

Ad Hoc Shrimp Trade Action Committee v. United States
Court No. 11-00335 Slip Op 13-93 (CIT July 23, 2013)

RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in Ad Hoc Shrimp Trade Action Committee v. United States, Court No. 11-00335, Slip Op. 13-93 (CIT July 23, 2013) (“Remand Opinion and Order”). These final remand results concern the Administrative Review of Certain Frozen Warmwater Shrimp From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940 (August 19, 2011), and accompanying Issues and Decision Memorandum (“PRC Shrimp AR5 Final”).¹ In its Remand Opinion and Order, the CIT determined that “Commerce must either adequately corroborate the 112.81 percent PRC-wide rate and explain how its corroboration satisfies the requirements of 19 U.S.C. 1677e(c), or calculate or choose a different countrywide rate that better reflects commercial reality, as supported by substantial evidence.”²

As set forth in detail below, pursuant to the Court’s Remand Opinion and Order, we have reconsidered our determination, taking into account additional record evidence from the LTFV

¹ The period of review is February 2, 2009, through January 31, 2010.

² See Remand Opinion and Order, at 23.

Investigation,³ and determined that the PRC-wide rate of 112.81 percent, the only rate ever assigned to the PRC-wide entity in this proceeding, remains relevant to the industry in question and reliable.

B. BACKGROUND

On January 27, 2004, the Department initiated the antidumping duty (“AD”) investigation of certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People’s Republic of China (“PRC”) and the Socialist Republic of Vietnam.⁴ On July 16, 2004, the Department published the PRC Shrimp LTFV Prelim,⁵ which was accompanied by an unpublished memorandum corroborating the rate used as the PRC-wide rate and the adverse facts available (“AFA”) rate.⁶ On December 8, 2004, the Department published the PRC Shrimp LTFV Final and on February 1, 2005, the Department published an amended final and Order, finding individually calculated rates between de minimis and 84.93 percent and continuing to assign 112.81 percent to the PRC-wide entity. However, as noted by the Court in

³ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China, 69 FR 70997 (December 8, 2004) (“PRC Shrimp LTFV Final or “LTFV Investigation”); see also Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People’s Republic of China, 70 FR 5149 (February 1, 2005) (“Order”).

⁴ See Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam, 69 FR 3876 (January 27, 2004) (“Initiation Notice”).

⁵ See Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People’s Republic of China, 69 FR 42654 (July 16, 2004) (“PRC Shrimp LTFV Prelim”).

⁶ See Memorandum to the File from Kabir Archuletta, Senior International Trade Analyst, Office 9, “Placing Documents on the Record of the Fifth Administrative Review” (August 5, 2013) (“Documents on the Record of Remand Opinion and Order”) at Attachment I “Memorandum to the File from Joe Welton, Analyst, through James C. Doyle, Program Manager, and Edward Yang, Office Director, ‘Corroboration of the PRC-Wide Adverse Facts-Available Rate’ (July 2, 2004)” (“Corroboration Memo”).

its Remand Opinion and Order, the individually calculated margins in the LTFV Investigation were subsequently reduced to 5.07, 7.20, and 8.45 percent.⁷

C. CORROBORATION OF THE PRC-WIDE RATE IN THE INVESTIGATION

In the Initiation Notice, the Department described how the calculation of export price (“EP”) and normal value (“NV”) was carried out in the Petition, noting that EP was based on official U.S. import statistics during the period of investigation (“POI”) and that NV was based on the factors of production (“FOPs”) provided by several significant producers in the United States of the domestic like product.⁸ We further noted that those FOPs were valued using surrogate values from India.⁹ The Department conducted a thorough examination of the methodology employed in the Petition, which included a discussion with the foreign market researcher contracted by Petitioner to obtain cost data for the primary input, raw warmwater shrimp, and making adjustments to Petitioner’s methodology, where appropriate.¹⁰ Upon confirmation that the methodology employed in the Petition conformed to the Department’s rules and regulations, this investigation was initiated with estimated recalculated dumping margins from 112.81 percent to 263.68 percent.¹¹

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

⁷ See Allied Pacific Food (Dalian) Co. v. United States, 716 F. Supp. 2d 1339 (CIT 2010); Shantou Red Garden Foodstuff Co. v. United States, 880 F. Supp. 2d 1332 (CIT 2012); see also Certain Frozen Warmwater Shrimp From the People’s Republic of China: Notice of Court Decision Not in Harmony With the Final Determination and Amended Final Determination of the Antidumping Duty Investigation, 77 FR 66434 (November 5, 2012); Certain Frozen Warmwater Shrimp From the People’s Republic of China: Notice of Amended Final Determination of Sales at Less Than Fair Value Pursuant to Court Decision, 76 FR 30100 (May 24, 2011).

⁸ See Initiation Notice, 69 FR at 3880-3881.

⁹ Id.

¹⁰ Id.

¹¹ Id., 69 FR at 3881.

concerning the subject merchandise.”¹² The SAA provides further that the term “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.¹³ To corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics, and customs data, as well as information obtained from interested parties during that particular investigation.¹⁴ To corroborate the margin calculations in the Petition for use as AFA for purposes of the preliminary determination in this investigation, the Department conducted a thorough examination of the evidence supporting the calculations in the Petition.

