

FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND
SHANDONG HUARONG MACHINERY CO., LTD., SHANDONG MACHINERY IMPORT
& EXPORT CORPORATION, LIAONING MACHINERY IMPORT & EXPORT
CORPORATION, AND TIANJIN MACHINERY IMPORT & EXPORT CORPORATION v.
UNITED STATES AND AMES TRUE TEMPER
Court No. 04–00460

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT) in Shandong Huarong Machinery Co., Ltd., Liaoning Machinery Import & Export Corp., Ltd. and Liaoning Machinery Import & Export Corp., Shandong Machinery Import & Export Corp., and Tianjin Machinery Import & Export Corp. v. United States and Ames True Temper, Court No. 04–00460, Slip Op. 06-88 (June 9, 2006) (Huarong). This remand addresses seven issues in the twelfth review of the antidumping duty orders on axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks from the People’s Republic of China (PRC).¹ See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Reviews, Final Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part, 69 FR 55581 (September 15, 2004) and accompanying Issues and Decision Memorandum (Final Results).

In Huarong, the CIT remanded several issues to the Department. First, the CIT held that the Department did not sufficiently explain why the failure of Shandong Huarong Machinery Co., Ltd. (Huarong) and Tianjin Machinery Import & Export Corporation (TMC) to report information on scrapers and forged tampers, respectively, justifies total adverse facts available (AFA) for the axe/adze order for Huarong and bar/wedge order for TMC, rather than just partial AFA for Huarong’s sales of scrapers and TMC’s sales of forged tampers.² On remand, the CIT directed the Department to explain why its application of total AFA, rather than partial AFA, is justified. Second, the CIT held that the Department did not adequately justify its application of the 139.31 percent rate to TMC’s sales of bars/wedges as total AFA. On remand, the CIT directed the Department to provide a factual basis showing that the 139.31 percent rate is a reasonable estimate of TMC’s actual rate plus an added amount to encourage cooperation. Third, the CIT held that the Department, in refusing to revoke Shandong Machinery Import & Export Corporation (SMC) from the hammers/sledges order, did not sufficiently explain how its “commercial quantities” methodology fulfills the purpose of 19 C.F.R. 351.222(e)(1) and ordered

¹ See Antidumping Duty Orders: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People’s Republic of China, 56 FR 6622 (February 19, 1991).

² Scrapers are subject merchandise covered by the antidumping duty order on axes/adzes. Forged tampers are subject merchandise covered by the antidumping duty order on bars/wedges.

the Department to explain its interpretation on remand. Fourth, the CIT granted the Department's request for a voluntary remand with respect to the valuation of steel pallets manufactured by certain hand tool factories, and directed the Department to revisit this issue for further analysis. Fifth, the CIT held that the Department failed to support with substantial evidence its decision that certain miscellaneous handling expenses are not included in the surrogate price of foreign brokerage and handling (B & H). Upon remand, the CIT ordered the Department to revisit this issue and, if the Department continues to find that the handling expenses in question are not in the surrogate price of B & H, to provide a thorough explanation. Sixth, the CIT held that the Department did not sufficiently explain its decision to value TMC's and SMC's ocean freight based on each company's aggregate market economy (ME) purchases. On remand, the CIT directed the Department to better explain why its decision to analyze ocean freight in aggregate is reasonable. Seventh, the CIT held that the Department, in its decision to deny the petitioner's request for a circumstance of sale (COS) adjustment to TMC's normal value (NV), did not sufficiently explain how the record lacks sufficient evidence to grant the requested adjustment. On remand, the CIT directed the Department to further explain its determination.

In accordance with the CIT's remand instructions, the Department has made redeterminations with respect to these issues. As a result of the redeterminations, the Department has calculated the following revised dumping margins: 4.05 percent for SMC's sale of bars/wedges; and 10.39, 139.31, 6.38, and 4.61 percent for TMC's sales of axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks, respectively. The Department has made no change to the following dumping margins: 139.11 percent for Huarong's sales of bars/wedges and 139.11 percent for LMC's sales of bars/wedges. Pursuant to the CIT's orders, the Department finds that:

1. A. In the Final Results, the Department applied total AFA to Huarong's sales of axes/adzes due to its failure to report requested information regarding its production and sales of scrapers, which are subject to the axes/adzes order. Since Huarong's sales of merchandise under the axes/adzes order were not enjoined from liquidation by injunction, all entries of Huarong's sales of merchandise under the axes/adzes order have been liquidated.
1. B. In the Final Results, the Department applied total AFA to TMC's sales of bars/wedges due to, in part, its failure to report its sales of forged tampers, which are subject to the bars/wedges order. The Department has addressed this issue on other grounds, based upon the CIT's findings, in a proprietary memorandum. The Department further notes that, in the Final Results, TMC reported that it made no sales of scrapers in the United States. The Department calculated a rate for TMC based upon its reported sales of merchandise subject to the axes/adzes order. See Final Results.
2. The Department has redetermined an AFA rate of 139.31 percent for TMC's sales of merchandise covered by the bars/wedges order.

3. The period of investigation (POI) trade level is a valid benchmark because it represents the respondent's commercial quantities without the discipline of an antidumping order.
4. The Department has included the cost of making steel pallets in the Department's calculation of NV. The labor required for making steel pallets and a factor of production (FOP) for welding rod are now included in the Department's calculation of NV.
5. An examination of the record of Stainless Steel Wire Rod From India; Final Results of Administrative Review, 63 FR 48184 (September 9, 1998) (India Wire Rod) shows that the B & H surrogate value includes all expenses noted by the petitioner, except for those that the record does not show were incurred.
6. The Department will continue to apply the respondents' average ME ocean freight expense to sales shipped with non-market economy (NME) carriers.
7. There is insufficient detail regarding the surrogate producers to determine whether there is a correlation between the expenses incurred by TMC and the surrogate producer which would warrant tailoring the surrogate selling, general, and administrative expenses (SG&A) calculation to TMC's experience. Therefore, the Department continues to deny the petitioner's request for a circumstance of sale adjustment to TMC's NV because there is not enough evidence on the record to make this adjustment.

BACKGROUND

On September 15, 2004, the Department published the final results of the twelfth administrative review of the antidumping duty orders on heavy forged hand tools (HFHTs) from the PRC. The period of review (POR) for this review is February 1, 2002 through January 31, 2003. See Final Results. On September 16, 2004, the respondents (Huarong, TMC, LMC and SMC) filed a summons with the CIT, and on September 20, 2004, they filed a complaint with the CIT in which they identified the aspects of the Final Results they are challenging. On September 17, 2004, the petitioner, Ames True Temper (Ames), submitted comments alleging that the Department made certain ministerial errors in the Final Results. On September 20, 2004, the respondents filed rebuttal comments. On September 28, 2004, the Department requested a voluntary remand to consider certain ministerial error allegations raised by the parties. The CIT granted the Department's request on November 3, 2004, and ordered the Department to address the alleged ministerial errors (without issuing a slip opinion). The Department corrected certain errors and published amended final results on December 1, 2004. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Notice of Amended Final Results of Antidumping Duty Administrative Reviews, 69 FR 69892 (December 1, 2004) (Amended Final Results). The Department issued a remand redetermination to the CIT on December 3, 2004. See Final Results of Redetermination Pursuant to Court Remand, Shandong Huarong Machinery, Co., Ltd., Liaoning Machinery Import & Export Corporation, Shandong Machinery Import and Export Corporation, and Tianjin Machinery

Import & Export Corporation v. United States, Court No. 04-00460, dated December 3, 2004. On June 9, 2006, the CIT issued its decision on all other issues. See Huarong.

On December 15, 2006, we released our Draft Results of Redetermination (Draft Redetermination) to Ames and to the respondents, for comment. Ames submitted comments on December 29, 2006 (Ames' Comments), and the respondents did also (Respondents' Comments). We have addressed the parties' comments below. The following discussion, prior to the discussion of the parties' comments, is identical to the Draft Redetermination, except for several clarifications made to the analysis.

ANALYSIS

I. Adverse Facts Available for Sales of Scrapers and Forged Tampers

A. Huarong

The Department initiated a scope inquiry covering scrapers, concurrent with the underlying administrative review. See Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Sales of Scrapers and Tampers," dated March 1, 2004 (Scrapers and Tampers AFA Memorandum). In the Final Results and Amended Final Results, the Department applied total AFA to Huarong's sales of merchandise subject to the axes/adzes order for its failure to respond to the Department's requests for information with respect to sales of scrapers, which are subject to this order. In Huarong, the CIT found that the Department did not sufficiently explain why the failure of Huarong to report its sales of scrapers justifies the application of total AFA for all sales within the axes/adzes order for Huarong. The CIT ordered the Department to explain its decision not to apply partial AFA to Huarong for its unreported sales of scrapers.

The Department's determination in the Final Results was based upon 19 C.F.R. 351.225(l)(4), which states that, "notwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart." Thus, as the Department had not yet issued its final scope ruling in response to the scope inquiry for scrapers, the Department could ask for information regarding the production and sales of scrapers during the course of an administrative review. Huarong refused to answer supplemental questions concerning its production and sales of scrapers during the administrative review because the Department had not yet completed the scope ruling on whether scrapers are covered by the scope of the order on axes/adzes.³ Since Huarong refused to provide the requested information, it was appropriate to apply total AFA for Huarong's sales of merchandise subject to the axes/adzes order, the order covering scrapers. See Final Results at Comment 17. Furthermore, Huarong

³ The Department issued its final scope ruling on December 9, 2004, in which scrapers were found to be within the order covering axes/adzes.

sold no other subject merchandise under the axes/adzes order, beyond the scrapers at issue.⁴ Therefore, the Department's application of "total" AFA to Huarong's merchandise under the axes/adzes order in fact only applies to Huarong's sales of scrapers, as there was no other merchandise exported by Huarong under that order.

In addition, as no party requested an injunction covering Huarong's exports under the axes/adzes order, and no injunction was issued covering that merchandise, the Department liquidated all entries for shipments under the axes/adzes order exported by Huarong. See CBP Instructions, Message Number 5056205 (February 25, 2005).⁵ Given these facts, the Department has filed a motion to dismiss for mootness with the CIT.

The Department further notes that, in the Final Results, the Department found that Huarong made no sales of forged tampers, but instead sold cast tampers. The Department did not apply AFA to Huarong for its failure to report its sales of cast tampers because the Department found that cast tampers, unlike forged tampers, are not within the scope of the order on bars/wedges. See Final Results at Comment 17. The Department applied AFA to Huarong's sales of merchandise covered by the bars/wedges order, but only because of its participation in an agent sales scheme that affected sales under the bars/wedges order. In Huarong, the CIT upheld the Department's application of AFA to Huarong's bars/wedges. See Huarong at 17.

Therefore, the Department has made no change with respect to Huarong's sales of axes/adzes and bars/wedges pursuant to this remand redetermination.

B. TMC

In the Final Results and Amended Final Results, the Department applied total AFA to TMC's sales of merchandise covered by the bars/wedges order due to, in part, TMC's failure to report its sales of forged tampers, which are subject to this order. In Huarong, the CIT found that the Department did not sufficiently explain why the failure of TMC to report forged tampers justifies the application of total AFA for all sales within the bars/wedges order for TMC. The CIT ordered the Department to explain its decision not to apply partial AFA to TMC for its unreported sales of tampers.

The Department has addressed this issue on other grounds, which are proprietary in nature, based upon the CIT's findings in Huarong. Please see Appendix 1, "Application of Adverse Facts Available to Tianjin Machinery Import and Export Corporation," for a discussion

⁴ "Lastly, we note that the only sales Huarong reported for the axes/adzes order are its sales of scrapers." See Scrapers and Tampers AFA Memorandum at 2.

⁵ Huarong did not seek to enjoin from liquidation its entries covered by this order. See Proposed Order for Preliminary Injunction, submitted by Huarong, SMC, LMC and TMC, dated November 5, 2004. Therefore, the entries were not enjoined from liquidation pursuant to this litigation. See the CIT's December 6, 2004 Injunction Order.

of the proprietary information regarding this issue. For the reasons outlined in this memorandum, the Department has applied total AFA to TMC's sales of merchandise covered by the bars/wedges order.

The Department also notes that, in the Final Results, TMC reported that it made no sales of scrapers, which are covered by the axes/adzes order, in the United States. The Department therefore calculated a rate for TMC based upon its reported sales of merchandise subject to the axe/adzes order. See Final Results. Furthermore, the Department has calculated a revised dumping margin for TMC's axes/adzes pursuant to other issues remanded by the CIT, as noted in this remand redetermination, below.

II. The 139.31 Percent Rate Selected as AFA For TMC's Sales of Bars/Wedges

In the Final Results and Amended Final Results, the Department assigned a rate of 139.31 percent to TMC's sales of products covered by the bars/wedges order, the highest rate ever calculated under the bars/wedges order. In the underlying administrative review, TMC argued that the 139.31 percent rate was unreliable because the surrogate values upon which it was based included export prices from South Korea, Thailand, and Indonesia, which the Department has found to maintain broadly-available, non-industry specific, export subsidies. The Department explained in the Final Results that the opportunity to challenge issues pertaining to surrogate country import prices used in the calculation of the 139.31 percent rate had been during the review in which the Indian trade statistics had been applied. Final Results at Comment 21. The Department also noted that the CIT and the Court of Appeals for the Federal Circuit (CAFC) affirmed the 139.31 percent figure in Shandong Huarong General Group Corp. v. United States, 177 F. Supp. 2d 1304 (Ct. Int'l Trade 2001), aff'd 2003 U.S. App. LEXIS 466 (Fed. Cir 2003) (Shandong Huarong 8th Review).

