Decisions of the United States Court of International Trade

ANNOUNCEMENT

Chief Judge Jane A. Restani has announced the call of the 13th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Monday, November 8, 2004 at the Grand Hyatt, Park Avenue at Grand Central Station, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is: **"The Court in a New Age of Trade, Ethics and Automation."**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Bureau of Customs and Border Protection, the Departments of Justice, Commerce and Treasury; members of the Bar of the Court; and other distinguished guests.

All interested persons are invited to attend. The Conference program, registration forms and additional information may be obtained through the Judicial Conference page on the Court's Website, **www.cit.uscourts.gov** or by contacting the Clerk's Office at 212–264–2800.

LEO M. GORDON,
Clerk of the Court.

September 29, 2004

Financial Hardship Policy

The U.S. Court of International Trade offers a discount of 15% off the conference/course fee to law students attending an accredited law school, solo attorneys admitted to the bar less than two years, government attorneys whose agencies/departments are not funding their attendance, attorneys who work for non-profit or legal services organizations, and unemployed attorneys. To qualify for the discount, submit a letter on your firm/agency/personal letterhead outlining how you qualify for the discount, along with a check in the amount of $140.25 and a completed registration form to the address listed above. Students must submit a copy of their current and valid Student ID card.

SLIP OP. 04–117

BEFORE: RICHARD K. EATON, JUDGE

SHANDONG HUARONG GENERAL GROUP CORPORATION & LIAONING MACHINERY IMPORT & EXPORT CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT.

COURT NO. 01–00858
PUBLIC VERSION

[United States Department of Commerce's final results of redetermination affirmed in part, remanded in part to Commerce a second time]

Dated: September 13, 2004

Hume & Associates, PC (*Robert T. Hume*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch; *Jeanne E. Davidson*, Deputy Director, International Trade Section, Civil Division, Commercial Litigation Branch (*Paul D. Kovac*); *Barbara J. Tsai*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION AND ORDER

EATON, *Judge*: This matter is before the court following remand to the United States Department of Commerce ("Commerce"). In *Shandong Huarong General Group Corp. v. United States*, 27 CIT ___, slip op. 03–135 (Oct. 22, 2003) ("*Huarong I*"), this court remanded Commerce's determination in the ninth administrative review of heavy forged hand tools from the People's Republic of China ("P.R.C."), covering the period of review February 1, 1999, through January 31, 2000. *See* Heavy Forged Hand Tools From the P.R.C., 66 Fed. Reg. 48,026 (ITA Sept. 17, 2001) (final det.) ("Final Results"). Plaintiffs Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import and Export Corporation ("LMC") (collectively the "Companies") had challenged that determination with respect to Commerce's decision to apply the P.R.C.-wide antidumping duty margin to their subject merchandise. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, this matter is affirmed in part, and remanded in part to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

The relevant facts and procedural history in this case are set forth in *Huarong I*. A brief summary of these is included here. On February 14, 2000, Commerce published a notice of opportunity to request

administrative reviews of the antidumping duty order covering heavy forged hand tools from the P.R.C. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 65 Fed. Reg. 7348, 7349 (ITA Feb. 14, 2000) (opportunity request admin. rev.). In response, several P.R.C. entities—including the Companies—requested administrative reviews. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the P.R.C., 65 Fed. Reg. 66,691, 66,692 (ITA Nov. 7, 2000) (prelim. results and prelim. partial rescission of antidumping duty admin. revs.) ("Preliminary Results"). Commerce then commenced its investigation and distributed standard nonmarket economy ("NME") country[1] antidumping questionnaires.

Based on information provided by the Companies in their original and supplemental questionnaire responses, Commerce determined that they were each preliminarily entitled to company-specific antidumping duty margins separate from the P.R.C.-wide antidumping duty margin. *See* Prelim. Results, 65 Fed. Reg. at 66,693. Commerce calculated Huarong's preliminary company-specific antidumping duty rate for bars/wedges to be 0.44%, and calculated LMC's preliminary company-specific antidumping duty rate for bars/wedges to be 0.01%. *See id.* at 66,696. The P.R.C.-wide antidumping duty rate for bars/wedges was preliminarily calculated to be 139.31%. *Id.*

Commerce then notified the Companies that it would conduct verification of their submitted sales and factors of production information. Commerce conducted verification of LMC's questionnaire responses from April 23 through April 26, 2001. *See* Verification in Dalian, Liaoning, the P.R.C, of the Questionnaire Resps. of LMC in the Antidumping Duty Admin. Rev. of Heavy Forged Hand Tools from the P.R.C., Conf. R. Doc. 73 ("LMC Verification Report"). In its verification report, Commerce noted that Company A[2], not Company B,[3] was actually the seller of an "overwhelming majority" of the bars and wedges, and that Company B's role was largely limited to processing shipping documents and payment receipts. *See* LMC Verification Report at 5. In other words, it was only at verification, and not before, that Commerce learned the actual nature of these transactions.

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[1] A "nonmarket economy" country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i).

[2] As this opinion was initially issued in confidential form, the court referred to Huarong as Company A for ease of reading while maintaining confidentiality.

[3] As this opinion was initially issued in confidential form, the court referred to LMC as Company B for ease of reading while maintaining confidentiality.

Commerce then conducted verification of Huarong's questionnaire responses from May 2 through May 9, 2001. *See* Verification in Dongping Town, Shandong Province, the P.R.C., of the Questionnaire Resps. of Shandong Huarong Gen. Group Corp. in the Antidumping Admin. Rev. of Heavy Forged Hand Tools from the P.R.C., Conf. R. Doc. 74 ("Huarong Verification Report"). Again, as with LMC, Commerce made certain "significant findings," including that "[t]he overwhelming majority of sales activities for subject merchandise sales reported by [Company B] were actually performed by [Company A]." *Id.* at 1. Indeed, Commerce determined that the sales claimed by Company B were actually Company A's. *See* Application of Adverse Facts Available to Shandong Huarong General Group Corp., Conf. R. Doc. 84 at 3.

After review and analysis of the questionnaire responses and the information gathered at verification, Commerce determined that the use of facts available and adverse facts available was warranted as the Companies did not cooperate by acting to the best of their ability to comply with Commerce's requests for information. *See* Final Results, 66 Fed. Reg. at 48,028. As a result of these findings, the Companies' subject merchandise was assigned the final P.R.C.-wide antidumping duty rate of 47.88%. *See id.* at 48,030 n.1 ("Based on the results of this review the following companies are no longer eligible for separate rates . . . Huarong, and LMC."). The Companies then commenced an action for judgment upon the agency record pursuant to USCIT R. 56.2, arguing that Commerce's decision to apply the P.R.C.-wide antidumping duty margin to their subject merchandise was not supported by substantial evidence or otherwise in accordance with law. The court remanded, instructing Commerce to reevaluate the evidence submitted by the Companies with respect to their entitlement to separate rates, and "revisit . . . its determination that the Companies were to receive the PRC-wide antidumping duty margin." *Huarong I*, slip op. 03–135 at 45.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Furthermore,

"[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

DISCUSSION

I. Assignment of Separate Rates

In *Huarong I*, the court reviewed Commerce's decision to reject the Companies' separate rates evidence and, thus, assign them the P.R.C.-wide antidumping duty rate based on the presumption of state control. Commerce's decision rested on two bases—facts available, and resort to adverse facts available. Use of facts available is warranted where Commerce finds that a respondent has, *inter alia*, withheld or failed to provide the requested information. *See* 19 U.S.C. § 1677e(a)[4]; *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The focus of subsection (a) is respondent's *failure to provide information*.") (emphasis in original).

