

UNITED STATES COURT OF INTERNATIONAL TRADE

TIANJIN MACHINERY IMPORT & :
EXPORT CORP. and SHANDONG :
HUARONG MACHINERY CO., LTD., :
 :
Plaintiffs, :
 :
v. : Before: Richard K. Eaton, Judge
 :
UNITED STATES, : Court No. 05-00522
 :
Defendant, : Public Version
 :
and :
 :
AMES TRUE TEMPER, :
 :
Deft.-Int. :
 :

OPINION AND ORDER

[United States Department of Commerce's final results of the thirteenth administrative review of the antidumping duty order covering imports into the United States of heavy forged hand tools from the People's Republic of China are sustained in part and remanded.]

Dated: August 28, 2007

Hume & Associates, PC (Robert T. Hume), for plaintiffs.

Peter D. Keisler, Assistant Attorney General; Jeanne E. Davidson, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice; Patricia M. McCarthy, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (Stephen C. Tosini); Office of Chief Counsel for Import Administration, United States Department of Commerce (Scott McBride), of counsel, for defendant.

Wiley Rein, LLP (Timothy C. Brightbill and Charles O. Verrill, Jr.), for defendant-intervenor.

Eaton, Judge: This matter is before the court on the USCIT Rule 56.2 motion for judgment upon the agency record of plaintiffs Tianjin Machinery Import & Export Corp. ("TMC") and Shandong Huarong Machinery Co., Ltd. ("Huarong"). By their motion, plaintiffs challenge certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results of its thirteenth administrative review of the four antidumping duty orders applicable to imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"). See HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) (final) ("Final Results"); see also HFHTs, Finished or Unfinished, With or Without Handles From the PRC, 56 Fed. Reg. 6622 (Dep't of Commerce Feb. 19, 1991) (notice) ("HFHTs Orders").

Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, Commerce's Final Results are sustained in part and remanded.

BACKGROUND

Plaintiffs are producers and exporters of HFHTs in the PRC. Their exports to the United States are subject to the HFHTs Orders covering axes/adzes, bars/wedges, hammers/sledges and

picks/mattocks. On February 27, 2004, plaintiffs (and defendant-intervenor) asked Commerce to conduct an administrative review of the HFHTs Orders, the thirteenth such review, for the period of review February 1, 2003, to January 31, 2004 ("POR"). See HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 11,934, 11,935, 11,937 (Dep't of Commerce Mar. 10, 2005) (prelim.) ("Preliminary Results").

The Department initiated its review on March 26, 2004, and published the Preliminary Results on March 10, 2005. Commerce determined preliminarily that plaintiffs sold HFHTs at less than normal value and further found appropriate the use of facts otherwise available and adverse facts available ("AFA") pursuant to 19 U.S.C. § 1677e(a), (b). See *id.* at 11,934-35. In the Final Results, Commerce confirmed its preliminary findings. See Final Results, 70 Fed. Reg. at 54,898. Accordingly, the Department assigned plaintiffs the following rates: Huarong's and TMC's sales of axes/adzes - 174.58 percent; Huarong's and TMC's sales of bars/wedges - 139.31 percent; TMC's sales of hammers/sledges - 45.42 percent; and TMC's sales of picks/mattocks - 98.77 percent. See *id.* at 54,899.

Before the court, plaintiffs raise two primary objections to the Department's conclusions in the Final Results and seek a remand of this case. First, plaintiffs insist that Commerce was not justified in its use of AFA. Second, in the event the court

finds warranted the use of AFA, plaintiffs urge that Commerce failed to support with substantial evidence its determination of the AFA rates. See Pls.' Mot. J. Agency R. ("Pls.' Mem.") 7-8.¹

STANDARD OF REVIEW

When reviewing a final antidumping determination from Commerce, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S.

¹ In addition, plaintiffs contend that Commerce erroneously included within the scope of the HFHTs Orders their exports of the multi-use tough tool ("MUTT") and thereby calculated incorrectly the AFA rate for axes/adzes. See Pls.' Mem. 8. The court, however, has since sustained Commerce's inclusion of the MUTT within the scope of the order applicable to axes, adzes and similar hewing tools. See *Olympia Indus., Inc. v. United States*, 30 CIT __, __, Slip Op. 06-110 at 2-3 (July 24, 2006) (not reported in the Federal Supplement) ("Because the MUTT's utility as a tool comes from its steel head with a sharp blade that can be used for cutting and chopping, the court finds that it is a hewing tool similar to an axe or adze and, thus, sustains Commerce's Final Scope Ruling."). The 60-day period for appealing that decision has come and gone without an appeal having been filed. See Fed. R. App. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.").

197, 229 (1938)). The court determines the existence of substantial evidence "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

I. The Department's Use of AFA

A. Application of AFA to "Agent" Sales

Where a respondent in an administrative review "significantly impedes" a Commerce proceeding, the agency is permitted to "fill[] gaps in the record" using facts otherwise available. See Statement of Administrative Action, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103-316, 656, 830-31 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199; see also 19 U.S.C. § 1677e(a)(2)(C). Here, Commerce states that it used facts available "because Huarong and TMC . . . significantly impeded the instant proceeding." Issues & Decision Mem. for the 13th Admin. Rev. of HFHTs from the PRC (Dep't of Commerce Sept. 6, 2005) ("Issues & Dec. Mem.") at 5. Specifically, the Department claims that the "use of the 'agent' sales schemes by [plaintiffs] impeded [its] ability to complete this administrative review . . . , impose antidumping duties and issue

instructions to [U.S. Customs and Border Protection ("Customs")] to assess the correct antidumping duties" *Id.* at 6 (citations omitted). In addition, Commerce decided to use AFA because, in its view, each company failed to cooperate to the best of its ability by not disclosing the true nature of the agency relationship, i.e., that TMC was merely a vehicle by which Huarong could export its goods to the United States at a lower rate. See Def.'s Resp. Pls.' Mot. J. Admin. R. ("Def.'s Resp.") 8. In reaching its conclusion, Commerce found that the companies' relationship was such that TMC did nothing more than forward its blank invoices to Huarong, thus enabling Huarong to benefit from TMC's lower dumping margin when making sales to the United States.

The relevant section of the antidumping duty statute, 19 U.S.C. § 1677e, requires Commerce to undertake a bifurcated analysis in determining whether to use facts otherwise available and, if reliance on such facts is warranted, whether to use an adverse inference in selecting from among those facts. First, under the pertinent part of subsection 1677e(a):

If—

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

(2) an interested party or other person . . .

