A-570-803
Administrative Reviews
POR: 02/01/05 - 01/31/06
Public Document
AD/CVD Enf. Off. 7: MF

September 4, 2007

MEMORANDUM TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China (A-570-803): Issues and Decision Memorandum for the Final Results of the Antidumping Duty Reviews

SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the antidumping duty reviews of heavy forged hand tools, finished or unfinished, with or without handles, (hand tools) from the People's Republic of China (PRC). As a result of our analysis, we have made certain changes from the preliminary results. *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Preliminary Results and Partial Rescission of the 2005-2006 Administrative Reviews*, 72 FR 10492 (March 8, 2007) (*Preliminary Results*). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation.

Comment 1: SMC and *de facto* and *de jure* government control

Comment 2: Use of adverse facts available (AFA) for Bars/Wedges and Hammers/Sledges

Comment 3: Corroboration of AFA rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes

Comment 4: Preliminary rescission of review for Axes/Adzes

Comment 5: Use of facts available if Preliminary rescission of review for Axes/Adzes is reversed

Comment 6: Use of adverse facts available if Preliminary rescission of review for Axes/Adzes is reversed

Background

The period of review (POR) is February 1, 2005, through January 31, 2006. We published the *Preliminary Results* in the *Federal Register* on March 8, 2007. We received a case brief from respondent Shandong Machinery Import & Export Company (SMC) on April 9, 2007 (SMC Case Brief). Separate rebuttal briefs were received from both petitioners, Ames True Temper (Ames) (Ames Rebuttal Brief) and Council Tool Company (Council Tools) (Council Tools Rebuttal Brief) on April 16, 2007.

On April 24, 2007, the Department's Customs Liaison Unit forwarded certain U.S. Customs and Border Protection (CBP) documents to the team. These were placed on the record of this review on April 24, 2007. *See* the Memorandum to the File from Mark Flessner, Case Analyst, entitled "Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China (A-570-803): U.S. Entry Documents and Opportunity to Comment" (April 24, 2007) (CBP Memorandum). These documents indicated U.S. sales in a class or kind for which SMC reported none; they also indicated unreported sales in classes or kinds for which SMC did report some sales. On May 9, 2007, comments concerning these CBP documents were filed by SMC (SMC CBP Comments), Ames (Ames CBP Comments), and Council Tools (Council Tools CBP Comments). SMC requested and was granted time to file a rebuttal to Ames' and Council Tools' comments; SMC filed its rebuttal comments (SMC Rebuttal Comments) on May 16, 2007.

DISCUSSION OF THE ISSUES:

Changes from the Preliminary Results

Based on the discussions below, we recommend reversing the preliminary decision to rescind the review for SMC with regard to the class or kind Axes/Adzes. We also recommend the use of adverse facts available for SMC with regard to the class or kind Axes/Adzes in the final results. Otherwise, we recommend making no changes to the *Preliminary Results*.

Comment 1: SMC and *de facto* and *de jure* government control

In its case brief, SMC asserts that it submitted all information necessary to show that SMC is free of *de jure* and *de facto* governmental control. SMC maintains that the Department was persuaded by petitioners' submissions which purported to show that SMC is a state-owned

enterprise, controlled by and subordinate to the Shandong provincial government. SMC states that it submitted an official letter from the Shandong Province Foreign Economic Trade Cooperation Bureau certifying the ownership status of SMC as an "all people-owned" enterprise, which was not taken into account by the Department; SMC argues that this letter clarifies the ownership issue. SMC lists the various submissions it made, maintaining that these satisfy the requirements of the *de jure* criteria set forth in *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) (*Sparklers*). SMC stresses that petitioners' submissions indicated only the possibility that SMC might in actuality be owned and controlled by the government of Shandong Province. In a reference to previous segments of this proceeding, SMC argues that the Department has found that record evidence of the type provided by SMC in this segment demonstrates SMC's freedom from *de jure* governmental control. SMC contends that it has also submitted all information necessary to show that it is free of *de facto* governmental control under *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 69 FR 22585 (May 2, 1994). SMC insists that it provided clear answers as to (A) who owns SMC, (B) who controls SMC, and (C) SMC's relationship with the national, provincial, and local governments. SMC restates one of its responses in the second supplemental questionnaire response to justify this position. *See* SMC Case Brief at 8; *see also* Memorandum to Stephen Claeys from Mark Flessner entitled "Administrative Review (02/01/2005 – 01/31/2006) of Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Adverse Facts Available and Corroboration," (AFA and Corroboration Memo), dated February 28, 2007, at 6-7.

In its rebuttal brief, Ames contends that SMC failed to provide evidence that it is free of government control. Ames contends that SMC's statements are full of contradictions, errors, and omissions of SMC's own making which call into question the veracity of SMC's statements concerning its eligibility for a separate rate. Ames traces some of these alleged contradictions, errors, and omissions through SMC's successive responses in this administrative review. Ames states that SMC completely failed to answer many of the questions, and merely repeated stock answers to many others. *See* Ames Rebuttal Brief at 9. Ames describes SMC's statements concerning its ownership and control, maintaining that SMC originally stated that it was owned by its shareholders and controlled by its directors and managers without further elaboration. Ames argues that SMC stated that its management was selected by the Board of Directors but refused to name the Board's members. Ames notes that SMC stated that the employees constituted the shareholders of SMC and had the power to control the company, but then SMC shifted position to say that it had no Board of Directors, was not a shareholding entity, and that the employees were not shareholders in the company.

Ames also contends that SMC's business license indicates (in Chinese) that SMC is a state-owned business. Ames disagrees with SMC's position that "state ownership" and "all-people ownership" have the same meaning and are interchangeable, stressing that the characters in Chinese for these two types of business are different. Ames maintains that when SMC was asked specifically about the differences in the Chinese characters, SMC did not address the issue, but

submitted a letter from the Shandong Province Department of Foreign Trade and Economic Cooperation (which stated that SMC is an "all-people owned" enterprise). Ames argues that SMC withheld information and refused to submit complete answers to questions, citing as examples SMC's failure to respond to questions concerning registered capital, price negotiation, revenue generated by U.S. sales, revenue generated by sales to other markets, the general structure of the company, the identity of third parties owning SMC, calculation of profits differentiating between subject and non-subject merchandise, and other subjects. *See* Ames Rebuttal Brief at 10-11. Ames states that each segment of an administrative proceeding is separate from other proceedings, necessitating individual separate rate evaluations regardless of whether there has been a previous separate rate determination. Ames asserts that it is the obligation of the respondent to create an accurate and complete record so as to demonstrate its qualification for a separate rate. Ames argues that SMC admitted that it is supervised by the Shanghai Foreign Trade Economic Committee (*see* SMC Case Brief at 8; *see also* AFA and Corroboration Memo at 6-7), establishing a direct link to a provincial government agency that controls SMC. Ames asserts that this plainly leads to the conclusion that SMC is a state-controlled entity. Ames characterizes SMC's responses as "scant evidence" to rebut the Department's non-market economy (NME) presumption. According to Ames, SMC's final remaining answer to the question of who controls SMC was left unanswered except by its admission that the Shandong Foreign Trade Economic Committee oversees SMC's business. *Id.*

In its rebuttal brief, Council Tools maintains that the Department's notices and memoranda in this case "demonstrate in crystal clear fashion" that SMC failed to respond adequately to the Department's requests for information. *See* Council Tools Rebuttal Brief at 3. Council Tools points to the Department's citation of excerpts from SMC's own questionnaire responses, arguing that these responses "demonstrate starkly that SMC provided confused and confusing responses to straightforward questions" regarding (1) who owned SMC, (2) who controls SMC, and (3) SMC's relationship to national, provincial, and local governments. Council Tools describes "SMC's post-hoc attempt in its case brief to rehabilitate its responses" by "quoting one of its many confused answers to the Department's questions" as insufficient for the Department to rely on in the context of the contrary evidence provided by SMC. Council Tools states that SMC was offered multiple opportunities to provide information about whether it qualified for a separate rate but was unwilling to do so in a comprehensible manner and did not cooperate to the best of its ability in responding to the Department's many requests for information. Council Tools contends that, without reliable information on which to base a separate rate determination, the Department has no alternative other than to rely on its NME presumption.

