Slip Op. 07–2

DUS & DERRICK, INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge
Court No. 05–00346

[United States Department of Agriculture's final determination denying plaintiff's application for trade adjustment assistance remanded.]

Dated: January 8, 2007

Steven D. Schwinn, for plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*), for defendant.

OPINION AND ORDER

Eaton, Judge: This matter is before the court on plaintiff Dus & Derrick, Inc.'s ("plaintiff" or "Dus & Derrick") motion for judgment upon the agency record pursuant to USCIT Rule 56.1(a). By its motion, plaintiff challenges the decision of the Foreign Agricultural Service of the United States Department of Agriculture (the "Department") to deny its application under the Trade Adjustment for Farmers program for trade adjustment assistance ("TAA") pursuant to 19 U.S.C. § 2401e (2002).[1] *See* Letter from Ronald Lord, Deputy

[1] As initially adopted, the TAA statute established a mechanism by which domestic workers, firms and communities affected adversely by an increase in imports like or directly competitive with the products they produced could apply to the United States Department of Labor for a cash payment or other benefits intended to compensate for economic harm caused by the increased imports. *See* Trade Act of 1974, Pub. L. No. 93–618, §§ 221–250, 251–264, 271–274, 88 Stat. 1978, 2019–40 (1975). The law was amended in 2002 to provide similar relief through the Department of Agriculture for agricultural or farm workers who were considered "commodity producers." *See* Trade Act of 2002, Pub. L. No. 107–210, §§ 141–143, 116 Stat. 933, 946–53 (2002). By its regulations for this amended provision,

Director Import Policies and Program Division to Dus & Derrick, Inc. (Mar. 7, 2005) ("Negative Determination"), AR[2] at 55; *see generally* Pl.'s Mem. Supp. R. 56.1 Mot. J. Agency R. ("Pl.'s Mem."). The Department concluded that because plaintiff's net fishing income for calendar year 2003 was not less than its net income for calendar year 2001, plaintiff failed to "meet the net income[3] requirement, in accordance with [7 C.F.R. § 1580.401(e) (2005)]," and therefore was ineligible to receive benefits. Negative Determination, AR at 55.[4]

Plaintiff asserts two arguments in support of its request for remand. First, in plaintiff's view, the Department's regulations required a comparison of plaintiff's net income for 2002, not 2001, to that from 2003. Second, plaintiff contends that by basing its denial solely on a comparison of the information contained in line 28 of plaintiff's submitted 2001 and 2003 Form 1120 tax returns,[5] the Department unreasonably determined that plaintiff's net fishing income for 2003, the marketing year,[6] was not less than its net fishing

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the Department of Agriculture defined a "producer" as a "person who is either an owner, operator, landlord, tenant, or sharecropper, who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm, or a qualified fisherman." 7 C.F.R. § 1580.102 (2005). In other words, farmers and qualified fishermen are permitted to seek TAA benefits much like other claimants. According to the regulations, however, in order to be a "qualified fisherman," the applicant must be a "person whose catch competes in the marketplace with like or directly competitive aquaculture products and report[s] net fishing income to the Internal Revenue Service." *Id.* These definitions would include Dus & Derrick. In addition, the 2002 Act contained provisions found in 19 U.S.C. §§ 2401 *et seq.* and later 19 U.S.C. § 2395, which provides for judicial review of final determinations made by the Secretary of Agriculture.

[2] Citations to "AR" refer to the Administrative Record submitted in this action.

[3] According to the Department's regulations, "net fishing income" is "net profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102.

[4] The regulatory provision cited as the basis for the Department's denial of plaintiff's application provides:

> The amount of an adjustment assistance payment during a qualifying year shall be determined in the same manner as in the originating year, except that the average national price shall be determined by using the 5-marketing-year period used to determine the amount of cash benefits for the first certification.

7 C.F.R. § 1580.401(e). This provision applies after the Department has determined that the producer qualifies for benefits based on its application under a re-certification, and all that remains is the amount of benefits to be awarded. While it is unclear how the cited regulation provides a basis for the denial of plaintiff's application, it is clear from the record that the primary reason for the Department's determination was plaintiff's failure to demonstrate the required decrease in its net income.

[5] Plaintiff filed its tax returns on a calendar year basis.

[6] "Marketing year means the marketing season or year as defined by National Agriculture Statistic Service (NASS), or a specific period as proposed by the petitioners and certified by the Administrator." 7 C.F.R. § 1580.102. It appears that 2003 is the marketing year for the re-certification of shrimp producers for benefits.

income for 2001, the pre-adjustment year.[7] *See* Pl.'s Mem. at 9, 11. Jurisdiction lies with 19 U.S.C. § 2395(c). For the following reasons, the Department's Negative Determination is remanded.

BACKGROUND

Plaintiff is a family-owned shrimp fishing company that has operated its business off the Texas Gulf Coast since the early 1970's. Plaintiff owns its own shrimp boat and, in addition to other business-related expenses, regularly incurred maintenance costs including fuel, new equipment, repairs and labor associated with the boat. Plaintiff, for the most part, received a steady income from its operations. Its business benefitted from the price of shrimp being determined primarily by domestic market forces of supply and demand. Beginning in 2001, however, increased shrimp imports caused the domestic price of shrimp to drop. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp.") at 4. In October 2003, as a result of the steadily declining price of U.S. shrimp, the Texas Shrimp Association ("TSA") filed with the Department a petition on behalf of Texas shrimp producers (including Dus & Derrick) for TAA certification in accordance with 19 U.S.C. § 2401a and 7 C.F.R. § 1580.201.[8] *See* Trade Adjustment Assistance for Farmers, 68 Fed. Reg. 60,078 (Dep't of Agric. Oct. 21, 2003) (notice). On November 19, 2003, after conducting an investigation, the Department found that increased shrimp imports had contributed importantly "to a decline in the landed prices of shrimp in Texas by 27.8 percent during January 2002 through December 2002, when compared with the previous 5-year average," and granted the petition. Trade Adjustment Assistance for Farmers, 68 Fed. Reg. 65,239 (Dep't of Agric. Nov. 19, 2003) (notice).[9] The downward trend in domestic shrimp prices continued

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[7] "Pre-adjustment year means the tax year previous to that associated with the most recent marketing year in the initial producer petition." 7 C.F.R. § 1580.102.

[8] According to the statute, the petition for certification is to be filed by "a group of agricultural commodity producers or by their duly authorized representative." 19 U.S.C. § 2401a(a). In addition, the regulation provides instructions as to the required contents of the petition. *See* 7 C.F.R. § 1580.201(c).

[9] Where a group of agricultural commodity producers or its authorized representative files a petition seeking a certification as eligible to apply for TAA benefits, the Department will make the certification if the petitioner establishes:

> (1) that the national average price for the agricultural commodity, or a class of goods within the agricultural commodity, produced by the group for the most recent marketing year for which the national average price is available is less than 80 percent of the average of the national average price for such agricultural commodity, or such class of goods, for the 5 marketing years preceding the most recent marketing year; and
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> (2) that increases in imports of articles like or directly competitive with the agricultural commodity, or class of goods within the agricultural commodity, produced by the group contributed importantly to the decline in price described in paragraph (1).

19 U.S.C. § 2401a(c).

and, on November 30, 2004, the Department, having found that "continued increases in imports of like or directly competitive products contributed importantly to a decline in the average landed price of shrimp in Texas by 33.7 percent during the 2003 marketing period (January-December 2003), compared to the 1997–2001 base period," re-certified the TSA and its member producers as eligible to apply for TAA benefits. Trade Adjustment Assistance for Farmers, 69 Fed. Reg. 69,582 (Dep't of Agric. Nov. 30, 2004) (notice).

In accordance with the statutory scheme, once the TSA received its certification, plaintiff (one of the agricultural commodity producers covered by the certification) became eligible to individually apply for a cash payment. *See* 19 U.S.C. § 2401e(a).

Plaintiff did not file for benefits under the original certification but rather made its application upon re- certification on January 19, 2005. *See* Application for TAA for Individual Producers for Dus & Derrick, Inc. ("Pl.'s Application"), AR at 1. In its application, plaintiff certified that it was entitled to a cash payment in part because its net fishing income in calendar year 2003 (what the application refers to as the "crop year") was less than its net fishing income in calendar year 2002,[10] the year plaintiff understood to be the pre-adjustment year. *See* Pl.'s Application, AR at 1 ("I reported on the applicable federal tax form that my net farm or net fishing income declined from the petition's pre-adjustment year."); *see also* 19 U.S.C. § 2401e(a)(1)(C); 7 C.F.R. § 1580.301(e)(4).

In support of its application, plaintiff submitted its Form 1120 corporate tax returns for calendar years 2001, 2002 and 2003. On line 28 of each return, which is entitled "Taxable income before net operating loss deduction and special deductions," the following data is provided: (1) for 2001, a net loss of $17,750.00; (2) for 2002, a net loss of $16,003.00; and (3) for 2003, a net profit of $9,044.00. *See* Pl.'s Mem. at Apps. C, D and E. While standing on their own these tax forms indicate that plaintiff's net income improved in each year, plaintiff states in its papers that it believed it would be given an opportunity to demonstrate this was not the case.

In addition, plaintiff understands the language of 7 C.F.R. § 1580.102 defining "net fishing income" to require the Department to at least review the tax returns in their entirety in order to understand fully the circumstances that led to the net figures. *See* Pl.'s Mem. at 11–12.