By contrast, the use of adverse facts available is warranted where Commerce finds that a respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information. . . ." *See* 19 U.S.C. § 1677e(b)[5]; *see also Nippon Steel*, 337 F.3d

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[4] This statute provides:

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadline for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title, the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a).

[5] This statute provides:

If [Commerce] . . . finds that an interested party has failed to cooperate by not acting

at 1381 ("[S]ubsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' " (bracketing in original)). The Court of Appeals for the Federal Circuit stated that "[t]he focus of [1677e(b)] is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information." *Nippon Steel*, 337 F.3d at 1381 (emphasis in original). The Court of Appeals further stated that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Id.* at 1382.

A. Commerce's Use of Facts Available/Adverse Facts Available in Assigning Separate Rates

The court in *Huarong I* first determined that Commerce's use of facts available and adverse facts available was justified, with respect to the Companies' sales data and factors of production, on the grounds that the integrity of the Companies' reported data was compromised "due to the nature of [the Companies'] verification failures, and the inadequacy of [their] cooperation." The court also found that

> [t]his reasoning, however, cannot be the basis for assigning the Companies the PRC-wide antidumping duty margin based on facts available, as it is clear the Companies did provide evidence of their entitlement to separate rates and there is no indication that any necessary information was missing or incomplete. In other words, the findings that justified the use of facts available and a resort to adverse facts available with respect to the Companies' sales data and factors of production, cannot be used to accord similar treatment to issues relating to the Companies' evidence of independence from state control.

Huarong I, slip op. 03–135 at 41–42. With respect to Commerce's resort to adverse facts available, the court stated:

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to the best of its ability to comply with a request for information from [Commerce] . . . , [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination in the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title,

(4) any other information placed on the record.

19 U.S.C. § 1677e(b).

> [T]he record shows that the Companies apparently kept records sufficient to satisfy Commerce of their independence from state control and supplied such records to Commerce in a timely fashion. Because findings with respect to data Commerce found to be "compromised"—i.e., the Companies' sales data and Huarong's factors of production data—are distinct from those related to state control, it is difficult to see how Commerce's determination with respect to the sales and factors of production data can form the basis for the use of adverse facts available with respect to independence from state control.

Huarong I, slip op. 03–135 at 43–44. Upon remand, the court instructed Commerce to "revisit its determination that the Companies were to receive the P.R.C.-wide antidumping duty margin." *Id.* at 45. Pursuant to this directive, Commerce reconsidered its determination with respect to separate rates in the Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), and found that "[s]ince the Department found no specific discrepancies with respect to the separate rates information, we therefore determine that Huarong and LMC are entitled to separate rates." Remand Results at 2. Because no party disputes this finding, the court affirms Commerce's conclusion as to the Companies' entitlement to separate rates.

II. Commerce's Use of Adverse Facts Available in Calculating Separate Rates

Where a party fails to cooperate by not acting to the best of its ability to comply with a request for information from Commerce, 19 U.S.C. § 1677e(b) permits Commerce to

> use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

Id. In *Huarong I*, the court sustained Commerce's use of adverse facts available as to the Companies' sales data, and Huarong's factors of production, since "the record show[ed] that LMC and Huarong did not make the maximum effort to produce the sales records in order to respond to Commerce's questionnaire requests.

Rather, the information contained in the questionnaire responses was inaccurate." *See Huarong I*, slip op. 03–135 at 36. Thus, although the court found unjustified the use of adverse facts available with respect to the separate rates determination, it found that the use of adverse facts available was justified in determining the rates themselves.

In its resort to adverse facts available, however, Commerce had a wide range of sources to look to. For instance, in accordance with 19 U.S.C. § 1677e(b), Commerce could have applied the petition rate, the rate from the final determination in this investigation,[6] the rate from any previous determinations,[7] or any other information placed on the record.[8] Thus, Commerce could have chosen rates ranging from 0.00% to 47.88%. Commerce, however, chose to apply an adverse facts available rate of 139.31% as the appropriate antidumping duty rate for the Companies. This rate, the highest calculated antidumping duty rate from any prior segment of the proceeding, was calculated for another Chinese respondent, Tianjin Machinery Import & Export Corp. ("TMC"), which produced the same bars/wedges covered by the antidumping duty order at issue here. *See* Heavy Forged Hand Tools From the People's Republic of China: Notice of Final Court Decision and Am. Final Results of Antidumping Duty Admin. Revs., 68 Fed. Reg. 37,121, 37,122 (June 23, 2003).

The Companies maintain that the facts in the case do not warrant resort to the highest allowable prior margin, since they "did not act with an intent to deceive or misrepresent any facts. Rather, plaintiffs believed they answered Commerce's questions during the 9th Review correctly and otherwise cooperated." Pls.' Comments on Final Results of Redetermination Pursuant to Remand ("Pls.' Comments") at 3. As the substance of these arguments was considered and rejected in *Huarong I*, they will not be reconsidered here. The Companies further argue that Commerce's corroboration was deficient; and that the adverse facts available rate has no probative value and is aberrational. The court will address these arguments in turn.

1. *The need to corroborate the 139.31% rate*

The Companies argue that Commerce must corroborate the infor-

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[6] The rate in the final determination for this review was 47.88%, the highest prior rate for either of the Companies. *See* Final Results, 66 Fed. Reg. at 48,030.

[7] In the seventh administrative review (1997–1998), for example, Huarong's rate was 1.27% and LMC's rate was 0.00%. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the P.R.C., 64 Fed. Reg. 43,659, 43,671 (ITA Aug. 11, 1999) (final results).

[8] For example, the rate Commerce chose, 139.31%, was the rate for another PRC producer, Tianjin Machinery Import & Export Corp. ("TMC"), in the eighth administrative review. TMC's rate dropped to 0.56% in the following review (1999–2000), and was 0.25% in the most recent review (2000–2001). *See* Final Results, 66 Fed. Reg. at 48,029; *see also* Heavy Forged Hand Tools From the P.R.C., 67 Fed. Reg. 57,789, 57,792 (ITA Sept. 12, 2002).

mation it relied upon in choosing their margins. In deciding upon an antidumping duty margin for an uncooperative respondent, Commerce may rely on "secondary information," and must corroborate that information, to the extent practicable, from independent sources. *See* 19 U.S.C. § 1677e(c). Such secondary information may include, but is not limited to, "published prices lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review." 19 C.F.R. § 351.308 (2004). Here, Commerce claims that, because it selected the Companies' rate based on an actual rate calculated for another P.R.C. company in the immediately preceding review, it did not rely on secondary information, and thus the corroboration requirement does not apply. *See* Remand Results at 4 ("[I]f the Department chooses, as total [adverse facts available], a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin if it was calculated from verified sales and cost data."); *see also Acciai Speciali Terni S.p.A. v. United States*, 25 CIT 245, 265, 142 F. Supp. 2d 969, 990 (2001) ("Since we are relying on verified data for use as adverse facts available for these unattributed sales, corroboration under 776(c) is not necessary.") (citing Stainless Steel Sheet and Strip in Coils From Italy, 64 Fed. Reg. 30,750, 30,760 (ITA June 8, 1999)). Whether or not the rate calculated for a third party constitutes secondary information need not be addressed, because the court is remanding questions relating to the selection of the Companies' rate on other grounds.

