No. 17-171

IN THE

Supreme Court of the United States

PAPIERFABRIK AUGUST KOEHLER SE,

Petitioner,

v.

UNITED STATES and APPVION, INC.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES AND REGULATIONS

Page

ADMINISTRATIVE PROCEEDINGS

Cited Authorities

Page

TREATISES AND PERIODICAL MATERIALS

REPLY BRIEF FOR PETITIONER

Events since Koehler filed its petition have only reinforced the need for this Court to address the scope of the Department of Commerce's ("Commerce's") discretion when applying adverse facts available in trade cases. Since Koehler filed its petition, Commerce preliminarily imposed an adverse facts available antidumping duty rate of 79.82% on Canadian aircraft manufacturer Bombardier.[1] When added to the 219.64% preliminary countervailing duty rate,[2] this amounts to nearly 300% in duties, tripling the cost of 100- to 150-passenger planes purchased for import into the United States. These are "astoundingly high retaliatory duties" on a class of aircraft the domestic competitor "stopped making years ago."[3] Commerce also recently imposed preliminary antidumping duty rates as high as 756.93% for carbon and alloy steel wire rods

1. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determination on Imports of 100- to 150-Seat Large Civil Aircraft From Canada (Oct. 6, 2017), *available at* https://www.commerce.gov/news/press-releases/2017/10/us-department-commerce-issues-affirmative-preliminary-antidumping-duty-0.

2. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Issues Affirmative Preliminary Countervailing Duty Determination on Imports of 100- to 150-Seat Large Civil Aircraft From Canada (Sept. 26, 2017), *available at* https://www.commerce.gov/news/press-releases/2017/09/us-department-commerce-issues-affirmative-preliminary-countervailing-1.

3. Steve Forbes, *Crony Capitalism Flies High in Boeing's Anti-trade Allegations*, The Hill (Oct. 29, 2017), *available at* http://thehill.com/opinion/finance/357674-crony-capitalism-flies-high-in-boeings-anti-trade-allegations.

from Russia,[4] 162.24% for aluminum foil from China,[5] and 134.92% for silicon metal from Brazil.[6] All of these antidumping duties were based on adverse facts available.

Since the start of this year, Commerce applied adverse facts available in 28 out of 58 final decisions in antidumping investigations or administrative reviews involving market economy countries.[7] Commerce applied total adverse facts

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4. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determinations on Carbon and Alloy Steel Wire Rod from Belarus, Russia, and the United Arab Emirates (Sept. 6, 2017), *available at* https://www.commerce.gov/news/press-releases/2017/09/us-department-commerce-issues-affirmative-preliminary-antidumping-duty.

5. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Issues Affirmative Preliminary Antidumping Duty Determination on Aluminum Foil from the People's Republic of China (Oct. 27, 2017), *available at* https://www.commerce.gov/news/press-releases/2017/10/us-department-commerce-issues-affirmative-preliminary-antidumping-duty-3.

6. *Silicon Metals from Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 82 Fed. Reg. 47,466 (Oct. 12, 2017).

7. These numbers are based on a review of final decisions in investigations or administrative reviews using the advanced search tool for the Federal Register (https://www.federalregister.gov/documents/search#advanced) and a review of Commerce's memorandum accompanying the decision from the Department of Commerce Enforcement and Compliance website (https://enforcement.trade.gov/frn/). The figures cited are current through November 15, 2017. In cases involving non-market economies, Commerce presumes that all companies are part of a single

available in 18 decisions and imposed a total adverse facts available rate greater than 50% in 12 decisions.

Commerce has increasingly used adverse facts available in a way that can only be described as punitive and inconsistent with the remedial nature of Commerce's statutory authority. Nevertheless, the Government argues that this Court should not review this case because the decision below "does not conflict with any decision of this Court or any other court of appeals." (Opp. at 13.) But that serves only to highlight what is happening here: Commerce's authority is subject to review by only one circuit court (the Federal Circuit), and that court has abdicated its responsibility to conduct meaningful review of Commerce's actions.