(C) significantly impedes a proceeding under this

subtitle, . . .

the administering authority . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a)(C). It is well settled that a party's intent is irrelevant to a decision to use facts available. See *Ferro Union, Inc. v. United States*, 23 CIT 178, 199 n.44, 44 F. Supp. 2d 1310, 1330 n.44 (1999) ("A respondent could impede a review without intending to do so, for example, because it did not understand the questions asked."). Thus, subsection (a) mandates the use of facts available when a respondent significantly impedes Commerce's investigation, irrespective of the respondent's intent.

Once it determines that the use of facts otherwise available is required, Commerce may, if the conditions warrant, use an inference adverse to the interests of the respondent in selecting from those facts.² The Court of Appeals for the Federal Circuit

² Pursuant to subsection 1677e(b):

If the administering authority . . . 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 the administering authority . . ., the administering authority . . ., 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

(continued...)

in *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003), stated that, as distinguished from subsection (a),

subsection (b) permits Commerce to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel Corp., 337 F.3d at 1381 (quoting 19 U.S.C. § 1677e(b)) (alteration & emphasis in original). While the statute does not define the phrase "to the best of its ability," the Federal Circuit has held those words to "require[] the respondent to do the maximum it is able to do." *Id.* at 1382.

²(...continued)

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 [periodic review] or determination under section 1675b of this title [countervailing duty injury investigations], or
- (4) any other information placed on the record.

19 U.S.C. § 1677e(b).

Here, the Department resorted to facts otherwise available and drew an adverse inference from those facts in determining plaintiffs' dumping margins for their "agent" sales because it found that plaintiffs: (1) significantly impeded the administrative review by continuously misrepresenting the nature of their "agency" relationship; and (2) failed to cooperate to the maximum they were able to by not revealing the true nature of their agency relationship.

Plaintiffs, however, maintain that they neither impeded the review nor failed to act to the best of their ability to provide Commerce with all data regarding their "agent" sales in the requested form and manner. See Pls.' Mem. 19-20. In making their argument, plaintiffs point to their initial responses to Commerce's Section A Questionnaire:

Huarong reported that it made sales through an agent. Huarong provided a copy of its agent agreement. Huarong also included a copy of previous verification reports where similar "agent" sales were made. . . . In addition, Huarong clearly indicated that TMC was used as an agent. Likewise, TMC properly identified that it acted as an agent during this period of review. Additionally, Huarong and TMC properly responded to all of the [Department]'s interrogatories. For example, Huarong provided 1) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all direct sales of bars during the POR, 2) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all agent sales of bars during the POR through TMC, and

3) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all direct sales of scrapers during the POR.

Pls.' Mem. 19-21 (footnotes omitted). Thus, plaintiffs insist that they did not impede the review and "complied to the best of [their] ability to answer all questions the [Department] posed."

Pls.' Mem. 21.

Plaintiffs further claim that they participated in a bona fide agency relationship and thus did not undermine the administrative review proceedings.

Commerce erred in stating [plaintiffs] used agents in an attempt to circumvent payment of antidumping duties. This is not correct because [plaintiffs] reported their respective agent sales and the information required to calculate dumping margins. Plaintiffs' intent was never to have their respective importers avoid dumping duties. If Plaintiffs had the intent of circumventing the antidumping duty order the Plaintiffs would not have requested, and participated in, the instant administrative review.

In addition, Commerce mistakes analyzing the relationship of Plaintiffs and confounding [sic] this with the separate issue of the importer of record. Plaintiffs have participated in this review giving forth valid information regarding its agent sales and relationship with various businesses. Plaintiffs have never deceived Commerce nor provided improper information. To the contrary, Plaintiffs have been forthcoming with all [their] dealings. No action taken by the [plaintiffs] undermined Commerce's ability to "impose accurate antidumping duties" Commerce, in fact, has not pointed to a specific law that has been violated.

Pls.' Mem. 23-24 (footnotes omitted).

With respect to Commerce's use of an adverse inference in selecting from among the facts otherwise available, plaintiffs insist that they acted to the best of their ability in providing Commerce with timely and complete responses to the questionnaires regarding their "agent" sales and, thus, an adverse inference was not supported by the record. See Pls.' Mem. 24.

As previously noted, Commerce used facts otherwise available to determine plaintiffs' dumping margins for their agent sales because it concluded that plaintiffs significantly impeded the review by failing to disclose the true nature of their business relationship. In reaching this conclusion, the Department rejected plaintiffs' general claim that, because they revealed their involvement in an agency relationship, Commerce was precluded from determining their dumping margins based on facts otherwise available. In fact, Commerce provided specific reasons for using facts available in determining plaintiffs' margins for their claimed agent sales. First, the Department maintained that plaintiffs misrepresented the nature of their business relationship throughout the administrative review:

After reviewing the record evidence, the Department found that both Huarong and TMC continually misrepresented the true nature of their relationship with their principal or "agent," as appropriate, during the POR. In their questionnaire responses, Huarong and TMC claimed that their relationships with their "agents" or principals were *bona fide*

business arrangements. However, only through issuing multiple supplemental questionnaires to each [plaintiff] did the Department learn that nearly all of the sales functions were conducted by the principal, and that the "agent's" participation was limited, for the most part, to supplying blank invoices to the principal with an intention to circumvent the order.

Issues & Dec. Mem. at 6. That is, because plaintiffs made it appear in their initial Section A responses that their agent sales were made pursuant to a legitimate agency relationship, they impeded the investigation. *Id.* at 7.

The Department then justified its use of adverse inferences in selecting from among the facts available in accordance with 19 U.S.C. § 1677e(b) when determining plaintiffs' dumping margins: "[T]he Department has determined that both Huarong and TMC failed to cooperate by not acting to the best of their ability to comply with [its] requests for information." *Id.* In Huarong's case, Commerce found that

an adverse inference [was] warranted because Huarong: (1) continually misrepresented the true nature of its relationship with the "agent" during the POR by portraying the company as a *bona fide* "agent" for the vast majority of Huarong's "agent" sales; (2) participated in an "agent" sales scheme in order to avoid payment of the appropriate cash deposit and assessment rate and circumvent the antidumping duty order; and (3) undermined [Commerce's] ability to issue instructions to [Customs] to assess accurate antidumping duties.

