UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman GT
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China for the period of review (POR) September 1, 2009, through August 31, 2010. Based on our analysis of the comments received, we have made changes in the margin calculations for one company, Xiping Opeck Food Co., Ltd. (Xiping Opeck). Therefore, the final results differ from the preliminary results. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Determination that Company A is an Interested Party
2. Application of Adverse Facts Available
3. Selection of Adverse Facts Available Rate

Background

On October 7, 2011, we published *Freshwater Crawfish Tail Meat From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 76 FR 62349 (October 7, 2011) (*Preliminary Results*).[1] On January 25, 2012, we published *Freshwater Crawfish Tail Meat from the People's Republic of China: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 77 FR 3730 (January 25, 2012), in which we extended fully the deadline for the final results to April 4,

[1] In publishing the *Preliminary Results*, the *Federal Register* distorted the title of the notice; the *Federal Register* thereafter published the correct title of the notice in 76 FR 65497 (October 21, 2011).

2012. On February 13, 2012, we determined a rate for Xiping Opeck, the sole mandatory respondent in this review, on the basis of adverse facts available (AFA). *See* memorandum to Paul Piquado, Assistant Secretary for Import Administration, entitled "Freshwater Crawfish Tail Meat from the People's Republic of China – Post-Preliminary Analysis Memorandum -- The Use of Adverse Facts Available," dated February 13, 2012 (AFA Memo), which we hereby incorporate by reference into the final results of our review. We invited interested parties to comment on the *Preliminary Results* and the AFA Memo. On February 22, 2012, we received case briefs from Xiping Opeck and the Crawfish Processors Alliance (CPA), the petitioner. On February 27, 2012, we received rebuttal comments from both parties. No interested party requested a hearing.

Discussion of the Issues

Use of Facts Available

In the *Preliminary Results*, we stated that the record evidence suggested a lack of commercial soundness in the transactions reported by Xiping Opeck in this review and that another entity (hereinafter, Company A)[2] plays a role in the pricing associated with the entries of subject merchandise in this review. *See Preliminary Results*, 76 FR at 62350. For a detailed discussion on this issue, which we hereby incorporate by reference into the final results of our review, *see* the memorandum entitled "Freshwater Crawfish Tail Meat from the People's Republic of China – Evaluation of an Allegation of Middleman Dumping and Nature of Transactions Pertaining to the Entries Under Review," dated September 30, 2011 (Evaluation of Transactions Memo). In the *Preliminary Results*, we also stated that further inquiry and a determination on this issue were key in establishing whether Company A and/or Xiping Opeck is the entity properly subject to a dumping inquiry as an exporter of subject merchandise and ultimately responsible for the pricing of entries of crawfish tail meat into the United States at issue in this review. *See Preliminary Results*, 76 FR at 62350. Consequently, we issued a non-market economy questionnaire to Company A, who did not provide a response to our questionnaire. Instead, Company A filed a letter in which it stated that it had never exported any crawfish tail meat to the United States and that it is not an exporter of subject merchandise. Company A also claimed that our questionnaire is not applicable to it and that it was unable to answer the questionnaire. *See* Company A's November 15, 2011, letter. On November 22, 2011, we again informed Company A of our reasons for requiring a questionnaire response and indicated that, in the absence of a full response, we may conclude that Company A has decided to not cooperate in this review. On November 25, 2011,[3] Company A filed a letter in which, citing U.S. Customs regulation 19 CFR

[2] We are withholding the identity of Company A because Xiping Opeck's U.S. customer claimed business-proprietary treatment of this information.

[3] Also on November 25, 2011, Company A filed a letter providing statements similar to the ones it made in its November 15, 2011, letter, as well as justification for business proprietary treatment of certain information that we identified in our November 22, 2011, letter.

101.1 and international fisheries regulation 50 CFR 300.181, [4] defining "exportation," it alleged that it is not an exporter of subject merchandise because its purchases and sales of crawfish tail meat were made within the territory of the United States and, as such, our questionnaire is not applicable to it.

We found that the record evidence establishes that the collective and interdependent actions of Xiping Opeck, its U.S. customer, GB Imports and Exports, Inc. (GBIE), and Company A (*i.e.*, GBIE's customer) caused the exportation and importation of crawfish tail meat into the United States and that it is Company A's unreported sales to unaffiliated purchasers in the United States that constitute the proper basis for U.S. price for the entries under review. *See* AFA Memo at 6. Specifically, we found that the sales from Xiping Opeck to GBIE (an entity whose behavior appears highly atypical of a party seeking to maintain a meaningful and active commercial role in the U.S. market) are not based on normal commercial considerations, and are only a piece of an integrated set of transactions that includes a resale to Company A (a foreign entity selling subject merchandise from outside the United States) and resale back to the United States. *Id.* at 4. We also found that this unique factual pattern indicates that Xiping Opeck, GBIE and Company A have collectively structured the transactions in a way that avoids the dumping liability. *Id.* As such, the particular set of transactions between Xiping Opeck and GBIE do not form a proper basis to determine U.S. price. *Id.*

In light of the significance of the information not reported by Company A and Company A's unsatisfactory explanation regarding its decision not to provide the requested information, we found that the limited information provided by Xiping Opeck could not serve as a reliable basis for reaching an accurate dumping determination with respect to Xiping Opeck, within the meaning of section 782(e)(3) of the Tariff Act of 1930, as amended (the Act). We also determined that Company A significantly impeded the proceeding because it did not provide any of the information which we determined to be critical and necessary for the completion of an administrative review of the entries and sales made by Xiping Opeck. *Id.* at 3. Accordingly, we found it necessary, pursuant to sections 776(a)(1), (2)(A) and (2)(C) of the Act, to use facts otherwise available to calculate the dumping margin for Xiping Opeck in this review. *Id*. at 4.

