*Tung Fong Industrial Co., Inc. v. United States*
Court No. 01-00070, Slip Op. 04-32 (CIT April 7, 2004)

**Final Results of Redetermination Pursuant to Court Remand**
**Stainless Steel Butt-Weld Pipe Fittings from the Philippines**

**Public Version**

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**Summary**

On April 7, 2004 the U.S. Court of International Trade (the Court) issued an order remanding to the Department of Commerce (the Department) the final determination of the antidumping duty investigation of stainless steel butt-weld pipe fittings from the Philippines. See Tung Fong Industrial Co., Inc. v. United States, (Slip Op. 04-32, CIT April 7, 2004). The investigation covered the period October 1, 1998 through September 30, 1999. The petition was filed on behalf of the domestic industry consisting of Alloy Piping Products, Inc., Flowline Division of Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless, Inc. (petitioners). There were two respondents in the investigation, Tung Fong Industrial Co., Inc. (Tung Fong) and Enlin Steel Corporation (Enlin).

We address herein, in accordance with the Court's directions, the sufficiency of the petition which formed the basis of the Department's initiation of the investigation. Furthermore, in accordance with the Court's instruction, we have utilized Tung Fong's submitted cost data, and have not used adverse facts available.

Please refer to the section of this final redetermination entitled "Final Results of Redetermination" for the revised antidumping duty weighted-average margins that result from the change in computation.

**Background**

On December 27, 2000, we published in the Federal Register the final determination of sales at less than fair value for stainless steel butt-weld pipe fittings from the Philippines for the period October 1, 1998 through September 30, 1999. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings from the Philippines, 65 FR 81823 (December 27, 2000) (Final Determination). We published the antidumping duty order on February 23, 2001. See Antidumping Duty Orders: Stainless Steel Butt-Weld Pipe Fittings from Italy, Malaysia, and the Philippines, 66 FR 11257 (February 23, 2001).

Tung Fong challenged various aspects of our final determination before the Court. On April 7, 2004 the Court remanded the Final Determination to the Department, directing the Department to (1) reconsider the adequacy of the domestic manufacturers' petition, and the consequences of the falsity of their allegations of home market sales by Tung Fong; and (2) reconsider its decision to resort to adverse facts available in calculating Tung Fong's antidumping duty margin and, if appropriate, reevaluate the particular adverse facts selected.

On June 4, 2004 and June 18, 2004 the Department solicited additional information from petitioners. We received petitioners' replies on June 14, 2004 and June 24, 2004. Respondent Tung Fong submitted comments on petitioners' submissions on June 28, 2004.

On July 16, 2004 the Department released its Draft Results of Redetermination Pursuant to Court Remand to Tung Fong and petitioners. We received comments on July 26, 2004. On August 16, 2004 the Department released a second Draft Results of Redetermination Pursuant to Court Remand to Tung Fong and petitioners. We received comments from both parties on August 24, 2004.

## 1. Sufficiency of Petition–Consequences of the Absence of Tung Fong sales during the period of investigation

**Background**

The Court directed the Department to reconsider the sufficiency of the petition that served as the basis for initiating the antidumping investigation. The Court noted that the antidumping margins calculated for Tung Fong in the petition were based on purported home market sales. However, following initiation of the investigation, Tung Fong placed on the record information indicating it had made no home market sales during the period of investigation (POI). Based on this information the Court concluded the petition may have been fraudulent. It writes, "The specter of fraud hangs heavy in the air. At a bare minimum, the record suggests that someone very close to the Domestic Manufacturers was making damaging allegations with full knowledge of their consequences and a reckless disregard for their truth." See Tung Fong Industrial Co., Ltd. v. United States, Court No. 01-00070, Slip Op. 04-32 (CIT April 7, 2004) at 23.

**Analysis**

The Department takes seriously the accuracy of the information upon which it bases antidumping investigations. The legitimacy of the antidumping investigation process requires that high standards of evidence be maintained throughout the entire proceeding, beginning with the petition. Thus, the Department requires that information contained in a petition be adequately supported. Where we find that a petitioner has acted with reckless disregard for the truth when preparing a petition, we will terminate an investigation.