Nevertheless, the court finds the rationale underlying the corroboration requirement, as articulated by the Court of Appeals for the Federal Circuit, to be instructive in this case:

> 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 [plaintiff'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. Obviously a higher adverse margin creates a strong 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.

Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (emphasis added). Therefore, under the Federal Circuit's reasoning, Commerce must nonetheless ensure that

the rate chosen "[is] a reasonably accurate estimate of [each company's] actual rate. . . ." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

2. *The adverse facts available rate is aberrational and has no probative value*[9]

The Companies argue that "Commerce made no effort to select a realistic rate"; rather, "Commerce simply selected the highest possible rate." Pls.' Comments at 7. They maintain that the 139.31% rate is aberrational because it "is over 90 percentage points higher than any other rate for bars/wedges." *Id.* at 10 (emphasis in original). They further argue that the 139.31% rate is not probative of their likely actual antidumping duty margins, because there is no evidence to show that their margins would otherwise be so large. The Companies state:

> Commerce says that the probative value comes because there was another exporter during the prior review that received the 139.31 percent margin. But, Commerce fails to address the fact that both Huarong and LMC participated in the 8th Review. Their margins were 28.96 and 29.10 percent, respectively. Commerce fails to explain that while the margin for TMC dropped from the 8th Review to the 9th Review,[10] Huarong's and LMC's should increase by almost 5 times.

Id. at 13 (emphasis in original). They also maintain that "[s]ince the rate was based on a different factory, for different bars, by a different seller, with different input steel, and unverified data, the figure is not realistic." *Id.* at 8.

It is well-settled that in determining the antidumping duty margin for an uncooperative respondent, such as the Companies here, "Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032. Thus, Commerce has "broad, but not unbounded, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found uncooperative." *China Steel Corp. v. United States*, 28 CIT ___ , ___ , 306 F. Supp. 2d 1291,

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[9] The Companies further claim that the rate chosen by Commerce is punitive. As the court is remanding questions relating to the rate selected for other reasons, it need not address this claim. The magnitude of the increase alone, however, (from 47.88% in the final determination to the 139.31% rate at issue here) suggests that Commerce's selection of the 139.31% rate may have been punitive.

[10] TMC's rate dropped from 139.31% in the eighth administrative review to 0.56% in the ninth administrative review, a decline of 138.75%. It is the ninth administrative review that is at issue here.

1311 (2004). In exercising its discretion, however, Commerce cannot select a rate based solely on its interest in inducing foreign exporters to cooperate with Commerce's investigations. "Rather, the rate must have *some relationship* to commercial practices in the particular industry. . . . Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available." *Ta Chen*, 298 F.3d at 1339–40 (emphasis added). To that end, Commerce maintains that it

> examined the 139.31 percent rate and determined that it was relevant for use as an [adverse facts available] separate rate for plaintiffs because it was both "reasonable" and had "some basis in reality." . . . [T]his rate was the final separate rate "calculated for another PRC company, TMC, also in the immediately preceding review, and therefore reflects recent commercial activity by Chinese respondents that export bars/wedges to the United States.

Remand Results at 8. With respect to its contention that the 139.31% rate is relevant and has "some basis in reality," Commerce states,

> Given that Huarong and LMC failed to cooperate in the underlying review, the Department concludes that the dumping margins that would have been calculated for the respondents in the review are likely higher than the dumping margins calculated for Huarong and LMC in the immediately preceding administrative review. . . . Without complete and verifiable information from the respondents, *it is not possible to definitively determine how much higher* [such calculated dumping margins likely would have been]. . . .

Id. at 4 (emphasis added).

In order to satisfy substantial evidence, Commerce must go beyond simply stating that the 139.31% rate is "reasonable" and has "some basis in reality" because of the presumption arising from the failure to cooperate. Commerce must also show how the rate "bear[s] a rational relationship to the *interested party*. . . ." *See Reiner Brach GmbH & Co.KG v. United States*, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1339 (2002) (emphasis added); *see also China Steel Corp.*, 28 CIT at ___ , 306 F. Supp. 2d at 1339–40. Here, the 139.31% rate was calculated in a preceding administrative review for another P.R.C. producer, TMC, and not for the Companies. Thus, Commerce looked to the sales information for TMC in the eighth administrative review even though actual sales information for both Huarong and LMC was available for that same review. *See Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 623–24, 799 F. Supp. 110, 115 (1992) (margin bearing no rational relationship to the respondent invalidated). Indeed, the actual sales information from the Companies'

eighth administrative review shows that their rates were significantly lower than TMC's—Huarong's rate was 28.96%, and LMC's was 29.10%. *See* Heavy Forged Hand Tools From the P.R.C., 65 Fed. Reg. 50,499, 50,500 (ITA Aug. 18, 2000) (am. final results). Finally, even if the rate calculated for the Companies in the ninth administrative review may have been higher than the rate they received in the preceding review, Commerce has given no explanation as to why the rates would likely have increased so dramatically, i.e., by over 100 percentage points. Considering that the rate chosen by Commerce would have resulted in the Companies' respective rates increasing more than five-fold from the eighth administrative review to the ninth, Commerce has failed to show how its chosen rate of 139.31% bears a rational relationship to the actual sales data for the Companies. Moreover, this increase appears to contravene the statutory requirement that Commerce "determine antidumping duty margins as accurately as possible." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994); *see also D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) ("The statutory directive that Commerce use the best information available is intended to serve 'the basic purpose of the statute—determining current margins as accurately as possible.' ") (internal citation omitted). For these reasons, the court agrees with the Companies that the rate selected by Commerce is aberrational and is not probative of what the Companies' actual rate would likely have been had they cooperated with Commerce's investigation, "with some built-in increase intended as a deterrent to non-compliance." *Ta Chen*, 298 F.3d at 1340; *see also Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 847 (2000) (not reported in the Federal Supplement) (noting the court's concern that the chosen antidumping duty margin bear a rational relationship to the respondent's sales); *Reiner Brach*, 26 CIT at ___ , 206 F. Supp. 2d at 1339.

CONCLUSION

Based on the foregoing, the court finds the 139.31% antidumping duty rate selected by Commerce to be both aberrational and lacking in probative value, and not supported by substantial evidence. On remand, Commerce shall revisit the evidence cited for its decision to apply the 139.31% rate and, shall it continue to employ such rate, provide adequate explanations for this decision based on the evidence. In particular, Commerce shall explain its reasons for not choosing a previous antidumping duty rate for the Companies themselves. Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 04–124

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

ROYAL THAI GOVERNMENT, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Consol. Court No. 02–00026

JUDGMENT ORDER

Upon consideration of the Final Results of Redetermination on Remand (Sept. 15, 2004) ("Redetermination Results") filed by the U.S. Department of Commerce ("Commerce") pursuant to the Court's decision in *Royal Thai Government v. United States*, Slip Op. 04–91 (July 27, 2004), and all other papers filed herein, it is hereby

ORDERED that Commerce's findings in the Redetermination Results that "the total estimated net countervailing subsidy rate [is] *de minimis*" and "[w]ith this change . . . no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand" are sustained.

