foreign party fails to cooperate with the agency's request for information in a proceeding." S. Rep. No. 45, 114th Cong., 1st Sess. 37 (2015) (Senate Report) (discussing essentially identical precursor to enacted legislation). The TPEA authorizes the Department, in selecting an adverse rate for an uncooperative party, to apply "any dumping margin from any segment of the proceeding, * * * including the highest such rate or margin, based on the evaluation by [Commerce] of the situation." 19 U.S.C. 1677e(d)(1)(B) and (2) (Supp. V 2017). The TPEA establishes that—contrary to petitioner's approach in this case (*e.g.*, Pet. 24)—the Department need not determine, or make adjustments to, an adverse rate "based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information." 19 U.S.C. 1677e(b)(1)(B) (Supp. V 2017). In corroborating that rate, Commerce likewise has no obligation to "estimate what the * * * dumping margin

would have been if the interested party * * * had cooperated." 19 U.S.C. 1677e(d)(3)(A) (Supp. V 2017). The new law also specifies that the Department need not demonstrate, for corroboration or "any other purpose," that an adverse rate "reflects an alleged commercial reality of the interested party." 19 U.S.C. 1677e(d)(3)(B) (Supp. V 2017). Finally, the law modified Section 1677e's corroboration requirement to authorize the agency to use any dumping margin applied in a separate segment of the same proceeding. See 19 U.S.C. 1677e(c) (Supp. V 2017).

As petitioner notes (Pet. 33 n.6), these amendments "do not apply here." Contrary to petitioner's contention (*ibid.*), however, they significantly affect the importance of the issues this petition presents and the suitability of this case as a vehicle to address the scope of the Department's discretion in antidumping proceedings. In light of these revisions, a ruling by this Court regarding the scope of *former* Section 1677e would have little prospective significance. In amending the law, moreover, Congress clearly sought to provide the agency *greater* flexibility in applying adverse rates, contrary to the core contention of petitioner and its amici that this Court should grant review to *curb* the Department's discretion under the former Section 1677e. Compare Pet. 32, with TPEA § 502, 129 Stat. 383-384, and Senate Report 37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2019