Qingdao Taifa Group Co., Ltd. v. United States, Court No. 08-00245
Slip Op. 10-126 (CIT Nov. 12, 2010)

**FINAL 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 "Court"), issued on November 12, 2010 in *Qingdao Taifa Group Co. Ltd. v. United States*, Slip Op. 10-126 (Nov. 12, 2010) ("Slip Op."). In reviewing 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), the Court remanded the matter to the Department for a third time to (a) explain why substantial record evidence supports a finding of central government control that justifies the imposition of the country-wide rate to Qingdao Taifa Group Co. Ltd.'s ("Taifa") exports, or (b) grant Taifa its own adverse rate without connection to the People's Republic of China ("PRC")-wide rate. *See* Slip Op. at 11. Although the Court did not overturn the Department's finding that the evidence for and against a finding of government control of Taifa is at least in equipoise, the Court found that the Department did not sufficiently link town-ownership to central government control over the company. *See* Slip Op. 10-11. The Court also held that the Department failed to corroborate adequately the adverse facts available ("AFA") rate it selected in the first remand redetermination. *See* Slip Op. at 11-12.

In accordance with the Court's third remand order, the Department first considered whether substantial record evidence supported a finding that Taifa's activities were subject to central government control such that Taifa should not be granted a separate rate. The Department concludes on remand, after re-weighing the evidence, that there is not substantial record evidence to conclude that the central government controlled Taifa's business decisions and, therefore, is granting Taifa a separate rate.[1] Finding that Taifa is entitled to a separate rate, the Department next considered the rate to apply to Taifa in accordance with the Court's order that the rate be a separate rate based upon facts available with adverse inferences. Therefore, the Department reviewed the antidumping duty margins in the history of the proceeding and Taifa's own data from the last segment of the proceeding when Taifa was a cooperative respondent. As a result of the Department's final remand redetermination, the Department assigns Taifa a separate antidumping duty rate of 145.90 percent.

BACKGROUND

On February 2, 2007, the Department initiated an administrative review of the antidumping duty order on hand trucks and certain parts thereof from the PRC for the period December 1, 2005, through November 31, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 FR 5005 (February 2, 2007).

Taifa was selected as a mandatory respondent in the administrative review. On July 28, 2008, the Department published the final results of the 2005-2006 administrative review of the antidumping duty order on hand trucks and certain parts thereof from the PRC. *See 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*"). In the *Final Results*, the Department applied total AFA to Taifa because the company withheld requested information and significantly impeded the proceeding by not cooperating to the best of its ability at verification. Additionally, the Department denied Taifa a separate rate because "Taifa withheld information,

[1] The Department is conducting this remand respectfully under protest. *See* Viraj Group, Ltd. v. United States, 343 F.3d 1371 (Fed. Cir. 2003).

significantly impeded the proceeding and provided information that could not be verified." *See Final Results* at 43686. Specifically, the Department concluded in its final results that at verification, Taifa withheld information regarding the sales and production of wheels (*i.e.*, part of the subject merchandise), failed to report factor of production ("FOP") data for wheels, and concealed documents that had been requested by the Department. *See Final Results*, and accompanying Issues and Decision Memorandum at Comment 1. In addition, because Taifa could not substantiate its ownership and Board of Directors management and, therefore, could not establish *de facto* independence from government control, the Department applied its general presumption that Taifa was part of the PRC-entity and applied to Taifa the rate of 383.60 percent, the rate applied to the PRC-entity in the less than fair value ("LTFV") investigation. Taifa challenged several decisions in the *Final Results* before the Court.

While the Court upheld the Department's decision to apply AFA for withholding information and impeding the proceeding, it disagreed with the Department's decision to deny Taifa a separate rate. On August 11, 2009, the Court issued its ruling in *Qingdao Taifa Group Co., Ltd. v. United States*, 637 F. Supp. 2d 1231 (CIT 2009) ("*Taifa I*"). In its opinion, the Court stated that the Department must "determine whether a government entity exercised *de facto* {*sic*} nonmarket control over Taifa sufficient to link the China entity rate with Taifa." *See Taifa I* at 19. The Court remanded the case to the Department for further analysis of *de facto* control and instructed the Department to "calculate a separate, substitute AFA rate for Taifa" if it could not be linked to the PRC-entity. *See Taifa I* at 20.

The Department filed its first remand results with the Court on January 22, 2010. *See Remand Redetermination Qingdao Taifa Group Co., Ltd., v. United States* (January 22, 2010), http://ia.ita.doc.gov/remands/09-83.pdf ("*Taifa I Redetermination*"). In *Taifa I Redetermination,* the Department concluded that the evidence on the record did not demonstrate affirmatively that a government entity exercised control over Taifa and, accordingly, calculated a separate, substitute AFA rate of 227.73 percent for Taifa, based on a control number ("CONNUM")-specific margin calculated for Taifa in the LTFV investigation.