The Federal Circuit has not always let Commerce have free rein when applying adverse facts available. Indeed, as explained below, the Federal Circuit's decision in this case conflicts with many other decisions of the Federal Circuit. The different standards applied by the Federal Circuit have left the law in a state of confusion. "[T]hese various standards are somewhat nebulous and confusing. Many times, they are difficult to administer in practice. As a result, the [Court of International Trade]'s docket is full of cases challenging Commerce's use of [adverse facts available]." Alexander V. Sverdlov, *Change is Coming: What to Expect from the Recent Amendments to the Trade Remedy Laws*, 47 Geo. J. Int'l L. 161, 176 (2015).

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country-wide entity, unless they can show their independence from government control. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002). In almost every non-market economy case, Commerce determines the rate for the country-wide entity on the basis of adverse facts available.

Section 1 of this brief discusses how the decision below conflicts with Federal Circuit decisions that limit the use of total adverse facts available to "situations where none of the reported data is reliable or usable." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011). Section 2 discusses how the decision below upholding Commerce's punitive use of adverse facts available conflicts with Federal Circuit decisions that an adverse facts available duty rate must be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). And Section 3 discusses how corroboration under Section 1677e(c) precludes Commerce from selecting the unreasonably high duty rate affirmed by the Federal Circuit.

Section 3 also discusses the amendments to Section 1677e. While the Government makes much of these amendments and suggests that they are a reason for this Court to deny the petition, in fact those amendments have no bearing on the questions Koehler presents. The Government does not even suggest that the statutory amendments affect the first two questions presented – Commerce's use of total adverse facts available and the use of a punitive adverse facts available rate. And even as to the third question presented, the statutory amendments did not alter the relevant statutory language. Indeed, as explained in Section 3, the statutory amendments only *increase* the importance of this Court addressing Commerce's use of adverse facts available.

Koehler's petition for a writ of certiorari should be granted to settle important questions regarding Commerce's discretion in applying adverse facts available. *See* Sup. Ct. R. 10(c).

1. In conflict with Federal Circuit precedent, Commerce exceeded its authority by resorting to total adverse facts available under Section 1677e(b) rather than filling gaps in the record.

The Government acknowledges that "[w]hen the Secretary determines that some reported information remains reliable and usable, the Secretary will rely only partially on adverse facts available – referred to as 'partial AFA.'" (Opp. at 5.) At least until recently it had been well established that "Commerce can only use facts otherwise available to fill a gap in the record." *Zhejiang DunAn*, 652 F.3d at 1348.

The only gap in the record here was the home market sales that were not originally reported. There were no grounds to question the accuracy of the other information Koehler timely submitted. Commerce thus should have limited its application of adverse facts available to the unreported sales. Commerce overreached its authority by disregarding all of Koehler's timely submitted, verifiable data and instead applying total adverse facts available.

The Government argues – as it argued successfully below – that Commerce was free to disregard all of Koehler's timely submitted information and apply total adverse facts available because Koehler's conduct rendered all of its data unreliable. (Opp. at 5.) But the Government's assertion that none of Koehler's information was reliable is

belied by Commerce's own actions. Commerce considered some of Koehler's reported information reliable and usable to corroborate the antidumping duty rate. Commerce corroborated the rate "by analyzing a range of petitioner's own sales data submitted by petitioner during the Secretary's second administrative review." (*Id.* at 19-20.) If Commerce considered Koehler's data from the second administrative review – where certain home market sales were likewise omitted (*id.* at 20) – to be reliable for purposes of corroboration, then Koehler's timely submitted data cannot be considered unreliable or unusable. At most, that information was underinclusive because of the omitted home market sales. But that situation – where some information is reliable but other information is missing – is exactly when partial, rather than total, adverse facts available are appropriate.

Commerce cannot have it both ways. Data reliable enough to corroborate a duty rate should be reliable enough to warrant only partial – rather than total – adverse facts available. If some of the data is sufficiently reliable to corroborate adverse facts available, then Commerce should have used the reliable information and filled whatever gaps remained in the record rather than resorting to total adverse facts available.

