Qingdao Taifa Group Co., Ltd., v. United States
Court No. 08-00245; Slip Op. 09-83 (CIT 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. 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"), issued on August 11, 2009, in *Qingdao Taifa Group Co., Ltd., v. United States*, Court No. 08-00245, Slip Op. 09-83 (CIT 2009) ("*Taifa v. United States (CIT 2009)*"). The Court's opinion and remand order were issued following a challenge to *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Final Results of 2005-2006 Administrative Review*, 73 FR 43684 (July 28, 2008) ("*Final Results*"). The Court remanded the *Final Results* to the Department to (1) determine whether a government entity exercised *de facto* control over Taifa such that Taifa is part of the PRC-wide entity; and (2) if such government control cannot affirmatively be demonstrated, to calculate a separate, substitute "adverse facts available" ("AFA") rate for Taifa.

In accordance with the Court's remand order, the Department first reconsidered record evidence with regard to government control over Taifa and concluded that the record does not contain affirmative evidence that a government entity exercised *de facto* control over Taifa. Thus, in accordance with the Court's remand instructions, the Department has granted Taifa a separate rate. In addition, the Department selected and corroborated a separate AFA rate for Taifa. The selected AFA rate is based on a control number ("CONNUM")-specific margin from

the most recently completed segment of this proceeding in which Taifa participated as a mandatory respondent.[1]

On December 24, 2009, we released our draft results of redetermination to the interested parties.[2] On January 11, 2010, we received comments from interested parties on our draft results. Below is a summary of the comments and the Department's position thereto. As a result of the Department's remand redetermination, the Department assigned Taifa a separate antidumping duty rate of 227.73 percent.

II. BACKGROUND

On July 28, 2008, the Department published its final results in the antidumping duty administrative review of hand trucks and certain parts thereof for the period December 1, 2005, through November 30, 2006. *See Final Results*. Taifa filed this action to challenge certain determinations reached in those *Final Results*. In the *Final Results*, the Department explained that Taifa impeded the administrative review because Taifa withheld information, was not forthcoming at verification, provided information that could not be verified, and failed to cooperate to the best of its ability. Accordingly, pursuant to sections 776(a)(1) and 776(a)(2)(A) and (C) of the Tariff Act of 1930, as amended ("the Act"), the Department applied facts available with adverse inferences to Taifa. Additionally, the Department found evidence at verification which indicated local government ownership over Taifa, which contradicted Taifa's submission in responding to the Department's standard questionnaire. As such, the Department determined

[1] *Amended Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 FR 65410 (November 12, 2004) ("*Less Than Fair Value Determination*"). *See* Attachment I, *Draft Results of Redetermination*, December 24, 2009.

[2] The Department's initial release inadvertently lacked a certain data set. The Department re-released the draft with the missing data set on December 29, 2009.

that Taifa failed to fully explain the ownership interests in the company and because of this, Taifa failed to demonstrate entitlement to a separate rate.

On August 11, 2009, the Court sustained the Department's decision to apply AFA, stating that the Department "properly concluded that the information that Taifa provided was 'incomplete and unreliable' and that no information on the record could be used to calculate an accurate dumping margin." *Taifa v. United States (CIT 2009)* at 11. The Court also sustained Commerce's decision to "apply AFA to all the facts relevant to calculating Taifa's dumping margin." *Id*. However, the Court remanded the matter to the Department to determine whether the town government ownership resulted in *de facto* control such that the Department could treat Taifa as part of the PRC-wide entity. The Court instructed that if the Department could not establish *de facto* government control, the Department must "calculate a separate, substitute AFA rate for Taifa." *Id.* at 20.

The rate assigned in the *Final Results* to Taifa as part of the PRC-wide entity was 383.60 percent. Based on the Department's determination that it could not affirmatively demonstrate *de facto* government control over Taifa to revoke its separate rate, and the Court's directive that the Department may not apply the 383.60 percent rate to Taifa without an affirmative finding of *de facto* government control, the Department has substituted another rate as AFA for Taifa in this redetermination. Accordingly, the Department has applied as the AFA rate for Taifa in this redetermination on remand, a margin of 227.73 percent, based on Taifa's own CONNUM-specific margins from the most recent segment in which Taifa was a mandatory respondent.

III. ANALYSIS

A. Whether a government entity exercised de facto control over Taifa such that the Department should now consider Taifa part of the PRC-entity.