SO ORDERED.

Slip Op. 04–125

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

TIANJIN MACHINERY IMPORT & EXPORT CORP., LIAONING MACHINERY IMPORT & EXPORT COMPANY, SHANDONG HUARONG GENERAL GROUP CORP., AND SHANDONG MACHINERY IMPORT & EXPORT CORP., Plaintiffs, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Defendant-Intervenor.

Court No. 02–00637

[Court sustains *Final Results*; Commerce's fifteen-day liquidation policy not in accordance with law.]

Dated: October 4, 2004

Hume & Associates PC (*Robert T. Hume*) for Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Barbara J. Tsai*, Of Counsel, Office

of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant United States.

Wiley Rein & Fielding LLP (*Eileen P. Bradner*) for Defendant-Intervenor Ames True Temper.

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiffs Tianjin Machinery Import & Export Corp. ("TMC") and Shandong Huarong General Group Corp. ("Huarong") (collectively "Plaintiffs")[1] challenge the final determination of the United States Department of Commerce ("Commerce") in the tenth administrative review of antidumping duty orders covering heavy forged hand tools in *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*, 67 Fed. Reg. 57789 (Sept. 12, 2002) ("*Final Results*").[2] The *Final Results* covers the period of review from February 1, 2000 through January 31, 2001. Pursuant to USCIT Rule 56.2, Plaintiffs move for judgment on the agency record.

For the reasons that follow, the Court sustains the *Final Results*, but finds that Commerce's new policy of issuing liquidation instructions within fifteen days of publication of the final results of review is not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and (i).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. It is only if the Court concludes that "Congress either had no intent on the

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[1] Plaintiffs Liaoning Machinery Import & Export Company and Shandong Machinery Import & Export Corp. were removed from the case pursuant to Plaintiffs' Second Amended Complaint filed on November 8, 2002. Second Am. Compl. at 1.

[2] After Commerce issued its *Final Results*, Plaintiffs and Defendant-Intervenor Ames True Temper filed ministerial error allegations with Commerce. *See* Hand Tools From the People's Republic of China – Clerical Errors In Final Determination, Proprietary Appendix to Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Conf. App.") at Ex. 5 (Sept. 16, 2002). On February 6, 2003, Commerce responded to the parties' allegations by issuing its Final Results of Redetermination Pursuant to Court Remand, *see id.* at Ex. 4, which Plaintiffs also challenge. Because the relevant portions of the Final Results of Redetermination Pursuant to Court Remand merely reiterate Commerce's stance in the *Final Results*, the Court will refer to both determinations collectively as the "*Final Results*."

matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

II. *DISCUSSION*

A. Commerce's Decision to Apply Adverse Facts Available to the Packing Factor of Production for TMC's Hammers/Sledges Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

For the cost portion of TMC's verification, Commerce preselected one of TMC's three hammer factories. *See* Defendant's Response in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s Br.") at 6. When Commerce arrived at the factory, Commerce discovered that it had closed approximately ten months before verification. *See* Verification Report (TMC's Hammer Factory), Defendant's Appendix to Defendant's Response in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s App.") at Ex. 7 (July 24, 2002). As a result, there were no packing materials present that Commerce could weigh to verify the packing factors reported in the review. *Id.* at 8. Moreover, there were no records available documenting the weights of the packing materials. *See id.* Commerce concluded that adverse inferences were warranted, and therefore applied the highest reported packing rate as adverse facts available ("AFA") for all of TMC's hammers, regardless of whether they were made by the closed factory or not. *See* Issues and Decision Memorandum for the Administrative Reviews of Heavy Forged Hand Tools from the People's Republic of China – February 1, 2000 through January 31, 2001, Def.'s App. at Ex. 11 at Cmt. 22 (Sept. 3, 2002) ("Issues and Decision Memo"); Memorandum of Points and Authorities in Support of Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Br.") at 9.

The asserted basis for Commerce's decision to apply AFA is that "TMC was responsible for demonstrating the reliability of its own data, [and] its failure to do so supports [the] conclusion that [TMC]

did not act to the best of its ability." Issues and Decision Memo at Cmt. 22. Commerce assumes that "when a respondent prepares its response, it [will] maintain the records which were used to compile its data." *Id.* Furthermore, Commerce reasons that because TMC maintained records for a variety of reported factors of production despite the closure of its factory, "[i]t is . . . reasonable to assume that [TMC] would have maintained records for all reported [factors of production,]" including packing factors. *Id.* Thus, Commerce concluded that TMC's failure either to maintain packing records or to provide actual packing materials for weighing constituted a failure to act to the best of its ability, warranting application of AFA. *See id.*

Before Commerce is allowed to apply AFA, Commerce must find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]" 19 U.S.C. § 1677e(b). "The statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). For Commerce to conclude that a respondent failed to cooperate to the best of its ability and to draw an adverse inference under 19 U.S.C. § 1677e(b), Commerce need only make two showings.

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83 (internal citation omitted); *see also China Steel Corp. v. United States*, 28 CIT ___, ___, 306 F. Supp. 2d 1291, 1304 (2004).

The first requirement is easily satisfied. As the Court has held, "[t]here can . . . be no doubt that a reasonable and responsible producer, seeking an administrative review, will have accurate records of its factors of production." *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT ___, ___, Slip Op. 03–135 at 36 (Oct. 22, 2003).

With regard to the second requirement, it is undisputed that TMC did not provide either packing materials for weighing[3] or records

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[3] TMC's failure to provide packing materials for weighing was due, at least in part, to the

documenting packing weights, even though Commerce expressly notified TMC in advance that packing materials and documentation would be required for verification. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002). TMC claims that it has never maintained records of packing weights, but rather, has always provided and verified packing data by weighing actual inventory. Plaintiffs' Reply Brief ("Pls.' Reply Br.") at 8. Thus, TMC asserts, short of weighing inventory, there is no way to verify packing weights. *See id*.

TMC's argument is unpersuasive. A respondent's failure to maintain required records is not an adequate defense to a determination by Commerce that the respondent failed to act to the best of its ability. The Court of Appeals for the Federal Circuit has clearly articulated that "the [best of ability] standard does not condone. . . inadequate record keeping." *Nippon Steel*, 337 F.3d at 1382. It assumes that respondents are familiar with the rules and regulations that apply, and requires respondents to "take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable [respondent] should anticipate being called upon to produce[.]" *Id*.

TMC has not adduced any evidence to suggest that maintaining packing records would be impossible, or even impracticable; rather, TMC merely asserts that its methodology does not involve maintaining packing records. TMC's assertion supports the subjective showing by Commerce that TMC's failure to respond fully is the result of its own lack of cooperation in failing to keep and maintain all required records. As such, the Court concludes that the second requirement for applying AFA is met.

Accordingly, the Court finds Commerce's conclusion that TMC failed to cooperate by not acting to the best of its ability, and its consequential decision to apply AFA to TMC's packing factor of production, to be supported by substantial evidence and otherwise in accordance with law.

