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

SUMMARY

The Department of Commerce ("the Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("the Court") in Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States, Court No. 01-00858, Slip Op. 05-129 (September 27, 2005) ("Huarong III"). This remand pertains to the Department's application of adverse facts available ("AFA") to Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import & Export Corporation ("LMC") because of their failure to provide information required for the Department's antidumping analysis in the ninth review of bars/wedges from the People's Republic of China ("PRC"). See Heavy Forged Hand Tools From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 48026 (September 17, 2001) ("Final Results"). In Huarong III, the Court found that the Department did not adequately justify its decision to apply a rate of 139.31 percent as AFA, and that application of this rate is punitive. In remand, the Court directed the Department to no longer employ this rate. Furthermore, the Court instructed the Department to choose and justify its choice of one of the following rates: (1) the rates calculated for Huarong and LMC from previous reviews, with a built-in increase as a deterrent to non-compliance; or (2) a calculated rate that accurately reflects what Huarong and LMC's rates would have been had they cooperated, with a built-in increase as a deterrent to non-compliance. Pursuant to the Court's order, the Department finds that the rate of 47.88 percent rate is representative of the margins that we would have calculated for Huarong and LMC in the ninth review had they not received total AFA, with an increase to encourage cooperation.

BACKGROUND

In the Final Results, the Department determined that application of facts available, pursuant to sections 776(a)(2)(A) and (C) of the Tariff Act of 1930, as amended ("the Act"), was appropriate due to verification failures. Further, due to the nature of the failures and the inadequacy of their cooperation, the Department found the integrity of each respondents' reported data, on the whole, was compromised. Accordingly, the Department determined that it was appropriate to rely upon AFA for purposes of determining the dumping margins for Huarong and LMC. 19 U.S.C. § 1677e(b). The Department also determined that Huarong and LMC had not adequately demonstrated their entitlement to rates separate from the government entity. As a consequence, the Department determined that Huarong and LMC should receive the PRC-wide entity's rate. See Final Results, 66 FR at 48028.

In Shandong Huarong General Group Corp. v. United States, Slip Op. 2003-135 (Oct. 22, 2003) ("Huarong I"), the Court determined that the Department's use of AFA was justified with respect to Huarong's and LMC's sales and factors data, but remanded our decision to apply the PRC-wide entity's rate to Huarong and LMC. Pursuant to the Court's order, we reconsidered our determination that the verification failures called into question the separate rates information provided by Huarong and LMC during the course of the administrative review. Since the Department found no specific discrepancies with respect to the separate rates information, in our remand redetermination dated January 20, 2004, we determined that Huarong and LMC were entitled to separate rates. The Department further determined that the appropriate AFA rate for Huarong and LMC was 139.31 percent, which is the weighted-average dumping margin calculated for Tianjin Machinery Import & Export Corporation ("TMC") in the immediately preceding (eighth) administrative review for the bars/wedges order.[1] See Heavy Forged Hand Tools From the People's Republic of China: Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Reviews, 68 FR 37121 (June 23, 2003) ("Amended Results of 1998-1999 Review Pursuant to Court Decision"). This rate is the highest dumping margin for the bars/wedges order that has not been judicially invalidated from any prior segment of the antidumping proceeding at issue in this litigation.

In Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States, Court No. 01-00858, Slip Op. 04-117 (September 13, 2004) ("Huarong II"), the Court affirmed the Department's conclusion as to the companies' entitlement to separate rates. The Court also went on to find that the Department must choose an AFA rate that is a reasonably accurate estimate of each company's actual rate, with some built-in increase intended to encourage cooperation. In its ruling, the Court stated that the Department failed to explain why it was more reasonable to utilize a rate calculated for a different company in the immediately preceding (eighth) review, rather than a rate derived from Huarong and LMC data for the same review. Further, the Court found the Department had failed to explain why a rate over 100 percentage points higher than the rates calculated for Huarong and LMC in the eighth review reasonably reflected Huarong and LMC's experience in the ninth review. Because the 139.31 percent rate represents a five-fold increase between the eighth and ninth reviews, the Court questioned whether the rate was aberrational and not supported by substantial evidence. The Court directed the Department to revisit the evidence cited for its decision to use the 139.31 percent rate. If the Department should continue to apply this rate, the Court directed the Department to explain its reasons for not choosing a previous antidumping duty rate calculated for Huarong and LMC themselves. In our January 24, 2005, remand redetermination, we revisited the Department's corroboration of this rate. See 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 (January 24,

[1] The margin for bars/wedges refers to the margin applicable under the antidumping duty order on bars and wedges, one of the four orders in the proceeding titled under the heading of Heavy Forged Hand Tools. See Antidumping Duty Orders: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China, 56 FR 6622 (February 19, 1991).

2005) ("Huarong Redetermination II"). Based upon several facts, we found that the rate of 139.31 percent for bars/wedges is both reliable and relevant. Therefore, we corroborated this rate, to the extent practicable, in accordance with section 776(c) of the Act.

In Huarong III, the Court rejected our corroboration of the 139.31 percent rate for three reasons. First, the Court stated that the Department inappropriately attempted to justify the 139.31 percent rate as being relevant to the bars/wedges industry, rather than showing how the selected rate is relevant to Huarong and LMC themselves. Second, the Court rejected the Department's position that it is appropriate to apply a rate as AFA that is a five-fold increase from the rates calculated for the companies in the immediately preceding review because of the historic volatility of the rates calculated in the bars/wedges order. Even though companies have experienced significant rate increases between reviews, the Court found that an increase of over 110 percentage points was not justified. Third, the Court disagreed with the Department's position that the 139.31 percent rate is relevant to Huarong and LMC because we calculated for each company several sale-specific margins at or above 100 percent in the immediately preceding review. According to the Court, when examining the relevance of a margin selected as AFA, the preferred methodology is to compare the weighted-average margin selected as AFA to the weighted-average margins, rather than sale-specific margins, calculated for the respondent in question from past reviews.

On January 26, 2006, we released our Draft Results of Redetermination to Ames True Temper ("Ames")[2] and to the respondents, Huarong and LMC, for comment. All three parties submitted comments on February 3, 2006. Huarong and LMC submitted rebuttal comments on February 8, 2006 ("Plaintiffs' Rebuttal Comments"), while Ames submitted its rebuttal comments on February 13, 2006 ("Ames' Rebuttal Comments"). We have addressed the parties' comments below. The following discussion contains only minor changes and clarifications to the analysis contained in the Draft Redetermination.

ANALYSIS

AFA Rate Selected

Pursuant to section 776(a)(2)(C) of the Act, the Department has determined that it is appropriate to base Huarong's and LMC's dumping margins for their sales of merchandise covered by the antidumping duty order on bars/wedges on facts available because Huarong and LMC significantly impeded the instant proceeding. In selecting from among facts available, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information." Section 776(b) of the Act goes on to note that an adverse inference may include reliance on information derived from (1) the petition, (2) a final

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[2] Ames was the petitioner in the underlying review. See Final Results, 66 FR at 48027. Although Ames is not a party to this litigation, it has entered comments as a domestic interested party.

determination in the investigation under this title, (3) any previous review under section 751 or determination under section 753, or (4) any other information on the record. It is the Department's practice, where warranted, to select the highest margin determined in the proceeding for any respondent, corroborate it to the extent practicable if it is secondary information, and apply it to uncooperative respondents. See Kompass Food Trading Int'l v. United States, 24 CIT 678 (2000) (using highest calculated margin from the investigation); Elemental Sulphur from Canada: Final Results of Antidumping Duty Administrative Review, 65 FR 11980 (March 7, 2000) at Comment 3; and Brass Sheet and Strip from Germany: Final Results of Antidumping Duty Administrative Review, 63 FR 42823 (Aug. 11, 1998).