Department's Position

We agree with petitioners that SMC has not rebutted the presumption that it is a part of the PRC-wide entity. For these final results we continue to find that SMC has failed to demonstrate an absence of *de jure* and *de facto* government control and is, therefore, not eligible for a separate rate with regard to the classes or kinds Bars/Wedges and Hammers/Sledges.

In the *Preliminary Results*, we found that, due to the deficient responses SMC provided to the Department, it failed to demonstrate an absence of *de jure* and *de facto* control from the government. Therefore, we preliminarily found that SMC remained part of the PRC-wide entity and thus was not eligible for a separate rate with regard to the classes or kinds Bars/Wedges and Hammers/Sledges.

In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty deposit rate. *See Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006). The Department's separate rate test to determine whether the exporters are independent from government control is not concerned, in general, with macroeconomic/border-type controls, *e.g.*, export licenses and quotas and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo From the People's Republic of China*, 64 FR 69723 (December 14, 1999); *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 *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Synthetic Indigo From the People's Republic of China*, 65 FR 37961 (June 19, 2000) (unchanged in Final and Amended Final). To establish whether a firm is sufficiently independent from government control to be entitled to a separate rate, the Department applies the test articulated in *Sparklers*. Under the separate rates test, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities. Absence of *de jure* control can be established generally, but the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates. The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions:

> (1) whether the export prices are set by, or subject to, the approval of a governmental authority;
>
> (2) whether the respondent has authority to negotiate and sign contracts, and other agreements;
>
> (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and
>
> (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

See Sparklers, 56 FR at 20589.

We disagree with SMC's position that it has supplied the Department with all the information and documentation necessary for it to demonstrate that it is eligible for separate rates. SMC refused to answer the majority of the Department's questions relating to ownership – answers that are required not only for the separate rates inquiry, but are also part of a standard Section A questionnaire response. SMC withheld information and refused to submit complete answers to numerous questions, including those regarding registered capital, price negotiation, revenue generated by U.S. sales, revenue generated by sales to other markets, the general structure of the company, and the identity of third parties owning SMC. Despite being given several opportunities, SMC failed to provide complete or consistent responses to our questions, rendering it impossible to adequately determine whether or not SMC's business operations are free from *de jure* or *de facto* government control. We are unable to definitively determine who owns SMC, who controls SMC, and the nature of SMC's relationship with the national, provincial, and local governments. We note that SMC admitted that the Shandong Foreign Trade Economic Committee supervises SMC. *See* SMC Case Brief at 8; *see also* AFA and Corroboration Memo at 6-7. This statement contradicts SMC's claim that it is independent from government control, and there is insufficient evidence on the record to demonstrate otherwise.

Therefore, we find that there continues to be insufficient information on the record to determine whether or not SMC is free of *de facto* and *de jure* government control under the *Sparklers* criteria. Accordingly, SMC has failed to rebut the presumption that it is controlled by the government. For purposes of these final results, we find that SMC remains part of the PRC-wide entity and thus is not eligible for a separate rate with regard to the classes or kinds Bars/Wedges and Hammers/Sledges.

Comment 2: Use of adverse facts available (AFA) for Bars/Wedges and Hammers/Sledges

SMC makes the general argument that the Department should not have applied AFA to SMC's sales of Bars/Wedges and Hammers/Sledges. SMC's points in support of this argument are: (1) with regard to the U.S. sales database, SMC cooperated to the best of its abilities and substantially complied with the Department's requests for information; (2) with regard to the FOP data, that the use of data from the previous POR was valid (applicable since SMC maintains that the material was produced during that POR) but acknowledges that it was unable to supply inventory records to document this situation; and (3) with regard to the information contained in the CBP Memorandum, any error was due to inadvertent oversight. These points are presented in all three of the submissions SMC made after the *Preliminary Results*, *i.e.*, SMC's Case Brief, SMC's CBP Comments, and SMC's Rebuttal Comments (which is in rebuttal to petitioners' CBP comments).

SMC argues that the Department should not have applied AFA to SMC's sales of Bars/Wedges and Hammers/Sledges because SMC cooperated to the best of its abilities. Citing to *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302 (Ct. Int'l Trade 1999)

(*Mannesmannrohren-Werke*), SMC states, "The only relevant question here is whether SMC's failure to provide certain requested information constituted anything more than mere 'inadvertent error.'" SMC also cites the Court of Appeals for the Federal Circuit (CAFC) in *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995) (*NTN*), arguing, "'{w}hile the parties must exercise care in their submissions, it is unreasonable to require perfection,' {t}he Department must not require it of SMC either." *See* SMC Case Brief at 10. SMC contends that the multiple questionnaire responses it submitted to the Department's questionnaires demonstrate that it cooperated to the best of its ability. Again citing the CAFC in *NTN*, SMC argues that "{t}he Court has said that in order for the Department to derive an adverse inference, it must first find that the Respondent had the ability to comply and willfully decided not to comply or did not behave as reasonable respondents," and that "the Department must analyze each of SMC's errors 'in light of its overall conduct, the importance of the information, the particular time pressures of this {review}, and any other information that will bear on the determination of whether this was an excusable inadvertence on {Respondent's} part or a demonstration of lack of due regard for its responsibilities in the {review}.'" *See* SMC Case Brief at 14, citing *NTN*, 74 F.3d at 1208. With regard to the Department's application of AFA to Bars/Wedges and Hammers/Sledges, SMC states that, "though the Department is not fully satisfied with SMC's submissions, SMC has substantially complied with the Department's information requests." *See* SMC Case Brief at 11. With regard to U.S. sales data, SMC states only that it was unable to fully ascertain exactly which freight expenses were paid in U.S. dollars and therefore could not provide this information. SMC addresses no other U.S. sales database deficiencies in its briefs or comments.

With regard to Section D reporting, SMC argues that its use of the previous POR's factors of production (FOP) data is correct because the subject merchandise it sold during the instant POR was produced by its suppliers (and acquired by SMC) during the previous POR. SMC states that there is no documentation of this because neither SMC nor SMC's suppliers maintain inventory records. SMC notes:

> SMC fills its orders of subject merchandise as these come in from the U.S. customer. When SMC receives an order from its U.S. customer, it negotiates with the supplier. Depending on the availability of materials (notably steel), the supplier schedules the production. Following production, the supplier notifies SMC that the order is ready and SMC then arranges the shipment in accordance with its U.S. customer's requirements.