As noted above, concurrent with publication of the PRC Shrimp LTFV Prelim, the Department issued a Corroboration Memo which detailed the determination to use total AFA, pursuant to sections 776(a) and 776(b) of the Act, as the rate assigned to the PRC-wide entity because the exporters comprising the single PRC-wide entity failed to respond to the Department’s request for information and thereby failed to cooperate to the best of its ability.¹⁵ As AFA the Department used information from the Petition because the margins derived from the Petition were higher than the calculated margins for the selected respondents.¹⁶ To corroborate the Petition margins, the Department compared those margins to the margins calculated for a respondent in the investigation, the Allied Pacific Group (“Allied”), noting that Allied was a significant producer and produced the merchandise under consideration using all factors of production described in the Petition and under the same production standards as the

¹² See Statement of Administrative Action accompanying the URAA, H.R. Rep No. 103-366 at 870 (“SAA”).

¹³ Id.

¹⁴ Id.

¹⁵ See Corroboration Memo at 1.

¹⁶ Id.

Petition.¹⁷ This analysis found that there was a significant percentage of Allied’s control numbers (“CONNUMs”)¹⁸ with positive margins and that a significant volume of those CONNUMs had margins which exceeded the lowest Petition margin of 112.81 percent.¹⁹ Accordingly, the Department found that the Petition margin of 112.81 percent was relevant to this investigation and had probative value.²⁰

D. ANALYSIS OF THE RECORD

Given that the margins of the mandatory respondents used to corroborate the Petition rate in the investigation changed following litigation, and pursuant to the Court’s Remand Opinion and Order, we have revisited the record of the LTFV Investigation to determine whether the margins calculated in the Petition, and vetted and revised by the Department at that time, remain relevant to the investigation and have probative value. Accordingly, we have examined the record evidence with respect to the revised margin calculations and have confirmed that although the final weighted-average margins may have been downwardly revised, significant percentages of positive, CONNUM-specific margins remain for at least one mandatory respondent and significant volumes of CONNUM-specific margins continue to be higher than the lowest Petition margin of 112.81 percent for one respondent, as detailed below.

Specifically, we have looked to the margins calculated for Shantou Red Garden Foodstuff Co. (“Red Garden”), a mandatory respondent in the LTFV Investigation and the respondent with

¹⁷ Id., at 2.

¹⁸ In most investigations, administrative reviews and new shipper reviews, the subject merchandise has different CONNUMs to identify the individual models of products for matching purposes. The CONNUMs are assigned to each unique product reported in the sales response. Identical products are assigned the same CONNUM in both the comparison market sales database (or in a non-market economy context, the factors of production database) and U.S. sales database. See Antidumping Manual (October 13, 2009), at Chapter 4, page 10.

¹⁹ See Corroboration Memo at 3.

²⁰ Id.

the highest volume of sales during the POI.^{21, 22} As was the case with Allied, we note that Red Garden produced shrimp in accordance with Hazard Analysis and Critical Control Point (“HAACP”) plans, which is required in order to comply with the U.S. Food and Drug Administration’s enforcement of food safety in the U.S. food supply,²³ and that the Petition based its calculations assuming production under the same standards.²⁴ Additionally, we note that Red Garden used all FOPs to produce subject merchandise during the POI which were included in the Petition, specifically: raw shrimp, tripolyphosphate, labor, electricity, water, and packing materials.²⁵ Therefore, Red Garden produced merchandise under consideration using all FOPs described in the Petition and under the same production standards as the Petition. Finally, we note that Red Garden was the largest single exporter of merchandise under consideration from the PRC, and thus is a significant exporter of merchandise subject to this investigation. Therefore, we find that Red Garden’s margins are relevant for purposes of corroboration of a margin based on information from the Petition.

An analysis of Red Garden’s sales data, FOP data, and calculated margins, subsequent to revisions pursuant to judicial review, reveals that more than half of the CONNUMs examined in

²¹ See Documents on the Record of AR5 at Attachment I “Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III, from Edward C. Yang, Office Director, Office 9, ‘Selection of Respondents for the Antidumping Investigation of Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China’ (February 23, 2004)” (“Respondent Selection Memo”) at Attachment II.

²² We note that the Corroboration Memo states that Allied is the largest single exporter of subject merchandise from the PRC. See Corroboration Memo at 2. However, a review of the margin programs for Allied and Red Garden, as well as the Respondent Selection Memo, confirm that this does not appear to have been the case. See Respondent Selection Memo at Attachment II; Documents on the Record of AR5 at Attachment I “Memorandum to the File through James C. Doyle, Program Manager, China/NME Unit, from Alex Villanueva, Case Analyst, ‘Analysis for the Preliminary Determination of Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China (‘the PRC’): The Allied Pacific Group (‘Allied’)’ (July 2, 2004)” (“Allied LTFV Analysis Memo”); Documents on the Record of AR5 at Attachment I “Memorandum to the File through James C. Doyle, Program Manager, China/NME Unit, from Joe Welton, Case Analyst, “Analysis for the Preliminary Determination of Certain Frozen and Canned Warmwater Shrimp from the People’s Republic of China (‘the PRC’): Red Garden Foodstuff Co., Ltd.” (July 2, 2004)” (“Red Garden LTFV Analysis Memo”).

²³ See Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, 60 FR 65096 (December 18, 1995).

²⁴ See Corroboration Memo at 2.

²⁵ Compare Red Garden LTFV Analysis Memo at 7-8 with Initiation Notice, 69 FR at 3880.

Red Garden's margin calculation had positive margins.²⁶ Of those CONNUMs with positive margins, the Department found that the percentage with dumping margins exceeding 112.81 percent is sufficient to demonstrate the probative value of the lowest Petition margin of 112.81 percent.²⁷ Furthermore, by quantity, we found that CONNUMs accounting for a significant volume of merchandise under consideration were sold at prices that resulted in margins which exceeded 112.81 percent.²⁸ Therefore, we find that the Petition rate continues to be relevant to this investigation, even after taking into account subsequent changes to the original calculations pursuant to remand redetermination, and the rate to be corroborated for purposes of this draft remand. Further, we conclude that the margin of 112.81 percent is based on information from the Petition and has probative value.

