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Administrative Review
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September 7, 2004

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Twelfth Administrative Review of the Antidumping Duty Orders on Heavy Forged Hand Tools from the People's Republic of China

Summary

The Department of Commerce (the Department) has analyzed the comments and rebuttal comments submitted by interested parties in the twelfth administrative review of the antidumping duty orders covering heavy forged hand tools (HFHTs) from the People's Republic of China (PRC). These orders consist of four classes or kinds of merchandise: axes and adzes, bars and wedges, hammers and sledges, and picks and mattocks. After analyzing these comments, we recommend making changes in the margin calculations, as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum.

Background

On March 10, 2004, the Department published in the Federal Register the preliminary results of the antidumping administrative reviews of HFHTs from the PRC. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Preliminary Results of Administrative Reviews, Preliminary Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part, 69 FR 11371 (March 10, 2004) (Preliminary Results). The period of review (POR) is February 1, 2002, through January 31, 2003. In response to the Department's invitation to comment on the Preliminary Results of these reviews, the petitioner,

Ames True Temper, and the respondents filed case briefs on April 16, 2004, and rebuttal briefs on April 21, 2004. The respondents in each of these reviews are Shangdong Huarong Machinery Co., Ltd. (Huarong), Liaoning Machinery Import & Export Corporation and Liaoning Machinery Import & Export Corporation, Ltd. (LMC/LIMAC), Shandong Machinery Import & Export Corporation (SMC), and Tianjin Machinery Import & Export Corporation (TMC). No interested party requested a public hearing for these reviews.

List of Issues On Which We Received Comments

Below is the complete list of the issues in these reviews for which we received comments from interested parties:

Part I - Surrogate Value Issues

Comment 1: The Department should use hexagonal steel bar as a surrogate for certain factors of production (FOP).

Comment 2: The Department should value marine insurance at 110 percent of invoice value.

Comment 3: The Department did not apply the proper surrogate value for railroad rails.

Comment 4: The Department should value pallets using hot- and cold-rolled sheet/strip because respondents' claims regarding the use of scrap metal for pallet manufacturing are unsupported.

Comment 5: The Department should recalculate the finished weight of shipped goods.

Comment 6: The Department should recalculate movement charges to include additional expenses.

Comment 7: The Department should value the coating on tool heads/bodies.

Part II - Company Specific Issues

A. Huarong

Comment 8: The Department should calculate a margin and assign it to Huarong if Huarong is benefitting from the rate that it has been assigned as adverse facts available (AFA).

B. LMC/LIMAC

Comment 9: The Department should revoke the dumping order for bars/wedges produced by the Lishu factory and exported by LMC/LIMAC.

C. SMC

Comment 10: The Department should apply AFA to SMC's ocean freight expense.

Comment 11: The Department should find that SMC shipped commercial quantities and revoke the hammers/sledges order with respect to SMC.

Comment 12: The Department should include sales made by SMC through an agent that are outside the POR.

D. TMC

Comment 13: The Department should label a PRC supplier as an uncooperative interested party with respect to the axes/adzes and picks/mattocks it supplied to SMC and apply AFA to TMC's sales of axes/adzes, hammers/sledges, and bars/wedges produced by this PRC supplier.

Comment 14: The Department should perform a Shakeproof analysis for TMC, which will show market economy purchases of ocean freight services to be insignificant.

Comment 15: The Department should increase TMC's normal value (NV) to account for the commission paid to its U.S. sales office.

Comment 16: The Department should disregard the variable Style (3.21) used by TMC in reporting hammer sales.

Part III - Issues Regarding the Use of Total AFA and Rescission of Certain Reviews

Comment 17: The Department should not apply AFA while scope inquiries are pending.

Comment 18: The Department should not apply AFA for the failure to report cast products.

Comment 19: The Department should not apply AFA to agent sales made by Huarong, LMC/LIMAC, and TMC.

Comment 20: The Department should establish "combination" cash deposit rates and utilize

"master list" assessment rates.

Comment 21: The Department should recalculate the AFA and PRC-wide rate of 139.31 percent for bars/wedges because this rate contains subsidized prices.

Comment 22: The Department should reconsider its determination to rescind the review of hammers/sledges and picks/mattocks with respect to Huarong and LMC/LIMAC.

Part IV - Issues Regarding Assessment Instructions

Comment 23: The Department should deny the request by Olympia Industrial Incorporated to instruct U.S. Customs and Border Protection (CBP) to liquidate entries of scrapers and tampers.

Comment 24: The Department should correct the ministerial error in the draft assessment instructions.

Changes in the Margin Calculations Since the Preliminary Results of Review

Based upon our analysis of the comments received from interested parties, for the final results we recommend making the following change to the margin calculations used in the Preliminary Results of administrative review:

1. The Department is no longer applying total AFA to SMC's sales of products covered by the bars/wedges order. Instead, the Department is calculating a margin using the reported sales and FOP data. See Comment 18.

2. The Department has applied partial AFA to SMC for its failure to report a FOP for finish coating. See Comment 7.

Application of AFA for the Final Results

In the Preliminary Results, the Department applied total AFA to Huarong for axes/adzes and bars/wedges; LMC/LIMAC for axes/adzes and bars/wedges; SMC for axes/adzes, bars/wedges, and picks/mattocks; and TMC for bars/wedges. In their comments and rebuttal comments, the parties challenged our corroboration of the 139.31 percent rate selected as AFA for sales of productions covered by the bars/wedges order made by Huarong, LMC/LIMAC, and TMC. See Comments 18, 19, and 21 for a discussion of our application of this rate and its corroboration. With respect to the other applications of total AFA to the respondents, the parties did not challenge our corroboration of the 55.74 percent rate selected as AFA for axes/adzes and the 98.77 rate selected as AFA for

picks/mattocks. Since the corroboration of these rates has not been challenged, we will continue to apply these rates as AFA for the final results. For a full discussion of our corroboration of these rates, see Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Sales of Scrapers and Tampers," dated March 1, 2004 (Scrapers and Tampers AFA Memorandum); Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Liaoning Machinery Import & Export Corporation and Liaoning Machinery Import & Export Corporation Limited with Respect to Axes/Adzes," dated March 1, 2004 (LMC/LIMAC Axes/Adzes AFA Memorandum); and Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Shandong Machinery Import & Export Corporation," dated March 1, 2004 (SMC Axes/Adzes and Picks/Mattocks AFA Memorandum).

The parties have challenged our application of total AFA in all instances except our (1) application of total AFA to LMC/LIMAC's sales of axes/adzes due to LMC/LIMAC's failure to provide FOP data for these sales, and (2) application of total AFA to SMC's sales of axes/adzes and picks/mattocks due to SMC's failure to provide FOP data for these sales. See Comments 8, 13, 17-19 for our discussion of the AFA determinations that have been challenged. With respect to our application of total AFA to LMC/LIMAC's sales of axes/adzes, since this application was not challenged, we will continue to apply the rate of 55.74 percent LMC/LIMAC as AFA. For a full discussion of our application of AFA toward LMC/LIMAC's sales of axes/adzes, see LMC/LIMAC Axes/Adzes AFA Memorandum. Similarly, concerning SMC's sales of axes/adzes and picks/mattocks, since our application of total AFA to these sales was not challenged, we continue to apply the AFA rates of 55.74 and 98.77 to SMC's sales of axes/adzes and picks/mattocks, respectively. (Although the petitioner raises an issue related to our application of SMC's sales of axes/adzes and picks/mattocks in Comment 13 below, the petitioner does not challenge the application of AFA to SMC.) For a full discussion of our application of AFA to SMC's sales of axes/adzes and picks/mattocks, see SMC Axes/Adzes and Picks/Mattocks AFA Memorandum.

Lastly, even though the Department has applied total AFA to Huarong, LMC/LIMAC, SMC, and TMC for their sales of products subject to certain of the HFHTs orders, these respondents have demonstrated an absence of governmental control, both in law (*de jure*) and in fact (*de facto*), with respect to their export activities. See the Preliminary Results for a full discussion of our separate rates analysis. As nothing has changed since the Preliminary Results with respect to their separate rates, we continue to grant Huarong, LMC/LIMAC, SMC, and TMC separate rates for the final results of these administrative reviews.

Discussion of Issues

Part I - Surrogate Value Issues

Comment 1: The Department should use hexagonal steel bar as a surrogate for certain FOP.

The petitioner claims that the record evidence indicates that the steel used by the respondents for hand tool production is not steel billet, which the Department valued in the Preliminary Results, but is instead hexagonal steel bar. The petitioner argues that the purchase invoices for steel submitted by the respondents do not demonstrate the type of steel that the respondents claim they use in their tool factories. Moreover, the petitioner claims that these vaguely worded invoices are in conflict with the narrative response and other record evidence submitted by the respondents. The petitioner argues that the Department cannot rely on the respondents' assertions that their steel input is billet steel because (1) the respondents have never provided a definitive document that demonstrates an ASTM grade for their steel; (2) have never provided copies of metallurgical or testing certifications; and (3) have never provided specific, known grade information for its "railroad wheels" and "railroad rails." See petitioner's submission dated April 19, 2004 (Petitioner's Case Brief), at 27.

According to the petitioner, Huarong submitted purchase orders from three U.S. customers where each customer specified that the ordered products be made from hexagonal steel bar. In addition, the petitioner argues that the product catalog submitted by TMC includes four classes of wrecking bars that are described as being "forged from hexangular stock." The petitioner states that this wording of the product description is evidence that TMC's steel input is hexangular steel bar rather than steel billet that is forged into a hexangular shape. The petitioner requests that the Department value all input steel described as billet steel with the surrogate value for finished steel bar contained in its February 2, 2004, submission. The petitioner submitted a surrogate value based on import prices for finished steel bar, classified in the Indian tariff schedule under 7214.99.09, as reported in the Monthly Statistics of the Foreign Trade of India (MSFTI), for April 2002 through February 2003. Alternatively, the petitioner recommends that the Department calculate a surrogate value using Indian import statistics and apply it to all steel inputs claimed by the respondents to be "steel billet."

In rebuttal, the respondents argue that the Department has verified the inputs the factories used to produce subject merchandise and has never found that these factories use hexagonal bar. The respondents contend that the Department's verifications consistently confirm the use of scrap rail, scrap wheels, and steel billet as the steel inputs used in production of subject merchandise. See the respondents' submission dated April 21, 2004 (Respondents' Rebuttal Brief), at 19. The respondents recommend that the Department continue as it has in numerous past reviews to use harmonized tariff schedule (HTS) subheading 7204.49.09 to value scrap steel and HTS subheading 7207.20.09 to value standard steel billet for surrogate value calculations. The respondents state that they placed on the record the U.S. import statistics for calendar years 1998 through 2003 in anticipation that the petitioner would argue that the steel values for bars/wedges were incorrect. Should the Department find that the Indian import statistics for scrap steel and steel billet are inadequate, the respondents recommend that the Department use U.S. import data to calculate the surrogate values for scrap steel and steel billet.

Department's Position:

We agree with the respondents. In its case brief, the petitioner does not identify the specific orders to which its argument applies. Instead, it presents a general argument that "the Department should value all input steel utilizing a surrogate value for finished steel bar," and "{i}n the alternative, the Department should utilize the Indian import statistics for steel bars for all steel inputs claimed by Respondents to be 'billet steel'." See Petitioner's Case Brief at 29. However, all of the specific evidence cited by the petitioner reflects sales of subject merchandise by Huarong and TMC, not their purchases of the steel input used for hand tool production.

Huarong reported that it used steel billet in the production of tools subject to the axes/adzes and bars/wedges orders. However, the Department continues in these final results to apply total AFA to Huarong's sales of merchandise subject to the orders on axes/adzes and bars/wedges. See Comments 8, 17, and 19. Moreover, since Huarong reported no shipments to the United States of hammers/sledges and picks/mattocks, these two reviews are being rescinded as to Huarong. See Comment 22. Thus, this issue is moot with respect to Huarong. We further note that LMC/LIMAC and SMC did not report the use of steel billets in producing any merchandise, subject to any of the four HFHTs orders. Thus, this issue is moot with respect to LMC/LIMAC and SMC.

TMC reported that it used steel billet in its production of certain products within the axes/adzes, bars/wedges, and hammers/sledges orders. However, the only evidence cited by the petitioner regarding the steel inputs used by TMC were four classes of wrecking bars in its product catalog described as being "forged from hexangular stock." We find that this ambiguous statement does not overcome the documentary evidence supplied by TMC's suppliers regarding the material inputs they used to produce HFHTs. Not all of TMC's bars are made from billet as TMC's suppliers reported using both scrap rail and billet in the production of this product. Regarding the billet used in the production of bars/wedges, TMC's suppliers placed on the record several purchase invoices for steel billet and tied these invoices into their raw materials inventory ledgers. See TMC's December 8, 2003, submission at Exhibits 6 and 9. Lastly, regarding the petitioner's contention that steel billet cannot be forged and formed into a hexagonal shape, the petitioner cites no record evidence in support of its assertion. Given that the forging process heats the steel input to a degree such that the input can be shaped into the desired form, there is no record evidence for concluding steel billet and/or scrap rails cannot be forged into a hexagonal shape. Based on the record evidence, we are continuing to value the steel input for certain products within the axes/adzes, bars/wedges, and hammers/sledges orders as billet.

Comment 2: The Department should value marine insurance at 110 percent of invoice value.

The petitioner argues that the Department should value marine insurance utilizing a rate where the insured price is valued at 110 percent of the stated price, citing the Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 3544, 3551 (January 26, 2004) (Poly Bags).

In rebuttal, the respondent states that "this is a factual question." See Respondents' Rebuttal Brief at 28.

Department's Position:

We disagree with the petitioner. In Poly Bags, which the petitioner cites, the Department used a surrogate for marine insurance that was based upon the value of merchandise. In this case, the Department's surrogate for marine insurance is an Indian rupee per metric ton value obtained from Stainless Steel Wire Rod From India: Final Results of Administrative Review, 64 FR 856 (January 6, 1999) (Stainless Steel Wire Rod from India). Since the surrogate value is based upon an actual shipment of stainless steel wire rod incurred by an Indian company, there is no reason to believe that the customary markup in price did not already take place in deriving the per metric ton insurance. Therefore, the Department has made no changes from the Preliminary Results with respect to marine insurance.

Comment 3: The Department did not apply the proper surrogate value for railroad rails.

The petitioner states that the Department should value the respondents' purchases of railroad rails with Indian imports of steel railway rails categorized under Indian HTS subheading 7302.1001, rather than the basket steel scrap category of HTS 7204.49.09 which covers, "Ferrous waste and scrap; remelting scrap ingots of iron or steel – {o}ther." The petitioner contends that the classification it recommends matches the material actually being purchased and utilized by the respondent companies. The petitioner notes that the respondents have purportedly tailored their manufacturing processes to match the utilization of railroad rails as the primary input. According to the petitioner, it is more accurate to utilize a surrogate value for a product that matches exactly the material input that is used. The petitioner states that since the Indian tariff schedule does not segregate between "new steel rail" and "used steel rail," the Department can reasonably assume that the relevant HTS subheading includes purchases of both types of rail. Lastly, the petitioner contends that the utilization of a surrogate value that encompasses railroad rails is significantly more accurate and more representative of the material used than is the utilization of a basket steel scrap category that would include everything from scrap ingots to scrap from appliances and automobiles.

In rebuttal, the respondents state that the petitioner's suggestion is totally without merit and

serves to show that the petitioner's objective is not to be accurate, but to be punitive. The respondents maintain that the Department should value the inputs based on the factors actually used, in accordance with the Tariff Act of 1930, as amended (the Act). According to the respondents, the Department has verified the tool-producing factory data on numerous occasions. The respondents argue that the Department knows from these verifications that the Jinma factory uses scrap railroad rail, and that these rails are collected as scrap when the rails have worn out and must be replaced with new rails. The respondents assert that these rails cannot be used as rails for tracks. Their sole value is as scrap. The respondents contend that the petitioner's argument that there is no difference between scrap rails and new rails, and that scrap rails should be classified as new rails simply because the Indian tariff schedule does not segregate between "new steel rail" and "used steel rail," is erroneous.

Department's Position:

We disagree with the petitioner and have continued to use the Indian HTS subheading 7204.49.09 for steel scrap to value the scrap steel rails that some respondents are using in producing certain classes or kinds of subject merchandise. We are not persuaded that the Department should use an HTS subheading for steel rail that, in the petitioner's words "does not separate between 'new steel rail' and 'used steel rail'." The explanatory notes of the Harmonized Tariff Schedule of the United States, Annotated for Statistical Reporting Purposes (2004) (HTSUS), at section XV, 8(a) define metal waste and scrap entering under HTS 7204 as "metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons." Thus, it is reasonable to assume that merchandise entered under HTS subheading 7214.99.09 is new railroad rails, or at least rails that are not yet so worn that they can no longer be safely used in train transportation. The Department has verified in past reviews that the railroad rails used in the production of subject merchandise by respondents are actually "scrap" rails, which are worn to the extent that they can no longer be safely used for rail transport. The petitioner does not dispute that the rail input used by the respondents to produce certain types of subject merchandise is worn and no longer capable of use as a functioning rail. Therefore, we find that the respondents' rail input is best classified and valued as scrap metal.