Id. at 7-8. Likewise, for TMC, the Department concluded that

an adverse inference [was] warranted because TMC: (1) continually misrepresented the true nature of its relationship with the principal during the POR by portraying itself as a *bona fide* "agent" for the vast majority of TMC's "agent" sales; (2) participated in an agent sales scheme in order to avoid payment of the appropriate cash deposit and assessment rate and circumvent the antidumping duty order; and (3) undermined [Commerce's] ability to issue instructions to [Customs] to assess accurate antidumping duties.

Id. at 8. Thus, in the Final Results, Commerce applied AFA to Huarong's and TMC's claimed agent sales of bars/wedges.

The court finds reasonable Commerce's decision to determine plaintiffs' dumping margins for their claimed "agent" sales based on AFA. First, pursuant to 19 U.S.C. § 1677e(a), the Department acted reasonably in resorting to the facts otherwise available on the record. By its Section A questionnaire response, Huarong claimed that it "made some direct sales and some sales through an agent," and further insisted that "the agent sales [were] exported by the agent and should be properly reported by the agent." Huarong Resp. to Apr. 14, 2004, Questionnaire, Sec. A (May 11, 2004) ("Huarong Sec. A Resp.") at A-2. In addition, Huarong submitted a copy of the purported "agency" agreement. See Huarong Sec. A Resp., Ex. 3; see also Mem. from James C. Doyle, Dir., AD/CVD Operations, Import Administration to Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, Application of AFA to Huarong (ITA Feb. 28, 2005) at 1-2 ("Huarong provided the Department with two copies of the

"agent" contract with TMC, one which predates the [POR] and one which was during the POR. According to the contract, TMC is to act as Huarong's 'agent' for certain sales and receive a commission for its services.") (internal citations omitted).

Plaintiffs fail to acknowledge, however, that Commerce discovered, after the issuance of several supplemental questionnaires, that the business relationship between Huarong and TMC was nothing more than a scheme apparently directed toward circumventing the antidumping duties applicable to Huarong's HFHTs sales to the United States. See Issues & Dec. Mem. at 6 ("[O]nly through issuing multiple supplemental questionnaires to each [r]espondent did the Department learn that nearly all of the sales functions were conducted by the principal, and that the 'agent's' participation was limited, for the most part, to supplying blank invoices to the principal"). Thus, while the record shows that the companies reported an "agency" arrangement, it is apparent that both Huarong and TMC withheld the actual details of their arrangement, information over which they had complete command. In other words, the mere statement that sales were made through an agent when, in reality, the agent's role was simply to provide the principal with blank invoices, is not enough to preclude Commerce from resorting to facts otherwise available. Thus, the Department reasonably concluded that Huarong's and TMC's failure to provide the details

of their arrangement significantly impeded the review.

Huarong's and TMC's failure to disclose fully their true business relationship in their initial questionnaire responses further impeded the review by preventing Commerce from issuing accurate liquidation instructions to Customs. Indeed, without knowing the identity of the actual seller, any "assessment rate calculated by the Department would be rendered meaningless because it would not be applied to all appropriate entries." Issues & Dec. Mem. at 6; *see also id.* at 7 ("The record evidence gathered by the Department demonstrates that the cash deposit and assessment rates calculated by the Department for these 'agent' sales either would not have been the appropriate rate or would not have been assessed by [Customs]."). Put another way, by entering its merchandise using TMC's invoice, Huarong avoided the higher duties that would normally attach to its entries and instead received the lower rate applicable to TMC's entries.

It is apparent from the court's review of the record that plaintiffs' failure to submit accurate and complete data in response to the Department's initial questionnaire prevented the agency from considering correct sales data. Thus, the court finds that the Department reasonably concluded that Huarong and TMC significantly impeded the review and thus that the Department was justified in its reliance on the facts otherwise available

under 19 U.S.C. § 1677e(a).³

Given that the record supports using facts otherwise available to determine plaintiffs' dumping margins with respect to their claimed "agent" sales, the court must now determine whether the Department lawfully used an adverse inference when selecting from among the facts otherwise available in accordance with 19 U.S.C. § 1677e(b). Under that provision, Commerce may use an adverse inference if the respondent "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) (emphasis added). Here, both Huarong and TMC possessed information regarding the true nature of their purported "agency" relationship that was material to Commerce's determination of their antidumping duty margins, yet both submitted that data only after the issuance of several supplemental questionnaires. Thus, as this Court has previously held, plaintiffs' "failure initially to provide the relevant information with respect to their invoicing arrangement, information that was fully within their command, justified Commerce's application of AFA" to plaintiffs'

³ Plaintiffs have previously made these arguments before this Court in litigation dealing with the twelfth administrative review of the HFHTs Orders. See *Shandong Huarong Mach. Co. v. United States*, 30 CIT __, __, 435 F. Supp. 2d 1261, 1269-70 (2006) ("[E]ven though the Companies ultimately disclosed the circumstances surrounding their 'agency' relationships, their failure to do so until after the issuance of several supplemental questionnaires surely significantly impeded Commerce's investigation by requiring the agency to prolong its review.").

claimed "agent" sales. *Shandong Huarong Mach. Co. v. United States*, 30 CIT __, __, 435 F. Supp. 2d 1261, 1270 (2006).

B. Company Specific Applications of AFA

In addition to applying AFA to Huarong's and TMC's "agent" sales, Commerce also applied AFA to both companies with respect to some of their remaining sales. Specifically, the Department applied AFA to certain of Huarong's sales of scrapers⁴ and to certain of TMC's sales of picks/mattocks.

1. Application of AFA to Huarong's Scraper Sales:
Movement Expenses

As previously noted, the application of AFA is the product of a two-step analysis. See 19 U.S.C. § 1677e(a), (b). In the Final Results, the Department found warranted the use of facts otherwise available in calculating the rate applicable to Huarong's scraper sales because, in its view, Huarong "withheld information that [was] requested by the Department."⁵ Issues & Dec. Mem. at 22. Specifically, Commerce found that Huarong failed to disclose that it shipped its merchandise to a

⁴ Scrapers are subject to the antidumping duty order covering axes/adzes from the PRC. See *Olympia Indus., Inc.*, 30 CIT at __, Slip Op. 06-110 at 2-3.