Furthermore, in the Final Results, the Department determined that the 139.31 percent rate was both reliable and relevant and, therefore, corroborated, because it was calculated specifically for TMC itself in the eighth administrative review and reflected TMC's recent commercial activity in exporting subject bars/wedges to the United States. The Department explained that it was applying an adverse rate to TMC, and that more recently calculated bars/wedges margins for other respondents would not offer an adequate incentive for TMC to cooperate in this proceeding given that these rates were not substantially above TMC's most recently calculated rates. Further, the 139.31 percent rate selected as AFA is the rate applicable to the PRC-wide entity's exports of bars/wedges in the underlying review. See Final Results, at Comment 18; see also Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Tianjin Machinery Import and Export Corporation," dated March 1, 2004 (TMC AFA Memorandum); and Scrapers and Tampers AFA Memorandum.

In its brief to the CIT, TMC argued that the 139.31 percent rate was inappropriate because of alleged broadly-available, non-industry specific, export subsidies in third countries.

See TMC's Brief, dated April 29, 2005, at 13-14. The Department's response brief addressed the subsidy allegations made by TMC. See Defendant's Response to Huarong's and Ames' Motion for Judgement Upon the Administrative Record, dated July 13, 2003, at 17-18.

However, the CIT did not directly address TMC's subsidization arguments. Instead, the CIT referenced other arguments TMC made during the underlying review and also referenced a portion of the Department's position in the Final Results regarding corroboration. See Huarong at 25 (citing TMC's argument in the Final Results at Comment 21 and the Department's position at Comment 18). As such, the CIT appears to have questioned the Department's corroboration of the 139.31 percent rate, in determining that the record does not support a conclusion that this number is relevant to TMC. See Huarong at 25-28. The CIT held that "by merely selecting a rate from a previous review, Commerce has not provided the Court with sufficient factual findings justifying its application of the 139.31 percent rate." See Huarong at 28. The CIT further held that "the Department failed to explain why the chosen rate represents a reasonably accurate estimate of TMC's actual rate, plus an added amount to encourage TMC to cooperate in future proceedings." Id. The CIT also stated as part of its analysis that "an assessment rate, standing alone, is not a 'fact' or a set of 'facts otherwise available,' and under no reasonable construction of this provision could it be so interpreted." See Huarong at 27 (citing Gerber Food (Yunnan) Co., Ltd. v. United States, 387 F. Supp. 2d 1270, 1285 (Ct. Int'l Trade 2005) (Gerber). The CIT remanded the issue to the Department to provide a factual basis for its selection of the 139.31 percent rate as AFA for TMC's sales of merchandise covered by the bars/wedges order. See Huarong at 28.

The Department believes that it satisfactorily corroborated the reliability and relevance of this rate during the Final Results, and we respectfully note our disagreement with the CIT's finding that the Department did not adequately demonstrate the relevance of the 139.31 percent rate.⁶

Section 776(c) of the Tariff Act of 1930, as amended (the Act), requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See Statement of Administrative Action (SAA) accompanying the URAA, H. Doc. No. 103-316 at 870 (1994) and 19 C.F.R. 351.308(d). The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. Neither section 776(c) of the Act nor the SAA defines how the Department should determine the relevance of the margin selected as AFA. The CAFC has stated that "{b}y requiring corroboration of AFA rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." See F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1034 (Fed. Cir. 2000) (F.Lli De Cecco). Thus, to

⁶ See Viraj Group, Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. The CAFC has stated that Congress “intended for an AFA rate 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.” See F.Lli De Cecco, 216 F.3d at 1034. The Department considers information reasonably at its disposal to determine whether a margin continues to have relevance to the respondent receiving the rate. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the selected margin and determine an appropriate margin. See, e.g., Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review, 61 FR 6812 (February 22, 1996) (where the Department did not apply an unrepresentative rate that could be explained by factors not associated with the overall industry, from a company that represented only a small fraction of the industry).

Reliability of the 139.31 Percent Rate

Concerning reliability, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses as total AFA a dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin. In the instant case, the rate selected as AFA, 139.31 percent, was calculated using verified information provided by TMC during the 1998-1999 administrative review of the bars/wedges order.

The Department believes that TMC challenged the reliability prong before the CIT, rather than the relevance prong, of the Department’s corroboration test with respect to the 139.31 percent rate, given that TMC’s arguments were limited only to the issue of alleged third country subsidies. TMC’s arguments are without merit. The 139.31 percent margin was calculated for the same respondent from verified data submitted by that respondent in a recently completed review. Moreover, this rate was subject to litigation in that review and was affirmed by the CIT and CAFC. For these reasons, the Department considered the rate to be reliable. See Final Results at Comment 18.

In addition, it appears in this case that the CIT might be questioning the reliability of the 139.31 percent rate, citing Gerber for the proposition that rates selected as AFA must be factually “justifi(ed),” and that an “assessment rate” calculated in a prior review is “not a fact.” See Huarong at 27. We note, however, that the 139.31 percent rate selected as AFA is, in fact, a collection of “facts” (i.e., the result of individual calculated expenses, factors of production, prices and other data obtained during the course of the review), that underlie the amount of dumping found to have occurred and applied, as AFA, to TMC’s sales in this review. This Court has affirmed the Department’s application of total AFA in this case, unlike the situation in Gerber. Thus, the analysis of Gerber simply does not apply in this context. Otherwise, if the Department were to follow the analysis in Gerber, it would have to, in applying total AFA in a proceeding, derive an adverse number for each identifiable “fact” (i.e., each factor of production, each expense, each applicable offset credit, etc.) a process which would result in extremely large

dumping margins with no basis in commercial reality. Nowhere in sections 776(a), (b), or (c) of the Act did Congress provide for such a requirement of the Department. In fact, one could argue that, in the context of total AFA, corroboration, pursuant to section 776(c), could only occur if the ultimate calculation had some basis in commercial reality and therefore could be calculated, not on a piecemeal basis, but as an overall margin. Thus, the CIT's statements in Gerber do not apply here where the Department must determine the reliability of the 139.31 percent rate as a total AFA rate to apply to TMC.

Relevance of the 139.31 Percent Rate

As to the relevance prong, since the rate was calculated for TMC, the Department has determined that the 139.31 percent rate reflected recent commercial activity by the same company in exporting bars/wedges to the United States. See Final Results at Comment 18; see also TMC AFA Memorandum and Scrapers and Tampers AFA Memorandum. This fact alone establishes that this rate has a relationship to recent commercial practices in the industry – indeed to the same company – and is alone a sufficient factual basis for the Department's determination that this rate is relevant to TMC.

The Department also finds that TMC, in particular, should have anticipated that this rate (a rate that had been applied to its merchandise in a previous review), or an even higher rate, would have been applied to its calculations if it failed to cooperate to the best of its ability during the administrative review, as it did in this case. In reviews where a respondent does not cooperate, the Department relies upon the “common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.” See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990) (Rhone Poulenc). Because of this well-known practice, respondents typically will cooperate if they expect to receive a rate lower than the highest previously calculated rate for any respondent, or not cooperate if they anticipate receiving a margin higher than the highest previously calculated rate for any respondent.

With respect to both prongs, no arguments raised by TMC in the administrative review, or before the CIT, undermine these conclusions. In the past, the CIT has disagreed with the Department's selected AFA rate where the Department sought “to justify the rate as having some relationship to the Companies' industry – rather than the Companies themselves.” See Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States, Slip Op. 05-129 (September 27, 2005) (Shandong Huarong 9th Review III), at 10. The CIT remanded the selected rate in that case because it found that the Department had provided no indication that the rate has a rational relationship to the respondent receiving AFA. Id. The present case can be easily distinguished from that case, as the selected AFA rate is a calculated rate for TMC from an earlier review.

Although the Department continues to believe that it provided sufficient justification in

the Final Results, namely that the selected AFA rate was a rate calculated for TMC in a recent review period, the Department has complied with the CIT's remand instruction to provide additional factual support for selecting the 139.31 percent rate. The Department sought additional information to test whether TMC's sales during the eighth administrative review are reflective of TMC's commercial activity during the underlying review period. The Department obtained information from the Automated Commercial System (ACS) of U.S. Customs and Border Protection (CBP) regarding the sales values of TMC's merchandise classifiable under harmonized tariff schedule subheading 8205.59.30, the subheading applicable to the merchandise subject to the bars/wedges order. The Department specifically queried the two review periods at issue: February 1, 1998, through January 31, 1999, and February 1, 2002, through January 31, 2003. See Appendices 2 and 3, respectively. Using this information, the Department calculated a weighted-average unit value (AUV) for each period, for TMC's sales of merchandise subject to the bars/wedges order. The Department compared the AUV from each period and found that TMC's AUVs for subject merchandise declined by 38.18 percent from the earlier to the later period. See Appendix 3. This change in TMC's AUVs values contrasts with little to no change in the production process used by the PRC industry to produce bars/wedges over the last five years, as demonstrated by respondent questionnaire responses and verifications from multiple administrative review proceedings. Thus, because the production process of the industry has generally stayed constant, while TMC's U.S. sales values have declined, the Department concludes that this information further substantiates the relevance of the 139.31 percent margin as AFA for TMC's sales of merchandise under the bars/wedges order.

In addition, a review of the volatility of TMC's margins and the margins of other respondents in past reviews provides further factual support for the relevance of the 139.31 percent rate. In the seventh administrative review, which is the first review of bars/wedges in which TMC participated, TMC received 47.88 percent as AFA for the bars/wedges order. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Reviews, 64 FR 43659 (August 11, 1999) (7th Review). During the eighth administrative review of bars/wedges, covering February 1, 1998, through January 31, 1999, the Department calculated a dumping margin for TMC of 139.31 percent, an increase of 92 percentage points. See Heavy Forged Hand Tools From the People's Republic of China: Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Reviews, 68 FR 37121 (June 23, 2003) (8th Review). In the ninth administrative review, the Department calculated a dumping margin of 0.56 percent for TMC's bars/wedges, which was a 248-fold decrease. See Heavy Forged Hand Tools From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 48026 (September 17, 2001). In the tenth administrative review, the last review prior to the underlying review in which the Department reviewed TMC's sales of bars/wedges, the Department calculated a *de minimis* dumping margin of 0.48 percent for TMC's bars/wedges, which is a negligible change from the previous review. See Notice of Amended Final Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools From the People's Republic of China, 68 FR 7347 (February 13, 2003) (10th Review). Thus, TMC has experienced

wide swings in its margin during three of the four administrative reviews of bars/wedges in which it has participated. An increase in its rate for the underlying review to 139.31 percent rate is in accordance with TMC's rate history.

TMC was not alone, however, in the volatility of its calculated dumping margins from review to review. In fact, there were many respondents throughout the industry that had the same experience. Between the sixth and eleventh administrative reviews, the calculated dumping margins for LMC and Huarong revealed considerable volatility, even when discounting rates currently subject to litigation. LMC had a calculated dumping margin of zero percent in the 7th Review. LMC's rate increased to 27.18 percent in the 8th Review, before dropping back to zero percent again in the 10th Review. Similarly, Huarong had a calculated dumping margin of 34.00 percent in the sixth administrative review. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews, 63 FR 16758 (April 6, 1998). Huarong's rate then dropped to 1.27 percent in the 7th Review, which is nearly a 27-fold decrease, and increased to 27.28 percent in the 8th Review, nearly a 22-fold increase. Accordingly, the volatility of dumping margins calculated for TMC and other respondents in TMC's industry is further factual support for the relevance of the 139.31 percent margin selected as AFA in this case.

Therefore, we find that application of the 139.31 percent margin as AFA to TMC is supported by the fact that this rate was calculated for TMC in the 8th Review. In addition, pursuant to the CIT's instructions, although we do not believe further justification of this rate for TMC is necessary or warranted, additional facts support the Department's application of 139.31 percent rate to TMC, namely: (1) the steep decline in TMC's AUVs, and (2) the fact that there is a history of volatility in the antidumping rates in the industry. For the reasons discussed above, and the additional factual information requested by the CIT, the Department believes that the 139.31 percent rate is a "reasonably accurate estimate" of TMC's actual rate while at the same time "adding an amount to encourage TMC to cooperate in future proceedings."

III. Commercial Quantities Methodology

In the Final Results and Amended Final Results, the Department did not revoke the order on hammers/sledges with respect to SMC because SMC's aggregate sales of hammers/sledges to the United States were not made in commercial quantities for a period of at least three consecutive years. Specifically, the Department stated that the sales quantity for the 2000-2001 POR is so small in comparison with the sales quantity from the POI that the Department cannot reasonably conclude that the *de minimis* margin SMC received during the 2000-2001 POR provides any meaningful information on SMC's normal commercial experience. See Final Results at Comment 11.

The CIT remanded the Department's decision to not revoke the hammers/sledges order with respect to SMC. In its remand, the CIT found that the Department did not explain its current methodology adequately. The CIT understood the methodology to be a comparison of

the quantity sold in the first two revocation periods to the quantity sold in the third period (*i.e.*, the benchmark period), and questioned whether such a methodology fulfills the purpose of 19 C.F.R. 351.222(e)(1). See Huarong at 38-39. The CIT ordered the Department to explain why the “benchmark” methodology utilized in the underlying review is a reasonable way to ensure that the respondent sold subject merchandise during the three revocation periods at prices not less than NV. Specifically, the Department must explain: (1) how it arrived at the “benchmark period”; (2) why it was reasonable in its selection; and (3) how a comparison of the two periods demonstrates that the exports for the year 2000–2001 do not constitute commercial quantities. Id.