On May 12, 2010, the Court again remanded this case to the Department, stating that "{the Department} misconstrued the remand instructions as requiring Commerce to affirmatively demonstrate that a government entity exercised *de facto* control over Taifa before it could apply the PRC-wide rate to Taifa and as shifting the burden of proof away from a respondent claiming a separate rate." *Qingdao Taifa Group Co., Ltd. v. United States*, 710 F. Supp. 2d 1352 (CIT 2010) ("*Taifa II*") (citing *Taifa I Redetermination* at 4) (internal quotations omitted). In *Taifa II*, the Court directed the Department to determine, after proper investigation and analysis of the record, whether a government entity exercised control over Taifa sufficient to link the PRC-wide rate to Taifa. The Court directed that if the Department determines that: (1) Taifa is not independent of government control, it must explain how the record evidence links Taifa to the central PRC government; (2) there is no government control, it must give Taifa a separate rate; or (3) the evidence does not yield an affirmative conclusion regarding government control or Taifa's relationship to the central PRC government, it may apply a "well supported and explained presumption" that Taifa is government controlled and apply the PRC-wide rate. *See Taifa II*, 710 F. Supp. 2d at 1358. In the *Taifa II* remand redetermination, the Department found that mixed evidence on the record did not affirmatively overturn the presumption of control. Therefore, the Department relied upon its general presumption based upon the PRC's continued status as a non-market economy that in the context of an AD proceeding, all exporters in the PRC are under government control unless they demonstrate otherwise. *See Remand*

Redetermination Qingdao Taifa Group Co., Ltd., v. United States (July 27, 2010) http://ia.ita.doc.gov/remands/10-53.pdf ("*Taifa II Redetermination*").

On November 12, 2010, the Court remanded this matter a third time. The Court held that the Department cannot apply a country-wide rate unless it supports with evidence its presumption that a manufacturing company such as Taifa is state-owned or controlled to a degree that warrants application of the country-wide rate. *See* Slip Op. 10-126 at 9. The Court further held:

> If Commerce cannot explain why substantial record evidence supports a finding of central government control that justifies imposition of the PRC-wide entity rate, Taifa must get the rate its own lack of verifiable production evidence warrants, without resort to an unconnected country-wide rate. … The mere conclusions in the August 30, 2006, Memorandum, however, do not support a link to a PRC-wide rate, as explained.

Id. at 11. The Court also held as invalid the Department's selection and corroboration of the 227 percent antidumping duty margin. *Id*. at 12.

On March 3, 2011, the Department released the "Draft Results of Redetermination Pursuant To Court Remand" ("Draft Results of Redetermination") to the parties for comment. Gleason Industrial Products, Inc., and Precision Products, Inc., (collectively "Gleason") and Taifa both submitted comments regarding the Draft Results of Redetermination on March 7, 2011. A summary of the parties' post Draft-Redetermination comments and the Department's responses to those comments are set forth below.

B. ANALYSIS OF REMANDED ISSUES

Whether "substantial record evidence supports a finding of central government control."

***See* Slip Op. at 11.**

We are granting Taifa a separate rate because, having re-weighed the evidence on the record, we do not find that there is substantial evidence to conclude that the central government controlled Taifa's business decisions. Although there is record evidence to demonstrate that Taifa is actually owned by the town government and there is reason to doubt the identity of an independent board of directors directing Taifa's activities in contradiction to how Taifa originally reported its ownership and management to the Department, *see Taifa II Redetermination*, in accordance with the Court's finding, the Department concludes that there is insufficient record evidence to support a conclusion that Taifa operated under central government control. The Court held that the Department "could find that an independent board of directors made Taifa's business decisions without contamination by government resource allocation." Slip Op. at 10-11. In this remand redetermination, the Department notes the absence of specific evidence on the record to support a finding that Taifa's board of directors was subject to *de facto* central government control. However, in re-weighing the evidence where it has been found that Taifa has not cooperated to the best of its ability, the Department finds that this absence of record evidence also is not sufficient to support the opposite finding (*i.e.*, that Taifa's board of directors acted independently of central government control). Nevertheless, the Department concludes the record evidence supports a finding that a board of directors exists at Taifa and that Taifa maintained control of its foreign currency without any restrictions. *See* Memorandum to the File: Verification of the Sales and Factors Response of Qingdao Taifa Group Import and Export Co., Ltd and Qingdao Taifa Group Co., Ltd. the Review of Hand Trucks and Certain Parts Thereof From the People's Republic of China, (June 12, 2008) ("Verification Report") at 9. Accordingly, within the Court's analytic framework, the Department finds that the record evidence is insufficient to support a finding that the board of directors was subject to central government non-market controls sufficient to link the PRC-wide rate to Taifa, and the Department will assign a separate rate to Taifa.

Selection and corroboration of an adverse facts available rate.

The Court held that the Department's selection of a 227 percent rate as an antidumping duty margin for Taifa was not an overall rate calculated for any particular respondent, but rather was calculated for a portion of Taifa's sales and, because it is such a high rate, was therefore not adequately corroborated. Slip Op. at 11-12. In so holding, the Court stated that the Department did not err by rejecting Taifa's previously calculated margin of 26.49 percent, and that the Department is not confined to the rates of the investigation, up to 47 percent. The Court stated, however, that "{w}hen rates are in multiples of 100 percent, one might assume that a bit more corroboration or record support is warranted." Slip Op. at 12 fn 7.

Pursuant to section 776(b) of the Tariff Act of 1930, as amended ("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." *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 Federal Circuit has held that the Department's discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco* (Fed. Cir. 2000)"). The Appellate Court has also held that "Commerce need not select, as an AFA rate, a rate that represents the typical dumping margin for the industry in question." *KYD, Inc. v. United States*, 607 F.3d 760, 765-66 (Fed. Cir. 2010) ("*KYD* (Fed. Cir. 2010)")(citing *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) ("*PAM* (Fed. Cir. 2009)"). In upholding a 122.88 percent antidumping duty margin, the Federal Circuit stated that the relevant inquiry focuses on the nature of the information, and that the Department need only satisfy the requirement that the information has probative value. *KYD* (Fed. Cir. 2010) at 765. The SAA states that the term "corroborate" as used in section 1677e of the Act means the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. With regard to determining the probative value of an adverse inference, the Federal Circuit held in *Gallant Ocean* that the Department must determine whether the rate has a relationship to actual dumping, rather than rely solely upon a petition rate in the face of lower calculated margins. *See Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1323-24 (Fed. Cir. 2010) ("*Gallant Ocean* (Fed. Cir. 2010)"). There, the Court referred to the touchstone of "commercial reality" in holding that a rate ten times the rate for cooperative respondents was not probative of the non-cooperative exporter's commercial behavior. *Id*., at 1324.