Application of Adverse Inferences for Facts Available

We determined that Company A is an interested party by virtue of its involvement in the relevant U.S. sales and pricing of the entries under review. *Id.* at 5. Because Company A failed to provide the U.S. sales and pricing information that we determined to be relevant in the *Preliminary Results* in calculating a dumping margin for Xiping Opeck in this review, we concluded, pursuant to section 776(b) of the Act, that Company A failed to cooperate by not acting to the best of its ability to comply with a request for information by the Department. Based on this failure to cooperate, in relying on facts otherwise available, we found that an

[4] Company A cites to 500 CFR 300.181 in its November 25, 2011 letter. Because the U.S. Code of Federal Regulations does not have a Title 500, the Department has presumed that Company A's reference was to Title 50.

adverse inference is warranted in determining a dumping margin for Xiping Opeck in this review. *Id*. at 5-6.

Selection of Adverse Facts Available Rate

In determining the AFA rate for Xiping Opeck in this review, we relied on primary information on the record because we were not able to corroborate and use the highest rate ever calculated in any segment of this proceeding, per our normal practice. *Id.* at 6-7. Accordingly, in constructing an AFA rate that we believe satisfies our obligation to prevent the respondent from benefitting from its lack of cooperation, we have relied on the U.S. wholesalers' aggregate price data (*i.e.*, across all wholesalers for which data was available), by count size, derived from sale offers of crawfish tail meat in effect during the POR as a proxy for Company A's U.S. sale prices. To calculate the AFA rate, we used the lowest average of these prices. For normal value we relied on Company A's highest acquisition cost during the POR, which was the highest of any value available on the record to use as normal value. *Id.* at 7. Using this information, we calculated an AFA rate of 70.12 percent for Xiping Opeck in this review. *Id*.

Comment 1: Determination that Company A is an Interested Party

Xiping Opeck contends that the record evidence does not support the Department's conclusion that Company A is an interested party in this review and that the Department does not point to any specific provision of section 771(9) of the Act under which Company A may be considered as such. Citing *Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 625 (CIT 1997), Xiping Opeck argues that the Department did not articulate its rationale in qualifying Company A as an interested party in this review and thereby show that its interpretation of the statutory provision was permissible. Xiping Opeck takes issue with the Department's expressed disagreement in the AFA memo concerning the claim made by Company A that it is not an exporter of subject merchandise. Citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), Xiping Opeck argues that the Department's conclusion was improper in finding Company A an exporter because there is no record evidence supporting such a finding. Xiping Opeck asserts that Company A was purchasing and reselling subject merchandise within the United States territory, subsequent to the importation of underlying merchandise to the United States. Xiping Opeck argues that, given a lack of the statutory and the regulatory definition of an "exporter," the definition of this term, as provided by the U.S. Customs regulation 19 CFR 101.1, should provide guidance to the Department's analysis of whether Company A qualifies as an exporter. Xiping Opeck argues that the record evidence supports a finding that Xiping Opeck and not Company A is the proper exporter subject to this review.

Citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), CPA asserts that the Department's interpretation of the term "exporter" was reasonable with respect to Company A based on the unique set of facts described in the Evaluation of Transactions Memo and in the AFA Memo. As such, CPA asserts that there is no merit to Xiping Opeck's further claim that Company A is not an interested party against which the

Department may apply AFA. Lastly, CPA contends that even if the Department were not able to treat Company A as an exporter under section 771(9)(A) of the Act, the Department could still treat Xiping Opeck, GBIE, and Company A, collectively, as a "business association" under the same paragraph.

Department's Position:

Contrary to Xiping Opeck's assertion, the record evidence supports the Department's determination that Company A is an interested party. The Department concluded that Company A is one of the "essential parties to a series of tied transactions leading to the exportation and importation of crawfish tail meat into the United States." *See* AFA Memo at 4, 8. We reached this finding based, in part, on evidence that "the sales activities of {Company A} triggered a series of back-to-back transactions … that caused the exportation of subject merchandise to the United States." *Id.* at 4 ("GBIE negotiates a purchase price with {Company A} first and then it negotiates a purchase price with Xiping Opeck."). Thus, in light of our examination of the record evidence and our prior analysis in the Evaluation of Transactions Memo, we ultimately determined that Company A is "an interested party by virtue of its involvement in the relevant U.S. sales and pricing of the entries under review …" *Id.* at 5. We continue to find that Company A is an exporter and interested party under section 771(9)(A) of the Act subject to this review.

We disagree with Xiping Opeck that U.S. Customs regulation 19 CFR 101.1 governs the Department's analysis of whether Company A is an exporter. As we explained in the AFA Memo, we did not accept Company A's claim that it is not an exporter pursuant to the antidumping duty laws and regulations governing the Department's administrative proceedings. While U.S. Customs' regulations may be informative in our assessment of what constitutes "exportation," this regulation is intended to serve another agency's administrative purposes. *See* AFA Memo at 7. The Department is obligated to conduct our proceedings and evaluate the information we deem relevant to our proceedings in accordance with the language and purpose of the antidumping duty law and regulations. *See id*. at 8. As such, in this case, we found that 19 CFR 101.1 (as well as international fisheries regulation 50 CFR 300.181, which was also relied on by Company A) was not dispositive as to whether a company is an exporter for purposes of determining a dumping margin. *Id*.