On remand, the Court instructed the Department to determine whether a government entity exercised *de facto* control over Taifa sufficient to revoke Taifa's separate rate status and consider Taifa part of the PRC-wide entity. *Id.* at 19. The Department respectfully disagrees with the implied premise of the Court's remand instruction which shifts the burden of proof in the application of the Department's separate rates test away from the respondent claiming a separate rate. Specifically, the Court's order requires the Department to affirmatively demonstrate that *de facto* government control existed over the respondent if there is evidence that government ownership exists, rather than requiring the respondent to affirmatively demonstrate the absence of *de facto* and *de jure* government control as required by the Department's separate rate test. Pursuant to section 771(18) of the Act, the Department considers the PRC to be a non-market economy ("NME"). *See* section 771(18)(C) of the Act (stating that the determination shall remain in effect until revoked by the administering authority). This determination presumes that all entities within the PRC are subject to government control, and therefore, all exporters should be assigned a single, country-wide rate.[3] The Department has refrained from codifying a presumption of a single rate in NME cases because "policy in this area continue(s) to develop."[4] Indeed, the Department has recognized, over time, that within the PRC, companies exist which are independent from government control to such an extent that they can

[3] *See Sigma Corp. v. United States*, 117 F.3d 1401, 1404-05 (Fed. Cir. 1997) ("Sigma"); *Shandong Huanri (Group) Gen. Co. v. United States*, 493 F. Supp. 2d 1353, 1357 (CIT 2007).

[4] *See Antidumping Duties: Countervailing Duties; Final Rule*, 62 FR 27295, 27305 (May 19, 1997).

independently set prices for export purposes.[5] In order for the Department to conclude that a company operates independently of government control, the Department announced its policy requiring that the exporter or producer submit evidence on the record to demonstrate an absence of government control both in law (*de jure*) and in fact (*de facto*).[6]

Those exporters who do not or cannot demonstrate their eligibility for a separate rate receive the country-wide rate. The burden of proof, as with any adjustment requested,[7] therefore, lies with the interested party to demonstrate its independence from *de facto* and *de jure* government control before a separate rate will be granted by the Department. The Department's separate rate practice has been consistently affirmed by the United States Court of Appeals for the Federal Circuit and the CIT.[8]

The Court held that Commerce incorrectly revoked Taifa's separate rate and applied the PRC-wide entity rate to Taifa because "government ownership is not tantamount to government control." *Taifa v. United States (CIT 2009)* at 15. However, we respectfully disagree with the Court's conclusion that revoking Taifa's separate rate status is not warranted here. The

[5] *See Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 69 FR 77722 (Dec. 28, 2004).

[6] *See Policy Bulletin 5.1, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries; See also Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) and *Notice of Final Determination of Sales at less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994).

[7] *Maui Pineapple Co. Ltd. v. United States*, 264 F. Supp. 2d 1244, 1259 (Ct. Int'l Trade 2003); *Tianjin Machinery Imp. & Exp. Corp. v. United States*, 806 F. Supp. 1008, 1015 (Ct. Int'l Trade 1992).

[8] *See Sigma*; *Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002); *Peer Bearing Co. v. United States*, 587 F. Supp. 2d 1319 (CIT 2008); *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008 (CIT 1992).

Department contends that Taifa did not meet its burden of demonstrating independence from government control and, therefore, did not demonstrate its eligibility to receive a separate rate.

While the Department's separate-rate analysis ultimately requires a respondent to show the absence of *de jure* and *de facto* government control, the analysis necessarily begins with fundamental issues such as ownership. Without this information, the Department is unable to conclude that a respondent has affirmatively demonstrated absence of government control. The separate-rate section of the questionnaire requires parties to submit certain information regarding ownership and the relationship of the owners to other entities. All companies requesting a separate rate must respond to the following questions detailing the level of government control and ownership over export practices:

a. Please describe and explain:

   (i) Who owns your company. In your explanation, please give the full name and address of the individual(s), corporation(s), or entities that own your company.

   (ii) Who controls your company. In your explanation, please give the full names of the individual(s), corporation(s), or other entities that control your company. Include the full names of all current owners, directors, and managers.

   (iii) Your company's relationship with the national, provincial, and local governments, including ministries or offices of those governments.

   (iv) Your company's relationship with other producers or exporters of the merchandise under consideration. Do you share any managers or owners?

   (v) Any entity, business group, or industry group in which your company or any of its affiliates has had membership anytime during the POR or the previous three years. In responding to this question, please ensure that you have identified corporate groups in which you are a member, or with which you have a business relationship, whether or not the group is a formal legal entity, and whether or not your company is an active participant.

b. Does the entity which owns or controls your company also own or control other exporters of the merchandise under consideration?

c. If your company is owned or controlled by a provincial or local government, please identify other producers/exporters of the merchandise under consideration in your province or locality.[9]

Without obtaining this fundamental information, the Department cannot fully analyze a company's ownership structure which may implicate affiliation issues with other entities. In this case, as we noted in our case brief to the Court, "Taifa was unable to show what entity owned Taifa, and thus {the Department} could make no determination that there was no government control."[10] Despite repeated requests from the Department, Taifa did not provide the information specified above and, furthermore, supplied documentation that could not be verified. The Department continues to contend that it is incumbent upon the respondent and not the Department to establish entitlement to a separate rate. Thus, the Department considers that it appropriately concluded that Taifa did not adequately explain its ownership structure, and as such, the Department properly applied its separate rates test to conclude that Taifa was not separate from the PRC-wide entity.

