

July 27, 2010

Qingdao Taifa Group Co., Ltd. v. United States
Court No. 08-00245
Slip Op. 10-53 (CIT May 12, 2010)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (“the Department”) has prepared these final results of redetermination pursuant to a remand order from the Court of International Trade (“the Court”) in *Qingdao Taifa Group Co., Ltd. v. United States*, Slip Op. 2010-53 (CIT 2010) (“*Taifa I*”). In *Taifa II*, the Court remanded the underlying administrative proceeding to the Department to determine whether the record evidence established that Qingdao Taifa Group Co., Ltd. (“Taifa”) is entitled to a separate rate pursuant to the Department’s separate-rate methodology.

In accordance with the Court’s remand order, the Department has analyzed the record with regard to Taifa’s ownership structure pursuant to the separate-rate methodology that the Department applies in administrative reviews of antidumping duty orders in nonmarket economies (“NME”). The Department has determined that the ownership information Taifa placed on the record is contradicted by other record information, including information discovered by the Department at verification. The Department finds that the unreliability of the information relating to Taifa’s ownership leaves the Department unable to conclude that Taifa’s board of directors is an entity independent of government ownership and control with respect to Taifa’s export activities, such that Taifa has failed to establish it is *de facto* independent from government control. Therefore, in this remand, the Department has assigned Taifa the People’s Republic of China (“PRC”)-entity rate of 383.60 percent because the Department is unable to

conclude based upon substantial evidence that Taifa is *de facto* free of government control and is entitled to a separate rate.

BACKGROUND

On February 2, 2007, Commerce 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 adverse facts available (“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, 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, 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. v. United States*, 637 F. Supp. 2d 1231 (CIT 2009) (“*Taifa I*”).¹ In its opinion, the Court stated that the Department must “determine whether a government entity exercised *de facto* 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 affirmatively demonstrate 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 CONNUM-specific margin

¹ The Court remanded the following issues: 1) to determine whether a government entity exercised *de facto* control over Taifa such that Taifa is part of the PRC-wide entity; and 2) if such government control cannot affirmatively be demonstrated, calculate a separate, substitute AFA rate for Taifa.

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 court's first remand instructions as requiring that the Department affirmatively demonstrate government control over Taifa. In this second remand, the Court has 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: (1) if the Department determines that Taifa is not independent of government control, it must explain how the record evidence links Taifa to the central PRC government; (2) if the Department finds that there is no government control, it must give Taifa a separate rate; or (3) if the Department determines that 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* at 10-11. Pursuant to the Court's second remand order, the Department finds the mixed evidence on the record does not affirmatively overturn the presumption of control. Therefore, the Department is applying its well-established general presumption, as further explained below, based upon the PRC's continued status as an NME that all companies in the PRC are under government control unless they demonstrate otherwise. *See Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 FR 19026, 19027 (April 30, 1996).

On July 16, 2010, we released our draft results of redetermination to the interested parties. On July 21, 2010, we received comments from interested parties on our draft results. Below is a summary of the comments and the Department's position thereto. As a result of the

Department's remand redetermination, the Department has assigned Taifa an antidumping duty rate of 383.60 percent.

ANALYSIS

A. Facts on the record

A review of the evidence on the record of this case demonstrates that Taifa withheld certain information from the Department, impeded the proceedings by its actions at verification, provided the Department unreliable and unverifiable information, and provided contradictory information regarding the company's ownership structure. *See Final Results* at 43686. With regard to the specific issue in this remand, the facts surrounding Taifa's ownership are contradictory and unreliable, calling into question the operational structure of Taifa such that the Department concludes that Taifa has not demonstrated the absence of government control to overcome the general presumption underlying the Department's separate-rate methodology. As noted by the Court, a respondent must show an absence of both *de jure* and *de facto* government control in order to be eligible for a separate rate. *See Taifa I* at 13. The Court of Appeals for the Federal Circuit ("CAFC") in *Sigma Corp. v. United States*² has upheld the Department's presumption in an NME that all commercial entities export under the control of the state and that a respondent must demonstrate that it is independent both *de jure* and *de facto* from the government.

A review of record evidence necessarily begins with Taifa's July 13, 2007 Section A Questionnaire response, ("Section A Response") in which the company stated that it is owned by its employee shareholders, is controlled by a board of directors and that the company has no

² 117 F.3d 1401, 1407 (CAFC 1997).

relationship with the national, provincial and local governments. In this document, the Department specifically asked Taifa:

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

In response to this question, Taifa stated that it is “a private company, registered in Qingdao, with their shareholders as follows: 1. [

]...” *See* Taifa’s Section A Response at 2. The Department next asked Taifa:

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

Taifa’s response to this question stated that, “Taifa and Taifa I&E³ are each controlled by their board of directors and operate independently for their own gains and losses.” *See Id.*

Further, the Department asked Taifa for information regarding its “relationship with the national, provincial, and local governments, including ministries or offices of those governments.” *See Id.*

Taifa responded that the companies “have no relationship with the national, provincial, and local governments, including ministries or offices of those governments...” *See Id.* Taifa submitted a list of its directors, a copy of the Company Law of the People’s Republic of China and relevant business licenses to substantiate its response. *See Id.* at Exhibits A-2-A-4.

