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Remand Redetermination
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June 9, 2015

Xiping Opeck Food Co., Ltd. v. United States
Court No. 12-00112; Slip Op. 14-142 (December 11, 2014)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. Summary

The Department of Commerce (the Department) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court), issued on December 11, 2014, in *Xiping Opeck Food Co., Ltd. v. United States*, 34 F. Supp. 3d 1331 (CIT 2014) (*Xiping Opeck*). These remand results concern *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review in Part*, 77 FR 21529 (April 10, 2012) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM).

As set forth in detail below, the Court ordered the Department to issue a redetermination that complies in all respects with the Court's opinion and order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law. Specifically, the Court ordered the Department to:

(1) explain how its interpretation of the word exporter as a "price discriminator" is a proper construction of the statute;

(2) explain clearly how Company A[1] is the "price discriminator" of Xiping Opeck's merchandise when it is Xiping Opeck that appears to be the "first entity" that "has

[1] For ease of reference in this remand, we identify the company [ ] as Company A because Xiping Opeck Food Co., Ltd.'s (Xiping Opeck) U.S. importer/customer, GB Imports & Exports, Inc. (GBIE), claimed business-proprietary treatment of this information.

knowledge that the sale of its goods is destined for the United States" and "is the entity whose price setting behavior will control dumping;"

(3) explain its determination that there were two reviewable sales (*i.e.*, from Xiping Opeck to GBIE, and from Company A to U.S. wholesalers), and how this complies with the law;

(4) should it continue to determine that Company A is an exporter for purposes of section 771(9)(A) of the Tariff Act of 1930, as amended (the Act), fully explain how this determination complies with the law, given that Company A took ownership to the merchandise and subsequently sold it to U.S. wholesalers after the goods had already entered the United States and cleared Customs;

(5) support its determination, that "it is highly likely that {Company A} agreed to resell goods back to the United States prior to the time of importation," with substantial evidence;

(6) explain the relevance of its findings that, given 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," and that Xiping Opeck would have been "aware that wholesalers' prices were significantly lower than the selling price it reported to the Department," and why Xiping Opeck's knowledge of the marketplace is sufficient for the application of adverse facts available (AFA);

(7) explain the relevance, if any, of the Federal Circuit's "inducement/evasion considerations" to its determination to assign an AFA rate to Xiping Opeck, a party found to have fully cooperated in this review;

(8) address the Federal Circuit's reasoning that a rate may not be determined for a cooperating party using AFA where the calculated rate has no impact on the entity that failed to cooperate;

(9) explain its determination to assign an AFA rate to Xiping Opeck, a party it found to have fully cooperated in this review, based on Company A's noncompliance;

(10) explain why it is permitted by law and the facts of this case to treat Company A's sales price to U.S. wholesalers as the export price;

(11) explain its determination to use Company A's acquisition costs (or GBIE's sales price of Xiping Opeck's product) rather than base Xiping Opeck's normal value

on its factors of production as used in the *Preliminary Results*,[2] and why it is permitted by law to ignore Xiping Opeck's reported factors of production information;

(12) pursue a middleman dumping investigation as part of its determination if the Department so wished; and,

(13) if necessary, reopen the record to solicit any information it determines to be necessary to make its determination.

As set forth below, consistent with Court's remand order and directives, the Department has reconsidered its determination, reevaluated the facts on the record, and concluded that it is appropriate to rely on the middleman dumping framework as a guide for our analysis and for determining a margin for the entries subject to this review. We have examined the guidance provided regarding the practice of middleman dumping and determined that it is appropriate to calculate a single rate for the entries under review. As explained below, we have calculated a rate of 70.12 percent for the entries subject to this administrative review.

We released our draft results of remand redetermination to interested parties on April 29, 2015 (*Draft Remand*) and provided parties the opportunity to comment. We received comments from Xiping Opeck and the petitioner, the Crawfish Processors Alliance (CPA) on May 18, 2015.[3]

II. Background

During the course of the review, CPA alleged that subject merchandise produced or exported by Xiping Opeck (the sole mandatory respondent in the review) was being sold in the United States at prices less than the cost of acquisition by Company A, and requested that the

[2] *See 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*).
[3] *See* Xiping Opeck's brief dated May 18, 2015, and CPA's brief dated May 18, 2015.

Department initiate a middleman dumping inquiry.[4] Based on price offers from four different U.S. wholesalers or distributors of subject merchandise produced by Xiping Opeck, CPA alleged that the wholesale price offers demonstrated that Company A had resold the subject merchandise to various U.S. distributors and wholesalers at prices less than its cost of acquisition from GBIE, Xiping Opeck's importer. As a result, CPA requested that the Department initiate a middleman dumping investigation regarding U.S. sales of Xiping Opeck merchandise by Company A and calculate a single rate applicable to Xiping Opeck which captured the middleman dumping by Company A.[5]

In the *Preliminary Results*, the Department declined to initiate a middleman dumping inquiry.[6] Although we determined that the middleman dumping analysis was not the appropriate vehicle to examine the record evidence in the review, we concluded that the channel of distribution associated with Xiping Opeck's shipments and entries of subject merchandise into the United States contained certain peculiarities that warranted further inquiry.[7] Further, we found that the record evidence suggested a lack of commercial soundness in the transactions reported by Xiping Opeck in this review, given the commercial environment in place during and following Xiping Opeck's involvement with its shipments.[8] Specifically, we found that the record evidence indicated that Xiping Opeck's reported U.S. transactions to its unaffiliated U.S. purchaser might not identify the appropriate or only relevant export prices associated with entries during the POR and, thus, that it remained unclear which U.S. sales served as the appropriate

[4] *See* Letter from CPA re: "Freshwater Crawfish Tail Meat from the People's Republic of China: Middleman Dumping Allegation" dated June 6, 2011.
[5] *Id*. at 1, 14-15.
[6] *See Preliminary Results*, 76 FR at 62350; *see also* 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).
[7] *See* Evaluation of Transactions Memo at 5.
[8] *Id.*

first sales to unaffiliated U.S. purchasers.[9] Because the record evidence indicated that Xiping Opeck might not be the exporter or sole exporter (*i.e.*, price discriminator) for at least some of the entries, the Department determined that an inquiry into Company A's selling practices was warranted.[10] We explained that further inquiry and a determination on this issue was key in establishing whether Company A and/or Xiping Opeck are the entity/entities 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.[11]

Following the *Preliminary Results*, we issued multiple supplemental questionnaires to Xiping Opeck and its U.S. customer/importer, GBIE, to which both companies responded. We issued a non-market economy (NME) questionnaire to Company A. Company A did not provide any information regarding its U.S. sales or the pricing of entries under review. Instead, Company A filed a letter claiming that it had never exported subject merchandise to the United States, that it was not an exporter of subject merchandise, that the Department's questionnaire was not applicable to it, and that it was unable to respond to the questionnaire. The Department reiterated to Company A its reasons for requiring a questionnaire response, explained again that in the absence of a full response it might conclude the company had not cooperated, and provided the company with another opportunity to respond to the NME questionnaire. Company A again declined to provide any information regarding its U.S. sales or the pricing of entries under review.

[9] *Id.* at 5-6.
[10] *Id.* at 15-16; *Preliminary Results*, 76 FR at 62350.
[11] *Id.*

Subsequently, the Department issued a post-preliminary results analysis.[12] The Department also preliminarily determined that the record evidence indicated that Company A played a central role in setting the U.S. pricing for the entries subject to the review (*i.e.*, Xiping Opeck's shipments).[13] Specifically, we preliminarily found that Xiping Opeck, GBIE, and Company A were each essential parties to a series of tied transactions leading to the exportation and importation of crawfish tail meat into the United States. We also found that the sales from Xiping Opeck to GBIE were not based on normal commercial considerations, and were only a piece of an integrated set of transactions that includes a resale to Company A, which is in a third country, and resale back to the United States.[14] Based on the unique factual pattern associated with entries of subject merchandise produced by Xiping Opeck, the Department concluded that Xiping Opeck, GBIE and Company A collectively structured the transactions under review in a way that avoided dumping liability. We further determined that the transactions between Xiping Opeck and GBIE did not form a proper basis to determine U.S. price and that the proper focus of our dumping analysis should be on Company A's unreported sales to unaffiliated purchasers in the United States.[15]

However, Company A did not provide the requested information. Accordingly, the Department preliminarily determined, pursuant to sections 776(a)(1), (2)(A), and (2)(C) of the Act, that necessary information was not on the record, that Company A withheld information that we requested and determined to be critical and necessary for the completion of the administrative

[12] *See* memorandum from Susan H. Kuhbach, Office Director, AD/CVD Operations Office I 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).
[13] *Id.*
[14] *See* Attachment I for a graphical depiction of transactions at issue.
[15] *See* AFA Memo at 4, 6.

review, and that Company A had impeded the proceeding.[16] Based on the facts available, the Department preliminarily determined that Company A was an interested party by virtue of its involvement in the relevant U.S. sales and pricing of the entries under review,[17] and that the limited information provided by Xiping Opeck could not serve as a reliable basis for reaching an accurate dumping determination with respect to the entries under review, within the meaning of section 782(e)(3) of the Act.[18] Further, we found that the collective and interdependent actions of Xiping Opeck, GBIE, and Company A caused the exportation and importation of crawfish tail meat into the United States, and as such, that Company A's unreported sales to unaffiliated purchasers in the United States were the proper basis for U.S. price for the entries under review.[19] On the basis of this information and Company A's failure to cooperate to the best of its ability, the Department determined, pursuant to section 776(b) of the Act, that the application of AFA was warranted in calculating a dumping margin for Xiping Opeck. The Department used the evidence available on the record to derive an AFA rate of 70.12 percent for the Xiping Opeck entries under review.[20] In the *Final Results*, we continued to apply an AFA rate of 70.12 percent for Xiping Opeck's entries.

III. Analysis

A. Framework for the Department's Analysis

In its opinion, the Court observed that "it is difficult to see {the transactions at issue} as anything other than an attempt to make it appear that Xiping {Opeck's} merchandise entered the country based on invoices that did not accurately reflect the true relationship between normal

[16] *Id.* at 3.
[17] *Id*. at 5.
[18] *Id*.
[19] *Id*. at 6.
[20] *Id*. at 5-8.

value and export price{}"[21] and that there appeared to be "no other explanation for {the structure of the transactions at issue} than to avoid a finding of dumping."[22] The Court further observed that CPA "seems to have made out a good case that the transaction{s} amounted to middleman dumping" and held that the Department could pursue a middleman dumping investigation as part of its determination to capture the dumping of Xiping Opeck's merchandise in the United States.[23] In light of the Court's statement that the Department could pursue a middleman dumping investigation as part of its determination, the Department has reconsidered its determination, reevaluated the facts on the record, and considered whether to initiate a middleman dumping investigation.

As the Department explained in it is *Final Results*, the presumption built into the law and the Department's 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.[24] This presumption underlies the definitions of export price (EP) and constructed export price (CEP).[25] Thus, whether the sale represents an EP or CEP sale, the statue anticipates that the first entity – whether the producer, an exporter, or an affiliated seller – which has knowledge that the sale is destined for the United States is the entity the price-setting behavior of

[21] *Xiping Opeck*, 34 F. Supp. 3d at 1339.
[22] *Id.* at 1354.
[23] *Id.* at 1354, 1355.
[24] *See* IDM at 9; *see also Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1304 (CAFC 2001) ("To determine the U.S. price for both {export price} and {constructed export price} sales, Commerce starts with the first sale price to an unaffiliated purchaser ('starting price') …."); *cf. Taiwan Semiconductor Mfg. v. United States*, 143 F. Supp. 2d 958, 966 (CIT 2001) (*Taiwan Semiconductor*) (affirming Commerce's definition of "relevant sale" for purposes of defining "producer" as "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").
[25] *See* section 772(a) of the Act (defining EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States or to an unaffiliated purchaser for exportation to the United States"); section 772(b) of the Act (defining CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter").

which will control dumping.[26] Accordingly, the Department normally calculates dumping margins based on a producer's or exporter's sales (in the NME context), whether or not those sales are made directly to an unaffiliated U.S. purchaser or to another exporter for sale to the United States.[27]

However, this presumption does not hold true in cases of middleman dumping, *i.e.*, when the producer may be dumping subject merchandise in its sales for export to the United States to another unaffiliated exporter, and/or that exporter may be dumping subject merchandise in its sales to the unaffiliated U.S. customer. While there is no specific statutory provision concerning middleman dumping, the legislative history for the Trade Agreements Act of 1979 addresses such a scenario, contemplating that there may be more than one relevant export sale to examine for dumping.[28] The legislative history envisions that normally the producer's sales price to an unrelated middleman will be used as the purchase price (the term previously used for "export price"), when the producer has knowledge that the merchandise is destined for the United States, and that such sales occur on or before the date of importation. Crucially, however, the legislative history also recognizes that middlemen may also be engaged in dumping and acknowledges that the Department has the authority to investigate "sales from the foreign producer to middlemen

[26] *See USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1318 n. 9 (CIT 2003); *see also Parkdale Int'l v. United States*, 429 F. Supp. 2d 1324, 1330 (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)). In the NME context, the Department does not utilize the knowledge test with respect to transactions occurring within a NME economy, but rather, examines knowledge beginning with the sale from a NME seller to a non-NME purchaser. *See, e.g., Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) (*OCTG from China*) and accompanying Issues and Decision Memorandum at Comment 31.