In Huarong III, the Court directed the Department to no longer apply the 139.31 percent rate as AFA to Huarong and LMC because the Court considers this rate to be punitive. See Huarong III at 21. Further, the Court instructed the Department to choose and justify its choice of one of the following 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 22. In accordance with our practice, we have selected the second option. With respect to the first choice, it seems that the Court is allowing the Department the option of selecting a calculated rate from a previous review and adding to this rate an unspecified increase that is intended to act as a deterrent to non-compliance. The Department does not normally follow this methodology, as selecting an unspecified amount to add to the existing rate would be subjective and not based on record evidence. Rather, as noted above, the Department's practice, where warranted, is to apply the highest previously calculated margin that can be corroborated as reliable and relevant. However, even if the Department were to follow the Court's first option, we note that the highest previously calculated margins for Huarong and LMC in the bars/wedges order are 34.00 percent and 27.18 percent, respectively. Thus, an AFA rate selected via either option outlined by the Court must be larger than 34.00 percent and 27.18 percent for Huarong and LMC, respectively.

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 redetermination, the Department has selected as AFA the 47.88 percent calculated for Fujian Machinery & Equipment Import & Export Corporation ("FMEC"), during the 1992-1993 administrative review of the bars/wedges order. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews, 60 FR 49251 (September 22, 1995) ("Final Results of the 92-93 Review"); and Heavy Forged Hand Tools From the People's Republic of China; Amended Final Results of Antidumping Duty Administrative Reviews in Accordance with Court Decision, 65 FR 15615 (March 23, 2000) ("Amended Final Results of the 92-93 Review"). This rate was based upon verified data and has not been judicially invalidated. As discussed below, the 47.88 percent rate satisfies the Court's instruction to select "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." See Huarong III at 22. Lastly, the Court has agreed with the

Department's ability to select as AFA a rate originally calculated for a different respondent, in a different segment of the proceeding. See, e.g., Chia Far Industrial Factory Co., Ltd., v. United States, 343 F.Supp.2d 1344, 1365 ("Chia Far Industrial Factory").

As discussed in Huarong I, 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. See Huarong I at 24-25. The Department finds that it is of overriding importance that we apply the same AFA rate to each company because the behavior of the two companies during the underlying review prevented U.S. Customs and Border Protection ("CBP") from collecting accurate cash deposits on the companies' actual sales, and would have caused the Department to issue assessment rates that do not reflect each company's actual U.S. sales. For a discussion of business proprietary information on this issue, please see Memorandum from Mark Manning, Acting Program Manager, to the File, "Business Proprietary Issues in the Third Redetermination," dated January 26, 2006 ("Business Proprietary Issues Memorandum").

Corroboration of the AFA Rate

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

The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. The courts have stated that "{b}y requiring corroboration of AFA rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." See F.Lli De Cecco Di Filippo Fara S. Martino S.p.A., v. U.S., 216 F.3d 1027, 1034 (Fed. Cir. 2000) ("F.Lli De Cecco"). Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

Concerning reliability, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses as total AFA a 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. See Amended Final Results of the 92-93 Review; and Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Reviews, 60 FR 19723, 19724 (April 20, 1995) ("Preliminary Results of the 1992-1993 Review") ("Verification of the questionnaire responses of FMEC and SMC was conducted between June 24, 1994, and July 5, 1994...."). 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. Therefore, we consider this rate to be reliable.

As to the relevance of the AFA rate, the Court has stated that Congress "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." See F.Lli De Cecco, 216 F.3d at 1034. The Department considers information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the selected margin and determine an appropriate margin. See e.g., Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review, 61 FR 6812 (February 22, 1996).

We believe that in Huarong Redetermination II we satisfactorily corroborated the relevance of the 139.31 percent rate applied as AFA to Huarong and LMC. Nevertheless, the Court in Huarong III disagreed with our corroboration of the relevance of this rate. In accordance with Viraj Group, Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003), we respectfully note our disagreement with the Court's finding that the Department did not adequately demonstrate the relevance of the 139.31 percent rate. Viraj, 343 F.3d at 1376 (appellate court expressly indicated that it is incumbent upon the Department to note when there is disagreement with a Court's conclusion). However, pursuant to the Court's instruction, we have selected a new rate as AFA, 47.88 percent, and have followed the Court's instruction to corroborate the relevance of the new rate.

In Huarong Redetermination II, the Department noted that the 139.31 percent rate selected as AFA was calculated for another PRC respondent, Tianjin Machinery Import & Export Corporation ("TMC"), in the immediately preceding (eighth) administrative review for the bars/wedges order. We further stated that because this rate was calculated in the immediately preceding review, it reflects recent commercial activity by Chinese exporters. See Huarong Redetermination II at 4. We concluded by stating that "{t}hese facts alone establish that this rate has some relationship to commercial practices in the industry – indeed recent commercial practices – and are a strong indication of the relevance of this information" to Huarong and LMC. Id. The Court disagreed with the Department's analysis by stating "{Commerce} seeks to justify the rate as having some relationship to the Companies' industry – rather than the Companies themselves." See Huarong III at 10. The Court states "there is no indication that Commerce has sought to select a rate that bears a rational relationship to the Companies themselves." Id. at 12. We respectfully disagree with the Court that the Department did not explain the relevance of the selected rate to Huarong and LMC. In Huarong Redetermination II, we noted that the recently calculated rate of another respondent provides value to our analysis because it illustrates recent commercial activity in the market in which Huarong and LMC both sold. The Department did not state that TMC's recent commercial behavior is, by itself, a sufficient basis for demonstrating the relevance of the rate to Huarong and LMC. Instead, we stated that TMC's commercial behavior is a "strong indication of the relevance of this information." See Huarong Redetermination II at 4. Relevance is determined by the totality of our analysis, which as discussed below, also includes consideration of transaction-specific margins and volatility.

The Court has accepted in past cases the commercial behavior of other respondents as evidence supporting a conclusion that a rate selected as AFA is relevant to the respondent receiving AFA. In Ferro Union, Inc. v. United States, the Court did not disagree with the Department's definitions of "relevancy" as meaning "that the prior margin should reflect the sales practices of the industry under examination." See Ferro Union, Inc. v. United States, 44 F.Supp.2d 1310, 1334 (1999) ("Ferro Union"). Further, the Court noted in Ferro Union that "Commerce has rejected prior margins which are not reflective of an industry's sales practices." Id. (citing Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996) (rejection of a rate because it was "unrepresentative of the other companies in that review, and by extension, of the entire flower industry"); Extruded Rubber Thread From Malaysia; Final Results of Antidumping Duty Administrative Review, 63 FR 12752, 12763 (Mar. 16, 1998) (applying same rationale, but concluding that a calculated rate did reflect business practices of rubber thread industry)). In Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F.Supp.2d 1339, 1346 (CIT 2005), the Court held that the Department possesses the discretion to select the highest margin, and, from the cases cited by the Court, it is clear that the Court understood the highest rate is the highest margin for any company, not just the respondent, so long as it bears some relationship "to past practices in the industry in question." In World Finer Foods, Inc. v. United States, 24 CIT 541, 548 (2000) ("World Finer Foods"), although rejecting the Department's corroboration, the Court explained that "Commerce shall determine a margin that, although adverse, bears some rational relationship to the current level of dumping in *the industry* and shall provide proper corroboration explaining the probative value of the data used in determining the adverse facts available margin." (Emphasis added.) Further, the Court of Appeals for the Federal Circuit ("CAFC") stated that the industry should be taken into consideration when it stated, "Commerce is in the best position, based upon it expert knowledge of the *market* and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." (Emphasis added.) See F.Lli De Cecco, 216 F.3d at 1032.