E. COMMENTS FROM INTERESTED PARTIES

On August 5, 2013, the Department released documentation from the LTFV Investigation in support of the corroboration of the PRC-wide rate, as explained above.²⁹ Specifically, the Department released the Respondent Selection Memo,³⁰ Red Garden's LTFV Analysis Memo, Allied's LTFV Analysis Memo, and the Corroboration Memo from the original investigation. The Department also released a file that was created in connection with the recent section 129

²⁶ See Memorandum to the File from Kabir Archuletta, Senior International Trade Analyst, Office 9, "Business Proprietary Analysis of Red Garden Foodstuff Co., Ltd., Margin Program" dated concurrently with this draft redetermination ("Red Garden BPI Memo").

²⁷ See Red Garden BPI Memo.

²⁸ Id.

²⁹ See Documents on the Record of AR5.

³⁰ Id., at Attachment I "Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III, from Edward C. Yang, Office Director, Office 9, 'Selection of Respondents for the Antidumping Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China' (February 23, 2004)" ("Respondent Selection Memo").

proceeding that listed every CONNUM-specific margin calculated for Red Garden.³¹ The Red Garden Margin File was created using Red Garden's data, as submitted during the original investigation, but recalculated to reflect any changes (i.e., surrogate values) that were made pursuant to U.S. litigation and to allow offsets for non-dumped sales.³²

On August 9, 2013, we received comments from Hilltop and Petitioner.³³ In response to a position in Hilltop's Comments, on August 14, 2013, the Department released additional documentation to interested parties.³⁴ Specifically, the Department released the Red Garden 129 Analysis Memo that accompanied the recalculation of Red Garden's investigation margin from the section 129 proceeding and included the complete SAS Output that is created when a margin calculation program is executed.³⁵ The SAS Output also includes a sampling of the highest and lowest calculated margins.³⁶ On August 16, 2013, the Department received additional comments from Hilltop.³⁷

Petitioner notes that the statutory requirement to corroborate secondary information using, to the extent practicable, information from independent sources reasonably at the Department's disposal is more easily satisfied with respect to PRC-wide rates because there "are

³¹ Id., at Attachment II ("Work File 'Margin' from recalculation of the antidumping duty margin for Shantou Red Garden Foodstuff Co., Ltd. in the antidumping duty investigation of certain frozen and canned warmwater shrimp from the People's Republic of China in connection with the Department's section 129 determination implementing the findings of the World Trade Organization's panel report in United States - Anti-Dumping Measures on Certain Shrimp and Diamond Saw Blades from China (DS422), dated June 8, 2012" ("Red Garden Margin File").

³² See Memorandum to the File from Kabir Archuleta, Senior International Trade Analyst, Office 9, "Placing Section 129 Documents on the Record of the Fifth Administrative Review" (August 14, 2013) ("Additional Documents on the Record of AR5") at Attachment I "Preliminary Results Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China" ("Red Garden 129 Analysis Memo") at 1.

³³ See Letter to the Secretary of Commerce from Hilltop "Hilltop Comments on New Information" (August 9, 2013) ("Hilltop Comments"); Letter to the Secretary of Commerce from Petitioner "Comments on Factual Information Placed on the Record in Remand Proceeding" (August 9, 2013) ("Petitioner Comments").

³⁴ See Additional Documents on the Record of AR5.

³⁵ See Red Garden 129 Analysis Memo at Attachment 1: Margin Program – Log/Output ("SAS Output").

³⁶ Id.

³⁷ See Letter to the Secretary of Commerce from Hilltop "Hilltop Comments on Additional New Information" (August 16, 2013) ("Hilltop Additional Comments").

no questionnaire responses from the PRC itself on which to rely.”³⁸ Petitioner contends that the Department is afforded broad discretion in corroborating the PRC-wide rate because the CIT has recognized that “there is no requirement that the PRC-wide rate entity rate based on AFA relate specifically to the individual company.”³⁹ Moreover, Petitioner notes that the U.S. Court of Appeals for the Federal Circuit (“CAFC”) has held that previously corroborated margins enjoy a presumption of continued validity.⁴⁰ Petitioner argues that documentation placed on the record by the Department fully corroborates the 112.81 percent PRC-wide rate and notes that the CAFC has upheld AFA rates that represented only 0.04 percent of the sales database.⁴¹ Thus, Petitioner contends, documentation placed on the record by the Department, using revised surrogate values after CIT remands, that demonstrates margins exceeding 112.81 percent satisfies the CIT directive to corroborate the PRC-wide rate.⁴²

Hilltop argues that the documentation placed on record by the Department impeded Hilltop’s ability to comment because the margin “work file” was incomplete and lacked explanation as to how this information was used in the section 129 proceeding.⁴³ Hilltop requests that the Department release additional disclosure documentation related to the section 129 proceeding calculation for Red Garden as well as the disclosure documents for the other respondents in that proceeding, Allied Pacific Group and Yelin Enterprise Co. Hong Kong.⁴⁴

³⁸ Petitioner cites to Shandong Machinery Import & Export Co. v. United States, 2009 Ct. Intl. Trade LEXIS 76, *16-17 (June 24, 2009); see Petitioner Comments at 2 n5.

³⁹ Petitioner cites to Peer Bearing Co. - Changshan v. United States, 32 CIT 1307, 1313, 587 F. Supp. 2d 1319 (2008) (“Peer Bearing”); see Petitioner Comments at 2 n6.

⁴⁰ Petitioner cites to KYD, Inc. v. United States, 607 F.3d 760, 767 (Fed. Cir. 2010) (“KYD”); see Petitioner Comments at 2-3 n.7-8.