The Department maintains, however, that such a review is not mandated by either the TAA statute or the regulations. *See* Def.'s Resp. at 14 ("[N]either [the Department]'s regulations nor the TAA statute require [the Department] to engage in the sort of *ad hoc* analysis that Dus & Derrick suggests would have been more appro-

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[10] The status of 2002 as the pre-adjustment year is one of the issues in this case.

priate."). Thus, without more, the Department compared plaintiff's net income figure on line 28 of its 2003 Form 1120 to that reported on line 28 of its 2001 return and, finding that the 2003 amount was not less than the 2001 number, denied plaintiff's application. In doing so, the Department used 2003 as the "marketing year" and 2001 as the "pre-adjustment year." *See id.* ("[I]n determining whether [plaintiff] qualified for benefits . . . , [the Department] compared [plaintiff's] net income as reported to the IRS for 2003 with its net income reported to the IRS for 2001. This net income is reflected in line 28 . . . of [plaintiff's] Form 1120, which was circled by [the Department].").

On May 6, 2005, plaintiff timely commenced the instant action asking that this matter be remanded to afford it the opportunity to explain its net income figures. *See* Letter from Wanda F. Walls to Office of the Clerk of the Court (May, 6, 2005) ("Complaint Letter") at 1. For the following reasons, the Department's denial of plaintiff's application is remanded.

STANDARD OF REVIEW

When reviewing a final determination by the Department, "[t]he findings of fact by the . . . [Department] . . . if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to [the Department] to take further evidence, and [the Department] may thereupon make new or modified findings of fact and may modify [its] previous action. . . ." 19 U.S.C. § 2395(b); *see also Former Employees of Gateway Country Stores LLC v. Chao*, 30 CIT ___ , Slip Op. 06–32 at 7 (Mar. 3, 2006) (not published in the Federal Supplement). "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)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

The court reviews whether the Department's determination is in accordance with law pursuant to "the default standard outlined in the Administrative Procedure Act." *Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, 28 CIT ___ , 350 F. Supp. 2d 1282, 1286 (2004) (referencing 5 U.S.C. § 706); *see also Former Employees of Gateway Country Stores LLC*, 30 CIT at ___ , Slip Op. 06–32 at 9; *Former Employees of Rohm & Haas Co. v. Chao*, 27 CIT 116, 122, 246 F. Supp. 2d 1339, 1346 (2004); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496–97 (2004).

DISCUSSION

I. Plaintiff's Individual Agricultural Commodity Producer Application for TAA Cash Payments

A. Relevant Law

Receipt of TAA benefits by an individual agricultural commodity producer is the result of a two-step process. Only the second step, the application of an individual commodity producer for TAA benefits, is at issue here.

After a group of producers is certified pursuant to 19 U.S.C. § 2401a, an individual commodity producer is entitled to apply for a cash payment "within 90 days after the date on which the [Department] makes a determination and issues a certification of eligibility under section 2401b of this title." 19 U.S.C. § 2401e(a)(1). It is the Department's responsibility to determine whether the individual producer has satisfied the statutory requirements to receive a cash payment. *See id.*[11]

Thus, once the group of producers has carried the burden of establishing that competitive imports have contributed importantly to a decline in the industry, an individual producer is entitled to a cash payment if it can establish, among other things, that its net income "for the most recent year is less than [its] net farm income for the latest year in which no adjustment assistance was received by the

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[11] The statutory criteria that must be met in order for an individual producer to receive a cash payment are as follows:

> (1) Requirements
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> Payment of a[n] adjustment assistance under this part allowance shall be made to an adversely affected agricultural commodity producer covered by a certification under this part who files an application for such assistance within 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility under section 2401b of this title, if the following conditions are met:
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> (A) The producer submits to the Secretary sufficient information to establish the amount of agricultural commodity covered by the application filed under this subsection that was produced by the producer in the most recent year.
> (B) The producer certifies that the producer has not received cash benefits under any provision of this subchapter other than this part.
> (C) The producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part.
> (D) The producer certifies that the producer has met with an Extension Service employee or agent to obtain, at no cost to the producer, information and technical assistance that will assist the producer in adjusting to import competition with respect to the adversely affected agricultural commodity, including —
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> (i) information regarding the feasibiity and desirability of substituting 1 or more alternative commodities for the adversely affected commodity; and
> (ii) technical assistance that will improve the competitiveness of the production and marketing of the adversely affected agricultural commodity by the producer, including yield and marketing improvements.

19 U.S.C. § 2401e(a)(1); *see also* 7 C.F.R. § 1580.301.

producer. . . ." 19 U.S.C. § 2401e(a)(1)(C).[12] Here, the Department compared line 28 of plaintiff's Form 1120 for 2003 with the same line from 2001. Plaintiff insists that in denying its application for a cash payment, the Department (1) unreasonably interpreted its own regulations by not using 2002 as the pre-adjustment year; and (2) failed to fully examine plaintiff's tax returns and did not allow it to explain the reasons for the apparent increase in its net income from 2001 to 2002 and 2003. Thus, the court's task is to determine whether the law and the facts support the Department's conclusion that plaintiff does not qualify for TAA benefits.

B. The Department's Interpretation of "Pre-Adjustment Year"

Plaintiff's first contention is properly understood as a challenge to the Department's interpretation of its regulation defining "pre-adjustment year."[13] *See* Pl.'s Reply Def.'s Resp. Pl.'s Mot. J. Agency R. ("Pl.'s Reply") at 6. Specifically, plaintiff takes issue with the Department's understanding that the phrase "initial producer petition" used in the regulation's definition of pre-adjustment year refers to the initial group petition. For plaintiff:

> "Initial producer petition" here can only refer to the *individual producer's initial application for TAA benefits pursuant to 7 C.F.R. § 1580.301*, not, as the defendant suggests, the group of producers[']s petition for TAA pursuant to 7 C.F.R. § 1580.201.
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> First, the plain language of the regulations supports this reading. . . . [T]he regulations define "pre-adjustment year" in terms of a singular "producer," not a "group of producers" or "authorized representatives." Only a "producer" (singular) may apply for TAA benefits pursuant to 7 C.F.R. § 1580.301 — and only after a "group of producers" or "authorized representative" applies for certification pursuant to 7 C.F.R. § 1580.201 or re-certification pursuant to 7 C.F.R. § 1580.401. Under the regulations, a "producer" (singular) does not apply for certification pursuant to 7 C.F.R. § 1580.201 or recertification pursuant to 7

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[12] In its regulations, the Department requires that along with submitting its application, a producer must also certify "that net farm or fishing income was less during the producer's pre-adjustment year" in order to receive benefits. 7 C.F.R. § 1580.301(e)(4). To comply with this provision, the Department permits a producer to submit:

> (i) Supporting documentation from a certified public accountant or attorney,
>
> (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency.

7 C.F.R. § 1580.301(e)(6).

[13] It is worth noting that plaintiff does "not argue that the Department's regulations run contrary to the law." Pl.'s Mem. at 8. Rather, plaintiff asserts that "the Department wholly failed to apply its own regulations properly in this case." *Id.* at 9.

> C.F.R. § 1580.401. Thus, "initial producer petition" must refer to *a producer's* initial application for TAA benefits pursuant to 7 C.F.R. § 1580.301.

Pl.'s Reply at 6 (emphasis in original) (footnote omitted). It is plaintiff's position, therefore, that the pre-adjustment year is to be determined by referencing the marketing year proposed by the individual commodity producer in its application for TAA benefits, not the year that the group of producers filed their petition for certification. *See* 7 C.F.R. § 1580.102 (defining "pre-adjustment year").

Plaintiff provides support for its asserted definition of "pre-adjustment year" by explaining that the word "petition" used in the regulation does not preclude plaintiff's proffered interpretation. *See* Pl.'s Reply at 7. Plaintiff asserts that the interpretative weight attributable to the singular form of the word "producer" far outweighs that attached to the word "petition." *See id.* Thus, according to plaintiff:

> The use of the term "petition" in the definition of "pre-adjustment year" is undeniably confusing, but when read with its qualifier "producer" (singular) and within the larger context of the regulations as a whole, the plain language of the regulations only supports a reading that "initial producer petition" means *an individual producer's initial application for TAA benefits pursuant to 7 C.F.R. § 1580.301*.

Id. (emphasis in original).

Finally, plaintiff claims that the Department's interpretation of "pre-adjustment year" leads to the unintended comparison of net fishing income from non-consecutive years (here 2001 compared to 2003). Plaintiff relies on the language of 19 U.S.C. § 2401e(a)(1)(C), which requires the producer to demonstrate that its net fishing income for "the most recent year" is less than "the producer's net [fishing] income for the latest year in which no adjustment assistance was received by the producer. . . ." Reading the definition of pre-adjustment year to be the year before that in which an individual producer applies for TAA benefits, plaintiff contends, would ensure the comparison of consecutive years that is required by the statute. Thus, relying on both the statute and the regulations, plaintiff claims that the Department unreasonably compared plaintiff's net fishing income from non-consecutive years in denying its application.

The Department maintains that "2001 is the only year that could be the pre-adjustment year based upon the clear language of the applicable regulations." Def.'s Resp. at 8.

> Plaintiff's contention that the pre- adjustment year is 2002 is directly contrary to the definition of "pre-adjustment year" pursuant to 7 C.F.R. § 1580.102. Dus & Derrick appears to assume

> that "pre-adjustment" year means the year prior to the year in which an individual applicant received benefits. This conflicts with [the Department]'s definition of pre-adjustment year as "the tax year previous to that associated with the most recent marketing year in the *initial producer petition*." The definition refers to the "initial producer petition," which is the initial petition filed by the group of producers, in this case the [TSA], for certification for [TAA]. It does not refer to the individual producer's initial application for benefits. The applicable statute and regulations clearly distinguish between the group's "petition" in the first stage of the TAA process, and an individual producer's "application" in the second stage of the process.