Thus, the Court has acknowledged that margins calculated for other respondents in other review periods do provide evidence as to the commercial behavior exhibited by the industry, and that this information can support a conclusion regarding the relevance of the selected AFA rate to the respondent in question, who is part of that industry. For this redetermination, we have selected as AFA the 47.88 percent rate. We note that, in the underlying review, this rate was assigned to the PRC-wide entity and to TMC, FMEC, Shandong Machinery Import & Export Corporation. In the eighth review, this rate was not assigned to the PRC-wide entity because it was replaced by the higher 139.31 percent rate. The 47.88 percent rate was also applied to the PRC-wide entity in the seventh administrative review, which occurred two years prior to the underlying ninth review. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Reviews, 64 FR 43659 (August 11, 1999); and Heavy Forged Hand Tools from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review in Accordance with Court Decision, 68 FR 70226 (December 17, 2003). Furthermore, while the Department assigned a rate of 66.32 percent to the PRC-wide entity in the fourth, fifth, and sixth reviews, that rate changed to 47.88 percent, as a result of litigation in the second review. The 47.88 percent rate was applied to three PRC-companies in the seventh review (which is only two reviews prior to the underlying review). The use of the 47.88 percent rate, and corroboration thereof, is evidence that companies in this industry, to which Huarong and LMC belong, recently sold subject merchandise at high rates of dumping and that it is appropriate to continue to apply this rate to uncooperative respondents. For this reason, recent commercial activity by other respondents in the industry, i.e. significant dumping in the U.S. market, supports the application of the 47.88 percent rate to Huarong and LMC, as the plaintiffs are also members of this industry.

In Huarong III, the Court ruled that the Department, in analyzing the relevance of the selected rate, inappropriately compared the selected weighted-average rate of 139.31 percent to the transaction-specific rates calculated for Huarong and LMC in the immediately preceding (eighth) review. The Court stated that "{i}n order for Commerce to carry out its mandate to determine antidumping duty margins as accurately as possible, where the information is available a 'like-kind' comparison is preferred. In other words, if Commerce wished to use the Companies' sales to corroborate the use of the 139.31% weighed-average margin for TMC in the eighth review to the Companies, then the preferred method would be to use the Companies' own weighted-average margins for the same review." See Huarong III at 17.

Although the Court indicated that it is preferable to compare the weighted-average margin selected as AFA to a weighted-average margin calculated for the respondent in question, the rate selected as AFA represents the Department's best estimate of the weighted-average margin the respondent would have received had it cooperated, including an additional amount to act as a deterrent to future non-cooperation. The weighted-average margin calculated for a cooperative respondent, however, represents the commercial activity of a respondent during a period for which it chooses to cooperate and does not include any built-in increase as a deterrent. While we considered respondents' weighted-average margins calculated in prior reviews in our analysis of what the Plaintiffs would have received had they cooperated, we must also gauge how large a deterrent is needed to be effective. One way to gauge the appropriate size of the deterrent is to examine transaction-specific margins. Accordingly, we respectfully disagree with the Court's conclusion that, in examining the relevance of the selected margin, it is better to compare weighted-average margins.

In reviews during which a respondent does not cooperate, the Department relies upon the "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990) ("Rhone Poulenc"). Because of this well-known rule, respondents will cooperate if they expect to receive a rate lower than the highest previously calculated rate for any respondent, or not cooperate if they anticipate receiving a margin higher than the highest previously calculated rate for any respondent. Even if the respondent doesn't expect to receive the highest calculated rate for any respondent, it will, at a minimum, expect to receive its highest calculated rate, plus a "built-in increase" for deterrence, and make its decision to cooperate on this basis. Therefore, for non-cooperative respondents, a conservative estimate of the lower bound 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 minium, Huarong and LMC would have received dumping margins of 34.00 and 27.18 percent, respectively, had they cooperated. Starting from these margins, the Department must then decide upon an appropriate rate to use as AFA, one that includes a deterrent to future non-cooperation. While there are various ways to gauge the size of the "built-in increase" that should be added to the margin the respondent would have received had it cooperated, one method the Department has used in the past of gauging this "built-in increase" is to look at that respondent's highest transaction-specific margins. 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. Since the selected AFA rate is intended to act as a deterrent to non-cooperation, and the highest-transaction specific margins are one possible method for measuring how large of a "built-in increase" is needed to act as a deterrent, we believe that comparing the highest transaction-specific margins for Huarong and LMC to the various rates that are available to select as AFA is an acceptable methodology to measure the size of this increase. In this case, after examining the transaction-specific margins for the Plaintiffs, we believe that the 47.88 percent rate includes an appropriate increase (i.e., 47.88 - 34.00 = 13.88 percent for Huarong and 47.88 - 27.18 = 20.70 percent for LMC) over Huarong and LMC's highest-calculated rates.

In NSK Ltd. and NSK Corporation, et al., v. United States, 346 F.Supp.2nd 1312 (CIT 2004), the Court upheld the Department's corroboration of the selected AFA rate, which was the highest rate calculated for any respondent during any segment of the proceeding. In corroborating the relevance of this rate, the Department used transaction-specific margins of another respondent. In Firth-Rixson Special Steels Ltd. v. United States, Slip Op. 03-70 (June 27, 2003) ("Firth-Rixson") the Court sustained our use of another respondent's sales and cost data to corroborate the sales and cost data contained in the petition, from which the AFA rate was derived. The Court stated that "Commere found the petition data to be 'in the range' of the unverified data provided by Corus and therefore of 'probative value.'" In Hyundai Elec. Indus. Co., Ltd. v. United States, Slip Op. 05-105 (Aug. 25, 2005) ("Hyundai Elec."), the Court considered Commerce's use of "the highest non-aberrational margin calculated for" the respondent's "U.S. transactions" as an AFA rate during the POR. Quoting Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330 (Fed. Cir. 2002) ("Ta Chen"), the CIT held that, when we use a respondent's own data, the Department possesses a broad discretion in selecting an AFA rate, "even if the selected rate is reflective of only a small proportion of the respondent's sales." Indeed, in Branco Peres Citrus, S.A. v. United States, 173 F.Supp.2d 1363 (CIT 2001) ("Branco Peres Citrus"), the Court considered the Department's use of the "single highest transaction-specific dumping margin" as an AFA rate, and the Court sustained our rate, rejecting plaintiff's argument that we should have used a weighted-average dumping margin, as is our practice. Using a respondent's transaction-specific margins to corroborate an AFA rate is as reasonable as using such margins as an AFA rate in the first instance.

In Huarong Redetermination II, the Department examined the companies' transaction-specific margins in the most recently completed review in order to gauge how high above their highest calculated weighted-average margin the selected AFA rate needs to be in order to act as an effective deterrent. We found that 16 percent of Huarong's transaction-specific margins were positive (i.e., greater than zero), and that all of these positive transaction-specific margins were very high.[3] See Huarong Redetermination II at 5. For additional discussion of these business proprietary margins, please see Business Proprietary Issues Memorandum. For this redetermination, we find that selecting 47.88 as the AFA rate is relevant to Huarong for the following reasons: (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.

Concerning LMC, we note that 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. See Huarong Redetermination II at 5. For additional discussion of these business proprietary margins, please see Business Proprietary Issues Memorandum. As mentioned in the "AFA Rate Selected" section above, the 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 a further discussion of the importance of applying the same

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[3] In Huarong II and Huarong III, the Court described Huarong's and LMC's positive-margin transactions as "aberrational." The Department reviewed the sales by Huarong and LMC during the underlying administrative review and did not find any of them to be aberrational, nor did any party ever allege that any of these transactions are aberrational in any way. In Huarong Redetermination II, we specifically noted that we reviewed Huarong's and LMC's positive-margin transactions and found all of them to be made in commercial quantities. Moreover, the fact that 16 percent and 21 percent of Huarong's and LMC's transaction-specific margins, respectively, were high demonstrates that high margins were not an isolated event in the companies' sales. The Court did not explain why it considered these sales as "aberrational", except for the fact that these transaction-specific margins are high. However, just because a calculated margin is high does not make it aberrational. For these reasons, we respectfully disagree with the Court's description of Huarong's and LMC's transaction-specific margins as "aberrational".