Comment 4: The Department should value pallets using hot- and cold-rolled sheet/strip because respondents' claims regarding the use of scrap metal for pallet manufacturing are unsupported.

The petitioner argues that the Department's use of Indian imports of steel scrap, categorized under Indian HTS subheading 7204.49.09, to value the respondents' steel pallets is unsupported by the record evidence. The petitioner states that although the respondents reported that most of their sales were shipped on steel pallets, which they manufactured themselves from scrap steel, the record indicates that steel input for the pallets is not scrap steel, but standard grades of steel and angles. In support of its argument, the petitioner notes that Huarong does not describe the material it purchases for the manufacture of its pallets as scrap. Instead, Huarong uses a generic description that appears to

indicate that the material it purchased is a finished metal product. Furthermore, Huarong's purchase invoices for this material give no indication that the material is scrap. The petitioner asserts that the Department should value the steel input for the self-produced steel pallets with Indian imports for either hot-rolled or cold-rolled sheet or strip.

The petitioner also argues that the respondents who reported the use of self-produced pallets have failed to provide the consumption rates for the labor and other materials necessary to produce a pallet. Specifically, the petitioner states that the respondents have failed to report the following inputs used to make a pallet: electricity, rivets, welding flux, welding solder, acetylene, and oxygen. Although the respondents argue that the cost of producing metal pallets is minimal, and that using wooden pallet surrogates to value steel pallets overstates the real cost (since the cost of the wood exceeds the cost of the scrap steel), the petitioner contends that the respondents have neither demonstrated this claim, nor have they placed on the record all of the necessary FOP to allow the Department to assess the validity of these statements. The petitioner argues that the respondents have failed to identify all of the inputs used to manufacture a pallet and have not demonstrated that such inputs account for a minimal portion of the overall cost of production (COP). Citing Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004) (Color Televisions from the PRC), the petitioner argues that the Department determined that it was proper to value all materials that are used in the manufacture of subject merchandise and the items required to pack and ship subject merchandise. The petitioner notes that in Color Televisions from the PRC, the Department requested and verified information concerning material inputs (such as pieces of wire, resistors, plastic tabs, *etc*.) that represented less than one thousandth of one percent of the total COP.

In rebuttal, the respondents state that the Department should reject the petitioner's conjecture and continue to use a scrap steel surrogate value, rather than a surrogate value derived from "finished" steel since making pallets does not require finished steel. According to the respondents, Huarong, which manufactured its own steel pallets, did not buy the scrap steel from steel companies, but from nearby auto parts factories. The respondents state that Huarong cuts the flat iron scrap it purchases into the proper length and solders the pieces together to form a pallet. The respondents state that virtually any scrap of a flat steel will suffice. According to the respondents, there is no support for the petitioner's assertion that the Department should use the classification for hot-rolled or cold-rolled sheet or strip to value this steel input.

Department's Position:

We agree with the respondents. With respect to Huarong, the issue of how the Department valued steel pallets is only potentially relevant to Huarong's sales of merchandise covered by the orders on axes/adzes and bars/wedges, since Huarong reported that it had no shipments of hammers/sledges and picks/mattocks during the POR. In the Preliminary Results, Huarong received total AFA in the axes/adzes order due to its failure to report its sales of scrapers and in the bars/wedges order because

of its participation in an agent sales scheme. Since the Department continues to apply total AFA to Huarong for axes/adzes and bars/wedges, the issue is moot for this company.

With respect to LMC/LIMAC, the issue of how the Department valued steel pallets is only potentially relevant to LMC/LIMAC's sales of merchandise covered by the order on axes/azdes and bars/wedges since LMC/LIMAC reported that it had no shipments in the hammers/sledges and picks/mattocks orders. In the Preliminary Results, LMC/LIMAC received total AFA in the axes/adzes order because its supplier ceased participating in this review and in the bars/wedges order because it participated in an agent sales scheme. Since the Department continues to apply total AFA to LMC/LIMAC in the axes/adzes and bars/wedges orders, the Department need not reach the issue of whether the steel utilized for pallets was properly reported by LMC/LIMAC.

With respect to TMC and SMC, the petitioner cites no evidence, and the Department can find no evidence on the record, that indicates that TMC and SMC used anything other than scrap steel for their self-made steel pallets. We further note that the quality of steel does not necessarily have any bearing on the classification of steel as scrap steel. Rather, steel is considered scrap when it is a byproduct of a manufacturing process. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review of the Order on Bars and Wedges, 68 FR 53347 (September 10, 2003) (HFHTs Final Results for Eleventh Review) and the accompanying Issues and Decision Memorandum at Comment 7.

Regarding the petitioner's argument that the Department failed to include other factors used in manufacturing a steel pallet, we note that the respondents have stated that the manufacturing process involves welding the steel parts together in the shape of a pallet. While this process may include welding solder, acetylene, and oxygen, these are the types of materials commonly accounted for under shop supplies in overhead costs. To the extent that SMC's and TMC's suppliers incurred these costs, they should be included in our surrogate value for overhead.

Comment 5: The Department should recalculate the finished weight of shipped goods.

The petitioner observes that the Department calculated the finished weight of the tool by summing the actual weights of the non-tool head components with the advertised or standard weight of the tool head. The petitioner argues that this calculation is not appropriate because shipping companies do not charge freight based on advertised or standard rates, but rather on actual weight. Since the tool head accounts for the majority of the weight of the tool, the petitioner focused its argument on this part of the tool. The petitioner recalculated the finished weight for each tool head by adding the reported input weights for steel, paint, and oil, and then subtracting the reported scrap offset. Based on this calculation, the petitioner asserts that the Department's methodology of using the advertised weight of

the tool head understated the total finished weight. The petitioner suggests that the Department correct this calculation in the final results by using the reported input weights for steel, paint, and oil, net of the reported scrap offset, rather than the advertised or standard weight for tool heads.

In rebuttal, the respondents state that it is unclear what difference the net weight calculation has on the ocean freight calculations. According to the respondents, the impact on the margin of using actual finished weight in movement expense calculations, rather than other types of weight, is unclear as long as whichever type of weight selected is applied on a uniform basis.

Department's Position:

We disagree with the petitioner.[1] In order to calculate the cost of inland freight, international freight, and marine insurance, the Department multiplies the finished weight of the product by the appropriate weight-based surrogate value for these expenses. This finished weight should estimate the scale weight of the finished product to the best extent possible, as the scale weight is used by shipping companies when determining the cost of freight or insurance. To calculate the finished tool weight, the petitioner uses the reported scrap offset and the reported input weights of steel, paint, and oil. However, this approach leads to an overstatement in the finished weight of the tool.

Using the input weights for paint and oil does not account for any yield loss of paint and oil that occurs during the production process. However, as it is reasonable to assume that the yield loss on paint and oil is minor, the impact of not subtracting these yields on the finished weight is negligible. With respect to steel inputs, the petitioner attempts with its methodology to account for steel scrap and waste generated in the production process by subtracting the reported scrap offset from the input weight of the steel. If the reported scrap offset was an accurate estimate of the yield loss generated during the production process, this methodology would be valid. However, the Department grants the scrap offset only on the amount of scrap that was sold during the POR, not the amount of scrap and waste that was generated during the POR. Since the respondents do not sell the full amount of scrap and waste generated during the production process, the reported scrap offset is less than the production yield. See Memorandum from Jeff Pedersen, Senior International Trade Compliance Analyst, to the File, "Analysis of Petitioner's Methodology's in Calculating Finished Weight of the Tool Head," dated September 7, 2004 (Finished Weight Memorandum). Thus, the petitioner's methodology of using the reported input weight of steel minus the reported scrap offset over-estimates the scale weight of the tool head. Using the production yield of SMC's supplier, the Department found during SMC's cost verification that the finished weight of the tool head was extremely close to the tool head's advertised weight. See Finished Weight Memorandum. Since the petitioner's suggested methodology

[1] Although the petitioner made this argument only with respect to SMC's sales of hammers/sledges, the Department followed an identical methodology regarding the finished weight of the product in our calculations for TMC's sales of axes/adzes, hammers/sledges, and picks/mattocks.

over-estimates the tool weight, and we found during SMC's cost verification that the weight of its finished tools heads was extremely close to the tool heads' advertised weight, we will continue to use the advertised tool weight in our calculations.

Similarly, for TMC, the Department will rely on its findings of the accuracy of advertised weights at the verification of SMC, as the Department did not verify TMC's data in this review.

Comment 6: The Department should recalculate movement charges to include additional expenses.

The petitioner argues that the Department erred by choosing a combination of ocean freight and brokerage surrogates that fail to deduct all movement expenses. According to the petitioner, the Department should account for all movement expenses regardless of the terms of delivery because the terms reported by the respondents demonstrate that the respondents incurred various movement expenses, such as loading and containerization charges. The petitioner notes that it is irrelevant whether the various handling and containerization services are invoiced separately or whether they are paid in Chinese currency. The petitioner continues by providing a list of various handling, containerization, and port fees and argues that the Department must assign a surrogate value to each of these charges and include them in the calculation of NV, as these fees are separate from and in addition to brokerage and handling charges. Finally, the petitioner asserts that the Department should use AFA in valuing these expenses because the respondents have failed to report that they incurred these additional handling, containerization, loading, and port fees.

In rebuttal, the respondents contend that the petitioner had sufficient time prior to the Preliminary Results to request that the Department ask further questions regarding the miscellaneous movement and handling charges listed in its case brief. Further, the respondents argue that the petitioner provides no factual support for its claims and that the claims are based on assumptions that are not supported by the record. The respondents assert that AFA is not warranted because they reported all movement charges that were incurred and provided timely and complete responses to all of the Department's questions. Lastly, the respondents contend that the charges identified by the petitioner are so small that the Department is fully justified in ignoring the petitioner's allegations since section 777(a) of the Act allows the Department to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise."

Department's Position:

We disagree with the petitioner that certain freight handling expenses are not included in the brokerage and handling surrogate value that we applied in the Preliminary Results. For the Preliminary Results, the Department used a surrogate value for brokerage and handling derived from a 1997 source document originally submitted to the Department in Stainless Steel Wire Rod from India. The petitioner is correct that some, but not all, of the miscellaneous handling expenses it identified are necessary

expenses incurred when exporting a product, and it is reasonable to assume that the exporter ultimately pays for these costs (for FOB, CIF, and CFR shipments). The freight forwarder (the party that pays such charges directly in its role of coordinating freight traffic) may bill the exporter for these expenses as a separate line item or consolidate it with other expenses into a single invoice line item. The key question, however, is whether these expenses are included in the brokerage and handling surrogate value or in the ocean freight surrogate value the Department used to value these expenses.

In the Preliminary Results, as acknowledged by the petitioner, the surrogate value for ocean freight includes only the cost of ocean freight, and no other miscellaneous expenses, since the Department used ocean freight invoices provided by market economy carriers to calculate the ocean freight surrogate value for SMC (hammers/sledges) and TMC (axes/adzes, hammers/sledges, picks/mattocks).

With regard to the brokerage and handling charge, we note that the original source document for this surrogate value provides no information regarding the specific expenses that have been aggregated in the identified rupee cost. See see Memorandum from Thomas Martin, Case Analyst, to the File, "Surrogate Values Used for the Preliminary Results of the Twelfth Administrative Reviews of Certain Heavy Forged Hand Tools From the People's Republic of China-February 1, 2002 through January 31, 2003," dated March 1, 2004 (Surrogate Value Memorandum) at 9 and Attachment DD. We reviewed the public record of Stainless Steel Wire Rod from India, but found nothing to indicate whether the miscellaneous handling expenses cited by the petitioner, including the expenses listed in the Department's "Index of Factor Values for Use in Antidumping Investigations Involving Products from the PRC," were covered by this surrogate value. Although there are exceptions to this practice, it is the Department's experience that the freight forwarder typically pays all of the miscellaneous expenses necessary to export a product, and then bills its customer (typically, the exporter) for these costs. Absent evidence to the contrary, it is reasonable to assume that the brokerage and handling surrogate value captures these costs. We also note that these miscellaneous expenses were not separately valued in Stainless Steel Wire Rod from India. Therefore, as it is likely that the brokerage and handling surrogate value used in the Preliminary Results includes these miscellaneous handling expenses, to avoid possible double counting, we have not included the additional handling expenses identified by the petitioner in our calculation of net U.S. price and only deducted foreign brokerage and handling.

Regarding containerization, in our review of the public information in Stainless Steel Wire Rod from India, we found evidence indicating that the brokerage and handling surrogate value from Stainless Steel Wire Rod from India contains expenses related to the containerization of cargo. For this reason, we did not include containerization in the net U.S. price calculation. See Viraj's March 16, 1998, Section A submission at 80.

Furthermore, we note that two of the miscellaneous handling expenses noted by the petitioner are not necessarily incurred when exporting a product. Specifically, demurrage and storage charges are not necessarily incurred if freight is properly expedited. There is no record evidence to indicate that

Huarong incurred demurrage and storage costs for any sale of subject merchandise during the POR.

Comment 7: The Department should value the coating on tool heads/bodies.

The petitioner argues that the nearly all of the respondents failed to report in their FOP databases an input for the "finished coatings" applied to tool heads and/or bodies. The petitioner states that the respondents, in their U.S. sales listings, responded to the field for the physical characteristic "finished coatings" (FINCOATU) with a value of 1 – meaning that the head or body of the tool has been coated with an "enamel, polyurethane, varnish or other finish." The petitioner claims that the Department specifically established a physical characteristic for tool heads with a finished coating that is separate from varnished/coated handles or painted heads, both of which have separate fields in the U.S. sales listing. The petitioner argues that although the respondents reported that their tool heads have a finished coating, they have almost universally excluded a coating, enamel, or other finishing material from their FOP databases. The petitioner contends that the respondents are under-reporting their FOP by omitting this factor. The petitioner argues that the Department should use facts available (FA) and assign a finished coating value to all products where a FINCOATU value of 1 was reported. As FA, the petitioner recommends that the Department utilize the reported consumption rate for finish coatings reported by another producer of subject merchandise. The petitioner urges the Department to apply this consumption rate to all sales with a value of 1 in the FINCOATU field.

In rebuttal, the respondents state that the basis of the petitioner's demand that the Department include a factor for finish coating in the calculation of NV is misplaced. The respondents acknowledge that they mistakenly reported in the FINCOATU field of the U.S. sales databases that they used a finish coating on the tool head and/or body. According to the respondents, this error resulted from the Department's introduction of a new system for reporting CONNUMs that was started for the first time in this administrative review. The respondents claim that despite the error in responding to the field FINCOATU, they correctly reported the data for the field PAINTU. The respondents note that the Department has verified the production process and factor inputs during repeated verifications. Since applying a coating such as enamel, polyurethane, varnish or other finish and also painting the tool would be superfluous, the respondents argue that coating and painting are substitute production methods. Lastly, the respondents assert that they do not coat any product; they only cover the item with paint.

Department's Position:

We agree with the petitioner. The Department's June 18, 2003, section C questionnaire stated that for Field Number 3.8 (axes/adzes), 3.11 (bars/wedges), 3.7 (hammers/sledges), and 3.9 (picks/mattocks), finish coating (FINCOATU), the respondents should "{r}eport whether the {tool} head is coated with an enamel, polyurethane, varnish or other finish (not including paint)." The questionnaire also included a separate field for PAINTU, which instructed respondents to "{r}eport whether the {tool} head is painted or not painted." Since the Department specifically instructed the respondents not to report paint in FINCOATU, and specifically requested that the respondents only

report enamel, polyurethane, varnish or other finish coatings for the tool head in this field, we must interpret the respondents' questionnaire responses as reporting a finish coating for certain subject merchandise in their U.S. sales database.

In field 2.0, "Raw Material Amounts," of the section D questionnaire, the Department instructs the respondents to "{r}eport the raw materials used to produce a unit of the subject merchandise." Section D of the questionnaire does not identify all of the individual inputs used to product subject merchandise, as the Department does not have that information in its possession. We rely on the respondents to completely and accurately report all of their inputs, and use verification as the means of ensure the completeness of the reported data.