2. In conflict with Federal Circuit precedent, Commerce's use of adverse facts available in this case was impermissibly punitive.

The Government concedes that the corroboration requirement in Section 1677e(c) "precludes the Secretary from 'select[ing] unreasonably high rates with no relationship to the respondent's actual dumping margin.'"

(Opp. at 14 (quoting *De Cecco*, 216 F.3d at 1032).) Likewise, "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032. The Government further agrees that an adverse facts available rate must be a "'reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" (Opp. at 14-15 (quoting Pet. at 16 and *De Cecco*, 216 F.3d at 1032).) But Commerce did not apply this standard here.

A "reasonably accurate estimate" of Koehler's actual dumping rate would be as low as 0.00% or as high as 4.33% to 6.50%. (*See* Pet. at 8.) The "built-in increase intended as a deterrent" skyrocketed these zero or single-digit rates to 75.36%, an unreasonably high rate with no relationship to Koehler's actual dumping margin. The appropriate standard, as recognized by the Government, requires that the adverse facts available rate remains a "reasonably accurate estimate of the respondent's actual rate," even after adding a deterrent. The adverse facts available rate applied to Koehler, however, is nearly twelve times a reasonably accurate estimate of Koehler's actual rate. By affirming this rate, the Federal Circuit "misapprehended or grossly misapplied" the relevant legal standard and the substantial evidence standard. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

While the Federal Circuit has reined in Commerce's use of punitive adverse facts available rates in the past, that court no longer does so. For example, in 2010 the Federal Circuit held that an adverse facts available rate more than five times the highest rate imposed on similar

products was punitive, aberrational, and excessive. *See Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). But more recently, that same court held that an adverse facts available rate more than twelve times higher than the highest weighted-average margin calculated for a cooperative respondent was acceptable. *See Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1360 (Fed. Cir. 2015). The case at hand makes clear that if this Court does not intercede, no court will constrain Commerce's punitive use of adverse facts available.

3. Corroboration under Section 1677e(c) precludes Commerce from selecting the unreasonably high duty rate affirmed by the Federal Circuit.

Commerce's action in this case – unchecked by the Court of International Trade and the Federal Circuit – effectively writes the corroboration requirement out of the statute. The Federal Circuit here upheld Commerce's corroboration of the adverse facts available rate using only the slimmest of reeds – a single, low-volume transaction that was clearly aberrational on its face.

The Government attempts to muddy the waters and describe this case as "factbound" by referring to 19 other transactions in the record "with margins between 20% and 50%." (Opp. at 20.) Those more accurately consist of one margin of 48.68%, one of 29.22%, and the rest of 25% or less. (*See* Pet. at 11; Opp. at 12.) Those transactions cannot reasonably show that the significantly greater duty rate of 75.36% has "probative value" for purposes of determining Koehler's weighted-average dumping margin, which is what the corroboration requirement in Section 1677e(c)

requires. 19 C.F.R. § 351.308(d); SAA at 870. The only data out of the 3,321 transaction-specific margins from the second administrative review that approaches support for a rate of 75.36% was the aberrational 144.63% transaction-specific margin. Corroboration should require more than observing that 75.36% is "half" of a wild outlier. (Opp. at 12, 15, 20.) The 144.63% margin is so dubious that Chief Judge Timothy C. Stanceu held in related litigation over the second administrative review that Commerce could not rely on it. *See Papierfabrik August Koehler AG v. United States*, 180 F. Supp. 3d 1211, 1229 (Ct. Int'l Trade 2016).

As the Government acknowledges, "[t]he Secretary's discretion is 'not unbounded.'" (Opp. at 14 (quoting *De Cecco*, 216 F.3d at 1032).) Here, Commerce imposed duty rates beyond the bounds of its discretion. But Koehler's case is just one of several in which the Federal Circuit has allowed Commerce to rely on a small amount of questionable evidence to corroborate excessive adverse facts available rates. (*See* Pet. at 30-32.)