The Department's inquiry into whether a selected AFA rate is probative evaluates whether the selected rate is sufficiently tied to the respondent and the respondent's actual dumping, with some built-in increase. Rather than select an arbitrary number to add to Taifa's calculated weighted average antidumping duty margin (26.49 percent) as a deterrent to non-compliance, the Department is analyzing Taifa's commercial behavior taken from that period when Taifa last cooperated with the Department. The Department considers this information to be a reliable indication of Taifa's actual pricing behavior because it is Taifa's own data that was used to calculate an antidumping duty margin in a previous segment of the proceeding. Additionally, the Department is satisfied that the information is relevant because there is only one intervening period of review since that information was submitted by Taifa and verified, and there is no information on this record to detract from that pricing data.

Specifically, the Department started with a list of each product-matching CONNUM from Taifa's sales database and ranked the margins from highest to lowest. *See* Attachment 1. This CONNUM list was generated by the SAS program used in the LTFV investigation. From this list, the Department calculated the percentage of the total quantity each CONNUM represented. That is, the Department calculated the cumulative percentages as one progresses through the list of margins by CONNUM. *See* Attachment 2. The Department then selected a cumulative percentage (by sales quantity) sufficiently high to leave no doubt that what is captured in the analysis is representative of Taifa's commercial reality. The Department then weight-averaged the margins by the quantity sold representing that selected percentage of sales. Using this above described framework, the Department calculated a rate of 145.90 percent. *See* Attachment 3.

In evaluating the cumulative percentage to include in its calculation described above, the Department determines that 36 percent of sales is more than adequate to represent Taifa's commercial behavior, with the application of an adverse inference. The Department uses a similar threshold in its test to determine whether targeted dumping is occurring. *See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 FR 26371 (May 9, 2008); *see also Antidumping Methodologies for*

Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation/Period of Review that May Require Using Shorter Cost Averaging Periods; Request for Comment and Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 32557 (June 9, 2008). Specifically, the first stage of the test requires the Department to determine whether there exists a "pattern" of prices that differs among purchasers, regions, or periods of time. The Department determines that if more than 33 percent of the total sales volume to the alleged target meets a standard deviation test, the pattern requirement is met.[2] The Department considers the 33 percent threshold to ensure that the numbers of sales at a low price are not mere anomalies but, rather, represent a pattern. *See* section 777A(d)(1)(B)(i) of the Act; *see also* 19 CFR 351.414(f)(1)(i). This test was upheld in *Mid Continental Nail Corp. v. United States*, Slip Op. 2010-47 (Ct. Int'l Trade 2010). The threshold of 33 percent is also used in the context of determining the circumstances under which the Department will use market economy input prices paid by a non-market economy ("NME") respondent as surrogate values for valuing the FOPs. *See* section 773(c)(4) of the Act. Under this best available information framework, the Department has defined "meaningful" percentage to require that at least 33 percent of the total volume of the input being valued be sourced from a market economy source. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61718 (October 19, 2006); *see also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

For purposes of identifying an appropriate rate to apply as AFA to Taifa, we examined the history of this antidumping proceeding. Taifa's failure to cooperate occurred during the

[2] Taifa's sales by quantity do not distribute evenly across the CONNUMs at exactly 33 percent.

second administrative review of this antidumping order, wherein Taifa was the only respondent subject to review. The only calculated rates in the history of the proceeding at the time the Department completed this administrative review were 0.00 percent, 17.59 percent, 26.49 percent, 32.76 percent, 33.68 percent, and 46.48 percent.[3] *See 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)("*Hand Trucks Amended AD Final*"); *Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*, 72 FR 27287 (May 15, 2007). While other exporters during the history of this proceeding have been assigned the 383.60 percent rate for failing to cooperate with the Department's administrative proceedings,[4] we have not considered that rate for purposes of these results of redetermination on remand pursuant to the discussion contained in the BACKGROUND section, above.

After reviewing the calculated rates from the history of this proceeding and in light of Taifa's own sales data which we relied on during the LTFV investigation, and have not been discredited, the Department concludes that rates up to 46.48 percent are not sufficiently adverse to encourage future cooperation, or an adequate representation with an adverse inference of Taifa's actual dumping if Taifa had participated in the proceeding. Specifically, Taifa's data indicates that Taifa engaged in dumping subject merchandise at rates substantially higher than the final weighted average antidumping duty margin (46.48 percent) assigned to respondent Qingdao Huatian Hand Truck Co., Ltd. ("Huatian"), which is the highest calculated rate assigned

[3] The Department agrees with Taifa's comment that it inadvertently left the margins from the first administrative review out of the draft released to the parties. Notwithstanding that oversight, the same rationale applies to the Department's rejection of using those calculated margins as an AFA rate to Taifa.
[4] *See Hand Trucks Amended AD Final*; *see also Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*,72 FR 27287 (May 15, 2007) (rate assigned to Forecarry Corporation and Foremost Plastics & Metalworks (Jiaxing) Co., Ltd.).

to a cooperative respondent in this proceeding. *Compare* Attachment 1 (dumping margin per CONNUM ranked highest to lowest) with *Hand Trucks Amended AD Final*. Further, the Department does not consider the weighted average dumping margin for a different respondent to be probative of Taifa's actual behavior when Taifa's own data supports an alternative conclusion. As the Federal Circuit held in *KYD* (Fed. Cir. 2010), the Department is not tasked with finding a dumping margin for the particular industry as a whole, but rather for the exporter subject to the administrative review.