Nonetheless, in accordance with the Court's remand instructions, the Department determines that it cannot affirmatively demonstrate government control over Taifa through the town government ownership evidence on the record. The Department also concludes that it cannot affirmatively demonstrate *de facto* government control over Taifa by opening the record. Thus, in light of the Court's remand instructions, the Department is compelled to grant Taifa a

[9] *See* Original questionnaire distributed to Taifa during the first administrative review, pp. 8-10.
[10] *Qingdao Taifa Group Co., Ltd. v. United States*, Defendant's Response to Qingdao Taifa's Motion for Judgment Upon the Administrative Record, Court No. 08-00245, April 20, 2009, p.15.

separate rate in this remand determination.

B. Selection and corroboration of a separate, substitute AFA rate for Taifa.

The Court ordered that, if the Department is unable to demonstrate *de facto* government control, the Department on remand must calculate a new, separate, substitute AFA rate for Taifa. The Court stated that the Department "may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and FOP data, but the respondent has established independence from government control." *Taifa v. United States (CIT 2009)* at 13. The Department respectfully disagrees with the Court's conclusion on the applicability of the AFA rate, which is also applied to the PRC-wide entity, to Taifa as a separate rate company. The Department contends that it may apply the highest calculated rate as AFA to a separate rate company, regardless of whether that rate is also applied to the PRC-wide entity, subject to the corroboration requirements of section 776(c) of the Act.

Pursuant to section 776(b) of the Act, when selecting from among the facts available, an adverse inference may include reliance on information from: 1) the petition; 2) a final determination in the investigation; 3) any previous review under section 751 of the Act, or 4) any other information placed on the record. Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information includes "information 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."[11]

[11] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc 103-316, Vol. 1, 103d Cong. (1994) (SAA) at 870.

The statute and the Department's regulations direct the Department to use "independent sources that are reasonably at the Secretary's disposal" to corroborate secondary information.[12] The term "corroborate" means the Department will satisfy itself that the secondary information to be used has probative value.[13] Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. Sources used to corroborate secondary information may include such evidence as, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review.[14]

However, unlike other types of information relevant to the Department's determination of a dumping margin, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. Thus, with respect to an administrative review, if the Department chooses to use as facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period.[15]

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate the selected margin is not appropriate as AFA, the

[12] *See* 19 CFR 351.308(d); *see also* 19 U.S.C. 1677e(c).

[13] *See* 19 CFR 351.308(d); *see also* SAA at 870.

[14] *See* 19 CFR 351.308(d).

[15] *See, e.g., Antifriction Bearings and Parts Thereof from France, et al.: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, Notice of Intent To Rescind Administrative Reviews, and Notice of Intent To Revoke Order in Part,* 69 FR 5950, 5953 (February 9, 2004), unchanged in *Antifriction Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part,* 69 FR 55574, 55576-77 (September 15, 2004).

Department will disregard the margin and determine an appropriate margin.[16] Similarly, the Department does not rely upon margins that have been judicially invalidated.[17]

In administrative reviews the Department normally selects as AFA the highest rate determined for any respondent in any segment of the proceeding.[18] The CIT and the Court of Appeals for the Federal Circuit have consistently upheld the Department's practice to rely upon the highest available margin on the record of the proceeding.[19]

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure the margin is sufficiently adverse so "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner."[20] The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not

[16] *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, at Comment 4 (February 22, 1996) (the Department disregarded the highest margin in that case as adverse "best information available (BIA)" – the predecessor to facts available – because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin).

[17] *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1221-1223 (Fed. Cir. 1997) (*D&L Supply*) (the Department was instructed not to rely upon a particular BIA rate because that rate had been corrected pursuant to separate litigation).

[18] *See, e.g., Stainless Steel Plate in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review*, 67 FR 40914, 40916 (June 14, 2002).

[19] *See Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding the Department's reliance upon an AFA margin calculated for another cooperative respondent because that rate was the highest available dumping margin); *Shanghai Taoen International Trading Co., Ltd. v. United States*, Slip Op. 05-22, at 16 (2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

[20] *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

so, the importer, knowing of the rule, would have produced current information showing the margin to be less."[21] The Department's discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information.[22]

The Department is permitted to use the information available to it in choosing and supporting an AFA rate. "In the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences. In cases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins."[23]

In this review, we found that the rate previously used as an AFA rate had probative value, *i.e.*, was corroborated, to the extent practicable, and applied it as the AFA rate to the country-wide entity. Likewise, in the two preceding segments of this proceeding, we found that the same rate had probative value and applied it as the AFA rate for the country-wide entity as well as to uncooperative exporters that received separate rates. However, in light of the Court's directive that the Department "may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and FOP data, but the respondent has established independence from government control,"[24] we have examined other data to derive the AFA margin in this case. Because Taifa provided the Department with no reliable information during the administrative review, we are not in a position to speculate what Taifa's margin might have been during this period had it

[21] *See Rhone Poulenc*, 899 F. 2d at 1190.

[22] *See* 19 CFR 351.308(a); *see also* section 776(a) of the Act.

[23] *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002) (*Ta Chen*).

