

UNITED STATES COURT OF INTERNATIONAL TRADE

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AMES TRUE TEMPER,	:	
	:	
Plaintiff,	:	Before: Richard K. Eaton, Judge
	:	
v.	:	Court No. 05-00581
	:	
UNITED STATES,	:	
	:	
Defendant.	:	
	:	

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OPINION AND ORDER

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

Dated: August 31, 2007

*Wiley Rein, LLP (Timothy C. Brightbill and Charles O. Verrill, Jr.),* for plaintiff.

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

Eaton, Judge: This matter is before the court on plaintiff Ames True Temper's ("Ames") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. By its motion, Ames challenges certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results for the

thirteenth administrative review of the four antidumping duty orders covering imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") made between February 1, 2003, and January 30, 2004 ("POR"). See generally Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem."); see also HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) ("Final Results").

With the exception of plaintiff's changed circumstances claim, see *infra* Part V., jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, Commerce's Final Results are sustained in part and remanded.

#### BACKGROUND

Ames is a domestic producer of HFHTs. On March 26, 2004, pursuant to Ames's request, Commerce initiated the thirteenth administrative review of the four antidumping duty orders applicable to imports into the United States of heavy forged bars/wedges, hammers/sledges, picks/mattocks and axes/adzes from the PRC. See Initiation of Antidumping and Countervailing Duty Admin. Revs. and Requests for Revocation in Part, 69 Fed. Reg. 15,788, 15,789 (Dep't of Commerce Mar. 26, 2004); see also HFHTs, Finished or Unfinished, With or Without Handles From the PRC, 56

Fed. Reg. 6622 (Dep't of Commerce Feb. 19, 1991). In its review, the Department analyzed the international trade behavior of a number of respondents, including Shandong Huarong Machinery Co., Ltd. ("Huarong") and Tianjin Machinery Import & Export Corp. ("TMC"). See HFHTs From the PRC, 69 Fed. Reg. at 15,789-800. On March 10, 2005, Commerce issued its preliminary results rescinding reviews with respect to some companies and finding that others continued to sell their HFHTs in the United States at less than normal value.<sup>1</sup> See HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 11,934, 11,935, 11,937 (Dep't of Commerce Mar. 10, 2005) ("Preliminary Results").

Plaintiff and the respondents filed with the Department case briefs contesting the Preliminary Results on June 13, 2005. See Pl.'s Mem. 3. The Department, having considered the parties' arguments, published in the Federal Register the Final Results on

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<sup>1</sup> "Normal value" is the price at which the "foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the [U.S. price]." 19 U.S.C. § 1677b(a)(1)(B)(i).

Because China is a nonmarket economy, Commerce generally will calculate the normal value of merchandise produced and sold in that country based on surrogate values "of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings and other expenses." 19 U.S.C. § 1677b(c)(1). The surrogate values "shall be based on the best available information . . . in a market economy country or countries considered to be appropriate by the administering authority." *Id.*

September 19, 2005. See *Final Results*, 70 Fed. Reg. 54,897. By its *Final Results*, Commerce: (1) assigned TMC's sales the PRC-wide dumping margins of 174.58 percent for axes/adzes, 139.31 percent for bars/wedges, 45.42 percent for hammers/sledges and 98.77 percent for picks/mattocks; and (2) assigned Huarong's sales of axes/adzes a margin of 174.58 percent, and its sales of bars/wedges a rate of 139.31 percent. See *id.* at 54,898, 54,899.

#### STANDARD OF REVIEW

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

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine whether substantial evidence exists, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

When reviewing the Department's treatment of various factors when calculating normal value, "the proper role of this court, . . . is to determine whether the methodology used by the [agency] is in accordance with law . . . ." *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996) (internal quotation marks & citations omitted; ellipsis & alteration in original). That is, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Id.*, 947 F. Supp. at 532 (internal quotation marks & citations omitted).

#### DISCUSSION

##### I. Scrap Offset to Normal Value for Huarong

The Department will grant a requesting respondent an offset to normal value "for sales of the scrap generated during the production of the subject merchandise," Def.'s Resp. Pl.'s Mot. J. Upon Admin. R. ("Def's Resp.") 14 (citing *Shandong Huarong Mach. Co. v. United States*, 29 CIT \_\_, \_\_, Slip Op. 05-54 at 3-4 (May 2, 2005) (not reported in the Federal Supplement), only if the respondent can demonstrate that the scrap is "either resold

or has commercial value and re-enters the respondent's production process." Issues & Decision Mem. for the 13th Administrative Review of HFHTs from the PRC (Dep't of Commerce Sept. 6, 2005) ("Issues & Dec. Mem.") at 30; see also 19 U.S.C. § 1677b(c)(1).<sup>2</sup> In the Final Results, the Department concluded that Huarong "[was] entitled to continue to receive an offset for its sales of steel scrap" that was originally granted in the Preliminary Results. Issues & Dec. Mem. at 31.