Rather than focusing solely on the entity arranging for shipment or the time of a shipment, for purposes of calculating a dumping margin the Department instead focuses on the foreign entity (or its U.S. affiliate, as the case may be) selling subject merchandise into the United States who is the price discriminator, *i.e.*, is in a position to set the U.S. price of subject merchandise that enters into the United States. Neither the statute nor the Department's regulations define the term "exporter;" rather, the statute focuses on what U.S. price the Department should use in its margin calculation. *See* section 772 of the Act; *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1318 n. 9 (CIT 2003) (quoting *Taiwan Semiconductor Mfg. Co., Ltd. v. United States*, 143 F. Supp. 2d 958, 966 (CIT 2001)) ("'Relevant sale' is 'the first sale in the distribution chain by

the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market.'"). Absent a definition of exporter in the statute, the Department may determine who is an "exporter" in a reasonable manner in order to effectuate the purposes of the antidumping duty law. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); *Pakfood Public Co. Ltd. v. United States*, 753 F. Supp. 2d 1334, 1342-45 (affirming the Department's use of import volume, rather than quantity and value questionnaires, for respondent selection purposes in certain cases). We find that the record demonstrates that Company A is a foreign entity acting as a price discriminator in selling to the U.S. market. Whether the subject merchandise is physically located in the United States when Company A makes the sale does not determine Company A's status as an exporter for antidumping purposes. As explained further in the Department's position on Comment 2, the Department determined that the unique circumstances in this case warrant looking beyond the sale between Xiping Opeck and GBIE. Given the nature of the back-to-back transactions from a foreign exporter to a U.S. importer to a second foreign entity (which render it highly likely that Company A agreed to resell goods back to the United States prior to the time of importation, *see* Evaluation of Transactions Memo at 14-15), we determine that the second foreign entity, Company A, is an exporter, as is Xiping Opeck, of the subject merchandise under review. Accordingly, we continue to find that Company A, as one of the entities who participated in the collective and interdependent actions that caused the exportation of the subject merchandise to the United States, is an exporter and interested party under section 771(9)(A) of the Act subject to this review.

Comment 2: Application of Adverse Facts Available

Xiping Opeck argues that because it met the requirements of section 782(e) of the Act, the Department should use the information reported by Xiping Opeck in this review regardless of the actions or the degree of cooperation exhibited by Company A in this review. Xiping Opeck contends that the Department's factual determinations must be supported by the record as a whole. In support, Xiping Opeck cites *Olympia Indus, Inc. v. United States*, 7 F. Supp. 2d 997, 1000 (CIT 1998) (citing *Atl. Sugar, Ltd., v. United States*, 744 F.2d 1556, 1563 (CAFC 1984)). Xiping Opeck argues that it was improper for the Department to apply AFA to Xiping Opeck based on a lack of cooperation from Company A, with which Xiping Opeck is not affiliated and has no business dealings. Xiping Opeck contends that section 776(b) of the Act limits the application of AFA only to a party that failed to cooperate by not acting to the best of its ability and Xiping Opeck cooperated fully in this review. Xiping Opeck argues that, in holding Xiping Opeck responsible for the action of Company A, the Department has, in effect, treated both companies as a single entity, even though the companies are not affiliated. Xiping Opeck argues that such an approach is not supported by the intent of section 771(33) of the Act or 19 CFR 351.401(f) and prior decisions. Xiping Opeck argues that in penalizing Xiping Opeck for the

actions of a company over which it has no control, the Department exceeded its statutory authority and abused its discretion.

Xiping Opeck questions certain conclusions the Department made in the AFA memo concerning the commercial authenticity of Xiping Opeck's reported transactions by challenging, individually, our interpretation of the various pieces of factual evidence. Namely, Xiping Opeck argues that: (1) the case record does not contain a "standard" pattern of price negotiations that disputes the nature of GBIE's negotiation with Xiping Opeck and Company A; (2) the Department is wrong in finding that Xiping Opeck did not demonstrate that its U.S. prices were reflective of, or congruent with, the market conditions; [5] (3) the market conditions were conducive to allowing Xiping Opeck to drastically increase both its U.S. prices as well as the volume of its shipments; (4) there is nothing unusual or atypical about the exclusive relationship between Xiping Opeck and GBIE, and such an arrangement does not indicate control of one party over the other (citing *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38872 (July 6, 2005), and accompanying Issues and Decision Memorandum at Comment 11); (5) GBIE has fully explained the reasons for its incorporation and the basis of its business relationship with Xiping Opeck; and (6) section 772 of the Act provides that export price is used as a starting price in margin calculations when the subject merchandise is first sold, before the date of importation to an unaffiliated U.S. purchaser, and record evidence supports that the relevant starting price is that of Xiping Opeck's sales.

CPA asserts that every argument raised by Xiping Opeck is premised on a single suggestion that Xiping Opeck was unaware of the pricing practices of Company A or that it did not collaborate with Company A in selling subject merchandise to the United States. CPA comments that the record evidence disputes any such notion. CPA argues that Xiping Opeck did not submit any information that reasonably disputes the prevailing U.S. wholesale prices during the POR for crawfish tail meat imported from the PRC, but rather, submitted only three retail prices. When U.S. wholesale prices are considered, CPA argues, record evidence clearly shows that Company A incurred significant and repetitive losses on its resale of Xiping Opeck's product in the United States. Citing Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harvard Law Review 697, 698 (February 1975), CPA argues that while predatory pricing makes sense only in a market that has very significant barriers to entry, such barriers are not present in the crawfish tail meat market because the subject merchandise is a fungible commodity product which is traded primarily on the basis of price. CPA argues that the only plausible explanation for the uncharacteristic commercial