However, the Department distinguishes between the submission of information in which a petitioner has recklessly disregarded the truth and the submission of imperfect information which petitioner believes to be true and which constitutes the best information reasonably available to a petitioner. The statute gives the standard for initiating investigations as follows:

> An antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 731, and which is accompanied by information *reasonably available* to the petitioner supporting those allegations. See 19 U.S.C. 1673a(b)(1). (Emphasis added.)

Thus, the Department does not automatically terminate an investigation simply because, as the investigation developed, information was placed on the record which was found to be inconsistent with some of the information in the petition.[1] The information available to petitioners regarding a foreign competitor's pricing, especially in a foreign market, will almost always be limited, and will rarely match the proprietary information provided by respondents during the case. Therefore, before terminating an investigation there must be concrete evidence that information reasonably available at the time the petition was prepared establishes that the petition is unsupported. Therefore, we determine that the point of inquiry in this case is whether the petitioners acted reasonably and without reckless disregard of the truth when they alleged that Tung Fong had home market sales.

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[1]See Notice of Initiation of Antidumping Duty Investigations: Prestressed Concrete Steel Wire Strand from Brazil, India, the Republic of Korea, Mexico and Thailand, 68 FR 9050 (27 February 2003); Notice of Preliminary Determination of Sales at Less Than Fair Value: Pre-Stressed Concrete Steel Wire Strand from India, 68 FR 42389 (17 July 2003); Notice of Initiation of Antidumping Investigations: Light-Walled Rectangular Pipe and Tube From Mexico and Turkey, 68 FR 57667 (20 October 2003); Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Equador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, 69 FR 3876 (27 January 2004); Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 19390 (13 April 2004).

Because of the nature of this issue and its importance, the Department requested further information or explanation from petitioners about the information contained in the petition in letters dated June 4, 2004 and June 18, 2004. In the June 18, 2004, letter we requested that petitioners submit for the record a complete copy of the foreign market research report upon which they based the antidumping petition. Petitioners submitted that report on June 24, 2004.

Based on our review of the foreign market research report and the antidumping petition that formed the basis for this initiation, we find that the information presented in the petition is consistent with the foreign market research report. Furthermore, based on our review of the foreign market research report and the record as a whole, we find that there is insufficient evidence to conclude that the petition was unsupported. In making this finding, we considered both the overall integrity of the foreign market research report which formed the basis of the petition, and the sufficiency of the allegation of home market sales contained therein.

With respect to the overall integrity of the foreign market research report, we note first that information sources are fully identified, the report contained no obvious inconsistencies or contradictions, and the researcher utilized standard acceptable research procedures. We note too that the researcher certified to the accuracy of the information. See petitioner's January 3, 2000 submission (exhibit 1) and petitioner's January 12, 2000 submission (exhibit 1). We therefore find that the foreign market research report appears adequate on its face.

With respect to the alleged sales contained in the foreign market research report, we find no conclusive evidence that the parties acted with reckless disregard for the truth. Our findings in this regard are set forth below.

The petitioner's January 3, 2000 submission (based on information contained in the foreign market research report) alleges that Tung Fong had a viable home market that consisted of a sales volume of [ ] MT during 1998. See petitioner's January 3, 2000 submission, exhibit A. Tung Fong, in contrast, alleges that it had no home market sales during the POI, thus impugning the validity of the petitioner's data. It supports its argument by citing to the fact that it is registered with the Cavite Economic Zone Authority as an export producer of pipe fittings. As such, it is not authorized to sell in the home market without receiving a waiver from the Philippine Economic Zone Authority (PEZA). Tung Fong has submitted a letter from PEZA stating that the last waiver granted to Tung Fong expired on 08 July 1998. See Tung Fong's May 3, 2000 submission, p. E19.

