Decisions of the United States
Court of International Trade

Slip Op. 05–126

HEBEI METALS & MINERALS IMPORT & EXPORT CORPORATION AND HEBEI WUXIN METALS & MINERALS TRADING CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Restani, Chief Judge

Court No. 03–00442

OPINION

[Results of Commerce's Second Remand Redetermination Regarding Surrogate Value for Coal in Non-Market Economy Anti-Dumping Duty Margin Calculation Sustained.]

Dated: September 22, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Bruce M. Mitchell*, *Mark E. Pardo*, and *Paul G. Figueroa*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*), *Philip Curtin*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

RESTANI, Chief Judge:

This litigation began with Plaintiffs Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. (referred to collectively hereinafter as "Hebei") challenging three surrogate values used by the United States Department of Commerce ("Commerce" or "the Department") in calculating the antidumping duty margin for lawn and garden steel fence posts from the People's Republic of China ("PRC"). *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, Slip Op. 04–88 (Ct. Int'l Trade July 19, 2004) [hereinafter *Hebei Metals I*]. After the court's review of Commerce's first remand determination, only one surrogate value remained at issue: Commerce's use of Indian import statistics data, rather than the domestic data advocated by Hebei, to value coal used in drying the subject fence posts' coating. *See Hebei*

Metals & Minerals Imp. & Exp. Corp. v. United States, 366 F. Supp. 2d 1264 (Ct. Int'l Trade 2005) [hereinafter *Hebei Metals II*]. Because neither party could cite record evidence to make the selection of a surrogate coal value more than a speculative choice, *Hebei Metals II* ordered Commerce to re-open the record in order to obtain information that would support a surrogate coal value and to adhere to its conditional preference for domestic surrogate data in reaching its decision. *Id.*, 366 F. Supp. 2d at 1276–77.[1]

The results of Commerce's inquiry are now before the court. *See Final Results of Redetermination Pursuant to Remand, Hebei Metals & Minerals Imp. & Exp. Corp. and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States* (Dep't Commerce July 20, 2005) [hereinafter "*Second Remand Determination*"]. In the *Second Remand Determination*, Commerce used Indian domestic price data to value coal instead of the Indian import statistics it used previously. Commerce tried unsuccessfully to obtain information from Hebei regarding the type of coal used in the production of the subject fence posts and found that Hebei failed to cooperate by not acting to the best of its ability in responding to its requests for information. *Second Remand Determ.* at 17. On this basis and pursuant to 19 U.S.C. § 1677e(b) (2000), Commerce applied adverse facts available ("AFA") in selecting from the Indian domestic price data on the record. *Id.* at 17. Hebei challenges the application of AFA, arguing—for the first time in this litigation—that information pertaining to the coal factor of production constitutes "very minor data" that it should not be expected to have. *See* Hebei Comments on Second Remand at 9. Hebei also seeks Rule 11 sanctions against the Government on the basis of alleged harassment and unnecessary delay. *See* Fed. R. Civ. P. 11. Because Commerce properly applied AFA and did not violate Rule 11, the *Second Remand Determination* is affirmed.

BACKGROUND

Commerce prepared the *Second Remand Determination* in response to *Hebei Metals II*, which provided the following remand instructions:

> On remand, Commerce shall re-open the record to add evidence. Commerce may add any relevant evidence, but it must either:
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> (1) seek evidence of the type of coal used by Hebei in its pro-

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[1] The court assumes familiarity with *Hebei Metals I* and *Hebei Metals II*. *Hebei Metals I* reviewed the margin calculations made in *Final Determination of Sales at Less Than Fair Value: Lawn and Garden Fence Posts from the People's Republic of China*, 68 Fed. Reg. 20,373 (Dep't Commerce April 25, 2003) [hereinafter *Final Determination*], and explained in *Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Lawn and Garden Steel Fence Posts from the People's Republic of China* (Dep't Commerce April 18, 2003), P.R. 158, Pls.' App., Ex. 2.

> duction process, and non-aberrational price data that best relates to this coal type, if the record does not already contain such data; or, if that is deemed impractical at this stage,
>
> (2) obtain evidence of the type or types of coal normally used for drying steel fence posts in China or India and non-aberrational price data that best relates to such coal type(s), if the record does not already contain such data.
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> In either scenario, Commerce shall adhere to its conditional preference for domestic surrogate data or Commerce shall state that it is deviating from this practice and provide a rational explanation for doing so.
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> If Commerce again decides to use the "others" provision of coal in the Indian Import Statistics, it must (1) provide record evidence that this provision at least roughly corresponds to the type of coal used to dry steel fence posts; (2) determine whether the type of coal used by Hebei or a reasonably comparable type is reflected in the TERI domestic data, and (3) provide a reasonable explanation as to why the "others" import data more accurately reflects the costs incurred in producing the subject merchandise. In any event, Commerce may not support the use of import data in the surrogate coal value on the basis of tax-exclusivity if there is no record evidence to indicate that the Indian coal market prices are distorted by taxes and/or duties. Further, the other reasons thus far offered for Commerce's choice of import coal data have been found insufficient and will not sustain the choice.

366 F. Supp. 2d at 1276–77.

Twenty days after *Hebei Metals II* was issued, Commerce sent a supplemental questionnaire to Hebei, asking it to provide (1) "complete and detailed information regarding the type and grade of coal used by Hebei during the POI [period of investigation] to dry steel fence posts;" (2) "an industry expert chemical analysis demonstrating the useful heat value (UHV) of the type and grade of coal used by Hebei during the POI;" and (3) "worksheets that illustrate how the costs reported for coal consumption during the POI on the audited financial statements reconcile to the general ledger and trial balance, materials sub-ledgers, production records, and inventory records." *Letter from Commerce to Grunfeld, Desiderio* (Mar. 30, 2005), P.R. Doc. 43, Def.'s App., Tab 1, at 1–2 [hereinafter *First Supplemental Questionnaire*]. Commerce also invited Hebei to submit additional information regarding (4) "evidence of the type or types of coal normally used for drying steel fence posts in the PRC or India; (5) "non-aberrational price data that best relates to the type or types of coal used by Hebei during the POI;" or (6) "information that is contemporaneous with the POI." *Id.*, Def.'s App., Tab 1, at 2.

Hebei responded on April 8, 2005. *See Letter from Grunfeld, Desiderio to Commerce* (April 8, 2005), P.R. Doc. 43, Def.'s App., Tab 2 [hereinafter *First Supplemental Response*]. In answering Commerce's inquiries regarding the type of coal it used, Hebei responded that all its reported coal consumption was consumed by a subcontractor [hereinafter "Subcontractor Y"] to "one of the companies [hereinafter "Company X"] that produced the subject merchandise for Hebei." *Id.*, Def.'s App., Tab 2, at 1. Hebei explained that Company X

> no longer uses [Subcontractor Y] as a subcontractor and has been unable to obtain any information from [Subcontractor Y] detailing the specific grade and type of coal it used three years ago for drying fence posts. Hebei and [Company X] never kept such records in their ordinary course of business.

Id., Def.'s App., Tab 2, at 1. Hebei also stated that it was unable to provide an industry expert chemical analysis of the coal used by Subcontractor Y "because there is no existing sample of this coal. In its ordinary course of business, Hebei does not keep samples of coal or records regarding coal used by its subcontractors." *Id.*, Def.'s App., Tab 2, at 1.

Hebei followed its *First Supplemental Response* by submitting domestic Indian coal prices for 2001–2002 published by the Tata Energy Research Institute's Energy Data Directory & Yearbook (the "2001–2002 TERI data"), which updated the 2000–2001 TERI data already on the record. *Letter from Grunfeld, Desiderio to Commerce* (April 15, 2005), P.R. Doc. 43, Def.'s App., Tab 3 [hereinafter *Second Supplemental Response*]. In this submission, Hebei stated that

> in light of the Court's recognition that the record does not contain precise information regarding the grade of coal used by Hebei during the POI, it is more accurate to calculate a surrogate value for coal using the average prices for all grades and types of coal contained in this TERI data.

Id., Def.'s App., Tab 3, at 2.

On April 22, 2005, the Government moved for a 60-day extension of time in which to file the remand results because "Hebei did not provide the information Commerce requested of it." Def.'s Mot. for Time (Apr. 22, 2005). The motion was granted, allowing Commerce to file the remand results on or before July 8, 2005. Order (May 16, 2005).

In the meantime, Commerce asked Hebei for more information. Commerce asked Hebei to explain in detail the steps it took to contact its subcontractors in order to obtain information about the coal used and to provide all available correspondence between these parties. *Letter from Commerce to Grunfeld, Desiderio* (Apr. 26, 2005), P.R. Doc. 43, Def.'s App., Tab 4, at 1–2 [hereinafter *Second Supple-*

mental Questionnaire]. Hebei responded merely that it contacted Company X and Subcontractor Y "by telephone and asked for the requested information. There is no written correspondence related to this information request." *Letter from Grunfeld, Desiderio to Commerce* (May 2, 2005) P.R. Doc. 43, Def.'s App. Tab 5, at 1 [hereinafter *Third Supplemental Response*].

In response to Commerce's inquiry as to why it was not necessary for Hebei or its subcontractor to know the coal quality specifications, Hebei stated that

> the coal consumption reported by Hebei in the investigation was used by [Subcontractor Y], an unaffiliated subcontractor whose task was to apply a coating to the fence posts. The coal was merely used for heat to help dry this coating. Hebei or [Company X] were only concerned that the fence posts they received from [Subcontractor Y] had been properly coated. They had no concern with the method [Subcontractor Y] used to accomplish this task. It is both unreasonable and irrational to assume that Hebie [sic] would take an interest in the grade, type or UHV value of the coal used by its subcontractor in its drying room.
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> Presumably, [Subcontractor Y] used the least expensive coal available since drying a coating on fence posts does not require the generation of an excessive amount of heat or energy.