See SMC Case Brief at 12. SMC asserts that there is no need for SMC to maintain inventory records because SMC does not hold inventory (except from the time it is delivered from the supplier and loaded for shipment to the U.S.) and that its suppliers do not keep inventory records; therefore, SMC contends that the requested source documents do not exist. *See* SMC Case Brief at 2. SMC maintains that "petitioners' allegations that SMC's answers to the Department's questionnaires were 'false assertions' and 'purposeful{ly} evas{ive}' are an inaccurate representation of the facts." *See* SMC Rebuttal Comments at 1.

In response to the CBP data indicating an additional U.S. shipment of merchandise not reported in its databases, SMC concedes that it failed to report a single shipment of subject merchandise covering various types of products (without indicating which classes or kinds are involved). SMC maintains that "the failure to report this single shipment was nothing more than an inadvertent oversight" and that there was "no intention on the part of SMC to make a false assertion." *See* SMC CBP Comments at 1. SMC states that it has no computerized tracking system for sales that segregates subject merchandise, and, as a result, it "simply overlooked this one particular invoice and associated documentation." *Id.* SMC argues that its own documentation suggests that individual sales associated with some of the merchandise in the shipment are not subject merchandise, and maintains that it is "very difficult for SMC to ascertain the nature of these particular sales." *See* SMC Rebuttal Comments at 1-2. SMC states that, even if these particular sales arising from the single shipment involved subject merchandise, they are monetarily "insignificant." *Id.* SMC then quotes the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc 103-316, Vol. 1, 103d Cong. (1994) (SAA) and states:

> {The SAA} directs the Department to consider a respondent's circumstances when evaluating their data. The SAA states that the Department "may take into account the circumstances of the party including (but not limited to) the party's size, its accounting systems, and computer capabilities, as well as the prior success of the same . . . in providing requested information in antidumping and countervailing duty proceedings." The language of the SAA expresses the clear intent of Congress to take account of the difficulties faced by respondents in developing countries. In this review, it is clear that Commerce failed to fully consider respondent's circumstances, and in particular, the success of SMC in providing requested data in previous antidumping proceedings.

See SMC Rebuttal Comments at 1-2. Citing *Mannesmannrohren-Werke*, SMC asserts that "the Department may not make a determination that a party failed to act to the best of its ability simply because it failed with regard to one aspect of its questionnaire response." *Id.* at 2-3. SMC explains its submission of its 2004-2005 POR Section D response and points out that the CBP materials do not provide a record as to when the purchase order for this shipment was placed. Maintaining that it purchases and ships merchandise in response to customer orders, SMC then says that the Department should accept the 2004-2005 POR Section D response and FOP databases which SMC reported for Bars/Wedges and Hammers/Sledges as "valid and reliable." *See* SMC Rebuttal Comments at 4.

In its rebuttal brief, Ames summarizes SMC's position by saying, "SMC responds to the Department's Preliminary Determination by effectively claiming 'inadvertent error' for its inability to provide questionnaire data." *See* Ames Rebuttal Brief at 13. Ames contends that SMC's arguments that it cooperated to the best of its ability, behaved responsibly, reported its sales to the best of its ability, and did not refuse to cooperate "could not be more incorrect." Ames criticizes SMC's conduct throughout the administrative review, alleging contradictory and

confusing responses, refusal to respond to certain questions, failure to produce necessary documents, and failure to keep and maintain requisite information. Ames insists that SMC mischaracterized the standard that governs the use of AFA in its citation of *Mannesmannrohren-Werke*, arguing that the use of the term "inadvertent error" by the U.S. Court of International Trade (CIT) was only in reference to the specific facts of *Mannesmannrohren-Werke* and that the CIT unequivocally held that the standard for determining if adverse inferences may be applied is whether the respondent cooperated to the best of its ability. Ames also criticizes SMC's citation to *NTN*, distinguishing the CAFC's focus on clerical errors in that case from a situation in which SMC failed or refused to submit information or provided nonresponsive answers. Ames maintains that SMC provides no support for the proposition that the Department must find that a respondent "had the ability to comply and *willfully* decided not to comply or did not behave as reasonable respondents" in order to apply AFA. *Id.* at 16-17 (emphasis in original). As an example of SMC's failure to cooperate to the best of its ability, Ames notes that, in SMC's September 15, 2006, responses to the Department's supplemental questionnaires, SMC refused to respond to entire lines of inquiry and demanded that the Department provide its reasoning for these questions. Ames argues that SMC has attempted to impede the Department's investigatory authority, stating:

> Even with respect to the data that SMC did submit, the information is so inadequate that it is virtually unusable and unverifiable. SMC's submissions and responses in relation to its Section C database is just one example of the countless times that SMC erred in numerous instances throughout the proceeding.

Id. at 18-19. As an example, Ames points to maritime transportation costs, and notes that SMC had: (1) first claimed that it shipped certain of its U.S. sales via market economy carriers; (2) completely reversed itself by stating that no subject merchandise was shipped by market economy companies during the POR, and no services were paid for in market economy currencies; (3) again reversed itself, admitting that it used market economy carriers which were paid for in market economy currencies, but did not then submit these expenses as requested. As a second example, Ames points to other transportation costs (including foreign inland freight, brokerage and handling, ocean freight/maritime transport, marine insurance, and other expenses related to the sale of subject merchandise to the United States) which SMC never submitted, despite the Department's repeated requests for this information. Ames states that there was confusion created by SMC's submission of contradictory data concerning its terms of sale with regard to delivery and payment, maintaining that SMC provided no evidence of the agreement on finalized payment terms.

Ames also argues that SMC failed to justify any of its FOP inputs. Ames states:

> The explanation offered in SMC's case brief regarding its failure to provide essential documents supporting its factors of production is incomprehensible. It simply defies logic as to how a company can operate and manage its orders without maintaining some record or system through which it can track its inventory.

See Ames Rebuttal Brief at 21. Ames also states it is "unclear how SMC knows when it 'obtained the majority of subject merchandise' if neither SMC nor its suppliers keep any records or documentation regarding the inventory." *Id.* Ames also notes that SMC has participated in several administrative reviews and is fully aware of what information the Department requires, and, therefore, "certainly could not have been surprised by Commerce's request for factors of production data and supporting documents." *Id.* at 22. In its CBP comments, Ames states that SMC apparently failed to report sales of subject merchandise in classes or kinds of merchandise that SMC did report other POR shipments.

Council Tools asserts that the burden of preparing a complete and accurate record falls squarely on SMC as a matter of law. Council Tools addresses the standard for application of AFA, with reference in particular to the CAFC's decision in *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel)*. Council Tools argues that this case establishes that a respondent is required to demonstrate that it put forth its maximum efforts to investigate and obtain the requested information from its records. Council Tools asserts:

> We have seen anything but SMC's maximum effort to cooperate with this review. In fact, we have seen evasion, multiple ineffectual attempts by SMC to confound the review process, and aborted attempts to change stories provided to the Department.