On September 11, 2007, Taifa submitted its First Supplemental Response (“First SR”) which included the 2003 Articles of Association for “Taifa Ltd.” *See* First SR at SQ1-2. These 2003 Articles of Association showed ownership in Taifa Ltd. of [] percent by employees of the company, and the remainder by [] companies. *See Id.* Based on this information

³ According to Taifa’s Section A Response, Taifa Group Import & Export Co., Ltd. (“Taifa I&E”) is a registered trading company in Qingdao that produces the subject merchandise and is wholly owned by Taifa Group Co., Ltd. *See* Section A Response at 1-2.

contained in the questionnaire responses, the Department preliminarily assigned Taifa a separate rate in the *Preliminary Results*. See *Hand Trucks and Certain Parts Thereof from the People's Republic of China: Preliminary Results, Partial Intent to Rescind and Partial Rescission of the 2005-06 Administrative Review*, 73 FR 2214 (January 14, 2008) (“*Preliminary Results*”).

Prior to the publication of the *Preliminary Results*, Petitioners submitted a Capital Verification Report of Qingdao Taifa Group Co., Ltd. dated December 16, 1997. See Petitioners’ Comments on Taifa’s Questionnaire Responses (December 7, 2007) at Exhibit 1. On page two of this document, the “Details of Investor’s Capital” indicates the Yingzhu Township Government as the holder of [] percent of the shares of Qingdao Taifa Group Co., Ltd. Petitioners included in this same submission the “Notes Regarding Capital Verification”, in which the “Application for Registration Capitals and Investment Stipulations” lists, on page three, Qingdao Taifa Group Company as the holder of [] percent of the shares of Taifa Ltd. See *Id.* Further, Petitioners placed on the record two additional Articles of Association, one dated 1997 and one dated 2002. See Petitioners’ Additional Comments Regarding Taifa’s Questionnaire Responses (December 21, 2007) at Exhibits 7 and 8, respectively. These documents contradict the ownership information in the 2003 Articles of Association that Taifa placed on the record, which stated that the employees own [] percent of the company.

Petitioners submitted additional comments on December 21, 2007, alleging that the 2003 Articles of Association submitted by Taifa in the First SR were not registered with the appropriate official government agency as required by Chinese law, and were, therefore, invalid. See Petitioners’ Additional Comments Regarding Taifa’s Questionnaire Responses (December 21, 2007). Additionally, Petitioners put on the record the 1997 Articles of Association of Taifa Ltd., and a 2002 modification to the Articles of Association of Taifa Ltd., which indicate that an

entity referred to as Qingdao Taifa Group Co. (“Taifa Co.”), is the owner of [] percent of the shares of Taifa Ltd. *See Id.*⁴

In its March 26, 2008 Sixth Supplemental Response (“Sixth SR”), Taifa responded to the Department’s request to “explain whether the 2003 Articles were registered with the Qingdao Administrative Bureau of Industry and Commerce (“QAB”). If yes, provide evidence of the 2003 Articles’ registration with the QAB.” *See Sixth SR at 1.* In response to this question, Taifa explained that:

In 2003, the shares held by Taifa Group Company as stated in the 2002 Articles of Association were further resold to [] employees, and Taifa amended its Articles of Association in 2003 as we submitted...During that time, Taifa intended to be publicly listed and file its final Articles of Association registration with QAB after closing of those listed shares. However, Taifa did not qualify to be publicly listed and inadvertently did not have its 2003 articles registration filed with QAB because the office director responsible for the filing resigned from Taifa. *Id.*

As evidence of the accuracy of the ownership information contained in the 2003 Articles of Association, Taifa submitted a 2003 Share Transfer Agreement purportedly documenting the purchase of the shares from Qingdao Taifa Group Co. by [] employees of Taifa Ltd. *See Sixth SR at Exhibit SQ6-1.*

From April 15 through 28, 2008, the Department conducted verification of Taifa at its headquarters in Qingdao, PRC. During this verification, the Department went to the Qingdao QAB to review Taifa’s history of registered ownership documents. At the QAB, Department officials noted that the 2003 Articles of Association submitted by Taifa in its September 11, 2007, response, were not registered with the QAB. *See the Department’s Memo to the File: Verification of the Sales and Factors Response of Qingdao Taifa Group Import and Export Co.,*

⁴ Although we received this information shortly before the publication of the *Preliminary Results*, the Department did not have time to fully analyze this information until after the *Preliminary Results*.

Ltd and Qingdao Taifa Group Co., Ltd. in the Review of Hand Trucks and Certain Parts Thereof From the People's Republic of China ("Verification Report") at 4-5. Department officials asked Taifa what the law required regarding registration of a company's Articles of Association. Taifa stated that Articles of Association only need to be registered when applying to set up a business. *See Id.* The Department asked if the Regulations of the People's Republic of China on Administration of Registration of Companies, articles 9(9), 21.3, 26, 27 (December 18, 2005) require that amended articles of association be registered with the company registration authority. Taifa responded, in contradiction to its previous response, that the amended articles should be registered with the QAB according to these regulations. *See Id.* When the Department asked company officials why Taifa did not register the 2003 Articles of Association, Taifa stated that it merely neglected to do so due to frequent changes in the personnel responsible for overseeing registration. *See Id.*