Commerce accepted Huarong's proffered allocation method for calculating the amount of the offset. See *id.* Under Huarong's formula, the scrap offset was determined by "allocating total scrap sales for the POR divided by total steel input used for the production of both subject and non-subject merchandise and then multiplied by the steel used in production of subject merchandise." *Id.* Using this methodology, "Huarong was able to take the total amount of scrap allocated for axes/adzes during the POR to calculate a per-unit amount of scrap allocated to one kilogram of the finished subject merchandise." *Id.* at 32.

Ames insists that "[t]his scrap offset allowance was erroneously granted . . . because the allocation method used to

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<sup>2</sup> That subsection provides, in pertinent part that, when determining the normal value of merchandise produced in a nonmarket economy country, Commerce shall rely on "the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1).

calculate the value of the scrap offset produces inaccurate results." Pl.'s Mem. 7. Plaintiff raises three related "flaws" in Huarong's allocation formula that it views as fatal to the grant of a scrap offset. First, Ames argues that Huarong's methodology fails to capture accurately Huarong's sales of scrap generated from the production of subject merchandise during the POR, specifically because Huarong "admitted during the administrative review that some of the scrap sold during the POR was generated from both subject and non-subject merchandise produced prior to the POR." Pl.'s Mem. 7. Second, Ames contends that "Huarong has repeatedly conceded that it cannot differentiate whether the scrap sold was produced from the manufacture of subject or non-subject merchandise." Pl.'s Mem. 8. Third, Ames insists that "Huarong has stated that it cannot correlate specific scrap sales to the production of subject merchandise." Pl.'s Mem. 8 (claiming that because Huarong cannot establish that the scrap was produced from subject merchandise and sold during the POR, Commerce lacks factual support for its finding of a "'sufficient link' between recovery and sale of scrap generated by subject merchandise").

In addition, Ames contends that "[b]y accepting Huarong's method to determine the scrap offset . . . the Department assumes that the production of subject and non-subject merchandise generates the same percentage of scrap from the same amount of

steel.” Pl.’s Mem. 8-9. For plaintiff, this assumption results in unavoidable inaccuracies “[g]iven the substantial physical differences between the subject and non-subject merchandise that [Huarong] produce[s] . . . .” Pl.’s Mem. 9.

Finally, Ames maintains that the Department’s grant of the scrap offset based on Huarong’s allocation method constitutes an unlawful departure from the agency’s past practice because it did not accept this same allocation method in the eleventh review. See Pl.’s Mem. 7 (“In the Final Results, the Department deviated from its past agency precedent and granted Huarong a scrap offset to normal value.”). Ames, therefore, asks the court to remand this case “and direct the Department to deny Huarong’s scrap offset.” Pl.’s Mem. 9.

Commerce asserts that it was justified in granting the scrap offset even though it acknowledges that Huarong “could not differentiate between scrap generated from production of subject and non-subject merchandise since scrap was collected for sale from all of its workshops.” Issues & Dec. Mem. at 31. For the Department, this inability to differentiate did not preclude the grant of the scrap offset because Huarong established an adequate connection between the scrap resulting from its manufacture of axes/adzes and the scrap sold. See *id.* (“[W]hile the Department determined that Huarong’s accounting records cannot differentiate scrap sales generated by subject and non-subject merchandise, the



Department finds that the scrap offset should not be denied because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise.”).

In addition, Commerce argues that it properly relied on the data contained in Huarong’s books and records as support for its decision to grant the scrap offset. The Department observes that when making its calculations, it “usually utilizes company records so long as they are maintained in accordance with the exporting country’s [generally accepted accounting principles] and reasonably reflect actual costs.” Def.’s Resp. 14 (citing 19 U.S.C. § 1677b(f)(1)).<sup>3</sup> For Commerce, “[r]ather than penalize Huarong because its records are not exactly tailored to antidumping calculations, the agency permissibly relied upon Huarong’s existing record keeping system and allocation.” Def.’s Resp. 15.