For the final results, we are applying total AFA to Huarong's and LMC/LIMAC's sales of subject merchandise in the axes/adzes and bars/wedges orders, and rescinding the reviews of these respondents in the hammers/sledges and picks/mattocks orders due to no shipments. Therefore, this issue is moot with respect to Huarong and LMC/LIMAC. TMC reported in its section C questionnaire response that it did not use a finish coating on its sales of merchandise subject to all four HFHTs orders. However, TMC did report an FOP for a finish coating in its section D response for all four orders. Although TMC failed to report that it used a finish coating in its section C response for all four orders, it did report the necessary FOP, which we have accepted and included in our calculation of NV for TMC in the Preliminary Results, and continue to include for the final results.

With respect to SMC, this respondent reported in its section C questionnaire response that it used a finish coating for its U.S. sales of axes/adzes, bars/wedges, hammers/sledges, and picks/mattocks. In its section D responses, however, SMC reported an FOP for finish coating only for hammers/sledges, which we included in our calculation of NV in the Preliminary Results. SMC did not report an FOP for finish coating for its axes/adzes and bars/wedges. For the final results, we continue to apply total AFA to SMC's sales of axes/adzes because the supplier of axes/adzes refused to participate. Therefore, this issue is moot with respect to SMC's sales of axes/adzes. For SMC's sales of bars/wedges, since it failed to supply requested information, we have applied partial AFA by including in our calculation of NV an additional FOP for finish coating. Specifically, we divided the weight of the finish coating reported by TMC's supplier for bars/wedges by the steel input weight for TMC's bars/wedges. We applied the highest of these ratios to the steel input weight for bars/wedges reported by SMC's supplier of bars/wedges. As partial AFA, we then included this weight as the consumption rate for finish coating our calculation of NV for SMC's bars/wedges. See Memorandum from Jeff Pedersen, Senior International Trade Compliance Analyst, to the File, "Finish Coating for Shandong Machinery Import & Export Corporation," dated September 7, 2004. We have used as AFA data from TMC, a respondent in the instant administrative review. As this information was obtained in the course of the administrative review, it is not necessary to corroborate such information under section 776(c) of the Act.

Part II - Company Specific Issues

A. Huarong

Comment 8: The Department should calculate a margin and assign it to Huarong if Huarong is benefitting from the rate that it has been assigned as AFA.

The petitioner notes that Huarong reported under the axes/adzes order its sales and FOP data for scrapers in its initial questionnaire responses. However, Huarong refused to respond to the Department's supplemental questions regarding scrapers because scrapers are the subject of an on-going scope inquiry. The petitioner argues that Huarong has benefitted by failing to cooperate with respect to the Department's supplemental questions regarding scrapers. In order to demonstrate that Huarong has benefitted, the petitioner prepared a margin calculation based on the sales and FOP data reported by Huarong. In calculating this margin, the petitioner claims that it made several conservative assumptions, including (1) the omission of an amount for foreign inland freight for the steel input from the calculation of NV, (2) the omission of an amount for foreign brokerage and handling from the calculation of net export price, and (3) the inclusion of Huarong's reported scrap offset in the calculation of NV. Using these assumptions, the petitioner calculated a margin several times higher than the 55.74 percent rate applied as total AFA by the Department to Huarong under the axes/adzes order in the Preliminary Results.

Based upon the results of its margin analysis, the petitioner urges the Department to calculate a margin based on the sales data and FOP data reported by Huarong in order to determine whether Huarong's margin on scraper sales is less than the highest previously calculated margin for axes/adzes. If it is higher, the petitioner asserts that the Department should apply this higher margin to Huarong's sales of scrapers and update the PRC-wide margin for axes/adzes with this new rate. The petitioner requests that the Department, in calculating a margin for Huarong's scraper sales, use adverse inferences when determining the appropriate values for brokerage and handling, ocean freight, inland freight for steel, the scrap offset, and the steel input.

Regarding the steel input for scrapers, the petitioner notes that Huarong provided its raw material consumption ledgers in Exhibit 6 of its November 21, 2003, supplemental questionnaire response. The petitioner also notes that Huarang, in its translated photocopies, failed to identify the type of steel being tracked in each raw material ledger. The petitioner provides an affidavit from an employee who is fluent in Cantonese and proficient in Mandarin. According to this affidavit, the ledger page for the steel consumed to produce scrapers identifies a type of steel other than billet. (The exact type of steel translated by the petitioner from Huarong's consumption ledger for scrapers is business proprietary information.) Furthermore, the petitioner contends that it makes logical sense that Huarong would use this type of steel, rather than billet, given that the type of steel it identified is physically more similar to the shape of the scraper than is billet.

In rebuttal, Huarong states that the petitioner's margin calculation is new information that the Department should strike from the record. The respondent states that it did not receive a copy of the petitioner's SAS margin program on diskette, and therefore it is impossible to review the calculations and to provide specific comments. Furthermore, the margin calculation submitted by the petitioner is based on incomplete data since Huarong did not continue to supply information for scrapers. Furthermore, Huarong states that the petitioner assumes that not only was Huarong obligated to respond, but also it can now be penalized for failing to cooperate by not participating fully on scrapers. Huarong contends that it presented its argument that it was not required to participate with respect to scrapers due to the on-going scope inquiry, which the Department has not yet completed.

Regarding the surrogate values that the petitioner used in its margin calculation, Huarong states that (1) the surrogate value selected by the petitioner for ocean freight is not relevant because this value was used in Notice of Preliminary Results of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat from the People's Republic of China, 69 FR 9800 (March 2, 2004) (Crawfish New Shipper Preliminary Results), a product that is very dissimilar to hand tools, and (2) Huarong uses its rolling machinery to roll billet into a form that is used to produce scrapers.

Department's Position:

We disagree with the petitioner. In its original questionnaire response, Huarong reported its sales and FOP data for scrapers. However, Huarong ceased to participate further with respect to scrapers by refusing to respond to any supplemental questions regarding the scraper sales or FOP data because scrapers are subject to an on-going scope inquiry. Since Huarong refused to answer any supplemental questions on scrapers, and this ruled out the possibility of any verification, the record regarding sales under this order is incomplete.

In attempting to demonstrate Huarong's margin for scrapers, the petitioner used Huarong's incomplete sales and FOP data for scrapers to estimate the margin Huarong would have received had it continued the review. We disagree that we should calculate a margin based on this data. The incomplete nature of the sales and FOP data upon the record renders the data unreliable. See Final Determination of Sales at Less than Fair Market Value: Steel Concrete Reinforcing Bars from Indonesia, Poland, and Ukraine, 66 FR 18752 (Apr. 11, 2001), Cf. Allegheny Ludlum Corp. v. United States, slip op. 03-126 (Ct. Int'l Trade 2003) (sustaining Commerce's rejection of ranged data after respondent's withdrawal). Thus, we have used AFA to determine Huarong's margin. Relying upon incomplete sales and FOP data, for which the respondent did not provide supplemental information, would be contrary to our responsibility to calculate accurate dumping margins. Moreover, as the Court of Appeals for the Federal Circuit (CAFC) noted in Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1991 (Fed. Cir. 1990), participation in an antidumping proceeding is voluntary. We consider the application of the AFA rate more appropriate than calculating a margin based on incomplete and unverified sales and FOP data.

Other than the petitioner's recommendation that the Department determine whether Huarong benefitted from its failure to provide supplemental information regarding its sales of axes/adzes, no party has challenged our application of total AFA toward Huarong's sales of axes/adzes, or our corroboration of the 55.74 percent rate selected as AFA. Since no party has challenged our preliminary application of total AFA toward Huarong, we will continue to assign, as AFA, the rate of 55.74 percent to Huarong's sales of products covered by the axes/adzes order. For a full discussion of our application of AFA toward Huarong, and our corroboration of the rate selected as AFA, see Scraper and Tampers AFA Memorandum.

B. LMC/LIMAC

Comment 9: The Department should revoke the dumping order for bars/wedges produced by the Lishu factory and exported by LMC/LIMAC.

LMC/LIMAC notes that the Department, in the Preliminary Results, decided that it was not appropriate to revoke the dumping order for LMC/LIMAC because the Department preliminarily determined that LMC/LIMAC made agent sales under the bars/wedges order for factories other than the Lishu factory. See the respondents' submission dated April 16, 2004 (Respondents' Case Brief), at 2. According to LMC/LIMAC, denying its request for revocation because it served as an agent for another PRC company was unreasonable for the following reasons: (1) the Department reviewed LMC/LIMAC's agent sales during the 2000-2001 POR and assigned those sales to the principal without resorting to total AFA, (2) the Department has not defined what type of agent sales are appropriate and what type are not appropriate, and (3) the Department's conditions for revocation tie LMC/LIMAC's sales of bars/wedges to those produced by the Lishu factory, which are not agent sales.

In rebuttal, the petitioner notes that LMC/LIMAC received a margin in the Preliminary Results that was above *de minimis*. See the petitioner's submission dated April 21, 2004 (Petitioner's Rebuttal Brief), at 6. The issue of whether or not the Department properly assigned this margin to LMC/LIMAC is irrelevant to the revocation issue. The petitioner notes that the regulations specifically require that a respondent demonstrate an absence of dumping for three consecutive years. The petitioner asserts that since the margin in the instant review is above *de minimis*, LMC/LIMAC is not eligible. Until LMC/LIMAC clears this hurdle, the petitioner claims that the arguments raised by this respondent are moot.

Department's Position:

We agree with the petitioner. Under 19 C.F.R. §351.222(b)(1)(A), a respondent must demonstrate an absence of dumping for three consecutive years. The margin in the instant review of LMC's bars/wedges is above *de minimis*, and therefore LMC/LIMAC is not eligible for revocation with respect to the bars/wedges order.

In regard to LMC/LIMAC's argument that the Department in past reviews has reassigned sales from agents to principals to calculate antidumping margins without applying AFA, the Department notes that this is the first review in which we have fully developed the record regarding the nature of the relationship between LMC/LIMAC and its principal. The record indicates that LMC/LIMAC continually misrepresented the true nature of its relationship with its principal during the POR. See Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Liaoning Machinery Import & Export Corporation and Liaoning Machinery Import & Export Corporation Limited with Respect to Bars/Wedges," dated March 1, 2004 (LMC/LIMAC AFA Memorandum) at 4. With respect to LMC/LIMAC's statement that the Department has not defined what type of agent sales are inappropriate, the Department notes that there is no true agency relationship between LMC/LIMAC and its principal. Id. at 5.

With respect to LMC/LIMAC's statement that the Department's conditions for revocation tie LMC/LIMAC's sales of bars/wedges to those produced by the Lishu factory, which are not agent sales, we note that LMC/LIMAC's argument is irrelevant for purposes of this determination. Upon receipt of a request for revocation, the Department will consider, in the first instance, the following in determining whether to revoke the order in part: (1) whether the producer or exporter requesting revocation has sold subject merchandise at not less than NV for a period of at least three consecutive years; (2) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping; and (3) whether the producer or exporter requesting revocation in part has agreed in writing to immediate reinstatement of the order, as long as any exporter or producer is subject to the order, if the Department concludes that the exporter or producer, subsequent to revocation, sold the subject merchandise at less than NV. See 19 C.F.R. § 351.222(b)(2); see also Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part: Certain Pasta From Italy, 66 FR 34414, 34420 (June 28, 2001) (Pasta from Italy). In determining whether a respondent sold subject merchandise at not less than NV for a period of at least three consecutive years, the Department looks to the rate assigned to the respondent in each review period. Since LMC/LIMAC did not receive a *de minimis* margin for the bars/wedges order in the instant review, it is ineligible for revocation from this order.

C. SMC

Comment 10: The Department should apply AFA to SMC's ocean freight expense expense.

The petitioner argues that the Department should apply AFA to SMC's ocean freight expense because SMC failed to accurately report its ocean freight expense despite two supplemental questionnaires from the Department informing SMC that its allocation methodology was incorrect. Further, the petitioner states that SMC's failure to comply with the Department's request to change its

allocation methodology led to ocean freight being under-reported on all sales. Although the Department recalculated SMC's ocean freight expense in the Preliminary Results by applying to all sales the average ocean freight expense calculated from SMC's market economy invoices, which are from a small number of U.S. sales, the petitioner asserts that this recalculation is not adverse and does not reflect SMC's lack of cooperation.

For the final results, the petitioner urges the Department to disregard SMC's reported ocean freight expenses because the submitted information was not verifiable under section 782(e)(2) of the Act. Moreover, given SMC's failure to cooperate with the Department's repeated requests to recalculate this expense, the petitioner argues that the Department should also determine that SMC did not act to the best of its ability under section 782(e)(4) of the Act in reporting this adjustment. Finally, the petitioner contends that the Department should assign AFA under section 776(b) of the Act because SMC impeded the review by refusing to alter its allocation methodology.

The petitioner continues by stating that, despite SMC's lack of cooperation, the Department used a surrogate value for ocean freight that rewarded SMC for failing to cooperate with the Department's request for recalculation. Specifically, the ocean freight expense used by the Department for SMC in the Preliminary Results is less than the surrogate values used in the two prior HFHTs reviews. The petitioner suggests that the Department adopt the surrogate value for ocean freight used in Crawfish New Shipper Preliminary Results, which is coincident with the POR, derived from more than once market economy carrier, and the average of freight to various U.S ports.

Furthermore, the petitioner claims that the Department did not analyze SMC's market economy ocean freight invoices for U.S. sales used to calculate this expense to determine whether the invoice values are significant, substantial, or meaningful as required under a Shakeproof analysis. See Shakeproof Assembly Components Div of Ill. Tool Works, Inc. v. United States, 59 F. Supp. 2d 1354 (Ct. Int'l Trade 1999) (Shakeproof). In addition, the petitioner argues that the Department did not review whether the market economy inputs were physically identical to the non-market economy (NME) inputs, which is another requirement in Shakeproof. According to the petitioner, SMC failed both Shakeproof tests. First, in order to determine whether the market economy shipments were significant, substantial or meaningful, the petitioner compared SMC's total market economy shipments for U.S. sales to the total non-FOB shipments. The petitioner found that on average only a small percentage (both by nominal weight and by piece) were shipped via market economy carriers. Because these percentages are less than the percentages seen in Shakeproof, the petitioner concludes that these percentages demonstrate that SMC's market economy ocean freight purchases are insignificant. Second, with respect to whether the inputs are physically identical, the petitioner argues that ocean freight is charged on a port-to-port basis. According to the petitioner, transportation arrangements from a single PRC port to different U.S. ports are not physically identical. Thus, the petitioner argues that the Department must look at the relative market economy purchases of ocean freight on a port-to-port basis. On this basis, the petitioner finds mixed results, where certain port-to-port routings were primarily transported via NME carriers, while other routings involve mostly market

economy carriers. The petitioner concludes by stating that if the Department goes through the effort of determining the distance from the PRC factory to the port, the Department should retain this level of accuracy for ocean freight.

In rebuttal, SMC argues that the Department cannot apply an adverse inference toward its ocean freight expenses because it cooperated to the best of its ability, contrary to the petitioner's assertions. SMC contends that the Court of International Trade (CIT) established the guidelines for the application of AFA in the litigation resulting from the seventh review of the HFHTs orders. Specifically, the CIT said that the Department, in order to apply an adverse inference, must find evidence of a "pattern of unresponsiveness" or evidence that "strongly indicate{s} a specific intent on the part of the respondent to evade {Commerce's} requests for information." See Fujian Machinery and Equipment Import & Export Corporation v. United States, Court no. 99-08-00532, Slip Op. 01-120 (September 28, 2001), at pp. 60-61 (quoting Nippon Steel v. United States, 146 F. Supp. 2d 835, 841 (Ct. Int'l Trade 2001)). SMC interprets the CIT finding to indicate that the Department may not derive an adverse inference where there is no evidence that it failed to cooperate to the best of its ability. Further, the respondents emphasize that any errors made by SMC were minor and not made with any intention to frustrate the reviews.

SMC also contends that its freight calculations were based on the approach it used in every review since the 1992-1993 review. Moreover, SMC claims that this approach is in accordance with an allocation methodology consistent with a decision of the CIT.[2] In addition, SMC states that, as it explained in its November 17, 2003, submission, "the conditions of 19 C.F.R. § 351.408 were satisfied." See Respondents' Rebuttal Brief at 15. According to SMC, any errors in its calculations were simply errors and its reported ocean freight expenses satisfy the Department's standards. With respect to the petitioner's recommendation that the Department value SMC's ocean freight with the surrogate value from the Crawfish Preliminary Results, SMC states that "{this} surrogate value is inappropriate for hand tools." Id.

SMC also disagrees with the petitioner's assertion that the shipments made by SMC do not meet the tests established in Shakeproof. SMC explains that as long as the market economy input was relevant and accurate, the Department is within its authority in using a market economy price. SMC concludes that its market economy freight charges are significant and provide a reasonable basis for approximating what the ocean freight cost would be in a market economy country.