Next, the Department asked Taifa if the 2003 Articles of Association were valid, considering the fact that they were never registered with the QAB. Taifa stated that it considered them to be valid and further stated that its registration was not crucial because the purpose of the Articles of Association is merely to notify external parties, such as shareholders and the public, of the internal responsibilities of the company. *See Id.* The Department also inquired as to why the 2003 Articles of Association only have the stamp, or chop, of Taifa Ltd. and the signatures of the internal employees, but none of the stamps, or chops, of the other shareholders in Taifa Ltd. Taifa responded that because the other shareholders were not affected, their stamps, or chops,

were not required on the document. *See Id.* The Department asked to see a law or regulation stipulating this practice; Taifa could find no such law or regulation.⁵

The Department requested evidence which would validate the unregistered 2003 Share Transfer Agreement, which purported to document the transfer of the shares in exchange for a []. In response, Taifa presented a paid-in sub-ledger and legal persons sub-ledger from its accounting books and records, showing that, in June 2003, the Yuan amount specified in the agreement was transferred to Taifa. The Department asked for evidence of the money transfer, such as bank records showing the transfer of funds. Changing its story, Taifa then claimed that it did not have such records because the transfer did not actually involve financial compensation, but that, rather Taifa Co. had agreed to turn over its shares to the nine named parties in exchange for their constructing an apartment building for the township collective. *See Verification Report at 7.* Accordingly, the Department asked for evidence of this agreement; Taifa was unable to produce any such agreement or third party evidence establishing or corroborating its claim regarding this exchange. Instead, Taifa provided only self-generated individual shareholder registry books, purporting to demonstrate each individual's respective increase in their shares. The Department noted that these Taifa-issued share books were not endorsed by any third party. *See Id.*

The Department also found additional documents on file at the QAB that contradicted the ownership information that Taifa submitted to the Department. The Department reviewed the Circular of Jiaonan City State Assets Management Bureau: Approval of Equity Settlement for

⁵ *See Verification Report. See also Application of Adverse Facts Available for Qingdao Taifa Group Import and Export Co., Ltd and Qingdao Taifa Group Co., Ltd. in the Review of Hand Trucks and Certain Parts Thereof From the People's Republic of China (July 14, 2008).*

Preparing to set up Qingdao Taifa Group Co., Ltd., dated September 24, 1997, and the Certification by the Jiaonan City Yingzhu Town People's Government (December 16, 1997). The first document indicated that "it is agreed to settle the net public productive assets of [] Yuan as [] shares of public owned legal person, the equity belongs to Yingzhu Town Government." *See* Verification Report at 6-7. The second document confirmed this ownership status, stating that "this is to certify that in accordance with the Circular of 1997 No. 52 issued by Jiaonan City State Assets Management Bureau, the [] shares held by Yingzhu Town People's Government are to be used for setting up Qingdao Taifa Group Co., Ltd." *See Id.* Department officials reviewed these documents on file at the QAB in order to assess the veracity of the discrepant information that Taifa had already placed on the record. The Department also reviewed Taifa's "Notice of Advance Approval of Enterprise Name" and the "Sale of Collective-Owned Share Report", each of which identifies the majority shareholder of Taifa Ltd. as the former collective Taifa Co., not the Yingzhu Town Government.

B. Whether Substantial Evidence Establishes That Taifa *De Facto* Operates Separate of Government Control

In *Taifa II*, the Court ordered that the Department "must explain, based on PRC law, prevailing practices in the PRC, or other relevant information, why these particular documents are significant to the issue of government control, how the documents ultimately link Taifa to central PRC-government control and a rate relating thereto, and why the fact that the documents indicating the transfer of the town government's interest were not properly registered in the PRC is significant to the issue of government control." *See Taifa II* at 10.

1) Ownership of Taifa

The Department considers the documentation discussed above important to give the Department an overall picture of the ownership structure of the respondent. The documentation related to ownership is important to the Department's analysis of government control because, as explained in detail below, ownership information is directly relevant to the analysis of whether the respondent: 1) sets its own prices, 2) has the authority to negotiate sales, 3) has autonomy in selecting management, and 4) whether the respondent, its owners, or its managers are affiliated with any other entities which may be operating under government control and which may exercise that control over the respondent.

As an initial matter, substantial evidence on the record does not establish whether the Yingzhu Town People's Government, the nine named individual shareholders, or some other entity actually owns a majority interest in Taifa. This ownership information goes to issues of affiliation and appointment of the company's board, managers, and directors. Here, Taifa claims that it is controlled by its board of directors. *See* Section A Response at 2. Taifa reported that its board of directors is comprised of six of the individuals that Taifa claimed are the new majority owners of Taifa, having obtained the shares of the Yingzhu Town People's government through the share transfer agreement. However, as discussed above, Taifa was unable to document the share transfer agreement, did not register its new articles of association, and was otherwise unable to show documents that these individuals actually purchased any shares in Taifa or had any ownership interests. Thus, Taifa contends that its board of directors is comprised of the same individuals who it claims purchased ownership interests in Taifa. However, substantial evidence does not establish that these individuals actually purchased ownership interest from the Yingzhu Town Government and, therefore, the Department has reason to doubt that each acts on the board of directors as owners/directors as Taifa claims.