[24] *Taifa v. United States (CIT 2009)* at 13.

cooperated. *See* SAA at 870 ("{P}roving that the facts selected are the best alternative facts would require that the facts available be compared with missing information, which obviously cannot be done."). This Court recognized that the information Taifa provided was "incomplete and unreliable" and that "no information on the record could be used to calculate an accurate dumping margin for Taifa." *See Taifa v. United States (CIT 2009)* at 11. Therefore, we have examined Taifa's program output and underlying data showing Taifa's range of margins from the most recent segment in which it participated as a mandatory respondent, the less than fair value investigation of this order.[25] There has been one intervening administrative review between the investigation and the administrative review at issue in this redetermination. However, Taifa was not a mandatory respondent in the intervening administrative review and therefore the investigation data is the most recent Taifa-specific information available to the Department and the **only** reliable information reported by Taifa during the history of the proceeding.

In reviewing Taifa's model-specific margins from the investigation, we found that the highest CONNUM-specific margin was 227.73 percent.[26] This margin was calculated for a

[25] *See* Attachment I, *Draft Results of Redetermination*, December 24, 2009.

[26] In the Draft Results released on December 24, 2009, the Department inadvertently referred to the CONNUM-specific margin of 227.73 percent as a "model-specific" margin. However, the Department should have referred to this margin as a "CONNUM-specific" margin. When calculating overall margins for respondents in less than fair value investigations, the Department typically calculates CONNUM-specific margins, as opposed to transaction-specific margins that it calculates in administrative reviews. A CONNUM-specific margin is based on a comparison of sales of all covered products that fall within that CONNUM description to the normal value ("NV") calculated for those same CONNUM transactions; whereas, a transaction-specific margin is the comparison of the net U.S. price and normal value of an individual transaction. For example, if there were seven sales of CONNUM x, in an investigation there would be a single margin calculation based on the average net price for all U.S. sales of that CONNUM, these CONNUM-specific margins would then be weight averaged to derive the overall dumping margin for the respondent. Given the same scenario in an administrative review, the Department would calculate seven transaction-specific margins (one for each sale of that same CONNUM), rather than a single CONNUM-specific margin, and the individual transaction margins would then be weight averaged to derive the overall dumping margin for the respondent.

CONNUM that represented twelve percent of Taifa's U.S. sales during the period covered by the investigation. The Courts have consistently affirmed the Department's selection of adverse facts available margins where the Department was able to corroborate the selected margin using a respondent's own transaction-specific margins, either from the period of review at issue, or a previous period of review.[27] Further, AFA rates have been found to be adequately corroborated when they are "'reflective of some, albeit a small portion'" of the respondent's sales.[28]

Because this information was available, and it allows us to demonstrate that the selected margin relates to Taifa, the Department finds reliance on Taifa's investigation information to be the best means of complying with the Court's remand order. Further, this is consistent with the Department's compliance with the Court's instructions in other proceedings. For example, when completing the remand results affirmed in *Pam v. United States*, the Department relied on Pam's reported information during a prior (the fourth) administrative review to corroborate the selected adverse margin applied in the sixth administrative review.[29] Further, because the 227.73 percent rate is a margin calculated from Taifa's own reported information and data from the investigation, we find the 227.73 percent rate, applied as AFA for Taifa, has probative value, *i.e.*,

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[27] *See PAM, S.p.A. v. United States, 2009 U.S. App. Lexis 21118, at 9-10, Court No.*, 2009-1066, (Fed. Cir., Sept. 24 2009); *Ta Chen v. United States*, 298 F.3d 1330, 1339-40 (Fed. Cir. 2002; *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d.1273, 1279 (CIT 2007).

[28] *See PAM v. United States*, Ct. Int'l Trade LEXIS 73, 12-13, Slip. Op. 2008-75 (CIT Jul. 9, 2008) (quoting *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339-40 (Fed. Cir. 2002)), aff'd *PAM, S.p.A.* 2009-1066.

[29] *See PAM, S.p.A. v. United States, 2009 U.S. App. Lexis 21118, at 9-10, Court No.*, 2009-1066, (Fed. Cir., Sept. 24 2009).

is reliable and relevant to Taifa and thus is sufficiently corroborated within the meaning of section 776(c) of the Act.[30]

As recognized by the Federal Circuit, "{s}o long as the data is corroborated, Commerce acts within its discretion to choose which sources and facts it will rely on to support an adverse inference."[31] Accordingly, because the Department has determined that the 227.73 percent AFA margin for Taifa is corroborated in accordance with law, we determine it is also consistent with the Court's order to calculate a new, separate, substitute AFA rate for Taifa.

IV. COMMENTS FROM INTERESTED PARTIES

Comment 1: Whether a government entity exercised *de facto* control over Taifa

Petitioners (collectively Gleason and Precision Products, Inc.) urge the Department to reaffirm and explain its long-standing non-market economy separate rates practice. Petitioners explain that central, provincial or local government control is essential to the Department's separate rates analysis. Petitioners cite to the Department's separate rate section of the questionnaire for support that ownership is essential to the Department's analysis. Petitioners continue to explain that ascertaining ownership interests in Taifa is essential for the Department to determine whether it should collapse Taifa with other affiliated parties, including affiliates which may be involved in the production, sale or distribution of hand trucks. *See* Petitioner's comments at 5. Petitioners conclude that because the Department could not make an accurate characterization of whom the respondent was in this review, the Department could not determine whether the export activities, prices or operations of Taifa were sufficiently independent of government control. *Id.* at 6.