AFA rate to LMC and Huarong, please see Business Proprietary Issues Memorandum. 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. For these reasons, the transaction-specific margins are evidence that the 47.88 percent rate is relevant to LMC and provides the appropriate deterrent to future non-compliance.

In Huarong Redetermination II, the Department reviewed the margins calculated in prior segments of the bars/wedges order and found that the volatile nature of these margins demonstrates the appropriateness of applying an AFA margin that is a five-fold increase from the margins calculated for Huarong and LMC in the immediately preceding 1998-1999 review. The Court, however, disagreed with our conclusion that the volatility was sufficient to demonstrate the relevance of a five-fold increase.[4] Moreover, the Court suggested the Department's analysis of volatility should be tied to the volatility of Huarong and LMC's rates. Because we believe it is reasonable to examine the historic volatility of margins, the Department respectfully disagrees with the Court's conclusion that the volatility of the historic margins calculated for Huarong and LMC, in addition to the other respondents that have participated in the bars/wedges order, does not demonstrate the relevance of the 139.31 percent AFA rate. We continue to believe that examining the experience of the entire industry, including respondents other than the respondents receiving AFA, is an appropriate avenue for determining the relevance of the selected rate. Neither section 776(c) of the Act nor the SAA defines how the Department should corroborate the relevance of the margin selected as AFA. Further, the Court has stated that "{b}y requiring corroboration of AFA rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." See F.Lli De Cecco, 216 F.3d at 1034.

The Department notes that margins calculated for Huarong and LMC in the bars/wedges order have varied widely from year to year.[5] Huarong's sales of bars/wedges were first reviewed in the 1996-1997 administrative review, when it received a calculated rate of 34.00 percent. See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 63 FR 16758

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[4] In discussing its finding that the historic changes do not justify an increase of 110 percentage points, the Court, in part, points to the margins calculated in the subsequent tenth review of the bars/wedges order and notes that the companies received comparatively low rates. We believe that it is inappropriate to include margins calculated in reviews subsequent to the underlying review in the corroborating analysis. See National Candle Assoc. v. United States, 366 F. Supp.2d 1318 (CIT 2005) (citing Torrington Co. v. United States, 786 F.Supp. 1027, 1029 (CIT 1992)).

[5] All cited margins are the final weighted-average margins calculated for the respondents after the conclusion of litigation.

(April 6, 1998). In the 1997-1998 review, Huarong's margin decreased 27-fold, to 1.27 percent. In the following review period, 1998-1999, Huarong's margin increased 21-fold, to 27.28 percent. Given the large swings in Huarong's rate, it is reasonable for the Department to conclude that its rate would have increased at least 1.7-fold from the 1998-1999 rate of 27.28 percent. Moreover, as the 47.88 percent rate is slightly above Huarong's highest calculated rate of 34.00 percent, the Department finds that this rate reasonably reflects a rate that is not punitive in nature. Thus, the volatile nature of Huarong's rates supports selecting 47.88 percent as AFA, in that it represents the rate Huarong would have received had it cooperated, plus a built-in increase as a deterrent. In addition, the 47.88 percent rate is only an increase of approximately 13 percentage points from Huarong's highest calculated rate, and an increase of approximately 20 percentage points from Huarong's rate in the immediately preceding review.

With respect to LMC, we note that LMC's sales of bars/wedges were first reviewed in the 1996-1997 administrative review, when it received a calculated rate of 2.94 percent. In the 1997-1998 review, LMC's margin decreased to 0.00 percent. In the following review period, 1998-1999, LMC's margin increased 27-fold, to 27.18 percent. <u>See</u> <u>Amended Results of 1998-1999 Review Pursuant to Court Decision</u>. Although LMC does not have as long a history of volatile changes in its margins, we find that incurring a 27-fold increase in its calculated margin in the immediately preceding review period demonstrates that LMC's margin is susceptible to large changes. Therefore, we find that LMC's recent history of a 27-fold increase in its margin demonstrates the relevance of selecting 47.88 percent as AFA, since this is only a 1.7-fold increase from the 1998-1999 rate of 27.18 percent. Given the large swing in LMC's rate in the preceding review, it is reasonable for the Department to conclude that LMC's rate would have increased at least 1.7-fold. Thus, the volatile nature of LMC's rates supports selecting 47.88 percent as AFA, in that it represents the rate LMC would have received had it cooperated, plus a built-in increase as a deterrent. In addition, the 47.88 percent rate is only an increase of approximately 20 percentage points from LMC's highest calculated rate, which is also the rate from the immediately preceding review.

In sum, we find that the selected rate of 47.88 percent is reliable because it is a calculated rate based upon verified data that has not been judicially invalidated. We also find that the selected rate of 47.88 percent for bars/wedges is relevant to Huarong and LMC for the following reasons, considered in totality: (1) commercial activity in the immediately preceding review where another respondent, TMC, received a high rate of dumping indicates that application of a high AFA rate is necessary to provide an effective deterrent to non-compliance; (2) the 47.88 percent rate is an active rate that was applied to the PRC-wide entity and other respondents in the last five reviews; (3) the fact that both Huarong and LMC had transaction-specific margins in the immediately preceding review that are well above the rate selected as AFA and that there is no other rate greater than 47.88 percent but less than the range of transaction-specific margins; (4) the fact that Huarong and LMC have experienced significant volatility in their calculated margins indicates that an approximate two-fold increase in their margin is appropriate; and (5) applying the 47.88 percent rate as AFA represents an increase in Huarong and LMC's margins by 14 and 21 percentage points, respectively, where these increases are not so large as to be considered punitive by the Court. Therefore, based on the above, we have corroborated this rate, to the extent practicable, in accordance with section 776(c) of the Act.

SEPARATE RATES FOR HUARONG AND LMC

The Court ordered the Department to issue separate AFA rates for Huarong and LMC. Accordingly, the applicable dumping margins are:

Shandong Huarong General Group Corporation bars/wedges...	47.88%
Liaoning Machinery Import & Export Corporation bars/wedges...	47.88%

INTERESTED PARTIES' COMMENTS

Comment 1: Ames disagrees with the Court's finding that the Department did not adequately corroborate the 139.31 percent rate selected as AFA.

Ames states that it respectfully disagrees with the following findings made by the Court in Huarong III: (1) that the Department did not adequately demonstrate or explain the relevance of the 139.31 percent margin to Huarong and LMC; (2) that Congress intended for an adverse facts available rate to be a reasonably accurate estimate of a specific company's actual rate; (3) in examining the relevance of the selected margin, that it is preferable to compare the weighted-average margin selected as AFA to a weighted-average margin calculated for the respondent in question.

Ames remains concerned that the rate chosen by the Department is not sufficiently high as to discourage the plaintiff companies from a return to the behaviors that led the Department to apply AFA in the underlying review. Ames states that Huarong engaged in misreporting aimed at persuading the Department that many of its U.S. sales were instead sales to another Chinese company. Ames continues, stating that despite clear instructions in multiple questionnaires aimed at eliciting correct information, Huarong continued to withhold crucial information, compromising the investigation. Ames contends that Huarong failed to provide requested documents at verification, such that the Department was unable to complete verification. Those portions of verification that were completed showed that the commercial reality of Huarong's business differed significantly from the information reported to the Department. In addition, Ames states that LMC also engaged in behavior meant to mislead the Department regarding its sales. Ames contends that LMC reported the sales of another company as its own, a behavior that can only be seen as a willful attempt to sabotage the Department's mandate to calculate an accurate rate. Ames states that LMC appears to have acted as the "agent" of another PRC enterprise, effectively renting its dumping rate to another exporter. Ames asserts that LMC withheld information even after multiple questionnaires, and refused to provide the Department with requested documents at verification. Ames concludes that both plaintiffs engaged in behavior that was not merely non-compliant, but specifically targeted at convincing the Department to accept information that the plaintiffs knew to be false, and designed to defeat the discipline of the orders.