Third Supp. Response, Def.'s App., Tab 5, at 1–2. For the same reason, Hebei also explained that neither it nor Company X had any records pertaining to coal grade or type. *Id.*, Def.'s App., Tab 5, at 2.

Responding to a question about the identity of the subcontractor that Company X "currently use[s] to provide coal in the production of fence posts," Hebei stated that Company X

> never used a subcontractor to "provide" coal. [Subcontractor Y's] job was to apply a coating to the fence posts, and it was [Subcontractor Y's] own choice to assist the drying of this coating by using coal heat. Other subcontractors accomplished this task using electricity, which is why [Subcontractor Y] was the only subcontractor to report coal consumption.

Id., Def.'s App., Tab 5, at 2.

When asked to about the standard type or types of coal used in the Indian or PRC markets, Hebei repeated its position that coal was merely used in the drying process and added that "there is no industry standard for the type or grade of coal that should be used to dry a coating on fence posts." *Id.*, Def.'s App., Tab 5, at 3.

Finally, Commerce asked Hebei to explain its position that the domestic TERI data provide a better surrogate value than the import statistics used previously. Hebei responded that the TERI data conformed to the preference for domestic data and referenced information it was submitting from Canadian and American web sites to show that the drying of coatings is a low-heat operation requiring only cheaper coal rather than more expensive imported coal. *Id.*, Def.'s App., Tab 5, at 4.

Commerce obtained a partial extension of time on July 7, 2005, which allowed filing of the remand results on or before July 21, 2005. *See* Order (July 7, 2005). While its motion for an extension of time was pending and before Hebei had filed its opposition to that motion, Commerce sent Hebei a fourth and final questionnaire, seeking additional information about the 2001–2002 TERI data. *Letter from Commerce to Grundfeld, Desiderio* (June 27, 2005), P.R. Doc. 43, Def.'s App., Tab 6. Hebei replied to Commerce's TERI questions on July 5, 2005. *Letter from Grunfeld, Desiderio to Commerce* (July 5, 2005), P.R. Doc. 43, Def.'s App., Tab 7 [hereinafter *Fourth Supplemental Response*].

Commerce issued a preliminary remand determination on July 14, 2005, in which it used the 2001–2002 TERI domestic data but applied AFA. Hebei filed comments in opposition to the proposed application of AFA.

Commerce maintained its use of AFA in the final remand results, which were filed with the court on July 21, 2005. In the *Second Remand Determination*, Commerce found that the 2001–2002 TERI data is exclusive of taxes and duties and is the best data source for a surrogate coal value. *See Second Remand Determ.* at 2 (citing *Tata Energy Research Institute's Energy Data Directory & Yearbook for 2001/2002* [hereinafter TERI Data]). Commerce applied AFA on the basis of what it found to be Hebei's "insufficient and/or confusing submissions" and in order to "ensure that Hebei 'would not benefit from its lack of cooperation.' " *Second Remand Determ.* at 18. In this vein, Commerce believed

> [i]t would not be appropriate for the Department to reward Hebei by using the surrogate value suggested by Hebei, the TERI steam coal averages of grades A, B, C and D, when it provided no information on the record to demonstrate the appropriateness of this recommended surrogate value. Thus, in applying AFA, the Department finds it most appropriate to use the simple average of the highest coal grade, coal grade A, in the 2001/2002 TERI Data as the surrogate value for coal.

Id. at 18–19. The revised surrogate coal valuation resulted in a slightly decreased weighted-average antidumping duty margin,

which fell to 6.49 percent from the 6.52 percent margin calculated in the *First Remand Determination*.[2] *Second Remand Determ.* at 22.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000). Commerce's antidumping duty calculation shall be sustained if it is supported by substantial evidence and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B).

DISCUSSION

I. COMMERCE PROPERLY APPLIED ADVERSE FACTS AVAILABLE IN SELECTING A SURROGATE COAL VALUE

When Commerce receives insufficient information from an interested party to make a determination, 19 U.S.C. § 1677e(a) authorizes Commerce to fill in the factual gaps with "facts otherwise available." If Commerce goes a step further and finds that the 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) provides that Commerce "may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available." The statute does not define "the best of its ability" expressly, but the Federal Circuit has elaborated on what the statute requires of Commerce:

> Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information.
>
> . . . .
>
> To conclude that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer 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

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[2] The initial weighted-average antidumping duty margin calculated in the *Final Determination* was 6.60 percent.

> 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. An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. "Inadequate inquiries" may suffice. The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003) (citation omitted).

With regard to the first, objective showing, Commerce found that "a reasonable respondent would have made some effort to document the type of coal utilized in its production of fence posts." *Second Remand Determ.* at 20–21. Commerce supported this finding by noting that coal is among the factors of production used to produce the subject merchandise, and therefore is something about which Hebei may be expected to keep accurate records. *Id.* at 20. As Commerce observes, *id.*, this court has stated that a "reasonable and responsible producer . . . will have accurate records of its factors of production." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F. Supp. 2d 1294, 1299 (Ct. Int'l Trade 2004) (quoting *Shandong Huarong Gen. Group Corp. v. United States*, Slip Op. 03–135 at 36 (Ct. Int'l Trade Oct. 22, 2003)). The court agrees with Commerce.

Turning to the subjective showing, Commerce concluded that "Hebei failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information regarding the type of coal used in its production of subject merchandise." *Second Remand Determ.* at 17. Commerce found Hebei was unresponsive to "questions concerning the type of coal used in fence post production," and cited the following as indications of Hebei's unresponsiveness:

> Hebei claimed that it telephoned its subcontractor to gather this information, but provided no documentation to support its claim. Hebei provided information from web-sites describing fence post production in Canada and the United States, but that information is not probative of fence post production in the PRC or India that uses coal as a heat source for drying. Hebei speculates that a fence post producer using coal would purchase the cheapest coal possible, arguing that fence post pro-

> duction requires a low UHV, but has provided no supporting documentation to support this presumption. The Department notes that it is also possible to presume that producer would purchase high-quality, high UHV coal, allowing the producer to use less coal over a longer period than it would with the cheap, low UHV coal. In addition, Hebei brought this litigation against the Department and claimed that the TERI Data coal prices on the record of this proceeding were more representative of the production experience of the PRC producer than the import prices the Department had used in the *Final Determination*. It is not unreasonable to expect that having made this claim, Hebei should be able to answer the Department's requests with regard to the grade and/or type of coal used to produce fence posts by the respondent, by a Chinese producer, or by an Indian producer.

Id. at 17–18.

Hebei argues that Commerce "fails to cite any specific instance where Hebei did not act to the best of its ability," Hebei Comments on Second Remand at 7, but Hebei does not address the fact that it did not document or detail its claimed attempts to obtain the requested information from Company X and Subcontractor Y by telephone.

Despite litigating this issue vigorously, Hebei now asserts that

> Commerce is seeking very minor data from an unaffiliated subcontractor three years after the fact. As explained repeatedly to Commerce, neither Hebei nor its supplier would have a reason to keep records about the type of coal an unaffiliated subcontractor was using to dry fence posts because this information was not relevant to their business operations.

Hebei Comments on Second Remand at 9. During the investigation and earlier in this litigation, Hebei was not so dismissive of the choice of a surrogate coal value. During the investigation, Hebei asserted that "steam coal" should be valued on the basis of prices "for non-coking steam coal." *Hebei Investigation First Surrogate Data Submission at* 6. In moving for judgment on the agency record, Hebei advocated the use of steam coal values listed in the 2000/2001 TERI data and asked the court to remand "with instructions for Commerce to adopt a surrogate value for coal using the domestic Indian prices on record." Hebei Mot. or J. on Agency R. at 10. After the *First Remand Determination*, Hebei asserted that "[t]he record plainly shows that Hebei does not import its coal." Hebei Comments on First Remand at 5. In sum, Hebei has repeatedly indicated that, to some extent, it knew the type of coal it did or did not use, as the Government argues in its brief. *See* Def.'s Response to Hebei Comments on Second Remand at 5. If, as Hebei now asserts, it had no reason to know "whether the subcontractor was using electricity or

coal to dry the coating or what type of coal might have been used," Hebei Comments on Second Remand at 9, one wonders how Hebei could have known that its subcontractor used domestically-sourced coal of a type that would have made it appropriate to use Indian domestic non-coking steam coal prices in computing a surrogate value.

The inconsistencies in Hebei's litigation positions provide a reminder why the Federal Circuit and this court have recognized that a reasonable and responsible producer will keep accurate records of factors of production. *See Nippon Steel*, 337 F.3d at 1382 ("While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."); *Tianjin Mach. Imp. & Exp. Corp.*, 353 F. Supp. 2d at 1299; *Shandong Huarong*, Slip Op. 03–135 at 36. In *Shandong Huarong*, this court emphasized that a producer who requests a review does so under the expectation that it has acted as a reasonable and responsible producer in keeping records of its factors of production: "There can also be no doubt that a reasonable and responsible producer, seeking an administrative review, will have accurate records of its factors of production." *Id.*, Slip Op. 03–135 at 36.

Similarly, Hebei chose to challenge Commerce's choice of a surrogate coal value and thereby subjected itself to the expectation that it have records of this factor of production. Until this second remand proceeding, Hebei had not stated that the coal not was a significant factor of production used to make the subject fence posts, and it had not admitted that it has no idea of what kind of coal was used to produce its fence posts.

Hebei attempts to avoid the application of adverse facts available on the basis that the information requested was outside of its control. *See* Hebei Comments on Second Remand at 9–10. Hebei cites *Usinor Sacilor v. United States*, 18 CIT 1155, 1162, 872 F. Supp. 1000, 1006–07 (1994), and *World Finer Foods, Inc. v. United States*, 24 CIT 541, 543–46 (2000), for what Hebei characterizes as the "well established" proposition that adverse facts cannot be applied where a producer is unable to obtain information outside its control. Hebei Comments on Second Remand at 9–10. These case, however, do not recognize such a broad safe harbor from the imposition of adverse facts.