B. Commerce's Decision to Apply Adverse Facts Available for Wooden Pallets to All of TMC's Hammers Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

TMC challenges Commerce's decision to apply AFA for wooden pal-

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fact that the factory selected for verification was closed and no longer had any inventory present. However, TMC conceded at oral argument that it could have furnished packing materials from another factory to be weighed as a substitute. *See* Oral Argument Tr. at 47 ("Could we have given packing material for a second factory . . . ? That is a possibility and, to my knowledge, that . . . option was never discussed."). In light of this admission, the Court is reluctant to conclude that TMC put forth its maximum effort in providing Commerce with materials for weighing. It is unnecessary for the Court to reach this issue, however, since TMC's failure to maintain records of packing weights is dispositive.

lets to all of TMC's hammers, regardless of whether they were made by the factory that failed verification. During the review, TMC reported that one of its factories did not use wooden pallets at all, while other factories only used wooden pallets for some hammers. *See* Heavy Forged Hand Tools from China – TMC Additional Response to the Department's December 6, 2001, Supplemental Questionnaire, Pls.' Conf. App. at Ex. 10 (Feb. 6, 2002). Moreover, TMC's sales documents (specifically, the bills of lading) indicate whether the hammers were placed on wooden pallets, metal pallets, or no pallets. *See* Sample Sales Traces TMC, *id.* at Ex. 9. Thus, TMC objects to Commerce's application of AFA to all hammers sold, regardless of whether they were shipped on pallets. *See* Pls.' Br. at 31–32. TMC asserts that even if Commerce was justified in applying AFA to its packing factor of production, Commerce erred in applying AFA to pallets for all of its hammer factories. *See id.* at 31.

TMC's argument attempts to distinguish pallets from the packing factor of production. Commerce's verification methodology, however, does not permit this distinction to be drawn. In fact, Commerce's methodology *includes* pallets in the packing factor of production, and does not contemplate using information from sales documents to verify packing factors. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002); Def.'s Br. at 34. As a result, TMC's argument hinges on the invalidity of Commerce's verification methodology.

The Court reviews Commerce's verification procedures for an abuse of discretion. *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1383–84 (Fed. Cir. 2001) (citing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997)). While "all information relied upon in making . . . a final determination in a review" is required to be verified under 19 U.S.C. § 1677m(i)(1), the statute does not delineate the precise means for conducting verification. 19 U.S.C. § 1677m(i)(1) (1994). Rather, "[t]he decision to select a particular [verification] methodology rests solely within Commerce's sound discretion." *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987). Moreover, in selecting its verification procedures, Commerce is given "wide latitude," *see Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1474 (Fed. Cir. 1994), and is owed "considerable deference" by the Court. *See Daewoo Electronics Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

In the instant case, Commerce's decision not to use information contained in TMC's sales documents to verify TMC's packing factors is reasonable. The sales and cost portions of verification are conceptually distinct and are conducted for separate purposes. The sales portion is undertaken to verify sales information (such as the type of merchandise shipped, the port of loading, and shipper expenses) by examining sample bills of lading. The cost portion is conducted to

verify factor of production information (such as packing data) by visiting a preselected factory and either weighing actual packing materials or reviewing records of packing weights. Commerce's methodology does not contemplate using incidental information from sample sales documents to verify factor of production data. The Court finds nothing on the record to suggest that Commerce abused its discretion in this regard.

TMC's claim that pallets are distinct from the packing factor of production is also without merit. Commerce determined in advance that pallets would be verified as a packing factor of production, and expressly notified TMC of this fact prior to verification. *See* Verification Agenda Outline for TMC, Def.'s App. at Ex. 3 at 10 (Apr. 9, 2002). Moreover, since pallets are used to package the merchandise at issue, such a methodology is reasonable. "When Commerce applies a reasonable standard to verify materials submitted and the verification is supported by such relevant evidence as a reasonable mind might accept, the Court will not impose its own standard, superceding that of Commerce." *Hercules*, 11 CIT at 726, 673 F. Supp. at 469 (internal quotation omitted).

Accordingly, the Court holds that Commerce's decision to apply AFA to pallets is supported by substantial evidence and otherwise in accordance with law.

C. Commerce's Application of Adverse Facts Available in Calculating Huarong's Labor Rate Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

Huarong argues that Commerce improperly resorted to AFA in calculating its labor rate because Commerce did not demonstrate that Huarong failed to act to the best of its ability during the review. Pls.' Br. at 18. Huarong claims that it complied with Commerce's requests for information, and attributes the disparities observed during verification to errors on the part of Commerce in using the methodology supplied by Huarong to calculate labor production figures. *Id.* at 20. Specifically, Huarong contends that Commerce should have divided certain production figures by the number of team members. *Id.* at 25. In addition, Huarong asserts that Commerce did not provide it with an adequate opportunity to correct deficiencies in its submissions. *See id.* at 26.

Commerce contends that Huarong did not cooperate to the best of its ability in providing information regarding labor production rates. Def.'s Br. at 13–14. According to Commerce, Huarong's labor production computations proved incorrect, despite supplemental requests for information, and did not survive verification. *Id.* at 19. In addition, Huarong deemed erroneous and subsequently retracted the explanation for the discrepancy that it originally provided to Commerce. *Id.* at 22. Huarong ultimately attributed the discrepancy to Commerce's faulty application of the provided methodology, and sug-

gested a modification in the calculations. *Id.* at 20. Commerce contends that Huarong's belated effort at correction is improper, and further notes that the labor production rates proved inaccurate even using Huarong's post-verification methodology. *Id.* at 19–20.

The Court first examines whether Huarong, through its questionnaire responses, "create[d] an accurate record and provide[d] Commerce with the information requested[.]" *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1333 (2002). Huarong's initial response to Commerce's request for information was inadequate, and Commerce provided Huarong with a supplemental questionnaire to clarify ambiguities in the information. *See* Huarong's Section D Response to Department's Supplemental Questionnaire, Def.'s App. at Ex. 2 (Jan. 15, 2002). Specifically, Huarong was asked to submit worksheets showing the calculation of its reported labor caps. *Id.* at 12. It responded with a formula multiplying the number of workers by number of hours worked and divided by number of pieces produced. *See id.* ("Based on years of experience, Huarong has worked out labor ratings which are close to the production records verified by the Department in prior reviews. For heat treatment, as an example, there are six (6) workers in one (1) shift, one (1) skilled and five (5) unskilled. Each shift processes 3430 pieces each work day, which is eight (8) hours."). The methodology set forth in Huarong's supplemental questionnaire response makes no mention of team production or division by number of team members. Thus, based on the information in the supplemental questionnaire response for the tenth review, Commerce did not have notice or reason to believe that it should divide labor figures by number of team members.