In support of its claims, Taifa supplied board of director meeting minutes in an attempt to demonstrate that the board selects company management and thus management operates independently of the government. *See* Verification Report at Exhibit 5. Similarly, in support of its claims that it acts independently, Taifa stated that its chairman/general manager (one of its purported owner/directors) is vested with the authority to negotiate sales prices. *See* Verification Report at 9-10. However, based upon Taifa's own admission that it failed to register the articles of association or document the share transfer agreement, substantial evidence does not demonstrate whether the purported owners/directors actually operate under their own legitimate independent direction as Taifa claims, or whether the absence of proper documentation reflects an undisclosed continuation of governmental control over Taifa. Given the fact that the Department has found Taifa to have actively withheld requested information from the Department and thus impeded the Department's administrative review, the Department finds that it cannot accept at face value Taifa's changing story and unverifiable claims with respect to ownership and control of the company which impact Taifa's claims involving its Board of Directors.

The Department's separate rates test focuses mainly on whether the exporter has the authority to set its own prices. In cases where there was majority government ownership, the Department considers whether the existence of a board of directors or separate management structure separates the ownership interests from directing or managing the company. Because the Department does not find Taifa's claims credible as to the circumstances by which Taifa's supposed board of owner/directors allegedly obtained independent control of the company, and because the record evidence fails to substantiate these claims, the Department does not consider that Taifa has established the existence of any legitimate separation between the Yingzhu Town

Government ownership and the direction of Taifa sufficient to grant a separate rate when there is government ownership. Furthermore, because the Department finds that Taifa has not provided adequate and reliable evidence of who ultimately owns and controls Taifa, we also cannot know the answers to other questions specified in our separate-rates questionnaire regarding any potential affiliations Taifa might have with the government that would be informative with regard to the issue of *de facto* government control.

2) The significance of the fact that certain documents were not properly registered in the PRC

Throughout the proceeding and at verification, the Department seeks to corroborate information from the respondent to validate that information which the respondent has placed on the record. This corroboration can come in a wide variety of forms, depending on the specific circumstances of the case and the nature of the information. For example, the fact that a document is in compliance with the laws and regulations of the relevant jurisdictions in which the respondent operates and properly filed with the appropriate authorities will naturally militate toward a determination that the document is legitimate. Here, the fact that certain documents were not registered with the appropriate authorities, contrary to PRC laws and regulations, naturally brings into question the authenticity of the documents presented to the Department. The Department has considered these facts, along with the entire record, in assessing the reliability of the information presented by Taifa.

3) How the documents ultimately link Taifa to PRC government control and a rate relating thereto

In conducting its analysis as to whether a government entity exercised nonmarket control over Taifa sufficient to link the PRC-entity rate to Taifa, the Court directed that: (1) if the Department determines that Taifa is not independent of government control, it must explain how the record evidence links Taifa to the central PRC government; (2) if the Department finds that there is no government control, it must give Taifa a separate rate; or (3) if the Department determines that 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-entity rate. *See Taifa II* at 10-11. As explained above, the Yingzhu Town Government ownership is relevant because Taifa could not establish through record evidence that a board of owners/directors obtained independent control of Taifa from the Yingzhu Town Government. Indeed, the Department concludes that Taifa's claim that a supposed board of owners/directors obtained ownership and control of Taifa from the Yingzhu Town Government is not borne out by record evidence. We are applying our general presumption that the central government in the PRC also controls town and state governments, such that Taifa's ownership is influenced by the PRC government. This analysis is detailed below.

a) The evidence does not yield an affirmative conclusion regarding government control or Taifa's relationship to the central PRC government

We have reviewed the record of the underlying administrative review in accordance with the Court's remand order and in light of the findings in our *Final Results* regarding the overall reliability of the information Taifa provided throughout the proceeding. Specifically, the record demonstrates that Taifa: (1) significantly impeded this proceeding by withholding significant information regarding production inputs; (2) generally misled the Department regarding the scope of its products and sales to the United States; (3) misrepresented the type of documentation it maintains in the ordinary course of business; (4) denied the existence of internal records that the Department eventually learned were in its possession throughout the verification, and (5) provided unverifiable information to the Department regarding ownership and control.⁶ With regard to the last point, the Department continues to be unable to determine the identity of Taifa's owners and, therefore, the entities actually controlling the company because the Department finds that Taifa's claims, *i.e.*, that a supposed board of owners/directors obtained ownership and control of the company, is not credible.

In this proceeding, Taifa engaged in a general and repeated pattern of providing discrepant answers and unreliable information. For instance, there is some information to suggest that Taifa's board of directors conducted Taifa's business. However, because we are unsure how this board of directors is actually appointed, apart from Taifa's claim that the owners sit on the board of directors, substantial evidence does not establish that the board of directors operates as a buffer between government ownership and Taifa's activities. In other such

⁶ See the AFA Memo; *see also* Verification Report.