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[2] Consolidated International Automotive, Inc. v. United States, 16 CIT 1062, 809 F. Supp. 125 (Ct. Int'l Trade 1992) (Consolidated International Automotive). This litigation challenged various aspects of the Department's findings in Notice of Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From Taiwan, 56 FR 36130 (July 31, 1991) (Lug Nuts from Taiwan).

Department's Position:

We agree with SMC that application of AFA is unwarranted in this instance, and will continue to base SMC's ocean freight expense on SMC's market economy freight invoices. Pursuant to section 773(c)(4) of the Act and 19 C.F.R. § 351.408(c)(1), where a producer sources an input from a market economy and pays for it in market economy currency, and where the market economy input represents a significant quantity of that input, the Department uses the prices paid for the input to calculate the factors-based NV. In the present case, the Department has determined to follow its precedent and use the market economy prices as reported by SMC for ocean freight charges in order to value this service where the service was obtained from both market economy and NME suppliers because the ocean freight arrangements were carried out by a market economy supplier and paid for in a market economy currency. Moreover, the shipments sent via market economy carriers represent a significant amount of SMC's ocean freight charges. See Memorandum from Jeff Pedersen, Senior International Trade Compliance Analyst, to the File, "Comparison of Shandong Machinery Import & Export Corporation Shipments on Market Economy Vessels vs. Non Market Economy Vessels," dated September 7, 2004.

The petitioner claims that the Department should not make its determination regarding the significance of the market economy inputs based on the aggregate of shipments to the United States on market economy carriers. Instead, the petitioner urges the Department to evaluate shipments on a port-specific basis, and thereby determine whether the market economy input purchases to each port meet our significance test independently. As support for this practice, the petitioner claims that freight charges to west coast ports and east coast ports cannot be considered the same input. Rather, the petitioner argues that these shipments should be treated in the same manner as inputs of wire rod and coke, which the Department would never aggregate together into a single input for the purposes of our "significance test." The Department disagrees. In evaluating whether market economy inputs are meaningful under 19 C.F.R. § 408(c)(1), the Department views each input separately. Unlike the wire rod/coke example, shipping is a single input, albeit with differing prices to different ports. The significance test focuses on whether a significant proportion of the inputs have been sourced from a market economy. Taken in the aggregate, SMC's purchases of transportation services from market economy suppliers meet the Department's significance test and can be used to value the ocean freight factor in our calculations.

The petitioner correctly notes that SMC reported its per-unit ocean freight using an incorrect allocation methodology. See Memorandum from Jeff Pedersen and Kevin Williams, Import Compliance Specialists, to Tom Futtner, Acting Office Director, "Verification of Questionnaire Responses of Shandong Machinery Import & Export Corp., in Antidumping Duty Administrative Review of Certain Heavy Forged Hand Tools from People's Republic of China," dated December 24, 2003 at 7. Given that SMC complied with our requests for documentary evidence regarding its ocean freight expenses, and based on our discussions with company officials during verification, we conclude that SMC's use of an incorrect allocation methodology was not an attempt to distort its actual

expenses, but rather stemmed from its belief that the allocation methodology was reasonable. Therefore, for the final results, we are continuing to use SMC's market economy ocean freight purchases to value SMC's ocean freight factor. The Department will continue to value SMC's sales with the weighted-average price of the market economy invoices with correct allocations. Since these invoices contain bars, hammers, and other products, we have applied this value to SMC's sales of bars/wedges and hammers/sledges.

Comment 11: The Department should find that SMC shipped commercial quantities and revoke the hammers/sledges order with respect to SMC.

The petitioner agrees with the Department's decision not to revoke the order on hammers/sledges with respect to SMC because SMC did not ship in commercial quantities in the tenth review (2000-2001 POR). However, the petitioner believes that record evidence suggests an even stronger reason for denying SMC's request for revocation. The petitioner claims that although the Department rescinded the eleventh review of hammers/sledges (covering the 2001-2002 POR), it has presented evidence demonstrating that SMC would have received a non-*de minimis* margin had the eleventh review been completed. Specifically, the petitioner used the following data to calculate a non-*de minimis* margin for SMC's U.S. sales of hammers/sledges: (1) SMC's reported consumption factors for hammers/sledges from the eleventh review, (2) SMC's reported U.S. sales of hammers/sledges from the eleventh review, (3) the final surrogate values from the eleventh review of bars/wedges, and (4) certain other surrogate values used by the Department in the Preliminary Results of the instant reviews.

SMC argues that the Department's conclusion in the Preliminary Results not to revoke the order on hammers/sledges with respect to SMC because it did not sell hammers/sledges in commercial quantities during the tenth review (2000-2001 POR) was erroneous and contrary to law. SMC contends that the cases cited by the Department in support of its decision not to revoke are considerably different from the circumstances surrounding SMC's request for revocation. Specifically, SMC argues that these cases: (1) do not include consumer items, but instead cover steel and raw materials, (2) covered reviews where the quantity and number of sales were small, and (3) did not involve comparisons over similarly extended time periods following their respective periods of investigation (POIs).

Furthermore, SMC argues that the Department failed to recognize that the HFHTs market has changed significantly in the 14 years between the POI and the revocation period under consideration. SMC also argues that the cash deposit rate assigned to it during the tenth review (2000-2001 POR) affected SMC's sales during that time period. SMC continues by claiming that supply and demand forces control the sales quantities it ships to the United States. Lastly, SMC provides the number of sales (by invoice) it made during the tenth review (2000-2001 POR), and the total quantity of hammers/sledges shipped on those invoices, and argues that these quantities must be considered commercial quantities.

In rebuttal to the petitioner's argument that SMC would have received a non-*de minimis* margin in the eleventh review (2001-2002 POR) of hammers/sledges had the Department completed that review, SMC argues that because the petitioner never provided it or the Department with a diskette containing an electronic copy of the program and data used by the petitioner to calculate the alleged margin, SMC has been unable to verify the accuracy of the calculations. SMC continues by asserting that there are fatal flaws in the methodology used by the petitioner to generate the alleged margin. Specifically, SMC contends that it calculated no margin for its U.S. sales of hammers/sledges during the eleventh review (2001-2002 POR) after correcting the petitioner's calculations in the following manner: (1) eliminated aberrational data and subsidized prices from the surrogate values, (2) adjusted for the fact that the Jinma factory makes it own wood handles, and (3) used the same Indian import HTS subheading for fiberglass handles that the Department used in the tenth review (2000-2001 POR). Since the petitioner's calculations using the data from the eleventh review (2001-2002 POR) are in error, SMC argues that the Department should reject this argument in total.

The petitioner rebuts SMC's argument that the order on hammers/sledges should be revoked with respect to SMC by noting that SMC failed to cite any statutory or regulatory provisions to support its claim that the Department's preliminary decision not to revoke was contrary to law. The petitioner observes that SMC distinguishes the instant review from the cases cited by the Department to support its decision in its Preliminary Results by noting that the past cases involved different classes of products, small quantities and number of sales, and had a much shorter length of time between the POIs and the revocation periods. However, the petitioner contends that neither the statute nor the regulations stipulate the criteria that the Department should use when analyzing a request for revocation. Given this framework, the petitioner asserts that there is no bright line test for determining what constitutes commercial quantities and that the Department may interpret this definition on a case-by-case basis. Therefore, the petitioner concludes that SMC's attempt to distinguish the extensive precedent from the instant case based on these three criteria is moot.

Furthermore, the petitioner rebuts the remainder of the respondent's arguments regarding significant market changes between the time of the investigation and the revocation period being considered, the market effect of cash deposit rates, and the effects of supply and demand as unconvincing. The petitioner states that SMC failed to explain how any of these cryptic statements affected SMC sales during the 2000-2001 period, or are in any way relevant. Additionally, the petitioner terms SMC's claim regarding cash deposit rates a "non starter" because cash deposit rates are always in effect for any revocation scenario and that it is a respondent's obligation to ship in commercial quantities notwithstanding the discipline of the order, in order to gain eligibility for revocation.

The petitioner continues its rebuttal by noting that SMC's argument that there are flaws in the

surrogate values used by the petitioner to recreate SMC's margins for the eleventh review (2001-2002 POR) are incorrect. The petitioner notes that SMC failed to identify which surrogate values used by the petitioner are aberrational or based upon subsidized prices. The petitioner argues that all of the surrogate values it used in its calculations were the values used by the Department in the final results of the eleventh review of bars/wedges, in addition to six surrogate values used by the Department in the Preliminary Results. The petitioner observes that SMC has not challenged any of these surrogate values. Regarding SMC's arguments about wood handles, the petitioner argues that the Department chose to value the finished handle in the current and in past reviews rather than valuing the inputs required to make the handle. Thus, SMC's argument that the petitioner did not consider the production of Jinma's self-made handles is incorrect. The petitioner contends that it applied a surrogate for handles that is consistent with the methodology followed by the Department in the HFHTs reviews.

Department's Position:

We agree with the petitioner that revocation with respect to SMC is not warranted. According to 19 C.F.R. § 351.222(d)(1), "before revoking an order or terminating a suspended investigation, the Secretary must be satisfied that, during each of the three (or five) years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply." In the Preliminary Results, the Department determined that SMC did not ship in commercial quantities during the three-year revocation period, and was therefore ineligible for revocation. Specifically, the Department stated in its decision memorandum that "{t}he sales quantity for the 2000-2001 POR is so small in comparison with the POI that we cannot reasonably conclude that the *de minimis* margin SMC received during the 2000-2001 POR provides any meaningful information on SMC's normal commercial experience." See Memorandum from Jeff Pedersen, Case Analyst, through Thomas F. Futtner, Acting Office Director, to the File, "Commercial Quantity Analysis of Shipments of Heavy Forged Hand Tools (Hammers/Sledges) to the United States by Shandong Machinery Import & Export Corporation," dated March 1, 2004 (Commercial Quantity Memorandum).

SMC's argument that the cases cited by the Department in support of its decision are significantly different from the instant case is without merit. Upon request for revocation, the Department considers the following in determining whether to revoke the order in part: (1) whether the producer or exporter requesting revocation has sold subject merchandise at not less than NV for a period of at least three consecutive years; (2) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping; and (3) whether the producer or exporter requesting revocation in part has agreed in writing to immediate reinstatement of the order, as long as any exporter or producer is subject to the order, if the Department concludes that the exporter or producer, subsequent to revocation, sold the subject merchandise at less than NV. See 19 C.F.R. § 351.222(b)(2); see Pasta From Italy. 19 C.F.R. § 351.222(d)(1) does not direct the Department to conduct a different analysis depending on whether the subject merchandise are industrial goods or consumer goods. The same criteria are applied to all cases, regardless of whether the subject

merchandise is an industrial product or consumer good. However, since each case is different, the specific facts of each decision will also be different. In the instant case, we found that "the abnormally low level of sales activity for the 2000-2001 POR does not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping." Id. It is irrelevant that the class of merchandise differed from that referenced in other cases. Each of the cited cases indicates that the Department's practice is to refuse to revoke orders where sales quantities are "abnormally small" in comparison to those prior to the order.

SMC's further arguments on changes in the market, the market effect of the high cash deposit rate and the length of time since the POI are similarly unconvincing. 19 C.F.R. § 222(d)(1) clearly states that exports must be in commercial quantities, and SMC has not demonstrated that this is the case. Because the Department continues to find that SMC did not sell in commercial quantities for three consecutive years, it will not address the issues raised by the petitioner regarding a hypothetical margin in the eleventh review.

Comment 12: The Department should include sales made by SMC through an agent that are outside the POR.

The petitioner asserts that the Department should include sales made by SMC through an agent in its calculations. The petitioner argues that, due to a change in the date of sale methodology, SMC deleted these sales from its reported sales database in a supplemental response because the invoice date was prior to the POR. While the petitioner is pleased that the Department clarified the date of sale methodology in this review, the petitioner contends that the Department should include these sales in SMC's calculations in order to avoid any gaps in coverage of the order.

In rebuttal, SMC explains that this issue arose because the Department changed the date of sale methodology in this review from reporting sales based upon entry date to reporting sales based upon invoice date. SMC contends that this methodology does not result in under-reporting sales and argues that it is the Department, not SMC, that directs how sales should be reported. Lastly, SMC prefers to report sales based on the invoice date since that is how its sales records are maintained and this approach does not require the use of records, such as entry summaries, which are in the hands of the importers.

Department's Position:

We disagree with the petitioner. At the beginning of this review, the Department instructed all respondents to report their U.S. sales based on invoice date. In its section C questionnaire response, SMC mistakenly continued to report its sales on the basis of entry date, rather than invoice date. SMC corrected this error in its supplemental response. Since the sales in question were made before the POR, the Department will not consider them in this review. Regarding the fact that these sales were made through TMC's agent, we find this fact is irrelevant toward the question of whether such sales

were made before or during the POR. We note that the petitioner does not dispute that these sales were made before the POR. Instead, it argues that a gap in the coverage of the order will occur if the Department does not include these sales in the instant review. This argument is incorrect. Since the Department rescinded the eleventh administrative review with respect to SMC, none of its sales made during that POR were examined.

D. TMC

Comment 13: The Department should label a PRC supplier as an uncooperative interested party with respect to the axes/adzes and picks/mattocks it supplied to SMC and apply AFA to TMC's sales of axes/adzes, hammers/sledges, and bars/wedges produced by this PRC supplier.

The petitioner notes that the Department included a certain PRC hand tool manufacturer, referred to as Company A, in its notice of initiation, and that this supplier did not respond to the Department's antidumping duty questionnaire. As a result, Company A was considered part of the PRC entity for the Preliminary Results and was assigned total AFA for all four classes or kinds of subject merchandise. In addition, the petitioner observes that SMC reported that Company A was its sole supplier of axes/adzes and picks/mattocks during the POR, and that this supplier did not wish to participate in these reviews. In light of the above, the petitioner states that the Department properly assigned AFA to SMC for failing to supply Company A's factor information for axes/adzes and picks/mattocks.

However, the petitioner argues that the Department, in discussing its decision to apply AFA to SMC for axes/adzes and picks/mattocks, failed to specifically state that Company A is an interested party to the reviews and that the supplier itself was uncooperative and deserving of AFA. According to the petitioner, the Department has repeatedly applied AFA where an exporter was not able to provide FOP due to a noncompliant factory. See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review for Xiangcheng Yisheng Foodstuffs Co., Ltd., 68 FR 75210 (December 30, 2003) (Fresh Garlic New Shipper Review). The petitioner notes that the Department appropriately followed this practice with respect to SMC. However, the petitioner notes that the Department, in the Fresh Garlic New Shipper Review, stated that a supplying producer is an interested party whose failure to cooperate is attributable to the exporting respondent. Specifically, the Department stated, "{w}e consider the supplier in this new shipper review an interested party... Accordingly, we continue to interpret the Act to include Yuyu {the producer} as an 'interested party' for purposes of this proceeding and find that the application of AFA is warranted because this 'interested party' also did not act to the best of its ability in providing FOP data necessary to calculate an antidumping duty margin." Id. Therefore, for the final results, the petitioner recommends that the Department affirmatively state that Company A is an interested party and that it failed to cooperate to the best of its ability.

The petitioner continues by noting that Company A also supplied axes/adzes, hammers/sledges, and bars/wedges to TMC. Although Company A failed to provide factor data to SMC, it did provide its factor data to TMC, who reported this information to the Department. The petitioner argues that when a respondent receives AFA for its response, any other respondent that also sells subject merchandise to the United States manufactured by that respondent should receive the same adverse AFA rate for its sales of that respondent's merchandise. The petitioner cites Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Administrative Review, 62 FR 61276 (November 17, 1997) (Tapered Roller Bearings 1995-1996), where the Department stated in the FA memorandum that, "likewise, that {AFA} margin should apply to all sales of merchandise produced by [***] regardless of whether Peer/Chin Jun had any ability to influence the responsiveness of [***]." The petitioner claims that the Department should follow its past practice and apply AFA to all sales of models supplied by Company A because that company is receiving total AFA as a respondent and because SMC is receiving total AFA for its sales of merchandise supplied by Company A.

Furthermore, the petitioner asserts that the Department cannot allow interested parties to control the investigation. In these reviews, Company A refused to participate in its own capacity as a named respondent, and as an "interested party" in support of SMC's sales of axes/adzes and picks/mattocks. Although Company A did provide its factor data to TMC, the petitioner contends that the Department cannot allow an interested party to selectively participate in one of three instances, since to do so would allow interested parties to obtain a more favorable result than had they fully and completely participated. Therefore, the petitioner argues that the Department should assign all of TMC's sales of models supplied by Company A the highest AFA rates available.