Id. at 9 (emphasis in original) (citations omitted). Based on its interpretation, the Department contends that it properly used 2001 as the pre-adjustment year because, as the marketing year in the initial producer petition was 2002, the previous tax year is 2001.

While plaintiff can hardly be faulted for straining to make sense of the Department's regulations, the court finds that its efforts are unnecessary. This is because, at least in the context of a re-certification, the regulations are not a permissible interpretation of the statute.

When a court reviews an agency's construction of the statute which it administers, it uses the familiar two-step process set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first step is to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If a plain reading of the statute clearly reveals the intent of Congress, "that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. As applied to the facts of this case, the court must determine whether Congress has directly addressed the issue of what years are to be compared by the Department when determining whether an agricultural commodity producer has satisfied the net income requirement for the receipt of TAA benefits. For the court, the language of 19 U.S.C. § 2401e(a)(1)(C) is clear in its instruction that consecutive years must be compared when determining whether a producer has satisfied the net income requirement. In addition, the court finds that the statute requires that the second of the two years to be used for comparison must be the year prior to that in which the application is made. Thus, it is unnecessary to address *Chevron's* second step.

"In determining whether a particular regulation carries out the congressional mandate in a proper manner, [the court] look[s] to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979). Congress provided that an individual producer is entitled to receive a cash payment only if it

demonstrated, among other things, that its "net farm income (as determined by the Secretary) for the most recent year is less than [its] net farm income for the latest year in which no adjustment assistance was received by the producer. . . ." 19 U.S.C. § 2401e(a)(1)(C). In promulgating its regulatory scheme, however, the Department altered the phrase "most recent year" to read the "tax year that most closely corresponds to the marketing year under consideration."[14] 7 C.F.R. § 1580.102 (defining "net fishing income" as "net profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration."); *see also id.* (defining "marketing year" as "the marketing season or year as defined by National Agriculture Statistic Service (NASS), or a specific period as proposed by the petitioners and certified by the Administrator."). The Department further provided that the producer's net income from the marketing year would be compared to its income from, what the Department refers to as, the "pre-adjustment year" or "the tax year previous to that associated with the most recent marketing year in the *initial producer petition*." 7 C.F.R. § 1580.102 (emphasis added).

While this scheme may comply with the statute where an application is made following an initial certification, it violates the statute when applied to an application made upon re-certification. This is highlighted by the scenario presented here. Dus & Derrick made its application for TAA in 2005. In reviewing the company's application, the Department compared its net income over non-consecutive years, i.e., 2001 and 2003. The year 2001 was selected because it is the year immediately preceding the marketing year used in the initial producer petition. The marketing year chosen for comparison, however, was the marketing year used in the petition for re-certification, i.e., 2003. Under these facts, the Department's regulations would always

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[14] Prior to November 1, 2004, the Department's regulations required a producer to submit, along with its application, a certification that its net fishing income "for the most recent tax year" was less than that in the producer's pre-adjustment year. 7 C.F.R. § 1580.301(e)(4) (2004). The regulatory scheme was based on a producer application made "with respect to the most recent marketing year for which national average prices [were] available." Trade Adjustment Assistance for Farmers, 69 Fed. Reg. 63,317, 63,317 (Dep't of Agric. Nov. 1, 2004) (final rule; technical amendments). As of November 1, 2004, however, the Department amended its regulations and replaced the reference to the "most recent tax year" in 7 C.F.R. § 1580.301(e)(4) with the phrase "tax year that most closely corresponds with the marketing year under consideration." *Id.* According to the Department:

> Because national average prices take months to be gathered and published by the Department, a producer's most recent tax year may follow the tax year that most closely corresponds with the marketing year being considered for TAA. Therefore, to correct this deficiency, § 1580.301(e)(4) is amended to delete reference to "the most recent tax year". Consequently producers are required to certify that net farm or fishing income during the tax year that most closely corresponds with the marketing year under consideration was less than that during the pre-adjustment tax year, in order to receive payments.

Id. Thus, in order to facilitate a determination of the amount of the TAA benefit, the Department altered the statutorily mandated manner in which eligibility was determined.

result in a producer's net income for the marketing year being compared to 2001. As a result, if the TSA were to be re-certified in 2004 and a producer were to apply for benefits in 2005 claiming 2004 as the marketing year, the present definition of "pre-adjustment year," as interpreted by the Department, would result in a comparison of that producer's net income from 2004 to that from 2001. This comparison is not in keeping with the language of the statute, which demands that a producer establish that its net fishing income for the most recent year (in the example 2004) is less than its net fishing income for the latest year in which no adjustment assistance was received by the producer (in the example 2003).[15] *See* 19 U.S.C. § 2401e(a)(1)(C). Thus, at least with respect to individual applications for benefits made pursuant to re-certifications, the court finds that the regulations are not a permissible interpretation of the statute, which clearly expresses Congress's intent that consecutive years be compared.

In addition, the court finds that the language of the statute did not invite the Department to devise an alternative definition for the phrase "most recent year." For the court, that phrase can only refer to the year preceding that of the application. The statutory phrase "is less than" clearly indicates that a comparison is to be made between two years. Plaintiff was denied benefits based on a comparison between 2003 as the marketing year to 2001 as the pre-adjustment year. A plain reading of the statute, however, demands that, for an application made in 2005, net income for 2004[16] (the "most recent year") must be compared to that earned in 2003 ("the latest year in which no adjustment assistance was received by the producer").

Therefore, the court concludes that because the intent of Congress manifested in 19 U.S.C. § 2401e(a)(1)(C) is clear, the Department's regulations in the context of a re-certification are an impermissible interpretation of the statute to the extent that they: (1) provide for the comparison of non-consecutive years when determining whether a producer has satisfied the statutory net income requirement; and (2) provide for a year other than the "most recent year" as the year selected for the comparison.

C. The Department's Reliance Solely on Line 28 of Plaintiff's Tax Returns

The court next addresses the question of the steps the Department must take in rendering a final determination with respect to a pro-

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[15] The record indicates that Dus & Derrick has never applied for or received TAA benefits.

[16] The court recognizes that a tax return for the preceding year may not be available when the application is made. Tax returns, however, are not the only means of determining net income. *See* 7 C.F.R. § 1580.301(e)(6).

ducer's net income. In plaintiff's view, the Department's denial of its application for TAA benefits was not supported by substantial evidence because the agency did nothing more than look at one line in plaintiff's tax returns when determining whether plaintiff had satisfied the net income requirement for an award of TAA benefits. The Department maintains that because "net income is reflected in line 28 . . . of Dus & Derrick's Form 1120," there was no need to look further into how those figures were calculated, or to consider any other evidence relating to net income. Def.'s Resp. at 14. The Department does not dispute that it took no other action and, in fact, argues that no other action is required by law. *See id*. at 14–15 ("Contrary to Dus & Derrick's suggestion, [the Department]'s regulation does not require a consideration of 'profit and loss information,' 'net income data,' or every line item that makes up Dus & Derrick's tax return. The regulation requires only a comparison of net income.").

Plaintiff asserts that the statute requires the Department is to "determine" an individual commodity producer's net fishing income prior to granting or denying an individual application for a cash payment. *See* 19 U.S.C. § 2401e(a)(1)(C). According to plaintiff, the statutory language does not permit the agency to make a finding of net fishing income based on a review of a single line in a producer's tax return. In fact, it is plaintiff's position that the Department's interpretation of 19 U.S.C. § 2401e(a)(1)(C) embodied in its definition of net fishing income under 7 C.F.R. § 1580.102 likewise prohibits the Department's current one-line-comparison method for determining net fishing income. Specifically, plaintiff maintains that the phrase "net profit or loss . . . reported to the Internal Revenue Service" included in the definition of "net fishing income" means that the Department must consider all of a producer's submitted tax information, including the various factors that went into calculating the reported numbers. *See* Pl.'s Mem. at 13. In plaintiff's view, the Department's failure to look beyond the one line in plaintiff's tax returns prevented it from considering that the deductions in 2001 and 2002 resulted from boat repairs that were financed from the company's savings and a private loan from one of the company's shareholders. That is, plaintiff argues that the figures contained in line 28 of its 2001 and 2003 Form 1120 tax returns do not tell the whole story.

Plaintiff's position is best expressed in the Complaint Letter.

> 1) in the year 2001, which sets up the controls for future years, the business had cash in the bank of $17,000 which was used to pay outstanding expenses plus gross sales which created the large net losses which in turn created the false basis
>
> 2) in the year 2002, stockholder loaned to the corporation approximately $16,000 working capital to pay outstanding expenses, plus gross sales which created another year of losses, just not quite as much as 2001 (We were also denied pmts for

> this same reason for this year) (mechanical down/time reduced sales)
>
> 3) in the year 2003, there was no longer any money in the bank and there were no stockholder contributions to be made. The business had to be conducted entirely from gross sales and with no additional capital sources. We could spend no more than we made.

Complaint Letter at 2. Therefore, plaintiff claims that when determining a producer's net fishing income, the Department must consider the "many accounting variables which affect the net income/loss." *Id*. These facts and this argument are echoed in the brief filed on plaintiff's behalf by counsel. *See* Pl.'s Mem. at 13. Thus, according to plaintiff, the variance between the net income reported in line 28 of its tax returns should have triggered a more comprehensive review of the evidence by the Department in order to determine whether plaintiff was in a worse financial condition in 2003 than it was in 2001. *See id*. at 15–16.