[30] *See Ta Chen*, 298 F.3d at 1339; *Mittal Steel* at 1278-79.
[31] *See Ta Chen*, 298 F.3d at 1339.

Moreover, petitioners argue that the Department should not grant Taifa a separate rate because Taifa substantially impeded the proceeding and to grant it a separate rate would necessitate the Department making inferences favorable to Taifa. Specifically, Petitioners contend that Taifa misled the agency about its ownership structure. *Id.* at 7. Petitioners explain that because Taifa raised doubts about the accuracy of the information it placed on the record, the Department must infer that the PRC government exercised *de facto* control over Taifa's export activities. Petitioners continue that Taifa failed to inform the Department that the 2003 Articles of Association were not registered with the appropriate government authority and also failed to inform the Department that the articles had not been authorized by the company's shareholders. Petitioners contend that when the Department asked Taifa about this, Taifa failed to provide an adequate explanation which meets the *Nippon Steel*[32] standard. Additionally, Petitioners contend that Taifa failed to adequately explain that it had once been owned by the PRC government and also failed to submit supporting documentation substantiating that it was now an independent company. For those reasons, Petitioners conclude that the Department must conclude that Taifa provided false and misleading information about its ownership structure and as a result must deny Taifa a separate rate.

Finally, Petitioners contend that the Department misconstrues the Court's remand order that the Court shifted the burden of proof regarding the Department's separate rates test from Taifa to the Department. Contrary to the Department's draft remand redetermination, Petitioners contend that the Court affirmed the Department's practice of presuming state control, which, according to Petitioners, requires Taifa to affirmatively demonstrate an absence of *de jure* and *de facto* control over exports to qualify for a separate rate. *See* Petitioners' comments at 15.

[32] *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Therefore, Petitioners conclude that the Department can employ its standard separate rates practice and determine that Taifa failed to affirmatively demonstrate an absence of *de facto* government control because Taifa failed to establish the ownership structure of the company. Petitioners continue that even if the Department continues to consider the Court's remand order to require the Department to affirmatively demonstrate government control over Taifa, there is substantive record evidence to indicate that there is government control over Taifa's prices, export activities and operations such that the Department can continue to treat Taifa as part of the PRC-wide entity. Specifically, Petitioners contend that Taifa's Assets Evaluation Report and the "Capital Verification Certificate" both indicate majority government ownership, and based upon this evidence and Taifa's failure to cooperate, Petitioners conclude that Taifa failed to demonstrate its eligibility for a separate rate.

Taifa argues that the Department ignored the Court's remand order by spending time in the remand redetermination discussing government ownership rather than government control. Taifa contends that government ownership alone does not result in government control for the purposes of a non-market economy separate rate. Specifically, Taifa cites several administrative and judicial precedents for support that government ownership is distinct from government control over export activities. *See* Taifa's comments at 4. Taifa concludes that the Department properly reconsidered its determination in the *Final Results* and granted Taifa a separate rate.

Department's Position:

The Department does not agree with Petitioners that the record demonstrates *de facto* government control over Taifa. While the Department agrees with Petitioners that Taifa did not clearly disclose its ownership information, and that record evidence suggests government ownership of Taifa, we do not agree that there is affirmative evidence that the PRC government

exercised *de facto* control over Taifa. The Department also does not agree with Petitioners that the Court's remand order can be read to suggest that the Department does not need to determine whether *de facto* government control existed over Taifa in order to deny Taifa a separate rate in this remand proceeding. Rather, the Department believes that the Court specifically directed that the Department must first find affirmative evidence of *de facto* government control in order to treat Taifa as part of the PRC entity. *See Taifa v. United States (CIT 2009)* at 19.

While the Department continues to respectfully disagree with the implied premise of the Court's remand instruction which shifts the burden of proof in the application of the Department's separate rates test away from the respondent claiming entitlement to a separate rate, in accordance with the Court's remand instructions, the Department reviewed the record of the underlying proceeding to determine whether there was evidence of *de facto* government control over Taifa through the town government ownership. Notwithstanding Petitioners' arguments to the contrary, as discussed in the Draft Redetermination, and the ANALYSIS section above, the Department concluded that the record does not affirmatively demonstrate *de facto* PRC-government control over Taifa.

Further, the Department disagrees with Taifa's assertion that the Department has ignored the Court's remand order and years of administrative and judicial precedent. The Draft Redetermination does not conclude that Taifa is subject to government control through government ownership, local or otherwise. Rather, the Department explains that while the separate-rate analysis ultimately requires a respondent to show the absence of *de jure* and *de facto* government control, the analysis necessarily begins with fundamental issues such as ownership. In the Draft Redetermination we explained the Department's position that without this information, the Department is unable to conclude that a respondent has affirmatively

demonstrated absence of government control. In this regard, we agree with Petitioners' contention that ascertaining the true ownership interests of a company is an essential first step in the Department's separate rates analysis. *Id.* at 6. For the same reason, we continue to find that based on record evidence, the Department cannot determine whether *de facto* government control existed over Taifa's export activities. Therefore, to comply with the Court's remand instructions, the Department is granting Taifa a separate rate.