In its rebuttal brief, TMC summarized Fresh Garlic New Shipper Review by noting that (1) the Department considered the supplier to be an interested party as defined by the Act and (2) the Department applied AFA to the exporter due to the supplier's failure to provide the factor data. However, the respondents contend that, contrary to the assertions made by the petitioner, the issue in the Fresh Garlic New Shipper Review was not whether the supplier cooperated with respect to other respondents, but was instead whether the respondent reported sufficient factor data to allow the Department to calculate a margin. Although the respondent in the Fresh Garlic New Shipper Review did not provide factor data from an uncooperative supplier, TMC states that it did provide factor data in these reviews for the merchandise produced by the supplier in question.

Additionally TMC states that Tapered Roller Bearings 1995-1996 does not apply as the facts of this case are different from the facts of the instant reviews. According to TMC, Tapered Roller Bearings 1995-1996 concerns a respondent that had its own exports to the United States and failed to cooperate with Peer/Chin Jun, another respondent to which it supplied subject merchandise for resale. TMC argues that this respondent's failure to cooperate on its direct sales tainted its sales to Peer/Chin Jun. Furthermore, TMC notes that unlike the Peer/Chin Jun situation, Company A did not export any subject merchandise directly to the United States. Instead, Company A's only participation was as a

supplier to SMC and TMC.

Furthermore, TMC cites Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1997-1998 Antidumping Administrative Review and Final Results of New Shipper Review, 64 FR 61837 (November 15, 1999) (Tapered Roller Bearings 1997-1998), where Premier, a respondent in that case, was unable to obtain factor data from all of its suppliers. TMC notes that the Department, in its final results, applied partial AFA to Premier's U.S. sales for which factor data was not provided, rather than all of Premier's sales. According to TMC, Tapered Roller Bearings 1997-1998 illustrates that the Department's practice is to calculate margins when the necessary information is available. TMC argues that the failure by Company A to provide its factor data to SMC should in no way influence the sales made by TMC for which it did cooperate.

Department's Position:

We agree with TMC and will continue to use the FOP data provided to TMC by Company A. The petitioner requests that the Department apply AFA to a respondent who reported the FOP data of its supplier because the supplier refused to provide its FOP data to another respondent, who also purchased merchandise produced by that supplier. The petitioner stated that it is the Department's practice to make this inference, citing Tapered Roller Bearings 1995-1996. Moreover, the petitioner claims that if the Department does not follow this practice, it will allow a respondent to obtain a more favorable result. We disagree. The example cited by the petitioner does not represent the same factual situation as we find in this case. In Tapered Roller Bearings 1995-1996, the Department applied AFA to Peer/Chin Jun's sales of subject merchandise produced by a particular supplier because that supplier refused to participate adequately in that review with respect to its sales to Peer/Chin Jun. Contrary to the petitioner's assertion, the supplier from Tapered Roller Bearings 1995-1996 did not selectively provide its FOP data to multiple respondents.

In the instant review, Company A did not respond to our questionnaire, so we are applying AFA to determine its weighted-average margins as a potential exporter. The Department obtained and reviewed entry data from CBP for the four HFHTs orders. These data indicate that Company A did not ship subject merchandise to the United States during the POR. Since Company A does not have a separate rate, any shipments it may make in the future will receive the PRC-wide cash deposit rate. As a producer, Company A provided its FOP data to TMC but not SMC. Therefore, in accordance with our standard practice, we are applying AFA to determine SMC's weighted-average margins for axes/adzes and picks/mattocks based on SMC and Company A's failure to report the FOP data of the merchandise SMC sold to the United States. With regard to TMC, it did report the FOP data of the merchandise it sold to the United States. Therefore, neither it nor its supplier has failed to act to the best of its ability and there is no statutory basis for applying AFA to TMC's sales. Further, the rationale for applying AFA is to induce cooperation. Applying AFA to TMC would do the contrary.

Given that TMC was able to persuade Company A to provide its FOP data, their cooperation should be acknowledged, not discouraged. We have reviewed and analyzed the data reported by TMC and have accordingly calculated a margin for the merchandise produced by Company A and exported by TMC. It is not clear from petitioner's arguments how this allows the producer to control the review or obtain a more favorable rate. Therefore, we are continuing to conduct our analysis as described above.

Comment 14: The Department should perform a Shakeproof analysis for TMC, which will show market economy purchases of ocean freight services to be insignificant.

The petitioner notes that the Department applied a surrogate value for ocean freight to all shipments that utilized NME carriers in the Preliminary Results. This surrogate value was based on the weighted-average ocean freight expense reported by TMC for all of its shipments made by market economy carriers. The petitioner argues that the Department did not analyze the market economy ocean freight expenses to determine whether these expenses were significant, substantial, or meaningful, and based on market economy inputs that were physically identical to the NME inputs as required by Shakeproof. The petitioner claims that neither is true in this instance. First, the petitioner notes that, on an aggregate basis, the percentage by weight or number of pieces transported on market economy carriers was "non-significant" under Shakeproof. Moreover, the petitioner argues that comparing the overall market economy shipments to total non-FOB shipments is inconsistent with the second test under Shakeproof that the inputs compared are physically identical.

Regarding the second test, the petitioner argues that ocean freight is charged on a port-to-port basis. According to the petitioner, transportation arrangements from a single PRC port to different U.S. ports are not physically identical. Thus, the petitioner argues that the Department must look at the relative market economy purchases of ocean freight on a port-to-port basis. On this basis, the petitioner finds mixed results, where certain port-to-port routings were primarily transported via non-market economy carriers, while other routings involved mostly market economy carriers. The petitioner urges the Department to compare port-to-port freight in doing a Shakeproof analysis for the final results. The petitioner believes that this level of analysis best fulfills Shakeproof, and is also coincident with the remainder of the freight calculations.

In rebuttal, TMC states that it satisfied the Shakeproof standards, stating that the same rebuttals that applied in the case of SMC apply to TMC. See SMC's rebuttal arguments in Comment 10.

Department's Position:

We agree with the respondent. Pursuant to section 773(c)(4) of the Act and 19 C.F.R. § 351.408(c)(1), it is the Department's practice that where a producer sources an input from a market economy and pays for it in market economy currency, and where the market economy input represents

a significant quantity of that input, the Department employs the market economy prices paid for the input to calculate the factors-based NV. In the present case, the Department has determined to follow its precedent and use the market economy prices as reported by TMC for ocean freight charges in order to value this service where the service was obtained from both market economy and NME suppliers because the ocean freight was carried by a market economy supplier and paid for in a market economy currency. Moreover, the shipments sent via market economy carriers represent a meaningful amount of TMC's ocean freight charges. See Memorandum from Karina Gziryan, International Trade Compliance Analyst, to the File, "Comparison of Tianjin Machinery Import & Export Corporation Shipments on Market Economy Vessels vs. Non Market Economy Vessels," dated September 7, 2004. With respect to the petitioner's arguments concerning the use of a port-to-port analysis, see the response to Comment 10 above.

Comment 15: The Department should increase TMC's NV to account for the commission paid to its U.S. sales office.

The petitioner observes that TMC has reported that it pays a commission to an affiliated U.S. sales office for its U.S. sales, and that the reported gross unit price includes this amount. Moreover, the petitioner notes that TMC has indicated that such payments are made in a market economy currency through a market economy bank. Therefore, the petitioner argues that this commission payment is not a payment to a PRC intermediary trading company, which the Department has denied in the past. The petitioner also notes that the Department need not seek an Indian surrogate for this commission since it is a market economy input and there is no indication that the preliminary surrogate for any factor already includes a commission. The petitioner argues that the Department should increase NV to offset this commission amount as required under section 773(a)(6)(C) of the Act.

In rebuttal, TMC notes that it has reported to the Department that it has no resellers in the United States, but does have an affiliated sales office. TMC emphasizes that while its affiliated sales office takes some sales orders, all sales are made by TMC directly to U.S. customers and U.S. customers make payments to directly to TMC. TMC contends that this argument has been addressed by the Department in previous reviews and was rejected, and should be rejected as without merit again.

Department's Position:

We agree with TMC. In EP situations, the Department does not make circumstance-of-sale adjustments in NME cases as the offsetting adjustments to NV are not normally possible. In the instant case, we do not believe NV contains the level of detail necessary to determine if an adjustment is appropriate and how to calculate it. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review of the Order on Bars and Wedges, 68 FR 53347 (September 10, 2003) and the accompanying Issues and Decision Memorandum at Comment 11; Final Determination of Sales at Less Than Fair Value: Foundry Coke Products From The People's Republic of China, 66 FR 39487

(July 31, 2001) and the accompanying Issues and Decision Memorandum at Comment 4; Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value, 65 FR 25706 (May 3, 2000) and the accompanying Issues and Decision Memorandum at Comment 13. Therefore, for the final results, the Department will not make the adjustment advocated by the petitioner.

Comment 16: The Department should disregard the variable Style (3.21) used by TMC in reporting hammer sales.

The petitioner states that the Department used an additional physical criterion in determining the CONNUM for TMC's sales of hammer/sledges.[3] TMC, in its Section C questionnaire response, added a field called "Style" (Field 3.21) to its CONNUM system. The petitioner argues that although TMC stated that the initial physical characteristic categories "did not adequately distinguish between shapes," TMC provided no other information as to why the addition of the "Style" field was warranted or even necessary. The petitioner claims that the requesting party has the burden to demonstrate that any physical differences are so significant as to require the addition of a separate reporting field, and TMC provided essentially no justification as to why the Department should accept a new physical characteristic in the control number other than the brief claim that the "categories did not adequately distinguish between shapes." The petitioner contends that no other respondents asserted the need for a "Style" field, even those that used some of the same suppliers as TMC.

In rebuttal, TMC argues that the reason it included a separate field for "Style" was to accommodate the request by the petitioner that each item of subject merchandise should be separately identified by CONNUM. The respondent asserts that the additional field does not affect the factor inputs in any way. Furthermore, TMC contends that this objection by the petitioner reflects the petitioner's efforts to make this proceeding complex and tedious, and to place excessive burden on the respondents. TMC argues that the PRC factories are small companies and the product is not complex in nature. According to TMC, the issues raised by the petitioner are not to promote accuracy, but to impose an unreasonable burden on a respondent that will necessitate the Department's assigning an AFA rate.

Department's Position:

We agree with TMC. The purpose of the CONNUM is to match an individual U.S. sale with its respective NV, which, in the case of an NME proceeding, is based on the reported FOP. The Department may use its discretion and accept an additional physical characteristic if adding the

[3] Although the parties argued this topic with respect to TMC, we note that this issue also applies to SMC, who reported a field called "Hammer Type," which is identical to TMC's "Style" variable.

additional characteristic allows the Department to more accurately match an U.S. sale to its proper NV. In the instant case, TMC and SMC sold certain types of hammers that have different NVs, but would have the same CONNUM if the "Style" or "Hammer Type" variables are not added. The Department has determined that these variables represent relevant criteria that should be accounted for in matching U.S. sales to their NVs for TMC and SMC. Since including the "Style" and "Hammer Type" variables in the CONNUM for hammers/sledges will allow the Department to match TMC's and SMC's sales of the hammers in question with their proper NV, the Department will continue to use the fields added by TMC and SMC for the final results.

Part III - Issues Regarding the Use of Total AFA and Rescission of Certain Reviews

Comment 17: The Department should not apply AFA while scope inquiries are pending.

The respondents first note that Huarong, SMC and TMC received total AFA in the Preliminary Results due to, in part, their failure to report sales and FOP data for cast tampers and scrapers. The respondents argue that Huarong, SMC, and TMC should not be penalized for failing to provide the requested information on cast tampers or scrapers because the Department did not explain why it was appropriate to request such information for these products. The respondents claim that after SMC explained its reason for not responding to the Department's requests, the Department did not advise SMC that it should respond. The respondents maintain that since there was no further comment from the Department, Huarong, SMC, and TMC reasonably assumed that the Department had accepted the arguments that it was not necessary to respond.

Further, the respondents argue that the Department's actions are inconsistent with its regulations regarding how to treat imports that are included in scope rulings. First, the respondents contend that the Department is required to issue a ruling within 45 days after it receives an application for a scope ruling if further inquiry is not warranted. In the case of both tampers and scrapers, the respondents observe that the Department did not issue rulings within 45 days. Instead, the Department determined that it was necessary to initiate scope inquiries, and did so on August 4, 2003, for tampers and on December 2, 2003, for scrapers. Even though the Department should have issued final rulings in 120 days, the respondents note that the final results for tampers and scrapers are still pending.

Second, the respondents state that the Department's regulations provide that the Secretary may conduct the scope inquiry in conjunction with an administrative review, but that there is no record evidence that this is what the Department decided to do. Third, the respondents state that, according to Section 351.225(l), when the Secretary conducts a scope inquiry and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued. However, the respondents argue that there is no indication that liquidations were suspended during the 2002-2003 POR for cast tampers or scrapers. The respondents contend that where there have been no

suspensions, the Secretary should instruct CBP to suspend liquidation and require a cash deposit of estimated duties for the products subject to the scope inquiry.

Fourth, the respondents state that, according to the Department's regulations, if, within 90 days of the initiation of a review "the Secretary issues a final ruling that a product is included within the scope of the order or suspended investigation that is the subject of the review, the Secretary, where practicable, will include sales of that product for purposes of the review and will seek information regarding such sales." The respondents continue, stating that if the Secretary issues a final ruling after 90 days of the initiation of the review, "the Secretary may consider sales of the product for purposes of the review on the basis of non-adverse facts available." The respondents state that there is no evidence that the Department considered this.

Fifth, the respondents state that, instead of applying non-AFA, the Department preliminarily determined that it is appropriate to apply total AFA, even though cast tampers are not made from the same steel and are not made by the same factories as the subject merchandise, and in the case of scrapers, they are not even within the HTS subheadings covered by the scope of the orders. The respondents argue that, only when the Department asked Huarong to report complete information on scrapers was there any reasonable basis for Huarong or the importer to suspect those items would be included, and there was no reason for the respondents to believe that they would be included in the axes/adzes category rather than the bars/wedges category where there is a length requirement (over 18"). The respondents state that, although Huarong initially reported its U.S. sales and the FOP data for scrapers in its questionnaire, when the scope request was filed, it reasonably expected the Department to issue a ruling promptly. The respondents assert that scrapers are outside of the scope of the orders due to their tariff classification, and due to the fact that scrapers were never mentioned in any prior segment of these proceedings.

In rebuttal, the petitioner contends that the Department directed the respondents on multiple occasions to report sales of tampers and scrapers. The petitioner notes that, on July 9, 2003, the respondents requested guidance on whether to report sales of tampers and scrapers. Two days later, the Department informed the respondents that tampers have always been considered part of the scope of these orders. Additionally, the Department instructed the respondents to report their sales of tampers in the order on bars/wedges. The petitioner also notes that the Department met with the respondents' counsel on July 24, 2003, to clarify the scope of the orders for the purpose of reporting sales, and that the respondents were advised to report all merchandise if there was even a question as to whether or not the merchandise was within scope.

The petitioner states that the Department is accorded significant authority to request information from parties for calculating dumping margins, and to require compliance with its rules and regulations. Where the Department is unable to rely upon submitted information, the petitioner notes that the statute and regulations permit the Department to apply FA. The petitioner adds that, for parties that fail to respond to Departmental requests for information or otherwise fail to cooperate with the Department,

the Department is permitted by law to take an adverse inference towards the information and the respondent to ensure cooperation and to ensure that parties do not either benefit through non-cooperation or take control of the proceedings. According to the petitioner, the Department has the ability to request information about merchandise and to include sales subject to a scope inquiry in the context of an administrative review. The petitioner contends that the Department in the past has found that the failure of a party to respond to Departmental requests concerning merchandise that was under a scope inquiry warranted the application of AFA, citing Final Results of Antidumping Duty Administrative Review for Two Manufacturers/ Exporters: Certain Preserved Mushrooms From the People's Republic of China, 65 FR 50183 (August 17, 2000), and the accompanying Decision Memorandum at Comment 2 (Certain Preserved Mushrooms).

The petitioner also provides a company-specific discussion of how the respondents failed to provide information requested by the Department. Regarding SMC, the petitioner argues that the Department instructed SMC to report the sales and FOP data for tampers in its supplemental questionnaires, and even warned SMC that failure to provide the requested data may result in AFA. The petitioner notes that, in response, SMC confirmed that it sold tampers in the United States, but failed to provide details with respect to these sales and refused to provide the requested FOP data. Likewise for Huarong and TMC, the petitioner states that each failed to provide requested data for tampers and scrapers, even after being informed of their deficiencies and warned of the possible use of AFA. The petitioner notes that Huarong failed to answer the Department's inquiries regarding tampers, such as identifying its tamper suppliers, stating whether Huarong is affiliated with its tamper suppliers, and reporting FOP for tampers. TMC similarly refused to respond. Given these omissions and material failures, the petitioner contends that the Department is clearly obligated not to permit a respondent to control the investigation. The petitioner contends that the Department must apply AFA to maintain control of the proceeding in accordance with Certain Preserved Mushrooms.