But Tung Fong's information on this point, even if true, does not impugn petitioner's home market viability information because the home market shipment volumes reported in the petition are based on Tung Fong's (and Enlin's) financial reports for calendar year 1998 data, and the POI does not begin until October 1998. (As the research report was submitted to the petitioners on [ ], 1999,[2] the 1998 information would have been the most recent calendar year information available.) Furthermore, as noted, Tung Fong's most recent waiver did not expire until 08 July 1998, and Tung Fong has never stated that it did not sell in the home market until that time. Thus, the home market sales volumes in the petition (based as they are on calendar year 1998 data) could be accurate. Furthermore, nothing on the record indicates that waiver information (e.g., when they expire) is publicly available, or that petitioners or the foreign market researcher had ever been informed that the waiver

[2] See the foreign market research report, title page, contained in petitioner's June 24, 2004 submission.

ended on 08 July 1998.[3] Thus, the Department finds that it was reasonable for petitioners to conclude that Tung Fong had a viable home market based upon the data available to them at the time.

Turning to the individual home market selling prices upon which the petitioners based their dumping allegation against Tung Fong, the petition indicates these were obtained from [ ]. See petitioner's January 3, 2000 submission, attachment B.[4] The record does not establish the dates on which [ ], nor the [ ]. Tung Fong, while denying that it had made any home market sales during the POI, has not denied that it made offers for sale. Instead, in order to establish that it had no home market sales Tung Fong points to two factors: that its authorization to sell in the home market ended on 08 July 1998, and that the Department allegedly verified that Tung Fong had no home market sales.

With respect to the first point, Tung Fong argues that since its authorization to sell in the home market ended on 08 July 1998, [ ], the alleged sales cannot have been made. We do not find this argument conclusive. As previously explained, Philippine law does allow parties located in export zones to sell in the home market provided they obtain certain waivers, and Tung Fong has in the past obtained such waivers. The record contains no information about the process for obtaining a waiver to sell in the home market, nor the effect of such waiver (e.g., when it could become effective). Furthermore, our review of Philippine law shows that the effect of selling without a waiver is only that additional taxes must be paid, and not that any

[3] See petitioner's June 24, 2004 submission, p. 5.

[4] Note that the information contained in double brackets in this attachment has since been released in single brackets. See petitioners June 14, 2004 submission, p. 4., n. 4, and petitioner's June 24, 2004 submission, p. 4.

criminal sanctions would ensue. See The Special Economic Zone Act of 1995, available at http://www.peza.gov.ph/aboutframeset.htm. Therefore, we do not find Tung Fong's argument persuasive in determining whether it made offers for sale.

Even if Tung Fong had no home market sales during the POI, it appears that the home market sales reported in the foreign market research report constituted offers for sale, and not actual sales. It is true that the foreign market research report in two contexts refers to the alleged sales as "actual sales." See petitioner's June 24, 2004 submission, enclosure, pp. 2-10, 32. Nevertheless, we believe that more precise information may have been provided when Department officials interviewed the foreign market researcher on January 18, 2000. As a result of that interview, we understood that the alleged sales were "offers for sale."[5] Therefore, we referred to the alleged sales as "offers for sale" in both the January 18, 2000 initiation checklist (p. 13) and the Federal Register notice initiating the investigation. See Initiation of Antidumping Duty Investigations: Stainless Steel Butt-Weld Pipe Fittings from Germany, Italy, Malaysia and the Philippines, 65 FR 4595, 4599 (January 31, 2000). Therefore, even if because its authorization to sell in the home market ended on 08 July 1998 Tung Fong made no home market sales during the POI, this does not demonstrate that the [

] or that there is no factual basis for the selling prices reported in the petition.

[5] The Department has on numerous occasions in the past initiated investigations where the normal value in the petition is based on "offers for sale." See Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers From Malaysia and the People's Republic of China, 68 FR 32013 (May 29, 2003); Notice of Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods From Austria, Brazil, the People's Republic of China, France, Germany, India, Indonesia, Romania, South Africa, Spain, Turkey, Ukraine and Venezuela, 67 FR 20730 (April 26, 2002); Notice of Initiation of Antidumping Duty Investigations: Stainless Steel Bar From France, Germany, Italy, Korea, Taiwan, and Ukraine, 66 FR 7620, (January 24, 2001).