⁴¹ Petitioner cites to Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (“Ta Chen”); see Petitioner Comments at 3 n9.

⁴² See Petitioner Comments at 3.

⁴³ See Hilltop Comments at 2.

⁴⁴ Id. at 2-3.

Hilltop notes that the overall margin reflected in the Red Garden Margin File fails to corroborate the 112.81 percent AFA rate adopted by the Department.⁴⁵ Hilltop contends that the Department must explain how transactions from this document would produce a reliable and relevant rate for the PRC-wide entity as a whole and argues that because the transaction-specific margins for Red Garden vary greatly, data from the other respondents are necessary for comparison.⁴⁶

Notwithstanding these reservations, Hilltop believes that the use of any data from the section 129 proceeding would fail to corroborate the PRC-wide rate in the current proceeding because the Court directed the Department not to use outdated information to corroborate a rate for the current proceeding.⁴⁷ Hilltop points out that the section 129 proceeding used data from the original investigation and, thus, uses data that was already rejected by the Court⁴⁸ and cannot be representative of sales made many years later.⁴⁹

In its comments on additional information placed on the record, Hilltop renews its request for disclosure documents related to the other respondents in the section 129 proceeding, arguing that the new information placed on the record by the Department fails to explain the wide range of transaction-specific margins calculated for Red Garden and fails to demonstrate that such a wide range of margins is typical.⁵⁰ Hilltop further argues that the Department has not demonstrated that margins from 2003 continue to be relevant and that the Department's refusal to place additional information on the record casts doubt on the objectivity of the Department's analysis.⁵¹

⁴⁵ Id., at 3.

⁴⁶ Id., at 3-4.

⁴⁷ Id., at 4.

⁴⁸ Id.

⁴⁹ Id., at 4-5 (citing Ferro Union, Inc. v. United States, 23 CIT 178, 204-205 (1999))

⁵⁰ See Hilltop Additional Comments at 2.

⁵¹ Id.

F. DEPARTMENT'S POSITION

With respect to Hilltop's argument that the Department did not provide sufficient context or explanation for the Red Garden Margin File placed on the record on August 5, 2013, the Department disagrees. The index page at Attachment II of the memorandum clearly states that the last document appended was a work file from Red Garden's margin program used in the section 129 proceeding.⁵² Given Hilltop's experience in proceedings before the Department,⁵³ the mechanics of the Department's margin program calculation should not be a novel concept. Nonetheless, the Department supplemented the record with additional record evidence from the section 129 proceeding, the Red Garden 129 Analysis Memo, to demonstrate the identical correlation between the ten highest CONNUM-specific margins and ten lowest CONNUM-specific margins listed in the Red Garden Margin File and the actual SAS Output released in the section 129 proceeding.⁵⁴ A comparison of the Red Garden Margin File and the SAS Output attached to the Red Garden 129 Analysis Memo confirms not only the highest and lowest margins, but also the total quantity and total value.⁵⁵ Further, the SAS Output attached to the Red Garden 129 Analysis Memo contains a time and date stamp indicating when the program that calculated these results was executed.⁵⁶ While Hilltop notes a discrepancy between quantities listed in the Respondent Selection Memo released to interested parties⁵⁷ and the Red Garden Margin File,⁵⁸ the Department notes that the Respondent Selection Memo is based upon

⁵² See Red Garden Margin File.

⁵³ Hilltop was a mandatory respondent in both the fourth administrative review of this proceeding, as well as this fifth administrative review; see Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 49460, 49463 (August 13, 2010) ("PRC Shrimp AR4 Final"); PRC Shrimp AR5 Final, 75 FR at 51942.

⁵⁴ Compare Red Garden Margin File CONNUM-specific margins to SAS Output.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ See Respondent Selection Memo.

⁵⁸ See Hilltop Comments at 2.

responses to the Department's quantity and value questionnaire,⁵⁹ whereas the Red Garden Margin File is based on the U.S. Sales files submitted by respondents that typically undergo multiple revisions pursuant to Department direction and supplemental questionnaires. Lastly, while Hilltop claims that it is unclear whether the quantities listed in the Red Garden Margin File are in kilograms ("kgs") or pounds,⁶⁰ we note that the Red Garden LTFV Analysis Memo, which describes the methodologies used to calculate the margins contained in the Red Garden Margin File, reflects the total quantity listed in the Red Garden Margin File in kgs and states that "{f}or all sales reported in pounds, we have converted the gross price and quantity of those sales, as well as any relevant selling expenses, to kilograms."⁶¹ Thus, we find Hilltop's claim that the documents placed on the record by the Department are incomplete or contain discrepancies such that interested parties are impeded from properly analyzing the results, without merit.

As noted above, the Department originally selected information from the Petition as the AFA rate for this investigation because the margins derived from the Petition were higher than the calculated margins for the selected respondents.⁶² Although Hilltop argues that the Department is attempting to cherry pick individual transactions from the Red Garden Margin File for its corroboration analysis,⁶³ Hilltop's argument is misplaced on two counts. First, the Department's normal practice in less than fair value investigations is to calculate margins using average-to-average comparisons,⁶⁴ meaning that, contrary to Hilltop's claim, the Department selected CONNUM-specific, or model-specific, margins rather than transaction-specific margins

⁵⁹ See Respondent Selection Memo, at 2 n2.

⁶⁰ See Hilltop Comments, at 2.

⁶¹ See Red Garden LTFV Analysis Memo, at 1.

⁶² See Corroboration Memo, at 1.

⁶³ See Hilltop Comments, at 2-3.