First of all, the relevance of *Usinor Sacilor* is limited by the fact that it reviewed Commerce's application of the now-repealed best information available ("BIA") provisions of 19 U.S.C. § 1677e(c) (1988, repealed 1994). *See* 18 CIT at 1161, 872 F. Supp. at 1006. The case is distinguishable on other grounds as well. The respondent in that case had reached an agreement with Commerce to provide limited reporting of downstream sales. *Id.*, 18 CIT at 1159, 872 F. Supp. at 1005. Although the respondent was unable "to trace the source of the steel processed by its secondary steel centers," it "substantially met the requirements of the original and modified questionnaire re-

quests. [Respondent] supplied more data than was required under the limited reporting agreement and provided well over 99% of the data demanded by the original questionnaire." *Id.*, 18 CIT at 1162, 872 F. Supp. at 1006. The court observed that "the deficiencies in [respondent's] data were a result of factors outside [respondent's] control," but it was the circumstances of the case bearing on reasonable conduct—rather than a simple finding that the respondent did not keep certain records—that made application of severely adverse BIA improper: "[Respondent's] subsidiaries did not maintain the sourcing data. Therefore, any tracing would have been done manually. Due to the time limitations and the large number of invoices involved (180,000), this would have been unreasonable." *Id.*, 18 CIT at 1162, 872 F. Supp. at 1007 (citation omitted).

In contrast, Hebei was not confronted with such an extreme logistical challenge. Indeed, Hebei asserts that only one subcontractor was involved in using coal to dry the fence posts during the period of investigation. Moreover, unlike the respondent in *Usinor Sacilor* who initially informed Commerce that outside factors prevented it from reporting accurate information on downstream sales, *id.*, 18 CIT at 1159, 872 F. Supp. at 1005, Hebei remained silent about potential limitations on its ability to provide data on coal—one of its factors of production—until the second remand proceedings. Prior to this point, Hebei argued repeatedly for a domestic Indian steam coal surrogate value, giving the impression that it had some basis for that position beyond a bare distinction between domestic and import data. *See* Pls.' Mot. for J. on Agency R., at 10; Hebei Comments on First Remand Determ. at 5.

World Finer Foods also fails to support Hebei's position. In that case, an Italian respondent had left the U.S. market and was in a dire financial condition that severely limited its ability to respond to Commerce's questionnaire during an administrative review. 24 CIT at 542. Nevertheless, the Italian respondent offered to supply any limited information Commerce might find helpful. *Id.* at 544. Commerce did not respond to the Italian respondent's offer and applied adverse facts available to it. By failing to offer any guidance to the Italian respondent, Commerce failed its duty under 19 U.S.C. § 1677m(c)(2) to consider the respondent's "ability to respond with some specificity and to modify its requirements, if necessary." 24 CIT at 544. Commerce's failure to attempt to cooperate with the Italian respondent—which had little incentive to cooperate as a result of its absence from the market—left the American importer "to bear the full impact of increased duties." *Id.* at 545. Presented with an offer to cooperate to the best of the Italian respondent's diminished abilities, it was Commerce's failure to discharge its burden under 19 U.S.C. § 1677m(c)(2) that made imposition of adverse facts improper. *See id.* at 544 (discussing Commerce's decision not to apply first-tier BIA in a similar situation in *Certain Fresh Cut Flowers from Colombia*,

59 Fed. Reg. 15,159, 15,174 (Dep't Commerce Mar. 31, 1994) (final results)). *World Finer Foods*, then, does not support Hebei's position that adverse facts available are inappropriate merely because it has not kept records regarding a factor of production used by a subcontractor.

Here, in contrast, Commerce fulfilled its duty under 19 U.S.C. § 1677m(d), when it provided Hebei with an opportunity to remedy deficiencies in its *First Supplemental Response*. *See Second Supp. Quest.*, Def.'s App., Tab 4. Among its many questions seeking some indication of the coal used by Hebei or in India and the PRC in general, Commerce asked Hebei to explain in detail the steps it took to contact its subcontractors in order to obtain information about the coal used and to provide all available correspondence between these parties. Hebei responded merely that it contacted its subcontractors "by telephone and asked for the requested information. There is no written correspondence related to this information request." *Third Supp. Response*, Def.'s App., Tab 5, at 1. In response to Commerce's inquiryas to why it was not necessary for Hebei or its subcontractor to know the coal quality specifications, Hebei stated that "[i]t is both unreasonable and irrational to assume that Hebie [sic] would take an interest in the grade, type or UHV value of the coal used by its subcontractor in its drying room." *Id.*, Def.'s App. Tab 5, at 1. These responses do not constitute the "maximum effort" required by Commerce's requests for information. *Cf. Shandong Huarong*, Slip Op. 03–135 at 36. Having continuously pursued this issue, Hebei should have been ready to support its claims with solid evidence. Moreover, at this point it is not clear that Commerce's choice is truly *adverse*. At most, it is a choice of limited partial adverse available facts, and no party to the litigation is in a position to say it is not the most accurate information.

II. RULE 11 SANCTIONS ARE NOT WARRANTED

Hebei argues it has been subjected to harassment and unnecessary delay "in violation of Rule 11(b)(1) and (2)." Hebei Comments to Remand Determination at 11 (citing Fed. R. Civ. P. 11(b)(1), (2)). Hebei bases its harassment allegation on Commerce's use of AFA, which it considers to be meritless and completely ignorant of the record and existing law. As discussed above, however, Commerce's use of AFA not only has some merit, it is proper under the statute as interpreted by the courts.

With regard to its allegation of unnecessary delay, Hebei argues that Commerce dragged out the remand proceedings for almost four months even though Hebei provided the surrogate data it eventually used—the 2001–2002 TERI data—on April 15, 2005. The court disagrees. Instead of needlessly prolonging the remand proceedings, Commerce was dutifully following the court's instructions by attempting to find information that would support a surrogate coal

value, just as it was fulfilling its statutory duty to allow Hebei the opportunity to remedy a deficient submission. *See* 19 U.S.C. § 1677m.

CONCLUSION

Substantial evidence supports Commerce's selection of Indian domestic data for the surrogate coal value and its application of adverse facts available therein. Accordingly, the Commerce's *Second Remand Determination* is sustained. Hebei's request for Rule 11 sanctions against Government counsel and/or Commerce is denied.

Slip Op. 05–127

TIANJIN MACHINERY IMPORT & EXPORT CORP., Plaintiff, v. **UNITED STATES,** Defendant, and **AMES TRUE TEMPER,** Defendent-Intervenor.

Before: Timothy C. Stanceu, Judge

Court No. 03–00732

OPINION

[Affirming redetermination excluding cast picks from scope of antidumping duty order]

Dated: September 22, 2005

Hume & Associates PC (*Robert T. Hume* and *Ayesha A. Khanna*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, *Stephen C. Tosini*, Trial Attorney, U.S. Department of Justice; *Ada P. Bosque*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendant.

Wiley Rein & Feilding LLP (*Eileen P. Bradner* and *Timothy C. Brightbill*) for defendant-intervenor.

Stanceu, Judge: Defendant-intervenor Ames True Temper ("Ames") challenges a redetermination of the U.S. Department of Commerce ("Commerce" or the "Department"), issued in response to a remand order of this court, in which redetermination Commerce concluded that certain hand tools identified as "cast picks" are not within the scope of a 1991 antidumping duty order applying to picks and mattocks (the "*Pick/Mattock Order*").[1] In the redetermination

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[1] Picks and mattocks are digging tools. A mattock is similar to a pick but has one broad end and one pointed end; a pick has two pointed ends. *See Heavy Forged Handtools From*

before the court, Commerce reversed its earlier ruling that cast picks were within the scope of the *Pick/Mattock Order*, which is one of four antidumping duty orders on heavy forged hand tools ("HFHTs") from the People's Republic of China ("China" or the "PRC"). Although acknowledging that cast picks are not "forged," Ames argues that Commerce nevertheless should have ruled that cast picks fall within the scope of the *Pick/Mattock Order* and urges this court to remand the challenged redetermination to Commerce for a second reconsideration. The court finds no merit in defendant-intervenor's argument and affirms Commerce's redetermination excluding cast picks from the scope of the *Pick/Mattock Order*.

I. BACKGROUND

Commerce issued antidumping orders on each of four classes of hand tools in 1991, including the class consisting of picks and mattocks. Common language defining the scope of the investigations applied to all four of the orders. *See Antidumping Duty Orders for Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China*, 56 Fed. Reg. 6,622 (Feb. 19, 1991) ("*HFHT Orders*"). On April 25, 2003, plaintiff Tianjin Machinery Import & Export Corporation ("Tianjin") requested a scope ruling from Commerce pursuant to regulations codified at 19 C.F.R. § 351.225(c) (2003). *See Scope Ruling Request on Cast Picks Submitted on Behalf of Tianjin Machinery Import & Export Corporation* at 1 (Apr. 25, 2003) ("*Tianjin Scope Ruling Request*") (*Pl.'s Mot. for J. on the Agency R.*, Ex. 2). In its scope ruling request, plaintiff argued that Commerce should determine cast picks to be outside the scope of the *Pick/Mattock Order*. *See id.* at 2.

Commerce's scope ruling, issued on September 22, 2003, rejected Tianjin's arguments and concluded that cast picks were within the scope of the *Pick/Mattock Order*. Commerce relied on the product description "in the petition, the initial investigation, and the determinations of [Commerce] and the [U.S. International Trade Commission]." *Memorandum from Thomas Futtner, Acting Office Director, Office of AD/CVD Enforcement IV, to Holly A. Kuga, Acting Deputy Assistant Secretary, Group II, Import Administration* at 9 (Sept. 22, 2003) ("*Tianjin Scope Ruling*") (*Pl.'s Mot. for J. on the Agency R.*, Ex. 3). Reasoning that the scope language in the HFHT Orders was illustrative and not exclusionary with regard to method of production, Commerce concluded that a product need not be forged to be considered a heavy forged hand tool within the scope of the *HFHT Orders*:

> [T]he scope of the orders notes that HFHTs are manufactured through a hot forge operation, but it does not state that this is

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the People's Republic of China, USITC Pub. No. 2357, Inv. No. 731–TA–457 (Final), at A–3 (Feb. 1991), *available at* 1991 ITC LEXIS 78, at *96–*97.