[5] Specifically, Xiping Opeck argues that (a) its prices dictate the market prices because of its significant market share, and (b) the retail pricing information it provided, and on which it and GBIE purportedly relied in their negotiations, corroborates the credibility of its reported prices. Concerning (b), Xiping Opeck argues, separately, that in case the Department continues to rely on AFA in the final results, the Department should use this pricing data instead of the U.S. wholesalers' data in establishing the U.S. price in its calculations. Xiping Opeck questions the sources and the reliability of the information underlying the U.S. wholesalers' pricing data as well as the means by which the data was obtained.

behavior of Company A is that another entity is subsidizing Company A's loss-generating activities. CPA asserts that the record evidence shows that because GBIE did not earn sufficient profits to cover the losses of Company A, the only remaining entity with the commercial interest and financial ability to cover the losses is Xiping Opeck. CPA asserts that the only reasonable conclusion that the record evidence supports is that Xiping Opeck significantly increased its market share by subsidizing losses incurred by Company A in selling Xiping Opeck's product in the United States all while negating the intent of the antidumping duty order by structuring fictitious sales to GBIE. Accordingly, CPA asserts that, because it is reasonable to conclude that Xiping Opeck reimbursed Company A for its losses, it is also reasonable to conclude that Xiping Opeck had knowledge of the entity's involvement in the chain of distribution concerning Xiping Opeck's shipments.

CPA asserts that, although the Department refers in the AFA Memo to the failure to cooperate in this review by Company A, the Department should extend the same treatment to Xiping Opeck, irrespective of the Department's findings concerning Company A. CPA asserts that such treatment is warranted because Xiping Opeck failed to disclose the details of the transactions that reveal actual dumping that Xiping Opeck concealed by way of reporting sham transactions.

Citing *Tung Mung Development Co., Ltd. v. United States*, 354 F.3d 1371, 1374-75, 1377-78 (CAFC 2004) (*Tung Mung*), CPA asserts that, based on its practice, it was appropriate for the Department to determine a single margin for Xiping Opeck on the basis of the difference between the acquisition costs and the proxy for its U.S. price of Company A, irrespective of its AFA consideration. This is so, CPA argues, because Xiping Opeck knew or should have known that Company A was selling Xiping Opeck's product to the United States at prices that did not cover Company A's costs. CPA argues that, irrespective of whether it is appropriate to apply the rubric of a middleman dumping to the facts of this case, the circumstances present in this review implicate the policy considerations identical to those the Department encountered in *Tung Mung*. CPA argues that regardless of whether Xiping Opeck's behavior fits the strictures of section 776(b) of the Act,[6] it is appropriate to apply a single rate to all of Xiping Opeck's shipments because Xiping Opeck knew or should have known that Company A was engaged in dumping of Xiping Opeck's product in the United States. CPA argues that such an approach fulfills the fundamental purpose of the antidumping law – to negate the benefit of dumping obtained by Xiping Opeck.

Department's Position: The Department is faced with unique and complex facts surrounding the U.S. sales in this administrative review. In particular, the sequence of transactions at issue does not follow the more typical, simple scenario of a single sale, accompanied by shipment, from a foreign producer/exporter to its unaffiliated U.S. customer. Nor do the transactions neatly follow the scenario of multiple foreign resales of subject merchandise prior to the final sale from

[6] Citing *KYD, Inc. v. United States*, 607 F.3d 760, 768 (CAFC 2010), the petitioner argues that there is no rule that no party other than a non-cooperative party suffers the consequences from an adverse inference.

a foreign exporter to an unaffiliated U.S. customer. Rather, the sales in this case have been structured as a series of back-to-back transactions between a foreign exporter/producer, a U.S. importer, a second foreign entity and, ultimately, a U.S. buyer. Under the statute, the Department must determine which sale forms the proper basis for determining U.S. price under section 772 of the Act. Xiping Opeck would have the Department ignore the totality of the circumstances presented in this case and the commercial reality surrounding these transactions, and calculate a margin that does not reflect the dumping occurring on the sales and entries under review. Xiping Opeck is an interested party subject to review, who is, along with other parties, responsible for the pricing on the sales and entries under review. To not attribute any role to Xiping Opeck would undermine the Department's ability to administer the law as intended.

The purpose of the antidumping duty law is to offset the amount by which subject merchandise is sold at less than fair value in the United States. *See Nucor Fastener Div. v. United States*, 751 F. Supp. 2d 1327, 1329 (CIT 2010) (quoting *U.S. Steel v. United States*, 637 F. Supp. 2d 1199, 1204 (CIT 2009)) ("The central aim of the antidumping laws is to protect domestic industries from foreign manufactured goods that are sold injuriously in the United States at prices below the fair market value of those goods in their home market."); *KYD, Inc. v. United States*, 704 F. Supp. 2d 1323, 1334 n. 16 (CIT 2010) (noting that the fundamental purpose of the antidumping law is to determine current margins as accurately as possible). The statute charges the Department with the responsibility to impose antidumping duties on subject imports equal to the amount by which the normal value of that merchandise exceeds the export price or constructed export price. *See* section 731 of the Act; *see also Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed.Cir.1990) (stating that "the basic purpose of the {antidumping} statute {is} determining current margins as accurately as possible"). The presumption built into the law and our practice is that the locus of dumping will be found in the first sale of subject merchandise to an unaffiliated party where the seller knows the merchandise is destined for the United States. This idea underlies the definitions of export price and constructed export price in the statute. *See* sections 772(a) and (b) of the Act. Therefore, whether the sale represents an export price sale or a constructed export price sale, the statute anticipates that the first entity – whether the producer or an exporter – who has knowledge that the sale is destined for the United States is the entity whose price setting behavior will control dumping. *See USEC Inc. v. United States*, 259 F. Supp. 2d at 1318 n. 9; *see also Parkdale Intern. v. United States*, 429 F. Supp. 2d 1324, 1331 (CIT 2006) ("During an administrative review, Commerce analyzes the data related to the named respondent, whether it is the manufacturer or third-party reseller that sold or exported subject merchandise to the United States. Importantly, Commerce must examine the first sale where the manufacturer or reseller knew merchandise would be exported to the United States. " (citations omitted)). Accordingly, when investigating a producer (or exporter, in the non-market economy ("NME")-context), it is normally sufficient to calculate dumping margins based on that producer or exporter's sales, whether or not those sales are made directly to an unaffiliated U.S. purchaser or to another exporter for sale to the United States.