[27] IDM at 9.

[28] *See* S. Rep. No. 96-249 at 94 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 480; H.R. Rep. No. 96-317 at 75 (1979).

and *any* sales between middlemen *before sale to the first unrelated U.S. purchaser*" so as to "avoid below cost sales by the middlemen."[29]

Consistent with this authority, the Department has initiated middleman dumping investigations in cases where it has received a documented allegation that a manufacturer or producer is selling to an unaffiliated trading company (*i.e.*, middleman) in the producer's home market or in a third country, and the middleman is reselling the merchandise to the United States at prices which do not permit recovery of its acquisition and selling costs.[30] The Department's authority to investigate and remedy middleman dumping has been expressly recognized by the CAFC in *Tung Mung III*.[31] To initiate an investigation of middleman dumping, the Department requires that the petitioners submit reasonably available information that provides evidence of middleman dumping, including information, either direct or circumstantial, on the price actually paid to the middleman by the U.S. end user.[32] If initiated, the purpose of a middleman dumping investigation is to analyze whether a substantial portion of sales are below acquisition cost, which would indicate that the middleman is engaged in middleman dumping.[33]

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[29] *Id.* (emphasis added).

[30] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 FR 30592 (June 8, 1999) (*Stainless Steel Sheet and Strip in Coils from Taiwan*), *remanded in Tung Mung Development Co., Ltd. v. United States*, 25 CIT 752 (CIT 2001) (*Tung Mung I*), *remand redetermination sustained in Tung Mung Dev. Co. v United States*, 219 F. Supp. 2d 1333 (CIT 2002) (*Tung Mung II*), *aff'd* 354 F.3d 1371 (CAFC 2004) (*Tung Mung III*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan*, 64 FR 15493 (March 31, 1999) (*Stainless Steel Plate in Coils From Taiwan*); *Fuel Ethanol from Brazil; Final Determination of Sales at Less than Fair Value*, 51 FR 5572 (February 14, 1986).

[31] *See Tung Mung III*, 354 F.3d at 1374 ("Although the antidumping statute does not explicitly address middleman dumping, the language of the Act is broad enough to cover it, and the legislative history of the Trade Agreements Act of 1979 … indicates that Congress intended Commerce to address 'below cost sales by middlemen' as well as direct dumping by foreign producers.") (*citing* S.Rep. No. 96-249 at 94; H.R. Rep. No. 96-317 at 75).

[32] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 67 FR 6212 (October 3, 2002) and accompanying Issues and Decision Memorandum at Comment 2.

[33] *Id*. (citing *Steel Wire Strand for Prestressed Concrete From Japan; Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Reviews*, 62 FR 60688, 60689 (November 12, 1997)).

Having reevaluated the record evidence and the petitioner's middleman dumping allegation, in accordance with the Court's suggestion, we have determined to conduct a middleman dumping inquiry, which has resulted in a finding that middleman dumping has occurred. We note that the facts present in this case do not, on their face, fit squarely into a traditional middleman dumping framework, which normally involves a foreign producer selling to a middleman located in the producer's home market or in a third country.[34] Here, there are no direct sales from the Chinese producer of subject merchandise (Xiping Opeck) to a foreign entity acting as middleman (Company A). Instead, there is a sale from Xiping Opeck to an unaffiliated U.S. importer, GBIE, that occurs before the sale to Company A. Nevertheless, as we explain in detail below, we continue to find, in light of the totality of the circumstances, that Xiping Opeck's sales to GBIE were not made on a commercially reasonable basis. As a result, and consistent with the Department's practice of excluding commercially unreasonable (*i.e.*, non-*bona fide*) sales from its U.S. price calculations, we have determined that it is appropriate to exclude the Xiping Opeck-GBIE and GBIE-Company A sales from our analysis. Because we conclude that the sales to GBIE were not commercially reasonable, the facts in this case are analogous to those in a traditional middleman dumping scenario. In particular, given the finding that the Xiping-Opeck sales to GBIE are not *bona fide* and cannot be relied upon, the Department must determine the appropriate sales for analysis between Xiping Opeck, Company A and the first sale to the United States that are appropriate to use as a basis for U.S. price.[35] In

[34] *See Tung Mung III*, 354 F.3d at 1374 (explaining that Ta Chen Stainless Pipe Co. (Ta Chen), the Taiwanese middleman, resold subject merchandise produced by two Taiwanese steel companies, Tung Mung Development Co. (Tung Mung) and Yieh United Steel Corp. (Yieh Steel)).

[35] Due to Company A's failure to cooperate with the Department's requests for information, the record does not include information on whether Company A sells directly to the first unrelated U.S. customer, or whether there are additional sales between middlemen before the sale to the first unrelated U.S. customer. *See* S. Rep. No. 96-249 at 94; H.R. Rep. No. 96-317 at 75.

the circumstances of this case, Company A acts as a middleman and the middleman dumping framework provides an appropriate guide for the Department's analysis.

B. Application of the Middleman Framework

1. *Bona Fides* Analysis

Faced with a novel transaction chain in the underlying review, the Department sought to establish which party's sale formed the basis for determining U.S. price under section 772 of the Act. Based on the record evidence in this review, the Department determined that Xiping Opeck's reported U.S. transactions did not form the appropriate basis for the U.S. price of the entries under review because they were not based on normal commercial considerations.[36] The Department has reevaluated the available record evidence, which, as a result of Company A's failure to cooperate with our requests for information, is limited to Xiping Opeck's sales to GBIE, and GBIE's sales to Company A. We continue to find that Xiping Opeck's sales to GBIE are not viable sales for purposes of determining a dumping margin for the entries at issue.

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 arm's-length basis.[37] 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."[38] If the

[36] *See* IDM at 10-12.
[37] *See Tianjin Tiancheng Pharm. Co. Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005).
[38] *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).

Department determines that a sale is not *bona fide*, its practice is to exclude the sale from its U.S. price calculations.[39]

As we explained in the *Final Results*, we evaluated record evidence concerning the price and quantity of Xiping Opeck's sales to GBIE, whether the transactions were made on an arm's-length basis, Xiping Opeck's relationship with GBIE, and GBIE's role in the transaction chain that resulted in subject merchandise entering for consumption in the United States.[40] We continue to find that the record evidence and the totality of circumstances surrounding Xiping Opeck's sales to GBIE, and GBIE's re-sales to Company A, call into question the commercial authenticity associated with the transactions reported by Xiping Opeck in this review.[41] The following facts indicate that Xiping Opeck's sales to GBIE are not *bona fide*:

(1) Xiping Opeck's prices and shipment quantities increased drastically from the immediately preceding period of review (POR) and in relation to its competitors, and Xiping Opeck did not provide a reasonable explanation for the factors accounting for these drastic increases;

(2) there was a wide gap between Xiping Opeck's reported U.S. selling prices and the average prevailing U.S. market prices at the wholesale level during the POR, and Xiping Opeck did not provide an explanation for this gap;

(3) Xiping Opeck and GBIE did not demonstrate how their negotiated prices were congruent with the U.S. market in which Xiping Opeck's products compete, *i.e.*,

[39] *See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 7013 (February 10, 2006) and accompanying Issues and Decision Memorandum at Comment 1 ("In determining whether sales are *bona fide* commercial transactions, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or 'the transaction has been so artificially structured as to be commercially unreasonable,' the Department finds that it is not a *bona fide* commercial transaction and must be excluded from review."); *Saccharin from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7515 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 1 (examining whether the totality of the circumstances surrounding the respondent's sale to the United States was commercially unreasonable); *see also Tianjin Tiancheng*, 366 F. Supp. 2d at 1249-1250 ("Commerce may exclude sales from the export price calculation where it finds that they are not *bona fide*."); *Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 995 (CIT 2000) ("the Court has provided a limited exception {to section 751(a)(2)(A) of the Act} which allows Commerce to "exclude sales from {United States Price} in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive.").

[40] *See* Evaluation of Transactions Memo at 6-15.

[41] *See* IDM at 11-12; AFA Memo at 3-4; Evaluation of Transactions Memo at 5.

both parties failed to explain adequately 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 (wholesale/distributor) to the United States;

(4) The exclusivity of the commercial relationships between Xiping Opeck and GBIE and GBIE and Company A, in terms of suppliers/buyers/product, is inconsistent with Xiping Opeck's and GBIE's purported interest in diversifying their customers/suppliers or products, and neither party provided persuasive evidence that it attempted to enter into other commercially competitive relationships;

(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; and,

(6) GBIE's purchases from Xiping Opeck were virtually simultaneous with its resales to Company A, a third-country entity.[42]

More specifically, with regard to the price and quantity of Xiping Opeck's sales to GBIE, the evidence demonstrates that Xiping Opeck's prices increased drastically from the immediately preceding POR and in relation to its competitors, while at the same time its sales quantity also increased drastically from the immediately preceding POR and narrowed the gap with its competitors in relation to the preceding POR.[43] Further, the competitors' average prices at the end of the preceding POR (2008-2009) and at the beginning of the instant POR (2009-2010) remained essentially constant while Xiping Opeck's average prices spiked in the first month of the POR and remained elevated throughout the 2009-2010 POR.[44] Furthermore, Xiping Opeck's U.S. selling prices were substantially higher than the average prevailing U.S. market price at the wholesale level.[45] The fact that Xiping Opeck was able to increase its sales significantly while also selling its merchandise at prices significantly above those of its competitors and the

[42] *See* IDM at 11-12; Evaluation of Transactions Memo at 6, 8, 13, 14, and 15.
[43] Evaluation of Transactions Memo at 6.
[44] *Id*. at 7.
[45] *Id*. at 8.

prevailing conditions in the U.S. market defies normal commercial considerations,[46] which would result in a company selling at prices closer to those of its competitors in the market.

Moreover, as we elaborated in the Evaluation of Transactions Memo, the reasons provided by Xiping Opeck to explain its pricing behavior – reputation, a decline in competitors' prices because of quality concerns, or increases in raw material costs – were not persuasive and did not justify the commercially unrealistic prices of the sales to GBIE.[47] Indeed, Xiping Opeck's and GBIE's statements and explanations were unresponsive to our repeated questions concerning how the prices it reported were established or whether the reported prices were commercially reasonable at the point in the distribution channel in which it sold crawfish tail meat (*i.e.*, wholesale/distributor) to the United States.[48] Neither Xiping Opeck nor GBIE offered evidence of prices at the wholesale level of distribution that could support its reported prices.[49] Accordingly, we concluded that both Xiping Opeck and GBIE did not demonstrate how the prices these companies negotiated were established in light of the prevailing conditions in the U.S. market or how the negotiated prices were congruent with the U.S. market in which Xiping Opeck's products compete.[50]

Regarding whether the transactions were made on an arm's-length basis and Xiping Opeck's relationship with GBIE, we continue to find that the nature and exclusivity of the relationships between Xiping Opeck and GBIE, and GBIE and Company A, contradict the general business principle that parties operating at arm's length rationally seek to maximize their respective profits and require us to ask what other relevant transactions or arrangements can

[46] *Id.* at 8 (finding that the increase in raw material costs did not fit with the timing of Xiping Opeck's price increases or magnitude thereof) and 9 (finding that "no buyer would agree to buy at a price that exceeds the price offered by U.S. wholesalers.").
[47] *Id.* at 6-9.
[48] *Id.* at 7-9.
[49] *Id.* at 8-9.
[50] *Id.* at 12 ("{n}either Xiping Opeck nor GBIE has provided any information or argument that supports, in a meaningful manner, the commercial soundness of Xiping Opeck's prices.").

explain the pricing associated with these entries.[51] Our finding is based on the following record evidence:

(1) Xiping Opeck sold [ ] percent of its crawfish tail meat destined for the United States to GBIE;

(2) GBIE purchased [ ] percent of crawfish tail meat destined for the United States from Xiping Opeck;

(3) GBIE does not sell crawfish tail meat purchased from Xiping Opeck for distribution in countries other than the United States;

(4) GBIE does not purchase whole crawfish from Xiping Opeck, and acknowledges that it "is [ ] importing crawfish tail meat purchased from Xiping Opeck"; and,

(5) GBIE resold [ ] percent of the crawfish tail meat it purchased from Xiping Opeck to Company A.[52]