Comment 2: Selection and corroboration of a separate, substitute AFA rate for Taifa

Petitioners argue that the Department should base Taifa's adverse facts available rate upon the 383.60 percent petition rate because that rate is sufficiently adverse and represents a reasonably accurate estimate of Taifa's dumping, with a built-in increase as a deterrent. Petitioners assert this claim is substantiated by record evidence that shows that in the investigation Taifa had higher transaction-specific margins than the CONNUM-specific margin[33] selected by the Department as AFA for purposes of the Draft Redetermination. Petitioners continue that if the Department decides not to base Taifa's rate on the petition rate, the Department should continue to base the rate on the highest CONNUM-specific margin for Taifa from the investigation. Petitioners contend that the highest CONNUM-specific margin calculated for Taifa in the investigation represents the most probative evidence of current margins because it bears a relationship to Taifa. Citing *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 113 F.3d 1027 (Fed. Cir. 2000) and *D&L Supply Co. v. United States*, 113 F.3d 1220 (Fed. Cir. 1997) Petitioners contend that the choice of 227.73 percent as

[33] In the Draft Remand the Department inadvertently referred to the rate of 227.73 percent as a "model-specific" rate. This rate is actually a CONNUM-specific rate. The Department calculates CONNUM-specific rates in investigations, and transaction-specific rates in administrative reviews. The Department weight-averages the CONNUM-specific or transaction-specific rates to calculate company-specific rates for investigations or reviews, as appropriate. Petitioners appear to have taken the underlying data in the investigation and run it on a transaction-specific basis to support this argument. *See* Petitioners Comments at 19, footnote 47.

the rate for Taifa is in accord with judicial precedent because the rate is from Taifa's own verified data and has never been discredited.

Taifa argues that the Department, when selecting the 227.73 percent rate as a separate, substitute rate, ignored its statutory mandate and searched for a margin which would punish Taifa rather than deter. Taifa contends that the selected rate is punitive, aberrational and uncorroborated. Taifa explains that should the selected margin meet one of those criteria, it is not appropriate as an AFA rate. First, Taifa argues that the selected margin is punitive because the selected rate is significantly higher than 1) the highest separate rate from any prior segment of the proceeding and 2) Taifa's separate rate from the investigation. For support, Taifa cites to *Shandong Huarong Group Corp.*[34] for the proposition that the Court rejected the Department's selected rate because of the magnitude of the increase between the rate selected and the highest rate calculated from the prior administrative review. Taifa explains that the Department failed to consider alternative rates in the draft remand redetermination and cites *Rhone Poulenc v. United State* and *Gerber Food v. United States,*[35] to support its contention that by rejecting lower, more recent rates in favor of an older higher rate, the Department's selected AFA rate is punitive. *See* Taifa's Comments at 8-9.

Taifa also contends that the Department failed to identify any precedent for the selection of the highest CONNUM-specific rate as the AFA rate for Taifa. Taifa argues that the Department could not have followed its normal practice of selecting the highest company-specific margin in the history of the proceeding because by definition company-specific margins

[34] 2007 WL 54067.

[35] *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) and *Gerber Food (Yunnan) Co., Ltd. v. United States*, 491 F. Supp. 2d 1326, 1353 (CIT 2007).

are weight-averaged CONNUM-specific rates and thus there must be higher CONNUM-specific rates.

Further, Taifa asserts that the 227.73 percent rate is aberrational, and cites to *PAM, S.p.A. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009) to contend that in that case, as opposed to here, there were 29 sales in the underlying administrative review with margins greater than the AFA rate. Taifa contends that the Department made no finding that there are company-specific, model-specific, or transaction-specific rates exceeding the selected AFA rate. In responding to the Department's reliance on *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002) in the draft remand redetermination, Taifa distinguishes *Ta Chen* by arguing that the transaction-specific rate in that case was applied in the same review in which it was calculated.

In addition, Taifa contends that the 227.73 percent rate is uncorroborated because the rate is not reliable or relevant. Taifa contends that the Department failed to explain why the selected rate was reliable for the underlying administrative review and instead stated that it was a calculated rate from a prior review period. Taifa continues that the rate is not relevant because the Department is first required to calculate what the rate would have been if the respondent had participated and then determine an amount to apply to deter noncompliance. Taifa explains that the 227.73 percent rate fails this calculus.

Department's Position:

The Court ordered that, if the Department is unable to demonstrate *de facto* government control, the Department on remand must calculate a new, separate, substitute AFA rate for Taifa. The Court stated that the Department "may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and FOP data, but the respondent has established independence from

government control." *Taifa v. United States (CIT 2009)* at 13. The Department respectfully disagrees with the Court's conclusion on the applicability of the AFA rate, which is also applied to the PRC-wide entity, to Taifa as a separate rate company. The Department contends that it may apply the highest calculated rate as AFA to a separate rate company, regardless of whether that rate is also applied to the PRC-wide entity, subject to the corroboration requirements of section 776(c) of the Act. However, pursuant to the Court's order, we have chosen a separate, substitute AFA rate for Taifa based upon a CONNUM-specific margin calculated for Taifa in the investigation.