The Government seeks to defeat Koehler's *certiorari* petition by invoking the amendments to Section 1677e in the Trade Preferences Extension Act of 2015 ("TPEA"), Pub. L. No. 114-27, § 502, 129 Stat. 362, 383-84 (2015). The parties agree that those amendments do not apply here, but the Government proceeds to argue "they significantly affect the importance of the issues this petition presents." (Opp. at 22.) The amendments actually *increase* the importance of the questions presented by Koehler's petition, because while Commerce's discretion to set a duty rate is greater under the new law, so are the chances that such discretion is abused.

The Government is incorrect that the Federal Circuit's decision has little prospective significance, because the relevant statutory language remains unchanged. *See Özdemir Boru San. ve Tic. Ltd. Sti v. United States*, No. 16-00206, 2017 WL 4651903, at *3-*4, *12, *15 (Ct. Int'l Trade Oct. 16, 2017) (relying on the Federal Circuit decision below in a post-TPEA case and noting that 19 U.S.C. § 1677e(a)(2) is "[u]naltered by the TPEA" and that "the TPEA did not substantially amend the corroboration requirement" in 19 U.S.C. § 1677e(c)(1)). The TPEA amended Section 1677e(c) to exempt from the corroboration requirement "any dumping margin or countervailing duty applied in a separate segment of the same proceeding." 19 U.S.C. § 1677e(c) (2017); *see also id.* § 1677e(d)(2) (2017) (Commerce may use "the highest such . . . margin."). Here, Commerce would not have been required to corroborate a duty rate of between 0.03% and 4.33%, which were the weighted-average margins for the first and second administrative reviews, or the 6.50% weighted-average margin from the period of investigation. (*See* Pet. at 8.) Under the TPEA, Commerce would still be required to corroborate the 75.36% duty rate taken from Appvion's petition.

New Section 1677e(d)(3) provides that Commerce (i) is not required to estimate the dumping margin that would have applied if a party had cooperated and (ii) is not required to show a dumping margin reflects the commercial reality[8] of the interested party when it applies

8. The Federal Circuit began using the term "commercial reality" in trade remedy cases in the early 1990s and increased use of the term since 2010. *See Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341-44 (Fed. Cir. 2016). In 2015, the TPEA eliminated "commercial reality" as a standard after the judicially-

adverse facts available. *See* 19 U.S.C. § 1677e(d)(3). Neither provision affects any of the three questions presented here. The TPEA did not change the standards for when Commerce may apply total adverse facts available. The TPEA also did not change the fundamental purpose of the antidumping laws, which is to remedy dumping, rather than to punish importers. *See*, *e.g.*, *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990). Finally, Koehler's corroboration argument does not depend on an estimate of the dumping margin that would have applied if a party had cooperated; nor does Koehler's argument depend on "commercial reality."

The Government argues that the TPEA "sought to provide the Secretary *greater* flexibility in applying adverse rates." (Opp. at 22; *see id.* 4 n.1, 21.) But granting Commerce more discretion only increases the need for this Court's review.

> What used to be a powerful, but restrained, tool in Commerce's arsenal has now been made bigger and more untethered. With fewer conditions to limit high [adverse facts available] rates, Commerce will, very likely, assign much bigger margins to noncooperative respondents

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created term had taken on a life of its own. In response, the Federal Circuit recognized that "[t]he term 'commercial reality' does not appear in the statutes that Commerce administers." *Id.* at 1343. The Federal Circuit decided that a determination by Commerce reflects "commercial reality" if it is "consistent with the method provided in the statute, thus in accordance with law." *Id.* at 1344.

> than it has in the past few years. As it does so, litigants and the court will have to chart an entirely new path about what standards should constrain Commerce's discretion and what types of challenges can successfully be brought to the use of [adverse facts available].

Alexander V. Sverdlov, *Change is Coming: What to Expect from the Recent Amendments to the Trade Remedy Laws*, 47 Geo. J. Int'l L. 161, 183 (2015). Koehler's petition should be granted to review the limits of Commerce's discretion in using adverse facts available to impose excessive antidumping duty rates.

CONCLUSION

The Government's brief in opposition to Koehler's petition does not diminish the importance of the questions presented for review that should be settled by this Court. Koehler respectfully requests that this Court grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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