As to the methodology used to calculate the amount of the offset, Commerce insists that its decision to accept Huarong’s method was reasonable. The Department points out that the antidumping statute does not prescribe a method for calculating scrap offsets but rather leaves the decision to Commerce’s

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<sup>3</sup> Subsection 1677b(f)(1) codifies the intent expressed in the Statement of Administrative Action (“SAA”) that “[c]osts shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review.” SAA, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103-316, 656, 835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4172.

discretion. See Def.'s Resp. 15. Thus, while conceding that "it is preferable for costs to be tied as closely as possible to subject merchandise," the Department urges that it "may consider allocations between subject and non-subject merchandise, so long as the agency is satisfied that the allocation method used does not cause inaccuracies or distortions." Def.'s Resp. 15 citing 19 C.F.R. § 351.401(g)(4) (2005)) ("The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made with respect to sales of merchandise that does not constitute subject merchandise . . . .").

Ames's claim presents both a legal and a factual question: (1) whether the Department acted in accordance with law when it accepted Huarong's allocation methodology and granted Huarong the scrap offset (a challenge to the methodology); and (2) whether Commerce supported with substantial evidence its decision to grant Huarong the offset. With respect to the legal aspect of Ames's claim, the court notes that the antidumping statute is silent as to how Commerce is to determine whether a respondent is entitled to a scrap offset to normal value and, if so entitled, how to calculate the amount of the offset. Under such circumstances, "the court does not simply impose its own construction on the statute . . . [but] [r]ather . . . the question for the court is whether the agency's answer is based on

a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Department, while not choosing to fill in the statutory gap with a regulation, has understood the antidumping statute to allow for the "offset [of] production costs with the sales revenue only if the byproduct is either resold or has commercial value and re-enters the respondent's production process." Issues & Dec. Mem. at 30; see also *Guangdong Chem. Imp. & Exp. Corp. v. United States*, 30 CIT \_\_, \_\_, 460 F. Supp. 2d 1365, 1373 (2006) ("19 U.S.C. § 1677b(c) does not mention the treatment of by-products, nonetheless, Commerce sometimes grants a respondent a credit for a by-product generated in the manufacturing process that is either reintroduced into production or sold for revenue.") (internal quotation marks, citation & alterations omitted).

The court finds that the Department acted in accordance with law in granting Huarong the scrap offset. It is clear from the record that Commerce reasonably based its decision to grant Huarong the offset on the information contained in the company's accounting books and records demonstrating that the scrap was sold. "As a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs." *Thai*

*Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999). Here, the Department accepted Huarong's books after verification and found that the company sold a quantifiable amount of scrap during the POR.

Commerce also verified: (1) the amount of scrap generated during the POR from the production of subject and non-subject merchandise; and (2) the total amount of steel used to produce both kinds of merchandise. Using these two numbers, Commerce calculated a scrap percentage. This percentage applied to the verified amount of steel used in the manufacture of the axes/adzes. While this calculation does assume that both subject and non-subject merchandise produce comparable amounts of scrap, there is nothing on the record indicating that this assumption is not reasonable. See Issues & Dec. Mem. at 31 (acknowledging that Huarong cannot differentiate between subject and non-subject scrap sales, but granting the offset "because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise").

Thus, although it would be possible to make a more accurate adjustment were there more facts on the record, it cannot be said that Commerce's methodology is unreasonable. See *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial

deference under *Chevron*.”). The court, therefore, concludes that Commerce was justified in granting Huarong a scrap offset.

As to Ames’s claim that Commerce violated its past practice in granting the offset, the Department insists:

Although [Ames] is correct that in a past administrative review of this order the Department denied Huarong the scrap offset, the Department finds that the facts of this review regarding Huarong’s offset are distinguishable. First, while the Department determined that Huarong’s accounting records cannot differentiate scrap sales generated by subject and non-subject merchandise, the Department finds that the scrap offset should not be denied because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise. This is contrary to the facts of the [eleventh review], where the Department denied Huarong the offset because there was an insufficient link between the recovery and sale of subject merchandise.

Issues & Dec. Mem. at 31 (internal citations omitted).

The court finds that Commerce has not violated its past practice. While it is true that Commerce initially denied Huarong a scrap offset in the eleventh administrative review, on remand from this Court, the Department reopened the record, considered the additional evidence regarding Huarong’s sales of scrap during the period of review and granted the offset. See *Shandong Huarong Mach. Co.*, 29 CIT at \_\_\_, Slip Op. 05-54 at 8. That determination was sustained by this Court. Thus, the past practice on which plaintiff relies was not sustained by this Court, while the practice to which it objects was. See *Shandong*

*Huarong Mach. Co. v. United States*, 31 CIT \_\_, \_\_, Slip Op. 07-3 at 9 (Jan. 9, 2007) (not reported in the Federal Supplement).