The Department contends that its regulations require nothing more than a comparison of the net income figures as reported to the Internal Revenue Service on plaintiff's tax returns. *See* Def.'s Resp. at 14. As the Department argues:

> The regulation requires only a comparison of net income. Although there may be numerous revenue and expense line items that are used in *calculating* net income, net income is ultimately a number based upon that calculation. Furthermore, although there may be a variety of ways of calculating net income, depending upon the rules being followed and accounting choices made by the company, [the Department] determined that the net income for purposes of TAA should be "net profit or loss, excluding payments under this part, reported to the Internal Revenue Service. . . ." 7 C.F.R. § 1580.102. Therefore, it was appropriate for [the Department] to compare Dus & Derrick's net income in 2003 with its net income in 2001 based upon the net income that Dus & Derrick reported to the IRS in line 28 of its tax returns.

Id. at 14–15 (emphasis in original) (footnote omitted).

Support for plaintiff's position can be found in the decisions of this Court and the Court of Appeals for the Federal Circuit ("Federal Circuit"). Specifically, this Court has found that: when examining the documents submitted to it, the Department has a duty to make a "reasonable inquiry" into the impact of those documents on a producer's application for benefits, *see Van Trinh v. U.S. Sec'y of Agric.*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1259, 1268 (2005) ("While the Department has considerable discretion in conducting its investigation of TAA claims, there exists a threshold requirement of reasonable in-

quiry.") (alterations, citations, emphasis and internal quotation marks omitted); *see also Anderson v. U.S. Sec'y of Argic.*, 30 CIT ___ , ___ , 429 F. Supp. 2d 1352, 1355 (2006) ("The Department of Agriculture's discretion in conducting its investigations of TAA claims is prefaced by the existence of a threshold requirement of reasonable inquiry.") (internal citations and quotation marks omitted); that it is appropriate to disregard certain income when determining net income, *see Than Viet Do & Binh Thi Nguyen v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1224, 1231 (2006) ("Thus, it was reasonable for Agriculture to define net fishing income as net profit or loss excluding the gain or loss from the sale of business assets."); that some kinds of expenses may also be disregarded, *see Selivanoff v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , Slip Op. 06–55 at 8 (Apr. 18, 2006) (not published in the Federal Supplement) (remanding the Department's denial of plaintiff's application to determine whether "extraordinary" expenses had been reported as net income); that the determination should take into account different accounting methods, *see Anderson v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , Slip Op. 06–161 at 21 (Nov. 1, 2006) (remanding the Department's denial of plaintiff's application and instructing the agency to consider "the reasonableness of its regulation as applied to [the plaintiff], in view of the differences in cash versus accrual accounting"); *Anderson v. U.S. Sec'y of Agric.*, 30 CIT ___ , Slip Op. 06–186 (Dec. 20, 2006) (not published in the Federal Supplement); and that the Department cannot simply compare one line of a producer's tax return when determining net fishing income, *see Lady Kim T. Inc. v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , Slip Op. 06–183 at 14–15 (Dec. 15, 2006) (not published in the Federal Supplement) (remanding the Department's denial of a producer's application for benefits with instructions for the agency to explain the reasons behind its negative determination).

In addition, the Federal Circuit has indicated that the Department's determination should include an examination of documents other than a producer's tax returns. *See Steen v. United States*, 468 F.3d 1357, 1360–61, 1363 (Fed. Cir. 2006) (holding that "net farm income," when applied to a producer in the fishing industry, means net income from all fishing activity, not just that income from a particular commodity; and further providing that "the regulations make it reasonably clear that the determination of . . . net fishing income is not to be made solely on the basis of tax return information if other information is relevant to determining the producer's net income from all . . . fishing sources.").

Further support for this view is found in the Department's own regulations. Under 7 C.F.R. § 1580.301(e)(6), a producer is allowed to support its claim that its net income has diminished by providing the Department with other documents besides its tax returns. Specifically, a producer may submit balance sheets, financial statements

or "documentation from a certified public accountant or attorney." 7 C.F.R. § 1580.301(e)(6). Thus, the agency may not rely solely on the information contained in plaintiff's tax return when other information is available.

It is not clear what effect, if any, a more complete analysis of plaintiff's submitted net income data will have on the ultimate determination; however on remand, plaintiff shall be given an opportunity to submit information as provided in 7 C.F.R. § 1580.301(e)(6). The Department is instructed to take that information into account when making its final determination and explain how, if at all, it affects that determination.

CONCLUSION

Because the regulations at issue here govern situations other than those presented by the facts of this case, the court will not order their vacatur. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Rather, on remand, the Department shall: (1) construct a methodology for considering a producer's application pursuant to a re-certification that comports with this opinion; (2) inform plaintiff of the methodology and give it an opportunity to place on the record any further documentation in accordance with 7 C.F.R. § 1580.301(e)(6); and (3) fully explain its methodologyand reasons for reaching its final determination with respect to plaintiff's application. Remand results are due May 8, 2007. Comments to the remand results are due June 7, 2007. Replies to such comments are due June 19, 2007.

Slip Op. 07–3

SHANDONG HUARONG MACHINERY COMPANY, Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Deft.-Int.

Before: Richard K. Eaton, Judge
Consol. Court No. 03–00676

[Motions for Judgment Upon the Agency Record of Shandong Huarong Machinery Co. and Ames True Temper are denied; United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are sustained.]

Dated: January 9, 2007

Hume & Associates PC (*Robert T. Hume*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), for defendant.

Wiley Rein & Fielding LLP (*Timothy C. Brightbill, Eileen P. Bradner* and *M. William Schisa*), for defendant-intervenor.

OPINION

Eaton, Judge: Before the court are the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Results"); the comments of plaintiff Shandong Huarong Machinery Company ("Huarong") and defendant-intervenor Ames True Temper ("Ames");[1] and Commerce's and Ames's replies. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons that follow, the court denies Huarong's and Ames's motions for judgment upon the agency record and sustains the Remand Results.

BACKGROUND

In accordance with this court's opinion and order in *Shandong Huarong Machinery Company v. United States*, 29 CIT ___ , slip op. 05–54 (May 2, 2005) (not published in the Federal Supplement) ("*Shandong I*"), Commerce reopened the record and issued four supplemental questionnaires on June 20, August 3, August 17 and September 12, 2005. Prior to issuing the Remand Results, Commerce released the Draft Results of Redetermination Pursuant to Court Remand ("Draft Redetermination") to Huarong and Ames, to which both filed comments. In the Remand Results, Commerce revised Huarong's dumping margin to 31.00 percent.[2] *See* Remand Results at 2.

STANDARD OF REVIEW

The court reviews the Remand Results under the substantial evidence and in accordance with law standard, which is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) ("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. . . ."). "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,

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[1] Ames filed its own motion for judgment upon the agency record challenging certain aspects of Commerce's final results in this investigation as plaintiff in the action commenced under Court No. 03–00737, which has been consolidated with this case. *See* Order of 12/23/03.

[2] Commerce originally assigned Huarong a 30.02 percent dumping margin for the period of review. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China, 68 Fed. Reg. 53,347, 53,348 (ITA Sept. 10, 2003) ("Final Results"). The Issues and Decision Memorandum, dated September 2, 2003, that accompanied the Final Results shall be cited as "Issues & Dec. Mem."

1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The court "must affirm [Commerce's] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from [Commerce's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotation marks omitted).

DISCUSSION

I. Steel Scrap Offset

In the Final Results, when calculating normal value, Commerce denied Huarong a scrap sales offset for steel scrap generated from the production of the subject bars and wedges because Huarong had not allocated the quantity of scrap sold between subject and non-subject merchandise. *See* Issues & Dec. Mem., cmt. 14 at 28–29. In *Shandong I*, the court remanded to Commerce with instructions to reopen the record to afford Huarong a reasonable opportunity to respond to Commerce's second supplemental questionnaire, i.e., to indicate how much scrap attributable to the subject merchandise was actually sold during the period of review. On remand, Huarong submitted new data. In addition, Huarong proposed an allocation methodology.

In the Remand Results, Commerce largely accepted Huarong's methodology but revised it to use the weight of steel used as an input, rather than the weight of finished products as Huarong had proposed, to calculate the offset. "[Commerce] divided the scrap sales allocated to bars by the total steel input weight of both wrecking bars and crow bars," and multiplied this ratio "by the input weight of steel for each CONNUM."[3] Calculation Mem. for the Final Remand Redetermination at 2, Pub. AR 3527 (ITA Nov. 30, 2005); Remand Results at 28. Using this methodology, Commerce applied a steel scrap offset in its calculation of normal value.

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[3] "Control numbers, or CONNUMs are used by Commerce to designate merchandise that is deemed identical based on the Department's model matching criteria. . . . CONNUMs are used as the basis for product identification in most cases." *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 161 n.6, 90 F. Supp. 2d 1284, 1288 n.6 (2000), *aff'd in part, vacated in part on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001).

Before the court, Ames does not dispute the revised methodology itself. Rather, it argues that the "Remand Results, like the draft results, are not supported by substantial evidence," and reasserts several grounds it raised previously before Commerce to challenge the sufficiency of the documentation that Huarong supplied to Commerce on remand. Ames's Comments on Redetermination Pursuant to Court Remand ("Ames's Remand Comments") at 2 ("Rather than repeat them, we again note our valid concerns as provided in [Ames's comments to the Draft Redetermination dated Oct. 17, 2005]."). [4] In particular, Ames argues that "Huarong has failed to provide sufficient documentary support for the data used in calculating [Huarong's proposed scrap ratio]." Ames's Draft Redetermination Comments at 2.