> the only operation used to make HFHTs or the only process covered by the scope of the orders. Moreover, nothing in the record of this case suggests that the Department had a reason to limit the scope of this proceeding to a single production type, such as forging.

Id. at 11 (emphasis omitted).

Plaintiff Tianjin filed a summons and complaint in this court on October 8 and 17, 2003, respectively, challenging the *Tianjin Scope Ruling* in this proceeding and contending that because its imported picks are hand tools that are cast, not forged, these picks should be found to be outside the scope of the *Pick/Mattock Order*. On February 2, 2004, plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.2.

In response to plaintiff's motion, defendant United States moved for and obtained from this court an order for a voluntary remand. Defendant's motion sought a voluntary remand so that Commerce could reconsider the *Tianjin Scope Ruling* in view of the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) ("*Duferco*"). Plaintiff Tianjin consented to that motion, and defendant-intervenor Ames did not oppose it. On April 7, 2004, the court granted defendant's unopposed motion for a voluntary remand.

Commerce filed its redetermination pursuant to the court's remand on July 20, 2004, in which the Department reversed the determination set forth as the *Tianjin Scope Ruling* and concluded that the cast picks at issue do not fall within the scope of the *Pick/Mattock Order*. *See Results of Redetermination Pursuant to Court Remand for Tianjin Machinery Import & Export Corporation v. United States and Ames True Temper* at 1 (July 20, 2004) ("*Redetermination*"). In the *Redetermination*, Commerce interpreted the scope of the *HFHT Orders* to exclude the cast picks because they are not forged. Commerce, relying on *Duferco*, reasoned that because "the language of the scope is clear, the Department cannot interpret the order in a manner that impermissibly modifies it." *Id*. at 5. Defendant-intervenor Ames, successor in interest to Woodings-Verona Tool Works, Inc. ("Woodings-Verona"), the petitioner in the antidumping investigation, now challenges the *Redetermination*, urging this court to order another remand so that Commerce may reconsider its decision to exclude cast picks from the *Pick/Mattock Order*. The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000).

II. STANDARD OF REVIEW

The court must affirm a determination concerning the scope of an antidumping order by Commerce if that determination is supported by substantial evidence on the record and is otherwise in accordance

with law. *See* 19 U.S.C. §§ 1516a(b)(1)(B)(i), 1516a(a)(2)(A)(ii), 1516a(a)(2)(B)(vi) (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

III. DISCUSSION

This case presents the issue of whether the *Redetermination*, in which Commerce concluded that the scope language of the *HFHT Orders* excludes cast picks, is supported by substantial evidence on the record and is otherwise in accordance with law. For the reasons discussed below, the court holds that Commerce, in the *Redetermination*, correctly interpreted the scope language in determining that the picks at issue are excluded and that the findings of fact necessary for that conclusion are supported by substantial evidence on the record.

With respect to the evidentiary support on the record, defendant-intervenor does not challenge Commerce's critical finding of fact that the picks at issue in the scope determination are cast and not forged. Nor does Ames challenge the factual finding by Commerce that "[t]he evidence on the record of this scope inquiry indicates that hot forging and casting operations are different production processes."[2] *Redetermination* at 4. Instead, Ames takes issue with Commerce's legal construction of the scope language in the *HFHT Orders* and Commerce's application of its regulations on scope determinations. Ames contends that Commerce, pursuant to those regulations, should not have construed the scope language to exclude hand tools made by processes other than hot forging. In support of this contention, Ames argues that the scope should not be interpreted to exclude cast tools because the scope language expressly includes "tampers," a type of hand tool that Ames maintains "is not produced through a hot-forge method," asserting that it and its predecessor have produced tampers for years using exclusively a casting method. *See Comments of Defendant-Intervenor Ames True Temper upon Defendant United States' Final Results of Redetermination Pursuant to Court Remand* at 3 (Aug. 19, 2004) ("*Comments of Defendant-Intervenor on Final Redetermination*"). Further, Ames argues that Commerce should have examined the documents from the underlying antidumping investigation, including the petition and the final determination by the U.S. International Trade Commission, for guid-

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[2] Commerce characterizes as undisputed by Ames the evidence provided by plaintiff that contrasts a casting process with a forging process. According to this evidence, casting is distinct from forging in that during the casting process, metal is heated to a molten state, poured into a mold, and allowed to harden into a solid state. The casting process causes changes to certain physical properties of the metal. During the forging process, however, the metal retains its initial physical properties as it is heated only to increase malleability for the forging process. *See Redetermination* at 4.

ance in interpreting the scope language. "Had Commerce conducted such an examination, it would have quickly found that Commerce's initial scope determination to include cast picks in the order on picks and mattocks was proper and legally supported, and that Commerce's *Redetermination* was contrary to its . . . regulatory duties[ ] and legal precedent." *Id.* at 10. Ames argues that Commerce, pursuant to its regulations, should have considered prior scope rulings in which Commerce interpreted the *HFHT Orders* in the context of other hand tools. According to Ames, these prior scope rulings support a conclusion that the scope language in the *HFHT Orders* does not confine the scope of the investigations to hand tools produced by a forging operation.

The various arguments offered by defendant-intervenor fall short in attempting to explain how Commerce's construction of the scope language in the *HFHT Orders* is not in accordance with law. Nor do these arguments establish that the determination to exclude cast picks from the scope of the *Pick/Mattock Order*, which resulted from application of that construction to the facts as found by Commerce, is unsupported by substantial evidence on the record.

In addressing the issue of whether the *Pick/Mattock Order* includes cast picks, the *Redetermination* begins its analysis by interpreting the scope language in the *HFHT Orders*. The *HFHT Orders* define the scope of the antidumping investigation for the four classes of subject hand tools as follows:

> The products covered by these investigations are *HFHTs* comprising the following class or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg. (3.33 pounds) ("hammers/sledges"); (2) bars over 18 inches in length, track tools and wedges ("bars/wedges"); (3) picks and mattocks ("picks/mattocks"); and (4) axes, adzes and similar hewing tools ("axes/adzes").
>
> *HFHTs* include heads for drilling hammers, sledges, axes, mauls, picks and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including wrecking bars, digging bars and tampers; and steel woodsplitting wedges. *HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size.* Depending on the product, finishing operations may include shot blasting, grinding, polishing and painting, and the insertion of handles for handled products. . . . Specifically excluded from these investigations are hammers and sledges with heads 1.5 kg. (3.33 pounds) in weight and under, hoes and rakes, and bars 18 inches in length and under.

HFHT Orders, 56 Fed. Reg. at 6,622–23 (emphasis added).

As directed by the Court of Appeals in *Duferco*, Commerce must consult the final scope language as the primary source in making a scope ruling because "Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Duferco*, 296 F.3d at 1,096. In *Duferco*, the Court of Appeals, drawing from its previous precedents, expressed the fundamental principle that "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Id.* at 1,089. The Court explained that resort to sources of information other than the final scope language, such as the petition and determinations made during the investigation, "may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself." *Id.* at 1,097. The Court of Appeals also established a general rule "grant[ing] significant deference to Commerce's own interpretation of [scope] orders." *See id.* at 1,094–95 (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)).

The scope language at issue in this case, in both of the pertinent paragraphs quoted above, consistently identifies the merchandise subject to investigation as "forged" hand tools. The scope language refers repeatedly to "HFHTs." *See HFHT Orders*, 56 Fed. Reg. at 6,622–23. The abbreviation "HFHTs," as used throughout the *HFHT Orders*, refers to "heavy forged hand tools." *Id.* at 6,622. The scope language imparts further clarity to the point by stating unambiguously that "HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size." *Id.* Moreover, the scope language in the *HFHT Orders* makes no reference to any hand tool that is not identified as an "HFHT," *i.e.*, as a "forged" hand tool, and does not refer to any production of a hand tool by casting or by any manufacturing process that is distinct from a forging process.

Further, Commerce recognized in the *Redetermination* that construing the *Pick/Mattock Order* to include cast picks would be an attempt to interpret that order "in a manner that impermissibly modifies it." *Redermination* at 5. Commerce is not permitted to " 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Duferco*, 296 F.3d at 1095 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)) (internal quotation marks omitted).

The court finds that Commerce's construction of the scope language to include only forged hand tools is consistent with the plain meaning of that language, interpreted as a whole. Commerce's deci-

sion to exclude from the scope of the *Pick/Mattock Order* the subject picks, which are cast rather than forged, therefore is based on a sound and reasonable construction of the scope language. In its findings of fact that the picks at issue are cast and that casting and forging are different methods of production, the *Redetermination* is supported by substantial, and undisputed, evidence. For these reasons, the court must sustain Commerce's construction of the scope language in the *HFHT Orders* and in particular Commerce's conclusion, as stated in its *Redetermination*, that the scope language in the *HFHT Orders* does not include, and may not reasonably be interpreted to include, cast picks.

Defendant-intervenor's arguments to the effect that the scope language in the *HFHT Orders* is not limited to forged hand tools rely principally on the specific reference therein to "tampers." Ames refers to the term "tamper" as "a piece of steel sheet" attached to a "metal handle ring and support webbing" in its discussion of potential methods of production of tampers.[3] *Comments of Defendant-Intervenor Ames True Temper upon Defendant United States' Draft Redetermination Results Pursuant to Court Remand* at 3 n.6 (July 16, 2004) ("*Comments of Defendant-Intervenor on Draft Redetermination*"). Ames asserts that tampers are not produced through a hot forge operation and that "[i]t is a well-known industry fact that tampers are produced through . . . a casting method." *Id.* at 3; *see Comments of Defendant-Intervenor on Final Redetermination* at 3–4. Ames proceeds to argue from these assertions that Commerce should have regarded the scope language as "ambiguous" on the issue of production method. *See Comments of Defendant-Intervenor on Draft Redetermination* at 3–6; *Comments of Defendant-Intervenor on Final Redetermination* at 3–7.