See Council Tools Rebuttal Brief at 6. Council Tools then cites examples of SMC's failure to cooperate such as SMC's failure to provide information on transactions involving market economy currencies in its U.S. sales, failure to provide requested data on freight allocations, and failure to respond to questions about terms of sale. Council Tools maintains, "These missing data make it literally impossible for the Department to calculate an accurate margin based on partial data." *Id.* at 8. Council Tools proceeds to the issue of FOP, insisting that SMC provided no records to substantiate its claim that all section D data were based on activity prior to the instant POR, despite knowing that it must maintain records to back up claims made as part of the Department's review process. Council Tools states that the Department correctly determined that there was no support for this "unusual claim." Council Tools relates "another apparent change of {SMC's} story" wherein "SMC's brief apparently disavows the prior claim that all of subject merchandise was obtained before the current POR when it refers to 'the majority' of subject merchandise in this context, and not the entirety." *Id.* at 8-9. Council Tools concludes that the application of total AFA to SMC is necessary and appropriate in this review.

Department's Position

Section 776(a)(1) of the Tariff Act of 1930, as amended (the Tariff Act), mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Tariff Act provides:

> If . . . an interested party or any other person: (A) withholds information that has been requested by the administering authority . . .; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of this title, the {Department} shall, subject to section 782(d) of this title, use the facts otherwise available in reaching the applicable determination under this title.

According to section 776(b) of the Tariff Act, if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available. *See also Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India,* 70 FR 54023, 54025-26 (September 13, 2005); and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002). Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* SAA at 1021. Furthermore, "affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference." *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27340 (May 19, 1997); *see also Nippon Steel*, 337 F.3d at 1382-1384.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Tariff Act provides that the Department "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." Section 782(d) further states that if the party submits further information that is unsatisfactory or untimely, the Department "may, subject to subsection (e), disregard all or part of the original and subsequent responses."

Section 782(e) of the Tariff Act provides:

> the {Department} . . . shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the {Department}. . . with respect to the information, and (5) the information can be used without undue difficulties.

In the *Preliminary Results*, we found that SMC's U.S. sales (section C) database had significant gaps in information necessary to calculate U.S. price accurately and that the Department was unable to compare the prices at which SMC's subject merchandise was sold the United States with normal value. We further found that there was no support for SMC's claim that all of its U.S. sales from the instant POR were filled from stock from production for the previous POR. Consequently, we found that SMC's section D database was unreliable, unresponsive, and unverifiable. As a result, the Department could not value the FOP necessary to calculate export price, constructed export price, or normal value under 19 CFR 351.402 and 351.403. We found that this information was reasonably available to SMC, yet withheld; therefore, we found that SMC failed to act to the best of its ability. Accordingly, we preliminarily applied total facts available to SMC's sales of Bars/Wedges and Hammers/Sledges. For the same reasons indicated in the *Preliminary Results*, we continue to conclude that AFA is warranted.

SMC's argument as to why AFA is unwarranted rests on an argument that any failure to provide required information was inadvertent, and therefore should be excused. However, as the CAFC has stated, "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of a respondent's ability, regardless of motivation or intent." *See Nippon Steel*, 337 F.3d at 1383. Section 776(b) of the Tariff Act provides that the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information. We disagree with SMC's characterization of *Mannesmannrohren-Werke* and SMC's claim, "The only relevant question here is whether SMC's failure to provide certain requested information constituted anything more than mere 'inadvertent error.'" We agree with petitioners that the CIT's use of the term "inadvertent error" was only in reference to the specific facts of *Mannesmannrohren-Werke* and is not applicable to the facts before us. Furthermore, the CAFC has recently stated that

> Whether a respondent has lived up to {the requirement to act to the best of its ability} is assessed by determining whether {the} respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While that standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.

See NSK v. United States, 481 F.3d 1355, 1361 (Fed. Cir. 2007) (*NSK*). SMC's intimation that the Department is holding it to a standard of "perfection" is without support. The information sought by the Department in the many dozens of questions SMC failed to answer in its responses to the Department's original and supplemental questionnaires is essential to the conduct of this administrative review.

We continue to find that SMC failed to properly address serious deficiencies in its U.S. sales database regarding foreign inland freight, brokerage and handling, ocean freight/maritime transportation costs, marine insurance, sales terms, and payment terms. These are standard and critical areas of inquiry, which ought to be familiar to a respondent that has been involved in

multiple reviews. SMC claimed that it was unable to fully ascertain exactly which freight expenses were paid in U.S. dollars, and did not even address other U.S. sales database deficiencies in its briefs or comments.

We disagree with SMC's position that the Section D FOP database from the previous POR is reliable. SMC now maintains that its merchandise is produced to order (which is entirely different from its previous description of its practices) and that it has no need to maintain inventory records since it does not hold inventory. It also insists that its suppliers do not keep inventory records. The Department asked for copies of all source documents which would show that the entirety of the stocks of subject merchandise sold by SMC during the POR were acquired by SMC during the previous POR. *See* the Department's second supplemental section A, C, and D questionnaire dated January 4, 2007, at question 570(i). In the absence of inventory records, this could have been demonstrated by SMC's submission of its own purchase records for the previous POR and its sales records for both PORs. Yet SMC made no attempt to supply the Department with this information.

With regard to the unreported sales in certain classes or kinds revealed by the CBP documents, SMC suggests that it "is entirely possible and may be assumed" that at least some of the merchandise under discussion here is not subject merchandise. *See* SMC Rebuttal Comments at 4. We disagree. The Department cannot rely upon possibilities and assumptions; it is incumbent upon respondent, as the sole party with access to the relevant records, to provide evidence to support its assertions. This is especially necessary when these assertions are at odds with its previous explanation of its procurement and sales processes. We are unable to conclude that the CBP documents do not include Bars/Wedges and Hammers/Sledges, and SMC itself is only able to speculate that some of the merchandise referenced in those documents is not subject merchandise.

We disagree with SMC's statement that the Department failed to take into account the success of SMC in providing requested data in previous antidumping proceedings. To the contrary, SMC is an experienced respondent which has participated in prior reviews successfully and, therefore, should have properly reported the requested data. *See*, *e.g.*, *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews*, 60 FR 49251 (September 22, 1995).

Thus we continue to find that SMC failed to act to the best of its ability and continue to find that the use of AFA for Bars/Wedges and Hammers/Sledges is warranted.

Comment 3: Corroboration of AFA rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes

In its case brief, SMC challenges the reliability, relevance, and reasonableness of the Bars/Wedges and Hammers/Sledges PRC-wide/AFA rates, as well as the PRC-wide/AFA rate for Axes/Adzes. SMC suggests that the Department must recalculate the margins from prior

segments of these proceedings in order to corroborate these rates. SMC maintains that the Department must exclude Indian imports of steel from the United Kingdom, Belgium, Canada, Germany, or the United States in its calculation of surrogate values. SMC argues that Indian imports of steel from the United States should be excluded from the calculation of surrogate values used to determine the AFA/PRC-wide rate for Hammers/Sledges because, according to SMC, the U.S. Foreign Sales Corporation (FSC) tax credit and the Continued Dumping and Subsidy Offset Act (the Byrd Amendment) subsidize exports. SMC also argues that the Department must exclude Indian imports of steel from these same countries in calculating surrogate values used to determine the AFA/PRC-wide rate for Axes/Adzes. Citing *Certain Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Administrative Review*, 61 FR 66255 (December 17, 1996) and accompanying Issues and Decision Memorandum at Comment 1, SMC argues that the Department's "subsidy suspicion policy" requires the Department to reject subsidized surrogate values and market-economy supplier prices. SMC also 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) and *China National Machinery Import & Export v. United States*, Slip Op. 03-16 (Ct. Int'l Trade 2003) for this proposition. SMC contends that ". . . since the PRC-Wide/AFA rates were based on different factories, for different products, by different sellers, and with different input steel, the rates are not appropriate." *See* SMC Case Brief at 15.