The petitioner continues its rebuttal by stating that the pendency of scope inquiries cannot justify a failure to provide requested information. The petitioner states that, while the respondents correctly note that the Department should issue a ruling within 45 days after it receives an application when no further information is required, the respondents ignore the fact that the Department initiated a scope inquiry pursuant to 19 C.F.R. 351.225(e), thereby negating the 45-day deadline. The petitioner states that, while respondents claim that the Department should have issued final rulings within 120 days of its initiation of scope proceedings, 19 C.F.R. § 351.225(f)(5) clearly states that the Secretary will issue results "*normally* within 120-days of the initiation," and past Departmental practice shows that the 120 day period is often exceeded. The petitioner maintains that, although the respondents claim that the Department provided no evidence that it decided to conduct the scope inquiries in conjunction with the administrative reviews, a decision to conduct scope proceedings in conjunction with administrative reviews is discretionary given the operative language "*may* conduct the {inquiry} in conjunction with an administrative review." The petitioner contends that it was wholly within the Department's discretion not to subsume the scope inquiries into the administrative reviews.

The petitioner also argues that the respondents have never documented that liquidation of scrapers or tampers has not been suspended. According to the petitioner, tampers have always been included in the scope of the HFHTs orders and should always have been suspended within the terms of the antidumping duty order on bars and wedge products. The petitioner states that it is reasonable for the Department to request information from the respondents on merchandise that is explicitly listed as being within the scope – and to suspend liquidation at the same time. The petitioner states that 19 C.F.R. 351.225(l)(4) provides the Department with the ability to "request information concerning this product that is subject of the scope inquiry for purposes of {an administrative review}." The petitioner notes that the Department required the respondents to submit sales and FOP data for both tampers and scrapers, but the respondents pointedly refused to supply the requested data. As such, the petitioner contends that the Department properly found the respondents uncooperative. Regardless of whether or not a scope inquiry is ongoing, the petitioner asserts that the Department is justified in applying AFA.

Department's Position:

We agree with the petitioner. In their questionnaire and supplemental responses, Huarong, SMC, and TMC refused to provide the requested information on scrapers and tampers because the Department had not yet issued a final ruling in the separate, on-going scope inquiries regarding these products. On July 29, 2004, the Department terminated the scope inquiry on bars with handles, in which the respondents raised the issue of whether tampers are subject to the 18-inch length requirement. See Letter from Holly A. Kuga, Senior Director, to Robert T. Hume, dated July 29, 2004 (Scope Termination Letter). The scope inquiry on scrapers remains on-going. However, as we stated in the Preliminary Results, 19 C.F.R. § 351.225(l)(4) states that, "notwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart." See Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Sales of Scrapers and Tampers," dated March 1, 2004 (Scrapers and Tampers AFA Memorandum), at 5. Thus, when the Department has not yet issued its final scope rulings in response to these inquiries, the Department may ask for the information regarding sales of these products during the course of an administrative review. However, Huarong, SMC, and TMC refused to provide the requested information. Thus, it is appropriate to use FA when a respondent refused to answer questions concerning merchandise that is subject to a pending scope inquiry. Id.

On July 20, 2004, the Department issued to the CIT the Results of Redetermination Pursuant to Court Remand: Tianjin Machinery Import & Export Corporation v. United States and Ames True Temper, Court No. 03-00732 (Cast Pick Remand). In that remand, the Department found that merchandise subject to the HFHTs orders are produced through a hot forged operation. See Cast Pick Remand at 5. The Department examined the record of this review to determine whether the tampers or scrapers sold by the respondents are produced through a casting process. We found that the tampers sold by Huarong and SMC were cast. See Comment 18. Under these circumstances, the

Department has determined that it is not appropriate to require the reporting of cast tampers and will not apply AFA to a respondent for failing to respond to questions concerning these products. However, we note that Huarong has stated in the record of the scope inquiry that its scrapers are forged products. Furthermore, there is no evidence that the tampers sold by TMC are produced through a cast process and tampers are explicitly mentioned in the scope of the HFHTs orders. For these reasons, we are no longer assigning total AFA to Huarong and SMC based on their failure to report the sales and FOP data for their cast tampers. However, we continue to apply total AFA to TMC and Huarong due to their failure to provide the requested data for sales of forged tampers and scrapers, respectively.

The respondents argue that 19 C.F.R. § 351.225(l) requires that suspension of liquidation be continued for products already subject to suspension when there is a scope inquiry on such products. We note that the Department terminated the scope inquiry on bars with handles, in which the respondents raised the question of whether tampers are subject to the 18-inch length requirement, on July 29, 2004. Since tampers are specifically mentioned in the scope of the orders, and no party has requested a scope ruling specifically on tampers, we find that this argument is moot for tampers. With respect to scrapers, the respondents have separately asserted that CBP has suspended certain entries containing scrapers. If CBP is suspending such entries, CBP is doing so under its own statutory authority, presumably because CBP believes that such products are within the scope of the HFTHs orders. The Department has not yet issued a preliminary determination in the scraper scope inquiry, but will advise CBP of the decision and its implications when it is appropriate to do so, pursuant to 19 C.F.R. § 351.225(l). See Comment 23.

Comment 18: The Department should not apply AFA for the failure to report cast products.

The respondents argue that the final scope ruling on cast picks, cited in the Preliminary Results, is legally flawed. The respondents cite TMC's litigation brief from Tianjin Machinery Import & Export Corp. v United States, Court No. 03-00732, where TMC challenged the scope ruling on cast picks as not supported by substantial evidence and was not in accordance with law because (1) the applicable dumping order specifies that the subject merchandise must be "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"; (2) the LTFV investigation never included non-forged items; and (3) the Department cannot interpret an antidumping order so as to change the scope of that order, or interpret an order in a manner contrary to its terms, citing Duferco Steel, Inc. v. United States, 296 F.3d 1087 (U.S. App., 2002) (Duferco). The respondents contend that, under Duferco, the Department cannot include cast tampers or scrapers in an administrative review without at least issuing a preliminary scope ruling that either or both items are within the scope. According to the respondents, requiring a respondent to supply sales and FOP data for products subject to an on-going scope inquiry simply because the items may be included is unreasonable.

The respondents continue by stating that the Department must take scope rulings seriously. The respondents note that the Department stated in the preamble to 19 C.F.R. 351.225 that "{i}t would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation." See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296 (May 19, 1997) (Final Regulations). Moreover, the Department stated that it "will not order the suspension of liquidation until it makes either a preliminary or final affirmative scope ruling, whichever occurs first." Id. Lastly, the respondents observe that the Department said in the preamble that it revised 19 C.F.R. 351.225(l) "to make suspension of liquidation, when ordered in conjunction with a preliminary or final affirmative ruling, effective as to entries of all affected merchandise that are made on or after the date of initiation of the scope inquiry and that remain unliquidated as of the date of publication of the affirmative ruling." Id. From these quotations, the respondents argue that it is clear that the Department intended to act with restraint in conducting its scope inquiries. From the record it appears that entries of tampers and scrapers have not been suspended since there has been no preliminary determination. The respondents question why AFA rates are being applied where entries are not suspended. If the point is to establish cash deposit rates, the respondents claim that the appropriate step is not to assess duties on the subject merchandise. Rather, in the case of tampers, since none of the forging factories make "cast" items, tying rates to exporter and producers would be sufficient.

In rebuttal, the petitioner contends that the Department should reject the respondents' attempt to re-litigate past proceedings. The petitioner argues that the respondents state without justification that the Department's scope ruling on cast picks was legally flawed. Moreover, the petitioner argues that the respondents have provided no legal basis as to why the Department should not or could not have requested certain information from the respondents. The petitioner notes that 19 C.F.R. 351.225(l)(4) affords the Department the opportunity to request information from respondents during the pendency of a scope proceeding. Regarding the cast picks scope, the petitioner notes that, as of the writing of the rebuttal brief, the cast pick scope ruling was still a legally binding one, as it was during most of this administrative review. According to the petitioner, the Department was wholly justified in applying AFA when the respondents unilaterally decided that they would not comply with the Department's instructions.

Department's Position:

We agree with the respondents and petitioner in part. We note that tampers have been specifically identified in the scope from the beginning of this proceeding. See Antidumping Duty Orders: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China, 56 FR 6622 (February 19, 1991). However, in light of the Cast Pick Remand, the Department finds that it is not appropriate to require the respondents to report their sales of cast tampers made during the POR. Upon further review of the record, we note that SMC reported that all of the tampers it sold during the POR were cast rather than forged. See SMC's October 3,

2003, response at 1. Similarly, Huarong reported that, "{t}he tampers Huarong sold to the United States during the POR were made by casting, not forging." See Huarong's September 3, 2003, response at 18. Under these circumstances, the Department will not apply AFA to a respondent for failing to report its sales of cast tampers. As a result, the Department will not apply AFA to SMC's sales of products subject to the bars/wedges order for the final results. We note that the Department is applying AFA to bars/wedges sold by Huarong due to its participation in the agent sales scheme, and therefore the change in the Department's position with respect to cast tampers will not affect the bars/wedges margin assigned by the Department to Huarong. See Department's Position at Comment 19.

After reviewing the record with respect to TMC, we have found no evidence to indicate that the tampers sold by TMC are cast. In its October 3, 2003, submission at 1, it stated, "TMC sold no other ... tampers ... made through a casting, rolling, stamped, or other non-forging process." On the other hand, in its November 24, 2003, submission at 2-3, TMC acknowledged that it did sell tampers to the United States during the POR. However, TMC contended that its tampers sales are out of the scope of the bars/wedges order, not because they were cast, but because they are less than 18 inches long. TMC stated, "TMC sold no tampers to the United States during the POR that are over 18 inches in length, so all of TMC's tamper sales are at issue in this scope review. Therefore, TMC will not be reporting any tampers sales, pending the final scope ruling on tampers." See TMC's November 24, 2003, submission at 3. Thus, these statements indicate that TMC sold tampers to the United States during the POR, and that these tampers were not manufactured through a cast or other non-forged operation.

As noted above, TMC stated that it sold tampers to the United States during the POR. Id. at 2-3. However, in response to the Department's request for sales and FOP data concerning its sales of tampers, TMC stated that there is an on-going scope inquiry regarding tampers and that it believes that tampers 18 inches or less in length are excluded from the scope of the bars/wedges order. Id. TMC continued by stating that, during the POR, it did not sell tampers that are over 18 inches in length to the U.S. customers. Therefore, TMC refused to report its tamper sales and FOP data, pending the final scope ruling on tampers. Id. As noted in Comment 17 above, the Department, on July 29, 2004, terminated the scope inquiry on bars with handles, in which the respondents raised the issue of whether tampers are subject to the 18-inch length requirement. See Scope Termination Letter.

The pendency of these scope inquiries aside, the evidence on the record of this review establishes that, pursuant to section 776(a)(2)(A) of the Act, the use of total FA is warranted in determining the dumping margin for TMC's sales of tampers because TMC refused to provide requested sales and FOP information regarding a product specifically identified in the scope of the HFHTs orders, despite repeated requests for such information. In its questionnaire and supplemental responses, TMC refused to provide the requested information on tampers because the Department has not yet issued a final ruling in a on-going scope inquiry on bars with handles in which TMC raised the issue of whether tampers are subject to the 18-inch threshold for bars/wedges. However, 19 C.F.R. §

351.225(l)(4) states that, "notwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart." Although, as noted in Comment 17 above, the Department subsequently terminated the scope inquiry on bars with handles, in which the respondents raised the issue of whether tampers are subject to the 18-inch length requirement, the Department was exercising its regulatory authority when it asked multiple times for information on the sales and FOP data for TMC's tampers, a product specifically mentioned in the scope of the HFHTs orders. TMC refused to provide the requested information. Thus, it is appropriate to use FA.

In selecting from among FA, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has failed to cooperate by not acting to the best of its ability to comply with a request for information. The record shows that TMC failed to cooperate to the best of its ability, within the meaning of section 776(b) of the Act. TMC repeatedly refused to report sales and FOP data for tampers, even though it acknowledged that it sold tampers to U.S. customers during the POR. Thus, TMC failed to provide information necessary to allow the Department to accurately calculate EP or constructed export price (CEP) and NV for its sales of tampers. By not responding to our requests for information regarding tampers, which are within the bars/wedges order, TMC failed to cooperate to the best of its ability. As TMC has failed to cooperate to the best of its ability, we are applying an adverse inference to its sales of bars/wedges pursuant to section 776(b) of the Act. As AFA, we are assigning to TMC's sales of products covered by the bars/wedges order, the rate of 139.31 percent. This is the highest rate in the proceeding. It was a calculated rate for TMC in an earlier review segment and is the rate assigned to the PRC-wide entity for bars/wedges in the most recently completed administrative review of this antidumping order. See HFHTs Final Results for Eleventh Review.

Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as FA. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316 at 870 (1994) and 19 C.F.R. § 351.308(d).

The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses, as total AFA, a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin. See Heavy Forged Hand Tools From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in

Part, 67 FR 57789, 57791 (September 12, 2002). The rate selected as AFA, 139.31 percent, is the highest rate in the proceeding on bars/wedges and was calculated using verified information provided by TMC during the 1998-1999 administrative reviews of the bars/wedges order. See Memorandum from Mark Manning and Lyman Armstrong, Case Analysts, to The File, "Verification of the Questionnaire Responses of Tianjin Machinery Import & Export Corp., in the Antidumping Duty Administrative Review of Certain Heavy Forged Hand Tools from the People's Republic of China," dated December 1, 2000. Furthermore, this rate was upheld by the CIT. Therefore, we consider this rate to be reliable.

The Department considers information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the selected margin and determine an appropriate margin. See e.g., Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review, 61 FR 6812 (February 22, 1996) (Flowers from Mexico).

As to the relevance of the AFA rate for bars/wedges, given that TMC failed to cooperate to the best of its ability in this administrative review, it is appropriate to select an AFA rate that serves as an adequate sanction to induce the respondents to cooperate in the proceeding. The rate of 139.31 percent was calculated for TMC in the eighth administrative review and reflects recent commercial activity by this exporter in exporting bars/wedges to the United States. Additionally, this rate was affirmed by the CAFC. See Shandong Huarong General Group Corp. v. United States, No. 02-1905 (Fed. Cir. Jan. 10, 2003), aff'd 177 F. Supp. 2d 1304 (CIT 2001). Moreover, other more recently calculated margins for bars/wedges do not offer an adequate incentive to induce TMC to cooperate in this proceeding, given that these rates are either less than, or nearly the same as, the cooperative rates calculated for TMC in the most recent reviews of its bars/wedges sales. Finally, we note that the 139.31 percent rate is currently applicable to the PRC-wide entity's exports of bars/wedges. See HFHTs Final Results for Eleventh Review, 68 FR at 53348. Therefore, we consider the 139.31 percent rate to be relevant.

Accordingly, we have determined that the selected rate of 139.31 percent for bars/wedges is both reliable and relevant. Therefore, we have corroborated this rate to the extent practicable in accordance with section 776(c) of the Act.

Comment 19: The Department should not apply AFA to agent sales made by Huarong, LMC/LIMAC, and TMC.

The respondents argue that the Department should not apply total AFA to sales of bars/wedges made by Huarong, LMC/LIMAC, and TMC[4] because they fully cooperated and accurately disclosed to the Department the fact that they had agent sales, or acted as an agent for another PRC producer, respectively. In response to the Department's finding in the Preliminary Results that Huarong, LMC/LIMAC, and TMC misrepresented the true nature of their relationship with the agent or principal in their questionnaire responses, the respondents argue that they made the distinction between regular sales and agent sales in their first questionnaire response. Moreover, the respondents argue that they reported their agent sales in the 2000-2001 and 2001-2002 administrative reviews, where the Department accepted such sales without resorting to AFA.

The respondents note that section 776(a)(2)(c) of the Act allows the Department to use facts otherwise available in reaching the applicable determination if an interested party "significantly impedes a proceeding" under the antidumping statute. The respondents dispute the three findings made by the Department to demonstrate that they did not "significantly impede" the instant administrative review. First, the respondents claim that, contrary to the Department's finding, they did not misrepresent the nature of their arrangement with the agent or principal. The respondents reported their agent sales and provided a copy of their respective agent agreements. Second, the respondents argue that the Department was incorrect when it found that Huarong, LMC/LIMAC, and TMC used agents in an attempt to circumvent payment of antidumping duties. The respondents argue that this is not correct because they reported their respective agent sales and the information required to calculate dumping margins. The respondents state that they did not seek to have their respective importers avoid dumping duties. If they had, the respondents argue that they would not have requested, and participated in, the instant administrative review.