First, Ames asserts that Huarong submitted false, unreliable documentation in response to Commerce's supplemental questionnaires:

> On the English translation of the invoice [used to support the figures that appear in a worksheet prepared by Huarong], Huarong put in "scrape {sic} steel sales" under the category "goods & labor taxable" to indicate that the underlying transaction was a sale of scrap. On the original Chinese receipt, however, there is no indication whatsoever that it is a "scrap steel sale" under that category.

Ames's Draft Redetermination Comments at 2. In response, Commerce acknowledges the discrepancy between the Chinese invoice and the English translation but points out that two other documents that Huarong submitted along with the invoice – a payment entry sheet showing the payment Huarong received for the sale and an accounting voucher – corroborated the information in the invoice. See Remand Results, cmt. 1 at 21–22. Therefore, Commerce concluded that the documentation submitted by Huarong was reliable. *See id.* at 24.

Second, Ames argues that Huarong's supporting documentation is not "tie[d] . . . to its financial statements or accounting records" that can be verified, and thus, "under [19 U.S.C. § 1677m(e)(2)] [5] Commerce must reject this information and deny Huarong any offset."

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[4] These comments shall be cited as "Ames's Draft Redetermination Comments."

[5] Subsection (e), titled "Use of certain information" provides, in pertinent part:

> In reaching a determination under [*inter alia*, 19 U.S.C. § 1675] the administering authority . . . 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 or the Commission, if— . . .
>
> (2) the information can be verified. . . .

19 U.S.C. § 1677m(e)(2).

Ames's Draft Redetermination Comments at 3. In response, Commerce notes that although Huarong admitted its accounting records were incomplete for the period of review, there is other evidence tending to verify its records. *See* Remand Results, cmt. 1 at 22. Indeed, according to Commerce, Huarong provided documentary evidence, such as vouchers, undisputed invoices and payment entry sheets, and explained how its accounting system works. *Id*. (noting Huarong was able to "demonstrate how its records reconcile when it enters scrap sales into its books and records.").

Third, Ames argues that Huarong should be denied an offset because Huarong used "caps" to report factors of production, and not actual usage.[6] Ames asserts that because a cap is based on budgeted rather than actual usage rates, it fails to account for variances between actual production and budgeted amounts, and thus constitutes a failed response. *See* Ames's Draft Redetermination Comments at 4. Ames also argues that denying the offset is appropriate here because it is not clear what portion of Huarong's reported steel consumption became scrap. *Id*. at 5.

In response, Commerce first notes that it "has accepted 'caps' in the past when the 'caps' were found to reasonably reflect actual consumption," and here, it "accepted Huarong's use of 'caps' in reporting its steel consumption rates in the preliminary and final results in this review" without any previous objection from Ames. Remand Results, cmt. 1 at 24–25. Next, Commerce points to questionnaire responses where "Huarong stated on the record that its reported steel [factor of production] is a pre-production quantity." *Id*. at 25 (citing Huarong's June 24, 2002, Sec. D Resp. at D–6). Since pre-production quantity, by definition, "includes the steel that will become scrap during the production process," *id*., the caps reasonably reflected the amount of steel that became scrap. Thus, according to Commerce, the record evidence supported the use of caps.

The court finds that Commerce complied with the court's remand instruction to reopen the record in order to afford Huarong "a reasonable opportunity to respond to [Commerce's] second supplemen-

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[6] When reporting the amount of an input, such as steel, that is consumed to produce subject merchandise, a company may give an estimate, rather than an actual amount. This estimate is called a "cap." In this investigation, "Huarong reported 'caps' for steel billets, the steel scrap offset, unskilled labor, skilled labor, and unskilled packing labor." Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China, 68 Fed. Reg. 10,690, 10,693 (ITA Mar. 6, 2003) (prelim. results) ("A production 'cap' is an estimate of the amount of factor input the company used to make the product in question."); *see also Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1574 (2003) (not published in the Federal Supplement) ("[T]he consumption amounts reported for the factors of production were based on what company officials call 'caps,' which are the company's closest approximation of the inputs used based on years of production experience manufacturing the subject merchandise." (internal quotation marks and citation omitted)); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169 n.34, 178 F. Supp. 2d 1305, 1326 n.34 (2001) ("Caps are approximations, based on historical production norms, of costs and quantities of inputs for factors of production.").

tal questionnaire." *Shandong I*, 29 CIT at ___ , slip op. 05–54 at 8. In accordance with the court's instruction, Commerce reopened the record and issued four supplemental questionnaires. In addition, the court finds that Huarong's proposed allocation methodology as revised by Commerce is in accordance with law. "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production, as long as it was a reasonable way." *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999) (citation omitted). Here, there is no dispute as to the reasonableness of Commerce's methodology. Huarong does not dispute the revised methodology. Nor does Ames. Indeed, the revised methodology reflects the change Ames proposed in its Draft Redetermination Comments. The revised methodology is therefore sustained.

As to Ames's objections with respect to substantial evidence, Commerce explained that the documentation submitted by Huarong to support its reported scrap sales was corroborated by other record evidence, and was therefore reliable and not "false." In addition, it found that Huarong explained how its accounting system worked and demonstrated how scrap sales were reconciled in its accounting records. Finally, the use of caps was found by Commerce to be reasonable because the reported quantity of steel consumed in producing the subject merchandise is the pre-production quantity, which includes steel that will become scrap during production. As set forth above, Commerce has cited substantial evidence to support its conclusions. In addition, Commerce has used reasonable judgment in considering the evidence and considered evidence that supports as well as "fairly detracts from the substantiality of the evidence." *Huaiyin*, 322 F.3d at 1374 (internal quotation marks omitted). The court thus finds Commerce's conclusions to be supported by substantial evidence and sustains Commerce's scrap offset calculation.

II. *Sigma* Cap

As explained in *Shandong I*, the court in *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997) found that

> when calculating constructed value where the cost of an imported input is presumed to be the same as its domestic counterpart, a rational manufacturer will minimize its material and freight costs by "purchasing imported [product] if the cost of transportation from the port to the foundry [is] less than the cost of transportation from the domestic . . . mill to the foundry." Put another way, where the cost of the imported and domestic product are presumed to be the same, the manufacturer is further presumed to acquire the product from the nearest source in order to minimize freight costs.

Shandong I, 29 CIT at ___ , slip op. 05–54 at 8–9 (citing *Sigma*, 117 F.3d at 1408) (alterations in original).

In the Final Results, Commerce sought to comply with *Sigma* by using "the distances that Huarong's steel suppliers were from Huarong to calculate a weighted average distance. Since the resulting weighted average was greater than the distance from Huarong to the nearest port, Commerce applied a cap equal to that distance for the inland freight cost." *Id.* at 9 (footnore omitted).

In *Shandong I*, the court instructed Commerce to "explain why, in calculating its weighted average [supplier distance], [Commerce] should include any distance greater than the distance from [Huarong's factory to] the nearest port or, failing that, adjust its methodology appropriately." *Shandong I*, 29 CIT at ___ , slip op. 05–54 at 10 (discussing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994) and *Sigma*, 117 F.3d 1401). In other words, the court reasoned that if no rational producer "would choose to pay the highest combination of prices for [an input] plus freight," *Sigma*, 117 F.3d at 1408, including distances greater than the distance between Huarong's factory and the nearest port would not produce an accurate dumping margin.

On remand, Commerce examined the *Lasko* and *Sigma* cases and found that "capping the distance for each supplier (the '*Sigma* cap') *before* calculating the weighted-average freight distance yields a more accurate result, based on *Sigma*, and [it] . . . changed [its] calculation of the surrogate freight cost accordingly." Remand Results at 5 (emphasis added). Commerce then calculated inland freight cost by weight-averaging the distances from Huarong's multiple steel suppliers to Huarong's factory with no single distance greater than the distance to the nearest port. Commerce explained its reasoning this way:

> [A] rational company located in a market economy would purchase identically priced inputs only from those suppliers that are closer to its factory than the nearest port. In the case of the [non-market economy, or "NME"] methodology, all suppliers are assumed to charge the same price for their input. When a NME company reports two or more input suppliers, where one supplier is more distant than the nearest port and the other is closer than the nearest port, the application of a single price means that a market-economy firm would not purchase inputs from the more distant supplier, because purchasing from the farther supplier would not be rational under these conditions, due to the higher freight cost. As a consequence, applying the *Sigma* cap before calculating the weighted-average freight distance will result in a more accurate surrogate freight cost, in accordance with the [Federal Circuit]'s reasoning in both *Sigma* and *Lasko.*

Id. at 7. The court finds that Commerce's methodology and explanation accord with the principles set forth in *Sigma* and *Lasko.*

Ames does not disagree with the basic premise that rational producers seek to minimize freight costs. Rather, Ames argues that Commerce's assumption that suppliers charge the same price for their input "does not correspond to the reality of this case." Ames's Draft Redetermination Comments at 10. According to Ames, "[i]n this review . . . there is *no* evidence on the record to suggest that the price before freight was the same from every supplier." *Id.* at 9 (emphasis in original). Because Huarong purchased input from multiple suppliers, which are at different distances from the factory, Ames argues this is evidence that "prices charged were different, or that transportation cost was not the only variable in decision-making." *Id.*

While Ames's interpretation of the evidence may be plausible, it is not the only reasonable interpretation. As Commerce points out, "Ames appears to concede . . . [that] there are numerous reasons why a particular supplier or group of suppliers may be used; thus, the use of multiple suppliers does not, by itself, demonstrate the prices differed." Commerce's Resp. Pls.' Remand Comments at 10. That a piece of evidence is susceptible to more than one reasonable interpretation does not detract from the substantiality of the evidence supporting Commerce's decision. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Thus, there is no apparent reason to abandon the teaching in *Sigma* in this case.