SMC argues that the Department must select a rate that has a relationship to the actual sales information. SMC maintains that the 139.31 percent AFA and PRC-wide rate for Bars/Wedges is punitive, does not reflect a reasonable dumping margin, has been judicially invalidated, is aberrational, and is not relevant to SMC. SMC cites from *Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, Slip Op. 05-129 (Ct. Int'l Trade 2005) (*Huarong III*), and argues that the 139.31 percent rate has been repeatedly challenged before the CIT, resulting in three remands. SMC stresses that the Department applied a lower AFA rate of 47.88 percent for Bars/Wedges in its final redetermination pursuant to remand, which was sustained in *Shandong Huarong Machinery Co. et al v. United States*, Slip Op. 06-88 (Ct. Int'l Trade 2006) (*Huarong IV*). SMC argues that the 47.88 percent rate stands as a final rate. SMC maintains that the 139.31 percent AFA margin rate has been invalidated and can no longer be employed by the Department. SMC also asserts that the Department failed to independently verify and corroborate these rates, arguing: "The Department simply stated, '{T}here are no independent sources for calculating margins . . . The only sources for calculated margins are administrative determinations.'" *See* SMC Case Brief at 19. SMC argues that the regulations require the Department to use independent sources such as published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. SMC states:

> The Department did not use any such independent information when corroborating the 139.31 or 45.42 percent dumping margins because "there are no

> independent sources for calculated dumping margins." Thus, the Department's arguments are unsupported.

Id. at 20. Though SMC states that "there may be no sources to independently corroborate the reliability of the 139.31 or 45.52 percent dumping margins themselves," it argues that the Department had sources to corroborate the FOP used in arriving at the dumping margins. SMC suggests the use of SMC's sales prices and production data for the instant review, as well as Indian import statistics, to corroborate the margins. *Id.* SMC then discusses the AFA/PRC-wide rate for Axes/Adzes of 189.37 percent. SMC insists that the Department improperly utilized sales of a particular type of scraper tool (the MUTT scraper) in its calculation of the 189.37 percent rate as a result of a scope inquiry. Citing *Olympia Industrial, Inc., v. United States*, Slip Op. 06-110, at 38 (Ct. Int'l Trade 2006) (*Olympia*), SMC states that "there existed compelling evidence on the record that the manufacturing process used in creating the MUTT scraper, roll forging, is not hot forging, as specifically stated in the HFHTs order and thus that the MUTT scraper should not be included within the scope." SMC points out that "the Court held that the MUTT scraper is within the scope of the HFHTs order under the category of Axes/Adzes," but argues that "since the PRC-Wide/AFA rate for Axes/Adzes was based on a different factory, for a different product, by a different seller, and with different input steel, the rate is not appropriate to use for the PRC-wide entity." SMC maintains that the Department has failed to verify and corroborate the 189.37 percent rate, suggesting that the Department should accordingly exclude the sales of these scrapers from the calculated rate for Axes/Adzes.

Ames argues that the selected rates for Axes/Adzes, Bars/Wedges, and Hammers/Sledges are reliable, relevant, and reasonable. Ames notes that the purpose of AFA is to ensure that a dumping margin is sufficiently adverse to induce respondents to provide the Department with complete and accurate information in a timely manner and to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. *See* Ames Rebuttal Brief at 24. Ames disputes SMC's interpretation of the holding in *Huarong IV*, and argues that the court's ruling invalidated the AFA rate of 139.31 percent for Bars/Wedges only as it was applied in the 9th administrative review. Ames reads *Huarong IV* as having "absolutely no impact on the validity of the 139.31 percent rate, which was calculated in the 8th administrative review and affirmed on appeal to the courts." Ames maintains that no evidence regarding the reliability or relevance of the selected rate was submitted in this review. Ames addresses SMC's argument that the Department failed to corroborate the rates for Bars/Wedges and Hammers/Sledges by calling it "meritless." Ames maintains that the Department has discretion in determining the appropriate AFA rate. Quoting from section 776(b) of the Tariff Act, Ames states that the Department is authorized to use information derived from the petition, a final determination in the investigation, any prior administrative review, or any other information placed on the record. Citing the Department's practice, Ames argues that the Department has assigned respondents who fail to cooperate the highest margin calculated for any party in the LTFV investigation or in any administrative review. Referring to 19 CFR 351.308(d), Ames indicates that the Department is required to corroborate "to the

extent practicable" from resources "that are reasonably at the Secretary's disposal." *See* Ames Rebuttal Brief at 30. Ames points out that SMC itself acknowledges that there are no independent sources that the Department can use to corroborate the selected rates.

With regard to SMC's suggestion that the Department use SMC's own 2005-2006 sales data (which Ames has argued are unreliable, *see* Comment 2 above) and FOP data to corroborate the selected rates, Ames states:

> In addition, it is questionable as to how Respondent's 2005-2006 sales prices for subject merchandise would corroborate the selected rates. Although normal value may be determined by sales price, Commerce determined in this proceeding to use a constructed value for Respondent's normal value. Because the determination of constructed value and export/constructed export price depend on production data, it is difficult to imagine how Respondent's 2005-2006 sales prices, in and of themselves, would be a significant source for corroboration purposes.

Id. at 34.

With regard to the subsidy allegations, Ames points out that the Department rejected SMC's argument in its final results in the 11th, 12th, and 14th administrative reviews, quoting the Department in the 11th administrative review as saying that it "does not have a policy of excluding all surrogate country import prices for factors of production that are exported by countries that may have generally-available subsidies, whether for domestic production or export sales." *Id.* at 25-26. Ames states that the subsidy suspicion policy issue has been upheld by reviewing courts. Ames cites to the CIT opinion in *China National Machine Importation & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229 (Ct. Int'l Trade 2003) for the proposition that "{c}onjectures are not facts and cannot constitute substantial evidence." *See* Ames Rebuttal Brief at 27. Ames urges the consideration of the effects:

> Respondent's argument is nonsensical because even if the FSC did provide such a financial contribution and a benefit to some 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, understating the actual value of the U.S. imports and therefore the resulting surrogate values. Absent any concrete evidence placed onto the record by Respondent, the Department should not hesitate to reject Respondent's claims.

Id. at 27-28 (emphasis in original).

Finally, with regard to the Axes/Adzes rate, Ames argues that the Department found the scraper to be within the scope of the Axes/Adzes order pursuant to a scope inquiry, which was sustained by the CIT. Ames says that SMC's argument is essentially that the scope determination was incorrect.

Addressing the FSC issue, Council Tools maintains that the Byrd Amendment and the FSC are not prohibited subsidies to U.S. exports, as repeatedly indicated by the U.S. government. Council Tools states that "implementation of WTO dispute settlement report recommendations, whether accurate or inaccurate, does not constitute an admission of the validity of all of the assertions in those reports under U.S. law." *See* Council Tools Rebuttal Brief at 10. According to Council Tools, SMC cites no precedent for its suggestion that U.S. data be excluded due to U.S. export subsidies and names no subsidies on U.S. exports related to this review.