Ames states that although the Court emphasized that the Department must beware of applying a punitive rate, the rate chosen by the Department must be such that the plaintiffs do not benefit from their noncompliance, and will effectively be dissuaded from non-compliance in the future. Ames remains of the opinion that the rate chosen by the Department in its prior remand determination in this case, 139.31 percent, is justifiable on the facts of this case, is in conformity with the statute, is sufficiently high to negate the benefits of the plaintiffs' improper behavior, and is not punitive given the fraudulent behavior of the plaintiffs. Ames respectfully disagrees with the Court's ruling in this case, which Ames contends appears to undercut its own prior precedent on the Department's practice, where warranted, of selecting the highest margin determined in the proceeding for any respondent, to corroborate it to the extent practicable, and to apply it to uncooperative respondents. <u>See</u>, <u>e.g.</u>, <u>Chia Far Industrial Factory</u>.

In rebuttal, the Plaintiffs strongly object to Ames' allegation that the 139.31 percent rate is justifiable as the AFA rate because of the Plaintiffs' "willful misconduct" displayed during the underlying review. It is the plaintiffs' continued position that the application of AFA was unwarranted and contrary to law. According to the Plaintiffs, the record demonstrates that both companies cooperated with the Department throughout the proceeding by answering all of the Department's questionnaires and cooperating fully during the verification. The Plaintiffs state that the Department successfully verified the Plaintiffs' data, with only a small number of discrepancies. Aside from four unreported sales by LMC, which were unreported due to change in the date of sale methodology, the Department found no unreported sales or misreported sales. The Plaintiffs contend that, despite Ames' allegations to the contrary, neither company sought to mislead the Department's verifiers but rather offered them corrections to prior submissions at the beginning of verification, and tried to comply with every request for documents and/or information. Accordingly, the Plaintiffs contend that there was no basis to resort to AFA. Lastly, with respect to Ames' characterization of the Plaintiffs' responses as "willful misconduct," the Plaintiffs strenuously disagree. According to Plaintiffs, Ames has provided no evidence to support such an allegation, and neither the Department nor the Court has characterized Plaintiffs' behavior as "willful misconduct." The Plaintiffs state that Ames' attempt to justify the selection of a rate higher than 47.88 percent on the basis of this characterization must fail.

However, the Plaintiffs acknowledge that the Court upheld the Department's application of AFA. The Plaintiffs advocate that the Department select as AFA the highest previously calculated rate for each company – namely, 34.00 percent for Huarong and 27.18 percent for LMC, plus an unspecified, added increase to deter future non-compliance. The Plaintiffs conclude by stating that the Department has not adequately corroborated the selected 47.88

percent rate, and that the record evidence does not support the application of the 47.88 percent rate because the companies cooperated to the best of their abilities.

Department's Position:

Although the Department has complied with the Court's order to no longer utilize the 139.31 percent rate, we agree with Ames that the Court's precedent in Chia Far Industrial Factory is applicable in this case. The 139.31 percent AFA rate previously assigned by the Department in Huarong Redetermination II was satisfactorily corroborated and is justifiable given that Plaintiffs significantly impeded the completion of the administrative review. Regardless of motivation or intent, the effect of the Plaintiffs' behavior is to impede the review and erode the effectiveness of the dumping order.

In regard to the Plaintiffs' contention that the Department had no basis to resort to AFA, as they had complied with all of the Department's requests, we disagree. The Court has ruled with respect to the Plaintiffs' failures in the underlying review, and found that the failures warranted the application of AFA. In Huarong I at 34-37, the Court affirmed the Department's determination that the administrative record showed that Huarong and LMC did not make their maximum effort to respond to the Department's questionnaires; indeed, the sales records produced at verification demonstrated their questionnaire responses were inaccurate. In addition, the Court affirmed the Department's determination that Huarong did not do everything possible to substantiate its use of factor of production "caps," because it did not retain the worksheets upon which the caps were based, or make any effort to replicate them during the Department's verification. As a result, the Court affirmed the Department's determination that Huarong and LMC failed to act to the best of their abilities, and found that the Department satisfied the statutory requirements for the use of adverse inferences as articulated by the CAFC in Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Id.

Comment 2: Ames states that the 47.88 percent rate selected as AFA is not high enough to deter future non-compliance.

Ames states that while the Department's chosen rate of 47.88 percent might be high enough to negate the benefit of the Plaintiffs' actions by placing them on an even field with the "all-others" from whom or to whom they might "rent" their rates, it does not create an additional guarantee of future compliance that attends a non-punitive "build-in increase." Accordingly, the Department should increase the 47.88 percent rate to create the guarantee of future compliance. Ames requests that the Department select an AFA rate that is more consistent with its own precedent, Congressional guidance as indicated in the Statement of Administrative Action, and prior court precedent.

Ames states than one alternative approach is to select as AFA the highest transaction-specific rate, 120.53 percent. According to Ames, this approach is consistent with the Department's precedent and prior Court rulings, although Ames acknowledges that the Court in

Huarong III does not appear to endorse this approach. Ames states that a second alternative approach could be to select as AFA a rate from the petition. In the initiation of the antidumping duty investigation on heavy forged hand tools from the People's Republic of China, the Department found a rate for bars and wedges of between 11.8 percent and 65 percent. Consistent with the Court's instructions, Ames claims that the Department could employ the highest of such rates, 65 percent, and add any number of benchmark rates as the "additional amount," such as the highest, calculated rates for each company. Were the Department to use the petition rate of 65 percent, or the Plaintiffs' highest calculated rates, with an additional increase to ensure compliance, the resulting rate would not only comply with the Court's instructions, but would not allow Plaintiffs to benefit by their noncompliance, according to Ames. Lastly, Ames explains that assigning the Plaintiffs' highest calculated rates as AFA would not be sufficient so as to prevent the Plaintiffs from "renting their rates." In fact, Ames notes that since the highest calculated rates are much lower than the rate assigned to the PRC-wide entity, 47.88 percent, assigning these rates would likely provide an incentive for these firms to continue renting their rates.

Ames contends that none of the rates it has suggested would run afoul of Rhone Poulenc. According to Ames, it is uncertain that the rationale in Rhone Poulenc, that the company's highest prior margin is the most probative evidence of current margins because the company would have produced current information showing the margin to be less, should apply where the respondents were not merely non-responsive, but engaged in willful misconduct. Ames states that any rate the Department chooses must be sufficiently high to discourage such behavior.

The Plaintiffs did not provide rebuttal comments on this topic.

Department's Position:

While the petition rate of 65 percent is available for the Department to consider in selecting the appropriate AFA rate, the Court has directed the Department in its remand order to use as AFA either (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. In both choices, the Court instructed the Department to focus on a calculated rate: either use the respondent's calculated rate as a base rate in the first choice, or select a calculated rate that includes the built-in increase in the second choice. Although the Department has selected petition rates as AFA in many past cases, and continues to believe that petition rates are acceptable to use as AFA, petition rates are not calculated rates, but are instead the petitioner's best estimate of the degree of dumping prior to the beginning of an investigation. Based upon the Court's direction to utilize a calculated rate, we believe that the 47.88 percent rate, which is the highest calculated rate (after the 139.31 percent rate) for bars/wedges, is the appropriate rate to select as AFA.