Third, the respondents argue that the Department was wrong when it found that Huarong, LMC/LIMAC, and TMC undermined the Department's ability to impose accurate antidumping duties. According to the respondents, the Department's actions with regard to Huarong and its agent, LMC/LIMAC and its principal, and TMC and its principal have no relation to whether the respondents cooperated in answering the questions during this review since all three respondents reported their agent sales in their initial submissions. The respondents argue that the Department is using the agent sale issue as an excuse to fix a problem concerning cash deposits, which bears no relation to the respondents since neither Huarong and its agent, LMC/LIMAC and its principal, nor TMC and its principal ever filed entries with CBP, nor had any entry documents in their possession. The respondents also argue that the Department has not cited an instance where the respondents violated U.S. or PRC laws (other than the antidumping law noted by the Department in the Preliminary Results). Thus, the respondents contend that the Department's decision is not to correct a problem, but instead

[4] Counsel for the respondents did not present separate arguments on behalf of TMC, but noted that its arguments were similar to those of Huarong. See Respondent's Case Brief at 18, footnote 20.

to penalize the importers irrespective of the type of information that may have been included on the entry forms that were filed with CBP.

The respondents cite section 776(b) of the Act and state that the Department must find that a party has "failed to cooperate by not acting to the best of its ability" before it can apply AFA. Furthermore, the respondents state that the Department must "explain why it concluded that a party failed to comply to the best of its ability" and "explain why the absence of this information is of significance to the progress of its investigation." See Ferro Union, Inc. v. United States, 44 F. Supp.2d 1310, 1332 (Ct. Int'l Trade 1999), and Mannesmannrohren-Werke AG v. United States, 77 F. Supp.2d 1302, 1314 (Ct. Int'l Trade 1999), respectively. The respondents argue that the statutory scheme "was designed to prevent the unrestrained use of facts available as to a firm that makes its best efforts to cooperate with Commerce." See Borden, Inc. v. United States, 4 F. Supp.2d 1221, 1245 (Ct. Int'l Trade 1998). The failure to respond is only a basis for using FA, not adverse facts. According to the respondents, the same is true with respect to "significantly impeding the review." As the court has said, "{a} respondent could impede a review without intending to do so, for example, because it did not understand the questions asked." See Ferro Union v. United States, 44 F. Supp.2d at1329. For these reasons, the respondents contend that the Department was unreasonable in applying AFA over the agent sales issue in the Preliminary Results.

The respondents also argue that the Department has not claimed that their respective agent sales agreements did not accurately reflect the transactions that took place pursuant to those agreements. According to the respondents, these agreements identified the parties to the agreements and the terms of the agreements, one of which stipulates that title to the goods does not pass to the agent. The respondents state that the facts the Department clarified through supplemental questionnaires are not related to the material issues of the agent agreement, other than which cash deposits were paid in these transactions. The respondents also note that the Department addressed similar agent sales situations in prior reviews and considered that the agent sales should be treated as sales of the principal, since the principal retained title to the goods. It is not clear to the respondents why the Department is attempting to draw a distinction between a true agent and a quasi-agent, or draw a distinction based on title. The respondents argue that (1) agents generally do not take title to goods for which they act as agent, and (2) the principal sets prices, negotiates contracts, and determines the functions of agents. The respondents contend that the Department has not cited any regulation or other provision that defines an agent or what an agent may or may not do in the context of the antidumping law. According to the respondents, while the Department may not condone certain activities, it should address its concerns through the process of rule-making. Parties should be advised of what activities are and are not appropriate.

In rebuttal, the petitioner states that the respondents' submissions in this review demonstrate that the PRC HFHTs industry is engaging in a systemic duty avoidance scheme. The petitioner contends that the record evidence shows that producers with high antidumping margins are using companies with lower margins as "agents" through which to funnel their U.S. sales, in exchange for a

small commission, and thus avoid duty. The petitioner argues that this misidentification of the true exporter prevents the Department from imposing accurate dumping margins. According to the petitioner, the assessment rate calculated by the Department for any given sale will not be assessed on that sale by CBP because CBP's records have a different company identified as the exporter. Thus, the Department's assessment rate will not be imposed accurately.

The petitioner also contends that the respondents were not forthright with all of the critical details of its agent arrangement. According to the petitioner, the agent sales "scheme" is not evident from the agency agreement or from the fact that the respondents used an agent. The petitioner states that it was not evident from the respondents' initial responses that: (1) the agency agreement was established at the request of a third party, (2) the principal performs all of the major selling and distribution functions, and (3) the principal uses blank documents provided by the agent on the agent's letterhead which are, in turn, provided to CBP by the importer with full knowledge that the party listed on the documents is not the actual exporter. Without knowing these critical items, the Department cannot impose accurate margins.

The petitioner continues its rebuttal by stating that the facts of the instant review are similar to the Department's findings in the ninth administrative review of this proceeding, where the application of AFA to Huarong was upheld in Shandong Huarong Gen. Group Corp. v. United States, Slip Op. 2003-135 (Ct. Intl. Trade, 2003) (Shandong Huarong). The Department found that Huarong "failed to report the great majority of its U.S. sales" by "not including these sales in its U.S. sales database and misidentifying these transactions as sales to another PRC company, for resale to the United States." See Shandong Huarong at 15. The petitioner notes that the CIT upheld the Department's application of AFA in Shandong Huarong and remanded the case to the Department only to determine company-specific margins. The petitioner also contends that the facts of the instant review can be distinguished from the two preceding reviews (the tenth and eleventh reviews) where agency sales were reported because in these reviews the Department did not find evidence of a scheme to circumvent the order, and the Department did not find that the respondents were not forthright in providing details underlying the agency agreement. Furthermore, the petitioner argues that the Department's actions with regard to this duty avoidance scheme are consistent with past precedent. According to the petitioner, the Department has found that if a respondent is serving as a conduit for other producers, such as when the respondent is "exporting merchandise produced and sold for export to the United States on behalf of other growers, we will consider this a case of potential evasion of the antidumping duty order and will take appropriate action." See Certain Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 62 FR 27219 (May 19, 1997), at 27220.

Additionally, the petitioner requests that the Department's Office of Inspector General formally investigate possible criminal fraud as evidenced by the information on the record in this review. In doing so, the petitioner asks that the business proprietary information contained in Huarong's response be released to both the Office of the Inspector General of the Department of Commerce and, as appropriate, the Inspector General of CBP, following all appropriate procedures of the Office of APO

Compliance. The petitioner requests that the Department and/or CBP investigate the role of any U.S. entities described in these sales transactions. The petitioner notes that Congress has fully appropriated the Department's new Office of China Compliance (OCC) with a mandate to investigate issues such as these. Lastly, the petitioner notes that Congress' mandate to the OCC is to focus its efforts to benefit small- and medium-size businesses such as the petitioner.

Department's Position:

We agree with the petitioner that the Department should continue to apply total AFA to those respondents that participated in an agent sales scheme. In the Preliminary Results the Department fully explained the reasons for applying total AFA with respect to bars/wedges sales made by Huarong, LMC/LIMAC, and TMC due to their participation in agent sales schemes. See Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Shandong Huarong Machinery Corporation Ltd. with Respect to Bars/Wedges," dated March 1, 2004 (Huarong Bars/Wedges AFA Memorandum); Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Liaoning Machinery Import & Export Corporation and Liaoning Machinery Import & Export Corporation Limited with Respect to Bars/Wedges," dated March 1, 2004 (LMC/LIMAC Bars/Wedges AFA Memorandum); and Memorandum from Thomas F. Futtner, Acting Office Director to Holly A. Kuga, Acting Deputy Assistant Secretary, "Application of Adverse Facts Available to Tianjin Machinery Import and Export Corporation," dated March 1, 2004 (TMC Bars/Wedges AFA Memorandum); collectively the Preliminary AFA Memoranda.

In the Preliminary AFA Memoranda, the Department stated that, pursuant to section 776(a)(2)(C) of the Act, the Department has determined that it is appropriate to base the respondents' dumping margins for their sales of merchandise covered by the bars/wedges order on AFA because Huarong, LMC/LIMAC, and TMC significantly impeded the instant proceeding. Specifically, use of the "agent" sales schemes by these respondents impeded our ability to complete this administrative review under section 751 of the Act and impose the correct antidumping duties, as mandated by section 731 of the Act, which instructs the Department to impose antidumping duties if it determines that a class or kind of foreign merchandise is being sold in the United States at less than fair value. See Huarong Bars/Wedges AFA Memorandum at 4; LMC/LIMAC Bars/Wedges AFA Memorandum at 4; and TMC Bars/Wedges AFA Memorandum at 4, collectively the Preliminary AFA Memoranda.

The respondents dispute the three findings made by the Department to demonstrate that they did not "significantly impede" the instant administrative review. First, the respondents claim that, contrary to the Department's finding, they did not misrepresent the nature of their arrangement with the

agent or principal. We disagree. After reviewing the record of this review, we found that the respondents continually misrepresented the true nature of their relationship with their principal or agent during the POR. In their questionnaire responses, the respondents claimed that their relationships with their agents or principals were bona fide business arrangements. However, only through issuing several supplemental questionnaires to each respondent 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 invoices to the principal. Id.

Second, the respondents argue that the Department was incorrect when it found that Huarong, LMC/LIMAC, and TMC used agents in an attempt to circumvent payment of antidumping duties. We disagree with this assertion. Through our supplemental questionnaires, we learned that Huarong and the other PRC companies acting as the principals in these agent sales schemes supplied to their respective importers certain documents that prevent CBP officials from recognizing that the principal, rather than agent, is the company actually selling the merchandise to the U.S. importer. Further, the Department recognizes that the willingness of LMC/LIMAC and TMC, acting as agents, to provide their invoices for use by the principal facilitates this circumvention of proper duties. Due to the business proprietary nature of these transactions, a full discussion is contained in the Preliminary AFA Memoranda. Because CBP is prevented from knowing the true seller of the agent sales, the assessment rate calculated by the Department would not have been applied to all appropriate entries. Thus, the existence of such a scheme during the POR undermined our ability to impose accurate antidumping duties, pursuant to our statutory mandate under section 731 of the Act.

Third, the respondents argue that the Department was wrong when it found that Huarong, LMC/LIMAC, and TMC undermined the Department's ability to impose accurate antidumping duties. According to the respondents, the Department's actions with regard to Huarong, LMC/LIMAC, and TMC have no relation to whether the respondents cooperated in answering the questions during this review since all three respondents reported their agent sales in their initial submissions. We disagree. Although the respondents provided answers to our supplemental questions, through which the true nature of the agent sales relationships was brought to light, and the respondents provided their sales made through an agent, this does not diminish the fact that the scheme in which these respondents participated would result, absent corrective action, in the Department failing to impose accurate dumping duties.

In selecting from among the facts available, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has failed to cooperate by not acting to the best of its ability to comply with our request for information. With respect to Huarong, an adverse inference is warranted because (1) Huarong misrepresented the nature of its arrangement with the "agent" by portraying the company as a bona fide agent for the vast majority of Huarong's sales of bars/wedges to the United States, (2) Huarong participated in a scheme that resulted in circumvention of payment of proper antidumping duties, and (3) the existence of such a scheme during the POR undermined our ability to impose accurate antidumping duties, pursuant to our

statutory mandate under section 731 of the Act. See Huarong Bars/Wedges AFA Memorandum at 7. Concerning LMC/LIMAC, an adverse inference is warranted in assigning a rate to its sales of bars/wedges because (1) LMC/LIMAC misrepresented the nature of its arrangement with its principal by portraying itself as a bona fide agent for certain of the principal's sales of bars/wedges to the United States, (2) LMC/LIMAC participated in a scheme that resulted in circumvention of payment of proper antidumping duties, and (3) the existence of such a scheme during the POR undermined our ability to impose accurate antidumping duties, pursuant to our statutory mandate under section 731 of the Act. Concerning TMC, an adverse inference is warranted because (1) TMC misrepresented the nature of its arrangement with its principal by portraying itself as a bona fide agent for the majority of the principal's sales of bars/wedges to the United States, (2) TMC participated in a scheme that resulted in circumvention of payment of proper antidumping duties, and (3) the existence of such a scheme during the POR undermined our ability to impose accurate antidumping duties, pursuant to our statutory mandate under section 731 of the Act. As AFA, we are assigning to sales of bars/wedges made by Huarong, LMC/LIMAC, and TMC the 139.31 percent PRC-wide rate for bars/wedges published in the most recently completed administrative review of this antidumping order. See HFHTs Final Results for Eleventh Review.

Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as FA. The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. As fully discussed in Comment 18 above, since this rate is calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin. Furthermore, we demonstrated that this rate is relevant to TMC. See Comment 18.

Regarding this rate's relevance to Huarong and LMC/LIMAC, we note that these two respondents are trading companies that export both identical and similar products covered by the order on bars/wedges as does TMC, and that all three companies compete for sales within the U.S. market. Since this rate reflects recent commercial activity by TMC, and TMC competes with Huarong and LMC/LIMAC for sales of similar and identical products in the U.S. market, we believe this rate can be reasonably attributed to recent commercial activity by Huarong and LMC/LIMAC. Moreover, other more recently calculated margins for bars/wedges for Huarong and LMC/LIMAC do not offer an adequate incentive to induce the respondents to cooperate in this proceeding, given that these rates are either less than, or nearly the same as, the cooperative rates calculated for these exporters in the most recent reviews of their bars/wedges sales. Finally, we note that the 139.31 percent rate is currently applicable to the PRC-wide entity's exports of bars/wedges. See HFHTs Final Results for Eleventh Review, 68 FR at 53348. Therefore, we consider the 139.31 percent rate to be relevant to Huarong and LMC/LIMAC.

Accordingly, we have determined that the selected rate of 139.31 percent for bars/wedges is both reliable and relevant. Therefore, we have corroborated this rate in accordance with section 776(c) of the Act.

Comment 20: The Department should establish "combination" cash deposit rates and utilize "master list" assessment rates.

The respondents agree that when a principal does not cooperate with the Department, the Department should base the principal's dumping margin on AFA. However, the respondents note that, in this case, they are being singled out for a failure to cooperate even though they did not provide any of the information at issue to CBP and the Department has not identified a material misrepresentation that affects the calculation of their dumping margins. Although the Department has focused on the principal/agent relationship in this review, the respondents note that generally the Department focuses on the producer's production information and the sales price paid to the NME exporter rather than the agent and principal roles of these parties. According to the respondents, the real concern here is whether the cash deposit rates are correct. The respondents contend that this concern may be allayed by setting exporter/producer specific cash deposit rates. Such combination rates simply require the importer to identify the supplying producer and would, according to the respondents, avoid penalizing exporters for the actions of importers with whom they are not affiliated.

The petitioner disagrees, noting that the real cause for concern is the respondents' fraudulent scheme that allows the importer to also fraudulently identify the exporter to CBP in order to reduce the posted antidumping duty cash deposit. According to the petitioner, combination rates will not solve the problem, rather the Department must seek to improve coordination and communication between itself and CBP. Specifically, the petitioner requests that the Department work with CBP to investigate these issues and arrive at appropriate enforcement steps, including but not limited to necessary modifications to cash-deposit rates, the proper identification of exporters when there are agent sales, and the use of "master list" assessment instructions in order to address duty avoidance by the PRC HFHTs producers. Additionally, the petitioner requests that the Department consider issuing draft assessment instructions in this case that reflect combination rates in order to address the special circumstances. Finally, the petitioner urges the Department to refer this matter to its inter-agency task force and the CBP Fraud Unit.

Department Position:

We disagree with the respondent's argument that the Department should utilize exporter/producer specific cash deposit rates, and we disagree with the petitioner's recommendation that the Department use "master lists" for assessment purposes. Regarding exporter/producer specific cash deposit rates, we find that such a cash deposit methodology is not appropriate in this case. As the petitioner notes, the cause for concern, and the basis of our AFA determinations, stem from the fact that the respondents are participating in a scheme that allows the importer to identify an incorrect exporter to CBP in order to reduce posted antidumping duty cash deposits. Given that the respondents reported to the Department that the seller of the merchandise is the principal, but participated in a scheme that allows the importer to incorrectly identify the agent as the seller to CBP, the universe of sales for which the Department would calculate the antidumping duty rate, and the universe of sales

against which CBP would assess that rate, are different. Issuing exporter/producer specific cash deposit rates, as the respondents urge, would amount to an application of only partial AFA. To employ a "master list" approach to cash deposits or duty assessments would dilute the impact of our decision to apply total AFA to Huarong, LMC/LIMAC, and TMC.