Although the weighted average rate calculated using this framework is not an antidumping duty margin published in the *Federal Register* for a specific respondent, the Department considers it probative of Taifa's pricing behavior and indicative of Taifa's commercial reality. *See Washington International Insurance Co. v. United States*, Slip Op. 2010-16 (CIT 2010), *aff'd* 2010-1310 (CAFC 2010) (the AFA rate of 188.52 percent results from the Department's comparison of the lowest U.S. net price among the respondent's "unreported" sales derived from entry documentation, and the higher of the two normal values from respondent's prior new shipper review). Moreover, the Department finds this rate to be sufficiently adverse to deter non-compliance.

The Department finds that there are no other antidumping rates from which to select which would be sufficiently adverse. Further, record information indicates that Taifa dumped at rates significantly higher than the highest weighted average dumping margin in the history of the proceeding at the time the Department completed this administrative proceeding. The Department has considered the policy implications of allowing Taifa, or any respondent, to elect to accept, knowing the true nature of its dumping rate, the highest calculated rate in the history of the proceeding in determining whether it will cooperate to the best of its ability as required by the antidumping duty law. As part of this consideration, the Department notes that the statute does not direct that an AFA rate must be based solely on a final calculated weighted average rate. As discussed above, section 776(b) of the Act specifically allows for the Department to rely on "(4) any other information placed on the record."[5] Here, Taifa's own data indicates that it is a price discriminator at rates which far exceed the final margin assigned to Huatian. Further, the Department is satisfied that one third of a respondent's transactions are indicative of that respondent's commercial reality in accordance with Federal Circuit precedent.

Moreover, the selected rate is corroborated by actual sales data from Taifa as reported in this administrative review. We compared the selected margin of 145.90 percent to the margins calculated in the preliminary results of this review prior to Taifa's failed verification. *See PAM* (Fed. Cir. 2009). Though the preliminary results margins have been discredited by the fact that Taifa withheld data and otherwise failed verification and the rates are likely significantly lower than they would be if Taifa had cooperated, there are [ ] sales with transaction-specific margins higher than 145.90 percent. These sales comprise [ ] percent of total sales from the preliminary results. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F. 3d 1330, 1339 (Fed. Cir. 2002) ("*Ta Chen* (Fed. Cir. 2002)") (selected rate corroborated by actual sales data, albeit a small portion of the respondent's actual sales); accord *PAM* (Fed. Cir. 2009) at 1340 (sales used to corroborated amounted to only 0.5 percent of PAM's total United States sales during a prior period of review). Therefore, the selected rate is corroborated to the extent practicable using a significant portion of Taifa's previously reliable sales data and corroborating that data to this period of review with Taifa's own discredited data.

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[5] The Court invalidated the Department's conclusion to assign Taifa a margin of 227 percent by holding that the number "is not an actual rate" and "not derived from an overall rate calculated for anyone by anyone" but rather is a portion of Taifa's sales. As described above, the Department used the data underlying Taifa's own calculated rate to determine a meaningful percentage or pattern of pricing behavior for Taifa.

C. SUMMARY AND ANALYSIS OF PARTIES' POST-DRAFT REDETERMINATION COMMENTS

Comment 1: Final Redetermination Should Clarify Why Department is Conducting Remand

Gleason claims that the Department should explain the nature of its protest. Specifically, Gleason seeks confirmation that the Department is disagreeing with the Court's directive that the Department may not rely on its presumption of government control where a respondent does not affirmatively demonstrate the absence of both *de jure* and *de facto* government control over its export activities. According to Gleason, Taifa was on notice that it would have to provide affirmative evidence to rebut the presumption because the PRC was determined to be a non market economy NME in the underlying review. Gleason contends that the Department properly applied its presumption of government control when Taifa did not meet its evidentiary burden. Gleason cites to *Routen v. West*, 142 F. 3d 1434, 1440 (Fed. Cir. 1998) for the premise that a presumption affords a party the luxury of not having to produce specific evidence to establish the point at issue. Therefore, Gleason argues that the Department does not need further support once it invokes the NME presumption.

In a footnote to its comments agreeing with the Department's decision to grant it a separate rate, Taifa contends that it is confused by the Department's footnote that the Department is conducting this remand under protest. According to Taifa, the Court did not instruct the Department to make the determination to grant Taifa a separate rate. Taifa also states that such a footnote is confusing when the Department had the opportunity to gather additional information. Taifa contends that the Department never explains in its remand how substantial evidence supports the Department's conclusion. Taifa states that such explanation is required pursuant to *Viraj Group, Ltd. v. United States,* 343 F.3d 1371(Fed. Cir. 2003).

Department Position:

The Department disagrees with Gleason that such an explanation is necessary here. The Court has ruled on the issue raised by Gleason. *See Taifa III*, Slip Op. 10-126 * 5; *see also Taifa II*, 710 F. Supp. 2d at 1356; *Taifa I*, 637 F. Supp. 2d at 1243-44. The Department previously explained its rationale, and the Court disagreed. *Compare Taifa I Redetermination* at 4, January 22, 2010, available at http://ia.ita.doc.gov/remands/09-83.pdf, *with Taifa II*, 710 F. Supp. 2d at 1356. For the reasons discussed herein, the Department is complying with the Court's order in *Taifa III* by granting Taifa a separate rate because the Department did not find that substantial evidence linked the central PRC government with Taifa.

With respect to Taifa's comments, we do not understand *Viraj* to require that the Department restate, in each remand determination, its previously stated positions to preserve the government's appeal rights. The purpose of the Department's footnote is to explain that should the Court affirm these remand results, the Department will be the prevailing party solely because "it acquiesced and abandoned its original position, which it had zealously advocated, and adopted under protest a contrary position." *Viraj*, 343 F. 3d at 1376.