instances, where the Department has found that it cannot rely upon the preponderance of the information provided, the Department concluded that it could not rely on the totality of the respondent's submissions. *See generally, Certain Steel Grating from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32366 at 32367 (June 8, 2010) (pattern of behavior calls into question the reliability of all data); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 3201 at 3202 (Jan. 20, 2010) (respondent provided inaccurate and unreliable data, and as such, the Department was unable to determine eligibility for separate rate); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 11085 at 11086 (Mar. 16, 2009). Because Taifa has claimed the 2003 Articles of Association constitute the current structure of Taifa and because the Department has evidence demonstrating the articles are unreliable, the Department does not have substantial evidence that the board of directors is composed of owners/directors who control Taifa independently of any government ownership or control.

b) Application of a presumption that Taifa is government controlled

Pursuant to section 771(18) of the Tariff Act of 1930, as amended ("the Act"), the Department continues to consider the PRC to be an NME. *See* Section 771(18)(C) of the Act (the determination shall remain in effect until revoked by the administering authority); *See also Final Results of Redetermination Pursuant to Remand, GPX International Tire Corp. v. United States*, Consol. Court No. 08-00285 (citing *Notice of Final Determination of Sales at Less than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From The People's Republic of China*, 71 FR 53079, 53080) (Sept. 8, 2006) and "Antidumping

Duty Investigation of Certain Lined Paper Products from the People's Republic of China (“China”)-China's status as a non-market economy (“NME”)" (the “August 30, 2006 Memorandum”) (“the Department has explained that it does not consider that China has satisfied the statutory criteria to be classified as a market economy country under the antidumping duty law”). In making this determination, the Department presumes that all entities within the PRC are subject to government control for antidumping duty purposes, and therefore, all exporters should be assigned a single, country-wide rate, with the exception noted below.

Pursuant to the Department's separate rates practice, an exporter may qualify for a separate rate if it submits evidence on the record to demonstrate an absence of government control both in law (*de jure*) and in fact (*de facto*). See Policy Bulletin 5.1: Separate -Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries. As explained above, the Department considers a variety of factors in reviewing evidence of the absence of government control. See *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (“Sparklers”); *Notice of Final Determination of Sales at less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585 (May 2, 1994) (“Silicon Carbide”). The CAFC has recognized that the burden of proof in presenting information rests with the party in possession of the necessary information. See *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993); See also *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (CAFC 2002) (“Ta Chen bore the burden of creating an accurate record.”). Indeed, the CAFC affirmed the Department's conclusion that the respondent in Sigma Corp. did not establish its entitlement to a separate rate through record evidence. See *Sigma Corp. v. United States* at 1406-07.

The Department concludes that Taifa failed verification with respect to its separate rate status by not being able to provide evidence establishing the authenticity of the 2003 share transfer agreement, not adequately explaining why it failed to file certain documentation with the proper government authorities, and ultimately not being able to document the identity of its owners and who ultimately controls the company's operations. As explained fully above and as the burden to establish entitlement to a separate rate is for the respondent to meet, Taifa failed to adequately establish its entitlement to a separate rate because record evidence regarding Taifa's independence from government control is incomplete and unreliable.⁷ Based upon this finding and the Department's continued treatment of the PRC as an NME, it is reasonable to apply the Department's general presumption of government control over Taifa and assign Taifa the PRC-wide antidumping duty margin.

⁷ The citation made by the Court, that "Commerce's verification report also "noted no indication of government control" was specifically addressing only the issue of *de jure* control. See Verification Report at Section III. Separate Rates, A. *De Jure* Absence of Government Control, page 8.

COMMENTS FROM INTERESTED PARTIES

Comment 1: Whether the Department Conducted a Thorough Analysis that Addresses the Issue on Remand.

Taifa asserts that the Department conflates the issue of ownership with the issue on remand, namely, *de facto* control by the PRC government over Taifa's export activities. Taifa contends that in doing this, the Department has disregarded the Court's order because it placed too much emphasis on Taifa's ownership rather than focusing on the management selection and price negotiation processes inherent to an analysis of *de facto* government control. *See* Taifa's comments at 7-8.

Taifa argues that the Department misquoted the "Court-sanctioned four-part test"⁸ and that the Department's application of the test is internally inconsistent. Specifically, Taifa challenges the Department's analysis that Taifa's failure to register its articles of association and to substantiate its share transfer agreement affects the analysis of whether Taifa has autonomy to select management and negotiate prices.

Taifa also argues that the Department did not respond to the Court's remand because, in its draft results of redetermination, it did not address the Court's finding that the burden of proof in demonstrating an absence of *de facto* government control lies with the Department when the respondent does not supply enough information. Specifically, Taifa states that the Department

⁸ Taifa uses the terminology "Court-sanctioned four-part test" to refer to part of the Department's *de facto* analysis which the Department developed in Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22,585, 22,587 (May 2, 1994). This is the standard test the Department applies in its separate rate application. *See* Separate Rate Application, available at <http://ia.ita.doc.gov/nme/sep-rate-files/062410/prc-sr-app-062410.pdf>. The Department does not consider this test sanctioned for the purposes of this remand only, but the policy of the Department in all cases involving the PRC. Here, the Department enumerated four elements as being relevant to government control and affected by the lack of ownership information.

should have asked Taifa additional questions or requested further documentation if it was dissatisfied with the information it had received at verification. Taifa asserts that the Department's emphasis on Taifa's ownership documentation is wholly irrelevant to the issue of whether Taifa's export activities are *de facto* controlled by the PRC government. *See* Taifa's comments at 9-10.