Commerce examined the methodology employed in the Final Results in light of *Sigma* and *Lasko*, found it appropriate to revise its calculations and explained its revised calculations in the Remand Results. Thus, the court finds Commerce has complied with the remand instructions in *Shandong I*, and Commerce's revised methodology is in accordance with law. There being no challenge to the inland freight calculation itself, that calculation is sustained.

III. Commerce's Decision Not To Exclude U.S. Export Data In Calculating Normal Value

In *Fuyao Glass Industry Group Company v. United States*, 27 CIT 1892 (2003) (not published in the Federal Supplement) ("*Fuyao I*") and *Fuyao Glass Industry Group Company v. United States*, 29 CIT ___ , slip op. 05–6 (Jan. 25, 2005) (not published in the Federal Supplement) ("*Fuyao II*"), Commerce rejected surrogate data from the market economies of Korea, Indonesia and Thailand because of subsidy programs available in those countries. In doing so, it relied on the legislative history surrounding the enactment of 19 U.S.C. § 1677b(c)(4) as its authority, which states in pertinent part: "In valuing . . . factors [of production], Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988,

H.R. Conf. Rep. 100–576, at 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623. In its final determination resulting in *Fuyao I*, Commerce stated, "What is relevant to [Commerce's] determination of whether it has a reason to believe or suspect that prices may be subsidized, is the existence of a subsidy program. A subsidy is, in itself, a market distortion." *Shandong I*, 29 CIT at ___ , slip op. 05–54 at 19 (quoting Final Results of Redetermination Pursuant to Remand, *Fuyao Glass Indus. Group Co. v. United States*, 27 CIT 1892, at 37–38).

Here, Commerce did not exclude U.S. export data from the Indian import statistics it used to value factors of production, citing its authority under 19 U.S.C. § 1677f–1 and 19 C.F.R. § 351.413 (2003) to disregard "insignificant adjustments" to normal value.[7] *See* Issues & Dec. Mem., cmt. 2 at 9. In *Shandong I*, the court directed Commerce to explain its decision to include data on allegedly subsidized U.S. exports in light of *Fuyao I* and *Fuyao II*.

The court finds that Commerce complied with the court's instruction to more fully explain its decision to disregard the effect of subsidies from the United States and other countries, in light of *Fuyao I* and *Fuyao II*. In both the *Fuyao* cases and the case at bar, the question concerns the construction of normal value in the NME context. In each case, Commerce valued a factor or factors of production purchased from a market economy supplier. Normally, the price paid for these factors of production would be considered to be reliable and used to calculate normal value. *See China Nat. Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 255, 264, 264 F. Supp. 2d 1229, 1237 (2003) ("Where actual prices reflect true market values, not to employ such prices would indeed be contrary to Commerce's mandate of estimating antidumping duty margins as accurately as possible." (internal quotation marks and citation omitted)). In the *Fuyao* cases, however, Commerce elected to avoid using the actual prices paid because it maintained that it had reason to believe or suspect that the prices were subsidized. *See Fuyao I*, 27 CIT at 1904 ("[P]rior CVD findings may provide the basis for the Department to also consider that it has particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country are subsidized.") (quoting Issues & Dec. Mem. at 11). In those cases,

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[7] Section 1677f–1 provides that when determining normal value under 19 U.S.C. § 1677b Commerce "may . . . decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." 19 U.S.C. § 1677f–1(a)(2).

Commerce's regulations define "insignificant adjustment":

> Ordinarily, under [19 U.S.C. § 1677f–1(a)(2)], an "insignificant adjustment" is any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case may be.

19 C.F.R. § 351.413.

Commerce did not inquire into the degree of subsidization, reasoning that, under its methodology, any level of subsidy was sufficient to require it to disregard the price paid for an input.

Here, Commerce has refined its methodology by adding a preliminary step. Where a claim of subsidization is made, Commerce will now first determine whether the inclusion or exclusion of the allegedly subsidized price for the factor of production affects the calculation of normal value in a significant way:

> In the *Final Results*, we conducted our analysis by first calculating two surrogate values, one with U.S. exports included and one other with the [allegedly subsidized] U.S. data excluded. We calculated [normal value] using both sets of surrogate values and calculated the total weighted-average and with U.S. exports excluded. We found that [normal value] changed only by 0.21 percent. As this adjustment would be an insignificant adjustment to [normal value] [under 19 C.F.R. § 351.413], we did not remove imports from the United States from Indian import data when calculating the surrogate values used in the administrative review.

Remand Results at 11 (citations omitted). It can be assumed that had Commerce found a more substantial effect on normal value from the inclusion of the challenged prices it would have then conducted a further analysis in accordance with the "reason to believe or suspect" test found in the *Fuyao* cases.[8]

The court finds that Commerce's method of examining allegedly subsidized inputs by incorporating a preliminary step to determine whether inclusion or exclusion of inputs affects normal value in a significant way, is reasonable. As a result, Commerce's decision not to exclude U.S. export data in calculating normal value is sustained.

IV. Brokerage and Handling: Labor Costs

In the Final Results, Commerce found, based on its "judgment" and "experience," that the surrogate value for brokerage and handling likely included the labor costs incurred by Huarong in making steel pallets. *See Shandong I*, 29 CIT at ___ , slip op. 05–54 at 22–23 (quoting Issues & Dec. Mem. at 21–22). In *Shandong I*, the court found that Commerce had not supported this finding with substan-

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[8] As set forth in *Fuyao II*:

> [T]o justify a finding with respect to subsidization, Commerce must demonstrate by specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation . . . ; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.

Fuyao II, 29 CIT at ____ , slip op. 05–6 at 10.

tial evidence and remanded to Commerce to "supply more information and a more complete explanation to support its decision to include [labor costs for making steel pallets] under brokerage and handling." *Id.* at 23.

On remand, Commerce collected more information from Huarong and explained:

> For this redetermination, we requested that Huarong provide the usage rate for labor required to manufacture self-produced steel pallets and the consumption rate for the materials and energy used when welding the steel into pallets. In response, Huarong reported consumption rates for labor and welding rod used in producing the pallets, and noted that the electricity used for welding the steel pallets was included in the previously reported electricity consumption rate. We valued welding rod using publicly available Indian import statistics for February 2001 through January 2002. . . . We valued labor for making pallets using the regression-based wage rate for the PRC that the Department applied for both skilled and unskilled labor in the Final Results.

Remand Results at 13 (citations and footnote omitted). Thus, Commerce took labor costs into account in its calculation of normal value.

None of the parties filed specific objections with the court regarding Commerce's findings on this issue. As is apparent from the Remand Results, Commerce requested and received information from Huarong concerning the labor and electricity used to make steel pallets and valued the factors of production using Indian surrogates, as it did with other factors of production in this case. That being the case, and Commerce having complied with the court's remand instructions, the findings are sustained.

V. Brokerage and Handling: Movement Costs

In the Final Results, Commerce relied on its experience, without citing specific evidence, to find that movement expenses incurred at the port of export were captured in the surrogate brokerage and handling values used. *See Shandong I*, 29 CIT at ___ , slip op. 05–54 at 26. In *Shandong I*, the court remanded this issue for Commerce to provide additional information and explanation with respect to its inclusion of movement expenses in brokerage and handling costs, "should Commerce continue to find on remand that the movement expenses at issue are accounted for under brokerage and handling." *Id.* at ___ , slip op. 05–54 at 27.

On remand, Commerce continued to find that movement expenses were accounted for under brokerage and handling. It explained that it is common for companies not to itemize brokerage and handling

expenses, and that neither Huarong nor Viraj,[9] the Indian company whose information Commerce used as surrogate data, itemized such expenses here. Nonetheless, it was able to "identify certain movement-related expenses that both [Huarong and Viraj] must have incurred, and that therefore must be captured in the [brokerage and handling] surrogate value." Remand Results at 16.

Ames challenges Commerce's methodology, arguing that Commerce failed to find affirmative evidence that Viraj actually incurred the movement expenses discussed above. Absent this evidence, Ames contends Commerce must "deduct [movement] expenses from Huarong's U.S. pricing." Ames's Draft Redetermination Comments at 12.

It is, of course, true that Commerce's determinations must be made on the basis of facts in the record. It is also true that, as Commerce contends, "it is entirely appropriate for the Department to make 'reasonable inferences' from the record evidence," which it has done here. Remand Results at 32 (quoting *Shandong I*, 29 CIT at ___, slip op. 05–54 at 23). For example, based on "cost-insurance-freight" delivery terms included in Viraj's questionnaire responses, Commerce was able to discern that "Viraj was responsible for paying all costs incurred at the port of export." *Id.* at 16. Since both Huarong's and Viraj's goods were transported to the port of export by truck and loaded and secured to a vessel, Commerce found that "it [was] reasonable to infer that Huarong would have incurred . . . expenses," such as drayage.[10] *Id.* In addition, Commerce explained, by reference to Huarong's supplemental questionnaire responses and other record documents, its determination that other movement expenses, such as containerization, were also included in brokerage and handling. *See* Remand Results at 17 (citing Huarong's Feb. 4, 2004, Supp. Resp. at Ex. 5; Indian Docs. Mem.).