With regard to Petitioner's contention that the Department should apply the 383.60 percent rate as AFA to Taifa, the Department does not consider that this would be in accordance with the Court's remand order that stipulated that the Department calculate a separate, substitute AFA rate for Taifa. Further, the Department does not agree with the Petitioner that it is necessary for the Department to consider transaction-specific margins based on data from the investigation in this remand determination. As noted above, in investigations the Department typically calculates CONNUM-specific margins which reflect the weighted-average margin of all the transactions within that CONNUM.

We also disagree with Taifa's assertion that 227.73 percent as an AFA rate is punitive. For Commerce's actions to be properly characterized as "punitive," the Department must have rejected "low margin information in favor of high margin information that was demonstrably less probative of current conditions."[36] Here, the Department used Taifa's own data which accounted for 12 percent of its sales volume during the most recently completed segment in which Taifa was a respondent. The Department considers this recent evidence of Taifa's actual dumping

[36] *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990).

behavior to be probative of Taifa's dumping behavior under the circumstances and conditions in the current period. While Taifa claims that the Department must calculate Taifa's actual margin for this period and then increase it slightly to add a deterrent effect, Taifa misses the point that the AFA rate is warranted precisely because the Department is unable to calculate Taifa's current margin as a direct result of Taifa's failure to cooperate. Further, Taifa has provided no evidence to persuade the Department that Taifa's actual recent dumping behavior, *i.e.,* from the investigation, does not have probative value for this current period. Accordingly the Department concludes that the 227.73 percent rate is probative. Indeed, in *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp 2d 1325, 1336-7 (CIT 2009), the Court recognized that Commerce may begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding so long as that AFA rate is corroborated to the extent practicable. This is precisely what the Department did in this case by using Taifa's own data.

Furthermore, as the Courts have recognized, the Department's general practice is to start with the highest margin in the history of the proceeding, which is subject to the corroboration requirements of section 776(c).[37] As affirmed in *Ta Chen Stainless Steel Pipe* (1339), it is within Commerce's discretion to presume that the highest prior margin reflects current margins. Although the respondent disputes this premise by citing *Shanghai Taoen International Trading Co., Ltd.* to argue that "Commerce must not…assume the highest previous margin applies simply because it is the one most prejudicial to the respondent," we emphasize that the Court, in that case, upheld the Department's selection of the highest prior rate as AFA for a mandatory respondent because there was no record information indicating that an alternative rate was more appropriate. In other cases, such as *Kompass Food Trading International v. United States*, (CIT

[37] *See*, for example, *Rhone Poulenc, Inc., v. United States*, 899 F.2d 1185. 1190 (Fed. Cir. 1990) and *Fujian Lianfu Forestry v. United States*, 638 F. Supp 2d 1325, 1336-7 (CIT 2009).

2000) and *Rhone-Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990), the court upheld the Department's presumption that the highest margin of record was the best information of current margins.

With respect to Taifa's argument that the Department did not consider other antidumping margins calculated for other respondents in the history of this proceeding, we have examined the weighted-average rates calculated in the investigation (ranging from 26.49 percent to 46.48 percent) and the first administrative review (ranging from zero to 17.59 percent), the two segments that preceded the period at issue this redetermination. Taifa was not a mandatory respondent in the intervening administrative review; however, it was in the investigation, where its overall calculated margin was 26.49 percent. We find that Taifa's 26.49 percent rate calculated in the investigation is not sufficiently adverse and does not provide an incentive for Taifa to cooperate in future segments of the proceeding. Taifa's cash deposit rate throughout the underlying period of review was 26.49 percent. By definition, cash deposit rates are applicable to subject merchandise that enters into the United States from the effective date forward and serve as payment of estimated duties owed on subject merchandise imported into the United States on a prospective basis. In this proceeding, we had instructed U.S. Customs and Border Protection ("CBP") to collect a cash-deposit rate of 26.49 percent for Taifa's hand truck imports from the People's Republic of China, effective November 12, 2004. Because Taifa was not covered by the intervening period of review, its cash deposit rate for entries covered by this redetermination continued to be 26.49 percent. Thus, subject merchandise exported by Taifa during the POR has been subject to this cash deposit rate. Thus, Taifa's failure to cooperate indicates to the Department that adoption of 26.49 percent as an AFA rate would have no effect in inducing future cooperation on the part of Taifa. We find that a rate identical to the rate Taifa

would have had to pay on entries during the POR absent a review is insufficiently adverse to induce cooperation. As a result, this rate, as advocated by Taifa, is not an appropriate AFA rate as it negates the purpose of an adverse inference provided for in section 776(b) of the Act.