Taifa argues that the Department's final results of redetermination must take into account the positions previously articulated by the Court. Specifically, Taifa contends that Department has not recognized the Court's previous positions that: 1) discrepancies in the ownership documents can only lead to the adverse inference that the town government owned a majority of interest in Taifa; 2) that Taifa's possible nominal town government ownership does not directly relate to nonmarket control by a government entity. *See* Taifa's comments at 11.

Taifa disagrees with the Department's assertion that Taifa provided unverifiable information regarding ownership and control, arguing that such a conclusion does not reconcile with the facts contained in the agency's verification report. Taifa contends that the verification report sets forth undisputed evidence that unequivocally demonstrates that Taifa passed the four-part test of *de facto* government control over export activities. In its final remand determination, Taifa argues that the Department must reconsider its position that the record lacks evidence of *de facto* control in light of the facts contained in the verification report. *See* Taifa's comments at 13.

Gleason Industrial Products, Inc. and Precisions Products, Inc. ("Petitioners") submit that the Department has provided a sufficient explanation, grounded in reasonable inferences from

record evidence, to support its finding that Taifa has failed to demonstrate an absence of *de facto* government control.

Petitioners argue that the ownership information placed on the record by Taifa is unreliable and suggest that the Department highlight additional evidence that appears on the record of this review as further support for its decision in the final results of redetermination. Petitioners note that the 2002 Amendment to Taifa's 1997 Articles of Association, and the appearance of the official seals, or "chops," of all shareholders on this amendment's signature page, as further support for the agency's conclusion that the 2003 Articles of Association are unreliable. *See* Petitioners' comments at 7.

Petitioners also note Taifa's failure to place on the record the corporate documents found in the official QAB record for the company, as well as Taifa's failure to submit written evidence to support its claims that these discovered documents erroneously reported government ownership and control over Taifa, as support for the agency's conclusion that Taifa engaged in a general and repeated pattern of providing discrepant answers and unreliable information. *See* Petitioners' comments at 7.

Finally, Petitioners state that Taifa's overall failure to respond fully and accurately to the agency's original and supplemental requests for information about government ownership and control as demonstrating that Taifa both withheld critical information and provided misleading information about these matters, raising serious doubts about all information placed by Taifa on the record with respect to *de facto* government control over its prices, export activities, and operations. *See* Petitioners' comments at 7. Petitioners submit that the Department must hold

that Taifa has failed to demonstrate its eligibility for separate-rate status and treat Taifa as part of the PRC-wide entity, assigning the PRC-wide entity rate of 383.60 percent to Taifa's exports.

Department's Position:

We disagree with Taifa that the Department is conflating government ownership with government control. The Court directed that if "Commerce finds that the evidence regarding government control of pricing, export activities, or operations and regarding Taifa's relationship to the central PRC government {is} in equipoise, Commerce may apply a well-supported and explained presumption based on current conditions that Taifa is government controlled and apply the appropriate rate." *See Taifa II* at 11. The Department has previously found that despite government ownership, a respondent can still establish *de jure* and *de facto* independence from the government with respect to its export activities. However, we maintain that ownership information is relevant to the entire separate rate analysis which tests whether the company acts independently from the government.⁹ As the Department explained, the significance of the discrepant and unsubstantiated ownership documentation is that it implicates other statements Taifa made on the record of the underlying proceeding. Because the share transfer agreement and the articles of association are in doubt, the ownership structure of the company is in doubt, and the fact that Taifa reported that the ownership acts as the board of directors, substantial evidence does not lead to the conclusion that the board of directors operates independent of any government control. Thus, the Department cannot reasonably conclude that Taifa can negotiate contracts or make decisions without government intervention, which the Department's separate

⁹ *See, e.g., Porcelain-on-Steel Cooking Ware from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 24641 (April 26, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (not granting a separate rate where the Department could not verify the information submitted by respondent regarding its formation and ownership and possible affiliations with other parties, including the local government).

rate test requires. In its experience, the Department has recognized that an established board of directors and its appointed professional managers, functioning within the confines of relevant corporate governance laws, generally act as a buffer between the ownership entity and certain company activities, including export activities. Taifa's failure to establish the authenticity and legitimacy of its corporate structure and relevant corporate governance guidelines leaves the scope and extent of the roles of its management ill-defined.¹⁰ In the absence of verified evidence of a separation between government and management, the potential *de facto* government control over Taifa's export activities cannot be ruled out. Furthermore, as also explained by the Department, ownership information is necessary for the separate-rates analysis because the respondent must demonstrate that its shareholders, or other affiliates in a position to exert control over its operations, are not themselves subject to government control.

Contrary to Taifa's argument, the Department met its burden administratively of asking for additional information and explanation in accordance with section 782(d) of the Act. First, the Department sent Taifa two supplemental questionnaires regarding *de jure* and *de facto* ownership and control.¹¹ When the Department discovered that Taifa failed to register its articles of association and the share transfer agreement, the Department asked for PRC laws or explanations as to why Taifa was not required to register these documents. Additionally, the

¹⁰ *See Id.* ("The Department reviews a company's corporate formation documents and its corporate structure to confirm the source, amount, and date of a company's initial capitalization and to determine who, in fact, owns and controls the company. If the Department cannot verify a company's corporate structure documents or its formation, it cannot verify the true owners and/or who has control over day-to-day operations.").