In the instant case, it would be difficult for the respondents to link their EP sales to specific entries because the respondents do not possess the necessary entry information. Even if the respondents could link their sales to entries, such information is not on the record of this review. In addition, it is burdensome on both the Department and CBP to issue and implement "master list" assessment instructions. More importantly, we find that assessing at the AFA rate all sales made by both parties participating in the agent sales scheme, the company acting as the principal and the company acting as the agent, will ensure that the principal does not receive an incorrectly low assessment rate and provides an inducement to the respondents to cease participating in such schemes.

Comment 21: The Department should recalculate the AFA and PRC-wide rate of 139.31 percent for bars/wedges because this rate contains subsidized prices.

The respondents argue that the AFA and PRC-wide rate of 139.31 percent for sales of bars/wedges is inaccurate because it contains subsidized prices and must therefore be revised. The respondents note that the Department has previously determined that Indian export data cannot be used for surrogate values because of Indian subsidies and that South Korea, Thailand, and Indonesia maintain broadly available, non-industry specific export subsidies which may benefit all exporters to all export markets. Moreover, the respondents note that the Department has recently found that there was sufficient reason to believe or suspect that steel prices in the United Kingdom, Belgium, Canada, and Germany are subsidized. See Certain Helical Spring Lock Washers from China; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order, in Part, 69 FR 12119 (March 15, 2004) (Lock Washers from China). The respondents contend that the Department, due to its subsidy suspicion policy, should revise the AFA rate of 139.31 percent and exclude imports from these countries from the Indian import data used to calculate the surrogate values from in the eighth review.

Furthermore, the respondents argue that the Department must also exclude from the Indian import statistics used in the eighth review any Indian imports from the United States because U.S. exports are subsidized. According to the respondents, the World Trade Organization (WTO) has determined that the U.S. Foreign Sales Corporation/Extraterritorial Income Exclusion (FSC/ETI) tax scheme is a WTO-illegal subsidy and the United States has agreed to implement the WTO's ruling. In light of these facts, the respondents argue that the United States must be deemed to have export subsidies too. The respondents state that the Department's subsidy suspicion policy requires the Department to reject surrogate values and market-economy supplier prices that are subsidized. Since the WTO has found the FSC/ETI tax scheme to be an illegal subsidy, the respondents conclude that the

Department must revise its AFA rate and exclude U.S. data from the Indian import statistics used to calculate the surrogate values in the eighth review.

The respondents also argue that since the AFA and PRC-wide rate of 139.31 percent was based on a different factory, for different bars, by a different seller, with different steel input, and unverified data, the rate is not appropriate. The respondents argue, citing Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d. 1330, 1340, that the Department must select an AFA rate that has a relationship to the actual sales information. Moreover, the respondents claim that the Department cannot select unreasonably high AFA rates that have no relationship to a respondent's actual dumping margin. See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027,1032 (Fed. Cir. 2000). The respondents contend that they fully disclosed every sale of subject merchandise during the POR with which the respondents were involved, except for those where there is a scope issue pending. The respondents argue that the Department can calculate and assess dumping margins on all of the sales made by the respondents, including agent sales. For these reasons, the respondents assert that the selected AFA rate is unreasonably high and should be revised.

In rebuttal, the petitioner notes that the respondents' claims do nothing but rehash prior arguments that have not only been rejected by the Department, but have also been rejected by both the CIT and the CAFC. Furthermore, the petitioner notes that the respondents have made their arguments with respect to the order that is most adverse to their position – the 139.31 percent rate for bars/wedges. The petitioner notes that the respondents have not argued that there was a similar error with respect to the AFA margins for axes/adzes – a rate that is currently less than half of the rate for bars/wedges.

According to the petitioner, the respondents correctly note that the AFA rate of 139.31 for bars/wedges had its origin as a calculated rate in the eighth administrative review. The petitioner notes that this rate was challenged by the respondents in court. After several rounds of appeals, remand determinations, and judicial review by the CAFC, this AFA rate was not only revised, but also upheld, and subsequently affirmed. The petitioner notes that the respondents never once challenged the Department's inclusion or exclusion of certain countries owing to the presence of generally available subsidies. Respondents have known about the Department's policy of excluding input prices that were affected by subsidies and have raised the issue with the Department as far back as early 1997. The respondents could have easily objected to the particular values used during the appeals process but either neglected to do so or deliberately chose not to.

The petitioner also notes that the respondents have in the instant review raised the very same subsidy arguments they unsuccessfully raised in the prior review. The petitioner argues that the respondents' claims are based on the premise that virtually any allegation of a country maintaining generally-available export subsidies qualifies as a reasonable basis for disregarding that country's commodity prices. The petitioner argues that the Department has already addressed this issue in its final determination in the eleventh review where it stated that the Department "does not have a policy of

excluding all surrogate country import prices for FOP that are exported by countries that may have generally-available subsidies, whether for domestic production or export sales." See Memorandum from Gary Taverman to James J. Jochum, "Issues and Decision Memorandum for the Eleventh Administrative Review of Heavy Forged Hand Tools from the People's Republic of China," dated September 2, 2003. As such, the petitioner contends that the Department need not consider every single subsidy program from every country. Further, the petitioner notes that the respondents never objected to the Department's decision to include these imports in the calculation of the surrogate values for the eighth administrative review.

Regarding the FSC/ETI tax scheme, the petitioner notes that the respondents cite no proceeding in which the Department has ever excluded imports of U.S. merchandise on these grounds. Nor is there any support for the assertion that the U.S. merchandise in question is not market priced. The petitioner states that there is no evidence on the record that the U.S. producers of these imports even had foreign sales corporations, or whether these producers received a financial contribution or benefit. Moreover, the petitioner contends that if the FSC/ETI tax scheme provided such a financial contribution and a benefit to U.S. producers, then the Indian import prices are erroneously low and should be increased for purposes of an actual market comparison. Use of the data is thus conservative. The petitioner states that absent any concrete record evidence, the Department should not hesitate to reject the respondents' claims.

With respect to the respondents' argument that the AFA and PRC-wide rate of 139.31 percent was based upon "a different factory, for different bars, by a different seller with different input steel, and unverified data," the petitioner argues that the respondents are attempting to restrict the Department's ability to use FA, contrary to the intent of Congress. The petitioner argues that the Department is not bound to assigning particular producer/exporter AFA rates or to provide a rate that is specific to each model of merchandise or method of production. To the contrary, the petitioner contends that an AFA rate must be one that does not serve as a benefit to a non-responding party given that the very nature of the AFA methodology is to induce cooperation from non-cooperative parties. Additionally, the petitioner asserts that the Department assumes that if an uncooperative respondent could have demonstrated that its dumping margin was lower that the highest prior margin, it would have provided information demonstrating such was the case. According to the petitioner, the respondents' argument, taken to its logical conclusion, would require the Department to maintain a separate AFA rate for every producer/exporter combination, a separate AFA rate for every producer/exporter combination for each production process utilized by that producer/exporter combination, and a separate AFA rate for every producer/exporter combination for each unique set of material inputs utilized by that producer/exporter combination. The petitioner concludes that this is not feasible. The petitioner notes that, according to the CIT, "it is not uncommon for Commerce to assign uncooperative respondents the highest margin assigned to any respondent in an antidumping review." See Fujian machinery & Equipment Import & Export Corporation v. United States, 276 F. Supp.2d 1371, 1381 (Ct. Int'l Trade 2003). Lastly, the petitioner contends that Congress stated that information from prior determinations is exempt from the corroboration requirement. As such, the Department should continue to utilize the 139.31 percent

margin as the AFA rate for those producers/exporters that warranted the application of FA with adverse inferences.

Department's Position:

We agree with the petitioner that the opportunity to challenge the 139.31 percent rate for bars/wedges has passed. Despite the respondents' claim that the rate selected as AFA for bars/wedges from the eighth administrative review may reflect subsidized prices, there is no basis to recalculate it in the current review segment. The Department calculated the 139.31 percent rate for bars/wedges in the eighth administrative review covering the 1998-1999 POR. While Huarong, LMC/LIMAC, and TMC were aware of the Department's policy regarding the exclusion of surrogate country import prices in valuing FOP and challenged certain aspects of the Department's final results and amended final results for the 1998-1999 POR before the CIT, they never raised excluding from the Indian trade statistics imports they believed were subject to generally available subsidies. On October 31, 2001, the CIT sustained the redetermination made by the Department in the 1998-1999 POR. See Shandong Huarong General Group Corp., Lianoning Machinery Import & Export Company, and Tianjin Machinery Import & Export Corp. v. United States, 177 F. Supp.2d 1304 (Ct. Int'l Trade 2001). On June 23, 2003, the Department published its amended final results pursuant to final court decision, assigning TMC the rate of 139.31 percent. See Heavy Forged Hand Tools from the People's Republic of China: Notice of Final Court Decision and Amended Final Results of Antidumping Administrative Reviews, 68 FR 37121 (June 23, 2003) (Hand Tools Amended Final Results 1998-1999). As this court decision is final, the opportunity to challenge any aspects of the Department's rate calculations in the 1998-1999 review period has passed.

Comment 22: The Department should reconsider its determination to rescind the review of hammers/sledges and picks/mattocks with respect to Huarong and LMC/LIMAC.

The petitioner disagrees with the Department's decision in the Preliminary Results to rescind the reviews of hammers/sledges and picks/mattocks with respect to Huarong and LMC/LIMAC because these respondents have been involved in schemes that circumvent the orders. The petitioner contends that these rescissions will open loopholes in the orders that these respondents will exploit in the future. Although the Department based its decision to rescind these reviews on the respondents' no shipment claims and data obtained from CBP, the petitioner claims that CBP data will not capture entries made by Huarong or LMC/LIMAC through an agent because the importer of record would identify the agent, rather than the true seller, on the CBP 7501 entry form.

The petitioner requests that the Department reverse its decision to rescind these reviews or, before rescinding these reviews, seek additional information from Huarong, LMC/LIMAC, and their known agents, in order to identify any unreported agent sales. Further, the petitioner argues that the Department should seek certification from these respondents regarding knowledge of the identity of the producer, the exporter, and use of agents.

In rebuttal, Huarong and LMC/LIMAC state that they reported no sales of hammers/sledges or picks/mattocks during the POR. The respondents note that Huarong, a producer of bars/wedges, does not have its own dumping rate for hammers/sledges or picks/mattocks and thus, any shipment of subject hammers/sledges or picks/mattocks by Huarong would be subject to the PRC-wide rate. In addition, the respondents note that if Huarong used an agent, other than one that had a separate rate, that shipper's sales would also be subject to the PRC-wide rate. According to the respondents, each exporter that has a separate dumping rate for these hand tools participated in this review, thereby accounting for all U.S. entries of hammers/sledges and picks/mattocks subject to a dumping rate less than the PRC-wide rate. The respondents state that a similar argument applies to LMC/LIMAC, which is a trading company. According to the respondents, it is only advantageous to ship through an agent when the agent has a separate rate for the particular class or kind of subject merchandise in question. In this instance, the respondents claim that no exporter with a separate rate for either hammers/sledges or picks/mattocks sold any items for Huarong or LMC/LIMAC.

Department's Position:

We agree with the respondents. In this review, Huarong reported to the Department that it had agent sales in the bars/wedges category, and LMC/LIMAC reported that it was acting as an agent for another PRC company that sold bars/wedges. As both respondents provided their agent sales data upon request, there is no reason to believe that they would not have provided similar data for the hammer/sledges or picks/mattocks reviews if it applied. We also note that all active exporters with a separate rate for these product categories participated in these reviews and did not report sales for Huarong or LMC/LIMAC. Furthermore, an examination of previous administrative reviews of the hammers/sledges and picks/mattocks orders demonstrates that the Department has never reviewed Huarong under the context of these orders. Similarly, the Department has never reviewed LMC/LIMAC under the context of the picks/mattocks order. Although LMC/LIMAC has shipped merchandise subject to the hammers/sledges order, we note that it received the AFA rate of 45.42 percent for its sales of hammers/sledges in the amended final results for the administrative review covering the 2000-2001 period. See Notice of Amended Final Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools From the People's Republic of China, 68 FR 7347 (February 13, 2003). Since Huarong and LMC/LIMAC (1) provided their purported agent sales data, (2) these respondents are not historically active in shipping merchandise subject to the reviews in question, (3) exporters with separate rates in these product categories did not report sales for Huarong or LMC/LIMAC and (4) our customs query provided no evidence of shipments by these respondents in these orders, we are finally rescinding the reviews of Huarong and LMC/LIMAC under the

hammers/sledges and bars/wedges orders.

Part IV - Issues Regarding Assessment Instructions

Comment 23: The Department should deny the request by Olympia Industrial Incorporated to instruct CBP to liquidate entries of scrapers and tampers.

The petitioner contends that the Department should deny the request made by Olympia Industrial Incorporated (Olympia), an interested party to this review, that the Department instruct CBP to liquidate entries of scrapers and tampers that entered into the United States prior to the initiation of the scope ruling on these products, because the request is based upon an incorrect interpretation of 19 C.F.R. § 351.225(k)(3). According to the petitioner, this section of the Department's regulations applies to situations after a final scope ruling has been issued. To date, this has not yet occurred. Further, the petitioner states that tampers have always been subject to the order and are specifically named in the scope language from the investigation phase of this proceeding, and therefore entries of tampers should have been suspended by CBP and subject to review since the preliminary determination of the investigation. The petitioner states that Olympia should bear the burden of proving, either by CBP ruling or by documentary evidence (such as 7501 forms and supporting invoices) that tamper and scraper entries have not been suspended in the past. The petitioner continues, noting that Olympia's request stated that CBP is suspending entries for increased cash deposit payments, but makes no mention as to why CBP is requesting this increase. Although Olympia states that the shipments being suspended contain scrapers and tampers, the petitioner argues that Olympia does not state that CBP's request is related to the scrapers and tampers included in these shipments. The petitioner notes that CBP could be requesting additional deposits or bonding requirements as a result of its estimates of current deposits versus potential assessed values.

In rebuttal, the respondents contend that the Department should follow its regulations regarding the suspension of liquidations and imposition of duties and should provide a positive list of items subject to the scope of the orders. The respondents argue that if the scope is not limited to "forged" items, in particular, regardless of the scope decision, the Department must amend the scope language to afford interested parties notice as to what is within the scope.

Department's Position:

We agree with the petitioner. Regarding tampers, the petitioner is correct in that tampers are specifically identified by the scope of the HFHTs orders as being subject merchandise. Since tampers are within the scope of the bars/wedges order, it is appropriate that CBP suspend liquidation of tamper entries. To the extent that Olympia or the respondents are uncertain as to whether a particular type of

tamper is covered by the scope of the order on bars/wedges, these companies may file a scope ruling request with the Department, pursuant to 19 C.F.R. § 351.225. As tampers are subject to the bars/wedges order, the Department will instruct CBP to liquidate entries of tampers for Huarong, LMC/LIMAC, and TMC at the AFA rate of 139.31 percent.

With respect to scrapers, we note that the Department has not yet issued its preliminary ruling because we are still collecting information regarding this product. See Letter from Holly A. Kuga, Senior Director, Office 4, to All Interested Parties, dated July 29, 2004, requesting that interested parties submit comments and/or factual information regarding whether the scrapers imported by Olympia satisfy the criteria identified in 19 C.F.R. § 351.225(k)(2). The Department's regulations state at 19 C.F.R. § 351.225(l)(1), if the product subject to a scope inquiry is currently being suspended, such suspension will continue until a preliminary or final scope ruling is issued. Furthermore, 19 C.F.R. § 351.225(l)(2) states that if the product subject to a scope inquiry is not currently being suspended, and if the Department preliminarily finds the product is included within the scope of the order, the Department will at the time of the preliminary ruling instruct CBP to begin suspension of liquidation on or after the date of the initiation of the scope inquiry.

With respect to scrapers, the respondents have separately asserted that CBP has suspended certain entries containing scrapers. If CBP is suspending such entries, CBP is doing so under its own statutory authority, presumably because CBP believes that such products are within the scope of the HFTHs orders. The Department has not yet issued a preliminary determination in the scraper scope inquiry, but will advise CBP of the decision and its implications when it is appropriate to do so, pursuant to 19 C.F.R. § 351.225(l). See Comment 17.

Comment 24: The Department should correct the ministerial error in the draft liquidation instructions.

The petitioner requests that the Department correct the misspelled name of one U.S. importer in the draft liquidation instructions for orders on axes/adzes and hammers/sledges.

The respondents did not comment on this issue.

Department's Position:

We agree with the petitioner and we will correct the misspelling of the importer's name in the liquidation instructions for the final results for the orders on axes/adzes and hammers/sledges.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margins in the Federal Register.

Agree _____ Disagree_____ Let's Discuss_____

_____
James J. Jochum
Assistant Secretary
for Import Administration

_____
Date