⁶⁴ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification, 71 FR 77722 (December 27, 2006) ("The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, Vol. 1 at 842-43 (1994), reprinted in U.S.C.C.A.N. 3773 (SAA), and the Department's regulations state that the Department normally will use the average-to-average comparison methodology in an investigation. 19 CFR 351.414(c)(1).")

for its corroboration analysis. CONNUM-specific margins result in calculated margins that represent the pricing behavior related to groups of sales, rather than individual sales, and, consequently, do not result from cherry picking of individual transactions. Second, Hilltop's contention that the identification of a significant number of CONNUM-specific margins exceeding the lowest Petition margin of 112.81 percent fails to corroborate that rate as a reasonable, reliable, and relevant rate for the PRC-wide entity ignores the fact that this was the same well-established methodology employed in the original investigation and many other proceedings. All weighted-average calculated margins were below the lowest Petition margin and that reality factored into the Department's decision to select information from the Petition as the AFA rate for this investigation.

As explained above, despite the reduction of calculated weighted-average margins subsequent to litigation, a significant quantity and value of CONNUM-specific margins higher than the lowest Petition margin remain for at least one respondent.⁶⁵ Thus, this rate is reasonable and supported by substantial evidence because it represents an actual rate at which a cooperating respondent sold the merchandise under consideration during the POI⁶⁶ and "does not lie outside the realm of actual selling practices."⁶⁷ The CAFC has affirmed the Department's use of an AFA rate that is supported not only by the evidence submitted with the petition, but also by the calculation of "high-volume transaction-specific margins for cooperative companies which are both higher than the { } petition rate and are close to that rate."⁶⁸ The CAFC has also upheld an

⁶⁵ See Red Garden BPI Memo.

⁶⁶ See Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339, 1347-48 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

⁶⁷ See KYD, 607 F.3d 760, 767 (Fed. Cir. 2010).

⁶⁸ Id., 607 F.3d 760, 766 (Fed. Cir. 2010) (citing Universal Polybag Co. v. United States, 577 F. Supp. 2d 1284 (CIT 2008))

AFA rate that was corroborated using a single transaction⁶⁹ and an AFA rate where only 0.5 percent of the respondent's sales were above that rate.⁷⁰ Here, the Department has identified significant quantities of high CONNUM-specific margins that represent a much higher percentage of Red Garden's sales than 0.5 percent.⁷¹ Further, these CONNUM-specific margins provide a broad representation of selling activity by taking into account all sales of that CONNUM.

If during the POI, the cooperating respondent sold the merchandise under consideration at the rate the Department selected, the Department may reasonably determine that a non-responsive, or uncooperative, respondent could have made all of its sales at the same rate.⁷² Thus, the Department determines that this rate continues to bear a rational relationship to the PRC-wide entity. Accordingly, we conclude that, despite a reduction in the overall weighted-average margins calculated for mandatory respondents in the original investigation, the commercial reality that a significant quantity and value of CONNUMs were sold at prices that resulted in AD margins exceeding 112.81 percent confirms the continued reliability of the 112.81 percent rate and relevance to the PRC-wide entity as a whole. Because we find that the record of this proceeding contains no other information that would call into question the reliability of that rate, and Hilltop has offered no new information that would rebut that presumption, the Department finds that this rate remains relevant to the PRC-wide entity.⁷³

⁶⁹ See Ta Chen, 298 F.3d 1330, 1339 (Fed. Cir. 2002).

⁷⁰ See PAM, S.p.A. v. United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009).

⁷¹ See Red Garden BPI Memo.

⁷² See High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 76 FR 77964, 77970-71 (December 15, 2011), unchanged in High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739, 26742 (May 7, 2012).

⁷³ See, e.g., KYD, 607 F.3d 760, 767 (Fed. Cir. 2010).

With respect to Hilltop's suggestions that recalculated margins from 2003 lack relevance and are no longer probative given the "wealth of more recent margin calculations,"⁷⁴ we disagree. The Court has upheld the Department's long-standing practice of calculating the PRC-wide entity rate using the highest margin calculated for any party in the investigation or in any administrative review.⁷⁵ The Court has also affirmed the position that the PRC-wide rate need not be corroborated with respect to each particular respondent who is found to form part of the PRC-wide entity.⁷⁶ The fact that AD margins have been calculated for respondents that have demonstrated their eligibility for a separate rate in certain segments of this proceeding has no bearing on the rate applied to the PRC-wide entity in this review, which includes Hilltop, because, as explained above, the rate being applied has been "corroborated according to its reliability and relevance to the countrywide entity as a whole."⁷⁷ As indicated above, in the investigation, the Department relied upon our pre-initiation analysis of the adequacy and accuracy of the information in the Petition. During our pre-initiation analysis, we examined the information used as the basis of EP and NV in the Petition, and the calculations used to derive the alleged margins, and made adjustments where appropriate.⁷⁸ Based on that information and the additional corroboration analysis here, we find that the chosen Petition rate is both reliable and relevant. Further, with regard to the relevance aspect of corroboration, the Court has held that the age of the information alone does not call into question the relevance of the chosen rate.⁷⁹ Thus, we find that this rate is an appropriate estimate of what the actual dumping margin

⁷⁴ See Hilltop Additional Comments at 2.

⁷⁵ See Peer Bearing, 587 F. Supp. 2d at 1327 (citing Sigma Corp. v. United States, 117 F.3d 1401, 1411 (Fed. Cir. 1997)).

⁷⁶ See Remand Opinion and Order, at 23.

⁷⁷ See Peer Bearing, 587 F. Supp. 2d at 1327.

⁷⁸ See Initiation Notice, 69 FR at 3880-81.