Comment 2: Whether Record Evidence Supports a Finding that Taifa Met its Burden Under the Department's Presumption of Government Control in NMEs

Gleason asserts that unlike in the current Draft Results of Redetermination, the Department's second remand results (*i.e.*, *Taifa II Redetermination*) correctly found that Taifa withheld requested information and instead provided incomplete, inaccurate and contradictory information regarding its ownership and control that ultimately could not be verified. Citing *PAM* (Fed. Cir.

2009),[6] Gleason contends that respondents have a statutory obligation to provide complete and accurate information in response to questions issued by the Department. In cases where a respondent does not meet this burden, Gleason suggests that the Court has previously found that such an overall lack of credibility is sufficient to call into question the veracity of documentation that is submitted by the party. *See Jinfu Trading Co., Ltd. V. United States*, 30 ITRD 1577, 1580-81 (CIT April 4, 2008).

Finally, Gleason argues that based on the above, the Department's second remand results were also correct in concluding that the record did not support Taifa's claim that the individuals it identified as its owners and Board of Directors actually constituted the corporate owners or an independent Board that controlled Taifa's operations. Citing *Nippon Steel* (Fed. Cir. 2006) and *Negev Phosphates* (CIT 1988),[7] Gleason contends the Court should not replace the Department's conclusion of fact with its own and that the Department "has the discretion to weigh and judge the credibility of conflicting evidence." Gleason concludes that the Department's finding in *Taifa II Redetermination*, that the information provided by Taifa regarding its ownership and control is not credible, is supported by substantial evidence and in accordance with law.

Department Position:

Rather than commenting on the current Draft Results of Redetermination (*see supra* 1-13), Gleason is commenting on the Department's prior remand redetermination (*Taifa II Redetermination)* and the Court's opinion in *Taifa III* which declined to affirm the *Taifa II Redetermination. See Taifa III* at 10-11. The issue before the parties for comment now is not

[6] *See also Fujian Lianfu Forestry Co., v. United States*, 638 F. Supp. 2d 1325, 1340 (CIT 2009) and *Tung Mung Dev. v. United States*, 25 CIT 752, 758 (2001) ("*Tung Mung* (CIT 2001)")

[7] *See Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, And Toyo Kohan Co., Ltd., v. United States*, 458 F.3d 1345, 1358-59 (Fed. Cir. 2006) ("Nippon Steel ((Fed. Cir. 2006)"), *Negev Phosphates, Ltd. v. U.S. Department of Commerce*, 699 F. Supp. 938 (CIT 1988) ("*Negev Phosphates* (CIT 1988)"). Gleason also cites *Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186, 1214 (CIT 2004) (citing *Nippon Steel Corp. v. International Trade Commission*, 345 F.3d 1379, 1381 (Fed. Cir. 2003)) and *Chung Ling Co., Ltd. v. United States*, 805 F. Supp. 45, 55 (CIT 1992).

whether the *Taifa II Redetermination* was correct, but the Department's decision in this current remand.

Comment 3: Selection of an AFA Separate Rate

Gleason argues 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. Gleason asserts that this rate is corroborated by CONNUM and transaction-specific margins from the investigation. Gleason argues 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. Gleason contends that the highest CONNUM-specific margin (227.73 percent) provides an appropriate incentive for cooperation, represents a significant percentage and number of sales by Taifa, and the normal value of the sales upon which this rate is based falls within the average of the normal values for Taifa's other sales. 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), Gleason contends that the choice of 227.73 percent as 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. Gleason states that, if the Department determines not to use either the petition rate or the highest CONNUM-specific rate from the investigation, it supports the Department's use of the 145.90 percent rate as alternative AFA.

Taifa argues that the Department, when selecting the 145.90 percent rate as a separate, substitute rate, ignored its statutory mandate and searched for a margin which would punish

Taifa rather than deter non-compliance. Taifa contends that the selected rate is punitive, aberrational, uncorroborated and not supported by substantial evidence or in accordance with law. 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. Taifa argues that the Department must consider all rates in the history of the proceeding when selecting an AFA rate (citing *Shandong Huarong General Group Corp.*, 2004 WL 2203486) and argues that the Department failed to consider alternative rates in the draft remand redetermination. Taifa cites *Rhone Poulenc* (Fed. Cir. 1990) and *Gerber Food* (CIT 2007),[8] 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.

Taifa argues that the size of the rate matters when selecting a rate to apply as AFA. Taifa cites to *Gallant Ocean* (Fed. Cir. 2010) as rejecting a rate selected by the Department because it was "unrelated to commercial reality and, thus, not a 'reasonably accurate estimate' of Gallant's actual dumping margin." *See Gallant Ocean* (Fed. Cir. 2010) at 1324. Citing *Shanghai Taoen Int'l Trading Co., Ltd., 360 F. Supp 2d* and *Washington Int'l Ins. Co. v. United States, 2009 WL 2460824, at *10 (CIT 2009) ("Washington Int'l Ins. Co* ("CIT 2009")") Taifa further notes that the CIT has held that the Department must not select the highest previous margin simply because it is the most prejudicial to the respondent. Taifa also cites to *Shandong Huarong General Group Corp.*, 2004 WL 2203486 at *5 for the proposition that the Court rejected the Department's selected AFA rate because of the magnitude of the increase between the rate selected and the highest rate calculated from the prior administrative review.

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

Taifa contends that the Department did not explain why the rate of 46.48 percent, the highest calculated rate in any segment of the proceeding, is insufficiently adverse to encourage cooperation, or an adequate representation of Taifa's actual dumping if Taifa had cooperated. Taifa also contends that the Department selectively left out lower calculated rates from the immediately preceding administrative review when listing the rates previously calculated in all segments of this proceeding.