Further, although GBIE claimed that it was interested in diversifying its supplier base, developing customers other than Company A, and or [ ], its responses to the Department made no mention of specific producers of crawfish tail meat in the People's Republic of China (PRC) with which it attempted to establish a new business, or of specific U.S. customers GBIE courted, or of [ ] of which it aspired to be a part.[53] Indeed, the record does not show that GBIE introduced competing bids from other suppliers in an attempt to obtain a better purchase price from Xiping Opeck, introduced bids from other buyers in an attempt to secure a better selling price from Company A, or introduced competing bids from Company A in an attempt to secure a better selling price for imported crawfish tail meat from any buyer. Further, Xiping Opeck's responses do not indicate that it attempted or even considered finding customers in the United States after it established its relationship with GBIE. Similarly, the

[51] *Id.* at 13-14.
[52] *Id.* at 13.
[53] *Id.* at 13-14.

information in GBIE's responses does not indicate that Company A attempted to procure Chinese crawfish tail meat directly from suppliers other than Xiping Opeck or indirectly through entities other than GBIE.[54]

Regarding GBIE's role in the transaction chain, we find that GBIE was incorporated for the sole reason of acting as an importer of record for Xiping Opeck's shipments. The bases for our conclusion are the following:

(1) GBIE was incorporated using the personal residence address of Xiao Huan Xu, and the mobile phone number of Xiao Huan Xu is GBIE's business phone number;

(2) while Xiao Huan Xu is GBIE's registered agent, its president, Zhijian Song, is a Chinese national residing in the PRC;

(3) GBIE was capitalized with little capital and has no fixed assets;

(4) the proximity of the date of GBIE's incorporation and the timing of its first purchases from Xiping Opeck;

(5) the purported interest of Company A to have an entity in the United States act as an importer;

(6) that GBIE had [ ] suppliers of crawfish tail meat other than Xiping Opeck and sold [ ] products other than crawfish tail meat since it was established;

(7) the absence of record evidence demonstrating purchase and sale negotiating activities by GBIE in the United States; and,

(8) that [ ] GBIE's buyers of Chinese crawfish tail meat are located in the United States.[55]

Based on this information, and the fact that GBIE imported subject merchandise into the United States and resold it to an entity in a third country (as opposed to downstream consumers/users of the product in the United States), we continue to find that GBIE demonstrated commercial behavior atypical of an entity that purports to seek to maintain a meaningful and participating

[54] *Id.*
[55] *Id.* at 13.

commercial role in the U.S. market with the natural intent of profiting from any displacement in the supply of, and the demand for, crawfish tail meat sold in the United States.[56]

Because we found that Xiping Opeck's sales to GBIE are not *bona fide* and consistent with our practice of excluding commercially unreasonable sales from our U.S. price calculations, we have disregarded Xiping Opeck's reported U.S. sales. Consequently, there are no viable U.S. sales between Xiping Opeck and GBIE (as the first unrelated U.S. customer) on which to base U.S. price. Accordingly, the facts render the scenario akin to the middleman dumping scenario contemplated by Congress, *i.e.*, multiple relevant sales occurring outside the United States ultimately resulting in a sale to the first unrelated U.S. purchaser: a Xiping Opeck-Company A sale transaction (through GBIE) and the unreported Company A-U.S. customer sale.

2. Margin Calculation

The Department has limited experience with middleman dumping and does not have an established practice for how it determines dumping margins in reviews where it has conducted a middleman dumping inquiry.[57] However, the CAFC upheld the Department's practice applied on remand in the Stainless Steel Sheet and Strip in Coils from Taiwan antidumping duty investigation in *Tung Mung III*, noting the Department's limited experience and lack of established practice.[58]

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[56] *Id.* at 14.

[57] *Tung Mung III*, 354 F. 3d at 1378.

[58] *Final Results of Redetermination Pursuant to Court Remand in Tung Mung Development Co., Ltd. v. United States, Consol. Court No. 99-06-00457 (CIT 2001)* (Dep't Commerce Nov. 28, 2001) at 4 & 8, *sustained in Tung Mung II*, 219 F. Supp. 2d at 1333, *aff'd Tung Mung III*, 354 F.3d at 1371 (noting the Department had on remand "highlight{ed} the fact that it had 'limited experience in middleman dumping'" and "disagreed {with the court} that it had a settled practice"). The litigation resulting from that investigation did not involve the question at issue here. The issue in that litigation was whether or not to apply a single rate to the exporter when it had two different channels of distribution: (1) direct sales by Tung Mung and Yieh Steel, producers of subject merchandise, to customers in the United States, and (2) sales by the Tung Mung and Yieh Steel to a middleman, Ta Chen, who resold that merchandise to United States customers. *Tung Mung III*, 345 F. 3d at 1374. The Department applied a "knowledge-based" standard, *i.e.*, it considered whether the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States. *Id.* at 1377-78. If the Department found such knowledge, it combined all sales, direct and through the middleman, to determine a single margin for the

With respect to sales through a middleman, the Department may determine the dumping margin for the exporter by examining the dumping between the first exporter and the middleman (comparing the exporter's sales price to the middleman to the exporter's normal value) and adding any margin found on the sales by the middleman (comparing the middleman's sales to the first unrelated U.S. purchaser to its acquisition cost from the exporter).[59] For this remand determination, the Department has calculated a dumping rate for the entries under review, [60] relying strictly on the data available for the Company A-U.S. customer sales and Company A's acquisition cost (based on its purchases from GBIE), as adverse facts available. We find that attempting to calculate a margin for a constructed Xiping Opeck- Company A (through GBIE)

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exporter. If the Department did not find such knowledge, it would calculate two rates for the exporter, one for the direct sales, and one for the sales through the middleman. In this case, however, we do not have the exact scenario at issue in *Tung Mung III*. Here, there [ ], through GBIE and Company A, [ ]. As such, the issue of whether to calculate two rates for Xiping Opeck (*i.e.*, whether or not to attribute middleman dumping to direct sales as well), based on whether Xiping Opeck was aware or should have been aware of Company A's selling practices is [ ] in this case. Moreover, [ ], the record evidence supports the use of a single rate. Xiping Opeck's admitted presence and knowledge of the U.S. market signifies that it would have had reason to know that its shipments of subject merchandise were ultimately being sold at less than Company A's acquisition cost to unaffiliated U.S. purchasers. IDM at 13. By its own admission, Xiping Opeck held a significant market share during the POR. *See* Xiping Opeck's case brief at 12. Further, Xiping Opeck claimed 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). Based on Xiping's own statements, we find it reasonable to conclude 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. Further, the evidence indicates that Xiping Opeck was an integral party to the series of tied transactions that led to the exportation and importation of subject merchandise into the United States. IDM at 10.

[59] *See Stainless Steel Sheet and Strip in Coils From Taiwan*, at Comment 2 (explain that the Department "{took} into account YUSCO's and Tung Mung's sales to Ta Chen and other customers, and the middleman dumping of YUSCO and Tung Mung merchandise attributable to Ta Chen)" to calculate the margin); *Stainless Steel Plate in Coils From Taiwan*, at Comment 21 (explaining that the Department "add{ed} the difference between normal value and the price paid by Ta Chen to the difference between Ta Chen's total acquisition cost and the price paid to the first unaffiliated U.S. customer{}" to calculate the margin).

[60] We note that given the timing, this rate will only be used for purposes of assessing duties on the entries subject to the review and not serve as a cash deposit rate. For cash deposit purposes, Xiping Opecks's rate in this review has been superseded by subsequent reviews, and the only issue that remains is the proper liquidation of the entries at issue. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission; 2010-2011*, 78 FR 22228 (April, 15, 2013); and *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission; 2011-2012*, 79 FR 22947 (April 25, 2014); and *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission; 2012-2013*, 79 FR 75535 (December 18, 2014).

sale (a constructed sale price from Xiping Opeck and Company A compared to Xiping Opeck's normal value) and incorporating it in our weighted average for all of Xiping Opeck's merchandise is unnecessary and improper. We have found the transaction chain between Xiping Opeck and GBIE and Company A to have been structured to avoid dumping liability,[61] and would require using information related to the sales we have determined are not *bona fide* (Xiping Opeck's sales to GBIE).

We have calculated a margin for the Company A-U.S. customer sale, as follows. First, as a proxy for Company A's U.S. sale prices, we have relied on record evidence for the prices charged by Company A in the United States, *i.e.*, the U.S. wholesalers' aggregate price data derived from sale offers of "150+pcs/lb" size count of crawfish tail meat in effect during the POR.[62] Because Company A failed to cooperate to the best of its ability in response to the Department's requests for information, we continued to apply adverse facts available pursuant to section 776 of the Act and used the lowest prices charged by Company A in the United States. Based on this information, we calculated an estimated average U.S. wholesalers' market price of USD 10.14 per kilogram for the POR.[63] Record evidence establishes that the U.S. wholesale price offers were for crawfish tail meat imported from the PRC and that all four entities for which we have price offers were downstream purchasers from Company A.[64]

Second, with respect to normal value, we relied on Company A's acquisition costs because such costs represent GBIE's sales prices of Xiping Opeck's product to Company A throughout the POR. Specifically, as adverse facts available, we used Company A's highest

[61] IDM at 10; *Xiping Opeck*, 34 F. Supp. 3d at 1354.
[62] *See* Evaluation of Transactions Memo at 8; see also CPA's submission dated February 28, 2011, at Exhibit 1 and CPA's submission dated March 3, 2011, at Exhibit 1.
[63] *See* Evaluation of Transactions Memo at 8.
[64] *See* Evaluation of Transactions Memo at 3, 8; see also CPA's June 7, 2011, submission at Exhibit 2 and 3 (where CPA provided an affidavit from [ ] of a competing U.S. wholesaler in support of CPA's assertion that the four U.S. wholesalers did not handle the product produced by Xiping Opeck's competitors).

acquisition cost during the POR, which we identified by examining all the prices that GBIE invoiced for crawfish tail meat to Company A. Thus, from the list of all of GBIE's selling prices available on the record,[65] we selected USD [ ] per kilogram as Company A's highest acquisition cost. After subtracting the U.S. price of USD 10.14 from the normal value of USD [ ], we derived a rate of 70.12 percent.[66]

C. Response To The Court's Directives

Explanation of "Exporter" As "Price Discriminator"

Summary of Court's Opinion

In its opinion the Court held that the Department had failed to supply an adequate explanation for its finding that Company A is an exporter and, thus, qualifies as an interested party under the statute.[67] More specifically, the Court held that the Department has not adequately explained how its interpretation of the term "exporter" is a permissible construction of the statute,[68] how being a "'price discriminator' alone makes an entity an exporter when the plain meaning of the word requires more, *i.e.*, not just price setting, but movement of goods."[69]

Department's Discussion

Section 771(9)(A) of the Act defines "interested party" in part as "a foreign manufacturer, producer, or exporter" of subject merchandise.[70] However, as the Court observed, the "statute provides no further explanation as to the type of entity that qualifies as an exporter."[71] Because the relevant statutory provision is silent with respect to the precise

[65] See AFA memo at 7 and Attachment II; *see* also Exhibit SSIM-1 of GBIE's July 2, 2011, response and Exhibits SSIM-3 and SSIM-5 of GBIE's May 20, 2011, response.
[66] The calculations to derive the rate are as follows: (1) [ ] – 10.14 = [ ]; (2) [ ]/10.14 = 70.12 percent.
[67] *See Xiping Opeck*, 34 F. Supp. 3d at 1345.
[68] *Id*. at 1344.
[69] *Id*.
[70] *See* 19 CFR 351.102(b)(29) (defining "interested party" in part as "a foreign manufacturer, producer, and exporter of subject merchandise.").
[71] *See Xiping Opeck*, 34 F. Supp. 3d at 1343.

question, the Department enjoys maximum deference in exercising its authority and interpreting the statute.[72]

In light of the absence of a definition for "exporter" in the statute, the Department has reasonably exercised its discretion and filled in this gap by defining "exporter" as a "price discriminator." The statute focuses on what U.S. price (be it EP or CEP)[73] the Department should use in its margin calculation. As a result, for purposes of calculating a dumping margin, the Department identifies the "relevant sale," *i.e.*, "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."[74] Thus, as part of this analysis, the Department "must first determine the exporter or producer of subject merchandise who *controls the export price* … that {it} compares to normal values to determine dumping margins."[75] In other words, the Department must identify the "price discriminator," meaning the party who, with its customer, determines the U.S. sales price (EP or CEP) of the subject merchandise entering the United States market.[76]

This construction of the term "exporter" is consistent with the statute because the intent of the statute is explicitly expressed, in part, by the identification, and definitions of, the U.S. sale price as an "export price" or "constructed export price." By providing differing definitions for U.S. price, the statute accommodates the variety of ways in which sales are made to the U.S. market. Specifically, it acknowledges that a sale may be made by the producer or exporter

[72] *See Chevron, USA., Inc. v. Natural Res. Def 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," and "{s}uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); *United States v. Eurodif S.A.*, 555 U.S. 305, 887-90 (2009); *see also Union Steel v. United States*, 713 F.3d 1101, 1106-10 (CAFC 2013).
[73] *See* sections 772(a) and (b) of the Act.
[74] *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1318 n. 9 (CIT 2003) (*quoting Taiwan Semiconductor*, 143 F. Supp. 2d at 966).
[75] *See*, *e.g.*, *Taiwan Semiconductor*, 143 F. Supp. 2d at 965 (emphasis added).
[76] *See* IDM at 6.