As an initial matter, there appears to be a misunderstanding about the Department’s methodology for analyzing SMC’s sales quantities in the Final Results. The CIT stated “Commerce compared the volume of exports by SMC to the United States from the 2000-2001 and 2001-2002 to the volume exported in 2002-2003.” See Huarong at 36. However, the Department did not use SMC’s sales quantity from the 2002-2003 review as the benchmark. Instead, pursuant to the Department’s normal practice, the Department selected the sales quantity reported by SMC in the POI as the benchmark for determining whether SMC had sales in commercial quantities during the three year revocation period. See Final Results at Comment 11; and Memorandum from Jeff Pedersen, Case Analyst, through Thomas F. Futtner, Acting Office Director, to the File, “Commercial Quantity Analysis of Shipments of Heavy Forged Hand Tools (Hammers/Sledges) to the United States by Shandong Machinery Import & Export Corporation,” dated March 1, 2004 (Commercial Quantities Memorandum).

In determining whether a respondent shipped in commercial quantities, absent substantial and unusual changes in the respondent’s business operations, the Department uses the sales quantity reported by the respondent during the less-than-fair-value (LTFV) investigation or the POI as the benchmark because this period shows the respondent’s normal commercial behavior before the imposition of the antidumping order (*i.e.*, pre-order shipment levels). See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part, 64 FR 2173, 2175 (January 13, 1999) (where POR sales were 0.12 percent of the POI sales for one company not revoked, but another company was found to have sold in commercial quantities); and Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 28659 (May 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1 (where the Department revoked the order for a company whose shipments never dropped below 41 percent of POI shipments during the three year period). In the Final Results, the Department found that SMC’s average monthly sales quantity during the 2000-2001 POR was less than three percent of the average monthly sales quantity SMC sold during the POI. See Commercial Quantities Memorandum at 4. The Department has declined to revoke antidumping orders in past cases when an administrative review period has a commercial quantity that is only a few percentage points of the commercial quantity sold during the benchmark period, normally the

POI. See Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Order: Brass Sheet and Strip from the Netherlands, 65 FR 742 (January 5, 2000) at Comment 5 (where merchandise sold was approximately 1.6 percent of the volume of merchandise sold in the period preceding the imposition of the order); Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke in Part: Certain Pasta From Italy, 67 FR 51827, 51832 (August 9, 2002) (where merchandise sold was 2.98 percent, 0.94 percent and 1.06 percent of POI sales).

The “commercial quantities” requirement ensures that the Department’s revocation determination is based upon a company’s normal commercial practice. When making such an assessment, the Department generally will use the original POI as a benchmark for a company’s normal commercial behavior. The POI is a logical benchmark for this assessment, because it is the only time period for which the Department has evidence concerning the company’s normal commercial behavior with respect to exports to the United States without the discipline of the antidumping duty order. Sales during the POR which, in the aggregate, are an abnormally small quantity do not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping. For purposes of revocation, the Department must be able to determine that past margins are reflective of a company’s normal commercial activity.

On the basis of the foregoing analysis, the Department has made no change with respect to our analysis of the hammers/sledges sold by SMC. Therefore, the Department has not partially revoked the order on hammers/sledges with respect to SMC.

IV. Surrogate Price of Steel Pallets

In the Final Results and Amended Final Results, the Department valued steel pallets produced by certain hand tool factories using the surrogate price of scrap steel. In its brief to the CIT, the petitioner contends that the Department employed an incorrect surrogate price to value the steel, and did not account for other necessary factors involved in the pallet manufacturing process. Due to the CIT’s holding in Shandong Huarong Machinery Co. v United States, Slip Op. 2005-54 at 20-22 (May 2, 2005) (Shandong Huarong 11th Review I), the Department requested a voluntary remand on this issue.⁷ In Huarong, the CIT remanded this issue back to the Department for further analysis.

In accordance with the CIT’s remand, the Department first reviewed the information on the record of the underlying review to determine if the costs associated with pallet manufacturing were taken into account by other surrogate values, so that the Department avoids any potential double-counting. The Department found that there is no information in the Reserve Bank of

⁷ The Department employed a methodology for valuing steel pallets in the remand redetermination pursuant to Shandong Huarong 11th Review I that is similar to the methodology employed in this remand redetermination. The CIT recently upheld that methodology in Shandong Huarong Machinery Co. v. United States, Slip Op. 2007-3 at 19-20 (January 9, 2007) (Shandong Huarong 11th Review II).

India Bulletin (RBI Bulletin) data used to calculate the surrogate value for overhead that indicates that the cost of pallet manufacture (labor, welding rod, and electricity) are accounted for in overhead. For this redetermination, the Department requested that the respondents with calculated margins that reported steel pallets, TMC and SMC, provide the consumption rate for materials, energy, and labor required to manufacture self-produced steel pallets. See the Department's supplemental remand questionnaires, dated July 20, 2006 and August 31, 2006.

A. TMC

In response to the Department's supplemental remand questionnaires, TMC reported consumption rates for materials for pallet manufacture. TMC had reported a CONNUM-specific steel consumption FOP for pallets in the underlying review. See TMC's December 8, 2003, supplemental questionnaire response at Exhibit 13. Nevertheless, TMC also provided the amount of steel consumed for one pallet, in response to the Department's request. See TMC's September 26, 2006, supplemental remand questionnaire response at Exhibit 4. The steel consumption rates that TMC reported pursuant to the remand redetermination are either equal to, or are very close to, the steel consumption rates reported in the underlying review. See Memorandum from Thomas Martin, International Trade Compliance Specialist, to the File, "Calculation Memorandum for the Draft Twelfth Review Remand Redetermination: Tianjin Machinery Import & Export Corp.," dated December 15, 2006 (three order-specific memorandums) (TMC Remand Calculation Memorandums). As the consumption rates reported for the remand redetermination, provided in the response to the Department's supplemental questionnaires, have more documentary support than the consumption rates reported in the underlying review, the Department will apply the steel consumption rates reported for the remand redetermination. TMC also reported that one factory used square steel tube rather than scrap steel to make steel pallets. See TMC's August 18, 2006 supplemental remand response at Exhibit 4. Therefore, the Department valued the steel for the pallets produced by this factory with a surrogate value for square steel tube. For details on how the Department included the reported steel consumption rates in TMC's NV, see TMC Remand Calculation Memorandum.

In regard to electricity consumption for pallet manufacture, TMC reported that the amount of electricity reported in its electricity FOP is an allocation based upon the "factory-wide consumption of electricity divided by the total weight of finished products produced." See TMC's August 18, 2003, section D response at D-10. TMC confirmed that the electricity usage rate previously reported included the electricity consumed for producing pallets, further noting that the weight of finished pallets was included in the weight of finished products. See TMC's August 18, 2006, supplemental remand questionnaire response at 4. Therefore, since the electricity consumed in producing a pallet was included in the numerator of the previously reported electricity consumption rates, and the denominator of those ratios include the weight of finished pallets, the Department will not add additional energy consumption for pallet production to the cost of pallet manufacture for TMC.

TMC also reported a new FOP for welding rod, used in welding the pallet steel together.

TMC reported the amount of welding rod needed to make one pallet, for each subject merchandise factory supplier. The Department valued welding rod using publicly available Indian import statistics for February 2002 through January 2003 from the World Trade Atlas, published by Global Trade Information Services, Inc., which is a secondary electronic source based upon the publication, Monthly Statistics of the Foreign Trade of India. Volume II: Import. This is the same source used by the Department for all other material inputs in the underlying review. In calculating this surrogate value, the Department excluded imports from NME countries, and countries the Department has found to maintain generally available non-industry specific export subsidies (i.e., South Korea, Thailand and Indonesia). The Department also excluded data that it deemed aberrational. The Department included the cost of welding rod in TMC's NV. See TMC Remand Calculation Memorandum.

TMC also reported additional labor for manufacturing pallets. Specifically, TMC reported the amount of time required to manufacture one pallet, for each factory supplier. The Department valued labor for making pallets using the regression-based wage rate for the PRC that the Department applied for both skilled and unskilled labor in the Final Results and Amended Final Results.

B. SMC

In response to the Department's supplemental remand questionnaires, SMC responded that it had made repeated attempts to obtain the requested information concerning pallet FOPs from its bars/wedges supplier, but that the supplier was unable to supply the information due to the elapsed time since the completion of the underlying review. See SMC's September 6, 2006, supplemental remand questionnaire response at 1. However, SMC previously reported a CONNUM-specific steel consumption FOP for pallets in the underlying review. See SMC's October 3, 2003, supplemental questionnaire response at Exhibit 16. Since the information SMC provided in the underlying review for pallets was verified by the Department, the Department will apply the previously reported consumption amounts for pallet steel for the remand redetermination. See Memorandum from Jeff Pedersen and Kevin Williams, Import Compliance Specialists, to Tom Futtner, Acting Office Director, "Verification of Questionnaire Responses of Shandong Machinery Import & Export Corp., in Antidumping Duty Administrative Review of Certain Heavy Forged Hand Tools from People's Republic of China," dated December 24, 2003.

In regard to electricity consumption for pallet manufacture, SMC reported in the underlying review that the amount of electricity reported in their electricity FOP is an allocation based upon the "factory-wide consumption of electricity divided by the total weight of finished products produced." See SMC's August 11, 2003, section D response at D-11. For this redetermination, SMC confirmed that the electricity usage rate previously reported included the electricity consumed for producing pallets, further noting that the weight of finished pallets was included in the weight of finished products. See SMC's September 6, 2006, supplemental remand questionnaire response at 4. Therefore, since the electricity consumed in producing a pallet was included in the numerator of the previously reported electricity consumption rates, and

the denominator of those ratios include the weight of finished pallets, the Department will not add additional energy consumption for pallet production to the cost of pallet manufacture for SMC.

Section 776(a)(2) of the Act, provides that, if an interested party (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. The Department finds that, pursuant to sections 776(a)(2)(A) and (B) of the Act, it is appropriate to apply partial facts available to SMC because it did not report, as requested, any information in regard to its consumption of welding rod for pallets, or the labor required for making pallets. Because SMC's supplier was unable to supply the information for welding rod for pallets, or the labor required for making pallets due to the elapsed time since the initial review, and this information was not reported in the underlying review, the Department has determined that the use of partial facts available is appropriate for the remand redetermination with respect to the welding bar and pallet labor FOPs. We note, however, that the Department made no specific requests for this information during the underlying review. In light of this, and also due to the fact that SMC states that it made repeated attempts to obtain the information from its supplier, the Department will apply a neutral inference in applying partial facts available.

Section 782(e) of the Act requires the Department to consider information that is submitted by the respondent and is necessary to the determination but does not meet all the applicable requirements established by the Department if: (1) the information is submitted by the deadline established for its submission; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information; and (5) the information can be used without undue difficulties. As noted above, SMC did provide information regarding steel for pallets, and information regarding electricity. The Department will apply this information for the remand redetermination. However, SMC failed to report any information in regard to its consumption of welding rod for pallets, or the labor required for making pallets and, therefore, the use of partial facts available is appropriate for these two FOPs.

For the remand redetermination, under section 776(a)(2)(B) of the Act, the Department has used facts otherwise available on the record of this review to calculate a consumption amount for welding bar and pallet labor. Since TMC is the only respondent that provided the information on the record for these two FOPs, the Department applied consumption amounts reported by TMC to SMC's NV calculation. In selecting from among the facts available, the Department calculated TMC's average reported consumption rate for welding rod and pallet labor. The Department incorporated these amounts in the Department's calculation of SMC's NV. See

Memorandum from Thomas Martin, International Trade Compliance Specialist, to the File, “Calculation Memorandum for the Draft Twelfth Review Remand Redetermination: Shandong Machinery Import & Export Corp.,” dated December 15, 2006 (SMC Remand Calculation Memorandum).

As previously, noted, Section 776(b) of the Act authorizes the Department to use as partial facts available, information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record. Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See SAA at 870 and 19 C.F.R. 351.308(d). Since the Department is applying information reported by TMC in the underlying review as partial facts available, it is not secondary information, and therefore it does not require additional corroboration.

Thus, the Department has recalculated NV for TMC and SMC pursuant to this remand redetermination. With respect to both TMC and SMC, the Department has adjusted NV to include the additional FOPs related to the self-made steel pallets used by these respondents to ship subject merchandise.

V. Surrogate Price of Brokerage and Handling

In the Final Results and Amended Final Results, the Department calculated a surrogate price of B & H using the rate in effect in India that was reported in the public version of the questionnaire response placed on the record in India Wire Rod. The Department determined that since freight forwarders typically pay all of the miscellaneous expenses necessary to export a product, and then bill the customer for these costs, it is reasonable to assume that the B & H surrogate value captures the miscellaneous export costs incurred in the surrogate country. The Department also noted that miscellaneous expenses listed by the petitioner were not separately valued in India Wire Rod, and therefore the B & H surrogate value in India Wire Rod must have included these miscellaneous handling expenses. The Department determined that it was inappropriate to include additional expenses, since this would likely result in double counting.

In Huarong, the CIT found that the Department failed to support with substantial evidence that miscellaneous expenses such as cartage, wharfage, stevedorage, berthage, terminal handling, and lashing were included in the surrogate value for B & H. See Huarong at 62-63. The CIT ordered the Department to revisit the surrogate price of B & H, and provide a thorough explanation, based upon record evidence, if the Department continues to find that the surrogate value includes the miscellaneous expenses. Id.

Generally, B & H is a category of expenses that can encompass a number of different

movement-related charges, including containerization, movement of the container from truck to container yard to ship, wharfage, stevedorage, berthage, terminal handling, lashing, drayage, cartage, demurrage, and storage. Although the complement of charges in the B & H expense category can vary from case to case, it is common for ME respondents (the source of the surrogate B & H values) to report a total expense for B & H without itemizing the specific charges that the expense covers. Similarly, NME respondents often report only whether they incurred B & H, also without providing an itemized breakdown. This lack of specificity means that neither the respondent's reported information nor the surrogate value source will necessarily contain detailed information regarding the composition of this expense. Therefore, it will not be possible in many cases to identify and match all charges contained in the B & H expenses for the NME respondent with those contained in the B & H surrogate value used by the Department. With that in mind, in selecting a surrogate value for this expense based upon the best available information on the record, the Department takes product characteristics into account whenever possible, on the reasoning that similar merchandise will incur similar B & H expenses. See Shandong Huarong 11th Review I at 13-16.