Moreover, when a respondent is uncooperative, such as the case here with Taifa, we find it appropriate to assume that, if Taifa could have demonstrated that its dumping margin is lower than the highest prior calculated margin, it would have provided information showing the margin to be less. *See Rhone Poulenc*, 899 F.2d at 1190. Because the highest calculated rate in any segment of this proceeding was 46.48 percent, we find it reasonable to conclude that the actual margin for Taifa in the review subject to this remand is greater than 46.48 percent. Accordingly, we find the other previously calculated weighted average rates also insufficiently adverse to induce future cooperation.[38] Further, in choosing from among multiple rates, we determine that it is preferable to choose one from the respondent's own data as being more probative and relevant to that respondent's behavior, specifically where the respondents own margins indicate that it had dumped at higher rates than those calculated for other respondents.

While Taifa argues that the cases cited by the Department to support its position that it may resort to the highest calculated margin on the record only allows the Department to consider company-wide weighted average margins, we do not agree. In the cases cited by the Department, there were weighted-average margins that were considered sufficiently adverse to induce future cooperation and so the Department did not need to consider additional margins in those cases. As discussed above, that is not the case here because the Court directed that the

[38] *See* Magnesium Metal from the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009), and accompanying Issues and Decision Memorandum at 11-12.

Department may not apply the only weighted average margin from this proceeding that the Department deemed sufficiently adverse to induce cooperation.

The Department also disagrees with the respondent's assertion that the 227.73 percent AFA rate in this case is aberrational. In *Ta Chen Stainless Steel Pipe, Inc. v. United States,* 298 F.3d 1330 (CAFC 2002), the appellate court held that just because a significant portion of a respondent's sales have margins below the selected AFA rate does not make the selected rate aberrant. The Court upheld Commerce's decision to apply the highest non-aberrational rate margin to Ta Chen based on its reported sales. In determining the AFA rate for Taifa, the Department acted consistently with the Federal Circuit's opinion in *Ta Chen Stainless Steel Pipe, Inc. v. United States,* 298 F.3d 1330 (CAFC 2002) by concluding that the selected rate is not aberrational because it bears a rational relationship to Taifa's sales.

Finally, the Department considers the 227.73 percent rate to be corroborated in accordance with the statute. To corroborate the rate, the Department will, to the extent practicable, examine the reliability and relevance of the information used. With regard to the reliability of the margin, as opposed to other types of information for which there are independent sources to corroborate, there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. Thus, with respect to an administrative review, if the Department chooses to use as facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period.[39] Indeed, Taifa did not demonstrate

[39] *See, e.g., Antifriction Bearings and Parts Thereof from France, et al.: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, Notice of Intent To Rescind Administrative Reviews, and Notice of Intent To Revoke Order in Part,* 69 FR 5950, 5953 (February 9, 2004), unchanged in *Antifriction Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty Administrative*

that the Department's selected CONNUM-specific margin from the investigation is unreliable, but merely asserts that it might be because it is from a prior segment of the proceeding. We do not agree with Taifa that the selected rate is unreliable. Specifically, this CONNUM-specific margin has not been discredited, moreover, it is a rate calculated for Taifa, reflecting this company's own sales practices. Because Taifa did not cooperate and provide complete and accurate data for the underlying POR at issue in this remand, the most recent reliable data we have reflecting Taifa's experience is from the investigation.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin.[40] Similarly, the Department does not rely upon margins that have been judicially invalidated.[41] In the history of this proceeding, the 383.60 percent margin has been applied to separate rate companies and the PRC-wide entity as the AFA rate and has not been judicially invalidated.[42] However, as explained above, the Court would not allow the Department to apply this rate to Taifa. Therefore, the Department examined other margins from the proceeding as potential AFA rates. As part of this examination we reviewed Taifa's CONNUM-specific dumping margins and

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Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part, 69 FR 55574, 55576-77 (September 15, 2004).

[40] *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, at Comment 4 (February 22, 1996) (the Department disregarded the highest margin in that case as adverse BIA – the predecessor to facts available – because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin).

[41] *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1221-1223 (Fed. Cir. 1997) (*D&L Supply*) (the Department was instructed not to rely upon a particular BIA rate because that rate had been corrected pursuant to separate litigation).

[42] *See LTFV Determination and 2005-2006 Administrative Review.*

determined that the highest CONNUM-specific margin, 227.73 percent, was calculated for a CONNUM that represented twelve percent of Taifa's U.S. sales during the period covered by the investigation

As recognized by the Federal Circuit, "{s}o long as the data is corroborated, Commerce acts within its discretion to choose which sources and facts it will rely on to support an adverse inference."[43] Accordingly, because the Department has determined that the 227.73 percent AFA margin for Taifa is corroborated in accordance with law, we determine it is also consistent with the Court's order to calculate a new, separate, substitute AFA rate for Taifa.

[43] *See Ta Chen*, 298 F.3d at 1339.

V. FINAL REMAND DETERMINATION

The Department continues to follow the Court's order to select a separate, substitute AFA rate for Taifa. Additionally, the rate chosen by the Department is not punitive, is not aberrational, and is corroborated to the extent possible as required by the Statute. Accordingly, the Department determines that the appropriate AFA rate to apply to Taifa for this final remand redetermination is 227.73 percent.

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date