⁵ Pursuant to 19 U.S.C. § 1677e(a)(2)(A), Commerce is directed to rely on facts available when reaching its determination if a respondent "withholds information that has been requested by [Commerce]"

distribution warehouse prior to shipping the goods to the United States despite the Department's repeated requests for that information.

As Commerce correctly notes, under the statute, a respondent is required to report those expenses "incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States" 19 U.S.C. § 1677a(c)(2)(A); see also Issues & Dec. Mem. at 22 ("As has been established in prior administrative cases, the respondent must report all movement expenses, which includes transportation and other expenses, such as warehousing."). Reporting this information is important to the dumping calculation because Commerce deducts from either constructed export price or export price the amount of the movement expenses. This deduction reduces the United States price of respondent's merchandise and, thus, increases its dumping margin.

Here, Commerce asked Huarong twice to report the movement expenses relating to its scraper sales, yet, Commerce found,

[i]n its questionnaire responses, . . . Huarong reported that it did not ship the subject merchandise from the factory to a distribution warehouse, and, thus, did not incur this movement expense. At verification, however, the Department noted that the loading notification notice for one sale listed an unreported movement expense. The Department asked for and received the loading notification notice for other sales,

which also listed this unreported movement expense. Moreover, when Huarong was asked about this expense, Huarong stated that this expense is incurred for all merchandise even though the Department noted that it was not reported in Huarong's U.S. sales database. Accordingly, the Department was not aware until it was discovered at verification that Huarong had not reported further movement expenses.

Issues & Dec. Mem. at 22; see also Verification of Sales and Factors of Production for Huarong (ITA May, 17 2005) ("Huarong Verification Rep.") at 17. Thus, because Commerce did not learn that Huarong incurred this movement expense until verification, it concluded that Huarong withheld information. See Def.'s Resp. 12 ("Verification is meant to confirm the accuracy of data already reported, not to re-start the period for providing data.").

In addition, the Department found that Huarong failed "to put forth its maximum efforts to report and obtain information from its records regarding all incurred movement expenses as requested." Issues & Dec. Mem. at 23. That is, Commerce found justified the taking of an adverse inference in selecting from among the facts otherwise available. See *id.*; see also 19 U.S.C. § 1677e(b). For the Department:

Huarong's knowledge of this movement expense and its decision not to report it, despite repeated questionnaires, properly warrants the use of AFA. A reasonable [r]espondent would have reviewed the Department's questionnaires and its records and reported the movement expenses. The [r]espondents

cannot unilaterally decide what requested information to provide. Accordingly, Huarong did not cooperate to the best of its ability with regard to the Department's request for information during the course of the administrative review. It was only at the Department's request at verification that Huarong acknowledged that this unreported movement expense was incurred for all sales of axes/adzes. Therefore, consistent with the Department's practice in cases where a respondent fails to cooperate to the best of its ability, and pursuant to [19 U.S.C. § 1677e(b)], the Department finds that the use of partial AFA is warranted for Huarong's unreported movement expense.

Issues & Dec. Mem. at 23.

As a result of Huarong's failure to provide the movement expense data, Commerce

us[ed] as an adverse inference the highest number of days, between the date of invoice and the shipment date, as the time period in which [the] expense . . . occurred for all sales in which this movement expense was not reported. Additionally, the Department [valued] this unreported movement expense for all sales with a publicly available Indian surrogate value because there is no surrogate value information on the record due to Huarong's failure to disclose this movement expense.

*Id.*⁶

⁶ Specifically, Commerce stated that in calculating Huarong's rate for its scraper sales:

As an adverse inference, the Department calculated the highest number of days [[]], between the date of invoice and the shipment date, from Huarong sales traced at verification, as the period incurred for all

(continued...)

Huarong contests both Commerce's use of facts otherwise available and its taking of an adverse inference in calculating the dumping margin for certain of Huarong's scraper sales. It argues that the application of AFA was unjustified because it "cooperated to the best of [its] ability by reporting [its] data as completely and as accurately as possible as can be demonstrated by the multiple questionnaire responses submitted as per the Department's requests." Pls.' Mem. 28. That is, Huarong urges that Commerce lacked a sufficient basis for applying partial AFA to its sales of scrapers under the axes/adzes order because Huarong eventually complied fully with the Department's requests for information. See Pls.' Mem. 28 ("The [p]laintiff[] behaved responsibly and reported [its] sales and other data to the best of [its] ability. [It] certainly did not refuse to cooperate.").

⁶(...continued)

sales that did not report this movement expense. The Department valued this unreported movement expense with a publicly available Indian surrogate value, which was deflated to be reflective of the POR. The Department took the surrogate value and multiplied it by the [[]], which was applied as the unreported movement expense incurred for all Huarong's sales of axes/adzes.

Analysis for the Final Results of HFHTs from the PRC: Huarong (ITA Sept. 6, 2005) ("Calculation Mem.") at 9 (citations omitted). In addition, Commerce provided the formula used in calculating Huarong's axes/adzes rate using partial AFA for the unreported movement expense. See Calculation Mem. at 10-11.

Huarong raises a final point in support of its claim that partial AFA were not applicable. It contends that, "[i]f the Department ha[d] concerns regarding the movement expenses of these sales, . . . the Department should [have] request[ed] further information from [r]espondents regarding these movement expenses." Issues & Dec. Mem. 21. In other words, the Department should have voiced its concerns about the questioned movement expense prior to verification.

Despite Huarong's contentions, the court finds that the record supports Commerce's decision to use AFA. First, the court finds reasonable the Department's conclusion that Huarong withheld requested information by not reporting all of its incurred movement expenses. Here, the record confirms that Commerce, through the issuance of several questionnaires, repeatedly asked Huarong to report its movement expenses associated with its sales to the United States of merchandise under the axes/adzes order, yet the Department did not learn that Huarong shipped its goods to a domestic warehouse until verification. See HFHTs From PRC - Huarong's Resp. to Questionnaire Secs. C & D (June 9, 2004) at C-23 ("Huarong did not ship to a distribution warehouse."); see also HFHTs From PRC - Huarong's Resp. to Supplemental Sec. C Questionnaire (Aug. 13, 2004) at C-9. While Huarong officials revealed at verification that the company shipped all of its axes/adzes to a domestic

warehouse prior to exporting the goods to the United States, this late revelation does not remedy Huarong's multiple failures to respond fully to Commerce's questionnaires. See *Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990) ("[V]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness."). Thus, because the use of facts available requires nothing more than a respondent's failure to provide the Department with requested information, Huarong's failure to report that it shipped its goods to a domestic warehouse prior to shipping the merchandise to the United States justified Commerce's reliance on facts otherwise available.