"before the date of importation,"[77] or may be made "before or after the date of importation by or for the account of the producer or exporter, or a party affiliated with such producer or exporter…."[78] Thus, a foreign entity that sets a price of a sale to a U.S. customer that would be either an export price or a constructed export price, within the meaning of the statute, is reasonably deemed an "exporter." In addition, the legislative history explains that the Department may examine "sales from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser" so as to "avoid below cost sales by the middlemen."[79] This indicates that Congress intended the definition of "exporter" to include resellers and middlemen, and that the Department could examine transaction chains with multiple sales.

The Court observed that the transport of merchandise from one country to another in the course of trade has traditionally been the focus of entities that have been found to be exporters under the antidumping duty law.[80] However, focusing on the entity engaged in the transport of merchandise would lead to incongruous results; producers and exporters frequently contract with shipping companies to provide transport services, and these companies have no involvement in the sale of the merchandise.[81] For purposes of the antidumping duty law, the export of merchandise is more than just the movement of goods from one country to another – it requires a

[77] *See* section 772(a) of the Act.
[78] *See* section 772(b) of the Act.
[79] S. Rep. No. 96-249 at 94; H.R. Rep. No. 96-317 at 75.
[80] *Xiping Opeck*, 34 F. Supp. 3d at 1343.
[81] *Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 23324 (April 28, 2014) and accompanying Issues and Decision Memorandum at Comment 3 (noting that the respondent paid for ocean freight to a freight forwarder); *Certain Oil Country Tubular Goods From the People's Republic of China: Preliminary Results of the First Antidumping Duty Administrative Review, Rescission in Part and Intent To Rescind in Part*, 77 FR 34013, 34017 (June 8, 2012) (noting that the respondent purchased international freight services for transportation of the subject merchandise to the United States), *unchanged in Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 77 FR 74644 (December 17, 2012) and accompanying Issues and Decision Memorandum at Comment 8 (stating the respondent paid ocean freight expenses to a freight forwarder, who in turn contracted a carrier).

sale or agreement to sell.[82] Indeed, the statutory definitions for export price and constructed export price both refer to the "price at which the subject merchandise is first *sold* (or *agreed to be sold*)…."[83]

Further, although the Court cites Black's Law Dictionary, we note that other sources recognize that the act of moving goods is a peripheral function of selling the goods abroad. For instance, Webster's New World College Dictionary defines the term "export" as "to carry or send (goods) to another country or other countries, esp. *for purposes of sale*."[84] Similarly, Webster's New World Finance and Investment Dictionary defines the term "export" as "*to sell* goods or services to a company in another country,"[85] and New Oxford American Dictionary defines the verb "export" as "send (goods or services) to another country *for sale*...," while it defines the noun "exports" as "a commodity, article, or service *sold* abroad" or "*sales* of goods or services to other countries, or the revenue from such *sales*."[86] The World Book Dictionary defines the term "export" as "to send products out of one country for *sale* or use in another…."[87] In addition, while the Webster's Third New International Dictionary defines the term "export" as "something that is exported; specifically: a commodity conveyed from one country or region to another for purposes of trade,"[88] it defines "exporter" as "one that exports; specifically: a wholesaler who *sells* to merchants or industrial consumers in foreign countries."[89] These

[82] *See* sections 772(a) and (b) of the Act (emphasis added). A "sale" or "agreement to sell" occurs when there is mutual assent to the material terms (price and quantity) of the transaction. *See Corus Staal BV v. United States*, 502 F. 3d 1370, 1376 (CAFC 2007). A "sale" requires "both a transfer of ownership to an unrelated party and consideration." *NSK Ltd. v. United States*, 115 F. 3d 965, 975 (CAFC 1997) (*cited in Corus Staal*, 502 F. 3d at 1376). An "agreement to sell" is a binding commitment that has not yet been consummated by the exchange of goods for consideration. *Corus Staal* , 502 F. 3d at 1376.
[83] Sections 772(a) and (b) of the Act.
[84] Webster's New World College Dictionary 512 (5th ed. 2014) (emphasis added).
[85] Webster's New World Finance and Investment Dictionary 124 (2003) (emphasis added).
[86] New Oxford American Dictionary 611 (3rd ed. 2010) (emphasis added).
[87] World Book Dictionary 751 (volume A-K) (1984) (emphasis added).
[88] Webster's Third New International Dictionary 802 (2002).
[89] *Id*. (emphasis added).

alternative definitions of the terms "export" and "exporter" illustrate that the focal premise is on a sale taking place in the course of trade, which necessarily requires the movement of goods.

The Court also observed that "under its ordinary meaning, an exporter is not thought of as a company that takes title to the merchandise after the goods have already entered the United States and cleared Customs."[90] However, the timing of Company A's sales, while determinative of whether such sales are EP or CEP sales, is not itself determinative of whether Company A is an exporter. The plain language of these definitions indicates that an exporter may sell, or enter into an agreement to sell, both prior to *and* after importation. Specifically, an exporter may sell (or agree to sell) before the date of importation, in which case the transaction is treated as an EP sale, or an exporter may sell or (or agree to sell) after importation, in which case the transaction is treated as a CEP sale.[91] Thus, in the Department's view, it is the ability to determine the sale price that is determinative of whether an entity is an exporter, and not the ability to move the goods physically from one country to another. It is for this reason that we explained that neither an entity's role in arranging for shipment, nor the timing of the shipment, nor the physical location of the subject merchandise at the time of the sale, serves as the basis for identifying the proper entity or entities that act as exporters for the purpose of antidumping duty law.[92]

[90] *Xiping Opeck*, 34 F. Supp. 3d at 1343.
[91] *See* sections 772(a) and (b) of the Act; *Gold East Paper (Jiangsu) Co., Ltd. v. United States*, 918 F. Supp. 2d 1317, 1332 (CIT 2013) (stating that the definition of constructed export price "includes sales made by either the producer/exporter or 'by a seller affiliated with the producer'" while export price sales, "can only be made by the producer or exporter of the merchandise.").
[92] IDM at 5-6.

Company A is A "Price Discriminator" and Therefore An "Exporter" Within The Meaning Of Section 771(9)(A) Of The Act

Summary of Court's Opinion

The Court takes issue with the Department's explanation as to why Company A was the "price discriminator" and thus an exporter.[93] Specifically, the Court held that although the Department had "succeeded in explaining its purpose in finding the transactions to be violations (*i.e.*, 'preventing the intentional evasion or circumvention of the antidumping duty law'), it ha{d} failed to supply an adequate explanation for its finding that Company A is an exporter and thus, qualifies as an interested party under the statute."[94] The Court directed the Department to:

(1) explain how its view that there were "arguably" two reviewable sales complies with the law, including how Company A is the "price discriminator" when Xiping appears to be the "first entity" that "has knowledge that the sale of its goods is destined for the United States" and it is "the entity whose price setting behavior will control dumping;"[95]

(2) explain its finding that, when determining that an entity is an exporter, "{w}hether 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," including how Company A can be said to have "exported" merchandise that was in the United States when it took ownership;[96] and,

(3) support with substantial evidence its factual finding that the sales from Company A to the U.S. wholesalers of Xiping Opeck's product occurred prior to the date of importation of the merchandise or that such an agreement was in place prior to the importation of Xiping's goods.[97]

Department's Discussion

1. The Transaction Chain Involves Two Reviewable Sales

As noted above, for purposes of calculating a dumping margin, the Department identifies the "relevant sale," *i.e.*, "the first sale in the distribution chain by the company that is in a

[93] *See Xiping Opeck*, 34 F. Supp. 3d at 1344-46.
[94] *Id.* at 1345.
[95] *Id*. at 1345, 1354.
[96] *Id*.
[97] *Id*. at 1345-1346, 1354.

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."[98] To determine which party in the distribution chain controls the price of the product (and thus is the price discriminator), the Department normally utilizes the "knowledge test."[99] In general, the Department's practice has been to consider documentary evidence that the party knew or should have known its goods were destined for the United States, as well as other evidence relevant to the knowledge issue.[100] When affirmative, the Department then proceeds to examine that party's U.S. sales for purpose of establishing a dumping margin.

In this review, the Department determined that, although the subject merchandise at issue was shipped and entered the United States only once, there were two sales from two separate foreign entities (Xiping Opeck and Company A) attributable to each entry prior to the sale to an unaffiliated U.S. purchaser.[101] The two sales were (1) Xiping Opeck's sales to GBIE and (2) Company A's re-sales of Xiping Opeck's product to an unaffiliated U.S. customer.[102] We determined that each of the two sales was arguably a reviewable sale.[103] In other words, because these sales involved a foreign entity and a U.S. company, a scenario which could result in an EP sale within the meaning of section 772(a) of the Act, it appeared as though either sale could be the relevant sale for purposes of calculating a dumping margin for the entries at issue.

No party disputes that Xiping Opeck had knowledge that its goods were destined for the United States. Because we have found the transaction chain at issue to be akin to middleman

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[98] *USEC*, 259 F. Supp. 2d at n. 9.
[99] *See, e.g., Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12*, 79 Fed. Reg. 96 (January 2, 2014) and accompanying Issues and Decisions Memorandum at Comment 2. However, as noted *supra* n.26, in the NME context, the Department does not utilize the knowledge test with respect to transactions occurring within a NME, but rather, examines knowledge beginning with the sale from an NME seller to a non-NME purchaser. *See OCTG from China* at Comment 31.
[100] *Id.*; *Wonderful Chemical Industrial, Ltd. v. United States*, 259 F. Supp. 2d 1273, 1279-80 (CIT 2003).
[101] *See* IDM at 10.
[102] *Id*.
[103] *Id*.

dumping, Xiping Opeck's knowledge of U.S. destination is relevant as it is thus properly considered part of a chain of transactions Congress intended to cover.

On remand, as explained above, the Department is relying on the middleman dumping framework for its analysis. Because Xiping Opeck's sales to GBIE are not *bona fide*, there are no viable U.S. sales breaking up the transaction chain at issue, and the scenario at issue is akin to the middleman dumping scenario contemplated by Congress, *i.e.*, two relevant sales resulting in a sale to the first unrelated U.S. purchaser – the Xiping Opeck - Company A (through GBIE) "sale" and the Company A - U.S. customer sale. Thus, we find that the transaction chain involves two reviewable sales. This determination is consistent with the dumping law. Congress directed the Department to investigate "sales from the foreign producer to middlemen and *any* sales between middlemen before sale to the first unrelated U.S. purchaser" so as to "avoid below cost sales by the middlemen."[104] By using the word "any" Congress recognized that there could be dumping in one or more sales before the sale to the first unaffiliated U.S. customer, and intended for the Department to remediate any dumping therein.

Application of the Department's practice of looking only to the transaction by the first seller with knowledge of U.S. destination under normal circumstances would ignore the totality of the circumstances involved in this case and undermine congressional intent. Ignoring transactions that follow the reported Xiping-GBIE sales, does not take into account the fact that the transaction chain is different from the shipment path of the goods, masks the Company A-U.S. customer sale, and allows GBIE to not identify Company A on any of the entry documentation associated with the subject entries.[105] In the *Final Results* and for this remand, we consider the totality of the available record information and conclude that Xiping Opeck and

[104] *Id.* (emphasis added).
[105] *See* IDM at 13.

Company A were both integral parties to a series of tied transactions leading to the exportation and importation of subject merchandise into the United States.[106]

2. Date Of Sale Determines Whether Sale Is An EP Or CEP Sale, And Is Not Determinative Of Whether An Entity Is An Exporter

In the *Final Results*, we stated that "{w}hether 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."[107] The Court ordered the Department to explain how Company A can be said to have "exported" merchandise that was in the United States when it took ownership. While transfer of ownership is relevant in determining if a "sale" has occurred,[108] it is not determinative of the "date of sale" or transaction considered for U.S. price for dumping purposes.