Huarong counters that Commerce verified its labor production figures in the ninth review, and therefore should have known to divide certain production figures by number of team members. Pls.' Br. at 25. Huarong, however, did not reference ninth review methodology in its responses to Commerce's questionnaires, and did not alert Commerce prior to verification that the calculations should include division by team members. In addition, as Commerce notes, it need only rely on information provided in a given review to arrive at its decision. *See Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) (observing that each administrative review is a separate exercise of administrative procedure opening the possibility of different conclusions based on different facts accumulated). Commerce indicated in the *Preliminary Results* that it intended to rely exclusively on the formula provided by Huarong in the current review, noting that because past computations produced discrepancies and were not verified, it would not blindly incorporate past methods into the present calculations. *See 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 Fed. Reg. 10123, 10126 (Mar. 6, 2002) ("*Preliminary Results*"). Thus, the Court finds that Commerce did not err in failing to divide certain production figures by number of team members.

Commerce subsequently conducted verification at Huarong's headquarters from May 27 through May 31, 2002. *See* Verification Report of Huarong, Def.'s App. at Ex. 8 (July 24, 2002). At verification, Commerce was unable to re-create or explain the method by which Huarong arrived at its labor production figures. Issues and Decision Memo at Cmt. 18. Commerce then afforded Huarong the opportunity to explain the discrepancy in production figures, which company officials attributed to an inflated estimate of labor time. *See* Verification Report of Huarong, Def.'s App. at Ex. 8 at 21–22 (July 24, 2002) ("Company officials explained that the difference between the labor in the production record and their reported figures was due to the fact that the workers did not necessarily work an entire 8 hours per shift. They stated that the use of an 8 hour shift would inflate the labor time for processes where laborers worked fewer hours. For example, after using Huarong's reported formula, it shows that it took [***] and [***] minutes to paint each piece for CONNUMU 5. However, company officials stated that it is unlikely that it took this much labor time to dip a CB or WB into paint. We asked officials to provide the correct amount of time for each shift. However, they could not provide an estimation of the time workers worked on each process for each shift.").

Two months later, Huarong retracted the explanation originally offered by its officials, replacing it with the contention that Commerce "erred . . . when it failed to include the number of workers in the denominator as well as the numerator for some of the[ ] calculations." Administrative Case Brief of Respondents, Def.'s App. at Ex. 9 at 23 (July 31, 2002). Commerce determined that this post-verification amendment to Huarong's reported methodology was inappropriate. Issues and Decision Memo at Cmt. 18. Accordingly, Commerce declined to accept the correction and recalculate Huarong's labor production figures. *See id*.

Agencies generally enjoy broad discretion in fashioning rules of administrative procedure, including the authority to establish and enforce time limits on the submission of data by interested parties. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544–45 (1978). In accordance with this principle, Commerce has promulgated regulations setting forth deadlines for submitting factual information. Specifically, 19 C.F.R. § 351.301(b)(2) states that "factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed[.]" 19 C.F.R. § 351.301(b)(2). Moreover, 19 U.S.C.

§ 1677m(d) provides that "[i]f [a] person submits further information in response to [a] deficiency and . . . such response is not submitted within the applicable time limits, then [Commerce] may . . . disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). Both the statute and the regulation underscore the breadth of Commerce's discretion in fashioning the temporal parameters of administrative proceedings, and force parties to submit information within a specified time frame in the interests of fairness and efficiency. *See Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1040, 981 F. Supp. 630, 653 (1997) ("Commerce's policy of setting time limits on the submission of factual information is reasonable because Commerce clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information.") (internal quotation omitted).

The correction in this case was submitted two months after verification and approximately six weeks before Commerce issued the *Final Results*. As such, the correction was tendered at the last minute, and its acceptance or rejection was well within Commerce's discretion. *See* 19 U.S.C. § 1677m(d). Commerce did not abuse its discretion by disregarding Huarong's correction and declining to modify its calculations after so much time had elapsed since verification. *Id.*

Huarong suggests that the errors in its data were obvious and that Commerce should have alerted company officials of the incorrect calculations immediately. *See* Pls.' Reply Br. at 17–19. Huarong implies that it could have cooperated in a better and more timely fashion had Commerce informed it of readily observable and remediable errors in its data. *See id.* Commerce, however, is under no obligation to request or accept substantial new factual information from a respondent after discovering that a response cannot be corroborated during verification. *See Reiner Brach*, 26 CIT at ___, 206 F. Supp. 2d at 1334; *Bergerac, N.C. v. United States*, 24 CIT 525, 532, 102 F. Supp. 2d 497, 503–04 (2000). Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response. *See Acciai Speciali Terni S.P.A. v. United States*, 25 CIT 245, 260–61, 142 F. Supp. 2d 969, 986 (2001) (citing *Certain Cut-to-Length Carbon Steel Plate from Sweden*, 62 Fed. Reg. 18396, 18401 (Apr. 15, 1997)); *see also* Verification Agenda Outline for Huarong, Def.'s App. at Ex. 4 at 2 (Apr. 9, 2002) ("[V]erification is not intended to be an opportunity for submitting new factual information. New information will be accepted at verification only when i) the need for that information was not previously evident, ii) the information makes minor corrections to the information already on the record, or iii) the information corroborates, supports, or clarifies information already on the record."). While Commerce is required to allow respondents to correct clerical errors discovered late in the administrative process, clerical errors are dis-

tinguished from substantive errors and do not encompass methodological modifications.[4] *See Torrington Co. v. United States*, 22 CIT 136, 137 (1998).[5]

The errors in Huarong's formula were neither self-evident nor the result of a clerical mistake. Rather, the errors were substantive in nature, and could be corrected only by modifying Huarong's original methodology. Commerce therefore was not required to alert Huarong of the errors or to accept substantive corrections post-verification.

Once Commerce identifies a discrepancy in the data submitted by a respondent, it must also find that the respondent failed to cooperate to the best of its ability for AFA to be warranted. *See* 19 U.S.C. § 1677e(b); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). Commerce is not required to show intentional noncooperation to apply AFA; it need only demonstrate that the respondent did not put forth its maximum effort possible. *See Nippon Steel*, 337 F.3d at 1382–83 ("The ordinary meaning of 'best' means 'one's maximum effort,' as in 'do your best.' . . . While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element."). Although the standard does not demand perfection, it censures inattentiveness and carelessness. *Id.* at 1382. To draw an adverse inference, Commerce must show that the party did not behave in the manner of a reasonable and responsible respondent, and that it failed to put forth its maximum effort in investigating and obtaining the requested information. *Id.*

Commerce properly applied AFA in this case because Huarong had the ability to timely provide accurate and comprehensive labor production data and simply failed to do so. Commerce, in accordance with 19 U.S.C. § 1677m(d), alerted Huarong of deficiencies in its data by issuing a supplemental questionnaire requesting additional information. A reasonable respondent acting to the best of its ability would have ensured that the information set forth in its supplemental questionnaire response was comprehensive. In contrast, the information provided by Huarong in its supplemental questionnaire

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[4] Clerical errors result from inaccurate copying or duplication, or other similar unintentional errors. *See World Finer Foods, Inc. v. United States*, 24 CIT 541, 549–50 (2000).

[5] *See also Maui Pineapple Co. v. United States*, 27 CIT ____, ____, 264 F. Supp. 2d 1244, 1261 (2003) (citing *Certain Fresh Cut Flowers From Colombia*, 61 Fed. Reg. 42833, 42834 (Aug. 19, 1996), where Commerce stated that it will "accept corrections of clerical errors under the following conditions: (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the responses; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification").

response was incomplete and failed to mention methodological modifications for certain production processes. A reasonable respondent also would have promptly provided Commerce with a corrected formula upon Commerce's post-verification request. In contrast, Huarong waited two full months to provide Commerce with a revised formula incorporating a substantial methodological modification. In both of these respects, then, Huarong did not put forth its maximum effort; thus, Commerce's decision to apply AFA is warranted.