⁷⁹ See Peer Bearing, 587 F. Supp. 2d at 1328 ("In addition, the age of the information alone does not call into question the relevance of the chosen rate.").

would be for an unverifiable PRC-exporter of subject merchandise and, therefore, relevant.⁸⁰ We note that Hilltop's participation in this proceeding and its material misrepresentations since the first administrative review were the subject of this original remand redetermination, and, as such, Hilltop's data cannot be relied upon for any purposes.⁸¹ Further, we note that a rate twice as high as the PRC-wide rate of 112.81 percent has been applied to an individual company⁸² and the PRC-wide rate of 112.81 percent has been applied to hundreds of companies since the third administrative review of this proceeding.⁸³

While Hilltop argues that the additional information placed on the record by the Department in response to Hilltop's request for additional documentation fails to explain the extremely wide range of margins calculated for Red Garden and fails to demonstrate that this range of margins is typical,⁸⁴ Hilltop has failed to provide any indication that a wide range of margins is atypical. The only citation included in Hilltop's comments is to this Remand Order and Opinion⁸⁵ and nothing on the record of this review suggests that a wide range of margins would somehow be unusual.

As explained above, our corroboration analysis is based upon a comparison of the highest CONNUM-specific margins, in accordance with our normal practice, and the Department does not believe it is necessary to release all data and programs for the other respondents to the

⁸⁰ See Peer Bearing, 587 F. Supp. 2d at 1329 (“The PRC-wide entity rate is an appropriate estimate of what the actual dumping margin would be for an unverifiable Chinese exporter of {subject merchandise}.”).

⁸¹ See, e.g., Remand Opinion and Order at 19 (“Commerce reasonably determined to disregard the totality of Hilltop's representations in this review”).

⁸² See Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049, 52052, at 52051-2 (September 12, 2007) (applying 225.62 percent to Zhoushan Huading Seafood Co., Ltd., a rate inclusive of the PRC-wide rate and an adjustment because the Department found reimbursement of ADs).

⁸³ See Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565, 46568 n16 (September 10, 2009)(“{t}he PRC-wide entity includes the 464 companies”); PRC Shrimp AR4 Final, 75 FR at 49463 n15 (“{t}he PRC-wide entity includes the 463 companies”); PRC Shrimp AR5 Final, 75 FR at 51942 n23 (“{t}he PRC-wide entity includes the 80 companies currently under review”).

⁸⁴ See Hilltop Additional Comments at 2.

⁸⁵ Id., at 2 n1.

section 129 proceeding in order to corroborate the PRC-wide rate. The original corroboration of the PRC-wide rate in this investigation was conducted using CONNUM-specific data, not the final weighted-average margin or transaction-specific margins, for a sole respondent in this investigation.⁸⁶ With respect to Hilltop's argument that the data from the other two respondents in the investigation are equally relevant to the corroboration of the PRC-wide rate, we note that Red Garden had the highest volume of sales during the POI by a significant quantity.⁸⁷ Further, the selection of Red Garden's data is reasonable because that data was from the investigation, in which we originally corroborated the PRC-wide rate, and incorporates the results of U.S. court litigation that is now final and complete.

G. COMMENTS ON THE DRAFT REMAND

The Department released its Draft Remand Results to interested parties on September 26, 2013.⁸⁸ Petitioner and Hilltop filed comments on the Draft Remand Results on October 21, 2013.⁸⁹

Petitioner notes that the CIT has repeatedly held that the country-wide rate need not be corroborated with respect to any individual entity and the statute expressly qualifies that the country-wide rate only need be corroborated to the extent practicable.⁹⁰ Because Hilltop was assigned the PRC-wide rate as AFA, Petitioner argues, the sales behavior of Hilltop and other

⁸⁶ See Corroboration Memo.

⁸⁷ See Red Garden BPI Memo at 2; compare Red Garden LTFV Analysis Memo with Allied LTFV Analysis Memo.

⁸⁸ See Letter to All Interested Parties from Catherine Bertrand, Program Manager, Office 9 "Draft Remand Redetermination in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China; 2/1/08 - 1/31/09" (September 26, 2013) ("Draft Remand Results").

⁸⁹ See Letter to the Secretary of Commerce from Petitioner "Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China (2009-2010): Comments on Draft Results of Redetermination Pursuant to Court Remand" (October 21, 2013) ("Petitioner Draft Remand Comments"); Letter to the Secretary of Commerce from Hilltop "Hilltop Comments on Draft Remand Redetermination: Remand of Ad Hoc Shrimp Trade Action Committee v. United States, Court No. 11-00335, Slip Op. 13-93 (CIT July 23, 2013)" (October 21, 2013) ("Hilltop Draft Remand Comments").

⁹⁰ See Petitioner Draft Remand Comments, at 3.

respondents receiving separate rates in other segments ceases to be meaningful.⁹¹ Petitioner notes that the CAFC has upheld rates corroborated using a single transaction that comprised 0.5 percent of a respondent's sales and the Department's corroboration analysis reveals significant sales made by the largest exporter in the investigation at prices resulting in margins exceeding the PRC-wide rate of 112.81 percent.⁹² Petitioner further notes that the CAFC has recognized that the Department may presume that a rate based on a petition and corroborated during the investigation is still valid, absent any evidence that would rebut that presumption.⁹³ The record in this proceeding offers no evidence that 112.81 percent is not an accurate estimate of the PRC-wide entity's actual rate and the Department has sufficiently considered the CIT's order to corroborate that rate in light of subsequent reductions in margins assigned during the investigation.⁹⁴

Hilltop claims that the Department has failed to explain how information from the investigation remains a relevant and probative form of corroboration.⁹⁵ Hilltop argues that the courts have held that historical data is appropriate for corroboration when no subsequent information calls into question the reliability of the rate and where the record demonstrates that alternative rates may be appropriate the burden of corroboration is greater.⁹⁶ Here, Hilltop argues, no respondent has ever received a margin in any segment of this case that exceeded 10 percent, demonstrating that this rate does not reflect commercial reality for the industry.⁹⁷

Hilltop contends that the CIT in its Remand Opinion and Order rejected corroboration of the

⁹¹ Id. (citing Watanabe Group, 2010 CIT LEXIS 144, at *14; Jiangsu Changbao Steel Tube Co. v. United States, 884 F. Supp. 2d 1295 (CIT 2012)).