Second, the court finds reasonable the Department's taking of an adverse inference in selecting from among those facts based on Huarong's failure to put forth its maximum effort in responding to Commerce's questions regarding the company's expenses incurred in transporting its scrapers from the factory to the United States. In its responses to Sections C and D of Commerce's questionnaire, Huarong stated that it did not ship its scrapers to a distribution warehouse. At verification, however, Commerce discovered that, in fact, Huarong did ship its scrapers to a domestic distribution warehouse prior to shipping the goods

to the United States.⁷ Nothing prevented Huarong from providing Commerce with the details of this unreported expense prior to verification. See *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT __, __, 353 F. Supp. 2d 1294, 1305 (2004) (“A reasonable respondent acting to the best of its ability would have ensured that the information set forth in its . . . questionnaire response was comprehensive.”).

In addition, Huarong erroneously contends that, if Commerce had concerns about Huarong’s reported (or unreported) movement expenses, it should have asked for more information. When Huarong submitted the response in which it stated that it did not ship its merchandise to a domestic warehouse prior to moving the goods to the United States, Commerce had no reason to doubt that statement’s accuracy. As a result, it was not until

⁷ While verifying Huarong’s questionnaire responses:

Analysts noted that the “Loading Notification” for [[]] states:
 [[
]]. We asked
 company officials about the [[
]] and they stated that the [[
]].

We note that Huarong reported for all sales of scrapers in their Section C database that the goods were not sent to a[] domestic intermediate location . . ., including a distribution warehouse, before the merchandise was shipped to the United States.

verification, when Commerce discovered that Huarong had not disclosed the expense, that the Department could have been expected to question the accuracy of Huarong's response. Thus, because it had no reason to believe there were domestic warehouse expenses prior to verification, Commerce was under no obligation to issue a supplemental questionnaire concerning Huarong's movement expenses.

It is evident, therefore, that Huarong, by withholding data concerning its movement expenses, created a gap in the record that Commerce rightly filled using facts otherwise available. It is equally apparent that Huarong failed to cooperate by doing the maximum it could do to respond completely to Commerce's questionnaires. As a result, the court sustains the Department's decision to account for Huarong's unreported moving expense using facts otherwise available and its accompanying decision to use an adverse inference when selecting from among those facts.

2. Application of AFA to TMC's Sales of
Picks/Mattocks: Supplier's Factors of Production

Next, plaintiffs maintain that the Department unlawfully applied AFA to TMC's sales of picks/mattocks because of its "inability to verify one of TMC's supplier's factors of production of picks/mattocks" Pls.' Mem. 29-30. Because it was unable to verify this information, the Department first applied facts available and then used an adverse inference when

selecting from among those facts.

According to TMC, it had no control over the events that led to its supplier's factors of production data becoming inaccessible. TMC makes the following representations:

On April 18, 2005, TMC officials informed the Department that the Tianjin Tax Authority had seized one of its suppliers accounting books and records. This event was completely out of TMC's control. TMC officials could not have anticipated that the Tianjin Tax Authority would seize its supplier's accounting books and records for a random tax audit. The Department confirmed this event with the supplier's general manager. Moreover, because the relevant documents had been seized, the supplier could offer no alternative method to verify [its] factors of production.

Pls.' Mem. 30 (emphasis & footnotes omitted). Therefore, TMC insists that it failed verification through no fault of its own, and thus Commerce should not have applied AFA to TMC's sales of picks/mattocks.

The Department maintains that its decision to apply AFA in response to TMC's failure to provide its supplier's factors of production information for verification was reasonable. See Issues & Dec. Mem. at 41 ("TMC provided factors of production . . . data that the Department was unable to verify for TMC's sales of picks/mattocks."). First, Commerce explains its use of facts otherwise available:

On April 18, 2005, the day the Department began verification, TMC notified the Department that the books and records of its

supplier of picks/mattocks, Dagang, were seized by the Tianjin Tax Authority On April 19, 2005 the Department conducted verification at Dagang's facilities to confirm that these records were no longer in the possession of Dagang and concluded that Dagang's [factors of production] were unverifiable. As a result of the [Tianjin Tax Authority]'s seizure of Dagang's FY 2003-2004 books and records, the Department was unable to verify TMC's [factors of production] data. In addition, as Dagang was TMC's sole supplier of picks/mattocks, the Department does not have a verified [factors of production] database upon which to calculate a normal value. Therefore, the Department must rely on the facts otherwise available in order to determine a margin for TMC

Id. (footnote omitted). Thus, for Commerce, while the Tianjin Tax Authority's ("TTA") seizure of Dagang's books and records might have been outside of TMC's control, it nevertheless created a void in information necessary to the calculation of TMC's dumping margin that Commerce needed to fill with facts otherwise available. See 19 U.S.C. § 1677e(a) (D).

With respect to its use of an adverse inference pursuant to 19 U.S.C. § 1677e(b), Commerce states:

We find that an adverse inference is warranted in determining the facts otherwise available because TMC failed to act to the best of its ability for two reasons. First, TMC failed to notify the department in a timely manner that Dagang's books and records had been seized. TMC did not notify the Department of the seizure until April 18, 2005. The TTA seized Dagang's books and records on April 1, 2005, and TMC learned of the seizure on April 4, 2005. On April 4, 2005, the same date . . . TMC learned of the

seizure, TMC requested that the Department postpone verification so that TMC could attend the "Canton Trade Fair." Thus, we have reason to question whether TMC misrepresented the reason for the request to postpone verification. In any event, on April 5, 2005, TMC withdrew its request to postpone verification, making no mention of the seizure of Dagang's books and records. When asked why it had not informed the Department of the seizure, TMC responded that it was not "{their} concern." As the Department was verifying TMC's [factors of production], it was incumbent upon TMC to inform the Department of any issue related to the scheduled verification.