Taifa asserts that the 145.90 percent rate is aberrational and does not accord with court precedent, as it consists of only the highest third of Taifa's margins, includes only three hand truck models, and is higher than any company-specific rate from any segment of the proceeding. Taifa cites to *PAM* (Fed. Cir. 2009) and notes 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 in the instant proceeding there is no evidence of company-specific rates exceeding 145.90 percent. Taifa cites to *JTEKT Corp. v. United States*, 675 F. Supp. 2d 1206, 1263 (CIT 2009) ("*JTEKT* (CIT 2009)") for the proposition that the Court affirmed an AFA rate because it was lower than a substantial number of the respondent's transaction-specific rates, and contends that the Department cannot make such a finding in the instant case. Taifa contends that the Department has not shown that the 145.90 percent rate is not disproportional (citing *China Kingdom Import & Export Co., Ltd. v. United States,* 507 F. Supp. 2d 1337, 1362 (CIT 2007) ("*China Kingdom* (CIT 2007)")), that the rate is "conservative" (*Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273, 1279 (CIT 2007) ("*Mittal Steel* (CIT 2007)"), and is not aberrant (*World Finer Foods, Inc. v. United States*, 24 CIT 541, 547 (2000) ("*World Finer Foods* (CIT 2000)").

Taifa further contends that the 145.90 percent rate is not corroborated. Taifa argues that the Court in *Taifa III* rejected the 227.73 rate proposed by the Department because it was not an actual rate calculated for a company, which applies equally to the 145.90 percent rate. Taifa argues that the Department's reliance on *KYD* (Fed. Cir. 2010) for the proposition that the Department need not select an AFA rate that represents the entire industry in question is misplaced, because *KYD* (Fed. Cir. 2010) and the cases it relies on dealt specifically with corroborating low AFA rates. Taifa further argues that the Department's use of a 33 percent threshold to measure commercial behavior, and its analogy to the Department's targeted dumping methodology and market economy price methodology, is misplaced.

Taifa argues that the Department is obligated to conduct further research to support its contention that the 145.90 percent rate is probative of Taifa's commercial reality, even though it is not a calculated company rate. Citing *Tianjin Machinery Import & Export Corp. v. United States*, 2001 WL 248542 (CIT 2011), Taifa further argues that the Department must explain why these transaction-specific rates constitute substantial evidence when a "large body of reliable information suggests the application of a much lower margin."

Taifa argues that the rate selected by the Department is neither reliable nor relevant. Citing *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310 (CIT 1999), Taifa argues that, although the selected rate is calculated from Taifa's own data, the fact that it is from a prior review period may render it unreliable and not relevant. Taifa argues that, in order to comply with the test in *De Cecco* (Fed. Cir. 2000), the Department must first estimate what Taifa's rate would have been if it had complied, and then determine a built-in increase as a deterrent to non-compliance. Citing *Shandong Huarong General Group Corp.*, 2004 WL 2203486 and *KYD* (Fed. Cir. 2010), Taifa argues that the estimated rate of what the respondent's rate would have been if it had cooperated should be the highest rate calculated for the respondent in a previous review. Taifa asserts that the Department should conduct an analysis to determine what built-in increase to apply to that rate, to establish an AFA rate.

Department's Position:

The Department disagrees with Gleason's contention that the Department should apply the 383.60 percent rate as AFA to Taifa. First, the Court held that the Department "may not apply the PRC-wide rate if substantial evidence does not support the finding that a government entity exercised nonmarket control over the respondent." *See Taifa III* at 5. Second, the Court stated that the Department would need to corroborate the 383.60 percent rate to Taifa. *See Taifa III* at 4, n. 1. As discussed above, substantial evidence does not support the conclusion that Taifa is linked to the PRC-central government. Further, the Department is unable to corroborate the 383.60 percent rate to Taifa in accordance with section 776 of the Act.

The Department also disagrees with Gleason that we should apply the 227 percent rate (Taifa's highest CONNUM-specific margin from the investigation) as an AFA rate. The Court held that the 227.73 percent rate was not corroborated. *See Taifa III* at 12, n. 7.

Taifa's comments claiming that the selected rate is improper can be divided into three sections. The Department analyzes each criticism below.

a. The Selected Rate is Not Punitive Because it is Probative of Current Conditions.

We disagree with Taifa's assertion that 145.90 percent as an AFA rate is punitive. For the Department'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."[9] Contrary to Taifa's assertions, the Department could have based its AFA rate on a percentage of Taifa's CONNUM-specific margins that is less than 36

[9] *See Rhone Poulenc* (Fed. Cir. 1990).

percent of its sales, and thus attain a margin higher than 145.90 percent. Also, the Department could use Taifa's own data to calculate a margin using the highest normal value and compare that to the lowest U.S. price. *See Washington Int'l Ins. Co* (CIT 2009). This could yield substantially higher rates than the rate the Department selected. *See* Attachment 4. Additionally, the Department could select information from the petition upon which to base the rate.