⁹² Id., at 3-4 (citing Ta Chen, 298 F.3d at 1339).

⁹³ Id., at 4 (citing KYD, 607 F.3d at 767).

⁹⁴ Id., at 4.

⁹⁵ See Hilltop Draft Remand Comments, at 4.

⁹⁶ Id., at 5 (citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990); Shanghai Taoen, 29 C.I.T. at 198).

⁹⁷ Id., at 4-5.

PRC-wide rate using the analysis conducted in the investigation because the 90.05 percent rate assigned to Allied Pacific was reduced to 5.07 percent and the Department has failed to explain how a limited selection of Red Garden's outdated data can reflect commercial reality for the entire PRC shrimp industry.⁹⁸

Hilltop notes that although the Department stated that it relied on CONNUM-specific margins for corroboration, the Department refused Hilltop's request for all transaction-specific data for Red Garden and the other respondents so it is impossible to determine how many transactions these margins comprise or compare this data to sales data from other respondents.⁹⁹ Although the Department claims that CONNUM-specific margins provide a broad representation of selling activity, this reasoning leads to the conclusion that all of Red Garden's sales data would be even more reliable and representative of selling activity.¹⁰⁰ The Department's refusal to use a fully calculated margin for corroboration or to consider the entire history of lower margins in this case supports the view that the Department is cherry picking data from an outdated time period.¹⁰¹ The Department's references to prior cases where the Courts have permitted corroboration based on a small percentage of sales does not permit such limited data in every case, as evidenced in Dongguan Sunrise.¹⁰²

H. DEPARTMENT'S POSITION

We disagree with Hilltop's argument that information from the investigation is not relevant or probative in this proceeding. As explained above, the Petition rate continues to have probative value (i.e., relevance and reliability) based upon a comparison of CONNUM-specific

⁹⁸ Id., at 5-6.

⁹⁹ Id., at 6.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id., at 6-7 (citing Dongguan Sunrise Furniture Co., Ltd. v. United States, 904 F. Supp. 2d 1359 (CIT 2013) ("Dongguan Sunrise")).

margins calculated for the mandatory respondent in the investigation with the largest volume of U.S. sales and the rates calculated, and vetted by the Department, in the Petition. Although Hilltop argues that the Court rejected the 112.81 percent rate as not reflecting commercial reality,¹⁰³ we note that the Court did not conclude that this rate does not reflect commercial reality. Rather, the Court stated that the “comparison margin” from the investigation was shown not to reflect commercial reality because it was subsequently reduced.¹⁰⁴ Specifically, the Court stated that “this rate was corroborated by comparison with the rate determined for the largest exporting respondent, which was 90.05 percent.”¹⁰⁵

We note that in PRC Shrimp AR5 Final Remand I, the Department stated that “the PRC-wide entity rate was fully corroborated during the investigation . . . {and} is based on rates alleged in the petition that were fully vetted during the pre-initiation phase of this investigation.”¹⁰⁶ This analysis was based on public information available to the Department at the time,¹⁰⁷ but the details of the Department’s corroboration analysis were contained in the proprietary Corroboration Memo. A review of the Corroboration Memo, which is now on the record of this review, reveals that the comparison rate used to corroborate the PRC-wide rate in the investigation was not the weighted-average margin of 90.05 percent assigned to Allied but the CONNUM-specific margins calculated for Allied underlying the 90.05 percent weighted-average margin. The original analysis found that there was a significant percentage of Allied’s CONNUMs with positive margins and that a significant volume of those CONNUMs had margins which exceeded the lowest Petition margin of 112.81 percent.¹⁰⁸ Indeed, the fact that a

¹⁰³ Id., at 5-6.

¹⁰⁴ See Remand Opinion and Order, at 25-26.

¹⁰⁵ Id., at 24.

¹⁰⁶ See Final Results Of Redetermination Pursuant To Court Remand (April 1, 2013) (“PRC Shrimp AR5 Final Remand I”) at 38, available at <http://enforcement.trade.gov/remands/>.

¹⁰⁷ PRC Shrimp LTFV Prelim, 69 FR at 3880-3881; unchanged in PRC Shrimp LTFV Final.

¹⁰⁸ See Corroboration Memo, at 3.

significant percentage of CONNUMs and significant volume of sales that resulted in margins in excess of the PRC-wide rate of 112.81 percent indicates that this rate is not an attempt to “overreach reality in seeking to maximize deterrence.”¹⁰⁹ Rather, the rate corroborated in these final results is an “appropriate estimate of what the actual dumping margin would be for an unverifiable Chinese exporter.”¹¹⁰ Accordingly, our revisited corroboration analysis follows the same procedure carried out during the investigation, in accordance with Department practice, and leads to the conclusion that our original corroboration analysis, revised to consider the results of subsequent litigation, continues to satisfy the requirements of section 776(c) of the Act and the guidance provided by the SAA.¹¹¹

The Court in its Remand Opinion and Order did not invalidate the corroboration analysis conducted in the investigation. The Court rejected the use of 90.05 percent, which was subsequently reduced, as the comparison rate for corroboration of the Petition rate. We now know that rate was not a factor in the Department’s corroboration analysis. Nor did the Court invalidate the 112.81 percent rate assigned to the PRC-wide entity in every segment of this proceeding. The Court stated that the Department “must either adequately corroborate the 112.81 percent rate and explain how its corroboration satisfies the requirements of 19 U.S.C. 1677e(c), or else calculate or choose a different countrywide rate that better reflects commercial reality.”¹¹² As explained above, these final results of redetermination adequately corroborate the PRC-wide rate such that the statutory requirements and existing court precedent are satisfied.¹¹³

¹⁰⁹ See, e.g., F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

¹¹⁰ See Peer Bearing, 587 F. Supp. 2d at 1315.