Second, TMC failed to provide any alternative methodology to verify its factors of production. In the verification outline released to TMC, the Department advised TMC to make available documents relating to its reported [factors of production]. [19 U.S.C. § 1677m(c)(1)] provides that, if an interested party is unable to submit the information requested or in the requested form, that party is required to notify the Department promptly and must suggest a reasonable alternative. As stated above, TMC did not notify the Department in a timely manner. Nor is there any evidence that TMC made an effort to contact TTA to ascertain, for example, how long the documents would be held or whether the documents or copies could be made available to the Department. In addition, while the Department requested at verification that Dagang provide an alternative method of verifying its [factors of production], neither TMC nor Dagang were prepared to proffer alternatives.

Issues & Dec. Mem. at 41-42. Thus, (1) because it found that TMC failed to notify the Department of the seizure until approximately two weeks after it learned that the records were taken, and (2) because neither TMC nor Dagang made any effort to

obtain either the factors of production data itself or provide an alternative information source, Commerce insists that the application of AFA was justified. See Def.'s Resp. 14 ("An adverse inference was warranted because a reasonable respondent would have made some effort to ensure Commerce would be able to verify the information that it had reported.").

The court finds that the record supports Commerce's application of AFA in constructing TMC's factors of production for its sales of picks/mattocks. First, by failing to have available for inspection information necessary to verify the calculation of its dumping margin, TMC triggered the Department's use of facts otherwise available. See *Nippon Steel Corp.*, 337 F.3d at 1383. That is, Commerce was unable to verify TMC's factors of production data and thus was required to determine TMC's dumping rate using facts available.

Second, the court's review of the record reveals substantial support for Commerce's use of an adverse inference pursuant to 19 U.S.C. § 1677e(b). As previously noted, the Department may use an adverse inference when selecting from among the facts otherwise available if it determines that the respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b). Here, the record makes clear that TMC became aware of the seizure of Dagang's factors of production data on April 4,

2005. See Verification of Sales for TMC in the 13th Admin. Rev. of HFHTs from the PRC (ITA May 23, 2005) at 12 ("TMC officials stated that they did not know about this situation until April 4, 2005 when they were faxed copies of the 'Notice on Tax Investigation' and 'Notice on Holding Account Ledgers for Tax Investigation.'"). Rather than inform the Department of this, TMC instead asked that verification be postponed so that it could attend a trade fair, a request that it subsequently withdrew. TMC only made known the fact that Dagang's books and records had been seized at verification, which took place two weeks after TMC concedes it learned of the seizure. See Issues & Dec. Mem. at 42.

Moreover, it is clear from the record that TMC neither made any effort to secure from the TTA copies of the seized records, nor attempted to suggest an alternative method for calculating the factors of production as was its right under 19 U.S.C.

§ 1677m(c)(1).⁸ Indeed, Commerce stated that "[h]ad TMC provided

⁸ That subsection provides:

If an interested party, promptly after receiving a request from the administering authority . . . for information, notifies the administering authority . . . that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority . . . shall consider the ability of

(continued...)

the information in a timely manner the Department may have had time to pursue any proposed alternatives, including, for example, alternative methods of verifying TMC's factors of production data" Issues & Dec. Mem. at 42. Thus, it is apparent that by failing to inform the Department of the seizure, and by making no effort to obtain copies of the documents or suggest a potential solution to the problem, TMC did not do the maximum it was able to do to respond to Commerce's request. See *Nippon Steel Corp.*, 337 F.3d at 1382.

Based on the foregoing, the court finds that Commerce's application of AFA to TMC's sales of picks/mattocks is supported by the record.⁹

III. AFA Rates for Bars/Wedges, Axes/Adzes and Picks/Mattocks

Huarong and TMC next claim that the rates imposed by the Department on their sales of bars/wedges, axes/adzes and

⁸(...continued)

the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1).

⁹ Because the court finds Commerce's application of AFA to Huarong and TMC to be supported by substantial evidence and in accordance with law, it further finds without merit plaintiffs' contention that the Department should have instead applied combination cash deposit rates to plaintiffs' merchandise.

picks/mattocks as a result of the application of AFA were unreasonable. See Pls.' Mem. 11-18.

A. AFA Rate for "Agent" Sales of Bars/Wedges

Plaintiffs insist that even if the application of AFA to their sales of bars/wedges as a result of their purported "agency" relationship is warranted, the rate applied as AFA is not. For its part, Commerce maintains that the 139.31 percent rate, which was taken from TMC's calculated rate in the eighth review of the HFHTs Orders, was reasonable. See Issues & Dec. Mem. at 9; see also Def.'s Resp. 16-17. According to the Department:

Because the AFA rate is based on TMC's actual sales data, it directly bears a "rational relationship" to TMC. The Department also finds that this rate "bears a rational relationship" to Huarong's commercial activity because both Huarong and TMC export identical products covered by the bars/wedges order and compete for sales within the U.S. market.

Issues & Dec. Mem. at 10. Thus, for Commerce, while the rate is relevant to TMC because it was calculated using that company's sales data in an earlier review, the rate is equally applicable to Huarong based on its participation in the same market as TMC.

In addition to the rate's relevance, the Department further states that

this rate is appropriate because it has been upheld [in *Shandong Huarong General Corp. v.*

United States, 25 CIT 1226, 177 F. Supp. 2d 1304 (2001)] as reflective of TMC's recent commercial activity in exporting bars/wedges to the United States. This rate is also the PRC-wide rate of 139.31 percent for bars/wedges published in the most recently completed administrative review of this antidumping duty order. Moreover, this rate is the highest rate in the proceeding and was calculated using verified information provided by TMC during the 8th administrative review of the bars/wedges order. Accordingly, the Department continues to find that this rate, instead of other recently calculated rates, offers a more adequate incentive to induce Huarong and TMC to cooperate in this proceeding.

Id.