¹¹ *See* the Department's March 3, 2008, Second Supplemental Sections A, C, and D Questionnaires concerning the 2005-2006 Antidumping Administrative Review on Hand Trucks and Certain Parts Thereof from the People's Republic of China at 1-3 (asking six questions covering Taifa's relationship with government entities). *See also* the Department's September 4, 2007 Supplemental Section A Questionnaire concerning the 2005-2006 Antidumping Administrative Review on Hand Trucks and Certain Parts Thereof from the People's Republic of China at 1-2 (asking five questions covering Taifa's affiliations with government entities).

Department requested that Taifa demonstrate the share transfer agreement actually occurred. Taifa was unable to demonstrate through record evidence, but rather explained that the town government and the individuals agreed on an undocumented promise to build an apartment building. At verification, the Department took the unusual step of going to the QAB to verify Taifa's documentation.¹² The Department's verification report contains almost four full pages detailing the Department's attempts to verify Taifa's ownership documentation.¹³ Thus, the Department asked for additional information even though Taifa bore the burden of creating an accurate record.¹⁴

The Department also disagrees with Taifa's statement that in performing its analysis the Department was not cognizant that the Court concluded that the adverse inference that the town government owned Taifa is insufficient to revoke Taifa's separate rate. However, the Department focused on whether not knowing the ownership of Taifa implicated other statements and submissions made by Taifa and how this affected the separate-rate analysis.

We disagree with Taifa that the Department's verification report contradicts the Department's determination that Taifa failed to demonstrate lack of government control. The Department does not make findings or conclusions in the verification report regarding how the facts obtained at verification will ultimately be treated in the Department's determinations. *See* Taifa Verification Report at 1. When taken as a whole with other evidence on the record, some of Taifa's responses appeared to be borne out by the truth, while others did not.¹⁵ The

¹² *See* Verification Report at 4.

¹³ *See Id.* at 4-7.

¹⁴ *See Ta Chen*, 298 F.3d at 1336. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (CAFC 2002)

¹⁵ To the extent that Taifa contends that the Department did not ask additional questions at verification with regard to some of Taifa's responses, this does not mean that the Department was satisfied with the information it received.

Department's separate rate analysis is a conjunctive analysis, *i.e.*, all of the elements need to be met to show freedom from government control. The Department concluded that the evidence presented by Taifa at verification is contradictory as to the identification of Taifa's owners and its board of directors, and for this reason, as explained above, Taifa's freedom from government control in the selection of management and the authority to set prices is in doubt. Thus, the Department applied its normal presumption underlying the separate rates test in accordance with the Court's remand order.

We agree with Petitioner that the appearance of the official seals, or "chops," of all shareholders on the 2002 Amendment to Taifa's 1997 Articles of Association is further support for the Department's conclusion that the 2003 Articles of Association are unreliable. The Department also agrees that Taifa's repeated pattern of providing discrepant answers and unreliable information is relevant to this analysis when the Department only has a partial picture of the respondent based upon the respondent's statements. However, the Court directed the Department to evaluate the record with respect to the issue of government control, notwithstanding Taifa's failings in reporting FOP or sales data. Under this rubric, the Department concluded that the record did not yield an affirmative conclusion and, therefore, the Department applied its presumption of government control in an NME.

Comment 2: Application of the Department's Presumption of Government Control

Verification is an opportunity for the Department to assess the accuracy of the respondent's already-submitted information. Verification is not an opportunity to present additional record evidence or alter responses which the respondent already submitted. To the extent that the Department appeared satisfied for some responses, the Department conducts verification on a strict timeline and each changing story by the respondent opens up new avenues of inquiry and document requests. Thus, when making a final determination about whether the Department successfully verified the respondent, the Department looks to the entirety of the verification report rather than individual parts.

Taifa contends that the Department did not adequately explain the presumption it applied in this case. Taifa contends that there is demonstrative evidence yielding a conclusion that there is no *de facto* government control over Taifa's export activities. Taifa cites to the verification report to support its argument that Taifa met each prong of the Department's four-prong *de facto* test. Taifa contends that the Court disposed of the issue of whether the Department can apply a presumption in lieu of adequate investigation. Taifa contends that the Court in *Taifa I* held that ownership has no bearing on *de facto* control. Taifa also contends that the Court concluded that the Department could not conclude that Taifa's separate rate was linked to Taifa's submission of unreliable information with regard to the issues of ownership, sales and FOPs. Taifa argues that the Department ignored the Court's remand with regard to applying its presumption under current conditions. Taifa concludes that following the application of the countervailing duty law to China, the Department is required to explain how its presumption remains valid.

Petitioners agree with the Department's conclusion but, citing to the CAFC's opinion in *Sigma Corp. v. United States*, urge the Department to clarify that its separate rate presumption requires the respondent to demonstrate the absence of *de facto* and *de jure* government control at the central government, state government, and town government levels in the PRC. Finally, Petitioners cite to the Department's antidumping duty manual which references analysis of central, provincial, township or government control. Petitioners contend that the Department's separate rate determination requires deference from the Court.