Because the court finds that Commerce properly based its decision to grant Huarong the steel scrap offset on the company's financial books and records, applied a reasonable methodology, supported its conclusion with substantial evidence and did not violate past agency practice, the court sustains Commerce's grant of the offset.

## II. Surrogate Value for Brokerage and Handling Expenses

Plaintiff next insists that Commerce erred in using the data contained in Certain Hot-Rolled Carbon Steel Flat Products from India, 66 Fed. Reg. 50,406 (Dep't of Commerce Oct. 3, 2001) ("HR from India"), as a surrogate value for brokerage and handling expenses. See Pl.'s Mem. 9-10. Commerce maintains that it relied on the value in HR from India because it was reliable and because it was "the only [brokerage and handling] value on the record of this review . . . ." Issues & Dec. Mem. at 34.

In support of its position, Ames urges that prior to the publication of the Final Results, it placed on the record the brokerage and handling value contained in Certain Stainless Steel Wire Rod from India, 63 Fed. Reg. 48,184 (Dep't of Commerce Sept. 9, 1998) ("SSWR"). See Pl.'s Mem. 10. Thus, Ames insists that "[t]he Department erroneously found that the surrogate value from

HR from India was the only [brokerage and handling] value on the record." Pl.'s Mem. 10.

According to Ames, it placed the SSWR brokerage and handling data on the record on two different occasions, both taking place before Commerce reached its final determination. Plaintiff claims that it first notified Commerce of the alternate surrogate value nine months prior to the Final Results in a letter to the Department. See Pl.'s Mem. 10. In its letter, plaintiff stated:

For purposes of valuing [r]espondents' brokerage and handling expenses, the Department should continue to utilize the public version questionnaire response placed on the record in Stainless Steel Wire Rod from India, 63 Fed. Reg. 48,184 (Sept. 9, 1998) (admin. rev., final). This surrogate has been consistently used by the Department in this and in dozens of other recent administrative proceedings.

Letter from Wiley Rein LLP to The Honorable Donald L. Evans, re: HFHTs From the PRC: Publicly Available Information on Factor Values (Dec. 28, 2004) (quoted in Pl.'s Mem. 10).

Ames also asserts that it put the SSWR brokerage and handling value on the record through its case brief in response to Commerce's Preliminary Results filed on June 13, 2005. See Pl.'s Mem. 10. In its case brief, Ames stated that it had placed the SSWR value on the record by way of its December 28, 2004, letter. See Case Br. of Ames True Temper (June 13, 2005) 8-9.

Plaintiff further argues that Commerce was on notice that the SSWR data existed because "[i]n the Preliminary Results, the

Department stated that it had used the rates reported in SSWR to value the [brokerage and handling] costs." Pl.'s Mem. 11 (citing Preliminary Results, 70 Fed. Reg. at 11,941). While the Preliminary Results do contain this statement, Commerce, in fact, used the HR from India data. Nonetheless, for plaintiff, Commerce's indication in the Preliminary Results that it determined the value of brokerage and handling costs using the SSWR data precluded the Department from claiming that the data was on the record.

Finally, plaintiff claims that Commerce violated its past practice of valuing brokerage and handling using the value in SSWR. See Pl.'s Mem. 13 ("Although the Department may deviate from its past practice, it must provide an explanation for its departure."). As plaintiff states:

The Department has used the SSWR surrogate in many other administrative proceedings, including several prior administrative reviews of this antidumping order. For example, in the eleventh review of this order, the Department determined that SSWR was the most appropriate surrogate value. . . .

The Department has failed to provide any reasons for its departure from its prior practice. Furthermore, nothing has changed in the review under appeal that would alter the Department's prior holding and findings.

Pl.'s Mem. 12, 13 (internal citations omitted).

Commerce counters by first pointing out that plaintiff at no point contests the reasonableness of the HR from India data. See



Def.'s Resp. 17 ("Ames maintains that Commerce should have used the surrogate value used in the prior review, i.e., the calculations from SSWR -- without ever maintaining that the surrogate value used is unreasonable.").