Council Tools rebuts SMC's suggestion to exclude certain scraper tools from the calculated Axes/Adzes rate by maintaining that SMC offers no reasoned basis for excluding a product that has been found to be within the scope of the review. Council Tools calls this argument, and SMC's other arguments regarding corroboration, "frivolous." Council Tools maintains that SMC's arguments "take no account of the explanation provided in the Department's notices regarding how the rates applied in the *Preliminary Results* have been carefully tested and corroborated using standard Department methodologies."

In its rebuttal brief, Council Tools maintains that the rates which have been applied in previous segments of this proceeding have not been effective in stopping SMC and other respondents from selling hand tools in the United States at less than fair value. Consequently, Council Tools offers alternative methodologies. Council Tools' first alternative is the application of the 189.37 percent Axes/Adzes rate to these particular classes or kinds, since it is "the highest non-aberrational calculated margin from a prior review." *See* Council Tools Rebuttal Brief at 10. The second alternative offered by Council Tools, based upon its argument that "the Department's efforts to administer U.S. trade laws has been compromised by certain respondents' behavior," is to add an amount of 40 percent additional over and above the rates for these particular classes or kinds as they currently stand. *Id.* Council Tools advocates the latter alternative "in order to attempt to deter such sales." *Id.* at 10-11. Council Tools states, "Such deterrent measures in the face of continued failures to cooperate with the Department's review process are clearly contemplated under the law and have been recognized by the Court of International Trade as one of the measures available to the Department to deal with situations like the one presented by this case." Council Tools emphasizes this point with regard to the CBP information:

> In fact, this failure to provide accurate information concerning a basic issue in this review undermines the credibility of all of SMC's responses to the Department's questions and is more reason to apply an additional margin of antidumping duty as an incentive for SMC to provide accurate information in future reviews. Not to do so will reward SMC for its purposeful failure to cooperate with this review process, which has cost the Department a significant amount of time and effort, and which has undermined the integrity of the review. The failure to achieve an appropriate margin in this case also will serve to undermine the overall effectiveness of this order and create an incentive for future respondents to withhold information needed to achieve accurate results in future reviews.

See Council Tools CBP Comments at 4-5. SMC did not comment on the issue of additional duties in its CBP Rebuttal Comments (the issue was raised by petitioner in its Rebuttal Comments and amplified in its CBP Comments).

Department's Position

We continue to find that the rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes have probative value. We find that the 189.37 percent Axes/Adzes rate, the 139.31 percent Bars/Wedges rate, and the 45.42 percent Hammers/Sledges rate have been corroborated, to the extent practicable, in accordance with section 776(c) of the Tariff Act. These rates are applied to the PRC-wide entity, including SMC, *i.e.*, those companies not eligible for a separate rate with regard to the individual class or kind of merchandise (no information has been presented in the current review that calls into question the reliability of the information used for these AFA rates, and the Department finds that the information is reliable).

In the *Preliminary Results*, we found that the rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes had probative value. We further found that the selected rates (189.37 percent for Axes/Adzes, 139.31 percent for Bars/Wedges, and 45.42 percent for Hammers/Sledges) had been corroborated, to the extent practicable, in accordance with section 776(c) of the Tariff Act.

Section 776(c) of the Tariff Act requires that the Department corroborate, to the extent practicable, secondary information used as facts available. Secondary information consists of "independent sources that are reasonably at the Secretary's disposal." *See* 19 CFR 351.308(d). This can include margins determined by the Department in prior segments of this proceeding. *See* SAA at 870. The term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. *See* 19 CFR 351.308(d); *see also* 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. The only sources for calculated margins are administrative determinations. These rates are applied to the PRC-wide entity, *i.e.*, only to companies not eligible for a separate rate with regard to the individual class or kind of merchandise. No information has been presented in the current review that calls into question the reliability of the information used for these AFA rates. Thus, the Department continues to find that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider 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 margin and determine an appropriate margin. *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996) (the Department disregarded the highest margin in that case as adverse best information

available – the predecessor to facts available -- because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin). Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co. v. United States*, 113 F.3d 1220, at 1221-1223 (Fed. Cir. 1997) (*D&L Supply*) (the Department will not use a margin that has been judicially invalidated).

As to reasonableness, in administrative reviews, the Department normally selects as AFA the highest rate determined for any respondent in any segment of the proceeding. *See*, *e.g.*, *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 68 FR 19504 (April 21, 2003); *see also Stainless Steel Plate in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review*, 67 FR 40914 (June 14, 2002). The CIT and the CAFC have consistently upheld the Department's practice in several cases. *See Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*); *see also Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent) (*Kompass Food*); *see also Shanghai Taoen International Trading Co., Ltd. v. United States*, Slip Op. 05-22, at 16 (Ct. Int'l Trade 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review) (*Shanghai Taoen*).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse so "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* SAA at 870; *see also D&L Supply*; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil*, 69 FR 76910 (December 23, 2004). In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." *See Rhone Poulenc*, at 1190.

We disagree with SMC's statements regarding subsidies on imported inputs; there is no need to recalculate margins previously calculated and affirmed. In an administrative review, if the Department chooses as total AFA a dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin. In the instant case, the 139.31 percent rate was affirmed by the CIT and CAFC, providing additional confirmation that it is an appropriate rate. *See Shandong Huarong General Group Corp v. United States, 177 F.Supp.2d 1304 (CIT 2001), aff'd 2003 U.S. App. LEXIS 466 (Fed. Cir. 2003).*

With regard to the reasonableness of the Department's application of the 139.31 percent rate for Bars/Wedges, we agree with petitioners. The CIT did not invalidate the AFA rate of 139.31 percent for Bars/Wedges except as it was applied in the 9th administrative review. *Huarong IV* cannot be read as having impacted the validity of the 139.31 percent rate under any other fact pattern than that present in the case itself. The 139.31 percent rate for Bars/Wedges was a calculated rate in the 8th review for a respondent and the methodology used by the Department to calculate this rate was affirmed by the CAFC, and is therefore a valid margin. *See Shandong Huarong General Corp v. United States*, 159 F.Supp.2d 714 (CIT 2001) (remanding final results); *Shandong Huarong General Corp v. United States*, 177 F.Supp.2d 1304 (CIT 2001) (sustaining remand), *aff'd* 60 Fed. Appx. 797 (Fed. Cir. 2003). This 139.31 percent rate is a reliable final margin that is the PRC-wide rate for Bars/Wedges as published in the 14th review; is the highest calculated rate in any segment of this proceeding; and was calculated using verified information during the 8th administrative review of the Bars/Wedges order. Therefore, this rate is a reliable final margin which the Department can utilize as an AFA rate.