Ames' various arguments with respect to tampers are unpersuasive. In a misguided attempt to introduce ambiguity, the construction that Ames would impart to the scope language would render that language internally inconsistent and self-contradictory. In the *Redetermination*, Commerce reasonably construed the plain meaning of the scope language to include only hand tools that are forged. In challenging that construction, defendent-intervenor offers an unsupported factual assertion that tampers are not produced by forging and its further assertion, irrelevant to the question of whether forged tampers exist, that its own tampers are produced by casting. Based on these flawed assertions, Ames would have this

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[3] In a prior proceeding, Ames defined "tampers" similarly: "tampers are essentially square plates with reinforcing ribs set at a 90-degree angle to the plate, which converge at the center. The center consists of a hole wherein a handle can be inserted." *Letter from Wiley Rein & Fielding LLP for Defendant-Intervenor Ames True Temper, to Import Administration, U.S. Department of Commerce* at 7 (Aug. 25, 2003) (*Redetermination*, Admin. R. Doc. No. 1).

court reject Commerce's internally consistent construction of the scope language in favor of an unreasonable, internally inconsistent construction that includes cast hand tools. This the court cannot do.

The court observes that common definitions of the term "tamper," as used in the context of hand tools, are far broader than Ames suggests. The word "tamper" is used to refer to "a tamping-bar; an instrument or machine used for tamping." 17 *The Oxford English Dictionary* 602 (2d ed. 1989); *see also Academic Press Dictionary of Science and Technology* 2,166 (1992) (defining "tamper" as "any of various hand-operated or power-driven machines used to tamp materials"). The term "tamper," as applied to hand tools, is not limited to the particular type of tool identified by Ames, which consists of a square plate that is allegedly cast in a design that accommodates the addition of a separate handle. Notably, the scope language places "tamper" in the context of an example of either a "bar product" or a "track tool." *HFHT Orders*, 56 Fed. Reg. at 6,622 ("*HFHTs* include . . . assorted bar products and track tools including wrecking bars, digging bars and tampers."); *see also Heavy Forged Handtools From the People's Republic of China*, USITC Pub. No. 2357, Inv. No. 731–TA–457 (Final), at A–3 (Feb. 1991), *available at* 1991 ITC LEXIS 78, at *96–*97. The tampers that constitute bar products, *i.e.*, "tamping bars," have integral handles and bear little or no resemblance to the cast square-plate tamper that Ames identifies.[4] Various tampers described by technical sources as "track tools" used in the railroad industry also differ physically from the "square plate" cast tool described by Ames.[5] The court cannot look favorably upon a construction of the scope language that requires an impermissibly narrow interpretation of the term "tamper" and a disregard of the context in which that term is used.

The arguments Ames advances before this court rely not only on a self-contradictory construction of the scope language but also on an assertion of fact that is unsupported by evidence on the record. Ames cites to no record evidence to support its assertion that tampers are not produced by a forging operation. Ames argues that it is "a well-known industry fact" that tampers are produced by casting. Ames also cites to "the longstanding experience of both Chinese respon-

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[4] *See, e.g., Forest Serv., U.S. Dep't of Agric., Handtools for Trail Work: 2005 Edition* 22 (Feb. 2005) ("A digging and tamping bar is about the same length as a crowbar, but much lighter. It is designed with a chisel tip for loosening dirt or rocks and a flattened end for tamping. These bars are not prying tools. Bars are approximately 70 inches long with a 2-inch-wide tamping end.").

[5] *See, e.g., Railway Age's Comprehensive Railroad Dictionary* 243 (2nd ed. 2002) (defining "tamping bar" as "[a] steel bar with a blade on each end used to drive ballast beneath the ties"); *Construction Glossary: An Encyclopedic Reference and Manual* 78 (2nd ed. 1993) (defining, in the context of railroad work, "tamping bar" as a "[s]teel bar with a blade on each end, used to drive ballast beneath the ties"); *Academic Press Dictionary of Science and Technology* 2,166 (1992) (defining "tamping pick" as "a wide, flat-headed pick used to drive ballast under railroad ties").

dents and Ames to produce tampers using a method other than hot forging" and the claim that "as noted by two of the Chinese exporters in the 12th administrative review of the underlying antidumping order, the companies sold only cast tampers to the United States." *Comments of Defendant-Intervenor on Draft Redetermination* at 3–4; *see Comments of Defendant-Intervenor on Final Redetermination* at 3. Defendant-intervenor's unsupported assertions fail to convince the court that Commerce should have found, based on substantial evidence on the record, that forged tampers did not exist during the period of investigation or that they do not exist now.

With respect to the Department's regulations, Ames relies on 19 C.F.R. § 351.225(k)(1), which requires generally that "in considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account the . . . descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [U.S. International Trade Commission]." 19 C.F.R. § 351.225(k)(1) (2004). Regarding the petition, Ames points to the "Scope of the Investigation" section, which states that the like product consists of "all imports from the PRC currently classified under" specified tariff provisions, which tariff provisions are set forth in the scope language in the *HFHT Order*, with exceptions only for hoes and rakes and for bars eighteen inches and under. *Antidumping Petition of Woodings-Verona Tool Works, Inc., for Heavy Forged Hand Tools, With or Without Handles, From the People's Republic of China* at 11 (Apr. 4, 1990) (*Tianjin Scope Ruling Request*, Ex. 4). With respect to the investigation by the U.S. International Trade Commission, Ames cites a statement in its final determination that "[t]he method used *most often* in the production of the subject products is forging." *Heavy Forged Handtools From the People's Republic of China*, USITC Pub. No. 2357, Inv. No. 731–TA–457 (Final), at A–4 (Feb. 1991), *available at* 1991 ITC LEXIS 78, at *97 (emphasis added).

In its arguments addressing § 351.225(k)(1), Ames fails to recognize that Commerce, before "taking into account" information from the various sources identified therein, first must conclude that the language of the order pertaining to scope is "subject to interpretation" on the issue presented by the merchandise under consideration. *See Duferco*, 296 F.3d at 1097 ("Thus, a predicate for the interpretive process is language in the order that is subject to interpretation."). For the reasons discussed above, Commerce correctly interpreted the scope language in the *HFHT Orders* as unambiguous on the issue of excluding cast tools. That language, therefore, is not "subject to interpretation" on the issue of whether cast picks are included within the scope of the *Pick/Mattock Order*.

Commerce appeared to acknowledge, even in the original scope ruling, that the scope language in the *HFHT Orders* is not ambigu-

ous and limits the scope to hand tools produced through forging. *See Tianjin Scope Ruling* at 10. In the original scope ruling, Commerce quoted the language in the *HFHT Orders* stating that "HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size." *Id.* (internal quotation marks omitted). The Department observed in the *Tianjin Scope Ruling* that "[r]ead alone, this language seems to indicate that forging is the only possible manufacturing process for HFHTs." *Id.* The *Tianjin Scope Ruling* then proceeded to reach the opposite conclusion on the question of cast hand tools by resorting to the information from the various sources identified in § 351.225(k)(1). *See id.* at 10–12. Again, as the Court of Appeals emphasized in *Duferco*, the petition and the investigation "may provide valuable guidance" but "cannot substitute for language in the order itself." *Duferco*, 296 F.3d at 1,097.

Defendant-intervenor's argument based on past Commerce scope rulings interpreting the *HFHT Orders*, for which Ames cites specifically to past rulings addressing a pry bar, a Pulaski tool,[6] and a skinning axe, is also unconvincing. *See Comments of Defendant-Intervenor on Final Redetermination* at 11; *see also Memorandum from Thomas F. Futtner, Acting Director, Office 4, Import Administration, to Holly A. Kuga, Acting Deputy Assistant Secretary, Import Administration* at 6–12 (Mar. 8, 2001) ("*Pry Bar Scope Ruling*") (*Redetermination*, Admin. R. Doc. No. 1, Ex. 7); *Memorandum from Thomas Futtner, Acting Director, Office 4, Import Administration, to Holly A. Kuga, Acting Deputy Assistant Secretary, Group II, Import Administration* at 5–7 (Mar. 8, 2001) (including "Pulaski tools" within the scope of the order) (*Tianjin Scope Ruling Request*, Ex. 2); *Memorandum from Thomas F. Futtner, Acting Office Director, AD/CVD Enforcement, Group II, Office 4, to Holly A. Kuga, Acting Deputy Assistant Secretary for Import Administration* at 3–6 (Mar. 9, 2001) (including skinning axes within the scope of the order) (*Pl.'s Mot. for J. on the Agency R.*, Ex. 7). A prior scope ruling on a particular product, even if falling within the ambit of the "prior scope determinations" identified in § 351.225(k)(1) as sources to be consulted by Commerce, is not designated by that regulation as controlling or precedential in a scope ruling on a different product. Moreover, under the principles recognized by the Court of Appeals in *Duferco*, Commerce may not disregard the effect of scope language that does

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[6] A "Pulaski tool" is a tool with the "ability to cut and to dig" and has "one part of the head shaped like an axe for cutting and the other part shaped like a hoe or mattocks (sic) for digging." *Memorandum from Thomas Futtner, Acting Director, Office 4, Import Administration, to Holly A. Kuga, Acting Deputy Assistant Secretary, Group II, Import Administration* at 1 (Mar. 8, 2001) (internal quotation marks and citation omitted) (*Tianjin Scope Ruling Request*, Ex. 2).

not include, and cannot reasonably be interpreted to include, the product under consideration in the scope proceeding. It makes no difference that Commerce, in prior scope determinations on different products, might be shown to have disregarded the effect of that same scope language.