With respect to Ames' recommendation that the Department assign as AFA the highest transaction-specific rate of 120.53 percent, we also believe that assigning transaction-specific rates as AFA is an acceptable methodology, which the Court has previously sustained in Firth-Rixson, Hyundai Elec., Ta Chen, and Branco Peres Citrus. In this case, although the transaction-specific rate is a calculated rate, and meets the Court's instruction to focus on a calculated rate, it is nearly as high as the 139.31 percent rate that the Court prohibited the Department from utilizing. Given the Court's instruction to no longer utilize the 139.31 percent rate, using a rate that is nearly as high could be construed as ignoring the Court's direction regarding the 139.31 percent rate. Therefore, although assigning a transaction-specific rate is an acceptable application of AFA, we will not follow Ames' recommendation.

Comment 3: The Department did not properly corroborate the 47.88 percent dumping rate.

The Plaintiffs argue that the assigned AFA rate should be the highest calculated rates for Huarong and LMC from previous reviews, 34.00 percent and 27.18 percent respectively, plus an added increase as a deterrent to non-compliance, rather than the 47.88 percent rate applied by the Department. The Plaintiffs contend that the Department failed to demonstrate how the Department's 47.88 percent rate, which was calculated for an unrelated company, reconciles with the Court's findings that (1) the selected rate should have some rational relationship to Huarong and LMC themselves and not just the particular bars/wedges industry; (2) the "built-in increase as a deterrent to non-compliance" should be justified; (3) the selection of transaction-specific "aberrational" rates for Huarong and LMC does not provide a "sufficiently probative like-kind comparison" to the chosen AFA weighted-average margin; and (4) the selected AFA rate should not be at odds with granting Huarong and LMC separate rates.

In rebuttal, Ames argues that while the Department did adequately corroborate the use of the 47.88 percent rate as AFA, it is Ames' opinion that this rate is conservative. Ames claims that several other margins are more appropriate, as discussed in its case brief, while still meeting the Court's requirements. See Ames' Rebuttal Comments at 2.

Department's Position:

The Department disagrees with the Plaintiffs. The Department has corroborated the 47.88 rate selected as AFA. As demonstrated in the Corroboration of the AFA Rate section above, this rate is reliable because it was calculated in a prior administrative review, during which the Department examined FMEC's reported U.S. sales and factors of production ("FOP"), and calculated surrogate values from import statistics that are independently collected (i.e., not collected for the purposes of the antidumping duty proceeding). Moreover, we verified FMEC's reported sales and FOP. See Preliminary Results of the 1992-1993 Review, 60 FR at 19724. The rate was upheld following litigation. It is entirely reasonable for the Department to find a margin that it previously calculated to be reliable. As discussed below, we also corroborated the relevance of the 47.88 percent rate to Huarong and LMC based upon the five factors identified in the summary paragraph of the corroboration section above.

We also disagree with the Plaintiffs that the Department did not follow the instructions the Court provided in Huarong III. The Department did, in fact, demonstrate that the selected rate is relevant to Huarong and LMC. See the section Corroboration of the AFA Rate above. We also explained that the selected rate does include a "built-in increase" to deter future non-compliance and justified the degree of "built-in increase" contained in the 47.88 percent rate. Id. With respect to the transaction-specific margins, we note that the Court did not *require* that the Department limit the selection or corroboration of rates assigned as AFA to only calculated, weighted-average rates. Indeed, in other instances, the Courts have upheld our use of transaction-specific margins to corroborate an AFA rate. See NSK Ltd. v. United States, 356 F.Supp.2d 1313 (CIT 2004); Firth Rixson (use of another respondent's transaction-specific margins to corroborate AFA rate selected in investigation). We respectfully disagree with the Court's stated preference for using only weighted-average margins in corroborating the relevance of weighted-average AFA rates. Given that 34.00 percent and 27.18 percent are the highest calculated rates for Huarong and LMC, respectively, and respondents should not benefit from their failure to cooperate, it would be virtually impossible to corroborate the AFA rate using only weighted-average margins. Further, as explained in Footnote 3 above, the quantity of positive-margin transactions examined by the Department was not insignificant. Moreover, they were made in commercial quantities and appear to be typical of the Plaintiffs' ordinary sales in every way. See Ta Chen, 298 F.3d at 1339 (AFA margin corroborated even if sales data used reflects small portion of actual sales). Lastly, as explained in our response to Comment 7 below, the 47.88 percent rate is not at odds with our granting separate rates to the Plaintiffs because the separate rates analysis and selection of the AFA rate are two independent analyses.

Comment 4: The Department did not utilize any measures to verify independently the reliability of the selected 47.88 percent rate.

The Plaintiffs argue that the Department did not utilize any measures to verify independently the reliability of the selected 47.88 percent rate. According to the Plaintiffs, the Department's corroboration of the reliability of the selected rate consisted of simply stating that "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." The Plaintiffs contend that while it is undisputed that the Department's regulation allows reliance on secondary information such as past administrative reviews when drawing adverse inferences, the Department must "corroborate that information from independent sources that are reasonably at the Secretary's disposal." See 19 CFR 351.308(d). The Plaintiffs claim that the Department failed to corroborate using any of the secondary information suggested in the regulations.

The Plaintiffs note that the Department did not use any such independent information when corroborating the 47.88 percent dumping margin because "there are no independent sources for calculated dumping margins." The Plaintiffs claim that the Department's conclusion is unsupported. While there may be no sources to independently corroborate the reliability of the 47.88 percent dumping margin itself, the Plaintiffs contend that the Department had sources that could have been used to corroborate the components used to calculate the dumping margin (e.g., FOP, U.S. prices, and surrogate values). According to the Plaintiffs, the Department has verified data on the Plaintiffs' U.S. sales prices and production data for the underlying review, in addition to Indian import statistics for the underlying POR. The Plaintiffs conclude that it would not have been burdensome for the Department to consult these sources in order to satisfy its obligation to corroborate the margin.

In rebuttal, Ames argues that both Huarong and LMC failed verification. In Ames' opinion, Congress did not intend that data from a failed verification be used to corroborate AFA information. See Ames' Rebuttal Comments at 3. Moreover, Ames notes the Department, in its Draft Redetermination, cited several cases in which the Court stated that the AFA rate does not have to be corroborated by data of the respondent receiving the AFA. Id. at 4, citing Draft Redetermination at 6-7. Ames notes that as recently as 2004, the Court accepted the use of an AFA rate derived from the calculated, verified rate granted a separate company in an earlier segment of a proceeding, citing Chia Far Industrial Factory. Based upon numerous Court decisions over the years, Ames disagrees with the Plaintiffs that there is a requirement that the AFA rate be corroborated by the FOP data provided by Huarong and LMC.

Department's Position:

We disagree with the Plaintiffs. The Department's regulations state, "when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal." See 19 CFR 351.308(d). To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. With respect to reliability, the Department must satisfy itself that this rate is the result of a reliable calculation. (The relevancy analysis must then determine whether the prior rate is relevant to the respondents in the instant review.) However, the inclusion of the phrase "to the extent practicable" and the use of the word "reasonably" in 19 CFR 351.308(d) clearly indicates that, in certain circumstances, there will exist limitations in the Department's ability to corroborate the reliability (and relevance) of the secondary information being used as AFA.