Next, Commerce insists that Ames never put its preferred data on the record:

[Ames] argues that, for the final results, the Department should value [brokerage and handling] using a value from SSWR [new shipper reviews]. However, the only [brokerage and handling] value on the record of this review is the one used in the preliminary results. [Title 19 C.F.R. §] 351.301(c)(3)(ii) of the Department's regulations allows interested parties to submit factor information up to 20 days after the preliminary results. Consequently, we note that after the preliminary results, [Ames] had an opportunity to place the SSWR . . . [brokerage and handling] value on the record, but did not. The Department cannot use information not on the record of this review for purposes of valuing [brokerage and handling] in these final results and, therefore, will continue to use the [brokerage and handling] surrogate value from HR from India. We note that the brokerage and handling value in HR from India is generally contemporaneous with the POR and, thus, is an appropriate surrogate.

Issues & Dec. Mem. at 34. Thus, it is the Department's position that merely referencing the SSWR data was not enough; if Ames wanted the value considered, it should have placed it on the record.

In addition, the Department insists that its reference to the SSWR data in the Preliminary Results was a mistake. See Def.'s Resp. 18. Commerce states that "[t]his inadvertency does

not change the information upon the record. As the underlying calculations show, Commerce used the calculations from [HR from India] in the Preliminary Results." Def.'s Resp. 18 (citation omitted).

Finally, in response to Ames's claim that the use of the HR from India value constituted an unlawful deviation from its past practice, Commerce notes that "what represents the best available information may vary on a case-by-case basis." Def.'s Resp. 19 (internal quotation marks omitted). Thus, the Department maintains that it was not bound to use information that was not on the record simply because it had previously used that information in earlier reviews.

Where the subject merchandise is exported from a nonmarket economy country, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . ." 19 U.S.C. § 1677b(c)(1). The statute further directs Commerce to value the factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." *Id.*

As the Court of Appeals for the Federal Circuit has held, "the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily

imprecise.'" *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997)). Notably, Ames does not take issue with the reasonableness of the HR from India data but rather bases its demand for a remand solely on its argument that, because the Department used the SSWR data as a surrogate value for brokerage and handling costs in prior reviews, it had to explain why it did not rely on that data when making the same valuation in this review.

For Commerce, the HR from India value for brokerage and handling was the best information available because: (1) it was "generally contemporaneous with the POR"; and (2) it was the "only [brokerage and handling] value on the record of this review . . . ." Issues & Dec. Mem. at 34.

The court sustains Commerce's determination. First, despite plaintiff's claim to the contrary, at no point in any of its filings did Ames place the SSRW brokerage and handling value on the record. Instead, plaintiff merely made mention of the SSWR source. Next, Ames's insistence that Commerce's previous use of the data and, in this case, mistaken reference to the SSWR source in the Preliminary Results created an obligation to use the SSWR brokerage and handling value overstates the case. As has been previously noted, plaintiff knew that the SSWR data was not used by Commerce in the Preliminary Results. If Ames wished Commerce

to employ the brokerage and handling surrogate value from SSWR in its calculation of the normal value of Huarong's axes/adzes, it should have made both its position and the actual value amount known to the Department within twenty days after publication of the Preliminary Results. See 19 C.F.R. § 351.301(c)(3)(ii) (permitting an interested party to submit data to be used for valuing factors of production in the final results 20 days after publication of the preliminary results).

Most importantly, the failure to use a particular data set from a previous investigation does not constitute a past practice. It is well settled that what is the best available information may change from one investigation to the next. See *Nation Ford Chem. Co.*, 166 F.3d at 1377 ("Whether . . . analogous information from the surrogate country is 'best' will necessarily depend on the circumstances . . . ."). At no point does Ames claim that the HR from India data is unreliable, nor does it contend that the SSWR data is superior to that used by Commerce.

Thus, the court sustains Commerce's use of the HR from India surrogate value for brokerage and handling.

### III. Huarong's Production of Metal Pallets

Ames further asserts that the Department unreasonably denied its request that Commerce "reopen the administrative record and require the respondents to report the associated factors used in

producing metal pallets.” Pl.’s Mem. 13. In particular, Ames argues that Commerce had to account for the cost of “oxygen, acetylene, and welding solder or rods” or other materials used for welding steel together to construct the metal pallets even though Commerce insists that there was no evidence on the record that such materials were employed in the pallet-production process. Pl.’s Mem. 13, 14. That is, given: (1) that Huarong made its pallets using a welding process; and (2) that the record contained no values for inputs necessary to weld the pallets together, Commerce should have conducted a more detailed investigation.