We disagree with Taifa's contention that we did not explain why we declined to select lower margins calculated for other respondents from previous segments of the proceeding in favor of the selected 145.90 percent margin.[10] We explained in detail that after reviewing these rates, the Department concluded that rates up to 46.48 percent are not sufficiently adverse to encourage future cooperation, or an adequate representation with an adverse inference of Taifa's actual dumping if Taifa had participated in the proceeding. We further explained that we do not consider the weighted average dumping margin for a different respondent to be probative of Taifa's actual behavior when Taifa's own data supports an alternative conclusion. Not only does Taifa's data from the LTFV investigation (a recent prior segment) support such a conclusion, but so does Taifa's reporting behavior and data from the underlying administrative review (see "*The Rate Selected is Corroborated*," section below). In this particular case, the record clearly demonstrates that Taifa did not report sales of a substantial portion of its merchandise because it did not want to pay the duties that would be calculated on that merchandise. *See* Verification Report at 13. Thus we can appropriately conclude that the un-reported sales would have yielded an overall higher margin than the one calculated without those transactions (otherwise Taifa would have included those transactions in its reported sales). We also explained that by

[10] We agree with Taifa that we did not acknowledge the rates of 0.00 and 17.59 percent when listing the previous rates from this proceeding. We submit that this was an oversight, and does not affect the argument that we consider the rates on the record insufficiently adverse to encourage cooperation. We have corrected this oversight in this final redetermination.

confining our selection to overall calculated rates from the history of the proceeding, Taifa could be rewarded for not participating. That is, Taifa could make a business decision to accept the highest rate calculated in the history of the proceeding as an AFA margin, and not comply with the Department's requests for information where it knows that its current pricing behavior would result in a higher dumping margin than already exists in the history of the proceeding. Thus, while we did not base Taifa's AFA margin on the lowest margins calculated in the history of this proceeding, we did not decline those margins in favor of higher margins that are less probative of current conditions because we do not find the lower margins to be probative of current conditions for Taifa.

Additionally, while Taifa claims that the Department is constrained to the use of only overall calculated rates for purposes of applying AFA to a respondent, Taifa has not cited to any instance or legal precedent so limiting the Department's discretion. Moreover, in this case, the Court specifically stated that the Department "is not necessarily confined to the rates of the investigation (up to 47 percent)" (see *Taifa III* at 12) notwithstanding that 47 percent is the highest overall calculated rate in the history of this proceeding.

Regarding Taifa's argument that the use of CONNUM-specific margins as an AFA rate is not the Department's "normal practice," we agree, in part. The highest rate in the history of this proceeding assigned to a separate rate respondent is 383.60 percent. The Department considers the alternative calculated rates from the investigation and first administrative review to be so close to Taifa's calculated rate from the last time it cooperated that selecting these rates would reward Taifa for its non-cooperation. The best evidence of whether any of these rates would discourage Taifa from future non-cooperation is Taifa's conduct in this proceeding wherein it failed to report data to the Department and obstructed verification. Because of the close proximity of the calculated rates to Taifa's rate, the Department concludes that selection of any of these rates would not encourage future cooperation, as required by the SAA. Thus, the Department does not rely upon its "normal practice," but exercises its discretion to select from the facts otherwise available in making an inference adverse to Taifa. *See* section 776(b) of the Act. The Department examined CONNUM-specific margins for Taifa from the last time Taifa cooperated, and determined that taking Taifa's CONNUM-specific rates from the 36 percent of its sales with the highest margins would be making an adverse inference based on Taifa's own pricing behavior. The Department further concludes that a rate based on Taifa's own pricing behavior for 36 percent of its sales is not punitive but rather clearly reflects Taifa's commercial reality.

b. The Rate Selected is Not Aberrational Because It Accounts for Over One-Third of Taifa's Sales By Quantity

We disagree with Taifa that the rate of 145.90 percent is aberrational. This weighted average rate accounts for over one third of Taifa's sales by quantity. As the Department explained, in its experience, when something occurs one third of the time, it reflects a pattern or meaningful percentage. Therefore, because the rate is within the normal range of Taifa's sales, it cannot be aberrational because it is not an outlier in Taifa's commercial behavior. We disagree with Taifa that the rate is aberrant because it encompasses only three models. Those three models accounted for 36 percent of Taifa's total sales volume for the relevant period. Under Taifa's framework, if one model accounted for 99 percent of its sales, because it was only one model, the rate would be aberrant. The Department does not agree.

Taifa cites to several cases where the courts affirmed AFA rates based on the fact that there were transaction-specific rates in the cases that were higher than the AFA rates, and argues that "{t}he Department has made no such finding in the instant proceeding with regard to the 145.90 percent rate because it cannot do so." The Department assumes that Taifa is relying on the fact that transaction-specific margins are not calculated in investigations to support its statement. It stands to reason that if the 145.90 percent rate is an average of the highest 36 percent of Taifa's sales by CONNUM, there could be transaction-specific rates higher than 145.90 percent.

To confirm the above, the Department ran Taifa's margin calculation program from the investigation to show transaction-specific margins, as it would if it were calculating a rate for an administrative review. *See* Attachment 4.[11] The results show that there were [ ] transaction-specific margins in the investigation that exceeded 145.90 percent. These [ ] margins comprised [ ] percent of Taifa's sales in the investigation, by quantity.

Thus, contrary to Taifa's claims, it is clear that the rate of 145.90 percent accords with judicial precedent cited by Taifa, as it is lower than a number of respondent's transaction-specific rates from prior reviews (*JTEKT* (CIT 2009)), falls within the range of transaction-specific margins (*Mittal Steel* (CIT 2007)), and these transaction-specific margins are not aberrant (*World Finer Foods* (CIT 2000)). In regards to *China Kingdom* (CIT 2007), we note that in that case the Court found that the Department was partially responsible for the fact that necessary information was not on the record, and faulted the Department because "Commerce did not confine its use of facts otherwise available and adverse inferences to fill gaps in the information needed to conduct the administrative review." *See China Kingdom* (CIT 2007) at 1355-56. The Court found, in that context, that "the 223.01 percent rate resulted from the Department's unwarranted refusal to use any of the information China Kingdom submitted

[11] This margin calculation program and the data used are Taifa's program and data from the investigation. The Department made a minor change to the program to make it run on a transaction-specific basis, as described in attachment 4.

during the administrative review." *Id.* We contend that this is not the case here, where Taifa impeded verification by hiding documents from the Department and submitted no reliable information in the review that would indicate that its margin should be lower than that used by the Department.

c. The Rate Selected is Corroborated Because It Reflects Taifa's Commercial Behavior and is Relevant to This Administrative Review.