Second, Tung Fong points to the Department's on-site verification of Tung Fong in October 2000 as further evidence that it made no home market sales. We find this evidence to be inconclusive. Prior to the October 2000 verification Tung Fong did not raise the alleged fact of its having had no home market sales as a reason to terminate the investigation. All parties were satisfied with using Belgium as the comparison market, and for these reasons, the Department did not focus on the question of whether Tung Fong had any home market sales. Not surprisingly, therefore, the November 7, 2000 verification report does not address the issue of home market sales.

Furthermore, we note that the sales quantities involved in the sales reported in the petition are very small. Petitioner based the petition on four alleged home market sales. Each of the four alleged sales consisted of only [ ], and even the heaviest of the four alleged sales weighed only [ ] kg. See petitioner's January 3, 2000, submission, attachment B. Sales in such small quantities could easily have been missed by a verifier when examining company documents because of the common practice of rounding numbers off to the nearest whole number, e.g., thousands of dollars or thousands of units. Moreover, if the sales prices reported in the petition were, as previously mentioned, actually sales offers that never culminated in an actual sale, verifiers could not have found them because no sales documentation or entries in the company's books and records would exist. All of these factors demonstrate that the Department did not verify the discreet issue of whether Tung Fong had *any* home market sales.

The analysis given above demonstrates to the Department's satisfaction that there is an insufficient basis for Tung Fong's argument that the investigation should be terminated because it had no

home market sales. This conclusion is further supported when we consider the broader context of the investigation, one in which Tung Fong was not the only respondent.

The petition filed on December 29, 1999 that formed the basis for this investigation contained a dumping allegation against not just Tung Fong, but also against Enlin. In estimating dumping margins for Enlin, the basis for normal value in the petition was purported home market sales. Like all investigations, the Department initiated this investigation on a country-wide basis. In a memorandum to the file dated March 1, 2000 that covered multiple countries, the Department announced it would analyze Enlin as the only mandatory respondent in the Philippines investigation because it was the larger exporter of subject merchandise to the United States.[6] On March 6, 2000 Tung Fong submitted a letter in which it requested to be analyzed as a respondent in the investigation. It wrote, "Tung Fong hereby indicates that it wishes to fully participate in this investigation, answering the Department's questionnaires, and receive its own dumping duty margin." See Tung Fong's letter of March 6, 2000, p. 1.

On February 7, 2000 Enlin and Tung Fong submitted their responses to question 1 of section A of the antidumping questionnaire. In its response, Enlin, like Tung Fong, indicated that it had no sales of the foreign-like product in the home market during the POI. (This is the only place on the record that indicates Enlin had no home market sales during the POI.) In follow-up, the Department sent Enlin a

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[6] In Tung Fong's February 22, 2000 submission it reports a sales volume of [ ] kg. for the POI, using the purchase order date as the date of sale. In its August 8, 2000 submission Tung Fong reports a sales quantity of [ ] kg. for the POI, using the invoice date as the date of sale. In Enlin's February 7, 2000 submission it reports sales of [ ] kg. to the United States during the POI.

Tung Fong has questioned the accuracy of the shipment volumes Enlin reported, arguing based on Customs data that Enlin's actual shipment volumes are likely [ ] than it reported, but Tung Fong has never asserted that it [ ] Enlin. See Tung Fong's May 3, 2000 submission, pp. 18-19.

supplemental questionnaire on June 1, 2000. In it we asked, inter alia, "Is Enlin legally permitted to sell stainless steel butt-weld pipe fittings in the Philippines? If not, why not?" See letter from the Department to Enlin, June 1, 2000 at 4. The Department never received an answer to that question because Enlin submitted a letter on June 22, 2000 in which it stated it would no longer respond to the Department's information requests. See Enlin's June 22, 2000, letter at 3. Thus, in accordance with the Department's March 1, 2000 memorandum, the Department determined to analyze Tung Fong as a voluntary respondent. Therefore, on July 14, 2000, the Department issued to Tung Fong a supplemental questionnaire.