The surrogate value used in the Final Results and Amended Final Results for B & H was one used for Viraj Impoexpo Limited (Viraj) in India Wire Rod. The Department reviewed Viraj's responses and found that its terms of delivery were CIF (cost-insurance-freight), which indicates that Viraj was responsible for paying all costs incurred at the port of export. See Memorandum to the File from Thomas Martin, Import Compliance Analyst, "Documents from Stainless Steel Wire Rod from India," dated December 15, 2006 (Indian Documents Memorandum), at Attachment 1, citing Viraj's March 30, 1998, supplemental questionnaire response at 11. Moreover, Viraj reported that its foreign inland freight accounted for only movement from the factory to the port of export, international freight accounted for only ocean freight, and insurance accounted for only marine insurance. Id. at 12-13. Therefore, any charges incurred in handling steel wire rod coils at the port of export must be included in Viraj's B & H, as they were not reported by Viraj in any other field. These port charges would include movement of merchandise from truck to container yard and from container yard to ship (which is also called drayage or cartage), as well as the other charges cited by Ames, that cover the costs of physically moving the goods from the truck to the vessel, and loading and securing it to the vessel (wharfage, stevedorage, berthage, terminal handling, and lashing). Given that both TMC's and SMC's goods also have to be trucked to the port and loaded and secured to a vessel, it is reasonable to infer from record evidence that TMC and SMC would have incurred these same expenses. TMC reported that its B & H, and all fees related to freight, are included in the invoices that it receives from its freight forwarder. See TMC's October 10, 2003, supplemental questionnaire response at 2. SMC also reported that its B & H was included, in all instances, with its ocean freight invoice from its freight forwarder. See SMC's October 3, 2003, supplemental questionnaire response at 8. Therefore, TMC and SMC did not report a separate charge for these expenses or claim that they were included in any other reported expense category. Since these costs were not elsewhere reported by Viraj, TMC, or SMC, it is reasonable for the Department, based upon record evidence, to consider the expenses associated with the movement of merchandise from truck to container yard and from container yard to ship,

wharfage, stevedorage, berthage, terminal handling, and lashing to be included in B & H and covered by the surrogate value that the Department applied.

TMC and SMC also reported that their freight forwarder containerized their merchandise as consolidated cargo. See TMC's October 3, 2003, supplemental questionnaire response at Exhibit 6, SMC's August 11, 2003, supplemental questionnaire response at Exhibits 7 and 8 for supporting documentation showing container freight service. Similarly, Viraj noted that its steel wire rod coils were "stuffed in containers," but did not report a separate cost for this service or claim that it was included in any other reported expense. See Indian Documents Memorandum, at Attachment 1, citing Viraj's March 16, 1998, section A response at 80; see also Indian Documents Memorandum, at Attachment 1, Viraj's May 11, 1998 supplemental B and C response at 4. Since these costs were not elsewhere reported by Viraj, TMC and SMC, the Department reasonably concluded, based upon record evidence, that the cost of containerization is included in B & H and covered by the surrogate value that the Department applied.

Regarding container demurrage and storage charges, these expenses are not necessarily incurred when exporting a product, if freight is properly expedited. To incur these expenses, shipments of subject merchandise would have to have been delayed during transport. See glossary of shipping terms on the website of the Maritime Administration, U.S. Department of Transportation, at <http://www.marad.dot.gov/Publications/genref.htm>. There is no record evidence to indicate that either Viraj, TMC, or SMC incurred demurrage and storage costs for any sale of subject merchandise during their respective PORs.

After comparing the record of India Wire Rod in regard to B & H expenses incurred by Viraj, with the B & H experience of TMC and SMC in the record of the underlying review, the Department finds that Viraj's experience is sufficiently similar to TMC and SMC that its serves as a reasonable surrogate value. The port charges and containerization expenses incurred by Viraj must be included in its reported B & H expense because Viraj was required to report all such costs, and there is no reason to believe that it did not do so. Since the Department finds that Viraj's reported B & H expense reasonably captures all relevant costs, the Department continues to find that its decision in the Final Results to deduct only B & H from U.S. price was correct.

VI. Ocean Freight for TMC and SMC

In a NME antidumping proceeding, the Department bases its calculation of NV on the NME producers' FOP, valued, to the extent possible, using prices from a ME country that is at a comparable level of economic development to the NME country and that is also a significant producer of comparable merchandise. See section 773(c)(1) of the Act. Where a NME producer purchases a "meaningfully" significant amount of inputs from ME suppliers and pays in a ME currency, however, the Department normally uses the actual price paid for these inputs to value the input in question, where possible. See 19 C.F.R. 351.408(c)(1). See also Shakeproof Assembly Components Div. of Ill. Tool Works v. United States, 268 F.3d 1376 (Fed. Cir. 2001).

In the Final Results and Amended Final Results, the Department, consistent with the law as noted above, and its policy, conducted a two-step process for valuing ocean freight costs for TMC and SMC. First, the Department conducted its analysis to determine whether or not the ocean freight obtained from ME sources was significant. Specifically, the Department aggregated each company's sales that used ME ocean carriers paid in a ME currency, per order, and compared this quantity to the quantity of subject merchandise, per order, the respondent shipped to the United States on NME carriers. The Department found, per order, that the shipments sent via ME carriers represented a significant amount of TMC's and SMC's ocean freight charges on a per-kilogram basis. In the second step, the Department calculated the value of international freight that was applied to the respondents' U.S. sales. Specifically, the Department took TMC's and SMC's ocean freight charges for shipments sent via ME carriers, and calculated averages on a per-kilogram basis for use in the dumping margin calculation for each company, as discussed in more detail below.

In its brief to the CIT, Ames provided two arguments related to the first step of the Department's process, *i.e.*, whether the ME ocean freight was significant, and could then be used to value ocean freight for sales shipped on NME carriers. See Ames Brief dated April 29, 2005 (Ames Brief). First, Ames contended that the Department must conduct its ME input significance analysis on an order-specific basis, and conduct separate analyses for axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks. Second, Ames argued that the Department did not analyze whether the ME inputs were physically identical to the NME inputs. Ames elaborated its second argument by asserting that ocean freight is charged on a port-to-port basis. Ames contended that transportation arrangements from a single PRC port to different U.S. ports are not physically identical, and therefore the Department must look at the relative ME purchases of ocean freight on a port-to-port basis. Furthermore, in its case brief on the record in the underlying review, "Administrative Review of Heavy Forged Hand Tools from the People's Republic of China: Petitioner's Case Brief," dated April 19, 2004 (Ames Administrative Brief), the petitioner stated that, for several port-to-port combinations, only a small percentage (both by nominal weight and by piece) were shipped via ME carriers. See Ames Administrative Brief at Exhibits 5 and 7. Because these percentages are less than the percentages seen in Shakeproof Assembly Components Div of Ill. Tool Works, Inc. v. United States, 59 F. Supp. 2d 1354 (Ct. Int'l Trade 1999) (Shakeproof CIT), Ames contended that these percentages demonstrate that, for these port-to-port combinations, TMC's and SMC's ME ocean freight purchases are insignificant, and therefore must be valued by a publicly available surrogate value.

In Huarong, the CIT noted that the Department is required to calculate accurate dumping margins, citing Shakeproof CIT and Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (stating that the purpose behind the antidumping statute "is to facilitate the determination of dumping margins as accurately as possible within the confines of extremely short statutory deadlines."). See Huarong at 68. The CIT ordered the Department to explain why its decision to aggregate TMC's and SMC's ME purchases (*i.e.*, treating international freight as a single input), rather than analyze them on a port-specific basis (*i.e.*, treating port-to-port international freight combinations as different inputs), is reasonable. Id. at

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A. TMC Ocean Freight Redetermination

1. *TMC and Order-Specific Significance Tests for ME Ocean Freight*

With respect to Ames' first argument that the Department did not conduct a ME input significance analysis on an order-specific basis, Ames is incorrect. The Department calculated the percentage by weight of subject merchandise shipped on ME carriers versus NME carriers, separately for hammers/sledges, axes/adzes and picks/mattocks for TMC. The Department found the quantity of ME shipments to be significant in each order. See Memorandum from Karine Gziryan, International Trade Compliance Analyst, to the File, "Comparison of Tianjin Machinery Import & Export Corporation Shipments on Market Economy Vessels vs. Non Market Economy Vessels," dated September 7, 2004.

2. *TMC and Port-Specific Significance Tests for ME Ocean Freight*

Ames' second argument is that the Department failed to analyze whether the ME inputs were "physically identical" to the NME inputs when it performed its ME input significance analysis for ocean freight on an aggregate basis, rather than a port-specific basis. See Ames Brief at 32. Ames contends that transportation arrangements from a single PRC port to different U.S. ports are not physically identical and should be analyzed separately. However, for the purposes of determining whether or not the ME inputs are significant, the Department does not consider ocean freight to different ports to be a different service or input.

As the Department stated in the Final Results at Comment 10, the Department finds shipping by a particular method of conveyance to be a single input, albeit with differing prices to different ports. The input, conveyance of goods by a particular method, is the same regardless of whether the destination is near or far. Ames argues that the Department is disingenuous when it states that shipping is a single input because it has consistently distinguished between truck, rail, and ocean transportation, and by the type of material transported, when valuing movement expenses. See Ames Brief at 32-33. Ames is correct that the Department has always considered different modes of transportation, such as truck, rail, or ocean vessel, to be different inputs and values these modes of transportation separately. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Preliminary Results of Administrative Reviews, Preliminary Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part, 69 FR 11371, 11382 (March 10, 2004). If there were purchases from ME and NME service providers within any single mode of transportation, the Department would conduct its significance test in aggregate for that particular mode of transportation, as was done in the Final Results. However, within any single method of conveyance, the Department has never treated freight service to different locations as different inputs.

While the distance of ocean freight is important, and may be a factor among several factors in how expensive the conveyance is, the service being purchased is still the same; namely, movement of goods. Moreover, ocean freight carriers normally stop at various ports of call on their way to different destinations to ensure the vessel is full of cargo. We do not believe it would be reasonable to consider freight service to different ports of call to be different inputs. For example, in instances where a single ocean vessel has several ports of call on its itinerary for a given voyage, it is not clear to the Department how each stop can be considered a different “input” or service apart from the rest of the voyage. Thus, the Department’s practice is to determine whether or not this service - ocean freight - is purchased in significant amounts from a ME supplier on an aggregate basis.

The Department’s ME input significance test methodology, aggregating only ME shipments reported for a particular order, is in accordance with section 773(c)(1) of the Act, and 19 C.F.R. 351.408(c)(1). The Department’s order-specific ME ocean freight significance test results in an accurate valuation of TMC’s ocean freight. The Department uses the significance test to determine whether the input purchases from the NME supplier should be valued with the average ME cost or with a publicly-available surrogate value. If the significance test indicates that ME purchases are not significant and meaningful, the Department is free to select the most appropriate publicly-available surrogate value to use in valuing the cost of the input. Moreover, if there are multiple publicly-available surrogate values on the record of the case, the Department is free to use more than one surrogate value, either individually or in an average, if doing so results in a more accurate valuation. This is why the Department has used more than one publicly-available surrogate value to value ocean freight provided by NME carriers in past cases. See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Reviews, Notice of Intent Not To Revoke in Part and Extension of Final Results of Reviews, 67 FR 10123, 10126 (March 6, 2002) (where the Department used publicly-available port-specific or region-specific ocean freight surrogate values to value ocean freight shipped on NME carriers).⁸

3. *TMC and the Valuation of Surrogate Ocean Freight Expenses / Changes to the Final Results for TMC*

In the Final Results, after finding that the quantity of ocean freight purchased from ME

⁸ In its case brief from the underlying review, Ames suggested that the Department use the ocean freight surrogate values from Notice of Preliminary Results of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat from the People’s Republic of China, 69 FR 9800 (March 2, 2004) (Crawfish Tail Meat from the PRC). See Ames Administrative Brief at 17-18. The publicly-available surrogate value from Crawfish Tail Meat from the PRC is an average of several port-specific ocean freight quotes obtained from a ME ocean carrier and freight forwarder. This surrogate value, however, is inappropriate to use in this case because the quotes are for transport of a very dissimilar product (*i.e.*, an agricultural product) in refrigerated containers. Since refrigerated containers are plainly not required for the movement of any type of heavy forged hand tool, it would be inappropriate to apply this surrogate value in this instance.

carriers was significant, pursuant to 19 C.F.R. 351.408(c)(1), the Department calculated an average per kilogram ocean freight cost from all of TMC's sales, in all orders, that used a ME carrier. Thus, our calculation of the weighted-average ME freight cost was not order-specific. The Department applied this cross-order average freight cost for ME shipments to all of TMC's U.S. sales, regardless of whether the sales used ME or NME carriers, in all orders. See Memorandum from Karine Gziryan to the File, "Calculation Memorandum for the Preliminary Results," dated March 1, 2004 at Attachment 1 (identical cite for three separate calculation memoranda, for axes/adzes, hammers/sledges, and picks/mattocks) (unchanged in Final Results).