We disagree with SMC with regard to corroboration. SMC states: "The Department simply stated, '{T}here are no independent sources for calculating margins . . . The only sources for calculated margins are administrative determinations.'" However, our original corroboration of this rate read as follows:

> 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. The only sources for calculated margins are administrative determinations. The rate selected as AFA for the PRC-wide entity's sales of Axes/Adzes is the highest calculated rate of any segment in this proceeding, which was calculated in the 14th administrative review. See Final Results of 14th Review. The rate selected as AFA for Bars/Wedges was calculated during the 1998-1999 administrative review, and was corroborated and used as the PRC-wide and AFA rate in the most recently completed administrative review. See Final Results of 14th Review. The AFA rate we are applying for the order on Hammers/Sledges was applied as "best information available" (the predecessor to AFA) during the LTFV investigation for the sole respondent China National Machinery Import & Export Corporation, and was again corroborated and used as the PRC-wide and AFA rate in the 14th review. Id. The AFA rate we are applying for the order on Picks/Mattocks was calculated in the fifth review, became the PRC-wide and AFA rate in the seventh review, and has been used since. Id. These rates are applied to the PRC-wide entity, i.e., those companies not eligible for a separate rate with regard to the individual class or kind of merchandise. No information has been presented in the current review that calls into question the reliability of the information used for

these AFA rates. Thus, the Department finds that the information is reliable.

See Preliminary Results at 10496. Hence, the Department did not simply state that there were no independent sources and close its inquiry; rather, the Department made a detailed examination of the history of this rate, explored its validity as "best information available," and recognized the requirement that other sources be utilized if available. The passage, when quoted in full, points out that no information had been presented that called into question the reliability of the information used for these AFA rates. We disagree with SMC that we should use its own data submitted in this review. We find that SMC's submissions are so deficient that they would be of no use in deriving the normal value that must be constructed based on FOP. We conclude this 139.31 percent rate for Bars/Wedges is an appropriate AFA rate for the PRC-wide entity.

We also disagree with SMC's statements that the Axes/Adzes AFA rate has not been corroborated. This calculated (not based on facts available) rate of 189.37 percent was based upon the sales and FOP data contained in certified questionnaire responses submitted during the course of the review in which it was calculated, the 14th review. As in all NME reviews, the Department also reviewed the PRC-entity during the 14th review. Because the PRC entity failed to cooperate to the best of its ability by not responding to the Department's questionnaire, the Department applied AFA to the PRC-wide entity. Consistent with the Department's practice, the Department applied the highest calculated rate to the PRC-entity as the AFA rate. Because the calculated rate for one particular respondent in the 14th review exceeded the PRC-wide rate from the 13th review, the newly-calculated rate for that respondent was applied to the PRC-wide entity as the AFA rate and thus became the new PRC-wide rate. That rate was also applied to three other companies who received total AFA for the Axes/Adzes order in the 14th review because it is the highest rate calculated for the Axes/Adzes order and provides adequate incentive to induce cooperation from respondents. The CIT and the CAFC have consistently upheld the Department's practice (*i.e.*, applying the highest calculated rate to the PRC-entity as the AFA rate) in several cases. *See Rhone Poulenc*, 899 F.2d at 1190; *see also Kompass Food*, 24 CIT at 689; *Shanghai Taoen*, Slip Op. at 16. As such, the AFA rate for Axes/Adzes has been corroborated in accordance with section 776(c) of the Tariff Act.

With respect to SMC's argument that the Axes/Adzes rate is inappropriate because it included certain scrapers, we note that this argument rests on an inaccurate premise, as scrapers are included in the order. *See Olympia*, Slip Op. at 38.

Lastly, we disagree with petitioner Council Tools' suggestion that we either apply the 189.37 Axes/Adzes rate to Bars/Wedges and Hammers/Sledges or apply an additional 40 percent duty to them. There is no basis on the record to indicate that the rates from one class or kind would be relevant to another.

The Department continues to find, for the reasons set forth above, that the rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes are reliable and relevant and have probative value. We finally find that the selected rates (189.37 percent for Axes/Adzes, 139.31 percent for

Bars/Wedges, and 45.42 percent for Hammers/Sledges) had been corroborated, to the extent practicable, in accordance with section 776(c) of the Tariff Act.

Comment 4: Preliminary Rescission of Review for Axes/Adzes

In its CBP comments, Ames argues that the Department should reverse its decision to rescind the administrative review with respect to Axes/Adzes. Ames notes that in its Quantity and Value submission of April 26, 2006, SMC reported no shipments of Axes/Adzes, and that in its Section C questionnaire response of May 11, 2006, SMC stated that it "did not export axes/adzes to the United States during the POR." *See* Ames CBP Comments at 3. Ames notes there are no factor values or consumption rates on the record for purposes of calculating a dumping margin with regard to Axes/Adzes. Ames states that "even if the Department were to accept SMC's prices as reported in the company's commercial invoice to the U.S. customer, the Department could not calculate any dumping margin as there are no consumption rates to serve as the basis for normal value." *Id.* Ames concludes, "Not only has SMC utterly failed to provide information concerning the company's corporate structure, ownership, and operations, but it appears now that SMC has failed to report sales of subject merchandise to the United States - including sales of a particular class or kind for which SMC initially claimed to have made *no* sales." *Id.* at 5 (emphasis in original).

In its CBP comments, Council Tools states that SMC failed to respond accurately to the Department's questions regarding whether or not it produced or sold Axes/Adzes or Picks/Mattocks in the U.S. market. Council Tools did not, however, refer specifically to the Department's preliminary decision to rescind the reviews of Axes/Adzes or Picks/Mattocks with regard to SMC.

In its CBP comments, SMC argues that its failure to report to the Department a single shipment of subject merchandise "was nothing more than an inadvertent oversight and was not intentional by any means." *See* SMC CBP Comments at 1. In SMC's Rebuttal Comments (*i.e.*, SMC's reply to Ames CBP Comments and Council Tools CBP Comments), SMC acknowledged that it had failed to report a single shipment of subject merchandise, without stating precisely which classes or kinds were involved, and did not address the preliminary rescission of the Axes/Adzes review.

Department's Position

We agree with petitioners that we should reverse our preliminary rescission of the administrative review of SMC with regard to Axes/Adzes.

The *Preliminary Results* state:

> We are preliminarily rescinding the review with respect to SMC for Axes/Adzes and Picks/Mattocks. SMC reported that it made no shipments of subject

> Axes/Adzes or Picks/Mattocks during the POR and the Department was able to review CBP data which support the claim that SMC did not export Axes/Adzes and/or Picks/Mattocks during the POR.

This decision was predicated upon (a) the CBP data query made at the beginning of the review and (b) SMC's responses. Based in part on SMC's responses to the Department's supplemental questionnaires (*see* SMC response dated September 15, 2006, to the Department's first supplemental section A, C, and D questionnaire at 69D and 69E; *see also* SMC response dated January 22, 2007, to the questions pertaining to sections A and C of the Department's second supplemental section A, C, and D questionnaire), an additional data query was requested. *See* Message Number 7052205 from Director, Special Enforcement to Directors of Field Operations, Port Directors, "No shipments inquiry on heavy forged hand tools (axes, and adzes) from China for Shandong Machinery Import and, Export Company (A-570-204)" dated February 21, 2007 (This data inquiry is publicly available at http://addcv.cbp.gov/index.asp?docID=7052205&qu =A570204&vw=detail.) CBP was requested to forward the pertinent documents when it received the results. CBP forwarded these documents to the Department; they were then forwarded to the team on April 24, 2007 (almost six weeks after the publication of the *Preliminary Results*). The CBP documents show that there were shipments of Axes/Adzes by SMC during the POR. The documents indicate the shipments were not made by third parties, but by SMC itself. This fact is not contested by SMC; SMC states that the failure to report these sales was due to inadvertent oversight. As both predicates for the rescission have fallen, we have reversed our preliminary rescission of review.