¹¹¹ See SAA, at 870.

¹¹² See Remand Opinion and Order, at 26.

¹¹³ See Ta Chen, 298 F.3d at 1339; PAM, S.p.A., 582 F.3d at 1340.

Although Hilltop contends that the Department has not explained how information from the investigation remains a relevant and probative form of corroboration,¹¹⁴ the Court has upheld the Department's long-standing practice of calculating the PRC-wide entity rate using the highest margin calculated for any party in the investigation or in any administrative review.¹¹⁵ As explained above, the fact that lower margins have been calculated for respondents that have qualified for a separate rate in other segments of this proceeding does not necessarily undermine the reasonableness of the rate applied to the PRC-wide entity in this review.

Although Hilltop argues that because the Department refused to supplement the record of this review with all transaction-specific data for Red Garden and the other respondents in the section 129 proceeding there is no way to confirm how many transactions comprise each margin or to compare this data to data from the other respondents,¹¹⁶ Hilltop has not explained why this information is necessary to corroborate the PRC-wide rate. The Red Garden BPI Memo released with the Draft Remand Results explains that Red Garden was the respondent with the highest volume of sales during the LTFV Investigation and details the number of CONNUMs it sold at rates resulting in margins higher than 112.81 percent and the significant volume of Red Garden's sales that those CONNUMs comprised.¹¹⁷

With respect to Hilltop's argument that the Department's claim that CONNUM-specific margins provide a broad representation of selling activity leads to the conclusion that all of Red Garden's sales data would be even more reliable and representative of selling activity, the Department disagrees.¹¹⁸ The Department's position that CONNUM-specific margins provide a

¹¹⁴ See Hilltop Draft Remand Comments, at 4.

¹¹⁵ See Peer Bearing, 587 F. Supp. 2d at 1327 (citing Sigma Corp. v. United States, 117 F.3d 1401, 1411 (Fed. Cir. 1997)).

¹¹⁶ See Hilltop Draft Remand Comments, at 6.

¹¹⁷ See Red Garden BPI Memo, at 3.

¹¹⁸ See Hilltop Draft Remand Comments, at 6.

broad representation of selling activity is based on the fact that these margins result in margins that represent the pricing behavior related to groups of sales, rather than individual sales, and, consequently, do not result from cherry picking of individual transactions. The Department does not agree with Hilltop that this reasoning leads to the conclusion that all of Red Garden's sales data would be even more reliable¹¹⁹ because that would result in a PRC-wide rate wholly based on rates individually calculated for respondents receiving a separate rate. Hilltop's suggestion that the Department should use a fully calculated margin as corroboration for the PRC-wide¹²⁰ rate in this review would do nothing to ensure that a party "does not obtain a more favorable result by failing to cooperate than if it had cooperated fully,"¹²¹ and could lead to an unreasonable result.

Although Hilltop points to Dongguan Sunrise to rebut cases cited by the Department where a much more limited selection of data was used to corroborate the PRC-wide rate, the comparison is misplaced.¹²² In Dongguan Sunrise, the respondent had been assigned a partial AFA rate and the Court noted that the AFA rate must not be aberrant or punitive, and it should bear a rational relationship to respondent's commercial reality.¹²³ Here, Hilltop has been found to be part of the PRC-wide entity ineligible for a rate of its own. In such cases, "there is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company."¹²⁴ Further, the partial AFA rate rejected by the Court in Dongguan Sunrise was based on what the Court concluded to be an impermissibly small percentage of sales, some of which were selected based on one or two transactions and some of which were based on a

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ See SAA at 890; see also Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910 (December 23, 2004); see also D&L Supply Co. v. United States, 113 F. Supp. 3d 1220, 1223 (Fed. Cir. 1997).

¹²² See Hilltop Draft Remand Comments, at 6-7.


¹²³ See Dongguan Sunrise, 904 F. Supp. 2d 1359, 1363 (CIT 2013) (citing KYD, 607 F.3d at 767-68).

¹²⁴ See Peer Bearing, 587 F. Supp. 2d at 1313.

percentage of sales smaller than the percentages accepted in Ta Chen and PAM, S.p.A.¹²⁵ In contrast, the Red Garden BPI Memo and our corroboration analysis detailed above demonstrate that the lowest Petition margin of 112.81 percent rate selected as the PRC-wide rate and corroborated using actual sales data for the respondent with the largest volume of U.S. Sales during the LTFV Investigation is properly corroborated using a large number of broadly representative CONNUM-specific margins and sufficiently supported by a significant volume of sales.

I. CONCLUSION

In accordance with the Court's Remand Opinion and Order, we have reevaluated the only rate that has ever been assigned to the PRC-wide entity in this investigation in light of subsequent adjustments made pursuant to court order, and find that the Petition rate of 112.81 percent continues to have relevance to the LTFV Investigation and continues to be reliable and have probative value.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

7 NOVEMBER 2013
Date

¹²⁵ See Dongguan Sunrise, 904 F. Supp. 2d at 1363.