In the Final Results, the Department's ME input significance analysis was done on an order-specific basis, but, conversely, the Department's calculation and application of the average ME carrier cost in the margin calculation, did cross orders. Upon review for this redetermination, the Department finds that correcting this inconsistency, and having all aspects of the Department's freight methodology on an order-specific basis, will result in a more accurate valuation for TMC's ocean freight. Accordingly, for the remand redetermination, the Department calculated separate weighted-average ME freight costs for TMC's sales of axes/adzes, hammers/sledges, and picks/mattocks and applied these average ME costs to TMC's sales of axes/adzes, hammers/sledges, and picks/mattocks that were shipped on NME carriers. See Appendix 4, "TMC Ocean Freight Calculations." Additionally, for those sales that were shipped on a ME carrier, the Department used the reported ME freight costs in the Department's margin calculations, rather than the average ME freight cost as was done in the Final Results. For details on the Department's calculations, see TMC Remand Calculation Memorandum.

B. SMC Ocean Freight Redetermination

1. *SMC and Order-Specific Significance Tests for ME Ocean Freight*

With respect to Ames' first argument, the Department also calculated separately the percentage by weight of subject merchandise shipped on ME carriers versus NME carriers, for bars/wedges and hammers/sledges for SMC. Contrary to Ames' argument, the Department did conduct a ME input significance analysis on an order-specific basis for SMC. The Department found the quantity of ME shipments to be significant in each order. See Memorandum from Jeff Pedersen, Senior International Trade Compliance Analyst, to the File, "Comparison of Shandong Machinery Import & Export Corporation Shipments on Market Economy Vessels vs. Non Market Economy Vessels," dated September 7, 2004.

2. *SMC and Port-Specific Significance Tests for ME Ocean Freight*

Ames' second argument, that the Department incorrectly did not analyze whether the ME inputs were "physically identical" to the NME inputs by not considering each port-to-port combination separately, fails for SMC on the same basis that it fails for TMC. The Department maintains that shipping within any single mode of transportation is a single input, albeit with differing prices to different ports, as explained above.

3. *SMC and the Valuation of Surrogate Ocean Freight Expenses / Changes to the Final Results for SMC*

In preparing this redetermination, the Department reviewed the method of valuing SMC's ocean freight. In the Final Results, the Department determined that SMC reported its ME per-unit ocean freight using an incorrect volume-based allocation methodology. However, using information obtained during verification, the Department was able to correctly allocate by weight the ocean freight of certain U.S. sales. See Final Results at Comment 10; and Memorandum from Jeff Pedersen to the File, "Calculation Memorandum for the Final Results," dated September 7, 2004, at Attachment 1. In the Final Results, since the shipments with correct allocations contained both bars and hammers, the Department used the weighted-average freight cost from these shipments to value SMC's sales of bars/wedges and hammers/sledges. Thus, in the Final Results, the weighted-average ME freight cost used to value SMC's sales of bars/wedges and hammers/sledges was calculated on a cross-order basis. However, upon review of the record for this remand, the Department notes that while the Department's ME input significance analysis of SMC's ME ocean freight for purposes of determining its significance was done on a order-specific basis, the Department's calculation and application of the average ME carrier cost was done on a cross-order basis.

The Department finds that correcting this inconsistency, and having all aspects of the Department's freight methodology on an order-specific basis, to the extent possible, will result in a more accurate valuation for SMC's ocean freight. Upon review, we found that one of the shipments used in the Final Results for calculating SMC's weighted-average ME freight cost did not contain any sales of bars or wedges. In order to make our valuation of SMC's freight cost as order-specific as possible, we removed this particular shipment from our international freight calculation.⁹ See Appendix 5, "SMC Ocean Freight Calculation." For the remand redetermination, the Department calculated an average ME freight cost for SMC's sales of bars/wedges (from the information obtained at verification, minus the shipment that did not contain any sales of bars or wedges) and applied it to SMC's sales of bars/wedges that used a NME ocean carrier. *Id.* Additionally, the Department continues to value SMC's U.S. sales that were shipped on a ME freight carrier with the same value applied to SMC's sales that were shipped on a NME carrier, described above, because SMC reported its ME freight with incorrect allocations. See Final Results at Comment 10. For details on the Department's calculations, see SMC Remand Calculation Memorandum.

Thus, for both TMC and SMC, the Department has not analyzed the significance of ME shipments, nor valued ocean freight, on a port-specific basis. However, the Department has recalculated ocean freight costs in order to make the calculations order-specific, where possible.

VII. Circumstance of Sale Adjustments

⁹ Since SMC's injunction only covers bars/wedges, the Department has made no change to the freight calculations for SMC's sales of hammers/sledges as all of SMC's sales of hammers/sledges have been liquidated.

In the Final Results and Amended Final Results, the Department did not make a COS adjustment to TMC's NV based on sales commissions reported for TMC's U.S. sales. In the underlying review, TMC reported certain commission fees in the United States, and included a calculation chart. See TMC's October 10, 2003 supplemental questionnaire response at Exhibit 3. In addition, the RBI Bulletin survey data that the Department used to value SG&A includes a line item titled "Selling Commission." In its administrative case brief at 35, Ames argued that the Department should subtract from TMC's NV the "Selling Commission" from the RBI Bulletin survey data, and add in TMC's U.S. commissions. See Surrogate Values Memo at Attachment Z. In the Final Results, the Department determined that, in accordance with its past practice, it does not make COS adjustments in NME cases for export price (EP) sales, as the offsetting adjustments to NV are not normally possible. The Department stated that it did not believe NV contained the level of detail necessary to determine if an adjustment was appropriate and could be calculated. See Final Results at Comment 15.

In Huarong, the CIT remanded the issue of whether the Department should adjust TMC's NV to account for the commissions paid on U.S. sales. The CIT observed that the Department did not cite any evidentiary basis for its determination in this case, limiting its explanation to past practice, and ordered the Department to further explain its determination that the record in this case lacks the detail necessary to permit a COS adjustment.

In the underlying review, the Department calculated NV using FOPs and surrogate values, pursuant to section 773(c) of the Act. Ames argues that the Department should adjust TMC's NV to account for U.S. commissions pursuant to section 773(a)(6)(C) of the Act. See Ames' Brief at 33. As in the Final Results, the Department continues to find that the record does not contain the level of detail necessary to make appropriate adjustments to NV to account for commissions. Moreover, even if the Department had the pertinent information necessary to make an accurate COS adjustment to account for commissions, it does not believe that such adjustments would be appropriate in this context.

In making its argument, Ames has oversimplified the Department's methodology with respect to the treatment of selling commissions. When calculating NV in a ME proceeding, the Department makes a COS adjustment by deducting comparison market commissions and adding U.S. commissions. But it also offsets commissions with indirect selling expenses. This is reflected in the Department's regulations at 19 C.F.R. 351.410(e), which states that the Department will make an adjustment to NV where commissions are paid in one market and not the other. This practice recognizes the fact that, while a respondent may pay a commission to an agent for performing certain selling functions, the respondent itself may perform such functions with respect to the other market, incurring indirect expenses in doing so. Thus, in a ME administrative review, the Department calculates the amount of other (indirect) selling expenses incurred and offsets adjustments for commissions with those other selling expenses to the extent that commissions differ between the markets. In a NME case, such a specific determination of indirect expenses cannot typically be made.

In the instant case, TMC reported that certain of its U.S. sales had no commissions. See TMC's October 10, 2003 supplemental questionnaire response at Exhibit 3. For those U.S. sales that did not have a commission, the Department would need to know the amount of indirect selling expenses incurred with respect to those sales in order to determine the commission offset to be applied to the NV for those sales.¹⁰ We do not request PRC respondents to report U.S. indirect selling expenses for EP sales, as those expenses are internal PRC expenses and thus considered unreliable. Therefore, we would not have appropriate information to use to offset any surrogate commissions deducted from NV.

For those U.S. sales that had commissions associated with them, we would also need to be able to accurately quantify the indirect selling expenses in the surrogate SG&A data so as to properly offset the U.S. commission, to the extent that the U.S. commission is greater than the surrogate commission. In this instance, the survey data from the 2,024 Indian companies used for SG&A indicates that some part of the sales by those companies did have commissions. However, the Department cannot reasonably assume that all of the sales by those Indian companies had commissions. Instead, we find it reasonable to assume that some portion of the Indian sales did not have commissions. Therefore, to the extent that the surrogate SG&A reflects sales that have no commissions associated with them, we would need to take into account indirect selling expenses as an offset to the U.S. commission. In other words, assuming the U.S. commission is greater than the surrogate commission, we would not simply deduct the surrogate commission and add the U.S. commission; we would further offset any remaining difference with indirect selling expenses of the surrogate, in accordance with our normal practice. Therefore, in attempting to calculate the commission offset, the Department would need to identify the amount of indirect selling expenses incurred by the 2,024 companies on Indian market sales.¹¹ Although there are a few line items of expenses in the survey data that may include some or all of the indirect selling expenses of the surveyed companies (such as "Advertisement" or "Insurance"), the Department has no way of separating the indirect selling expenses from direct selling expenses, nor indirect selling expenses from general or administrative expenses. For this reason, the Department cannot calculate the indirect selling expenses incurred on sales reflected in the Indian surrogate data, and therefore the Department cannot be certain that the commission offset would be accurate.

Regarding the reported amounts for U.S. commissions, it is important to note that these commissions were paid to affiliated parties. To the extent that the Department has considered

¹⁰ Where commissions are paid in the comparison market but not in the U.S. market, the Department offsets the comparison market commissions, which are deducted from NV, by adding to NV an amount for U.S. indirect selling expenses. This offset is the lesser of (1) the amount of the commission paid in the comparison market, or (2) the amount of indirect selling expenses incurred for U.S. market sales.

¹¹ Where commissions are paid in the U.S. market but not in the comparison market, the Department offsets the U.S. commission, which is added to NV, by deducting from NV an amount of indirect selling expenses for comparison market sales. The offset is the lesser of (1) the amount of the commission paid in the U.S. market, or (2) the amount of indirect selling expenses incurred on comparison market sales.

ME input purchases when the purchases were made from an affiliate located in a ME, it has used the actual expenses of the affiliated agent or determined that the purchase was at arm's length. See e.g., Saccharin from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 7515 (February 13, 2006) and the accompanying Issues and Decision Memorandum at Comment 3; and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004) and the accompanying Issues and Decision Memorandum at Comment 8. Since it is the Department's practice to not make COS adjustments in NME proceedings for EP sales, the Department did not examine whether TMC's commissions were made at arm's-length, nor did it request the affiliated agent's actual expenses, during the underlying review. Without this information, the Department cannot determine the proper amount of any adjustment for the commission.

Lastly, even if the Department had the pertinent information about commissions and indirect selling expenses necessary to make an accurate COS adjustment in the present proceeding, it would still have reservations about adjusting for one difference between the respondent's and surrogate's experience given that there were other potential adjustments that should be made but for the lack of the relevant data. In NME proceedings, the Department selects an appropriate surrogate company or companies that might be reflective of what the respondent's ratios might have been had the respondent been located in a ME country. While the Department attempts to select surrogate companies that are similar to the respondent firms, it does not expect these firms to correspond exactly to the respondent. The proposed adjustment essentially aims to produce a more accurate SG&A expense, however making such isolated adjustments would not necessarily achieve that result. In fact, the CAFC recognized this problem when it stated that Commerce need not "duplicate the exact production experience of the Chinese manufacturers," or undergo an item-by-item analysis when valuing factory overhead. Nations Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (Nations Ford) (citing Magnesium Corp. of America v. United States, 166 F.3d 1364, 1377 (Fed. Cir. 1999) ("Factory overhead is composed of many elements, and 19 U.S.C. 1677b(c)(4) gives Commerce broad discretion in valuing the factors of production on which factory overhead is based.")). Therefore, even if the Department had the necessary information to accurately adjust for any difference between respondent's actual ME-based U.S. selling expenses and the analogous expenses incurred by the surrogate, adjusting for this difference might only be appropriate if the Department could reasonably account for all differences in selling expenses between the respondent and the surrogate. Accounting for all such differences would prove to be a difficult exercise, both because the Department usually has relatively limited information about the companies it uses as surrogates, and because the respondents themselves are located in NME countries. Because the Department in most cases cannot reasonably account for all such differences between these companies or confirm that no other significant differences exist, there is no certainty that making a single adjustment would offer a more accurate antidumping calculation.

The Department's approach in the underlying review is consistent with past cases where it stated that it does not normally make COS adjustments in NME proceedings because of the difficulty in correlating the NME producer's experience with the surrogate producer's experience. See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1996-1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not To Revoke Order in Part, 63 FR 63842 (November 17, 1998) at Comments 12, 17, and 18 (where the Department stated that it prefers to base surrogate values on industry-wide, public information, and the Department does not tailor surrogate overhead or SG&A rates to match the circumstances in the NME country, citing Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the Republic of Romania; Final Results and Rescission in Part of Antidumping Duty Administrative Review, 61 FR 51427, 51429 (October 2, 1996). Rather than attempting to tailor the surrogate SG&A calculation to a specific NME producer's experience, the Department includes all selling expenses, as reported by surrogate companies, in the surrogate SG&A calculation.