From the above narrative it is evident that the fact pattern with respect to Enlin is similar in several respects to that for Tung Fong. In particular, the petition margins for both Enlin and Tung Fong were based on home market sales, and both respondents later claimed they had no home market sales. Nevertheless, there are two important distinctions between Tung Fong and Enlin. First, the record contains far less information on the issue of home market sales for Enlin because Enlin, unlike Tung Fong, ceased responding to the Department's requests for information. Second, the Department never conducted an on-site verification of Enlin.

The Department, of course, does not know what it would have found had Enlin continued to participate in the investigation. But we do find that Enlin was a proper subject of the investigation, and our practice is always to conduct antidumping investigations on a country-wide basis. Therefore, even if Tung Fong had successfully demonstrated that it had made no home market sales during the POI, the Department still would not have terminated the investigation absent a showing that Enlin too had no

home market sales, and the petitioner, in alleging the existence of such sales, acted in reckless disregard for the truth.

In conclusion, we find that though the information we have about the alleged [ ] is limited, the information to which Tung Fong points to demonstrate that it had no home market sales is not so conclusive that we can determine that the alleged [ ] or that the information in the petition was unsupported. Furthermore, we find that nothing from the record substantiates Enlin's claim that it had no home market sales during the POI. For these reasons, we determine that it was appropriate to complete the investigation.

**Comment**

Tung Fong argues that the petition failed to allege (much less show) that the home market sales reported in the petition were of Philippine-made product. It argues that this failure is significant because a petition must contain the elements necessary to support an antidumping duty order. It argues further that this failure is especially significant here because of the overwhelming evidence of record that Enlin was importing the subject product from Taiwan into the Philippines.

Furthermore, Tung Fong argues that in their June 2000 submissions petitioners failed to provide source documents that the Department requested. Petitioners' reasons for not providing those documents, Tung Fong states, can be summarized as (a) the individual involved left the foreign consulting firm and cannot be located, (b) the foreign consulting firm does not have the documents in its files, and (c) the petitioners' representatives never requested the support documents from the foreign consulting firm. Tung Fong states in response that these arguments are not credible and are

unsupported. Indeed, the claims themselves, Tung Fong states, indicate a reckless disregard for the truth. Moreover, Tung Fong argues, since petitioners were on notice as early as May 3, 2000 that Tung Fong (based on Tung Fong's May 3, 2000 submission) had no home market sales, the petitioners' failure to preserve these documents warrants adverse inferences against the petitioners because the petition contained false information and was filed in reckless disregard for the truth.

Tung Fong also argues that the information petitioners did supply does not support a claim of home market sales of subject merchandise because it provides no specifics as to the persons supplying the information or the dates on which the information was supplied. It also does not indicate whether the alleged home market sales were for domestic consumption or subsequent export from the Philippines. Further, Tung Fong argues that petitioners recognized that Tung Fong and Enlin are in export processing zones, but made no further inquiry as to how any product made in an export zone could have been sold in the home market.

Tung Fong also argues that the home market sales alleged in the petition are so small that there is no allegation, much less proof, of a viable home market. Indeed, Tung Fong argues, the viability standard is not even close to being met.

Petitioners support the Department's analysis in the Draft Remand, but underscore three points: (1) the market research report's volume and price data incorporated in the petition represent the best information reasonably available to the petitioners, (2) this information supports petitioners' reasonable belief that there was a viable Philippine home market, and (3) Tung Fong has not conclusively established by concrete evidence that there were no home market sales or offers for sale of subject fittings by Tung Fong and Enlin during the POI.

**Department's Position**

The Department continues to maintain that the petition provided an adequate basis to initiate and complete the antidumping investigation. While Tung Fong seeks to demonstrate that petitioners acted with reckless disregard for the truth, we do not find its arguments persuasive.