As we explained above, the plain language of the definitions for EP and CEP indicates that an exporter may sell, or enter into an agreement to sell, both prior to and after importation. Specifically, an exporter may sell (or agree to sell) before the date of importation, in which case the transaction is treated as an EP sale, or an exporter may sell or (or agree to sell) after importation, in which case the transaction is treated as a CEP sale.[109] Thus, although the timing of an entity's sale may determine whether the sale is treated as an EP sale or CEP sale, the timing is not itself determinative of whether the entity is an "exporter" within the meaning of sections 771(9)(A), or 772(a) and (b) of the Act.

The Department uses the date of sale to determine whether a sale was made before or after importation, and thus whether it should be treated as an EP or CEP sale. The Department's

[106] *See* IDM at 10.
[107] *See* IDM at 6.
[108] *See NSK*, 115 F.3d at 975 (stating that a "sale" requires "both a transfer of ownership to an unrelated party and consideration.").
[109] Sections 772 (a) and (b) of the Act; *see also Gold East Paper*, 918 F. Supp. 2d at 1332.

regulations provide that "date of sale" will normally be the date of invoice, but may be a date other than such date if the Department is "satisfied that a different date better reflects the date on which the exporter *establishes the material terms of sale*."[110] Thus, in examining the timing of a party's sale the Department focuses on when the material terms, such as price and quantity, are set. Although invoice date is frequently the date of sale, the Department has encountered numerous instances in which the shipment date[111] or the date of purchase order[112] is the date on which the material terms are set.

Moreover, as we explained above, the plain language of the definitions for EP and CEP indicates that an exporter may sell, or enter into an agreement to sell, both prior to and after importation. Specifically, an exporter may sell (or agree to sell) before the date of importation, in which case the transaction is treated as an EP sale, or an exporter may sell (or agree to sell) after importation, in which case the transaction is treated as a CEP sale.[113] Thus, although the timing of an entity's sale may determine whether the sale is treated as an EP sale or CEP sale, the timing is not itself determinative of whether the entity is an "exporter" within the meaning of sections 771(9)(A), or 772(a) and (b) of the Act.

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[110] 19 CFR 351.401(i) (emphasis added); *see Corus Staal*, 502 F. 3d at 1376 (holding that a "sale" or "agreement to sell" occurs when there is mutual assent to the material terms (price and quantity) of the transaction).

[111] Indeed, the Department has a "long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established." *Certain Welded Carbon Steel Standard Pipes and Tubes From India: Final Results of Antidumping Duty Administrative Review*, 75 FR 69626 (November 15, 2010) and accompanying Issues and Decision Memorandum at Comment 1; *see Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*,69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; *see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

[112] *See, e.g., Large Power Transformers From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 57046 (September 24, 2014) and accompanying Preliminary Determination Memorandum at 8, *unchanged in final results*, 80 FR 17034 (March 31, 2015); *Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 41 (July 10, 2013) and accompanying Preliminary Determination Memorandum at 13, *unchanged in final results*, 78 FR 63164 (October 23, 2013); *Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Final Results of Antidumping Duty Administrative Review*, 75 FR 47777 (August 9, 2010) and accompanying Issues and Decision Memorandum at Comment 1.

[113] Sections 772 (a) and (b) of the Act; *see also Gold East Paper*, 918 F. Supp. 2d at 1332.

3. *Timing of Company A's Sale*

In the *Final Results* we determined that Company A's sales likely occurred prior to the date of importation.[114] The most direct and relevant evidence that would establish whether Company A sold (or agreed to sell) Xiping Opeck's product to the United States prior to importation would normally take the form of communication records, formal agreements, purchase orders, invoices, and payment information between Company A and its U.S. customers. The Department reasonably sought such evidence from Company A, the owner and party in control of the information. Although we twice requested this information from Company A, it failed to provide the necessary information. Because Company A failed to comply with the Department's inquiries into Company A's selling practices, and thus impeded our ability to gather evidence critical to this review,[115] we relied on the available record evidence to fill the gaps left unexplained and/or unrefuted as a result of Company A's non-compliance, consistent with section 776(a) of the Act.[116] Accordingly, under such circumstances, evidence concerning Company A's sales to unaffiliated U.S. customers is limited to record information related to the GBIE-Company A sales and documentation for entries corresponding to the sales under review.[117]

Our examination of the purchase orders between GBIE and Company A and GBIE's invoices to Company A revealed that there were no changes to the material terms of sale between

[114] IDM at 6.
[115] *See Xiping Opeck*, 34 F. Supp. 3d at 1346 ("The court is mindful that it is because of Company A's noncompliance with Commerce's nonmarket economy questionnaires that the Department lacks the necessary information to determine the timing that the agreements between Company A and its U.S. wholesale buyers were entered into.").
[116] "Commerce shall fill in the gaps with 'facts otherwise available'" if any respondent significantly impedes the Department's ability to conduct a proceeding. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (CAFC 2003); *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1378, 1379–80 (CAFC 2013).
[117] *See* Evaluation of Transactions Memo at 145-15; GBIE's Supplemental Questionnaire Response, dated July 2, 2011, at SSIM-1; GBIE's Supplemental Questionnaire Response, dated August 24, 2011, at SSSIM-1; Memorandum to the File, re: Request for U.S. Entry Documents - Freshwater Crawfish Tail Meat from the People's Republic of China (A-570-848), dated August 31, 2011.

the date of purchase order and the date of invoice.[118] Accordingly, although GBIE issued commercial invoices and transferred the title to the goods to Company A after importation, consistent with 19 CFR 351.401(i), it is appropriate to select the earlier date, the date of the purchase order, as the date of sale for GBIE's sales to Company A.[119] The date of sale of GBIE's sales to Company A is relevant because the record also indicates that Company A purchased merchandise from GBIE [ ] of the time the product was imported for consumption into the United States.[120] Indeed, Company A purchased the merchandise at issue on average [ ] days before importation, as demonstrated below.[121]

	Purchase Orders		*Import*	*# of Days from Purchase Order to Importation*	
		A)	*B)*	*C) = B-A*	
	Xiping/ GBIE	GBIE/ Company A			
[					]
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[118] *See* Evaluation of Transactions Memo at 14, n.3.
[119] Because our examination of purchase orders between GBIE and Xiping Opeck and Xiping Opeck's invoices to GBIE revealed that there were no changes to the material terms of sale between the date of purchase order and the date of invoice, it is appropriate to select the date of the purchase order, as the date of sale for Xiping Opeck's sales to GBIE. *Id*.
[120] *Id*. at 15.
[121] *Id*.

Additionally, GBIE itself agreed that Company A purchased the merchandise at issue prior to importation, stating that "Company A agreed to purchase crawfish tail meat from GBIE prior to the date of importation into the United States."[122] Thus, the evidence demonstrates that Company A had ample time to arrange its own sales to its U.S. customers prior to importation.[123]

Because Company A failed to provide the Department with requested information regarding its sales, consistent with section 776(a) of the Act, we have no alternative but to use the information on the record regarding the date of sale of Xiping Opeck's and GBIE's sales to determine Company A's date of sale. First, as discussed above, the record indicates that the date of sale of the Xiping Opeck-GBIE and GBIE-Company A sales occurred well in advance of importation.[124] Second, the record demonstrates that GBIE's purchases from Xiping Opeck were nearly simultaneous with its re-sales to Company A, as is evident from the fact that GBIE-Company A purchase orders were issued within days following the issuance of the Xiping Opeck-GBIE purchase orders.[125] Based on this information, we reasonably concluded, as facts available, that the transactions between Company A and its U.S. customer followed a similar pattern, meaning it is reasonable to conclude that the date of sale for the Company A-U.S. customer sales occurred within a few days of the GBIE-Company A and Xiping Opeck-GBIE sales.[126] These conclusions are consistent with normal business considerations. Given the refrigeration costs necessary to preserve the frozen crawfish tail meat, risk of loss in the event that the merchandise is not properly refrigerated, and the cost of financing between the time of

[122] *Id*.; *see also* GBIE's July 2, 2011, response at 8.
[123] The record shows that GBIE issued commercial invoices to Company A on the same day GBIE transferred title to goods to Company A, which was shortly after importation. *See* GBIE's July 5, 2011, response at Exhibit SSIM-1 and its August 24, 2011, response at Exhibit SSSIM-1.
[124] *See* Evaluation of Transactions Memo at 15.
[125] *Id*.
[126] In fact, Xiping Opeck has itself argued that it is not "in any way unusual or atypical of normal business practices for a reseller … to handle negotiations with its suppliers *and customers in a concurrent manner*." Xiping Opeck's case brief at 19 (emphasis added); *see Brief in Support of Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record*, dated September 4, 2012, at 25.

purchase from the exporter and the time of sale to the customer, rational market participants are willing to bear the risk inherent in purchasing merchandise for resale only if they can be reasonably sure that they can resell the merchandise, *i.e.*, by having a U.S. customer in place. Thus, transactions necessary to fulfil a U.S. buyer's order for crawfish tail meat would normally start with the U.S. customer and proceed through the distribution chain to the producer level. We find it reasonable to conclude that it would make little commercial sense for Company A to place an order with GBIE without Company A already having an order from the ultimate buyer, *i.e.*, the U.S. customer. Approaching the transaction in this manner would make the most commercial sense because it would reduce or eliminate prohibitive cold storage costs in warehousing the frozen crawfish tail meat after importation and prior to finding a buyer, reduce the cost of financing the purchased product that is not yet sold, and mitigates the risk of loss. Accordingly, based on the record evidence regarding the commercial behavior of Xiping Opeck and GBIE, and in light of normal commercial considerations, we continue to find that Company A likely agreed to sell subject merchandise prior to importation. We note that if Company A had provided the requested information and such evidence demonstrated that the date of sale for its sales to its U.S. customer occurred after the date of importation, this fact would only affect how the Department would treat the sale under section 772 of the Act (CEP rather than an EP sale), and would not be determinative of Company A's status as an exporter.

The Court has asked the Department to explain how Company A is an exporter "given that the company took ownership of the merchandise and subsequently sold it to U.S. wholesalers after the goods had already entered the United States and cleared Customs."[127] First, we note that Company A did not provide a response to the Department's NME questionnaire, and thus the record contains a significant gap regarding the timing of Company A's sales to U.S.

[127] *Xiping Opeck*, 34 F. Supp. 3d at 1354.

wholesalers.[128] The Department is not aware of any evidence indicating that Company A sold merchandise to U.S. wholesalers *after* the goods had entered the United States. Indeed, the record only includes information regarding the date of sale of Xiping Opeck's and GBIE's sales, which we have relied upon, as facts available, consistent with 776(a) of the Act, to determine Company A's date of sale.

Second, the Court's statement suggests that it is focusing on the timing of the transfer of ownership from GBIE to Company A (via transfer of the title to the goods). In this case, the timing of the title transfer between GBIE and Company A is not relevant for purposes of determining the date of sale within the meaning of 19 CFR 351.401(i). As explained above, we have determined, based on facts available, that the Company A-U.S. wholesaler sales followed the pattern of the Xiping Opeck-GBIE and GBIE-Company A sales, and thus that date of sale for the Company A-U.S. wholesaler transactions is prior to the date of importation.

Nevertheless, the date of title transfer supports our finding that the Company A-U.S. wholesaler sales occurred before importation. The record evidence shows that Company A took title to goods [ ] after the merchandise entered the United States for consumption,[129] and that GBIE issued commercial invoices to Company A at the time Company A took title to merchandise.[130] Crucially, however, the record evidence shows that, on average, Company A only took [ ] to pay for subject merchandise it acquired from GBIE, after Company A took ownership of said merchandise (see table below).[131] Record evidence further

[128] *See* AFA Memo at 2.
[129] *See* Evaluation of Transactions Memo at 15.
[130] *See* GBIE's July 2, 2011, response at Exhibit SSIM-1 (for GBIE's invoices to Company A) and GBIE's August 24, 2011, response at 1-2 and Exhibit SSSIM-1 (for information detailing the timing of title transfer).
[131] *See* GBIE's July 2, 2011, response at Exhibit SSIM-1 (for Company A's payment information).

shows that, on average, GBIE pays Xiping Opeck approximately [ ] after GBIE collects a payment from Company A (see table below).[132]

Company A Taking Title	*Payment*		*Days - Company A Payment from Title*	*Days - GBIE Payment after Company A Payment*
A)	*B)*	*C)*	*X) = C - A*	*Y) = B - C*
	Xiping/ GBIE	GBIE/ Company A		
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Based on this information, as facts available, the Department finds that Company A would have received payment from its U.S. customer no more than approximately [ ] days after the date it took title to the merchandise. We find that this amount of time is inadequate for a reseller/middleman to take ownership of imported merchandise, identify potential customers, negotiate a sale, receive a purchase order from its customer, arrange for shipment of the merchandise to the customer, issue an invoice, receive payment from the downstream customer, and execute a payment to its supplier. Given the number of steps that would need to occur

[132] *See* Evaluation of Transactions Memo at 15.

between title transfer and payment, and the time required to accomplish each step, we conclude that it is unlikely that Company A had not already re-sold the merchandise to its U.S. customer prior to importation of the goods into the United States.