We disagree with Taifa that the rate of 145.90 percent is uncorroborated. The weighted average rate selected by the Department is corroborated to the extent practicable in that it is based on a meaningful percentage of Taifa's own export sales activity and is otherwise reliable and relevant based on a review of Taifa's reported sales from this administrative review. Although the weighted average rate calculated is not an antidumping duty margin published in the *Federal Register* for a specific respondent, the Department explained above why it was necessary to use this rate, and why it considers it probative of Taifa's pricing behavior and indicative of Taifa's commercial reality.

Further, the 145.90 percent dumping margin is corroborated by actual sales data from this POR. We compared the margin of 145.90 percent to the margins calculated in the preliminary results of this review prior to Taifa's failed verification. Though the preliminary results margins have been discredited by the fact that Taifa withheld data and otherwise failed verification, and thus the rates are likely significantly lower than they would be if Taifa had cooperated, nevertheless there are [ ] sales with transaction-specific margins higher than 145.90 percent. These sales comprise [ ] percent of total sales from the preliminary results. Thus, Taifa cannot contend that the rate selected by the Department as AFA is not reflective of at least some of Taifa's actual sales.

The Federal Circuit held in *Ta Chen*, that "so long as the data is corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference." *Ta Chen* (Fed. Cir. 2002) at 1339. Furthermore, we do not agree with Taifa that a large body of reliable information suggests that the rate of 145.90 percent is too high, in fact we find just the opposite. As discussed above, this rate is not only based on Taifa's own sales, it has been tied to Taifa's sales in this POR as well.

With respect to Taifa's argument that the rate selected is not reliable because it is taken from a prior proceeding, the Department disagrees. In cases such as this one the only sources for calculated margins are prior investigations and administrative reviews when the sole mandatory respondent fails to cooperate. Indeed, Taifa did not demonstrate that the Department's selected CONNUM-specific margins from the investigation are unreliable, but merely asserts they might be because they are from a prior segment of the proceeding. Taifa does not contend that the Department erred in its calculation. Therefore, the CONNUM-specific margins upon which the weighted average rate is based have not been discredited. Further, Taifa does not dispute that the weighted average margin applied by the Department is derived from Taifa's own data as it provided to the Department. Therefore, the Department concludes that the weighted average rate reflects Taifa's own sales practices. Moreover, because Taifa did not cooperate to the best of its ability, but rather impeded verification and provided incomplete and inaccurate 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.

As discussed above, this rate is sufficiently relevant to Taifa. The Department believes the relevancy prong of corroboration is what Taifa challenges by arguing that the selected weighted-average rate does not reflect commercial reality. The Department believes that the rate reflects Taifa’s commercial reality because it is based on 36 percent of Taifa’s sales by quantity from the investigation which represents both a “pattern” and “meaningful percentage” of Taifa’s business activity. Further, Taifa has not demonstrated any change in this commercial reality from the investigation to this administrative review. Rather than select an arbitrary number to add to Taifa’s previously calculated weighted average antidumping duty margin (26.49 percent) as a deterrent to non-compliance, the Department is analyzing Taifa's commercial behavior taken from that period when Taifa last cooperated with the Department. The Department considers this information to be a reliable indication of Taifa's actual pricing behavior because it is Taifa's own data that was used to calculate an antidumping duty margin in a previous segment of the proceeding. Additionally, the Department is satisfied that the information is relevant because there is only one intervening period of review since that information was submitted by Taifa and verified, and there is no information on this record to detract from that pricing data. Taifa has not provided any information to discredit its pricing behavior other than relying on the pricing behavior of other cooperative respondents. However, Taifa is not a cooperative respondent which distinguishes it from these other companies.

We also disagree with Taifa’s proposal that the Department use 100 percent of Taifa’s margins to calculate a weighted average margin for Taifa in accordance with the Department’s remand redetermination in *Gallant Ocean* (Fed. Cir. 2010). That remand redetermination was never affirmed by a Court. *See Joint Stipulation of Dismissal, Gallant Ocean (Thailand) v. United States*, Ct. No 07-360 (Jan. 18, 2011). Therefore, the Department does not rely on it for the purposes of calculating an AFA rate for Taifa in these proceedings.

Finally, we disagree with Taifa that the Department erred in not conducting an analysis to determine the amount to be added as a “built-in increase intended as a deterrent to non-compliance." This comment implies that the Department should conduct an econometric study on the impact of dumping margins on a particular exporter in the particular industry such that a certain threshold rate for that exporter would be sufficiently adverse as not to punish but rather encourage future cooperation. There is no mandate in the statute for such an analysis. Moreover, such an analysis would require information from the respondent, which is absent from the record due to Taifa's failure to cooperate in this proceeding.

D. FINAL RESULTS OF REDETERMINATION

The Department has determined, in accordance with the Court's finding, that there is not substantial evidence which indicates that Taifa operated under central government control. Accordingly, the Department has complied with the Court's remand order and assigned Taifa a separate antidumping duty margin. The rate chosen by the Department is corroborated to the extent practicable in that it is based on a meaningful percentage of Taifa's own export sales activity and is otherwise reliable and relevant. Accordingly, the Department determines that the appropriate AFA rate to apply to Taifa for this final remand redetermination is 145.90 percent.

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Kim Glas
Acting Deputy Assistant Secretary
for Import Administration

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Date