First, we do not find compelling Tung Fong's argument that the petition failed to allege or show that the alleged home market sales were of product manufactured in the Philippines. Where a researcher obtains home market sales information from [

], it is reasonable for the researcher to conclude that the merchandise being purchased would be manufactured in the Philippines. Nothing subsequently placed on the record disproves this conclusion. On the contrary, Tung Fong has stated, "All Tung Fong fittings are manufactured in and sold from the Philippines," and Enlin has stated, "[D]uring the POI, Suplex (the Enlin entity that manufactures Enlin's fittings) manufactured the merchandise under investigation in the Philippines." See Tung Fong's February 22, 2000 submission, p. 11, and Enlin's February 22, 2000 submission, p. 6.

Second, we do not believe the fact that petitioners and the foreign market research firm no longer possess all the supporting documentation originally accompanying the foreign market research report to be grounds to rescind the order. The research was conducted in 1999, and the antidumping duty order published on February 23, 2001. Because of the subsequent time lapse, we disagree with Tung Fong's assertion that it is "not credible" that neither the petitioners nor the foreign market research firm any longer possess the supporting documentation. This is especially so since the documents at

issue here were generated only for purposes of initiating an antidumping investigation, and are not required by law or GAAP to be maintained for any set period of time.

Third, while Tung Fong argues the market research report is deficient, we do not agree with Tung Fong that because of these deficiencies the information petitioners supplied "does not support a claim of home market sales." The information contained in the foreign market research report is sufficiently supported with a description of the research methods, the time periods involved, and the information sources such that we find it adequate. Furthermore, while the research report does not directly address whether the alleged sales were home market sales destined for export or domestic consumption, there is no information on the record contradicting petitioner's treatment of them as home market sales for domestic consumption. Only if petitioners had willingly portrayed home market sales destined for export as home market sales would there be a "reckless disregard of the truth." We do not find that situation to exist here. Moreover, we cannot agree with Tung Fong that the petitioners, despite knowing that the respondents were located in export processing zones, "made no further inquiry as to how any product made in an export zone could have been sold in the home market." The record does not show what steps petitioners or the researcher took with respect to that information. However, information subsequently placed on the record does show, as discussed above, that manufacturers located in export processing zones are permitted to sell in the home market provided they obtain certain waivers.

Finally, we find that Tung Fong has not undermined the validity of the petitioners' home market viability data. While, as noted above, the individual sales (or offers for sale) were very small, the petitioners' conclusion regarding viability was not based on those sales. It was based on 1998 calendar

year data, which the research report states was obtained from the company brochure, financial report, and trade statistics. See page 1 of the foreign market research report, contained as an appendix to petitioner's June 24, 2004 submission. Furthermore, Tung Fong's assertion that it "did not have home market sales during any of the periods discussed in the petition" (if it was intended to include the calender years 1997 and 1998, both discussed in the petition) is unsupported, unverified, and would seem at variance with the fact that in July 1997 Tung Fong applied for an extension of its waiver so it could sell in the home market for an additional year. See Tung Fong's July 26, 2004 submission, p. 2, and its May 3, 2000 submission, p. E19.

In sum, Tung Fong's arguments do not persuade the Department that petitioners acted with reckless disregard for the truth in alleging that Tung Fong and Enlin had made home market sales (or offers for sale) during the POI. We therefore determine that the Department properly initiated and completed this antidumping investigation.

**2. Use of Adverse Facts Available**

The Court directed the Department to reconsider its use of partial adverse facts available (AFA) for Tung Fong. In the computations performed at the administrative level the Department calculated a sale-by-sale margin only for those U.S. sales which had a match to an identical model in the third-country market. To all other U.S. sales, i.e., those U.S. sales matching to similar merchandise, the Department applied the highest margin found for any U.S. sale for which it did find an identical match.