To support its position, Ames relies on this Court’s finding in *Shandong Huarong Mach. Co. v. United States*, 29 CIT \_\_\_, Slip Op. 05-54 (May 2, 2005). In remanding that case, the Court held that “it is not sufficient for Commerce to simply rely on the absence of evidence to reach its decision; rather, Commerce must provide findings and analysis justifying its determination.” *Id.*, Slip Op. 05-54 at 23. For Ames, the Court’s decision in *Shandong* applies here and requires remand of the Final Results with instructions for Commerce to reopen the record and collect more evidence concerning Huarong’s construction of metal pallets. Specifically, Ames asserts that remand is necessary because the Department “supported its decision . . . by explaining that ‘there is no evidence on the record to indicate that Huarong has

used solder, welding rods or inert gases in the manufacture of pallets.'" Pl.'s Mem. 15 (quoting Issues & Dec. Mem. at 36).

In addition, Ames contends that Commerce's conclusion that the verification report showed that there was no welding rod, solder or inert gases at Huarong's packing facility, is erroneous. See Pl.'s Mem. 15. According to Ames:

Contrary to the Department's claim, the verification report did not include an affirmative finding that Huarong did not use or have any of the listed associated factors. Rather, the verification report simply did not mention or include observations regarding any inputs associated with the production of steel pallets, other than metal.

Pl.'s Mem. 15 (emphasis & citation omitted).

The Department maintains that it reasonably declined to reopen the record. For Commerce:

Huarong reported all labor, electricity and steel used in the production of pallets and . . . the Department verified these usage factors. A careful review of Huarong's verification report reveals that the Department noted no solder, welding rods, gas tanks or inert gases in Huarong's packing facility. In addition, there is no evidence on the record to indicate that Huarong has used solder, welding rods or inert gases in the manufacture of pallets.

Issues & Dec. Mem. at 36.

The Department does not view this conclusion as one based on the absence of evidence. See Def.'s Resp. 20. It is Commerce's position that "[a]bsent evidence that a company actually utilizes a particular input, there is no basis to value that input."

Def.'s Resp. 19. Commerce further emphasizes that it verified Huarong's reported factors of production relating to metal pallets at Huarong's packing facility and did not find any evidence that welding rods, solder or inert gases were used. See Def.'s Resp. 19 ("Because Huarong's verified factors of production do not include rivets, welding flux, welding solder, acetylene, and oxygen, it is entirely lawful to decline to value these items.") (emphasis omitted)). In other words, "Commerce does not assume that a company utilizes a particular input. Rather, [it] values the factors of production actually used." Def.'s Resp. 20.

Ames does not ask Commerce to assume the use of a particular input but rather points out that some input must have been used to construct the pallets. See Pl.'s Reply 7 ("Although the factors of production for metal pallets may include labor, electricity and steel, common sense dictates that other unreported factors had to be used to produce the pallets. . . . [I]t is inexplicable how the respondent could have manufactured the pallets without utilizing any other inputs."). This proposition seems irrefutable. Therefore, despite Commerce's having verified Huarong's responses, it is apparent that something held the pallets together and therefore something has been overlooked. Commerce is instructed to reopen the record and obtain additional evidence regarding Huarong's production of

metal pallets.

#### IV. Commerce's Application of By-Product Credit and Packing Materials Cost Directly to Normal Value

Next, Ames urges the court to find unlawful Commerce's decision to apply the credit for Huarong's by-product sales and add the value of Huarong's packing material costs directly to normal value. Ames contends that "[t]he Department erred in directly adding the packing material costs to and subtracting the byproduct offset from [normal value]. Instead, the Department should have added the cost of packing materials to the total cost of manufacturing ("TOTCOM"), and deducted the byproduct offset from [cost of manufacturing], before applying the financial ratios to them." Pl.'s Mem. 17. For its part, the Department maintains that its methodology is consistent with its current practice of applying the by-product offset and cost of packing materials directly to normal value where the surrogate financial statement does not specifically account for those items. See Def.'s Resp. 21.

As noted, when constructing the normal value of merchandise exported from a nonmarket economy country, Congress has provided that Commerce base its determination on "the value of the factors of production utilized in producing the merchandise . . . ."

19 U.S.C. § 1677b(c)(1). In doing so, the Department typically relies on factor of production data from a surrogate country,



i.e., a "market economy countr[y] that [is] at a level of economic development comparable to that of the nonmarket economy country . . . ." 19 U.S.C. § 1677b(c)(4); see *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001). Once Commerce has determined the value of the factors of production, the statute mandates that it add to that value "an amount for general expenses and profit plus . . . other expenses." 19 U.S.C. § 1677b(c)(1); see also *Guandong Chem. Imp. & Exp. Corp.*, 30 CIT at \_\_\_, 460 F. Supp. 2d at 1373. In calculating the amount of these expenses, Commerce generally applies financial ratios derived from a surrogate company's (1) overhead; (2) selling, general and administrative ("SG&A") expenses; and (3) profit to the surrogate factors of production values.