The Department noted in these prior cases that it is not possible to tailor surrogate financial ratios to match the circumstances of respondents. See Honey from the People's Republic of China: Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 3, 2004) and accompanying Issues and Decision Memorandum at Comment 5 (“{T}he Department determined that because sales commissions are standard selling expenses, rather than a reduction to sales revenue like discounts, commission expenses should be included in the surrogate SG&A calculation even if the company under review does not regularly incur commissions on its sales of subject merchandise. The Department determined in that case that whether or not a PRC producer (e.g., Cheng Du) has commissioned sales staff is irrelevant because the Department normally does not tailor surrogate financial ratios to match the circumstances in the NME country. Therefore, consistent with our determination in that case, the Department is not excluding commissions from the surrogate SG&A calculation for purposes of these final results.”); and Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews, 70 FR 9271 (February 25, 2005) and accompanying Issues and Decision Memorandum at Comment 3 (“{T}he Department determined ... that because sales commissions are standard selling expenses, the commission expenses should be included in the surrogate SG&A calculation regardless of whether the respondent incurred commissions on its sales of subject merchandise. The Department found that whether or not a PRC producer had sales commissions is irrelevant to the Department's surrogate SG&A calculation, because the Department does not tailor surrogate financial ratios to match the particular circumstances in the NME country. Therefore, consistent with the Department's practice, we will continue to include honey sales commissions in the surrogate SG&A calculation for the final results”). The Department further notes that in Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 67 FR 72139 (December 4, 2002), the Department removed the line item ‘Selling & Administrative Expense -USA office,’ because the Department found that it was not appropriate to include surrogate expenses for a U.S. (foreign) office in the surrogate producer's SG&A ratio.

While the Department removed a foreign expense from the surrogate financials in that review, the Department did not further tailor the domestic experience of the surrogate company to the experience of the PRC producer.

The Indian sales commissions are one aspect of the surrogate financial ratio for SG&A calculated from the RBI Bulletin survey data. The ratio attempts to capture the experience of many Indian companies. Therefore, the Department will continue to include the RBI Bulletin sales commissions, rather than including TMC's U.S. sales commissions, in the surrogate SG&A calculation.

INTERESTED PARTIES' COMMENTS

Comment 1: Ames argues that the Department's defense of its B & H surrogate value is not logical or supported by the record.

Ames contends that the Department's position that it has completely valued B & H expenses is unsupported by substantial evidence, and is based on speculation rather than a new analysis of the record. According to Ames, the Department's reasoning that it takes product characteristics into account whenever possible, because similar merchandise will incur similar B & H expenses, is flawed because (1) the Department incorrectly speculates that wire rod and hand tools are similar merchandise, and (2) the Department incorrectly speculates that such similar merchandise must have similar B & H expenses. Ames states that no evidence on the record supports either proposition. Regarding containerization expenses, Ames contends that the Department cannot reasonably conclude that the cost of containerization is included in B & H. According to Ames, the Department does not consider the possibility that containerization expenses were included in Viraj's reported internal cost of manufacture or packing fields, or were invoiced and performed by a third party for whom the Department did not request supporting documentation. Ames argues that since containerization is not a minor element of cost, the Department should not speculate that its surrogate already includes it.

The respondents did not comment with respect to this issue.

Department's Position

The Department disagrees with Ames. Contrary to Ames' assertions, the Department is not relying on "speculation" in finding that it is reasonable to conclude that the surrogate value for B & H accounts for all B & H costs. Rather, our decision is based upon record evidence from India Wire Rod and the underlying review.¹²

¹² The Department supported its valuation of all B & H expenses using India Wire Rod in the remand redetermination pursuant to Shandong Huarong 11th Review I that is similar to the methodology employed in this remand redetermination. The CIT recently upheld that methodology in Shandong Huarong 11th Review II at 20-22.

The Department has reviewed the record of India Wire Rod, and placed it on the record of this proceeding in relevant part. The evidence on the record indicates that all B & H expenses incurred by Viraj were reported in Viraj's B & H expense field, and not in the cost of manufacturing or packing expenses. The absence of evidence of additional B & H costs on the record of India Wire Rod leads to the logical conclusion that all port costs are captured in the B & H surrogate value. This position is not speculation, as argued by Ames, but rather is a conclusion based upon the factual record of India Wire Rod.

As the CIT recognized, it is entirely appropriate for the Department to make "reasonable inferences" from the record evidence. See Shandong Huarong 11th Review I at 23. It is within the Department's discretion to make logical, fact-based inferences. The fact that Ames can draw inconsistent conclusions from the evidence contained in the record does not render the Department's findings unsupported by substantial evidence. See Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). Ames' contention that the Department must find affirmative evidence that Viraj incurred these specific expenses, and that such expenses were reported by Viraj in its B & H, would prevent the Department from making any logical inference based upon record evidence. Furthermore, Ames' assertion that the Department must deduct the expenses it believes are unaccounted for from U.S. price absent affirmative evidence from the India Wire Rod record is itself based upon speculation, as there is no affirmative evidence on the record of the underlying review that TMC and SMC incurred these port expenses.

In India Wire Rod, the Department was satisfied that Viraj fully reported its B & H expenses, and did not require Viraj to provide an itemized list of its specific port expenses as no party maintained that Viraj's reporting was incomplete. It is therefore reasonable to conclude that Viraj's reported B & H expenses encompass all of Viraj's port expenses. Moreover, it is also reasonable to find that, given the product similarity (steel product shipped in containers), the expenses incurred by Viraj are the same as those incurred by TMC and SMC at the time of export.

In sum, the Department finds that the record of India Wire Rod reasonably demonstrates that all of Viraj's port expenses are reported in its reported B & H expense. Since the Department finds that Viraj's reported B & H expense reasonably capture all relevant costs, the Department continues to find that its decision in the Final Results to deduct only B & H from U.S. price was appropriate.

Comment 2: Ames argues that the Department's reasoning for aggregating ocean freight as a single input for its ME input significance methodology is not logical.

Ames contends that the Department's decision to treat ocean freight as a single input does not make sense and is based upon unsupported statements. According to Ames, the Department claims that it should not calculate port-to-port ocean freight charges because ocean freight carriers normally stop at various ports of call en route to the final destination, even while conceding that ocean freight distance is important and may be a factor in determining the ocean

freight expense. Ames asserts that the Department makes no effort to ascertain with record evidence whether distance is a driving factor in determining ocean freight expense. Ames asserts that the Department knows that ocean freight expense varies directly with distance because it examined and assigned different freight expenses to different ports in a previous administrative review. Ames states that shipments to the U.S. east coast from the PRC require additional labor, time, and energy (e.g., passage around South America or via the Panama Canal) compared to shipments to the U.S. west coast, and that the Department fails to take such substantial differences into account.

The respondents did not comment with respect to this issue.

Department's Position

The Department disagrees with Ames. While the Department considers distance to be a factor in the cost of ocean freight to different ports, it is not clear that distance is directly determinative of pricing. There are other factors that influence the cost of ocean freight, such as the weight or volume of the cargo to be shipped (e.g., bulk discount or small quantity premium), the number of stops made by the vessel while traveling to the destination (and the corresponding impact on transit time), whether refrigeration is required, the quality of services provided by the ocean carrier, or even the reputation of the carrier. These factors may have offsetting effects on the cost of ocean freight. For these reasons, and those discussed in item VI of the analysis section above, the Department finds ocean freight to be a single input (conveyance of goods), albeit with differing prices to different ports, and conducts its ME input analysis on an aggregate, rather than port-to-port, basis.

The only publicly-available surrogate value on the record of this review is the ocean freight rate reported by the Indian respondent in India Wire Rod. See Memorandum from Thomas E. Martin to the File, "Surrogate Values Used for the Preliminary Results of the Twelfth Administrative Reviews of Certain Heavy Forged Hand Tools From the People's Republic of China - February 1, 2002 through January 31, 2003," dated March 1, 2004 (Surrogate Values Memo) at Attachments CC and DD. This surrogate value is the cost of transporting a single shipment of non-subject merchandise (steel wire rod), from India to the United States, specifically Philadelphia. On the other hand, the ocean freight cost used by the Department to value TMC's shipments made on PRC carriers is the weighted-average cost of multiple shipments of subject merchandise, exported by TMC from China to several different U.S. ports. A review of TMC's reported ports of entry demonstrates that TMC had more shipments to the U.S. west coast than to the U.S. east coast. See TMC's Section C submission, dated August 18, 2003, at Exhibits 2 and 6. Contrary to Ames' contentions, this weighted-average cost includes shipments to several different ports and, therefore, does take distance into account to some degree. The Department believes that its weighed-average cost for ocean freight used in this remand redetermination is more appropriate than the Indian surrogate value on the record of the underlying review because it results in a more accurate valuation, as it represents the cost of ocean freight for subject merchandise from the PRC to the United States, for delivery to several

different ports.

Lastly, we note that the surrogate value from India Wire Rod is for ocean freight to Philadelphia, an inland port located in the eastern section of the United States. TMC reported that more of its shipments were to west coast ports of entry. Id. The Department believes that valuing TMC's sales, the majority of which are to the west coast, with a surrogate value for ocean freight to the eastern section of the United States is less accurate than valuing the freight of those sales with a weighted-average cost significantly based upon west coast shipments. The Department's weighted-average ocean freight cost, obtained from TMC's actual subject merchandise shipments, better reflects the commercial reality that more of TMC's shipments are to the U.S. west coast.

Comment 3: Ames contends that the Department erred in not assigning a COS adjustment.

Ames states that the Department's explanation of its determination that the record lacks sufficient detail to make a COS adjustment to account for U.S. commissions is without merit and based on speculation. First, Ames states that the Department speculates without record evidence that some portion of Indian sales have commissions, but that not all sales have commissions. Second, Ames states that, although the Department alleges that it cannot calculate indirect selling expenses precisely in NME methodology cases, the Department does make these same COS adjustments in constructed value (CV) cases. Ames contends that the NME methodology is similar to a CV methodology, and that the Department is able to overcome the same hindrances in ME cases where NV is based upon CV. Third, Ames contends that the Department was required by its own policy to obtain the affiliated parties' actual expenses, and submit the information to the record, but has not done so. If the Department claims that it cannot make an adjustment because it does not have the necessary information, Ames contends that the Department placed itself in that position.

Ames also disagrees with the Department's reliance on Nations Ford, in finding that the Department need not "duplicate the exact production experience of the Chinese manufacturers" in valuing selling expenses. Ames distinguishes Nations Ford, stating that Nations Ford focused on factory overhead, which is part of the NV calculation under the FOP methodology, while commissions are direct selling expenses that the Department deducts from U.S. price pursuant to a different section of the statute.

Finally, Ames disagrees with the Department's position that the COS adjustment might only be appropriate if the Department could reasonably account for all differences in selling expenses between the respondent and the surrogate. Ames argues that the Department is speculating on the need to make additional adjustments, rather than basing this statement on record evidence.

The respondents did not comment with respect to this issue.

Department's Position

The Department disagrees with Ames. Ames' argument comparing COS adjustments in ME cases where NV is based upon CV cases and NME cases is not a meaningful comparison. In CV cases, the respondents normally have the information necessary to report all comparison market and U.S. market expense information. In CV cases, the Department requests and obtains from the ME respondent the most specific and reasonable allocation methodology possible given the available data generated by the respondent in the normal course of business. In addition, the Department reviews at verification the respondent's records to ensure that the respondent has calculated its expense data as specifically as possible to subject merchandise and between markets.

In the present instance, the Department lacks, and is unable to obtain, the type of information that is routinely reported in an ME proceeding as part of the CV methodology. The Department would need to obtain the indirect selling expenses incurred by TMC within the PRC on its EP sales, and indirect selling expenses incurred by the Indian surrogate companies on sales in the surrogate country. Regarding TMC's indirect selling expenses incurred in the PRC, the Department does not request these data because such expenses reflect transactions in an NME country that are considered unreliable. See section 771(18)(A) of the Act. With respect to the Indian RBI Bulletin survey data, if the Department were to calculate a surrogate value for indirect selling expenses incurred in India for U.S. sales, the Department would first need to isolate and subtract these indirect selling expenses from the remaining indirect selling expenses included in the RBI Bulletin survey data in order to avoid double-counting TMC's indirect selling expenses. This means that the RBI Bulletin survey data would have to be sufficiently detailed to allow the Department to distinguish between (1) indirect selling expenses and direct selling expenses, and (2) indirect selling expenses incurred for sales to the U.S. market and indirect selling expenses incurred for sales in the surrogate market. However, the RBI Bulletin survey data do not have the sufficient detail to make such a conclusion. Thus, what Ames requests is not feasible.

Although the Department would not have collected indirect selling expenses on EP sales in NME cases because these are internal PRC costs, we further note that Ames did not raise this issue in the supplemental phase of the review, but raised the issue for the first time in its administrative case brief. Even if the Department potentially could have pursued an approach such as Ames suggests, the time for collecting the necessary data had already passed by the time Ames first made its argument.

Comment 4: TMC contends that the Department did not properly corroborate the 139.31 percent antidumping rate.

TMC contests the Department's continued application of the 139.31 percent antidumping rate. TMC argues that this rate is punitive, and states that the Department should calculate a rate based on TMC's reported data, with an additional amount added to the rate for deterrence purposes. TMC also argues that the Department has failed to corroborate the 139.31 percent

margin.

Citing the language of F.Lli De Cecco, TMC contends that the Department did not utilize any measures to verify independently the reliability of the 139.31 percent AFA rate, relying instead on the position that if the Department chooses as total AFA a dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin. The statute and the Department's regulations allow reliance on secondary information, subject to the requirement of section 776(c) of the Act that the Department "shall, to the extent practicable, corroborate that information" using independent sources, and TMC claims that the Department failed to corroborate the information using independent sources such as published price lists, official import statistics and CBP data, and information obtained from interested parties during an investigation or review. Rather, it argues that the Department did not use any such independent information when corroborating the 139.31 percent dumping margin, claiming there are no independent sources for calculated dumping margins, and therefore, TMC states that the Department's argument is unsupported. TMC agrees that there may be no sources to independently corroborate the reliability of the 139.31 percent dumping margin itself, but contends that the Department had: (1) sources that could have been used to corroborate the FOP used in arriving at the dumping margin; (2) verified data on TMC's sales prices for the twelfth review; (3) verified data for TMC's consumption rates for the twelfth review; and (4) Indian import statistics for the twelfth review. TMC states that it would not have been burdensome for the Department to consult these sources in order to satisfy its obligation to corroborate the margin.