Defendant-intervenor makes an additional argument to support a request that this court remand this matter to Commerce for reopening of the record and for the soliciting of information on how tampers are produced, the use of production methods other than hot forging in manufacturing hand tools, and the steps leading up to the issuance of the *HFHT Orders*. Ames argues that the court should order such a remand because Commerce placed on the administrative record, without notice to the parties, two documents from the proceeding resulting in the *Pry Bar Scope Ruling*. Commerce cited one of these documents in the *Redermination* to point out that Ames, in that previous proceeding, had submitted through counsel a letter acknowledging that tampers are produced by casting, welding or forging. *See Letter from Wiley Rein & Fielding LLP for Defendant-Intervenor Ames True Temper, to Import Administration, U.S. Department of Commerce* at 7 (Aug. 25, 2003) ("Tampers are generally cast, but can be welded or forged.") (*Redetermination*, Admin. R. Doc. No. 1).

The court finds no merit in defendant-intervenor's argument concerning the two documents that Commerce added to the record. This argument is directed, at least in part, to an opportunity to place on the record new information to rebut the statement Ames previously made concerning forging of tampers. However, the court does not discern in Commerce's supplementing the record with the two documents at issue a justification for an additional remand. Commerce based the *Redetermination* on its correct conclusion of law that the scope language unambiguously excludes cast hand tools such as the picks at issue in this proceeding. The scope language itself, rather than the earlier statement by Ames to the effect that tampers could be forged as well as cast, was identified in the *Redetermination* as the basis for that conclusion of law. Therefore, if there was error in the failure of Commerce to notify the parties of the inclusion of the two additional documents and to provide the parties an opportunity to submit additional information, it was harmless error and not an adequate basis upon which this court may order another remand.

IV. CONCLUSION

Commerce employed a reasonable construction of the scope language in the *HFHT Orders* in determining that the *Pick/Mattock Order* excludes the cast picks at issue in the *Redetermination*. The findings of fact necessary to support the *Redetermination*, the principal ones of which defendant-intervenor does not challenge in this

proceeding, are supported by substantial evidence on the record. Commerce's *Redetermination* is therefore affirmed, and judgment will be entered accordingly.

Slip Op. 05–128

DAIMLERCHRYSLER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani
Chief Judge

Court No. 99–00668

JUDGMENT

[Judgment for plaintiff on Tariff Classification of U.S. made truck parts painted and assembled in Mexico free of duties.]

Dated: September 26, 2005

Barnes, Richardson & Colburn, (*Lawrence M. Friedman* and *Ilya A. Bakke*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*), *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for defendant.

Restani, Chief Judge: The merchandise at issue is identical in all material respects to that in *DaimlerChrysler Corp. v. United States*, 361 F.3d 1378 (Fed. Cir. 2004), wherein defendant's classification failed.

The parties do not request a new trial. Accordingly, the court is bound by precedent, and judgment is entered for plaintiff requiring duty free treatment under Harmonized Tariff Schedule of the United States ("HTSUS") item 9802.00.80 for the U.S. made truck parts painted and assembled in Mexico, re-entered into the United States on May 5, 1993, under entry numbers 228–0107083–4 and 228–0107085–9.

Defendant shall refund the duties erroneously collected together with interest as provided by law.

SLIP OP. 05–129

SHANDONG HUARONG GENERAL GROUP CORPORATION and LIAONING MACHINERY IMPORT & EXPORT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge

Court No. 01–00858

OPINION AND ORDER

[United States Department of Commerce's Final Determination on heavy forged hand tools remanded to Commerce]

Dated: September 27, 2005

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, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*).

Eaton, Judge: This matter is before the court following a second remand to the United States Department of Commerce ("Commerce"). In *Shandong Huarong General Group Corporation v. United States*, 28 CIT ___ , slip op. 04–117 (Sept. 13, 2004) ("*Huarong II*"), 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 determination) ("Final Results"). Plaintiffs Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import and Export Corporation ("LMC") (collectively the "Companies") 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 again remanded 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 II*. A brief summary of these is included here. On February 14, 2000, Commerce published a notice of opportunity to request administrative reviews of the Final Results. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 65

Fed. Reg. 7348 (ITA Feb. 14, 2000) (opportunity to 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.) ("Prelim. 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 then 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 calculated to be 47.88%. *Id.*

Commerce then notified the Companies that it would conduct verification of their submitted sales and factors of production information. After review and analysis of the questionnaire responses and the information gathered at verification, Commerce determined that it was proper to use facts available[2] and adverse facts available,[3] as

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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] Use of facts available is warranted where Commerce finds that a respondent has, *inter alia*, withheld or failed to provide requested information. *See* 19 U.S.C. § 1677e(a). The 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 deadlines 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.

Id.

[3] The use of adverse facts available is warranted if Commerce

the Companies had withheld information and failed to cooperate by not acting to the best of their ability to comply with Commerce's requests for information.[4] *See* Final Results, 66 Fed. Reg. at 48,028. As a result of these findings, the Companies were, among other things, found not to have demonstrated their independence from the P.R.C. government, and their subject merchandise was therefore assigned the final P.R.C.-wide antidumping duty rate of 47.88%. *See id.* at 48,030 n.1. The Companies then commenced this action for judgment upon the agency record pursuant to USCIT Rule 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 ordered a remand, instructing Commerce to reevaluate the evidence submitted by the Companies with respect to their entitlement to separate rates, and to "revisit . . . its determination that the Companies were to receive the PRC-wide antidumping duty margin." *Shandong Huarong General Group Corp. v. United States*, 27 CIT ___ , ___ , slip op. 03–135 at 45 (Oct. 22, 2003) ("*Huarong I*"). In the Final Results of Redetermination Pursuant to Court Remand (Jan. 20, 2004), Commerce found that the Companies were entitled to separate rates, and assigned each company an antidumping duty rate of 139.31% based on adverse facts available. The court affirmed Commerce's determination to apply separate rates, but remanded Commerce's decision to apply a rate of 139.31%, on the grounds that the rate was aberrational and not supported by substantial evidence. *See Huarong II*, 28 CIT at ___ , slip op. 04–117 at 17.

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finds that an interested party has failed to cooperate by not acting 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, or
(4) any other information placed on the record.

19 U.S.C. § 1677e(b).

[4] Specifically, Commerce found that Huarong failed to report the great majority of its U.S. market sales and had prepared almost none of the documents requested of it in Commerce's verification outline. *See* Final Results, 66 Fed. Reg. at 48,028. Similarly, Commerce found that LMC had supplied none of the documents requested in the verification outline and could not provide the information necessary to verify its own submissions to Commerce. *See id; see also Shandong Huarong General Group Corp. v. United States*, 27 CIT ____ , slip op. 03–135 (Oct. 22, 2003) (affirming Commerce's application of facts available and adverse facts available to both Huarong and LMC).

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. . . ." *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.' " *Id.* 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)).

DISCUSSION

Title 19 U.S.C. 1677e(a) permits Commerce to use the facts otherwise available in making its determination when an interested party withholds or fails to provide requested information, significantly impedes Commerce's investigation, or provides information that cannot be verified. If Commerce further determines that a party has failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). In drawing the adverse inference, Commerce may rely on information drawn from the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.*

I. The 139.31% Antidumping Duty Rate

In *Huarong II*, the court found that the rate Commerce selected was aberrational and not indicative 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." *Huarong II*, 28 CIT at ___, slip op. 04–117 at 17. The court based its finding on two factors: (1) Commerce failed to demonstrate that assigning to the Companies the rate of another producer[5] in the eighth administrative review satisfied the requirement that Congress "intended for an adverse facts available rate to be a reasonably accurate estimate of the [Companies'] actual rate, albeit with some built-in increase intended as a deterrent to non-compliance"; and (2) even if the rate assigned to the Companies in

[5] The other producer, Tianjin Machinery Import & Export Corp. ("TMC"), produced the same bars/wedges covered by the antidumping duty order at issue here.

the ninth administrative review could reasonably have been higher than the rate they received in the preceding review, Commerce gave no explanation as to why the rate would have increased so dramatically, i.e., by over 100 percentage points. *See id.* at ____ , slip op. 04–117 at 16–17. The court therefore instructed Commerce to "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." *Id.* at ____ , slip op. 04–117 at 17.

In the Remand Results, Commerce continues to apply the 139.31% rate, claiming that it "is representative of the margins that we would have calculated for Huarong and LMC in the ninth review had they not received total [adverse facts available], with an increase to encourage cooperation." Remand Results at 1. First, Commerce maintains that the rate chosen bears a rational relationship to commercial practices in the Companies' particular industry, despite representing a five-fold increase in their margins from the eighth to the ninth review and being 91.43 percentage points greater than the P.R.C.-wide rate:

> The Court has upheld [Commerce's] chosen AFA [adverse facts available] rates when the rates sought to be imposed are "relevant, and not outdated, or lacking a rational relationship." *See Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999). . . . Further, the rate chosen must have some relationship to commercial practices in the particular industry. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002). . . . [Commerce] selected as AFA a rate calculated for another PRC company, TMC, in the immediately preceding review. This rate therefore reflects recent commercial activity by Chinese exporters. These facts alone establish that this rate has some relationship to commercial practices in the industry – indeed recent commercial practices – and are a strong indication of the relevance of this information.

Id. at 4 (internal citation omitted). Thus, although Commerce claims that the 139.31% rate represents the rate it would have calculated for the Companies plus an additional percentage to encourage cooperation, it seeks to justify the rate as having some relationship to the Companies' industry – rather than the Companies themselves.