In certain, and rare, instances, this presumption does not hold true. For instance, in the case of middleman dumping, the producer may be dumping subject merchandise in its sales (for export

to the United States) to another unaffiliated exporter, or that exporter may be dumping subject merchandise in its sales to the unaffiliated purchaser in the United States, or both parties may be dumping the same merchandise. In the instant case, we are confronted with a novel transaction chain: although the subject merchandise is shipped and enters the United States only once, there are two sales from two separate foreign entities attributable to each entry prior to the sale to an unaffiliated U.S. purchaser, with an intervening transaction with a U.S. importer (Xiping Opeck to GBIE and Company A to U.S. purchasers[7]), each of which is arguably a reviewable sale. The statute and the regulations do not directly speak to this fact pattern. The Department, however, "has been vested with authority to administer the antidumping laws in accordance with the legislative intent" and, thus, "has a certain amount of discretion {to act} … with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." *Tung Mung Dev. Co. v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002) (quoting *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (1988)), *aff'd* 354 F.3d 1371 (Fed. Cir. 2004); *see Gerber Food (Yunnan) Co., Ltd. v. United States*, 387 F. Supp. 2d 1270, 1289 (CIT 2005) (noting that "{C}ommerce has certain discretion to interpret ambiguous statutory provisions with the purpose of preventing evasion of antidumping duties …."); *Hontex Enterprises, Inc., et al. v. United States*, 248 F. Supp. 2d 1323, 1343 (CIT 2003) (finding that the Department's decision to increase the scope of its analysis to include NME exporters was reasonable in light of its "responsibility to prevent circumvention of the antidumping law"); *Queen's Flowers De Colombia v. United States*, 981 F. Supp. at 622(determining that the Department's decision to define the term "company" to include several closely related companies was a permissible application of the statute, given its "responsibility to prevent circumvention of the antidumping law"). In exercising this authority it is also the Department's objective to associate dumping with the party or parties responsible for it. Accordingly, during the course of this review the Department has endeavored to establish which is the appropriate basis for U.S. price, in order to calculate an accurate dumping margin. *See* Evaluation of Transactions Memo at 5-6.

Our inquiry has revealed that Xiping Opeck's sale to GBIE does not by itself represent a commercially viable sale that serves as an appropriate basis for U.S. price for the reasons cited in the Evaluation of Transactions Memo. Rather, we found, based on the record evidence, that Xiping Opeck, GBIE, and Company A have collectively structured the transactions under review in a way that avoids the dumping liability. *See* AFA Memo at 4. Moreover, we found that both Xiping Opeck and Company A are integral parties to a series of tied transactions leading to the exportation and importation of crawfish tail meat into the United States. *See* AFA Memo at 4. In other words, it is the interdependent activities of both companies that make sales and exports of subject merchandise to the United States possible. Although we found that Xiping Opeck's reported transactions do not form the appropriate basis for the U.S. price for entries subject to the review because they are not based on normal commercial considerations,[8] the rate we calculated

[7] *See* Evaluation of Transactions Memo at 11 (discussing Company A's customers).

[8] *See infra* page 11-12, Evaluation of Transactions Memo at 6-16; *see also* AFA Memo at 3-4.

in the AFA memo reflects the degree of dumping associated with the integrated set of transactions of which Xiping Opeck was part. By taking into account both Xiping Opeck's normal value in its sales to GBIE and the extent to which Company A sold that merchandise at less than its acquisition cost to a U.S. purchaser (by using U.S. wholesalers' aggregate pricing data as a proxy for U.S. sale prices of Company A), our objective is to void, and remedy, less than normal value sales by any of the entities in the transaction chain.

The Department provided an exhaustive analysis of the factual record and a thorough explanation supporting our rationale for pursuing an inquiry into the selling practices of Company A. *See* Evaluation of Transactions Memo at 6-16. Specifically, in assessing the commercial reality[9] associated with Xiping Opeck's reported U.S. sales, we relied on the following facts, which summarize the detailed discussion in the Evaluation of Transactions Memo:

(1) Xiping Opeck did not provide a reasonable explanation for the factors accounting for the drastic increases in its U.S. prices and quantities in relation to the last POR and in relation to its competitors;
(2) Xiping Opeck did not explain the wide gap between its U.S. prices and the average prevailing U.S. market prices at the wholesale level;
(3) Xiping Opeck and GBIE did not identify the specific sources of information that both parties considered in their negotiations in gauging the prevailing U.S. market prices involving large quantities of subject merchandise. Specifically, both parties failed to adequately explain how the reported U.S. prices were established or how the reported U.S. prices were commercially reasonable at the point in the distribution channel at which Xiping Opeck sold crawfish tail meat (*i.e.*, wholesale/distributor) to the United States;
(4) The exclusivity of the commercial relationship between Xiping Opeck and GBIE and between GBIE and Company A, in terms of the supplier/buyer/product/market is relevant. Although Xiping Opeck and GBIE were purportedly interested in diversifying their customers/suppliers or products, their arrangement remained exclusive during the POR and neither party provided persuasive evidence that it attempted to enter into other commercially competitive relationships;

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[9] In evaluating whether or not a sale is commercially reasonable, the Department considers, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) receipt of payment; (5) whether the goods were resold at a profit; and (6) whether the transaction was made on an arms-length basis. *See Tianjin Tiancheng Pharmaceutical Co. v. the United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005). Therefore, the Department considers a number of factors in its bona fides analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum).