Here, Commerce used as its surrogate source financial data reported by 2,031 Public Limited Companies in India for the period 2002-2003 contained in the August 2004 Reserve Bank of India Bulletin ("RBI Bulletin") to construct the overhead and SG&A surrogate financial ratios. See *Preliminary Results*, 70 Fed. Reg. at 11,942. Because it could find no evidence of how by-product sales or packing materials were treated in the RBI Bulletin, Commerce applied the amounts associated with these items directly to normal value. See *Issues & Dec. Mem.* at 38.

Ames's primary argument is that Commerce unreasonably

concluded that the surrogate companies' financial statements in the RBI Bulletin did not account for the by-product offset or packing material costs simply because the statements did not list those values. See Pl.'s Mem. 17. For plaintiff, "[r]egardless of whether costs and materials are individually identified in a surrogate company's financial statements, it can be assumed that all of the costs involved in producing merchandise, such as direct materials, scrap offsets, and packing materials, will be included in the financial statements." Pl.'s Mem. 17 (citing *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC*, 69 Fed. Reg. 35,296 (Dep't of Commerce June 24, 2004) (final determination)).

In support of its position, Ames argues:

In order to calculate an accurate normal value, the Department must apply the overhead and SG&A ratios on an apples-to-apples basis. This can only be accomplished by including the same costs that were used to derive the overhead and SG&A ratios in the production costs in the calculation of [cost of manufacture] and TOTCOM. Thus, the Department should have deducted the respondent's byproduct offset from [cost of manufacturing] before applying the overhead ratio, which was devised from financial data that accounted for byproduct offset. Similarly, the Department should have added packing material costs to TOTCOM before applying the SG&A ratio, in which packing material costs were accounted for.

Pl.'s Mem. 18-19.

As previously mentioned, "as long as the agency's

methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Shieldalloy Metallurgical Corp.*, 20 CIT at 1368, 947 F. Supp. at 532 (internal quotation marks & citations omitted). The court finds that Commerce has supported with substantial evidence its practice of directly adding the packing material costs to - and subtracting the by-product offset from - normal value when such values are not specifically accounted for in the surrogate financial statements upon which the surrogate financial ratios are based.

First, the court observes that both Ames's preferred methodology and that of Commerce require the making of assumptions. While Ames does not dispute Commerce's conclusion that the financial statements found in the RBI Bulletin do not mention either by-product credits or packing material costs, it insists that Commerce must assume that those surrogate companies' financial statements took the unlisted values into account. Commerce, on the other hand, assumes that the absence of specific values for by-product sales and packing material costs from the surrogate financial statements means that they were not taken into account.

The court cannot agree with Ames. In using its preferred methodology, Commerce followed its reasoning in *Fresh Garlic From the PRC*, 69 Fed. Reg. 33,626 (Dep't of Commerce June 16, 2004) at cmt. 6. See Issues & Dec. Mem. at 38.

Where the Department cannot ascertain from the surrogate financial information whether packing expenses are in the surrogate financial ratio calculations, such as in the denominator, it is not necessarily appropriate to include packing expenses in the production costs to which the surrogate financial ratios are applied. If packing expenses are not in the denominator of surrogate financial ratio calculations or, as here, we cannot identify where and to what extent such expenses are in the ratio calculation, and we apply the ratios to production costs that include amounts for packing materials and labor, we may distort the amount of overhead, SG&A, and profit that we calculate for the cost of production. Accordingly, for the final results of these reviews, in calculating the amount of overhead, SG&A, and profit included in the cost of production, we have determined not to apply the surrogate financial ratios to production costs that include packing expenses (i.e., we have removed packing expenses from the production-cost build-up to which we apply the surrogate ratios).

*Fresh Garlic From the PRC*, 69 Fed. Reg. 33,626 at cmt. 6. In like manner, "Commerce developed a practice that provided for the application of a by-product credit to normal value when financial statements used as a surrogate do not expressly address the treatment of by-products." Def.'s Resp. 21.