**Analysis**

In its first Draft Results of Redetermination issued on July 16, 2004, the Department stated that it would apply a neutral facts available to Tung Fong's U.S. sales for which there was no match of an identical sale in the third-country market. However, since issuing the first Draft Results of Redetermination, the Department has re-examined the Court's opinion. In particular, the Court stated, "[T]he Commerce Department improperly resorted to adverse facts available - instead of using the weight-based cost allocation data provided to the agency by Tung Fong - in calculating the company's dumping margin." See Tung Fong Industrial Co., Ltd. v. United States, Court No. 01-00070, Slip Op. 04-32 (CIT April 7, 2004) at 31. Accordingly, the Department understands the Court's opinion to mean that the use of adverse facts available was improper under the facts of this case, and that the Department should use Tung Fong's cost data. While we continue to have concerns about the accuracy of Tung Fong's cost data, in accordance with the Court's opinion we have used Tung Fong's submitted cost data, and have recalculated Tung Fong's margin accordingly.[7]

**Comment**

Petitioners agree with the Department's conclusion that Tung Fong was afforded sufficient time to provide a full cost response, but argues that a full cost response would reasonably be expected to

[7] Apart from our decision to apply non-adverse facts available in this case, we have re-examined the issue of the amount of time provided to Tung Fong for its voluntary submission. Upon closer examination, we find that the agency provided 32 days for the original cost response, 25 days (including three extensions) for the supplemental questionnaire (which included both sales and cost questions), and 11 days (including one extension) for a second cost questionnaire. Based on the above, we find that Tung Fong did have sufficient time to provide a full cost response.

include accurate, verifiable machine times for Tung Fong's fittings. Therefore, petitioners argue that because Tung Fong did not submit such machine times, Tung Fong did not act to the best of its ability. Petitioners also argue that Tung Fong did not demonstrate in accordance with 19 USC 1677m(e)(4) that it did act to the best of its ability.

**Department's Position**

Petitioner's argument that Tung Fong could have provided accurate, verifiable machine-times has already been reviewed and rejected by the Court. The Court has stated:

> [T]he agency's determination that Tung Fong could have provided "time-based" cost allocation data (based on "machine times") cannot be squared with the record facts.
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> * * *
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> There is thus no basis in fact - much less the record - for the finding in the Commerce Department's Decision memo that Tung Fong had 'model specific processing times available' and refused to 'explain why it would not provide this information.'
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> * * *
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> Nothing in the record effectively refutes Tung Fong's claim that:
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> > Tung Fong, an extremely small family-owned Philippine company, run by one person, was not able to provide {the Commerce Department with the} requested cost data within the limited time available given (a) Tung Fong's lack of a cost accounting system; and (b) {the fact that} Tung Fong sold over 700 different types of fittings, making the development of any allocation of cost{s} based on *observed processing time* to produce each type of fitting difficult. Pl.'s Brief at 5 (emphasis added).
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> * * *
>
> In short, the record is simply devoid of evidence to support either the Commerce Department's finding that Tung Fong withheld critical information that it had in its possession, or the agency's finding that it would have been - as a practical matter - feasible for Tung Fong to have obtained

actual "machine times" to respond to the agency's request for time-based cost allocation data during the course of the investigation.

See Tung Fong Industrial Co., Ltd. v. United States, Court No. 01-00070, Slip Op. 04-32 (CIT April 7, 2004) at 25-27.

Based on the above statements made by the Court, we conclude that the Court has already firmly rejected any suggestion that Tung Fong could have provided costs based on machine times, and thus did not act to the best of its ability. Therefore, we stand by our interpretation of the Court's opinion to mean that the use of adverse facts available was improper under the facts of this case, and that the Department should use Tung Fong's cost data.

**Final Results of Redetermination**

As a result of recalculating the antidumping margin for Tung Fong using Tung Fong's cost data, we have determined that the weighted-average margin for Tung Fong for the period October 1, 1998 through September 30, 1999 is 7.59 percent. Our calculations are described in the August 16, 2004 analysis memorandum from Fred Baker to the file, on file in room B-099 of the Department of Commerce building. Furthermore, because the margin we assigned to "all others" in the final determination was based upon the margin we calculated for Tung Fong, we are also assigning a margin of 7.59 percent to "all others" as a result of this remand redetermination. Upon a final and conclusive court decision, the Department will publish a notice amending the final determination reflecting the change in the margin calculation for Tung

Fong and "all others,"and will also send instructions to U.S. Customs and Border Protection advising it of the new cash deposit rate for these entities.

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James J. Jochum
Assistant Secretary
for Import Administration

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(date)