TMC also states that the Department also fails to substantively address its subsidization arguments, and contends that it is not trying to re-litigate the eighth administrative review of the order. TMC believes that the 139.31 percent rate is tainted because the steel surrogate value used in calculating the 139.31 rate included dumped or subsidized prices. TMC states that it is not questioning the application of the 139.31 rate in the eighth review, but is only arguing that the rate is invalid for use in the underlying review. TMC states that the Department determined in the preliminary results of the underlying review that South Korea, Thailand, and Indonesia maintain broadly available, non-industry specific export subsidies which may benefit all exporters to all export markets. TMC states that, in addition, the Department has also said that it will not use any prices (either ME supplier prices or surrogate values) where it has reason to believe or suspect the prices may benefit from generally-available subsidies, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002) and the accompanying Issues and Decision Memorandum at Comment 14. Furthermore, TMC states that it is unclear why the Department determined that it will exclude data from South Korea, Thailand, and Indonesia, but not the United States, which, according to the WTO, has generally available subsidies, specifically the Foreign Sales Corporation tax scheme. TMC claims that the Department should have excluded any prices that may be subsidized, not only data from the three countries noted in the preliminary results of the underlying review, but also from nearly every

other country. TMC claims that the United States acknowledged, in its defense before the WTO of the Continued Dumping and Subsidy Offset Act (referred to as CDSOA or Byrd Amendment), that most countries have generally available subsidies.

TMC further argues that the 139.31 percent AFA rate is not relevant to TMC's current commercial activities because the CIT determined in litigation pursuant to the ninth administrative review that the Department failed to justify the subject 139.31 percent rate with substantial evidence. In litigation pursuant to the ninth administrative review, TMC states that the CIT found that the 139.31 percent rate was punitive in nature and directed the Department upon remand to no longer employ the rate. On remand, the Department applied a lower AFA rate of 47.88 percent. TMC contends that the 47.88 percent rate is drastically different from the previously applied AFA rate of 139.31 percent and also contends that its experience in the eighth review is very different from TMC's experience in the underlying review. Specifically, TMC states that the Department has failed to consider (1) that the FOP and the steel surrogate values for the eighth review were different from those for the underlying review and (2) that the AFA rate chosen by the Department is substantially higher than the rate calculated for TMC for that last completed segment (a *de minimis* dumping margin of 0.48 percent).

TMC also states that it received total AFA for its bars/wedges due to its agent sales, even though similar agent sales occurred in the prior tenth and eleventh reviews. TMC states that, in these prior reviews, the principal distinguished which sales were direct sales and which were agent sales, and the Department reassigned the sales to the party that it deemed to be the appropriate seller. Therefore, TMC contends that it had no reason to anticipate that it would receive AFA for agent sales in the underlying twelfth review, as this was the first instance in which the Department applied AFA due to agent sales, after the prior two reviews. TMC states that it had no reason to anticipate that the Department would use an AFA rate of 139.31 percent, which was an aberrational rate that arguably contained subsidized prices.

TMC states that it cooperated to the best of its ability, and the Department has not alleged that it did not provide all of the necessary information and data in order to calculate an actual rate. TMC claims that the Department had verified data on TMC's sales prices and production data for the twelfth review, and that it would not have been burdensome for the Department to consult these sources in order to satisfy its obligation to calculate the margin. TMC contends that, since the purpose of the antidumping statute, according to the CAFC, is "determining current margins as accurately as possible," the Department could have calculated the companies' actual rates or at the minimum, estimates of the companies' actual rates, and then added a deterrent amount. As such, TMC claims that the selected rate fails to comply with the CAFC's requirement that the rate selected as AFA be "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *Id.*

TMC also argues that the decline of TMC's AUVs between the eighth and twelfth reviews does not establish the relevance of the 139.31 percent margin. TMC states that any number of reasons may account for TMC's decline in AUVs, and that if the decline demonstrates

the chosen rate's deterrence value, this is not the sole issue, as the CIT has specifically requested that the Department impose an AFA rate that is both a "reasonably accurate estimate of the respondent's actual rate" and is an effective "deterrent to non-compliance."

TMC also contends that the history of volatility of the antidumping rates in the industry does not justify a 290-fold increase from TMC's immediately previous (tenth) review rate, nor does it support the relevance of the rate. Finally, in conclusion, TMC contends that the increase does nothing to respond to the CIT's request that the Department explain why the chosen rate represents a reasonably accurate estimate of TMC's actual rate to which it has added an amount to encourage future cooperation.

Ames did not comment with respect to this issue.

Department's Position

We disagree with TMC. The Department corroborated the 139.31 percent margin to the extent practicable, therefore the rate is not punitive. Furthermore, neither the CAFC, nor the CIT, has ever required the Department to apply a formulaic approach to the selection of AFA in the form urged by TMC. In addition, TMC's other arguments are equally without merit. Accordingly, the Department has determined it will continue to apply the 139.31 percent rate to TMC's entries as AFA.

A. The 139.31 percent rate is corroborated to the extent practicable and is not punitive.

In F.Lli De Cecco, the CAFC stated the following:

{T}he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins. ... It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. 1677e(c) that it intended for an adverse facts available rate 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. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin.

F.Lli De Cecco, 216 F.3d at 1032 (cited by Ta Chen, 298 F.3d at 1340, which is in turn cited by the CIT in Huarong at 27). TMC argues in its submission that, pursuant to this language, the Department's use of the highest calculated rate is "punitive" and that the Department must apply a formula that calculates an "actual" rate for TMC, and then add more as a "deterrent." See TMC's December 29, 2006, submission at 12.

We find that TMC's arguments are inconsistent with the language and legislative history of sections 776(b) and (c) of the Act (19 U.S.C. 1677e(b)&(c)), inconsistent with the conclusions of the CAFC in F.Lli De Cecco, and Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1340 (Fed. Cir. 2002) (Ta Chen), and simply cannot work in operation and enforcement of the antidumping law. First, we note that in F.Lli De Cecco, the CAFC made the following additional observation regarding the statute's corroboration provision:

Obviously, a higher adverse margin creates a stronger deterrent, but **Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.**

F.Lli De Cecco, 216 F.3d at 1032 (emphasis added). In the same decision, the CAFC also explained that it "is within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative" and that Commerce "is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts available that will create the proper deterrent to the non-cooperation with its investigations and assure a reasonable margin." Id. Thus, the CAFC did not hold that the statute requires a formulaic approach to the application of AFA. Instead, the CAFC merely explained that as a general matter, Congress did not intend for the Department to use "punitive, aberrational, or uncorroborated margins," which is the reason section 776(c) was added to the Act in 1994, to prevent such rates from being used. In other words, if a rate selected as AFA satisfies the corroboration requirement of section 776(c), then that rate is not punitive.

This interpretation of the Act is consistent with the legislative history of AFA. The first "best available information" (BIA) provision was added to the Act in 1979, and contained no "adverse" or "corroboration" language. See Trade Agreements Act of 1979; Statements of Administrative Action, H.R. Doc. 153, part II, 96th Cong. (1979) at 435-436; H.R. Rep. No. 96-317, at 77 (1979); S. Rep. No. 96-249, at 98 (1979). The United States Court of Customs and Patent Appeals had long ago concluded that the imposition of antidumping duties is not, in of itself, punitive and the "expressed purpose of Congress" in applying antidumping duty laws was to "equalize competitive conditions between the exporter and American industries affected." See C.J. Towers & Sons v. United States, 71 F.2d 438, 450 (CCPA 1934). Nonetheless, in 1994, Congress added section 776(b), the "adverse inference" provision, to the Act, stating that its purpose was "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. In considering what information to use, Congress further stated that the agency should consider "the extent to which a party may benefit from its own lack of cooperation." Id. This authority was needed by the Department because, the Department does not have subpoena authority to require parties to provide necessary information during the conduct of a proceeding. See Rhone Poulenc v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (Rhone Poulenc) (preceding the codification of the adverse inference

provision, the Federal Circuit stated with respect to the use of the adverse presumption in applying BIA, “although Congress may not have intended it, the presumption effectively induces importers to comply with agency questionnaires, an important practical consideration since the ITA no subpoena power”).¹³ See also *National Steel Corp. v. United States*, 870 F. Supp. 1130, 1134 (CIT 1994); *Ad. Hoc Committee of AZ-NM-TX-FL Producers of Cement v. United States*, 865 F. Supp. 857, 863 (CIT 1994)(both referencing the fact that the only means it has to effectuate compliance in providing data is the use of BIA, as the Department has no subpoena power).

In addition to section 776(b) of the Act, Congress also added section 776(c) to the Act in 1994, which, as the CAFC explained in *F.Lli De Cecco*, “tempered” the agency’s selection of adverse facts available. Section 776(c) of the Act requires that the Department “to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.” Congress explained that “corroborate means that the agencies will satisfy themselves that the secondary information to be used as probative value.” See *SAA* at 870. It therefore stands to reason that in granting the Department the authority to use information that may be to the detriment of an uncooperative respondent, Congress intended to bound that authority by requiring corroboration to the extent practicable.

Furthermore, we believe that the Court’s legal analysis in *Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, Slip Op. 07-4 (January 9, 2007) (*Shandong Huarong 9th Review IV*) also supports this reading of the statute and the Federal Circuit’s interpretation. The Court stated that for the Department’s selection of AFA to be sustained, it “must be both reliable and relevant to the Companies.” *Shandong Huarong 9th Review IV* at 8. The Court held that the Department, in the final results and previous remand redeterminations in that case, had “failed to demonstrate either the reasonableness or the relevance of the 139.31 percent rate to the companies.” *Id.* at 7. In this remand redetermination, we believe that the Department has met both of these criteria. Thus, we disagree with TMC’s apparent belief that a choice of AFA could be “punitive” even if it satisfies the corroboration requirement of section 776(c) of the Act.

In this administrative review, the Department determined that the application of total AFA was warranted because TMC and another company impeded the administrative review through inadequate questionnaire responses and a scheme to prevent the payment of cash deposits. This Court affirmed the Department’s application of total AFA. See *Huarong* at 17. Specifically, the use of the “agent” sales scheme impeded the Department’s ability to complete this administrative review under section 751 of the Act and impose the correct antidumping duties and cash deposits, as mandated by section 731 of the Act. Thus, the Department applied

¹³ The Federal Circuit in *Rhone Poulenc*, which preceded the codification of the adverse inference in law, also stated that “{w}e believe a permissible interpretation of the best information statute allows the agency to make such a presumption and that the presumption is not ‘punitive’” and that “{t}he agency’s presumption implements the basic purpose of the statute – determining current margins as accurately as possible.” *Rhone Poulenc* at 1190-1191.

total AFA to TMC based upon the agency's inherent authority to prevent the circumvention of the antidumping order. In addition, as the CIT noted in Huarong, even though TMC ultimately responded to the Department's requests for information, the failure to do so until after the issuance of several supplemental questionnaires significantly impeded the Department's investigation by requiring the agency to prolong its review. See Huarong at 16. Thus, the Department's decision to apply total AFA has already been affirmed, and the Department will not revisit it here.

In this remand redetermination, the Department has further explained in detail, including the addition of further supportive information, why the rate it selected as AFA satisfies the corroboration requirement of section 776(c) of the Act. Thus, the Department's application of the 139.31 percent rate in this case is neither based upon an arbitrary formula, as advocated by TMC, nor is it punitive. In addition, from an operational perspective, the formulaic approach makes little practical sense in light of the record before the Department. In applying AFA to the entire record for TMC, the Department rejected the use of all of TMC's reported data. Without TMC's data, the Department has limited sources of information on the record left from which it can derive an AFA rate. Specifically, the Department can examine publicly available data, data from past reviews, or data from other respondents in the current review. In light of these limited options, the Department is uncertain how it could estimate TMC's "actual" rate, based upon data rejected as unreliable, let alone calculate an additional amount for deterrence. With no data to calculate a built-in increase, any attempt to calculate a rate would be based on an unknown estimated starting point and adding an unknown estimated built in increase. The statute does not mandate such an arbitrary exercise, and there is no practical means by which the Department could employ such an analysis.¹⁴

Finally, with regard to TMC's citation of F.Lli De Cecco, the facts of that case are distinguishable, and thus do not support TMC's argument that the Department must arbitrarily estimate TMC's actual rate. The AFA rate at issue in F.Lli De Cecco had been calculated for different companies, in an industry which had two types of producers, which the CAFC termed "high-end" and "low-end." See F.Lli De Cecco, 216 F.3d at 1032-1033. The CAFC noted that low-end producers had higher calculated antidumping rates than high-end producers, and the respondent in F.Lli De Cecco was a high-end producer. Id. The rate selected by the Department was higher than the rates calculated for the low-end producers. Thus, the CAFC's ruling in F.Lli De Cecco barred the application of a rate that had no relationship to the respondent's actual dumping margin, as it was a high-end producer, and as such there was "nothing to support" an inference that the higher rate the Department had chosen might reflect the respondent's actual dumping margin.

¹⁴ Even the Department's analysis in its third remand redetermination for the 9th review, which the Department conducted under protest, and which was affirmed by the Court in Shandong Huarong 9th Review IV, did not use data in the manner advocated by TMC. TMC would have the Department use data which was already rejected in this review used in its calculations. In the 9th review remand redetermination, the Department looked to Huarong's and LMC's highest transaction-specific margins from previous administrative review periods, and not the review record in which total AFA was applied.