In drawing an adverse inference, Commerce must clearly articulate the manner in which a party failed to cooperate to the best of its ability, and why the missing information is significant to the progress of the proceeding. *See Borden, Inc. v. United States*, 22 CIT 233, 264, 4 F. Supp. 2d 1221, 1246 (1998). Commerce provided an adequate explanation of its decision to apply AFA in this case, citing its reliance on the methodology provided by Huarong, the verification failure, and Huarong's belated effort at correcting the requested data. *See* Issues and Decision Memo at Cmt. 18.

Accordingly, Commerce's decision to apply AFA in calculating Huarong's labor production rate is supported by substantial evidence and otherwise in accordance with law.

D. Because TMC Failed to Apply for a Scope Ruling Regarding Cast Iron Picks, TMC Did Not Exhaust Its Administrative Remedies.

Commerce decided that TMC failed to cooperate to the best of its ability by neglecting to report its U.S. sales of three cast iron picks. *See* Issues and Decision Memo at Cmt. 21. Specifically, Commerce determined that cast iron picks fall within the scope of the antidumping duty orders covering heavy forged hand tools, based on both the language of the orders and a 2001 scope ruling at TMC's behest with regard to Pulaski axes, which excluded production method from scope determinations. See Final Scope Ruling – Antidumping Duty Orders on Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China – Request by Tianjin Machinery I/E Corp. for a Ruling on Pulaski Tools, Public Appendix to Motion of Plaintiffs Tianjin Machinery Import & Export Corp. and Shandong Huarong General Group Corp. for Judgment on the Agency Record ("Pls.' Pub. App.") at Ex. 14 at 7 (Mar. 8, 2001) ("Pulaski Tools Final Scope Ruling"). As a result, Commerce applied AFA to derive the margin for TMC's unreported cast iron pick sales. Issues and Decision Memo at Cmt. 21. TMC counters that Commerce erred in applying AFA because the antidumping duty orders discuss forging as an exclusive, rather than illustrative, production method. *See* Pls.' Reply Br. at 21.

Under 19 C.F.R. § 351.225(b), a determination regarding the scope of an antidumping duty order can be initiated by Commerce or, under 19 C.F.R. § 351.225(c)(1), by the application of an interested

party. Thus, if a question arises as to whether certain merchandise is encompassed by an antidumping duty order, an interested party may request that Commerce issue a scope ruling to clarify the order's application to the merchandise in question.

In this case, it is unclear whether cast iron picks fall within the scope of the antidumping duty orders. The Pulaski Tools Final Scope Ruling referenced by both parties is ambiguous in its analysis of the antidumping duty orders, and it provides ambivalent guidance regarding the orders' applicability to cast iron picks. Moreover, given Commerce's exclusion of production method from scope determinations in the Pulaski Tools Final Scope Ruling, TMC should have hesitated to conclude that cast iron picks fall outside the scope of the antidumping duty orders because they are cast rather than forged. *See* Pulaski Tools Final Scope Ruling at 7. Instead, TMC should have requested a scope determination from Commerce to resolve the issue. It had an opportunity to do so when Commerce issued the *Preliminary Results* stating its intent to consider cast iron picks as falling within the purview of the antidumping duty orders. *See Preliminary Results*, 67 Fed. Reg. at 10123. However, TMC never applied for a scope ruling.[6]

Whenever warranted, the Court is obligated to require the exhaustion of administrative remedies before an issue may be properly addressed here. 28 U.S.C. § 2637(d). "The detailed scope determination procedures that Commerce has provided constitute precisely the kind of administrative remedy that must be exhausted before a party may litigate the validity of the administrative action." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998).

Accordingly, because TMC failed to exhaust its administrative remedies, the Court declines to exercise jurisdiction to address whether Commerce properly applied AFA as a result of TMC's failure to report its cast iron pick sales.

E. Commerce's Decision to Use Indian Import Data for the Period Covering February through December 2000 as the Surrogate Value for the Handles on TMC's Hammers and Axes Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

During the period of review, TMC exported hammers and axes with wooden and fiberglass handles. Pls.' Br. at 32. In accordance with 19 U.S.C. § 1677b(c)(1), Commerce used Indian import data for the period covering February through December 2000 as the surrogate value for the handles.[7] *Id.* at 33; Def.'s Br. at 5. However, Com-

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[6] *See* Oral Argument Tr. at 30 ("[Y]ou're sitting at a verification and they now say you should have asked before for a scope ruling. And certainly, the issue had – it was not on our radar screen, to use that oft-used phrase. We – it never occurred to us. . . .").

[7] 19 U.S.C. § 1677b(c)(1) provides:

merce previously determined in a new shipper review for heavy forged hand tools that the same Indian import data for the period covering February through July 2000 was aberrational. *See Heavy Forged Hand Tools From the People's Republic of China: Final Results of New Shipper Administrative Review*, 66 Fed. Reg. 54503 (Oct. 29, 2001).

TMC asserts that Commerce should have also rejected as aberrational the February through July 2000 Indian import data used to value the handles on TMC's hammers and axes. Pls.' Br. at 34. At a minimum, TMC contends that Commerce should have explained how it determined that this data was aberrational in the new shipper review, but not in the present review. *Id.* at 33–34. TMC further claims that Commerce failed to evaluate the Indian data against the U.S. benchmark, and that had it done so, it would have realized the Indian data was aberrational. *Id.* at 32–33. TMC also points to Commerce's obligation under 19 U.S.C. § 1677b(c)(1) to select the "best available information" when valuing factors of production, arguing that Commerce did not show how the Indian import data, rather than Indonesian import data, was in fact the best available information. *See* Pls.' Reply Br. at 10–11.

The Court readily disposes of TMC's first line of argument by applying the doctrine of exhaustion of administrative remedies. As noted above, "[t]he doctrine . . . provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting McKart v. United States, 395 U.S. 185, 193 (1969)) (internal quotation omitted). The exhaustion doctrine is "particularly pertinent" where, as here, "the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise." *McKart*, 395 U.S. at 194.

TMC did not raise its contention regarding differential treatment of the February through July 2000 Indian import data in its administrative case brief. *See* Administrative Case Brief of Respondents, Def.'s App. at Ex. 9 at 13–17 (July 31, 2002). Had TMC identified this issue during the administrative review, Commerce could have

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If--

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined . . . , [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. . . . [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

19 U.S.C. § 1677b(c)(1).

addressed it in the Issues and Decision Memo. By not raising its "argument with reasonable clarity and avail[ing Commerce] with an opportunity to address it[,]" *Timken Co. v. United States*, 25 CIT 939, 958, 166 F. Supp. 2d 608, 628 (2001), TMC failed to exhaust its administrative remedies. Therefore, the Court declines to exercise jurisdiction over this issue.