As an initial matter, the cases relied upon by Commerce do not support its findings. For instance, *Ferro Union* is incompletely quoted. Commerce states that "[t]he Court has upheld [Commerce's] chosen AFA rates when the rates sought to be imposed are 'relevant, and not outdated, or lacking a rational relationship.' " Remand Results at 4 (quoting *Ferro Union*, 23 CIT at 205, 44 F. Supp. 2d at 1335). In fact, the passage from *Ferro Union* reads, "In order to com-

ply with the statute and the [Statement of Administrative Action's] statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to Saha Thai [the Plaintiff]." *Ferro Union*, 23 CIT at 205, 44 F. Supp. 2d at 1335. By not quoting the case fully, Commerce apparently wishes to leave the impression that *Ferro Union* stands for the proposition that it need only justify its chosen rate as bearing a rational relationship to the particular industry under investigation. A reading of the relevant sentence in its entirety, however, makes clear that each assigned adverse facts available rate must bear a rational relationship to the individual company itself. In like manner, the holding in *Ta Chen* requires that an assigned rate relate to the company to which it is assigned. "Because Commerce selected a dumping margin within the range of Ta Chen's actual sales data, we cannot conclude that Commerce 'overreached reality.' " *Ta Chen*, 298 F. 3d at 1340. Thus, while *Ta Chen* does note that sales practices within an industry may provide support for concluding that a rate is accurate, Commerce's goal is to assign a rate that accurately reflects what a company's rate would have been had it cooperated. It is to that rate that Commerce is then permitted to add an amount to deter noncompliance. Here, there is no indication that Commerce has sought to select a rate that bears a rational relationship to the Companies themselves.

Second, in *Huarong II* the court expressed its concern that "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." *Huarong II*, 28 CIT at ___ , slip op. 04–117 at 16. In the Remand Results, Commerce

> notes that margins in the bars/wedges order have varied widely from year to year and company to company. For example, Fujian Machinery & Equipment Import & Export Corporation ("FMEC") jumped from 1.05 percent in the 1994–1995 review to 36.76 percent in the 1995–1996 review, Huarong increased from 1.27 percent in the 1997–1998 review to 27.28 percent in the 1998–1999 review, LMC grew from zero percent in the 1997–1998 review to 27.18 percent in the 1998–1999 review, and TMC dropped from 139.31 percent in the 1998–1999 review to 0.56 percent in the 1999–2000 review. When looking at the rates for different companies within a particular review period, we found that rates ranged from 2.94 percent to 38.30 percent in the 1996–1997 review and from zero percent to 47.88 percent in the 1997–1998 review. As these examples clearly illustrate, margins in the bars/wedges order have experienced greater than 25-fold increases from review to review, and more than 19-

> fold differences between companies in a particular review period.

Remand Results at 4–5 (footnote omitted). In other words, Commerce maintains that the five-fold increase in the Companies' margins is consistent with the volatile nature of calculated rates for bars and wedges. *Id.* at 5. While changes in antidumping duty rates from one review to the next may be consistent with the "volatile nature" of the rates for bars/wedges, Commerce has still failed to demonstrate the validity of such a large absolute increase. For example, Huarong's rate in the eighth review was calculated to be 28.96%. Following remand in the ninth review, Huarong's rate jumped over 110 percentage points, to 139.31%. It is worth noting that in the tenth review, Huarong's rate was calculated to be 16.22%. Similarly, LMC's rate in the eighth review was 29.10%. Following remand in the ninth review, LMC's rate jumped by nearly the same amount as Huarong's, over 110 percentage points, also to 139.31%. In the tenth review, LMC's rate was 0.00%. By contrast, in the examples Commerce provided, it found that "rates ranged from 2.94 percent to 38.30 percent in the 1996–1997 review and from zero percent to 47.88 percent in the 1997–1998 review." Remand Results at 4. In no case do the increases from one review to the Huarong and LMC from the eighth to the ninth review. Significantly, Commerce's sole justification for a five-fold percentage increase – volatility – is never tied to the Companies themselves. That is, Commerce provides no explanation as to why the Companies' rates should increase so dramatically in this case.

Third, Commerce states that, because there was no corroborating data available in the ninth review for purposes of calculating the Companies' antidumping duty margins, it was entitled to justify its chosen rate by referencing calculated transaction-specific margins from the eighth review for Huarong and LMC. Commerce explains:

> Given that Huarong, LMC, and SMC [Shandong Machinery Import & Export Corp., another respondent in the ninth review] failed to cooperate and thus received total AFA [adverse facts available], and FMEC [Fujian Machinery Import & Export Corp., another respondent in the ninth review] remained within the PRC-wide entity (which also received total AFA), the only respondent left from the ninth review that could possibly serve as a basis of corroborating the rate selected as AFA is TMC. In the ninth review, TMC received a calculated, weighted-average margin of 0.56 percent for bars/wedges, which is nearly a *de minimis* margin under 19 C.F.R. § 351.106(c)(1). TMC's information does not provide a suitable

> basis[6] for corroborating the selected rate, nor do we consider this one cooperative respondent to represent the behavior of uncooperative respondents.

Remand Results at 5.

With respect to the transaction-specific margins it calculated for the Companies from the eighth review, Commerce gives the following explanation: "Several of these transaction-specific margins for both Huarong and LMC are well above 47.88 percent, which is the second highest margin ever calculated for bars/wedges. In fact, a significant number of the transaction-specific margins are nearly as high as the 139.31 percent rate selected as AFA [adverse facts available]." *Id*. This explanation overstates the case. Of eighty-seven transaction-specific margins, the highest was calculated at 120.53%, and thirteen others ranged from 97.84% to 117.20%. The remaining seventy-three margins were all calculated at 0.00%. Nonetheless, Commerce insists that because several of Huarong's and LMC's transaction-specific margins are nearly as high as the adverse facts available rate selected,

> [t]he U.S. transactions corroborating the AFA [adverse facts available] rate do not appear to be aberrant or unusual in any way. . . . Because we are making an adverse inference with regard to Huarong and LMC, we regard these transactions as representative of the margins we would have calculated for these companies in the ninth review (with a built-in incentive to encourage cooperation) had they not received total AFA. . . . Because these transaction-specific margins for Huarong and LMC in the eighth review are nearly as high as the rate selected as AFA, and these margins were calculated for transactions involving the same class of merchandise sold in the same market, under similar demand and supply conditions, as the AFA rate, we find that they support the relevance of the rate selected as AFA.

Id. at 6.

In their joint brief, the Companies first argue that "Commerce's reliance on certain of Plaintiffs' sales from the eighth review is misplaced. Commerce highlights only selected sales made by Plaintiffs in the eighth review. These selected sales, by themselves, do no corroborate the 139.31 [percent] rate as applied to all Huarong and LMC sales in the ninth review." Pls.' Comments on Final Results of Redetermination Pursuant to Court Remand ("Pls.' Comments") at 11 (emphasis in original). The Companies explain:

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[6] Commerce gives no explanation as to why TMC's ninth review rate was not suitable; apparently, while reliable, the rate was simply too low for Commerce's purposes.

> By using selected sales to corroborate the 139.31[%] rate, Commerce failed to note that they also calculated total weighted dumping margins for Plaintiffs in the [eighth] review. Since the 139[.31%] rate [of TMC] represents a total weighted dumping margin, it would follow that the weighted dumping margins in the eighth review are the best values for comparison, not the transaction-specific margins cited by Commerce.

Id. at 11–12. Put another way, the Companies urge an apples-to-apples comparison: Since TMC's 139.31% rate is a weighted-average margin from the eighth review, for corroboration purposes it should be compared to the weighted-average margins for the Companies from that same review, i.e., 28.96% for Huarong and 29.10% for LMC, not selected transaction-specific margins from the eighth review.

The court finds that Commerce's reliance on the Companies' high-margin transactions as corroboration for the 139.31% rate does not satisfy its mandate to determine antidumping duty margins as accurately as possible. Of the eighty-seven transaction-specific margins, only one was calculated at 120.53%, the closest percentage to the Companies' rate of 139.31%. Just thirteen transactions, or 14.9%, ranged from 97.84% to 117.20%. The vast majority of all transactions, i.e., over 83% of the transactions, were calculated at 0.00%. Moreover, at no point does Commerce provide an adequate explanation as to why these transaction-specific margins are probative of the validity of the use of a weighted-average margin from an unrelated company. In order for Commerce to carry out its mandate to determine antidumping duty margins as accurately as possible, where the information is available a "like-kind" comparison is preferred. In other words, if Commerce wished to use the Companies' sales to corroborate the use of the 139.31% weighted-average margin for TMC in the eighth review to the Companies, then the preferred method would be to use the Companies' own weighted-average margins for that same review. Here, the court finds that the chosen transaction-specific rates do not provide a sufficiently probative like-kind comparison to TMC's weighted-average margin to satisfy the substantial evidence requirement, nor do these aberrational sales reasonably corroborate the 139.31% weighted-average rate.[7] *See World Finer Foods, Inc. v. United States*, 24 CIT 541, 547–48 (2000) (not reported in the Federal Supplement) (refusing to uphold Commerce's use of

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[7] The court finds the facts of this case to be distinguishable from those in *Branco Peres Citrus, S.A. v. United States*, 25 CIT 1179, 173 F. Supp. 2d 1363 (2001). In that case, Commerce used Plaintiff's single highest transaction-specific margin because the application of a weighted-average dumping margin would have allowed Plaintiff to benefit from its non-cooperation. The court acknowledged, however, that "the selection of a party's highest transaction-specific rate may not in every case be reasonable. . . ." *Id*. at 1191, 173 F. Supp. 2d at 1377.

"apparently aberrant transactions" from unrelated respondents to corroborate petitioners' margin, where Commerce did not explain whether the transactions represented a significant portion of the transactions at issue or how the transactions related to a rational dumping margin for petitioners).

Next, Commerce insists that if either Huarong or LMC could have demonstrated that its dumping margin was lower than "the highest cash deposit rates for bars/wedges," they would have provided evidence showing their margins to be less. Remand Results at 6. Relying on *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990), Commerce explains:

> Since the highest cash deposit rates[8] for bars/wedges being collected by U.S. Customs and Border Protection ("CBP") during the period of the ninth review . . . were . . . 47.88 percent, and [Commerce] assumes that a respondent will cooperate if its actual margin is less than such rate, it is reasonable to conclude that the actual margins for Huarong and LMC in the ninth review were greater than 47.88 percent.