Use of AFA To Determine a Rate for the Entries Under Review

Summary of Court's Opinion

The Court held that the Department had not adequately explained whether its finding that Company A significantly impeded the proceeding may result in the application of AFA to Xiping Opeck.[133] Further, the Court held that the Department's explanation for its authority to apply an AFA rate to Xiping Opeck's export price and normal value was insufficient.[134]

With respect to EP, the Court first opined that the Department's basis for calculating a dumping margin for Xiping Opeck exclusively based on AFA, given its express finding that Xiping was a fully cooperative party, was unclear.[135]

Second, the Court opined that the Department did not provide an explanation for its actions that takes current case law into account, *e.g.*, *Mueller Comerical de Meciso, S. de R.L. de C.V. v. United States* (*Mueller*),[136] because it did not cite to any record evidence indicating that Xiping Opeck could have induced Company A to cooperate.[137]

Third, the Court took issue with the Department's conclusions in the *Final Results* that Xiping Opeck would have had reason to know that its shipments of subject merchandise were ultimately being sold at less than Company A's acquisition cost to unaffiliated U.S. purchasers, and would have been aware that the U.S. wholesalers' prices were significantly lower than the

[133] *See Xiping Opeck*, 34 F. Supp. 3d 1348.
[134] *Id.* at 1350.
[135] *Id.* at 1351.
[136] *Mueller*, 753 F. 3d 1227 (CAFC 2014).
[137] *Xiping Opeck*, 34 F. Supp. 3d at 1346-47, 1350-51.

selling prices Xiping Opeck reported to the Department.[138] The Court ordered the Department to explain why such knowledge of the marketplace, even if lawfully imputed, is sufficient for the application of AFA if it continues to employ the imputation of knowledge to justify the use of AFA to calculate the EP.[139]

Fourth, the Court directed the Department to clarify its legal basis for calculating an AFA rate for Xiping, which it found to have cooperated fully in the review.[140] The Court ordered the Department to explain the relevance of *Mueller*'s "inducement/evasion considerations" discussed in *Mueller*, and address the reasoning in *Changzhou Wujin Fine Chemical Factory Co. v. United States* (*Changzhou*),[141] and to explain why it is permitted for the Department to determine a rate for a cooperating party (Xiping Opeck) using AFA that has no impact on the party that failed to cooperate in the review (Company A).[142]

With respect to normal value, the Court first held that the Department had not provided a sufficient explanation for determining normal value using Company A's acquisition costs rather than Xiping Opeck's factors of production.[143] Second, the Court held that the Department did not explain its decision to apply AFA to the determination of Xiping Opeck's normal value.[144] The Court ordered the Department to keep in mind, in supplying its explanation, that even if Company A is found to be an interested party, no one withheld information as to the costs of production and no interested party failed to cooperate with a request for information relating to the costs of production.[145] Further, the Court also ordered the Department to fully explain its

[138] *Id*. at 1351, 1354.
[139] *Id*. at 1351.
[140] *Id*.
[141] *Changzhou*, 701 F.3d 1367 (CAFC 2012).
[142] *Xiping Opeck*, 34 F. Supp. 3d at 1351, 1354.
[143] *Id*. at 1353, 1354.
[144] *Id.*
[145] *Id*. at 1353-54.

determination to assign an AFA rate to Xiping Opeck, which was found to have cooperated in the review, based on Company A's non-compliance.[146]

Department's Discussion

As summarized above, the Court directed the Department to explain and substantiate its use of AFA in determining a dumping rate for the entries subject to the review, including how it determined export price and normal value. Because the Department is relying on the middleman dumping framework, our analysis on remand is somewhat different from our analysis in the *Final Results*.

In the *Final Results*, the Department applied AFA because Company A failed to cooperate by not acting to the best of its ability to comply with a request for information.[147] Crucially, we also determined that Company A's reporting failures "result{ed} in a record that cannot serve as a reliable basis for calculating an accurate dumping margin for Xiping Opeck."[148] When a respondent's failure to cooperate results in gaps in the record that are so extensive that the record cannot serve as a reliable basis for calculating a margin, the Department's practice is to apply total AFA.[149] When applying total AFA, the Department normally selects the highest rate from any segment of the proceeding as the AFA rate, which in this case would have been 223.01 percent.[150] In other words, in total AFA situations, the

[146] *Id.* at 1354.
[147] *See* AFA Memo at 5-6; IDM at 12.
[148] *See* AFA Memo at 5.
[149] *See Mukand, Ltd. v. United States*, 767 F.3d 1300, 1305 (Fed. Cir. 2014) (The Department "applies total AFA when none of the reported data is reliable or usable because, for example, the data contains *pervasive and persistent deficiencies that cut across the entire record*. In such situations, {the Department} applies an adverse inference to all of the respondent's sales covered by the relevant antidumping duty order." (emphasis added)).
[150] *See, e.g., Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 15930, 15934 (April 8, 2009), *unchanged in the final results*, 74 FR 41121 (August 14, 2009); *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). The CAFC and the CIT have upheld the Department's practice. S*ee KYD, Inc. v. United States*, 607 F.3d 760, 766-67 (CAFC 2010) (*KYD*); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190-91 (CAFC 1990); *see also Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1336 (CIT 2009) ("{The Department} may, of course, begin its total

Department does not normally construct an AFA rate by using normal value and U.S. price information provided by parties during the review (though it may use such information for corroboration purposes, consistent with 776(c) of the Act).

Here, however, we determined that our usual approach for selecting an AFA rate was not appropriate because the record information did not allow us to satisfy the corroboration requirement.[151] As a result, the Department constructed, and assigned, an AFA rate of 70.12 percent to Xiping Opeck's entries.[152] We did not rely on information reported by Xiping Opeck for its sales to GBIE because we had determined that the record evidence and the totality of circumstances surrounding Xiping Opeck's sales to GBIE, and GBIE's re-sales to Company A, called into question the commercial viability associated with the transactions between Xiping Opeck and GBIE.[153] Thus, as export price, we selected the lowest prices charged by Company A in the United States (*i.e.*, the U.S. wholesalers' aggregate price data, as a proxy for Company A's U.S. sale prices) and calculated an estimated average U.S. wholesalers' market price for the POR of USD 10.14 per kilogram.[154] For normal value, we examined all of the prices that GBIE invoiced for crawfish tail meat to Company A, and used Company A's highest acquisition cost during the POR, *i.e.*, USD [ ] per kilogram.[155] Using this information, we calculated an AFA rate of 70.12 percent for Xiping Opeck in this review.[156]

As explained above, on remand the Department has amended its analysis of the record information. Although we continue to find that Xiping Opeck's sales to GBIE are not based on commercial considerations, *i.e.*, are not *bona fide*, we now find that the facts in this case are akin

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AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable.").

[151] AFA Memo at 7.

[152] *See* AFA Memo at 7; IDM at 13.

[153] *See* Evaluation of Transactions Memo at 15; *see also id.* at 6-15; *supra* section III.B.1.

[154] *See* AFA Memo at 7.

[155] *Id.*

[156] *See* IDM at 4.

to those in a traditional middleman dumping scenario in that we are left with two relevant sales, the Xiping-Company A (through GBIE) "sale" and the Company A-U.S. customer sale. Based on the channel of U.S. sales in this review, it is appropriate to calculate a single dumping rate for the entries under review.[157] Because calculating a margin for a constructed Xiping Opeck-Company A (through GBIE) "sale" and incorporating it in our weighted-average rate for all of Xiping Opeck's merchandise would mean relying on information related to sales we have determined are not *bona fide* (Xiping Opeck's sales to GBIE), we have relied strictly on the margin determined for the Company A-U.S. customer sales to calculate the single rate in this case.[158] In calculating the rate for the Company A-U.S. customer sale, we have applied AFA pursuant to section 776(b) of the Act in light of Company A's failure to cooperate to the best of its ability in response to the Department's requests for information. Thus, for U.S. price we relied on record evidence for the prices charged by Company A in the United States, *i.e.*, the U.S. wholesalers' aggregate price data, and calculated an estimated average U.S. wholesalers' market price of USD 10.14 per kilogram for the period of review.[159] For normal value we used Company A's highest acquisition cost during the period of review, USD [ ] per kilogram.[160] Based on this information, we derived a rate of 70.12 percent for the entries at issue in this review.

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[157] *See supra* section III.B.2.

[158] *See* IDM at 10; *Xiping Opeck*, 34 F. Supp. 3d at 1354. In other words, calculating a margin for this part of the transaction chain would normally involve a comparison of Xiping Opeck's normal value (using factors of production data) and the first relevant sale in the middleman chain (Xiping Opeck's sales to the middleman, if viable). We have not attempted to calculate a margin for the Xiping Opeck-Company A direct "sale," because doing so would undermine and conflict with our finding that (1) the Xiping-GBIE transactions are not commercially reasonable and (2) the Xiping-GBIE and GBIE-Company A transactions were structured to avoid dumping liability. Moreover, we note that, because we had calculated a preliminary margin on Xiping Opeck's sales to GBIE, which was *de minimis*, it is probable that no measurable dumping would exist on any constructed sale to Company A, meaning that any such calculation would likely not have an effect on the weighted-average rate for the entries under review.

[159] *See* CPA's submission dated February 28, 2011, at Exhibit 1 and CPA's submission dated March 3, 2011, at Exhibit 1.

[160] See AFA memo at 7 and Attachment II; *see* also Exhibit SSIM-1 of GBIE's July 2, 2011, response and Exhibits SSIM-3 and SSIM-5 of GBIE's May 20, 2011, response.

With the Department's modified analysis on remand in mind, we have addressed the Court's directives, to the extent they are still applicable, below.

1. *Application Of Adverse Inferences*

The Court directed the Department to explain why it is appropriate to apply AFA in determining EP and normal value for Xiping Opeck given that the company was a fully cooperative party.[161] As explained above, we have found that it is not appropriate to calculate a margin for a constructed Xiping Opeck-Company A (through GBIE) "sale" and incorporate it in the single weighted-average rate applicable to the merchandise under review. Thus, we have not applied AFA in calculating a margin for the sale in which Xiping Opeck was involved.

The Court also directed the Department to explain why Xiping Opeck's knowledge of the marketplace is sufficient to support the application of AFA, if the Department continues to rely on this knowledge to justify the use of AFA to calculate EP. Xiping Opeck's knowledge of the marketplace is not a factor in determining whether to apply AFA because the Department is not calculating a margin for the constructed Xiping Opeck-Company A (through GBIE) "sale," and thus not applying AFA in calculating a margin for the sale in which Xiping Opeck was involved. Nonetheless, as we have noted,[162] Xiping Opeck admitted that it held a significant market share during the POR, and claimed 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.[163] It is on the basis of these statements that we have continued to find that Xiping Opeck 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

[161] *See Xiping Opeck*, 34 F. Supp. 3d at 1351, 1353, 1354.
[162] *See supra* at 18-19 n.58.
[163] *See* Xiping Opeck's case brief at 12.

Department.[164] While this finding is not relevant to our treatment of the Xiping Opeck-Company A (through GBIE) sale, it is relevant to our analysis of the Xiping Opeck-GBIE transaction, and thus whether these facts warrant a middleman dumping inquiry. Given that we have determined that a middleman dumping analysis is appropriate and in light of the channel of trade, Xiping Opeck properly remains a named exporter for the entries under examination.

2. *Inducement/ Evasion Considerations*

Citing *Mueller*, the Court held that the Department had not provided an explanation for its determination to apply AFA to Xiping Opeck that "takes current case law into account" because it did not cite record evidence indicating the Xiping Opeck could have induced Company A to cooperate.[165] We respectfully note that the Department could not have addressed, or considered the precedent established by, *Mueller* in its *Final Results* because we issued the *Final Results* on April 10, 2012, just over a month before the CAFC issued *Mueller*.

The Court also directed the Department to explain the relevance of the "inducement/evasion considerations" discussed in *Mueller*.[166] In that case, the Department calculated a dumping margin for Mueller,[167] an exporter under review, by using cost of production information from its supplier Ternium.[168] However, because Ternium did not report its cost of production on a product-specific basis, the Department used AFA to determine Ternuium's cost of production on a product-specific basis. The Department relied on this AFA cost of production information to calculate Mueller's dumping margin.[169] The Department argued that doing so was appropriate because Mueller could have and should have induced

[164] *See* IDM at 13; Evaluation of Transactions Memo at 8-9.
[165] *See Xiping Opeck*, 34 F. Supp. 3d at 1351.
[166] *Id.*
[167] Mueller Comercial de Mexico, S. de R.L. de C.V., and Southland Pipe Nipples Company, Inc. (collectively, Mueller).
[168] Ternium Mexico, S.A. de C.V. (Ternium).
[169] *See Mueller*, 753 F.3d at 1230; *see also Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 887 F. Supp. 2d 1360, 1363-64 (CIT 2012).