For their part, plaintiffs argue that the 139.31 percent rate "is punitive and does not reflect a reasonable dumping margin." Pls.' Mem. 16. In support of its position, plaintiffs rely on this Court's decision in *Shandong Huarong General Group Corp. v. United States*, 28 CIT __, Slip Op. 05-129 (Sept. 27, 2005) (not reported in the Federal Supplement), remanding Commerce's decision to apply the 139.31 percent rate to the companies' sales of bars/wedges in the ninth administrative review of the HFHTs Orders. In that case, the court concluded that the 139.31 percent rate was both aberrational and punitive. See *id.* at __, Slip Op. 05-129 at 21. On remand, Commerce lowered the 139.31 percent to 47.88 percent. The court sustained this rate as both reliable and bearing a rational relationship to the respondents. See *Shandong Huarong Gen. Group. Co. v. United*

States, 31 CIT __, __, Slip Op. 07-4 at 8 (Jan. 9, 2007) (not reported in the Federal Supplement) (“[T]he court finds that Commerce has explained adequately the reliability and relevance of the 47.88 percent rate with respect to the Companies’ sales of bars and wedges.”). Plaintiffs cannot discern a difference between the facts of that review and those presently before the court. As a result, plaintiffs seek a remand of Commerce’s decision to apply the 139.31 percent rate to their sales of bars/wedges.¹⁰

Where Commerce relies on secondary information in determining dumping margins, it is statutorily mandated to “corroborate that information from independent sources that are reasonably at their disposal.” 19 U.S.C. § 1677e(c). The Federal Circuit has stated that “[i]t is clear from Congress’s imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent

¹⁰ Plaintiffs further contend that Commerce is precluded from using TMC’s calculated rate from the eighth review because that rate was calculated using Indian data that plaintiffs insist were distorted by subsidies. The court notes that: (1) plaintiff put no actual evidence of subsidization on the record, either in this review or during the eighth review; and (2) the issue of subsidization was not raised during plaintiffs’ challenge to the final results of the eighth review before this Court. See *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 1226, 177 F. Supp. 2d 1304 (2001). As a result, plaintiffs are foreclosed from making their claim now.

to non-compliance." *F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

That is, "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id.* As this Court has held, "[a]n AFA rate must be both reliable and bear and a rational relationship to the respondent." *Shandong Huarong Gen. Group Corp.*, 31 CIT at ___, Slip Op. 07-4 at 9. In other words, Commerce may not simply select as AFA the highest possible rate as punishment for a respondent's unwillingness to cooperate. *See Gerber Food (Yunnan) Co. v. United States*, 31 CIT ___, 491 F. Supp. 2d 1326, 1348 (2007) ("The statute does not permit Commerce to choose an antidumping duty assessment rate as an adverse inference without making factual findings, supported by substantial evidence.") (internal quotation marks & citation omitted); *see also Shandong Huarong Mach. Co.*, 30 CIT at ___, 435 F. Supp. 2d at 1274-75.

Finally, this Court has interpreted Congress's intent as requiring Commerce to select an AFA rate that is both reliable and bears a rational relationship to the respondent, not just the industry on the whole. *See Shandong Huarong Gen. Group Corp.*, 31 CIT at ___, Slip Op. 07-4 at 7 ("[T]he law requires that an assigned rate relate to the company to which it is assigned.") (internal quotation marks & citation omitted).

Commerce has failed to meet these standards in making the case for its use of the 139.31 percent rate for TMC's and Huarong's sales of bars/wedges. With respect to the "agent" sales, Commerce has no verified information from which to calculate an actual rate. Thus, Commerce selected a rate from a previous review. In support of its application of the 139.31 percent rate to TMC, Commerce relies solely on the evidence that the rate was calculated for TMC using that company's own verified information in the eighth administrative review of the HFHTs Orders (for the period of review 1998-1999). While Commerce has shown that the rate, having been calculated using the respondent's own verified data, was reliable when calculated, it has failed to explain how the rate is relevant to TMC's sales activity during the thirteenth review. Such an explanation is particularly warranted here where there are more recent rates for TMC that are lower. See, e.g., HFHTs From the PRC, 66 Fed. Reg. 48,026, 48,029 (Dep't of Commerce Sept. 17, 2001) (final results) (assigning TMC's sales of bars/wedges between February 1, 1999, and January 31, 2000, a rate of 0.56 percent); HFHTs From the PRC, 64 Fed. Reg. 43,659, 43,671 (Dep't of Commerce Aug. 11, 1999) (final results) (assigning TMC's sales of bars/wedges between February 1, 1997, and January 31, 1998, a rate of 47.88 percent). In failing to explain how the facts and circumstances present here justify a higher rate than those earlier reviews,

Commerce has failed in its duty to estimate "respondent's actual rate" during the POR. See *De Cecco*, 216 F.3d at 1032.

With respect to Huarong, the Department does nothing more than state that, because Huarong is involved in the same industry as TMC, the 139.31 percent rate is relevant to Huarong. In other words, that rate is reflective of what Huarong's rate would have been had it complied, albeit with an increase intended to deter future uncooperative behavior. As noted, Commerce must demonstrate that the rate it selects as a result of the application of AFA is both reliable and relevant to the individual respondent, not simply the subject industry as a whole. By merely noting that Huarong and TMC are participants in the same industry, Commerce has not sufficiently explained how the 139.31 percent rate relates to Huarong. In other words, the Department has not articulated how the 139.31 percent rate is a reasonable estimate of what Huarong's rate would have been had it complied together with a built-in increase as a deterrent.

Based on the foregoing, the court remands the issue to Commerce with instructions to: (1) explain (a) how the 139.31 percent rate applied to TMC's and Huarong's sales of bars/wedges is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter non-compliance and, in particular, how that rate is more accurate than other rates calculated for TMC; and (b) explain in detail how any rate assigned to Huarong is

reliable and bears a rational relationship to the company itself; or (2) reopen the record and calculate an AFA rate to be applied to Huarong's and TMC's sales of bars/wedges, with an additional amount to deter future non-compliance.

B. AFA Rate for Huarong's Sales of Axes/Adzes

As discussed *supra*, the Department found warranted the application of AFA to Huarong's sales of axes/adzes based on the company's failure to report fully its movement expenses, i.e., that Huarong failed to report that it shipped its merchandise to a domestic storage warehouse prior to shipping the goods to the United States. Commerce, therefore, as it had in several prior cases, used "as an adverse inference the highest number of days, between the date of invoice and the shipment date, as the time period in which [the movement expense] occurred for all sales in which this movement expense was not reported." Issues & Dec. Mem. at 23. The Department further decided to "valu[e] this unreported movement expense for all sales with a publicly available Indian surrogate value because there is no surrogate value information on the record due to Huarong's failure to disclose this movement expense." *Id.* For the Department, this method ensured that "Huarong's margin for sales of axes/adzes was calculated using Huarong's information." Def.'s Resp. 17. As a result, certain of Huarong's sales of axes/adzes received a

calculated rate of 174.58 percent.