As indicated in the Draft Redetermination, it is the Department's practice to find calculated rates from prior segments of the proceeding to be reliable as there are no independent sources for calculated dumping margins. The Plaintiffs contend that this assumption does not satisfy our responsibility to corroborate the reliability of the selected rate. The Plaintiffs' argument, however, ignores the fact that, in calculating the rate selected as AFA, the Department examined the price and FOP data submitted by FMEC, issued supplemental questionnaires to correct deficiencies, and verified the accuracy and completeness of the reported data. In other words, the Department performed all of the normal analyses involved in calculating a dumping margin for a cooperating respondent. As noted in the Draft Redetermination, this rate has not been judicially invalidated. In essence, Plaintiffs are suggesting that the Department question its own prior calculations as possibly unreliable, inaccurate, and invalid margins. It is, however, entirely reasonable for the Department to find its own prior calculations to be reliable. Indeed, the Department's decisions are presumed accurate unless there is a final and conclusive court decision to the contrary. See The Timken Company v. United States, 893 F. 2d 337 (Fed. Cir. 1990). As noted earlier, since the selected rate has been judicially validated, there is no court decision that calls into question the rate now being selected as the AFA rate. See Olympia Indus., Inc. v. United States, 36 F. Supp. 2d 414 (CIT 1999).

The Plaintiffs recommend that the Department separately corroborate the reliability of the three components that constitute FMEC's 47.88 percent rate: U.S. sales, FOP data, and surrogate values. Specifically, the Plaintiffs advocate that the Department compare FMEC's U.S. prices and FOP data, in addition to the surrogate values used in the 1992-1993 review, to the Plaintiffs' U.S. prices and FOP data reported in the underlying review, and the surrogate values from the underlying review. However, contrary to Huarong and LMC's assertions, both Huarong and LMC failed their respective verifications. Based upon these verifications, the Department found, and the Court upheld, that each company failed to act to the best of its ability in providing accurate and complete sales and FOP data. Under such circumstances, it is not reasonable for the Department to use the information it was unable to verify to corroborate. See Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F.Supp. 2d 1339 (CIT 2005) (upholding refusal to use preliminary margin, where underlying information ultimately rejected). Accordingly, even if the Department re-evaluated the surrogate values, which relate to normal value, there is still no practicable way to separately corroborate the U.S. sales component of the dumping calculation. Further, with respect to the surrogate values, we note that the Department calculated the surrogate values used in the 1992-1993 and underlying reviews using Indian import statistics, which are independent statistics not collected for use in the antidumping duty proceeding. Comparing them to the surrogate values used in the underlying review would speak more toward relevance, rather than reliability, which is what the Plaintiffs have challenged.

Comment 5: The Department's selection of an AFA rate of 47.88 percent for an unrelated company fails to satisfy the Court order which specifies that the companies' rates be taken into account.

The Plaintiffs assert that the Department has not corroborated the relevance of the 47.88 percent rate, which was calculated for FMEC and applied as AFA to Huarong and LMC. The Plaintiffs observe that the Department, in its Draft Redetermination, argued that: (1) margins calculated for other respondents in recent review periods do provide evidence as to the commercial behavior exhibited by the industry, and that this information can support a conclusion regarding the relevance of the selected AFA rate to the respondents in question, and (2) the 47.88 percent rate is relevant to the industry because it was applied to the PRC-wide entity and other PRC exporters in several recent administrative reviews. The Plaintiffs contend that the Court, however, made it clear in its analysis of Ferro Union and Ta Chen that each assigned AFA rate must bear a rational relationship to the individual company itself. Accordingly, the Plaintiffs argue that the Department's position is inadequate and selective, and the Department improperly used FMEC's prior dumping rate as a benchmark for Huarong and LMC. The Plaintiffs contend that, when applying FMEC's experience in the 1992/1993 review to Huarong and LMC for the 1999/2000 review, the Department failed to consider that: (1) the product mix for Huarong and LMC was different from that for FMEC in the 1992/1993 review, and (2) the steel surrogate values for the 1992/1993 review were different from those for the 1999/2000 review. According to the Plaintiffs, the Department should consider the two factors listed above before applying FMEC's dumping margin as AFA.

In rebuttal, Ames argues that Congress, in describing the purpose of the corroboration requirement under 19 U.S.C. 1677e(b), did not require that information for an adverse margin must be corroborated with respect to particular producers. See Ames' Rebuttal Comments at 2. Ames respectfully disagrees with the Court that the statute or the SAA require the AFA rate to be tied directly to the respondent receiving the rate. Id. at 4. In corroborating secondary information, Ames contends that the Department is charged only to ensure that the secondary information to be used has probative value in general, and not that it be somehow tied directly to the particular respondents at issue. According to Ames, the rate used by the Department was both calculated and verified, and therefore is fully corroborated. Id. at 3.

With respect to the factors that the Plaintiffs put forward as demonstrating the inapplicability of the AFA rate to their particular market situation, Ames claims that these arguments are specious. According to Ames, it is to be expected that the product mix for the Plaintiffs and FMEC, in addition to the steel surrogate value, will be different. According to Ames, such differences are irrelevant to the question of whether the rate is adequate for use as AFA. Id. at 4. Ames reiterates that the Court has accepted on numerous occasions AFA rates that were calculated for other respondents, in prior segments of a proceeding, despite the fact that there will always be differences in the market situation of different respondents. Accordingly, Ames concludes that these arguments have no merit.

Department's Position:

We agree with Ames that the arguments made by the Plaintiffs that the Department must take into account the differences in product mix and FOP between the source of the secondary information and the data reported by the Plaintiffs are without merit. Section 776(c) of the Act does not establish how, or to what degree, the Department shall corroborate secondary information. As the Court has consistently recognized, in selecting an AFA rate, it is not incumbent upon the Department to replicate the non-cooperating respondent's business. See, e.g., Nat'l Candle Assoc. v. United States, 366 F.Supp.2d 1318 (CIT 2005) ("Court is aware of no statute or regulation requiring Commerce to apply product-specific margin," i.e., one based upon the precise type of merchandise produced by the non-cooperating respondent); Reiner Brach GMBH & Co. KG v. United States, 206 F.Supp. 2d 1323, 1338 (CIT 2002) (rejecting attempt to distinguish respondent as possessing "greater manufacturing capabilities as well as a different product line and different annual sales revenue"). In calculating a dumping margin, the Department examines U.S. sales of subject merchandise, which constitute a single class or kind of merchandise. See Department's Position at Comment 2. The class or kind of merchandise is defined broadly enough to account for sales of different models and products within the same category of goods. In the underlying review, the class or kind of merchandise is bars and wedges. As long as the secondary information obtained from FMEC (i.e., its dumping margin) under consideration for use as AFA is drawn from the bars and wedges class or kind of merchandise, the Department can appropriately apply that information to the Plaintiffs. The 47.88 percent rate was calculated for FMEC's sales of bars and wedges, and therefore is appropriate to use as AFA. Moreover, as explained above, and further in response to Comment 6 below, we determined the relevance of the 47.88 percent margin to both Huarong and LMC.

Comment 6: The Department's use of transaction-specific margins fails to (1) justify the "built-in increase as a deterrent to non-compliance" and (2) follow the Court's preferred "like-kind" comparison method.

The Plaintiffs characterize the Department's analysis by stating that the Department first selected an AFA rate of 47.88 percent, reviewed the transaction-specific margins to determine how much to add to this rate to act as a deterrent to future non-compliance, but failed to actually increase the rate above 47.88 percent. According to the Plaintiffs, the Department provided no justification for a deterrent amount because it failed to separate the rate from the deterrent amount. Accordingly, the Plaintiffs contend that it is unclear exactly how the transaction-specific margins are relevant to gauging the appropriate size of the deterrent.

The Plaintiffs also argue that the Department's corroboration of the 47.88 percent rate by examining transaction-specific margins disregards the Court's finding that the preferred method would be to use the companies' own weighted-average margins for the same review from which the AFA rate originated, a "like-kind" comparison. According to the Plaintiffs, the Court held in Huarong III that the Plaintiffs' transaction-specific rates do not provide a sufficiently probative like-kind comparison to the weighted-average margin selected as AFA to satisfy the substantial evidence requirement, and that the transaction-specific margins identified by the Department are aberrational sales. The Plaintiffs contend that, instead of following the Court's preferred method, the Department used the transaction-specific margins to gauge how large of a deterrent is needed. The Department bolstered its approach by citing Hyundai Elec. and Branco Peres Citrus.