Based on this new information and additional explanation, the court sustains Commerce's finding that movement expenses incurred at the port of export were captured in surrogate brokerage and handling values.

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[9] Viraj was a respondent in Certain Stainless Steel Wire Rod From India, 63 Fed. Reg. 48,184 (ITA Sept. 9, 1998) (prelim. results). Commerce used information from the record in that investigation to value factors of production in its investigation of heavy forged hand tools from China.

[10] Drayage, or cartage, is a port charge that includes "movement of merchandise from truck to container yard and from container yard to ship. . . ." Remand Results at 17.

CONCLUSION

For the foregoing reasons, the court denies Huarong's and Ames's motions for judgment upon the agency record and sustains the Remand Results. Judgment shall be entered accordingly.

Slip Op. 07–3

SHANDONG HUARONG MACHINERY COMPANY, Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Deft.-Int.

Before: Richard K. Eaton, Judge
Consol. Court No. 03–00676

JUDGMENT ORDER

Upon considering the United States Department of Commerce's ("Commerce") determination in Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China, 68 Fed. Reg. 53,347 (ITA Sept. 10, 2003) (final results) as modified by the Final Results of Redetermination Pursuant to Court Remand (Nov. 30, 2005), the memoranda and accompanying materials in support thereof, and upon all the other papers and proceedings had herein, it is hereby

ORDERED that Commerce's determination, as modified on remand, is sustained.

Slip Op. 07–4

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

Before: Richard K. Eaton, Judge
Court No. 01–00858

[United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand sustained.]

Dated: January 9, 2007

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

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice

(*Stephen C. Tosini*); *Ada E. Bosque,* United States Department of Commerce Office of Chief Counsel for Import Administration, of counsel, for defendant.

MEMORANDUM OPINION

Eaton, Judge: This matter is before the court following a third remand to the United States Department of Commerce ("Commerce" or the "Department").[1] In *Shandong Huarong General Group Corporation v. United States*, 29 CIT ___ , Slip Op. 05–129 (Sept. 27, 2005) (not published in the Federal Supplement) ("*Huarong III*"), the court remanded the Department's second remand determination in the ninth administrative review of the antidumping duty order covering the importation of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"). *See* HFHTs From the PRC, 66 Fed. Reg. 48,026 (ITA Sept. 17, 2001) (final determination) ("Final Results"). Plaintiffs Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import & Export Corporation ("LMC") (collectively "plaintiffs" or the "Companies") challenged that determination with respect to the Department's decision to apply adverse facts available ("AFA") and to assign the Companies a 139.31 percent[2] dumping rate to their sales of bars and wedges.[3] The court found that Commerce failed to support its selection of the 139.31 percent rate with substantial evidence, that the rate was aberrational and punitive, and remanded the determination with instructions for Commerce to select another justifiable rate. On the third remand, Commerce selected a rate of 47.88 percent to apply as AFA. *See* Final Results of Redetermination Pursuant to Court Remand

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[1] Ames True Temper, as *amicus curiae*, has filed comments to Commerce's remand results.

[2] In the Final Results, both companies received the PRC-wide rate for this review of 47.88 percent. *See* Final Results, 66 Fed. Reg. at 48,028, 48,030.

[3] In cases where a respondent:

> (A) withholds information that has been requested by the administering authority or the Commission under [19 U.S.C. § 1677],
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a) (2000).

If Commerce determines that a respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may then "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

(ITA Mar. 3, 2006) ("Third Remand Determination") at 1. The Companies now challenge the Department's selection on remand of the 47.88 percent rate applicable to their sales of bars and wedges. Jurisdiction lies with 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, the court sustains Commerce's Third Remand Determination.

BACKGROUND

The facts of this case have been set forth adequately in the court's prior opinions. A brief discussion of the facts relevant to the instant action follows. In the Final Results, Commerce used AFA to set the Companies' dumping margins and assigned the Companies the PRC-wide rate of 47.88 percent for their sales of bars and wedges. *See* Final Results, 66 Fed. Reg. at 48,028. The court agreed that Commerce supported with substantial evidence its application of AFA to the Companies, but because it found that the Companies had demonstrated their independence from the PRC-wide entity, it remanded the Final Results and instructed Commerce to assign the Companies separate rates. *See Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1596 (2003) (not published in the Federal Supplement) ("*Huarong I*"); *see also* Third Remand Determination at 5 ("Huarong received AFA, in part, because it failed to report certain transactions as being its own sales, rather than another company's sales, while LMC received AFA because certain transactions it reported as its own sales were, in fact, made by another company."). On remand, Commerce found that the Companies were entitled to separate rates and assigned each of them an individual rate of 139.31 percent. That rate was the highest antidumping duty rate from any prior segment of the proceeding. Because it found that the Department failed to justify its selection of the 139.31 percent rate, the court again remanded the matter. *See Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT ___ , ___ , Slip Op. 04–117 at 17–18 (Sept. 13, 2004) (not published in the Federal Supplement) ("*Huarong II*").

In accordance with the court's remand, the Department attempted to explain its decision to apply the 139.31 percent rate to the Companies' sales of bars and wedges, but the court found the effort insufficient. *See Huarong III*, 29 CIT at ___ , Slip Op. 05–129 at 21–22. Specifically, the court found the rate both aberrational and punitive, and further concluded that Commerce failed to support adequately the reasonableness and the relevance of that rate to the Companies' sales. The court remanded the matter for a third time with instructions for the Department to choose from the following two rates: "(1) the Companies' rates from a previous review, with a built-in increase as a deterrent to non-compliance; or (2) a calculated rate that accurately reflects what the Companies' rates would have been had they

cooperated, with a built-in increase as a deterrent to non-compliance." *Id.* at ___ , Slip Op. 05–129 at 22.

In the Third Remand Determination, Commerce returned to the rate of 47.88 percent, which is both the country-wide rate in this administrative review and the rate calculated for another company in the 1992–1993 administrative review. *See* Third Remand Determination at 1, 4. For the reasons that follow, the court sustains the selection of that rate.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." 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)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

When selecting a rate to apply as AFA, "Commerce must do more than assume any prior calculated margin for the industry is reliable and relevant." *Ferro Union, Inc. v. United States*, 23 CIT 178, 204, 44 F. Supp. 2d 1310, 1334 (1999). Indeed, "[i]n order to comply with the statute and the [Statement of Administrative Action]'s statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to [the respondent]." *Id.* at 205, 44 F. Supp. 2d at 1335. In its previous remand determination, Commerce did not meet the standard set forth in *Ferro Union*. In particular, Commerce failed to demonstrate either the reasonableness or the relevance of the 139.31 percent rate to the Companies. *See Huarong III*, 29 CIT at ___ , Slip Op. 05–129 at 21; *see also* 19 U.S.C. § 1677e(c).[4] The court stated that the law "requires that an

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[4] Pursuant to that provision:

> When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

19 U.S.C. § 1677e(c).

assigned rate relate to the company to which it is assigned." *Huarong III*, 29 CIT at ___ , Slip Op. 05–129 at 11. In addition, the court stated that where a rate from a previous review is selected as AFA, if that prior rate was a weighted-average margin, "then the preferred method would be to use the Companies' own weighted-average margins for the same review." *Id.* at ___ , Slip Op. 05–129 at 17. Moreover, the court found that the 139.31 percent rate selected was aberrational and punitive. *Id.* at ___ , Slip Op. 05–129 at 21. Thus, in order to be sustained, Commerce's current selection of the 47.88 percent AFA rate must be both reliable and relevant to the Companies.

In plaintiffs' view, Commerce failed to corroborate its selection of the 47.88 percent rate in accordance with 19 U.S.C. § 1677e(c). *See* Pls.' Comments on Dep't of Commerce's Final Results of Redetermination Pursuant to Court Remand at 7. Specifically, plaintiffs claim that: (1) Commerce did not establish the reliability of the 47.88 percent rate because it failed to support the rate with an independent source; (2) Commerce failed to explain how a 47.88 percent rate that was applied to an unrelated company in a prior review was relevant to the Companies here; and (3) Commerce incorrectly employed a transaction-specific comparison method to determine the deterrent amount in contravention of the court's instructions. *See id.* at 7, 9, 11–15.

Despite plaintiffs' contentions, the court finds that Commerce has explained adequately the reliability and relevance of the 47.88 percent AFA rate with respect to the Companies' sales of bars and wedges, and finds the method employed by Commerce in reaching its conclusion reasonable. Here, Commerce selected 47.88 percent, the PRC-wide rate for the underlying review and the rate that was applied to Fujian Machinery & Equipment Import & Export Corporation ("FMEC") during the 1992–1993 administrative review of the bars/wedges order, as AFA. *See* Third Remand Determination at 4. It selected this rate only after first finding that, had it cooperated, LMC would have received a rate of 27.18 percent and, likewise, Huarong would have been subject to a rate of 34.00 percent. *See id.* Commerce based this finding on the highest previously calculated rates for each company. *See id.* Commerce then chose to apply the 47.88 percent rate, in part, because that rate, having been previously verified, was reliable and because the resulting 13.88 percent increase in Huarong's rate and the 20.70 percent increase in LMC's rate was sufficient to deter any future non-compliance. *See id.* at 9.

An AFA rate must be both reliable and bear a rational relationship to the respondent. *See Huarong III*, 30 CIT at ___ , Slip Op. 05–129 at 11–12; *see also F. LLI De Cecco Di Fillippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate

to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."). The court finds that Commerce has sufficiently demonstrated the reliability of the 47.88 percent rate. According to Commerce:

> In accordance with our normal practice, the Department reviewed all potential rates in the history of the proceeding which could be applied as an AFA rate in the underlying segment. For this remand determination, the Department has selected as AFA the 47.88 percent calculated for [FMEC], during the 1992–1993 administrative review of the bars/wedges order. This rate was based upon verified data and has not been judicially invalidated.