Remand Results at 6 (footnotes omitted). Commerce cites to no source demonstrating that this assumption follows its past practice or that it has been found to be in accordance with law by any Court. Nor does this court find justification for this assumption in Commerce's reliance on *Rhone Poulenc*. The Court in *Rhone Poulenc* found that, in cases where use of adverse facts available[9] is justified, it is reasonable to assume that "the [company's] 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." *Rhone Poulenc*, 899 F.2d at 1190 (emphasis omitted). Here, the highest prior margins for reviews in which the Companies cooperated are Huarong's rate of 34.00% in the sixth review and LMC's rate of 29.10% in the eighth review. The most that can be assumed from the Companies' failure to cooperate is that they believed their rates in the ninth review would exceed their rates in these prior reviews.

Finally, nowhere does Commerce explain why it failed to follow the court's instruction in *Huarong II* to "explain its reasons for not choosing a previous antidumping duty rate for the Companies themselves." *Huarong II*, 28 CIT at ___ , slip op. 04–117 at 17.

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[8] Importers who enter merchandise that is within the scope of an antidumping duty order must make a deposit of estimated antidumping duties. 19 U.S.C. § 1673d(c)(1)(B)(ii) (requiring the posting of a cash deposit, bond, or other security in the final antidumping determination Commerce makes in the investigation).

[9] It should be noted that the analysis in *Rhone Poulenc*, a 1990 case, was governed by the application of the best information available ("BIA") rule, which was used prior to enactment of the Uruguay Round Agreement Act ("URAA") in 1995. The URAA replaced Commerce's application of BIA in antidumping duty cases with the use of facts available.

Based on the foregoing, it is apparent that Commerce has failed to justify the 139.31% rate with substantial evidence. Indeed, Commerce's strained efforts to demonstrate the validity of this elevated rate lead the court to find that the application of the rate is punitive in nature. *See F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("[T]he purpose of [the statute governing adverse inferences] is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."). In choosing a margin, Commerce must "appropriately balanc[e] th[e] goal of accuracy against the risk of creating a punitive margin." *Timken Co. v. United States*, 26 CIT 1072, 1076, 240 F. Supp. 2d 1228, 1234 (2002). "Punitive rates are the result of rejection of low-margin information in favor of high-margin information that is demonstrably less probative of current conditions." *Usinas Siderurgicas de Minas Gerais, S.A. v. United States*, 22 CIT 743, 765 n.41 (1998)(not reported in the Federal Supplement)(citing *Rhone Poulenc*, 899 F.2d at 1190); *see also Peer Bearing Co. v. United States*, 25 CIT 1199, 1206, 182 F. Supp. 2d 1285, 1296 (2001) (citing *Allied-Signal Aerospace Co. v. United States*, 996 F. 2d 1185, 1191 (Fed. Cir. 1993)). Here, the record shows that Commerce had several other sources from which to choose the Companies' rates, which would have been more probative of the Companies' actual rates, and to which a further percentage could be applied to ensure compliance. For example, Commerce could have chosen from among the Companies' rates for previous reviews. In addition, other sources available to Commerce are the petition rate, the rate from a final determination or previous review, and any other information on the record that would indicate what the Companies' rate might have been had they cooperated. *See* 19 U.S.C. § 1677e(b).

CONCLUSION

Because the court finds that Commerce has failed to justify the 139.31% rate assigned to the Companies, and further finds that the rate is punitive, Commerce is directed upon remand to no longer employ this rate. Also upon remand, Commerce is directed to choose and justify its choice of one of the following rates:

(1) the Companies' rates from a previous review, with a built-in increase as a deterrent to non-compliance; or

(2) a calculated rate that accurately reflects what the Companies' rates would have been had they cooperated, with a built-in increase as a deterrent to non-compliance.

Remand results are due on December 27, 2005, comments are due on January 26, 2006, and replies to such comments are due on February 6, 2006.

Slip Op. 05–130

COLAKOGLU METALURJI A.S., Plaintiff, v. UNITED STATES Defendant, and GERDAU AMERISTEEL CORP., Defendant-Intervenor.

Before: Carman, Judge

Court No. 04–00621

[Upon review of the parties' papers, this case is remanded.]

OPINION AND ORDER

Dated: September 27, 2005

Lafave & Sailer LLP (*Arthur J. Lafave III, Francis J. Sailer*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Jeanne M. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David S. Silverbrand*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Robert E. Nielsen*, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Brickfield, Burchette, Ritts & Stone PC (*Damon E. Xenopoulos*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, Judge: This case is before this Court on a motion for judgment on the agency record filed by Plaintiff Colakoglu Metalurji A.S. ("Plaintiff" or "Colakoglu"). Plaintiff challenges the final determination by the United States Department of Commerce ("Defendant" or "Commerce") in *Certain Steel Concrete Reinforcing Bars from Turkey*, 69 Fed. Reg. 64,731 (Dep't Commerce Nov. 8, 2004) (final determination) ("*Final Results*"). The sole issue in this case is the date of sale. Plaintiff challenges Commerce's use of the invoice/shipment [hereinafter invoice] date rather than the contract/order [hereinafter contract] date as the date of sale to determine the dumping margin. Commerce has voluntarily requested that this case be remanded to review this issue. This Court grants Commerce's request for voluntary remand. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a (a)(2)(A)(i) (2000).

BACKGROUND

On April 17, 1997, Commerce issued an antidumping duty order covering concrete steel reinforcing bars from Turkey. *Certain Steel Concrete Reinforcing Bars from Turkey*, 62 Fed. Reg. 18,748 (Dep't Commerce Apr. 17, 1997) (antidumping duty order). The list of Turkish producers and exporters to be reviewed included Plaintiff for the

period of review from April 1, 2002, through March 31, 2003. Plaintiff completed the questionnaires and responded that the date of sale is the "contract or order confirmation . . . because, without exception, all material terms and conditions were fixed on those dates for all sales" during this period. (Pl.'s Br. in Supp. of Its R. 56.2 Mot. for J. on the Agency R. ("Pl.'s Mot.") at 3.) On May 5, 2004, Commerce published the preliminary results of the review, using the invoice date as the date of sale. *Certain Steel Concrete Reinforcing Bars from Turkey*, 69 Fed. Reg. 25,063 (Dep't Commerce May 5, 1997) (preliminary results of antidumping administrative review). In response, Plaintiff submitted case and rebuttal briefs to support its assertion that the contract date was the proper date of sale. In the *Final Results*, however, Commerce reaffirmed its previous decision to use the invoice date as date of sale "because it concluded the material terms of the sale (price and quantity) were not established" until the that time. (Def.'s Mem. in Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.'s Resp.") at 3.) On November 26, 2004, Commerce issued a correction to the Final Results, noting that Plaintiff made no home market sales below the cost of production for the period of review. *Certain Steel Concrete Reinforcing Bars from Turkey*, 69 Fed. Reg. 68,883 (Dep't Commerce Nov. 26, 2004) (correction to final determination). Plaintiff timely appealed the *Final Results* to this Court.

Defendant-Intervenor, an interested party in the underlying review, opposes Plaintiff and Defendant's requests for remand and rather seeks that this Court uphold Commerce's determination regarding the date of sale. (Def.-Intervenor's Br. in Opp'n to Pl.'s Mot. for J. on the Agency R. at 1, 19.)

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's decision unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." Tariff Act of 1930, § 516A(b)(1)(B) (codified as amended at 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)).

DISCUSSION

The issue in this case is whether Commerce should have used the contract date or the invoice date as the date of sale in the administrative review. The regulation which governs date of sale provides:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is sat-

> isfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i) (2004). Upon a plain reading of the language, this regulation provides a rebuttable presumption that the invoice date will be identified as the "date of sale." According to Defendant, this presumption is based upon the fact that the material terms of sale are normally not determined until the time of invoice or shipment. (Def.'s Resp. at 5.) An exporter or producer, however, may attempt to rebut that presumption by presenting evidence that establishes the material terms of sale were fixed at a different time. Commerce then has the power to exercise discretion by using that different time as the date of sale. 19 C.F.R. § 351.401(i).

As Plaintiff urged, "The 'date of sale' is important because home market sales in the same month as the date of the U.S. sale are the first group of sales considered for price-to-price comparisons in Commerce's antidumping duty margin analysis in an administrative review." (Pl.'s Mot. at 3.) Plaintiff further states that "[i]n a hyperinflationary economy [such as Turkey's], moreover, there can be a significant difference in the home market sales price if one looks at the price, *e.g.*, in April as compared to June or July." *Id.* at 4. Plaintiff asserts that it established on the record that there were no material changes to the essential terms – price and quantity – of the contract date. Plaintiff explains that any minor differences in quantity ordered and shipped were within the "tolerances contained in the contract or purchase order with respect to each sale." (Pl.'s Mot. at 6–7.) Consequently, Plaintiff challenges Commerce's usage of the later-in-time invoice date rather than the earlier-in-time contract date as the date of sale as unsupported by the record and not in accordance with law. (Pl.'s Mot. at 16.) In response, Defendant "respectfully request[s] that the Court remand this case to Commerce so that it may reconsider whether, based upon its established past practice, it reasonably applied its treatment of delivery tolerances to the facts at issue here." (Def.'s Resp. at 5.) Since Defendant voluntarily requested remand on the issue of date of sale, this Court grants this request and no further discussion is necessary at this time. For the aforementioned reasons, it is hereby

ORDERED that Plaintiff's motion for judgment on the agency record is granted insofar as the remand request but denied as to dictate a particular determination; and it is further

ORDERED that this case in its entirety is remanded to the U.S. Department of Commerce; and it is further

ORDERED that the U.S. Department of Commerce shall file its Remand Results with this Court no later than November 30, 2005.