(5) GBIE did not demonstrate any reason for its incorporation beyond acting as an importer of record for Xiping Opeck's shipments or how GBIE's activities amounted to a meaningful or active commercial role in the U.S. market;
(6) Xiping Opeck's U.S. sales did not enter the stream of commerce in the United States because GBIE's purchases from Xiping Opeck were back-to-back with its re-sales to Company A, GBIE resold crawfish tail meat to a third-country entity, and GBIE transferred title of the subject merchandise to Company A only days after importation;
(7) The high likelihood that Company A agreed to resell subject merchandise back to the United States prior to importation, given Company A's agreement to purchase subject merchandise from GBIE well prior to the date of importation into the United States.

See id.; *see also* AFA Memo at 3-4 (summarizing the Evaluation of Transactions Memo at 6, 8, 13, 14, and 15). After evaluating the nature of the transactions under review, we concluded that it was appropriate to initiate an inquiry of Company A because it "appears to be an exporter that has made, or has participated in making, the first sales to unaffiliated U.S. purchasers." Evaluation of Transactions Memo at 15-16.

As a result of Company A's failure to provide a response to the Department's antidumping questionnaire, the Department's inquiry of Company A yielded no additional information regarding the transactions under review. Nevertheless, the Department examined the available record evidence and concluded that Company A "plays a central role in the selling and the U.S. pricing associated with the entries of crawfish tail meat subject to this review" based on evidence that Company A (1) is a company located in a third country, (2) agreed to purchase subject merchandise from GBIE prior to importation, and (3) also had sufficient time to sell subject merchandise in the United States prior to the importation. AFA Memo at 3-4 (citing Evaluation of Transactions Memo at 14-15 (finding that "GBIE agreed to sell crawfish tail meat to {Company A} at the same time it agreed to buy the product from Xiping Opeck" and that "it is highly likely that {Company A} agreed to resell goods back to the Unites States prior to the time of importation")).

We also disagree with Xiping Opeck that we should use its information in our final results. As summarized above, and fully explained in the Evaluation of Transactions Memo, the record evidence demonstrates that the sales from Xiping Opeck to GBIE are not based on normal commercial considerations. *See supra* page 11-12; Evaluation of Transactions Memo at 6-16; *see also* AFA Memo at 3-4.

Further, we disagree with Xiping Opeck that we are effectively treating two unaffiliated companies – Xiping Opeck and Company A – as a single entity simply because we are attributing the AFA rate to Xiping Opeck. Because Company A failed to provide a response to the Department's questionnaire, information necessary to determine U.S. price is not on the record. Further, based on the fact that for each Xiping Opeck U.S. sale there are in fact multiple transactions that result in a single entry, it is appropriate to determine a single margin applicable to entries from Xiping Opeck. While it is Company A that has failed to cooperate by not acting

to the best of its ability with the Department's request for cooperation with respect to the appropriate U.S. sales price, the lack of cooperation reasonably results in the application of an adverse inference applicable to the calculation of the dumping margin for the sales and entries made by Xiping Opeck, with Company A, in this review. The record demonstrates that Xiping Opeck, GBIE, and Company A are all integral parties in the series of transactions under review. In addition, we find that based on Xiping Opeck's admitted presence and knowledge of the market, it would have had reason to know that its shipments of subject merchandise were ultimately being sold at less than GBIE's buyer's acquisition cost to unaffiliated U.S. purchasers. By its own admission, Xiping Opeck held a significant market share during the POR. Xiping Opeck's case brief at 12. Further, Xiping Opeck claims that its "sales prices *determine* what the market prices are" and that its "dominance means that it in effect sets the prevailing prices of the market." *Id.* (emphasis in original). We find it reasonable to assume that a company whose market share was such that it "determined" market prices would be well aware of the prices at which wholesalers were offering its subject merchandise, and would thus be aware that wholesalers' prices were significantly lower than the selling price it reported to the Department. *See* Evaluation of Transactions Memo at 8-9.

Finally, we have determined that it is reasonable to assign the 70.12 percent AFA rate to Xiping Opeck, rather than solely to Company A or as a combined Xiping Opeck/Company A rate because the record evidence establishes that Xiping Opeck shipped all subject merchandise that Company A sold to the United States. Further, because the identity of Company A is not apparent in any entry documentation, there is no practical reason to establish a rate that is associated with any entity other than Xiping Opeck. We note that if Xiping Opeck alters the manner in which it makes sales to unaffiliated U.S. purchasers in the future, *e.g.*, by making direct sales or using alternative transaction chains, the Department will consider such changes in the context of future administrative reviews.

Comment 3: Selection of Adverse Facts Available Rate

CPA contends that the Department should use an AFA rate of 223.01 percent for Xiping Opeck. Citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987, 3989 (January 22, 2009), CPA argues that the Department normally selects as AFA the highest rate from any segment of the proceeding. CPA argues that the courts have consistently upheld the Department's practice in this regard, particularly in *Shanghai Taoen Int'l Trading Co. v. United States*, 360 F. Supp. 2d 1339, 1346-48 (CIT 2005) (*Shanghai Taoen*) where it affirmed the use of the 223.01 percent AFA rate in a prior segment of this proceeding.