Comment 5: Use of Facts Available for Axes/Adzes

In its CBP comments, Ames maintains that "it is of paramount importance that a respondent report all sales made during the period under consideration," justifying the declaration with a quotation from the CIT, ". . . the capture of all U.S. sales at the actual prices is at the heart of the Department's investigation." *Florex v. United States*, 705 F. Supp. 582 at 588 (Ct. Int'l Trade 1988). Citing *Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Order in Part*, 65 FR 47960, (August 4, 2000), *aff'd* 66 FR 11256 (February 23, 2001) and *Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Germany*, 64 FR 30710 (June 8, 1999), Ames argues that the Department considers the failure to report sales a "serious error" and, therefore, routinely applies AFA to unreported sales. Ames asserts that the Department must base its final margins upon facts available with respect to Axes/Adzes where the unreported sales represent the only sales during the POR. Further, Ames points out that SMC provided no FOP data for Axes/Adzes that could serve as the basis for normal value. Ames cites to sections 776(a)(2)(A) and 776(a)(2)(B) of the Tariff Act, which provide that the Department shall use facts available when an interested party withholds information or fails to provide the information requested in a timely manner and in the form requested.

In its CBP comments, SMC offered the following explanation for failing to report sales in the Axes/Adzes class or kind:

> SMC manually culls through its accounting records and it is possible that SMC overlooked this one particular invoice and associated documentation. SMC regrets the oversight and reiterates that it did not intend to mislead the Department in any way.

SMC states that some portion of the merchandise included in this shipment might have been non-subject merchandise, but provides no evidence. SMC made no other comment concerning the effect of the CBP documents upon the Axes/Adzes order.

Department's Position

We find that there is neither sales nor FOP data for this class or kind on the record and that we should therefore base the margin for Axes/Adzes on the facts otherwise available with regard to SMC.

Section 776(a)(1) of the Tariff Act (discussed above under Comment 2) requires us to apply facts available if necessary information is not available on the record of an antidumping proceeding. Section 776(a)(2) of the Tariff Act (discussed above under Comment 2) requires the application of facts otherwise available if the respondent withholds or fails to provide such information, or significantly impedes the proceeding. There is no information on the record upon which any margin calculation for Axes/Adzes could be attempted because SMC has provided no sales database for Axes/Adzes; neither has SMC provided any FOP (from this or any other POR) for this class or kind of subject merchandise. We find that the required information is not available on the record because SMC has failed to provide it, thereby impeding this proceeding. Accordingly, given the absence of any sales or factors data for this class or kind, we base SMC's margin for Axes/Adzes on the facts otherwise available for the purposes of these final results.

Comment 6: Use of Adverse Facts Available for Axes/Adzes

In its CBP comments, Ames states that SMC failed to report certain sales to the Department and categorically denied the existence of any sales of merchandise under this particular class or kind, which prevented the Department from conducting a complete and accurate analysis of these U.S. sales. Citing section 776(b) of the Tariff Act, Ames maintains that adverse inferences are warranted because SMC failed to cooperate by not acting to the best of its ability to comply with the Department's requests to report all U.S. sales. Ames states that SMC "had numerous opportunities to present complete and accurate information regarding its U.S. sales but failed to do so." *See* Ames CBP Comments at 8. Ames urges the Department to apply the PRC-wide rate for Axes/Adzes from the 2004-2005 POR as the AFA rate, which is 189.37 percent.

In its CBP comments, Council Tools maintains that the information contained in the CBP documents requires the use of AFA in calculating the rate for Axes/Adzes. Council Tools recounts in detail SMC's responses over the two supplemental questionnaires concerning Axes/Adzes (SMC's responses which were cited by Council Tools are partially set out in the "Department's Position" section below). Council Tools states that SMC failed to respond accurately to these questions, "as demonstrated unequivocally" by the CBP information. *See* Council Tools CBP Comments at 4. Council Tools insists that "SMC failed to cooperate to the best of its ability and did not provide information to which it had ready access, and thereby impeded the Department's investigation." Council Tools argues that "SMC purposefully evaded the Department's questions and then provided demonstrably inaccurate information to the agency." *Id.*

SMC made no comment concerning the use of AFA for the Axes/Adzes order.

Department's Position

We find that SMC has failed to cooperate by not acting to the best of its ability to comply with our requests for information. We therefore shall use an inference that is adverse to the interests of SMC in selecting from the facts otherwise available.

Section 776(b) of the Tariff Act (discussed above under Comment 2), the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information. The CAFC has clarified what it means for a respondent to act to the best of its ability in *NSK*:

> Whether a respondent has lived up to {the requirement to act to the best of its ability} is assessed by determining whether {the} respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While that standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.

See NSK, 481 F.3d at 1361. Thus, inadvertence, of itself, does not signify that a respondent has acted to the best of its ability; the test is whether the respondent put forth its maximum effort. SMC's explanation is that its sales representative "believed that all sales had been accounted for," that these sales were "overlooked," and that it was an "oversight." *See* SMC CBP Comments at 1.

The Department first asked for this information generally in its questionnaire. *See* Section A questionnaire dated April 6, 2006, at 5. In its response, SMC did not state directly that it had no sales in this class or kind. *See* SMC's Section A questionnaire response dated May 11, 2006, at 2 and Exhibit A-1. The Department then asked specifically for this information in its first supplemental questionnaire: "State directly that you have not produced or sold axes/adzes in the

U.S. market, if that is so." *See* Section A, C, and D supplemental questionnaire dated August 8, 2006, at question 69D. SMC's answer appeared to be equivocal: "SMC did not produce axes/adzes in the U.S. market." *See* SMC's Section A, C, and D supplemental questionnaire response dated September 15, 2006, at 69D. The Department then asked, "Resubmit your section C database, reflecting all sales of axes/adzes in the U.S. market during the POR." *See* Second Section A, C, and D supplemental questionnaire dated January 4, 2007, at question 69D(i). SMC then responded: "SMC inadvertently omitted 'or sell' in its prior SACDQR. SMC did not produce or sell axes/adzes in the U.S. market during the POR." *See* SMC's Second Section A, C, and D supplemental questionnaire response dated January 22, 2004, at 69D(i). The Department extended three separate opportunities (with increasing specificity) to SMC to provide this information.

Upon notification of the CBP information (*see* CBP Memorandum), SMC apparently was able to locate these documents, which indicates that respondent did in fact have these records. *See* SMC CBP Comments at 1. Hence, the Department has reason to believe that they were reasonably available to SMC; we note that SMC's counsel made a lengthy argument concerning the Axes/Adzes rates *before* the CBP documents became available (*see* SMC Case Brief at 12-18), but do not find this fact dispositive. Records concerning a company's own sales are information that is reasonably within its own control, and could have been provided to the Department with reasonable effort. Because the Department brought the need for this information to SMC in numerous questionnaires and supplemental questionnaires, the failure to provide this information, in this case, amounts to a failure to act to the best of the respondent's ability. Accordingly, the use of AFA is appropriate. *See* Comment 3 above for the discussion of the reasonableness and corroboration of the appropriate rate, which is 189.37 percent, as calculated in the 14th review.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions. If accepted, we will publish the final determination of the review in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
David Spooner
Assistant Secretary
for Import Administration

_____
Date