Plaintiffs do not contest the Department's methodology employed in calculating the unreported movement expense, rather they contend that Commerce's reliance on Indian surrogate data is misplaced. Plaintiffs first state that Commerce is precluded by its own past practice from using Indian surrogate data "because of Indian subsidies." Pls.' Mem. 11.

In addition, plaintiffs maintain that the axes/adzes rate is artificially inflated because of Commerce's improper inclusion of scraper sales. According to plaintiffs, "[t]he Department should have excluded scrapers from the calculated PRC-Wide and AFA rate for axes/adzes as these rates were based solely on Huarong's sales of scrapers." Pls.' Mem. 17. Plaintiffs apparently contend that, had Commerce excluded Huarong's scraper sales, here the sales of the MUTT scraper, the AFA rate would be substantially lower.

The court finds that the Department has supported with substantial evidence its determination to use AFA to calculate the rate applicable to Huarong's sales of axes/adzes. In this case, Huarong's failure to report the movement expense resulted in the absence from the record of a surrogate value for that expense. That is, because it was not known that the expense had been incurred, no party put a surrogate value on the record. Commerce, therefore, relied on a publicly available Indian

surrogate value to calculate the unreported movement expense. While plaintiffs insist that the surrogate value Commerce employed was distorted by subsidies, they have provided no evidence to support their assertion. Thus, the court cannot credit plaintiffs' subsidy objection.

The court also finds no merit in Huarong's assertion that the inclusion of its sales of the MUTT scraper under the terms of the order applicable to axes/adzes was in error and increased artificially the AFA rate. This Court has held that the MUTT is, in fact, subject to the terms of the axes/adzes order. See *Olympia Indus., Inc. v. United States*, 30 CIT __, __, Slip Op. 06-110 at 2-3 (July 24, 2006) (not reported in the Federal Supplement) ("Because the MUTT's utility as a tool comes from its steel head with a sharp blade that can be used for cutting and chopping, the court finds that it is a hewing tool similar to an axe or adze and, thus, sustains Commerce's Final Scope Ruling.").

Therefore, the court sustains as supported by substantial evidence and otherwise in accordance with law Commerce's calculation of the 174.58 percent rate.

C. AFA Rate for TMC's Sales of Picks/Mattocks

The Department selected 98.77 percent, "the highest margin from this or any prior segment of the proceeding," as an AFA rate for TMC's sales of picks/mattocks based on the company's failure

to have available for inspection at verification its sole supplier's factors of production data. Issues & Dec. Mem. at 43 ("The Department . . . has determined to use a rate calculated for another respondent and the PRC-wide rate as AFA."). The selected rate was first "calculated in the 5th review and corroborated in the Final Results of the 12th review as amended." Final Results, 70 Fed. Reg. at 54,899; see also HFHTs From the PRC, 62 Fed. Reg. 11,813, 11,819 (Dep't of Commerce Mar. 13, 1997) (final results) (fifth admin. rev.); HFHTs From the PRC, 69 Fed. Reg. 55,581 (Dep't of Commerce Sept. 15, 2004) (final results) (twelfth admin. rev.). In support of its decision not to calculate a rate, Commerce explains that it "was unable to conduct verification of the factors of production used in the preliminary rate calculation." Issues & Dec. Mem. at 43. Further, Commerce maintains that its use of a previously calculated rate as AFA "from the current or a prior segment of the proceeding," renders the rate reliable. See 19 U.S.C. § 1677e(c).

For their part, plaintiffs reassert their arguments that the selected AFA rate was calculated using subsidized prices and bears no relation to TMC.

While, for the reasons previously stated, the court does not credit plaintiffs' subsidy argument, it finds that Commerce has not explained adequately why it selected the 98.77 percent rate

to apply to TMC's sales of picks/mattocks. As previously mentioned, "[t]he statute requires Commerce to select an antidumping duty rate that is a reasonably accurate estimate of the respondent's actual rate." *Gerber Food (Yunnan) Co.*, 31 CIT at ___, 491 F. Supp. 2d at 1348-49 (internal quotation marks & citations omitted). In addition, the rate must be both reliable and relevant to the company to which the rate is assigned. Here, because Dagang was TMC's sole supplier of picks/mattocks, the absence of that company's factors of production data meant that the Department did not have verified facts to rely on in calculating an actual rate for TMC.

Commerce justifies the chosen rate's reliability by stating that it was calculated for another respondent in a prior segment of these proceedings. This, however, is not sufficient for the court to find that the selected rate was a reasonably accurate reflection of what TMC's actual rate would be during the POR. This is particularly the case where there have been other lower rates recently calculated for TMC's sales of picks/mattocks. See, e.g., HFHTs From the PRC, 69 Fed. Reg. 55,581 (Dep't of Commerce Sept. 15, 2004) (assigning a 4.76 percent rate to TMC's picks/mattocks for February 1, 2002, through January 31, 2003); HFHTs From the PRC, 66 Fed. Reg. 48,026, 48,029 (Dep't of Commerce Sept. 17, 2001) (assigning a 0.02 percent rate to TMC's sales of picks/mattocks from February 1, 1999, through January

31, 2000). The 98.77 percent rate, therefore, may not represent a reasonable estimate of what TMC's rate would have been had the respondent cooperated, albeit with a built-in increase to deter future non-compliance. See *De Cecco*, 216 F.3d at 1032. While the record may not contain evidence sufficient to permit Commerce to calculate an actual dumping margin for TMC, the Department must nonetheless justify its decision to select a rate from a prior review as an AFA rate. In other words, the absence of verifiable evidence does not release Commerce from its obligation to apply an AFA rate that is reasonable, bears a rational relationship to the respondent and reasonably reflects what the respondent's actual rate would have been. Thus, Commerce must do more than simply select a high rate from a prior review. On remand, the Department is instructed to: (1) explain (a) how the 98.77 percent rate for TMC's picks/maddockes is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter non-compliance; and (b) why it did not select as an AFA rate for TMC's sales of picks/maddockes one of the previously assigned lower rates, albeit with a built-in increase to deter future non-compliance; or (2) reopen the record and obtain evidence to support an actual calculated rate for TMC's sales of picks/maddockes.

CONCLUSION

Based on the foregoing, the court remands Commerce's Final Results for further action in accordance with this opinion. Remand results are due on November 28, 2007. Comments on those remand results are due on December 28, 2007. Replies to such comments are due on January 8, 2008.

/s/ Richard K. Eaton
Richard K. Eaton

Dated: August 28, 2007
New York, New York