CPA argues that the Department's concern is misplaced when it acknowledged the difficulty in corroborating the 223.01 percent rate arising from its perceived inability to reasonably relate the 223.01 percent rate to the commercial activity during the POR. In corroborating the AFA rate, CPA argues, the Department need not tie the AFA rate to actual dumping margins during the POR but, rather, take into account any record evidence that might indicate that the actual

margins are radically different from the AFA rate being considered. CPA contends that in the instant review the Department does not have record evidence of actual dumping margins. CPA argues that no judicial precedent requires the Department to settle on a lower AFA rate where a respondent's lack of cooperation has created a record devoid of facts illuminating the actual magnitude of dumping. Citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (CAFC 1990), *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (CAFC 2002) (*Ta Chen*), and *KYD, Inc. v. United States*, 779 F. Supp. 2d 1361 (CIT 2011) (*KYD*), CPA argues that, in the absence of the most recent pricing data, the Department may presume that the highest prior margin reflects the current margins. Citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (CAFC 2010) (*Gallant Ocean*), CPA argues that the existence of margins in the contested review that were much lower than the selected AFA rate was deemed by the court as substantial evidence disputing the selected AFA rate as reflective of the commercial reality during the POR. CPA contends that *Gallant Ocean* does not, however, sanction against the use of a 223.01 percent AFA rate in this review because the 223.01 percent is a calculated rate and there is no evidence on the record of this review to suggest that it is not reflective of a commercial reality.

CPA argues that, in case the Department continues to decline to use the 223.01 percent as the AFA rate, it should use 122.92 percent, the weighted average of margins the Department calculated for four mandatory respondents in the original investigation (used as a rate for respondents not selected for individual examination).[10] CPA observes that in calculating the AFA rate for Xiping Opeck, the Department used the U.S. wholesalers' aggregate pricing data for crawfish of a certain size count as a proxy for U.S. sale prices of Company A. CPA asserts that because Company A did not provide its U.S. pricing data, in order to properly estimate Company A's U.S. prices, the Department needs to remove the profit element from the U.S. wholesalers' price that it had used in its calculation.[11] CPA asserts that removing the U.S. wholesalers' mark up results in a more accurate estimate of Xiping Opeck's actual dumping margin, which is significantly higher than the 70.12 percent AFA rate the Department determined in the AFA memo. Citing *F.lli De Cecco Di Filippo Fara S. Martino, S.p.A. v. United States*, 216 F.3d 1027, 1032 (CAFC 2000) (*F.lli De Cecco)*, CPA argues that the 122.92 percent AFA rate is a reasonably accurate estimate of Xiping Opeck's actual margin with some built-in increase intended as a deterrent to non-compliance. Following the court's rationale in *Gallant Ocean*, *F.lli De Cecco*, and *KYD*, CPA argues that the 122.92 percent AFA rate is not many times higher than its estimate of Xiping Opeck's actual dumping margin.

Xiping Opeck argues that there is no information on the record to determine whether the 223.01 percent or the 122.92 percent rates are still accurate or valid. Stating that the 223.01 percent rate is from the 1999-2000 review and that the 122.92 percent rate is from the original investigation

[10] *See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 FR 41347, 41350, 41358 (August 1, 1997).

[11] The petitioner proposes to estimate profit using the financial statements of GB Imports and Exports, Inc., the U.S. customer of Xiping Opeck.

covering six months in 1996, Xiping Opeck argues that since that time there have been innumerable changes in the pricing trends, surrogate values, production and selling practices, U.S. market conditions, *etc.*, and that these changes could have a significant impact on the continued accuracy or validity of the rates proposed by CPA. Xiping Opeck contends that there is nothing on the record that shows that the 223.01 percent or the 122.92 percent rates are reasonably accurate estimates of the actual rate, as required by *Ta Chen*, 298 F.3d at 1340, or that they are reliable and bear a rational relationship to the activities of Xiping Opeck, as required by *Shandong Huarong Gen. Group Corp. v. United States*, 31 C.I.T. 42 (CIT 2007) (*Shandong Huarong*).

Citing *Timken Co. v. United States*, 354 F.3d 1334, 1335 (Fed. Cir. 2004), Xiping Opeck argues that the Department has no obligation to use the highest rate from any segment of the proceeding because doing so would create an overly punitive result. Citing *Gallant Ocean*, 602 F.3d at 1319, Xiping Opeck argues that the Department is required to consider margins calculated in the most recent segments of the proceeding in order to determine whether the rates proposed by CPA are reasonable and relevant. Xiping Opeck states that the rates in the three most recently completed reviews, including the rates calculated for Xiping Opeck, are significantly lower than the AFA rates proposed by CPA or the AFA rate calculated by the Department. Xiping Opeck argues that if the Department determines to apply as AFA the rate from a prior segment, *Shandong Huarong* dictates the preference of using a previously calculated rate for Xiping Opeck.

Xiping Opeck asserts that it is not appropriate to rely on GBIE's financial data in estimating the U.S. wholesalers' mark up. Xiping Opeck argues that if the Department rejects, as it has done, Xiping Opeck's U.S. sales as inauthentic and treats Xiping Opeck, GBIE, and Company A as a single business entity, then it must write off the entire record of information submitted by Xiping Opeck, GBIE, and Company A. Otherwise, Xiping Opeck argues, the Department establishes a part of its AFA rate calculation on the rejected data that the Department considered unreliable. Citing *Shanghai Taoen*, 360 F. Supp. 2d at 1349, Xiping Opeck argues such an approach is not invalid.