Ternium to cooperate with the Department's requests for information by refusing to do business with it, and Ternium would not be sufficiently deterred if Mueller were unaffected by its non-cooperation because Ternium could otherwise evade its own antidumping rate by funneling goods through the exporter.[170] The CAFC held that the Department may rely on such policy considerations as part of the margin determination for a cooperating party like the exporter "as long as the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account as well."[171] The CAFC also recognized that Mueller had an existing relationship with Ternium and therefore could have refused to do business with it as a tactic to force it to cooperate. [172]

As noted in *Mueller*, the relationship between the exporter and supplier in that case was similar to the relationship between the importer and exporter in *KYD*.[173] In *KYD*, an importer asserted that Commerce should apply AFA rates only against uncooperative parties and that a cooperative, independent importer should not be required to pay an assessment based on an AFA dumping margin imposed on the uncooperative producer/exporter that supplied its merchandise.[174] The *KYD* court was unpersuaded, noting that the importer is legally responsible, by law and regulation, for paying the assessed duties associated with the goods it imports.[175] The CAFC also reasoned that:

> KYD's argument would allow an uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its antidumping investigations. The prospect that domestic importers will have to pay enhanced antidumping margins because of the uncooperativeness of the exporters from whom they purchase goods may, in some cases, result in the imposition of costs on

[170] *See Mueller*, 753 F.3d at 1233.
[171] *Id.*
[172] *Id.* at 1235.
[173] *Id.* (citing *KYD*, 607 F.3d at 768).
[174] *See KYD*, 607 F. 3d at 768.
[175] *Id*.

> an individual importer that the importer is unable to avoid. In the aggregate, however, the importer's exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products.[176]

The specific facts in *Mueller* and *KYD* are distinguishable from those in this case, and thus the CAFC's holdings in those cases are only instructive here. Nevertheless, the reasoning underlying those decisions supports the Department's determination in this case. As explained above, *Mueller* involved a calculated margin for a cooperative exporter that relied in part on cost information determined on an AFA basis because of the supplier's failure to cooperate. *KYD* involved an importer bearing the liability of an AFA rate assigned to an uncooperative exporter. In contrast, in this case the Department is calculating, under the middleman dumping framework, a single rate for the entries under review, and is faced with a cooperative exporter and an uncooperative middleman. Nevertheless, the CAFC's discussions regarding inducement and evasion in those cases have bearing here, as we find that the Xiping Opeck was in a position to induce cooperation on the part of any company's involvement with its product and sale in the U.S. market, including Company A, as Company A was not in a position to evade a dumping margin assigned to Xiping Opeck by sourcing from a different supplier. Xiping Opeck admitted that during the POR its sales prices determined U.S. market prices and that its "dominance" meant it effectively set the prevailing prices of the market.[177] Additionally, the record also demonstrates Xiping Opeck sold [ ] its crawfish tail meat destined for the United States to GBIE, and GBIE resold [ ] of the crawfish tail meat it purchased from Xiping Opeck to Company A.[178] Given Xiping Opeck's dominance over the U.S. crawfish tail meat market, it is reasonable to conclude that Xiping Opeck was aware of the distribution process for its

[176] *Id*.
[177] *See* Xiping Opeck's case brief at 12.
[178] *Id.* at 13.

merchandise (and thus that Company A was involved), and the prices at which its merchandise was sold in the U.S. market. The [ ] between Xiping Opeck and GBIE and GBIE and Company A means that Xiping Opeck could have, by refusing to supply GBIE (Company A's [ ] supplier), induced Company A to ensure its sold Xiping Opeck product at or above its acquisition costs. Further, the [ ] means that Xiping Opeck could have induced Company A to cooperate in the administrative review by refusing to supply GBIE (Company A's [ ] supplier) in the future.

3. Impact Of AFA On A Cooperating Party

The Court also directed the Department to address the reasoning in *Changzhou* and to explain why it is permitted for the Department to determine a rate for a cooperating party (Xiping Opeck) using AFA that has no impact on the party that failed to cooperate in the review (Company A).[179] We respectfully note that the Department could not have addressed, or considered the precedent established by *Changzhou*, in its *Final Results* because we issued the *Final Results* on April 10, 2012, just over eight months before the CAFC made its decision.

In *Changzhou* the court considered whether the Department's calculation of a separate rate by averaging the *de minimis* rate of the sole cooperating mandatory respondent with a constructed AFA rate that was based on U.S. price data obtained from a non-cooperating respondent was proper.[180] The CAFC held that the Department's approach was improper because the deterrence imparted by the constructed AFA rate was not relevant to the separate rate calculation where the AFA rate impacted only the cooperating separate rate respondents.[181] The circumstances in this case are distinguishable from those in *Changzhou* in that here, the Department is not calculating a separate rate for Xiping Opeck. Rather, the Department is

[179] *Xiping Opeck*, 34 F. Supp. 3d at 1351, 1354.
[180] *Changzhou*, 701 F.3d at 1372-73.
[181] *Id.* at 1378-79.

applying the middleman dumping framework and calculating a single rate for the merchandise subject to the review covering multiple relevant U.S. sales transactions for each entry, as explicitly contemplated by Congress.

Although the *Changzhou* court expressed concern with the impact on a cooperating respondent as a result of a calculation that involved an AFA component, there is nothing in the language of section 776 of the Act that requires or instructs the Department to consider the possible adverse effects on other parties when deciding whether to use AFA as a result of a party's failure to cooperate. Moreover, it would be unreasonable to interpret *Changzhou* as precluding the Department from applying AFA in cases where its use may impact a cooperating party. Indeed, in *KYD*, the CAFC reached the opposite conclusion, holding that an exporter's failure to cooperate may, in some cases, result in an adverse impact on the importer that the importer is unable to avoid.[182] A conclusion similar to that of *KYD* – that a middleman's failure to cooperate may, in some cases, result in an imposition of a rate on the exporter's merchandise that the exporter is unable to avoid – is appropriate here, in light of the legislative history and the CAFC's decision in *Tung Mung III*. Specifically, in directing the Department to examine "sales from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser" so as to "*avoid* below cost sales *by the middlemen*{,}" Congress indicated that the Department should take action consistent with avoiding middleman dumping.[183] Because this Congressional directive does not exempt situations in which the middleman does not cooperate with the Department's examination, it is reasonable to conclude that Congress recognized that the Department might employ AFA in addressing middleman dumping.

[182] *See KYD*, 607 F.3d at 768.
[183] S. Rep. No. 96-249 at 94 (emphasis added); H.R. Rep. No. 96-317 at 75 (emphasis added).

In practical terms, the rate we have calculated on remand will serve to encourage Xiping Opeck and GBIE to use a different middleman who will cooperate with the Department's inquiries (an outcome adverse to Company A, if it wants the business with Xiping Opeck and GBIE), or encourages Xiping Opeck to make *bona fide* direct first sales to unaffiliated U.S. customers. Moreover, to somehow insulate Xiping Opeck from the margin we have calculated using the middleman dumping framework simply because the middleman's rate is based on an AFA rate would be akin to a finding that Xiping Opeck's reported transactions are *bona fide* and constitute the proper basis for our analysis, and that Xiping Opeck had no reason to know of middleman dumping. As explained above, the factual evidence in this case does not support such findings.

IV. Comments

CPA

CPA argues that, because 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, in order to properly gauge Company A's actual U.S. prices, the Department needs to remove the profit element (or mark-up) from the U.S. wholesalers' offered price that the Department used in its calculation. CPA contends that, as the Department recognizes, the U.S. wholesalers' sale offers constitute price offers from the downstream purchasers of Company A and not from Company A itself. CPA argues that because wholesalers make their living by buying merchandise and reselling it to others at a higher price than what they paid for it, the prices stated in the U.S. wholesalers' sale offers are clearly higher than Company A's prices to the U.S. wholesalers. In fact, CPA argues, the gap between the U.S. wholesalers' price offers and the price obtained by Company A may be quite large due to the fact that 1) the U.S. wholesalers' actual resale prices

were probably lower than their offers (because offers merely serve as the starting point in the price negotiations and the U.S. wholesalers' U.S. customers would never pay more than the offered price) and 2) it is not known whether the U.S. wholesalers in question had purchased directly from Company A or, instead, were further downstream from Company A (in which case there would have been a wholesaler mark-up of one or more other wholesalers in the chain between the U.S. wholesalers in question and Company A). CPA argues that these known circumstances amplify the importance and necessity of making an adjustment, because they clearly suggest that Company A's price to its first U.S. customer would have been considerably lower than the price the Department used in its calculations in the *Draft Remand*.[184]

CPA contends that, because the uncertainty concerning Company A's actual U.S. prices arises from Company A's failure to respond to the Department's inquiries, it is appropriate to make the required adjustment for the wholesaler mark-up on the basis of facts available on the record. CPA comments that the record of this review provides two possible sources of information which may inform the Department in calculating the appropriate adjustment for mark-up to the U.S. wholesalers' price offers. First, CPA claims, on the basis of the questionnaire responses provided in the underlying review by Xiping Opeck and GBIE, the Department can readily derive the average mark-up claimed to have been obtained by GBIE during the period of review. Second, CPA continues, the record contains an overall gross profit margin for Walmart that Xiping Opeck computed when it was attempting to estimate Walmart's mark-up on subject the merchandise retailed at Walmart.[185]

Department's Position: We did not adopt CPA's suggestion. The adjustment that CPA contemplates constitutes the use of facts available pursuant to section 776(a) of the Act. We do

[184] *See* CPA Brief at 1-3.
[185] *Id*., at 3-4.

not find that an adjustment to the aggregate U.S. wholesalers' pricing data, on the basis of facts available, is warranted in this case, because the Department is already relying on AFA, pursuant to section 776(b) of the Act, in utilizing a single U.S. price and single normal value to calculate a dumping margin for the entries subject to this review. Specifically, we selected the lowest U.S. wholesalers' price offer as a proxy for what Company A charges in the United States; we selected the highest acquisition cost of Company A as normal value. Accordingly, the AFA rate we used reflects a broad calculation and does not warrant the specific adjustment requested. Further, there is no record evidence that illuminates whether, or to what extent, the U.S. wholesalers made profit on reselling Xiping Opeck's merchandise in the United States.

Xiping Opeck

Xiping Opeck argues that a middleman framework for the Department's analysis is not warranted in this case because the legislative history on which the Department relies in the *Draft Remand* requires an examination of sales by a middleman before sale to the first unrelated U.S. customer. Here, Xiping Opeck alleges, Company A made its sales after the subject merchandise was sold to the first unaffiliated U.S. purchaser, GBIE. For the same reason, Xiping Opeck argues, *Tung Mung III* does not apply - there, the Court found that middleman dumping exists because the middleman sale was made before the goods were imported into the United States. Xiping Opeck argues that the Department's finding that its sales to GBIE were not *bona fide* does not detract from what Xiping Opeck alleges as a fact that Company A's sales occurred after the subject merchandise was imported into the United States and the first unaffiliated U.S. customer took title to the goods.[186]

Xiping Opeck alleges that the Department's finding that Xiping Opeck's reported U.S. sales to GBIE were not *bona fide* is not supported by the facts on the case record. Xiping Opeck

[186] *See* Xiping Opeck's brief at 2-3.

reintroduces its factual analysis and its interpretation of record evidence identical in substance to what it had done during the course of the review and continues to repudiate the factual findings the Department has made in the Evaluation of Transactions Memo (which were reiterated in the AFA Memo, the *Final Results*, and the *Draft Remand*) concerning the commercial authenticity of Xiping Opeck's reported transactions. Xiping Opeck continues to challenge, individually, our conclusions that collectively underpinned our determination that its reported U.S. sales to GBIE lacked any sense of commercial validity. In sum, Xiping Opeck argues that because its reported U.S. sales to GBIE were *bona fide* in all aspects, *i.e.*, reflective of normal and typical business practices, the Department should be able to calculate a reasonable antidumping duty rate for it using the information on the record, as these sales are the only reviewable transactions during the POR under the antidumping law.[187]

Xiping Opeck challenges as baseless the Department's finding that Xiping Opeck would have been aware that the U.S. wholesalers' prices were significantly lower than the selling prices Xiping Opeck reported to the Department that led to the Department's determination that a middleman dumping inquiry was warranted in this case. Xiping Opeck objects that the U.S. wholesalers' price offers 1) reflect the lowest prices that CPA could locate out of CPA's self-serving interests, 2) were made by companies with flawed corporate registration status, and 3) are likely for a product of low quality or from past years' harvest seasons. Xiping Opeck argues that these factors call into question the "truthfulness" of the price offers in question, which makes baseless the presumption of Xiping Opeck's knowledge of low price offers in the United States.[188]

[187] *Id*., at 3-7.
[188] *Id*., at 8.