In contrast, the hand tools industry is not characterized by divisions between high-end and low-end producers as found in F.Li De Cecco. More specifically, the rate which the Department has selected in this instance, 139.31 percent, is a rate calculated for TMC itself in a previous review. This rate has not been discredited. As noted above, this rate has been upheld by the CIT and the CAFC in Shandong Huarong 8th Review. Accordingly, the AFA rate rejected in F.Li De Cecco cannot be compared with the rate selected by the Department as AFA in this instance. In Ta Chen, the CAFC upheld an AFA rate based upon only one transaction by the same respondent. See Ta Chen, 298 F.3d at 1339. The rate selected by the Department in this instance is based upon the weighted-average margin for the same respondent from all sales of an entire review period. The relationship of the selected rate to TMC in this case is therefore, at least as reasonable, reliable and relevant as the AFA rate upheld in Ta Chen.

B. The Department will not entertain TMC's belated subsidy claims

TMC has also reiterated and extended the argument set forth in its brief to the CIT, that the 139.31 percent rate used as AFA contains broadly-available, non-industry specific, export subsidies in third countries. Specifically, TMC states that while it does not question the legitimacy of using the rate in the eighth review, it does believe that the rate is "tainted" and cannot be used as the AFA rate in the underlying review. See TMC's December 29, 2006, submission at 6. As we explained in the Final Results, and again in the Department's briefs to the CIT in this case, TMC had many opportunities during the eighth administrative review to notify the Department of its belief that the 139.31 percent rate is tainted by subsidized prices and failed to do so. To the extent that TMC suggests that the 139.31 percent rate selected as AFA should be discredited, we find TMC's assertions to be baseless, considering that the rate has been upheld by the CIT and CAFC in Shandong Huarong 8th Review, as noted above. By attempting to discredit the rate, TMC is, in effect, relitigating a closed segment of the proceeding which goes beyond the scope of the remand order and the Department will not reopen this matter in this remand redetermination. Moreover, TMC's position is inconsistent. If the rate is legitimate and appropriate for use in the eighth review, then it must also be available for use in the underlying review.

Regarding TMC's allegation that the FOP and steel surrogate values used to calculate the 139.31 percent rate were substantially different from those used in this review period, the Department finds that such facts do not necessarily undermine the reasonableness of selecting the 139.31 percent rate as AFA. In selecting an AFA rate, the Department examines the facts of the instant review when analyzing the relevancy of the selected AFA rate, and may even examine transaction-specific margins from current or recent reviews. In any event, in this instance, the Department cannot compare the sales and FOP data from the eighth review to the twelfth review because the Department has no confidence in the completeness or accuracy of TMC's reported data in the twelfth review.¹⁵

¹⁵ We note that TMC's repeated assertion that the information that it submitted to the record in the underlying review was verified by the Department is false. See TMC's December 29, 2006, submission at 5 and 11.

C. TMC's further corroboration arguments are also not persuasive

TMC makes several other arguments which the Department believes are without merit.

First, although it is true the 139.31 percent rate is higher than the rate calculated for TMC in the most recently completed review of TMC's sales (*i.e.*, *de minimis* rate of 0.48 percent), the history of volatile dumping margins in this industry demonstrates that a large increase or decrease in dumping margins is still not unusual. It is undisputed that the calculated dumping margins for the PRC hand tools industry have a history of rate volatility. As TMC has noted, between the eighth and tenth review periods, TMC's calculated dumping margin dropped from 139.31 percent, to a *de minimis* margin. Given the fact of a dramatic decrease, TMC cannot sustain an argument that a dramatic increase of the same proportion is not reasonable. In stating that the history of volatility in antidumping rates throughout the industry does not explain *why* TMC's rate should increase, TMC has overemphasized the significance of the Department's discussion on volatility, as a part of the Department's corroboration analysis. The Department has not used the volatility as a reason explaining *why* the increase occurred, but only that such an increase is reasonable. This is consistent with the Department's analysis which was analyzed and affirmed in Shandong Huarong 9th Review IV, where the Department also used volatility in the market to confirm the relevancy of the AFA rate applied in the most recent remand redetermination. Shandong Huarong 9th Review IV at 7-8. Thus, the Department's discussion of the rate volatility has the limited purpose of demonstrating that such increases and decreases, while dramatic, are characteristics consistent with the record of this proceeding.

In Rhone Poulenc, the CAFC ruled that the best information for selecting AFA is not necessarily the most recent. See Rhone Poulenc, 899 F.2d at 1190 ("Although we see no escape from our earlier reasoning that Congress desired the ITA always to use the most recent information in administrative reviews, it does not follow . . . that the ITA must equate 'best information' with 'most recent information.' What is required is that the ITA obtain and consider the most recent information in its determination of what is best information"). Thus, the fact that TMC received a *de minimis* margin in the tenth review is not dispositive of its activity in the underlying review.

Next, with regard to TMC's claim that because this was the first time that the Department had applied AFA to TMC due to its agent sale relationship, TMC had no reason to anticipate the 139.31 percent rate, this argument makes no sense in light of the requirements of section 776(b) of the Act. If the Department concludes in a review that the application of an adverse inference is warranted, the fact that the party was able to "get away" with similar behavior in previous reviews does not absolve it of its responsibility to cooperate in each review. Respondent companies receive total AFA when they fail to cooperate to the best of their ability. The "agent" scheme that resulted in the reporting of incorrect data to the United States Government, as well as TMC's failure to provide truthful, complete data to the Department during the administrative review, reflects that TMC did not act to the best of its ability in this case. Thus, it is reasonable for the Department to conclude that TMC understood that it could receive its highest calculated

rate from its previous proceedings if the Department determined that the application of an adverse inference was appropriate.

In addition, with regard to TMC's allegations that the Court has banned the Department from using the 139.31 percent rate and considered that rate punitive, we noted that in *Shandong Huarong 9th Review IV*, the Court stated that the reason the Department's rate was punitive in that case was because it was not corroborated. *Shandong Huarong 9th Review IV* at 7-8.¹⁶ However, the Court also stated that a rate which was based on "verified information" provided by a respondent in a previous administrative review was evidence that a number was "reliable" and that it was "equally permissible" for the Department to use a respondent's "highest previously calculated rate as a deterrent," for purposes of the relevancy prong of the corroboration exercise. *Id.* at 11 and 14. In this case, the 139.31 percent rate was calculated, based upon verified data, for TMC in a previous proceeding. Thus, TMC is incorrect in its arguments that the agency cannot use TMC's own rate from a previous proceeding as an AFA rate in a subsequent proceeding, and that the rate cannot be corroborated successfully.

Finally, regarding TMC's claim that AUVs can decline for any number of reasons, we do not disagree, but we offer that the Department cannot ignore what is an obvious change over time in export prices for particular subject merchandise. There are, indeed, several factors which might influence such pricing behavior, but the Department does not have information on the record to examine all of the various reasons as to why TMC's AUVs declined. In fact, TMC itself, which does have access to all information as to why its own AUVs declined, failed to cite any specific reason to explain the decrease that would also explain a decline in its dumping margin. Furthermore, TMC did not contest that the production experience for producers of hand tools from the PRC has not changed to any significant degree to warrant such a large decline in prices. Thus, in light of the record before it, the Department has concluded that this secondary information – the 139.31 percent margin – is further corroborated to the extent practicable for purposes of applying it as AFA to TMC's entries.

Comment 5: SMC states that the Department has failed to consider all of the facts of the current case in refusing to revoke SMC from the hammers/sledges order due to SMC's "failure" to meet the "commercial quantities" test.

SMC states that it fulfilled the regulatory requirements for revocation by exporting in commercial quantities for three consecutive years, and that it sold at not less than NV for the

¹⁶ In litigation pursuant to the ninth review, the CIT rejected the 139.31 percent rate as "punitive," in part because it was concerned that the rate had not been calculated for the parties to the litigation. Nonetheless, the Department continues to believe that the 139.31 percent rate was corroborated, was supported by evidence on the record, and was not punitive in that case. See *Final Results of Redetermination Pursuant to the Remand Order of the U.S. Court of International Trade in Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, Court No. 01-00858, Slip Op. 05-129 (September 27, 2005), dated March 3, 2006, at 6. In any case, the corroboration of a dumping margin to be applied to a specific company in a specific review period by definition must be distinct for each company, in each review period.

same period of time. SMC argues that the Department's normal practice of using the sales quantity reported by SMC in the LTFV investigation or the POI as the benchmark does not apply in cases where a company has experienced a "substantial and unusual change in business practice" since the imposition of the order that may explain a substantial sales drop-off in U.S. sales, and that a more recent POR that is reflective of the company's normal commercial experience may provide a more appropriate benchmark. SMC contends that the Department failed to consider SMC's arguments made at the administrative level, that an unusual change in business practice existed where (1) there were changes in the heavy forged hand tool market in the fourteen years between the POI (1990) and the review of the POR, (2) the market share change as a result of high cash deposit rates and other exporters, and (3) the length of the time since the POI, fourteen years, was no longer reflective of the company's normal commercial experience. SMC argues that there is nothing on the record that shows that SMC did not sell as much subject merchandise as it could.

As the Department failed to address this "unusual change in business practice" according to SMC, the Department has failed to adequately explain the reasonableness of its benchmark period. SMC also argues that, in comparing the review periods with the benchmark period, the Department incorrectly based a comparison of two periods on an erroneous sales number for SMC. SMC requests that the Department correct this error and re-assess whether SMC's sales volumes during the 2000-2001 period constitute "commercial quantities." SMC also states that there is no statutory or regulatory authority defining what constitutes commercial quantities for purposes of revocation, and the Department can also consider the number of sales and total sales volume (1) in absolute terms, (2) in comparison with the period of investigation, and (3) in comparison with other review periods, in order to assess meaningful participation in the market. SMC requests that the Department also consider the other two review periods in its determination of commercial quantities for the 2000-2001 period.

Ames did not comment with respect to this issue.

Department's Position

The Department disagrees with SMC. SMC does not cite any specific "unusual changes" in its business practice that would justify deviating from our practice of using the POI as the benchmark. In its case brief on the record in the underlying review, "Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Respondent's Case Brief," dated April 16, 2004, at 9, SMC made the same vague assertions about changes in the hand tools market, and did not cite to any specific "unusual changes" in its new arguments either. Thus, SMC has not specifically cited any circumstances that are in any way similar to those in Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 FR 742 (January 6, 2000) (Brass Sheet), neither in the underlying review, nor in its comments to the Draft Redetermination. A lapse of time is not, in itself, a "change of business practice."

In Brass Sheet, 65 FR at 750-752, at Comment 5, cited by SMC, the Department found that the respondent had acquired a domestic U.S. producer and temporarily transferred production to the United States. Thus, in that case, the “unusual changes” warranting a change from the Department’s normal practice for determining commercial quantities were an acquisition of another company and temporary international movement of production. Although the Department deviated from our normal practice of examining the POI shipments in Brass Sheet, it still examined a pre-order benchmark period.

Regarding the specific calculation error alleged by SMC regarding the quantity of sales in the 2000-2001 period, we agree with SMC’s analysis, and acknowledge the error. However, even using SMC’s own analysis, the sales quantity in the 2000-2001 period remains very low in relation to the POI, and is not significant enough to impact the Department’s decision in the Final Results.

RESULTS OF REMAND DETERMINATION

As a result of this remand redetermination, the revised dumping margins for the period February 1, 2002, through January 31, 2003, are as follows:

Shandong Huarong Machinery Corporation Limited (Huarong)	
Bars/Wedges.....	139.31 percent
Liaoning Machinery Import & Export Corporation (LMC)/	
Liaoning Machinery Import & Export Corporation Ltd. (LIMAC)	
Bars/Wedges.....	139.31 percent
Shandong Machinery Import & Export Corporation (SMC)	
Bars/Wedges.....	4.05 percent
Tianjin Machinery Import & Export Corporation (TMC)	
Axes/Adzes.....	10.39 percent
Bars/Wedges.....	139.31 percent
Hammers/Sledges.....	6.38 percent
Picks/Mattocks.....	4.61 percent

David M. Spooner
Assistant Secretary
for Import Administration

Date

Appendix 1

Contains Business Proprietary Information

Application of Adverse Facts Available to TMC

RE: Remand Redetermination for 12th Administrative Review of Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China

SUBJECT: Application of Adverse Facts Available to Tianjin Machinery Import and Export Corporation

In Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, Final Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part, 69 FR 55581 (September 15, 2004) and accompanying Issues and Decision Memorandum at Comment 19, the Department of Commerce (the Department) applied adverse facts available (AFA) to Tianjin Machinery Import and Export Corporation (TMC).

In Shandong Huarong Machinery Co., Ltd., Liaoning Machinery Import & Export Corp., Ltd. and Liaoning Machinery Import & Export Corp., Shandong Machinery Import & Export Corp., and Tianjin Machinery Import & Export Corp. v. United States and Ames True Temper, Court No. 04-00460, Slip Op. 06-88 (June 9, 2006) (Huarong) at 17, Court of International Trade (CIT) discussed the activities of [* * *]. Specifically, the CIT found that [* * *] justified the Department's application of total AFA to [* * *] sales subject to the bars/wedges order. The CIT upheld the Department's application of total AFA to [* * *]. However, only [* * *] challenged the Department's selected AFA rate of 139.31 percent. Since the CIT upheld the Department's application of total AFA to [* * *], the Department need not reach the issue of whether TMC's failure to report sales of forged tampers justifies the application of total AFA for all sales in the bars/wedges order.

Appendix 2

**Contains Business Proprietary Information
Cannot Be Summarized**

ACS Data - TMC Eighth POR

Appendix 3

**Contains Business Proprietary Information
Cannot Be Summarized**

ACS Data - TMC Twelfth POR

Appendix 4

**Contains Business Proprietary Information
Cannot Be Summarized**

TMC Ocean Freight Calculations

Appendix 5

**Contains Business Proprietary Information
Cannot Be Summarized**

SMC Ocean Freight Calculation