The Court turns next to TMC's claim that Commerce failed to evaluate the Indian data against the U.S. benchmark. Contrary to TMC's contention, Commerce did make such a comparison. Indeed, Commerce considered but ultimately rejected Indian import data for January 2001, explaining that "[t]he Department has excluded from the Indian import data the month of January 2001, which has a monthly value that is high enough *in relation to the U.S. benchmark* and the rest of the Indian data to be considered aberrational." Issues and Decision Memo at Cmt. 7 (emphasis added). Accordingly, the Court finds TMC's assertion to be unfounded.

TMC's argument that Commerce did not show how the Indian import data, rather than Indonesian import data, was the "best available information" is also unavailing. Commerce values the factors of production in a nonmarket economy country "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1). "While the statute does not define 'best available information,' it grants to Commerce broad discretion to determine the best available information in a reasonable manner on a case-by-case basis." *Anshan Iron & Steel Co. v. United States*, 27 CIT ___ , ___ , Slip Op. 03–83 at 7 (July 16, 2003) (quoting *Timken*, 25 CIT at 944, 166 F. Supp. 2d at 616) (internal quotation omitted). In fact, "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way." *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Manufacturers v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999).

The record shows that Commerce's decision to use Indian data was well within Commerce's broad discretion. Commerce determined that the average unit value of 289.06 rupees per kilogram (US $6.38 per kilogram) for Indian imports during the eleven-month period was sufficiently viable to be used as a surrogate value. Response of Defendant-Intervenor to Motion by Plaintiffs for Judgment on the Agency Record ("Def.-Intvr.'s Br.") at 25; *see also* Pls.' Br. at 34; Def.'s Br. at 40. While the Indian value was higher than the 2000 benchmark Indonesian unit value proffered by TMC, the Indian value was substantially lower than the 1999 Indonesian unit price of $11.168 per kilogram. Def.-Intvr.'s Br. at 25. Given the fluctuations in market prices and the wide variations in benchmark prices, the Court

finds that the Indian data was a reasonable and appropriate surrogate value.

Accordingly, Commerce's use of Indian import data for the period covering February through December 2000 as the surrogate value for handles is supported by substantial evidence and otherwise in accordance with law.

F. Commerce's Fifteen-Day Liquidation Policy Is Not in Accordance with Law.

Shortly before issuing the *Final Results*, Commerce posted a notice on its website announcing its implementation of a new liquidation policy. The notice states that Commerce intends to issue liquidation instructions to Customs "within 15 days of publication of the final results of review in the *Federal Register* or any amendments thereto." Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews, Pls.' Pub. App. at Ex. 13 (Aug. 9, 2002).

Plaintiffs challenge this new liquidation policy on the grounds that it conflicts with the sixty-day period set forth in USCIT Rule 3(a)(2) for perfecting an appeal. Pls.' Br. at 35. Plaintiffs further contend that the new policy will result in a flood of preliminary injunction motions before the Court by parties seeking to stay liquidation and preserve the Court's jurisdiction. *See id*.

Commerce posits that the new policy is in accordance with law because nothing in Rule 3(a)(2) prohibits a party from filing its summons and complaint together within fifteen days after publication of the final results. Def.'s Br. at 42–43. Commerce also asserts that in light of the Federal Circuit's determination in *International Trading Co. v. United States* that entries not liquidated within six months of the publication of final results are deemed liquidated at the cash deposit rate, it would be administratively unwise for Commerce to wait sixty days before sending liquidation instructions to Customs. *Id*. at 43.

Rule 3(a)(2) implements the statutory directive of 19 U.S.C. § 1516a(2)(A) that an interested party may challenge an administrative determination by filing a summons within thirty days of the date of publication of the final results in the Federal Register, and by subsequently filing a complaint within thirty days thereafter. 19 U.S.C. § 1516a(2)(A). On its face, then, § 1516a(2)(A) allows a plaintiff to *wait* thirty days before filing its summons, and to *wait* an additional thirty days before filing its complaint. The fact that a party *could* file both its summons and complaint within fifteen days is immaterial. Because Commerce's fifteen-day liquidation policy directly contravenes the time frame established by § 1516a(2)(A) for filing a summons and a complaint, the Court finds that Commerce's new

policy is not in accordance with law.[8]

Moreover, the Court is concerned that Commerce's new policy will compel parties, in every instance, to seek a preliminary injunction within fifteen days to prevent liquidation and preserve the Court's jurisdiction, regardless of whether the party ultimately decides to challenge any aspects of the final determination. As a result, in addition to imposing financial burdens on litigants in the form of increased attorney's fees and court costs, the policy will also impose a substantial burden on the Court by inundating it with preliminary injunction motions.

Although Commerce contends that it would be administratively unwise to wait sixty days before issuing liquidation instructions, the rationale offered by Commerce at oral argument to support this assertion is wholly insufficient. Commerce's entire argument is as follows:

> [I]t does take a while for Commerce to issue the instructions, for those instructions to make it to the ports at Customs, and then for the individual Port Directors to actually liquidate those entries. It's a time-consuming process that takes double-checking and double-checking to make sure that there are no inadvertent liquidations.

Oral Argument Tr. at 72. Commerce's argument is conveniently vague and entirely fails to address exactly how "time-consuming" the liquidation process is. As a result, the Court finds that Commerce has not adequately explained how it would be administratively unwise to wait sixty days, instead of fifteen, before issuing liquidation instructions.

Accordingly, the Court holds that Commerce's fifteen-day liquidation policy is not in accordance with law.

III. *CONCLUSION*

For the aforementioned reasons, the Court sustains the *Final Results*, but finds that Commerce's fifteen-day liquidation policy is not in accordance with law. Judgment will be entered accordingly.

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[8] Commerce argues that Plaintiffs do not have standing because they waited eighteen days (instead of fifteen) to file their summons and complaint. *See* Def.'s Br. at 45. The Court disagrees. 19 U.S.C. § 1516a(2)(A) permits parties to wait thirty days before filing their summons, and an additional thirty days before filing their complaint. However, because of Commerce's new liquidation policy, Plaintiffs felt compelled to file their summons and complaint within eighteen days. Plaintiffs were injured to the extent that Commerce's new policy required them to file their summons and complaint prematurely; the fact that Plaintiffs waited for eighteen days instead of fifteen is beside the point. Thus, Plaintiffs do have standing to challenge Commerce's new liquidation policy.

Slip Op. 04–126

BEFORE: GREGORY W. CARMAN

FORMER EMPLOYEES OF GETRONICS WANG CO., LLC Plaintiffs, v. ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 03–00529

JUDGMENT ORDER

Upon consideration of the United States Department of Labor's determination in *Getronics Wang Company, LLC, Valley View, OH; Notice of Revised Determination on Remand*, 69 Fed. Reg. 20,643 (April 16, 2004), issued in response to this Court's order of March 31, 2004, *Former Employees of Getronics Wang Co., LLC v. Chao*, No. 03–00529 (Ct. Int'l Trade March 31, 2004) (order granting voluntary remand), Plaintiffs' letter to Court dated September 27, 2004, advising this Court that Plaintiffs accepted Department of Labor's remand determination and settlement documents have been signed, and all other pertinent papers, it is hereby

ORDERED that the Department of Labor's determination is affirmed; and it is further

ORDERED that all issues before the Court having been resolved, this case is dismissed.