Department's Position:

The Department disagrees with Taifa that it improperly applied the presumption of government control in this case. As discussed, the Department finds that the evidence is inconclusive with respect to whether Taifa is *de facto* separate from government control. Specifically, the Department agrees with Taifa that the Department examined some evidence at verification indicating that Taifa acted independently with respect to whether a government agency approves export prices or whether Taifa retains proceeds from its export sales. However, with respect to the issues of whether Taifa negotiates agreements or selects management absent government control, the record is contradictory and does not affirmatively demonstrate Taifa's independence. Rather, the contradictory documentation regarding the ownership of Taifa combined with Taifa's explanation that this ownership group comprised its board of directors, necessitates that the Department apply its standard presumption that all exporters are subject to government control. Here, due to the contradictory evidence on the record, the Department does not know the exact composition of the board of directors, the individual affiliations of board of directors' members with the town government, or the individual affiliations of board of directors' members with any other entity, including the central PRC government. Because the record is unclear and the burden rests with the respondent to demonstrate absence of government control, the Department acted properly in applying the presumption of government control over exporters when applying the antidumping law to the PRC as an NME.

Pursuant to section 771(18) of the Act, the Department considers the PRC to be a NME. The statute provides that “{a}ny determination that a foreign country is a NME country shall remain in effect until revoked” by the Department. *See* 771(18)(C)(i) of the Act. The

Department last conducted a review of the PRC's NME status on May 15, 2006.¹⁶ *See* The People's Republic of China (PRC) Status as a Non-Market Economy (NME), available at <http://ia.ita.doc.gov/download/prc-nme-status/prc-nme-status-memo.pdf>. The Department reaffirmed the PRC's status as an NME because it concluded that "the various levels of government in China, collectively, have not withdrawn from the role of resource allocator." *See Id.* As explained in the re-certification of the PRC as an NME, the Department does not limit its analysis of government control to central government control, but rather extends that analysis through provincial, town and local government control over sectors of the economy. Because no party challenged the Department's continued treatment of the PRC as an NME in the underlying administrative review, the Department did not analyze whether to alter that determination. Therefore, the determination that the PRC is an NME country remains unchallenged.

Consistent with the treatment of the PRC as an NME, the Department requires exporters to submit a separate rate application or certification (if a separate rate had previously been granted) to demonstrate an absence of both *de jure* and *de facto* government control over export activities. *See, e.g.*, Separate Rate Application, available at <http://ia.ita.doc.gov/nme/sep-rate-files/062410/prc-sr-app-062410.pdf>. This is due to the Department's presumption of state control over exporters in an NME country, which the CAFC affirmed in *Sigma Corp. v. United States*, (affirming the Department's separate rates test placing the burden on exporters to demonstrate the absence of government control). The CAFC reaffirmed that the burden to demonstrate independence is on the respondent under the Department's presumption. *See*

¹⁶ The period of review in this remand is December 1, 2005, through November 30, 2006. Because the Court could only have meant the term "current conditions" to mean for the period of review at issue in the Department's *Final Results*, the Department does not analyze Taifa's claims that the Department's presumption of government control must be explained in light of the more recent application of the countervailing duty law to China.

Transcom Inc. v. United States, 294 F.3d 1371, 1381 (Fed. Cir. 2002) (“the NME presumption begins with the assumption that the producers are part of the NME entity until they prove otherwise”).

The Department does not agree with Taifa that it did not conduct a review of record evidence before applying its presumption. The evidence on the record does not lead to the conclusion that Taifa is independent of government control, at any level of the PRC government.¹⁷ The Department examined the entire record and, while some evidence indicates that Taifa operated independently, other evidence is contradictory and does not support a finding that a board of directors operated as a buffer between government ownership and the operations of Taifa. Because the Department fully evaluated whether to continue to treat China as a NME in 2006 and concluded that reforms in the PRC did not necessitate a finding that market forces operated independent of government control, the presumption underlying the Department’s separate rates test remains valid. Since that time, the Department has continued to treat the PRC as an NME in its administrative proceedings and investigations. *See, e.g., Certain Steel Grating From the People’s Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 847 (January 6, 2010) unchanged in *Certain Steel Grating From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32366 (June 8, 2010); *Saccharin from the People’s Republic of China: Preliminary Results of the 2008-2009 Antidumping Duty Administrative Review*, 75 FR 13495 (March 22, 2010) unchanged in *Saccharin From the People’s Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 75 FR 43146 (July 23,

¹⁷ *See Shandong Huanri (Group) General Co. v. United States*, 493 F. Supp. 2d 1353, 1359-63 (Ct. Int’l Trade 2007) (holding that the Department’s finding of *de facto* government control at the village level did not constitute a change in the agency’s separate-rate methodology).

2010); *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006). Therefore, the Department concludes that the presumption underlying its separate rates test remains valid, and because Taifa failed to meet its burden to establish a separate rate with respect to the issues of whether Taifa has the authority to negotiate prices or select management absent government control, application of the presumption is supported by substantial evidence.

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

Pursuant to the Court's order, the Department has determined, after thorough investigation and analysis, that the evidence regarding government control of Taifa is in equipoise and has applied its well-established general presumption of government control of PRC entities to Taifa. Accordingly, the Department finds that Taifa is part of the PRC-entity and has applied the rate of 383.60 percent, the PRC-wide rate in this proceeding.

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date