Xiping Opeck takes issue with the Department's finding that, given Xiping Opeck's dominance over the U.S. crawfish tail meat market and the [

] between Xiping Opeck and GBIE and GBIE and Company A, Xiping Opeck would have the ability to induce cooperation from Company A. Xiping Opeck argues the following:

> {a} seller's 'dominance' in a market depends on the acceptance of its customers, and the customers of its customers…If Xiping Opeck {threatens} not to sell, GBIE would turn to other suppliers {of subject merchandise} and suppliers {of} different commodities. As a producer, Xiping Opeck has to sell the products it produced to the customer that accepts the highest price. To lose a paying customer is not to Xiping Opeck's best interest. Depending on its customers, Xiping Opeck does not have power over them, let alone the customer of its customer, {of whose} existence Xiping Opeck became aware only through the underline review case.[189]

Relying on its interpretation of the decision in *Changzhou*, Xiping Opeck argues that the Department's imposition of AFA to it, a cooperative party, is improper and that the Department should calculate two separate antidumping duty rates, one for Xiping Opeck (using the information on the record), and one for Company A (using AFA). Doing so, Xiping Opeck contends, encourages the cooperating party to continue being cooperative and deters the non-cooperating party from being non-cooperative. Alternatively, Xiping Opeck suggests, the Department may calculate a combined antidumping duty rate using both Xiping Opeck's information and Company A's information obtained through a middleman dumping questionnaire. Xiping Opeck claims that either of these two methods will reach the most rational and proper result under the antidumping law.[190]

Xiping Opeck disputes the Department's finding that Company A is an exporter under antidumping law on the basis of our decision that it acted as a price discriminator for entries subject to the review. Xiping Opeck claims that the intent of Congress was clear in that an

[189] *Id*., at 8-9.
[190] *Id*., at 9-10.

exporter is the one who exports, or moves goods or provides services across borders. Xiping Opeck argues that a party that purchases goods from one market and then resells them in the same market (we presume Xiping Opeck implied the United States) does not "export" the goods because no international border was crossed in such a circumstance. Xiping Opeck claims that, because the goods were already in the United States and not re-exported out of the United States, there was no way that any party could "export" it again to another "first unaffiliated U.S. customer." Accordingly, Xiping Opeck contends, the Department's analysis and determination that there are two reviewable sales does not comply with the law, is not supported by the case record, and makes no logical sense.[191]

Xiping Opeck takes issue with the Department's finding that the timing of Company A's sales, while determinative of whether such sales are EP or CEP sales, is not itself determinative of whether Company A is an exporter. Xiping Opeck argues that "the Department confuse{s} the date of sale {issue} with the nature of sales. The statute is applicable to export sales only, not for a downstream customer's domestic sale."[192]

Lastly, Xiping Opeck claims, it cannot tell from the *Draft Remand* whether the Department treats Company A as an exporter or a middleman because, it alleges, it cannot be both. Xiping Opeck contends that if the Department chooses to treat Company A as a middleman and to conduct a middleman investigation, then the argument as to whether Company A is an exporter or not is moot. In such case, Xiping Opeck continues, the Department should conduct a middleman investigation by following the Court's suggestion to reopen the case record, and to solicit the necessary information by issuing a middleman questionnaire (instead of

[191] *Id*., at 10-11.
[192] *Id*., at 11.

a NME exporter questionnaire) to Company A, to complete a middleman dumping investigation.[193]

Department's Position: We find none of the arguments raised by Xiping Opeck persuasive because they do not respond in a meaningful manner to our factual analysis of record evidence and our findings in the *Draft Remand*.

As we explained in the *Draft Remand*, the presumption built into the law and our practice anticipates an examination of dumping in the first sale of subject merchandise to an unaffiliated party where the seller knows the merchandise is destined for the United States. This presumption underlies the definitions of EP and CEP. The statute anticipates that the first entity which has knowledge that the sale is destined for the United States is the entity whose price setting behavior will control dumping. This presumption does not, however, hold true in cases of middleman dumping – and the legislative history specifically recognizes that middlemen may also be engaged in dumping and acknowledges that we have the authority to investigate "sales from the foreign producer to middlemen and *any* sales between middlemen *before sale to the first unrelated U.S. purchaser*."[194] Here, after having reevaluated the record evidence and the petitioner's middleman dumping allegation, in accordance with the Court's suggestion, we conducted a middleman dumping inquiry, which resulted in a finding that middleman dumping occurred. We provided an explanation that, although the facts present in this case do not, on their face, fit squarely into a traditional middleman dumping framework, our determination that Xiping Opeck's sales to GBIE were not commercially reasonable aligns the facts of this case to those present in a traditional middleman dumping scenario. Specifically, given our finding that the Xiping-Opeck sales to GBIE are not *bona fide* and cannot be relied upon, we determined that

[193] *Id.*
[194] *See* S. Rep. No. 96-249 at 94 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 480; H.R. Rep. No. 96-317 at 75 (1979) (emphasis added).

Company A acted as a middleman and that the middleman dumping framework provided an appropriate guide for the Department's analysis.[195] While Xiping Opeck continues to repudiate our factual findings that Xiping Opeck's reported transactions to GBIE lack commercial validity, the factual information on which it relies and the arguments it makes were thoroughly analyzed and rejected in the Evaluation of Transactions Memo – Xiping Opeck brings forth nothing new in its comments on the *Draft Remand* that we have not already considered.

Xiping Opeck challenges the applicability of the middleman dumping framework in the Department's analysis concerning the entries subject to this review on the grounds that 1) Company A made its sales after the subject merchandise was sold to the first unaffiliated U.S. purchaser, GBIE, and 2) Company A's sales occurred after the subject merchandise was imported into the United States and GBIE took the title to the goods. Concerning Xiping Opeck's first point, as we explained in the *Draft Remand*, because we found its sales to GBIE not *bona fide*, lending them to be disregarded in our calculations, the factual scenario becomes akin to the middleman dumping scenario contemplated by Congress, *i.e.*, multiple relevant sales (Xiping Opeck-Company A sale transaction (through GBIE) and the unreported Company A-U.S. customer sale) occurring outside the United States and ultimately resulting in a sale to the first unrelated U.S. purchaser, which is no longer GBIE.[196] In establishing a dumping rate for the entries under review, we focused strictly on the Company A-U.S. customer sale, because attempting to calculate a margin for a constructed Xiping Opeck-Company A (through GBIE) sale and incorporating it into our weighted average for all of Xiping Opeck's merchandise would be unnecessary and improper.[197]

[195] *See* Draft Remand at 8-11.
[196] *Id*., at 11-17; 26-27.
[197] *Id*., at 17-19.

Concerning Xiping Opeck's second point, in the context of the antidumping law, the record evidence does not support Xiping Opeck's assertion (and Xiping cites no evidence) that Company A made sales to its U.S. customers after importation into the United States (and after GBIE took title to the goods). In the *Draft Remand* we explained that, while transfer of ownership is relevant in determining if a "sale" has occurred, it is not determinative of the "date of sale" or transaction considered for U.S. price for dumping purposes. Further, we explained that, although the timing of an entity's sale may determine whether the sale is treated as an EP sale or CEP sale, the timing is not itself determinative of whether the entity is an "exporter" within the meaning of sections 771(9)(A), or 772(a) and (b) of the Act.[198] Lastly, using available record evidence, we demonstrated that 1) Company A had ample time to arrange its own sales to its U.S. customers prior to importation, 2) Company A likely agreed to sell subject merchandise prior to importation on the basis of our examination of the commercial behavior of Xiping Opeck and GBIE, and in light of normal commercial considerations as they apply to Company A's involvement with Xiping Opeck's product, and 3) the date of title transfer and payment information actually supports the finding that the Company A-U.S. wholesaler sales occurred before importation.[199]

In challenging our finding that Xiping Opeck would have been aware that the U.S. wholesalers' prices were significantly lower than the selling prices Xiping Opeck reported to the Department (that led to our finding that a middleman dumping inquiry was warranted concerning entries of Xiping Opeck's product for consumption in the United States), Xiping Opeck questions the "truthfulness" of the price offers in question. The factors on which Xiping Opeck

[198] *Id*., at 28-30.
[199] *Id*., at 30-37.

relies to make its assertion, however, were either addressed and discredited in the Evaluation of Transactions Memo or simply find no support in record evidence (and Xiping Opeck cites none).

Xiping Opeck disputes our finding that it would have the ability to induce cooperation from Company A. In the *Draft Remand*, we stated that, in light of Xiping Opeck's admitted dominance over the U.S. crawfish tail meat market, it is reasonable to conclude that Xiping Opeck was aware of the distribution process for its merchandise (and thus that Company A was involved). We also stated that, on the basis of the [ ] between Xiping Opeck and GBIE and GBIE and Company A, Xiping Opeck could have, by refusing to supply GBIE (Company A's [ ] supplier), induced Company A to either 1) ensure its sold Xiping Opeck product at or above its acquisition costs or, alternatively, 2) cooperate in the administrative review by refusing to supply GBIE (Company A's [ ] supplier) in the future.[200] Xiping Opeck argues that if it threatened not to sell its product, GBIE would turn to other suppliers of subject merchandise and suppliers of different commodities. Xiping Opeck's argument runs afoul, however, of record evidence which establishes unequivocally that GBIE did not have alternative suppliers of subject merchandise (nor any demonstrated prospects of securing, imminently, alternative suppliers) and GBIE's own admission of [ ] importing subject merchandise purchased from Xiping Opeck (nor any demonstrated prospects to diversify products in which it deals).[201]

Concerning Xiping Opeck's interpretation of *Changzhou*, as we explained in the *Draft Remand*, a conclusion that a middleman's failure to cooperate results in an imposition of a rate (on the basis of AFA) on the exporter's merchandise that the exporter is unable to avoid, is appropriate in this case, in light of the legislative history and legal precedent that considered

[200] *Id*., at 45-46.
[201] *Id*., at 12-17 (citing Evaluation of Transactions Memo at various pages).

middleman dumping.[202] Further, as we explained in the *Draft Remand*, the factual evidence in this case does not support any finding that warrants insulating Xiping Opeck from the margin we have calculated using the middleman dumping framework simply because the middleman's rate is based on an AFA rate – doing so would conflict with and undermine our findings that Xiping Opeck's reported transactions were non-*bona fide* (and, thus, do not constitute the proper basis for our analysis) and that it is proper in middleman dumping to calculate a rate applicable to Xiping Opeck's sales through Company A.[203] Lastly, we explained in the *Draft Remand* the appropriate inducement considerations born out from the rate that we calculated concerning entries of Xiping Opeck's merchandise.[204]

Xiping Opeck argues that Company A cannot be deemed an exporter because it had not moved goods across an international border in that it purchased and resold Xiping Opeck's product when the goods were in the United States. As we clearly explained in the *Draft Remand*, however, for purposes of antidumping law, an exporter is considered an entity which controls the export price, *i.e.*, a party who, with its customer, determines the U.S. sales price (EP or CEP) of the subject merchandise entering the Unites States market or, in other words, a party that acts as a price discriminator. Moreover, in the *Draft Remand*, we concluded that it is the ability to determine the sales price that is determinative of whether an entity is an exporter, and not the ability to move the goods physically from one country to another.[205] As such, contrary to Xiping Opeck's assertion, for purpose of the antidumping law, a company can, in fact, be both a middleman and an exporter.

[202] *Id*., at 46-47.
[203] *Id*., at 47.
[204] *Id*., at 48.
[205] *Id*., at 20-36.

Xiping Opeck argues that we should conduct a middleman investigation by following the Court's suggestion to reopen the case record, and to solicit the necessary information by issuing a middleman questionnaire (instead of a NME exporter questionnaire) to Company A. We find no merit in Xiping Opeck's suggestion. The record shows that we attempted, on two occasions, to solicit information from Company A concerning its practice of selling subject merchandise to the United States. Because the record demonstrates Company A's repeated refusal to respond to our requests for information during the course of the review, we determined not to pursue further inquiry with Company A for purposes of this remand.

V. Results of Redetermination

Consistent with the Court's remand order and directives, we reconsidered our determination, reevaluated the facts on the record, and considered whether to initiate a middleman dumping investigation. Because we continue to find that Xiping Opeck's sales to GBIE were not commercially reasonable, we find that the facts in this case are analogous to those in a traditional middleman dumping scenario. Accordingly, we conclude that it is appropriate to rely on the middleman dumping framework as a guide for our analysis and for determining a margin for the entries subject to this review. We have examined the guidance provided regarding the practice of middleman dumping, and determined that it is appropriate to calculate a single rate of 70.12 percent for the entries under review.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

9 JUNE 2015
(Date)

ATTACHMENT I