The Plaintiffs claim that Hyundai Elec. is distinguishable from the underlying review because, in Hyundai Elec., "the Court considered the Department's use of the highest non-aberrational margin calculated for the respondent's U.S. transactions as an AFA rate during the POR." See Plaintiffs' Remand Comments at 14, citing Draft Redetermination at 9. The Plaintiffs state that, in Huarong III, the Court found that transaction-specific margins identified by the Department are aberrational and do not reasonably corroborate the weighted-average rate selected as AFA. According to the Plaintiffs, it follows from this reasoning that Plaintiffs' highest aberrational sales are not appropriate to calculate the AFA rate. The Plaintiffs also assert that Branco Peres Citrus is also distinguishable from the underlying review. In Branco Peres Citrus, the Department used the Plaintiff's single highest transaction-specific margin because the application of a weighted-average dumping margin would have allowed Plaintiff to benefit from its non-cooperation. The Court in Branco Peres Citrus acknowledged, however, that "the selection of a party's highest transaction-specific rate may not in every case be reasonable." The Plaintiffs contend that, due to the Department's failure to justify the use of transaction-specific margins to calculate the appropriate deterrent for the AFA rate with substantial evidence, the companies' highest calculated weighted-averages margins from prior reviews should prevail.

In rebuttal, Ames agrees with the Plaintiffs that the 47.88 percent rate does not meet the Court's requirement that the rate chosen as AFA include a "built-in increase as a deterrent to noncompliance." See Ames' Rebuttal Comments at 4, citing Plaintiffs' Remand Comments at 9-10. Ames states that, in its opinion, the AFA rate selected by the Department should be such as to have the intended deterrent effect, and that the 47.88 percent rate chosen by the Department does not appear to include this "increase". Ames continues by noting that the Plaintiffs have mischaracterized how the Department used the transaction-specific rates in the Draft Redetermination. It appears to Ames that the Department argued in the Draft Redetermination that the highest transaction-specific rate can be indicative of what kind of "built-in increase" might be justified as an incentive to future compliance. While Ames agrees with the Plaintiffs that it does not appear that an "increase" was added to the base rate for AFA in this case, we believe that the highest transaction-specific margin would provide an appropriate reference for what such an increase should ultimately be.

Department's Position:

The Department disagrees with the Plaintiffs. As an initial matter, we note that the Plaintiffs have misunderstood the Department's methodology and analysis contained in the Draft Redetermination. The Department did not intend to add an additional increase to the AFA rate of 47.88 percent to act as a deterrent to future non-compliance. Rather, the "built-in increase" is included within the 47.88 percent, as this rate is above the Plaintiffs' highest, previously calculated rates. As discussed above, the Department, in this case, began with a conservative estimate of what the margins would have been had the Plaintiffs cooperated – namely, their highest, previously calculated dumping margins. To use those margins as the AFA rate, as Plaintiffs suggest, would allow them to benefit from their failure to cooperate. Accordingly, to arrive at an AFA rate, we then reviewed the Plaintiffs' transaction-specific margins from the eighth review in order to judge how high above the highest calculated rates the selected AFA rate should be in order to provide an incentive for future compliance. The Department reviewed all of the previously calculated weighted-average margins for bars/wedges from any respondent and, based upon the transaction-specific margins and other factors identified above, selected the 47.88 percent rate. By reviewing the positive transaction-specific rates calculated for Huarong and LMC, in conjunction with our analysis of the historic volatility of rates for bars/wedges and the experience of dumping within the industry (to which the Plaintiffs belong), we reasonably concluded that 47.88 is a reasonable estimate of the Plaintiffs' rates with a "built-in increase," and, thus, the selected rate is relevant to Huarong and LMC.

Regarding the Plaintiffs' argument that the Department did not follow the Court's preferred analysis, that a weighted-average AFA rate should be compared only to other weighted-averages rates for corroboration purposes, as noted above, we disagree with the Court's reasoning. However, in Huarong III, the Court did not mandate a weighted-average to weighted-average comparison. Rather, the Court expressed only its preference for this methodology. Given that section 776(c) of the Act does not establish the specific methodology the Department should use in corroborating secondary information, the Department is free to use any reasonable methodology in order to demonstrate that the secondary information is reliable and relevant. Although the Department's position is that the Plaintiffs' failure warrants the highest margin on the record of the proceeding as AFA, the Court's order has constrained the Department from selecting the highest margin. As there are only a limited number of weighted-average margins on the record of the proceeding, there frequently may not be a weighted-average margin available for the Department to use for corroboration in every instance. In this case, we have used the Plaintiffs' positive transaction-specific margins to corroborate the relevance of the 47.88 percent rate. Since the Court in past cases has accepted the use of transaction-specific margins as the actual AFA rate, it is certainly reasonable to use transaction-specific margins for corroboration purposes. See Branco Peres Citrus.

Comment 7: The Department's use of 47.88 percent rate as AFA disregards the Court's previous decision that Huarong and LMC receive separate rates.

The Plaintiffs assert that it is already established that Huarong and LMC should receive separate rates. The Plaintiffs contend that the Department should not now be allowed to select the AFA rate of 47.88 percent, which the Department characterizes as the rate for bars/wedges for FMEC in the 1992/1993 review, when in reality the Department is actually applying the PRC-wide entity rate to Huarong and LMC.

Ames did not provide any rebuttal comments on this topic.

Department's Position:

We disagree with the Plaintiffs. Under the Department's "separate rate" practice, the Department will calculate a separate rate for all PRC companies that demonstrate that they are not *de jure* or *de facto* controlled by the PRC government. Granting a separate rate means that a PRC respondent will not receive the PRC-wide rate *per se*. As the Court noted in Huarong I, granting a separate rate has no connection with determining whether the respondent fully cooperated in responding to the Department's requests for sales or FOP information. The Department undertakes a completely different analysis in determining whether a respondent should receive AFA. The Plaintiffs themselves, in their brief to the Court, made this argument. See, e.g., Plaintiffs' July 22, 2002 reply brief at pages 16, 20.

When a respondent fails to act to the best of its ability in complying with a Department request, the Department's normal practice, where warranted, is to apply the highest calculated rate that can be corroborated. In the non-market economy context, the PRC-wide rate is typically an AFA rate against the PRC-wide entity for its failure to cooperate in the Department's investigation or administrative review. It is the Department's practice to apply the highest calculated rate to the PRC-wide entity. It follows, therefore, that when a PRC respondent fails to act to the best of its ability and it is appropriate to apply the highest calculated margin to that respondent, it may receive as AFA the same rate as the PRC-wide entity, because both entities failed to cooperate to the best of their abilities. In this case, the Department applies the 47.88 percent rate to the Plaintiffs, not because they were denied their separate rates and rejoined the PRC-wide entity, but because the 47.88 percent rate was the highest calculated rate (excluding the 139.31 percent rate) in the proceeding that can be corroborated. We note that the Court recognized, and no party challenged, the Department's practice of applying as AFA, the highest calculated rate, which also happened to be the PRC-wide rate, in litigation pursuant to the seventh administrative review of the heavy forged hand tools orders. See Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 276 F. Supp. 2d 1371, 1381 (CIT 2003).

FINAL RESULTS OF REMAND REDETERMINATION

Upon a final and conclusive court decision, the Department will issue amended final review results and liquidation instructions to CBP identifying an antidumping duty rate of 47.88 percent for Huarong's and LMC's exports of merchandise subject to the antidumping duty order on bars/wedges for the period February 1, 1999, through January 31, 2000.

____
David M. Spooner
Assistant Secretary
for Import Administration

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Date