Third Remand Determination at 4 (citations omitted). Commerce further stated:

> [U]nlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses as total AFA a 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 rate selected as AFA, 47.88 percent, was calculated using verified information provided by FMEC during the 1992–1993 administrative review of the bars/wedges order. Furthermore, this rate was not judicially invalidated, and we have no new information that would lead us to reconsider the reliability of the rate being used in this case.

Id. at 5–6 (citations omitted).

In other words, by using a rate from a previous investigation, Commerce sought to satisfy the reliability standard found in 19 U.S.C. § 1677e(c). Thus, the court concludes that Commerce established the rate's reliability as required by statute, in part, because the Department selected a rate that was based on verified information provided by FMEC in the 1992–1993 review.

In addition, the court finds that Commerce demonstrated the relevance of the 47.88 percent rate to both Huarong and LMC. In this case, to satisfy the court's concerns with respect to the relevance of the rate to the Companies, Commerce first estimated what the Companies' rates would have been had they cooperated.

> [F]or non-cooperative respondents, a conservative estimate of the lower bound [sic] of what the respondent's margin would be had it cooperated is the highest-weighted average margin calculated for that respondent in a prior review. In this case, using the conservative assumption, the Department expects that, at a minimum, Huarong and LMC would have received dumping

> margins of 34.00 and 27.18 percent, respectively, had they cooperated.

Third Remand Determination at 9. The Department then considered an amount to be added to those rates to deter future non-compliance. To test the relevance of that additional amount to the Companies, Commerce examined the Companies' transaction-specific margins. *See id.* ("These transaction-specific margins are actual margins calculated for the respondent in question and demonstrate the highest margins of dumping made by the respondent when selling subject merchandise in the U.S. market."). That is, to determine an appropriate amount to add to the Companies' previously calculated rates, Commerce compared the Companies' highest transaction-specific margins to the 47.88 percent rate.

Commerce made the comparison for each company. After comparing Huarong's highest transaction-specific margins to available verified rates, Commerce found that the 47.88 percent rate was relevant. Specifically, Commerce found:

> (1) all of Huarong's positive transaction-specific margins are above 47.88 percent, the quantity of these transactions is not insignificant, and these sales are not aberrational; (2) there are no other previously calculated, weighted-average rates from which to select as AFA that are greater than 47.88 percent but less than the range of transaction-specific margins; and (3) selecting a rate lower than 47.88 percent would not act as an effective deterrent in light of the high transaction-specific margins. For these reasons, the transaction-specific margins are evidence that the 47.88 percent rate is relevant to Huarong and provides the appropriate deterrent to future non-compliance.

Id. at 10. Similarly, with respect to LMC, Commerce concluded:

> 21 percent of LMC's transaction-specific margins were positive (*i.e.*, greater than zero) and that all of these positive transaction-specific margins were high, although not quite as high as Huarong's positive transaction-specific margins. . . . [T]he Department is applying the same AFA rate to LMC as it is to Huarong because LMC identified certain transactions in the underlying review as its own sales, when, in fact, they were not. . . . For this redetermination, we find that selecting 47.88 as the AFA rate is also relevant for the following reasons relating to transaction-specific margins: (1) all of LMC's positive transaction-specific margins are above 47.88 percent, the quantity of these transactions is not insignificant, and these sales are not aberrational; (2) there are no other previously calculated, weighted average rates from which to select as AFA that are greater than 47.88 percent but less than the range of transaction-specific margins; and (3) selecting a rate lower

> than 47.88 percent would not act as an effective deterrent in light of the high transaction-specific margins.[5]

Id. at 10–11 (citations omitted). Therefore, Commerce determined that based on a comparison of the 47.88 percent rate to the Companies' transaction-specific margins, the 13.88 percent increase for Huarong and the 20.70 percent increase for LMC would serve as an appropriate deterrent to future non-compliance.

To further justify the relevance of these rates, the Department examined the variation in the Companies' margins over prior reviews. With respect to Huarong, Commerce observed that the dumping margin assigned to that company for its sales of bars and wedges in the 1996–1997 review was a calculated 34.00 percent. *See* Third Remand Determination at 12. In the 1997–1998 review, Huarong received a calculated rate of 1.27 percent. *See id*. Huarong then received a calculated 27.28 percent rate in the 1998–1999 review, the review immediately preceding the underlying review. *See id*. Likewise, Commerce found that LMC has also received varying dumping margins from review to review. Specifically, in the 1996–1997 review, when LMC was first assigned a calculated rate for its sales of bars and wedges, it received a 2.94 percent rate. *See id*. In the 1997–1998 review, LMC was assigned a 0.0 percent rate. *See id*. That changed, however, in the 1998–1999 review, where LMC was assigned a calculated rate of 27.18 percent. *See id*.

Thus, Commerce's chosen rate is not dramatically different from those fluctuating rates that the Companies previously received. That is, it is not unreasonable for Commerce to allot to Huarong an approximate thirteen-percentage-point increase from its highest calculated rate of 34.00 percent as a deterrent, and it is equally permissible for Commerce to add a twenty-percentage-point increase over LMC's highest previously calculated rate as a deterrent. Thus, unlike in *Huarong III*, where the court found a more than 110 percentage point increase to be aberrational and punitive, the 47.88 percent rate is not so high as to be aberrational.

Having considered plaintiffs' arguments with respect to the relevance of the chosen rate and Commerce's explanation of its decision to apply a rate of 47.88 percent to the Companies' sales of bars and wedges, the court finds that: (1) Commerce established the reliability and relevance of the rate to both Huarong and LMC; and (2) the method by which Commerce reached its conclusion was reasonable. Therefore, the court sustains the Third Remand Determination.

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[5] While what Commerce says is true, it is worth noting that the vast majority of the Companies' transaction-specific margins were calculated to be 0.0 percent. *See Huraong III*, 29 CIT at ____, Slip Op. 05–129 at 17 (finding that over 83 percent of the transactions were at zero margins).

CONCLUSION

Based on the foregoing, the court sustains Commerce's Third Remand Determination and its selection of 47.88 percent as the rate to be applied to Huarong and LMC as AFA for their sales of bars and wedges. Judgment shall be entered accordingly.

Slip Op. 07–4

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

Before: Richard K. Eaton, Judge
Court No. 01–00858

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; Now therefore, in conformity with said decision, it is hereby

ORDERED that the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand *Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, Court No. 01–00858, are sustained.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C06/61 11/27/06 Restani, J.	Amko In'tl Trading	00–00150	2002.10.00 Assessed duties at the rate of 100% pursuant to subheading 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%, 7% and 6.8%	Agreed statement of facts	Newark Peeled tomatoes
C06/62 11/29/06 Pogue, J.	Motoman, Inc.	01–00728	8479.50.00 2.7% or 2.5%	8428.90.80 8428.90.00 4% and/or Free of duty 8515.31.00 1.7% (1998), 1.6% (1999 & 2000) 8515.21.00 Free of duty (1999 & 2000)	Agreed statement of facts	Chicago Seattle Material handling, arc welding, resistance (spot) welding, sealing and general purpose robots
C06/63 12/11/06 Restani, J.	BASF Corp.	03–00051	2934.90.12 7.9%	2934.90.12 and is duty-free under 9902.38.20	Agreed statement of facts	Houston "Vinclozolin tec, MUP" (Technical grade fungicide)
C06/64 12/14/06 Restani, J.	Motoman, Inc.	01–00728	8479/50.00 2.7% pr 2.5%	8428.90.80 8428.90.00 4% and/or Free of duty 8515.31.00 1.7% (1998), 1.6% (1999 & 2000) 8515.21.00 Free of duty (1999 & 2000)	Agreed statement of facts	Chicago Seattle Material handling, arc welding, resistance (spot) welding, sealing and general purpose robots
C06/65 12/19/06 Restani, J.	California Innovations, Inc.	01–00093	6307.90.99 7%	3924.10.50 3.4%	Agreed statement of facts	Los Angeles Lunch boxes, etc.
C06/66 12/19/06 Restani, J.	California Innovations, Inc.	05–00533	6307.90.99 7%	3924.10.50 3.4%	Agreed statement of facts	Los Angeles Lunch boxes, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*VALUATION*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
V06/16 12/5/06 Restani, J.	Target Stores	05–00369	Transaction value	On the basis of the price paid for merchandise by OPIL to Hsieh Huang	Agreed statement of facts	Los Angeles Women's swimwear
V06/17 12/5/06 Restani, J.	Target Stores	05–00370	Transaction value	On the basis of the price paid for merchandise by OPIL to Sam-Han	Agreed statement of facts	Los Angeles Women's sweaters
V06/18 12/5/06 Restani, J.	Target Stores	05–00371	Transaction value	On the basis of the price paid for merchandise by OPIL to Sheng Min	Agreed statement of facts	Los Angeles Women's swimwear
V06/19 12/21/06 Restani, J.	Target Stores	04–00573	Transaction value	On the basis of the price paid for merchandise by OPIL to Onus Apparels Ltd.	Agreed statement of facts	Norfolk women's blouses
V06/20 12/21/06 Restani, J.	Target Stores	04–00591	Transaction value	On the basis of the price paid for merchandise by OPIL to Suzhou Silk	Agreed statement of facts	Los Angeles Women's blouses