Department's Position: As we noted in our AFA memo, the Department normally selects as AFA the highest rate from any segment of the proceeding. *See*, *e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987, 3989 (January 22, 2009). In this case, the Department considered the use of the 223.01 percent rate, the highest rate ever calculated in any segment of this proceeding, as the AFA rate for Xiping Opeck. AFA Memo at 6; *see Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002). Because the 223.01 percent rate

constitutes secondary information,[12] the Department would have to corroborate[13] the rate, to the extent practicable, if the Department were to apply such as rate as an AFA rate. *See* section 776(c) of the Act.

In determining whether the 223.01 percent rate had probative value, we considered information from recently completed administrative reviews of this order, including weighted-average and transaction-specific margins assigned to Xiping Opeck and other participating respondents. *See* AFA Memo at 7, Attachment I. In particular, we considered the information reasonably at our disposal to ascertain whether the 223.01 percent rate was relevant with respect to Xiping Opeck, *i.e.*, whether the rate bore a rational relationship to Xiping Opeck's commercial practices. *See Am. Silicon Techs. v. United States*, 273 F. Supp. 2d 1342, 1346 (CIT 2003) (finding that the selected AFA rate bore a "rational relationship" to the respondent's "commercial practices" and was, therefore, relevant). Because there were significant differences between the said margins and the 223.01 percent rate, we determined that the information available on the record of this review and in more recently completed administrative reviews of this order does not sufficiently allow us to satisfy the corroboration requirement of section 776(c) of the Act.

We disagree with CPA's assertion that there is no record evidence to suggest that the 223.01 percent rate is not reflective of commercial reality. Although we have limited information with respect to the commercial activity during the instant POR because Xiping Opeck is the sole mandatory respondent in this segment of the proceeding, the record does contain certain information that allows us to glean the prevailing U.S. prices during the POR. Specifically, record information contains average POR import values for crawfish tail meat applicable to Xiping Opeck's major competitor as well as the U.S. wholesale price offers in effect during the POR. *See* CPA's February 25, 2011, submission Exhibits 1 and 2, CPA's February 28, 2011, submission at Exhibit 1, CPA's March 3, 2011, submission at Exhibit 1. We find such information relevant to Xiping Opeck's commercial practices because the underlying U.S. prices for its entries compete at a similar point in the distribution channel. Crucially, this information,

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[12] The Statement of Administrative Action (SAA) defines "secondary information" as "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* SAA accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, Vol. 1, 103d Cong. (1994) at 870.

[13] The SAA explains that "corroborate" means to determine that the information used has probative value. *See* SAA at 870. The Department has determined that to have probative value, information must be reliable and relevant. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997). The SAA also explains that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See* SAA at 870; *see also Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181, 12183 (March 11, 2005).

along with the available information on normal value, undercuts the probative value of the 223.01 percent rate. Moreover, the 223.01 percent rate is significantly greater than the weighted-average or transaction-specific margins that were calculated in more recent prior review periods. *See* AFA Memo at Attachment I. As such, and based on this evidence, the Department reasonably determined that that the 223.01 percent rate is not relevant to Xiping Opeck during this review period.

We find that CPA's reliance on *Gallant Ocean* is misplaced in arguing that, absent record evidence to the contrary, the 223.01 percent is reflective of a commercial reality in the instant review. Although CPA is correct that, unlike in *Gallant Ocean*, the record evidence lacks actual calculated margins in this review, we do not believe that *Gallant Ocean* supports the use of the 223.01 percent rate under the circumstances here. As we stated in the AFA Memo, we examined information contained in recently completed administrative reviews of this order, including weighted-average and transaction-specific margins assigned to Xiping Opeck and other participating respondents. *See* AFA Memo at 7. We found that the highest weighted average margin calculated in the last three administrative reviews was 41.91 percent and no transaction-specific margin calculated for any respondent in those reviews was above this rate. *Id.* at Attach. I. Moreover, in all reviews in which we individually examined Xiping Opeck, the weighted average margins for Xiping Opeck were as follows: 9.39 percent in the 2008-2009 review, *de minimis* in the 2007-2008 review, 13.61 percent in the 2005-2006 review, and 34.85 percent in the 2004-2005 review. The 223.01 percent and the 122.92 percent rates suggested by CPA represent margins that are significantly larger than any weighted average or transaction-specific margin that we calculated for any respondent, including Xiping Opeck, in recent segments of this proceeding. Accordingly, we continue to find that the 223.01 percent rate is not probative and thus is not an appropriate AFA rate to apply to Xiping Opeck. Similarly, we also find, based on evidence of commercial activity during the POR, as well as previously calculated weighted-average or transaction-specific margins, that the 122.92 percent rate suggested by CPA is not probative. We therefore continue to find that the record evidence does not sufficiently allow us to satisfy the corroboration requirement of section 776(c) of the Act were we to use these rates.

Finally, we also disagree with CPA that removing the U.S. wholesalers' mark up from the U.S. prices used in calculating the 70.12 percent AFA rate would support the 122.92 percent AFA rate as a more accurate estimate of Xiping Opeck's actual margin with some increase built-in to deter non-compliance. Even if we were to take into account a mark up, based on the information available, the resulting margin would not be sufficient to corroborate the 122.92 percent rate.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of the review in the *Federal Register*.

✓
Agree

Disagree

Paul Piquado
Assistant Secretary
for Import Administration

4 APRIL 2012
Date