Even though Commerce's methodology requires the making of an assumption, i.e., that the RBI Bulletin financials do not capture

by-product sales or packing material costs, the court cannot say that its assumption is unreasonable. As the *Guandong* Court noted, “[e]ven if Guandong’s alternative approach to implementation of the statute were reasonable, the court could not substitute its own view of the statute for Commerce’s reasonable interpretation or implementation.” *Guandong Chem. Imp. & Exp. Corp.*, 30 CIT at \_\_\_, 460 F. Supp. 2d at 1376 (citing *Chevron U.S.A. Inc.*, 467 U.S. at 844).

Therefore, because Commerce has adequately explained its decision to apply the by-product offset and packing material costs directly to normal value, the court upholds the Department’s methodology.

#### V. Changed Circumstances Review

Finally, Ames asserts that, because Commerce applied adverse facts available (“AFA”) to Huarong’s and TMC’s sales of bars/wedges in the ninth, twelfth and thirteenth reviews based on their participation in the agency sales invoicing scheme, the Department should have granted Ames’s request that it initiate a changed circumstances review for the tenth and eleventh reviews pursuant to 19 U.S.C. § 1675(b)<sup>4</sup> and 19 C.F.R. § 351.216.<sup>5</sup> See

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<sup>4</sup> Subsection 1675(b) provides, in pertinent part:

Whenever the administering authority  
. . . receives information concerning, or a  
(continued...)

Pl.'s Mem. 19; Pl.'s Supplemental Br. 1-4; see also *Shandong Huarong Mach. Co. v. United States*, 30 CIT \_\_, \_\_, 435 F. Supp. 2d 1261, 1270 (2006) (finding that respondents' failure to provide relevant information about their agency sales invoicing scheme justified Commerce's application of AFA). By its request, Ames had hoped to demonstrate that the agency sales invoicing scheme was present during the period of investigation for each of those reviews too. In the tenth and eleventh reviews, Commerce did not apply AFA to respondents' bars/wedges sales.

Commerce maintains that its "refusal to reopen closed cases remains squarely within [its] discretion," and is not reviewable

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<sup>4</sup>(...continued)

request from an interested party for a review of—

(A) a final affirmative determination that resulted in an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or in a countervailing duty order under this subtitle or section 1303 of this title, . . .

which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority . . . shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1).

<sup>5</sup> The regulations permit the Department to conduct a changed circumstances review either on request from an interested party or on its own initiative. See 19 C.F.R. § 351.216(b), (d).

by this Court. Def.'s Resp. 24 (citing *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-35 (1946)). For the Department, "an agency's refusal to reopen a closed case is generally committed to agency discretion by law and therefore exempt from judicial review." Def.'s Resp. 24 (internal quotation marks & citation omitted).

With respect to Commerce's insistence that its denial of plaintiff's request is immune from judicial review, the court finds that Commerce overstates its claim that an appeal of a denial of a request for a changed circumstances review cannot be heard. This Court has recently held otherwise. See *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 30 CIT \_\_, \_\_, 464 F. Supp. 2d 1350, 1355-56 (2006) (finding jurisdiction under subsection 1581(i) to hear an appeal of Commerce's determination denying a request for a changed circumstances review). Nonetheless, the court finds that, here, Ames has asserted no valid basis for jurisdiction. Ames claims that the court has jurisdiction to hear its appeal under 28 U.S.C. § 1581(c). Compl. ¶ 1. Subsection (c) provides this Court with jurisdiction to hear appeals of those determinations listed in 19 U.S.C. § 1516a. See *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004) ("Section 1581(c) provides the court with exclusive jurisdiction over actions commenced under

section 516A of the Tariff Act [19 U.S.C. § 1516a].”). A determination by Commerce (as distinct from the United States International Trade Commission) denying a request for a changed circumstances review is not among the listed determinations that can be reviewed pursuant to section 1516a. See *AOC Int’l v. United States*, 17 CIT 1412, 1414-15 (1993) (not reported in the Federal Supplement); *Trs. in Bankr. of N. Am. Rubber Thread Co.*, 30 CIT at \_\_\_, 464 F. Supp. 2d at 1355-56. Thus, despite Ames’s claims to the contrary, the court has no jurisdiction under 28 U.S.C. § 1581(c) to hear its appeal regarding Commerce’s denial of a request to initiate a changed circumstances review.

#### CONCLUSION

Based on the foregoing, the court sustains in part and remands Commerce’s Final Results. On remand, Commerce is instructed to render a determination in accordance with this opinion. Remand results are due on December 3, 2007. Comments on the remand results are due on January 2, 2008. Any replies to such comments are due on January 14, 2008.

/s/ Richard K. Eaton  
Richard K. Eaton

Dated: August 31, 2007  
New York, New York