UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-047
Investigation
Public Document
E&C/VIII: IG

DATE: January 17, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China

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I. Summary

The Department of Commerce (the Department) finds that Certain Carbon and Alloy Steel Cut-to-Length Plate (CTL plate) from the People's Republic of China (PRC) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is October 1, 2015, through March 31, 2016.

After analyzing the comments submitted by interested parties, we have made no changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

Comment 1: Separate Rate Treatment of Tiangong
Comment 2: Separate Rate Treatment of Jiangyin Special

II. Background

On November 14, 2016, the Department published the *Preliminary Determination* of sales of CTL plate from the PRC at LTFV. We invited parties to comment on the *Preliminary Determination.*

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[1] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 79450 (November 14, 2016) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

On December 14, 2016, Jiangyin Xingcheng Special Steel Works Co., Ltd. (Jiangyin Special), the sole mandatory respondent, and Jiangsu Tiangong Tools Company Limited (Tiangong) filed case briefs.[2] On December 21, 2016, Jiangyin Special refiled its case brief absent the new information that was included in its December 14, 2016, case brief.[3] On December 21, 2016, the petitioners[4] submitted rebuttal briefs.[5] Based on our analysis of the comments received, we have made no changes from our *Preliminary Determination*.

III. Discussion of Issues

Comment 1: Separate Rate Treatment of Tiangong

Tiangong Case Brief:

- The Department improperly rejected Tiangong's quantity and value of sales (Q&V) response filed two business days after the deadline, despite it not being listed in the petition and not receiving a questionnaire. There would have been no burden on the Department in accepting the Q&V response two days after the deadline.[6]
- The Department improperly rejected Tiangong's timely filed separate rate application and questionnaire responses, and unlawfully applied the PRC-wide rate, which was based entirely on adverse facts available (AFA).
- The Department applied AFA without a proper basis under the statute, which requires a finding of non-cooperation, among other prerequisites, before making an adverse determination. The statute requires the Department to allow a respondent to remedy a deficiency prior to applying AFA. There is no basis to apply AFA to Tiangong, because Tiangong made at least six filings seeking to provide the Department with the information it needed to assign Tiangong a separate, individual rate.
- The Department failed to follow the statute and regulations in rejecting its submissions. The Department improperly removed Tiangong's filings from the record, hindering Tiangong from establishing its record for appeal. The Department rejected every single one of Tiangong's questionnaire responses, including both the cover letters/explanatory information and supplementary information, separate and apart from the actual Q&V response. In *Artisan*, the Court of International Trade has held almost identical action to be unlawful.
- The Department must allow Tiangong to refile its Q&V, separate rate application, and accept Tiangong's voluntary questionnaire response, or assign Tiangong a separate rate.

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[2] *See* Letter from Jiangyin Special, re: Case Brief, dated December 14, 2016 (Jiangyin Special Case Brief), and Letter from Tiangong, re: Case Brief, dated December 14, 2016 (Tiangong Case Brief).
[3] *See* Letter from the Department to Jiangyin Special, re: "Rejection of New Information in Case Brief," dated December 20, 2016. *See also* Letter from Jiangyin Special, re: Case Brief, dated December 21, 2016 (Jiangyin Special Refiled Case Brief). The Department has addressed below information and arguments contained only within Jiangyin Special Refiled Case Brief.
[4] The petitioners are ARCELORMITTAL USA LLC (AMUSA) and SSAB Enterprises, LLC (SSAB).
[5] *See* Letter from AMUSA, re: Rebuttal Brief, dated December 21, 2016 (AMUSA Rebuttal), and Letter from SSAB, re: Rebuttal Brief, dated December 21, 2016 (SSAB Rebuttal), collectively Petitioners' Rebuttal Briefs.
[6] *See* Tiangong Case Brief at 10, citing to *Artisan Mfg. Corp. v. United States*, 978 F. Supp. 2d 1334 (CIT 2014) (*Artisan*) and *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342 (CIT 2012) (*Grobest).*

Petitioners' Rebuttal Briefs:

- The *Initiation Notice* provided sufficient notice and instruction for the procedures to file a Q&V response and a separate rate application.
- The Department properly treated Tiangong as part of the PRC-wide entity because it did not provide timely information that would permit consideration for a separate rate. The courts have found that announcement in the *Federal Register* is sufficient to place an unnamed respondent on notice that its entries are subject to a proceeding.[7]
- Nothing precluded Tiangong from requesting an extension to file a Q&V response before the deadline. Tiangong's failure to file a timely Q&V response or request an extension of that deadline is not an "extraordinary circumstance." The Department has stated that evidence of inattentiveness is unlikely to be considered extraordinary circumstances.[8]
- The Department has broad discretion to determine its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data.
- Tiangong's reliance on *Artisan* and *Grobest* is misplaced, because both rulings were case specific, based on their unique facts, and did not address the treatment of timely Q&V data as a prerequisite for separate rate eligibility. Moreover, the underlying regulatory framework was different in both appeals, such that the "extraordinary circumstance" exception did not apply.
- The statutory opportunity to remedy a deficient response does not apply when a party fails to submit the requested information by the deadline. Tiangong's submission was rejected not because it was deficient, but because the entire submission was untimely filed.
- Pursuant to TPEA,[9] there is no basis to compel the Department to conduct a voluntary respondent review for Tiangong. The voluntary respondent statutory provision provides no exception for a party that submits an untimely response and, again, grants the Department wide latitude when deciding whether to investigate an additional respondent as voluntary.

Department's Position:

The Department disagrees with Tiangong with respect to its claims for separate rate treatment. First, we disagree that the Department inappropriately rejected Tiangong's untimely Q&V response because it was without counsel, and thus, allegedly unaware of the proceeding and any deadlines regarding the submission of information.

The Department's *Initiation Notice* stated that:

> In accordance with our standard practice for respondent selection in cases involving NME countries, we intend to issue quantity and value (Q&V) questionnaires to each potential respondent and base respondent selection on the responses received.

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[7] *See* SSAB Rebuttal Brief at 41, citing to *Royal United Corp. v. United States,* 714 F. Supp. 2d 1307 (CIT 2010) (*Royal*) and *Transcom, Inc. v. United States*, 24 CIT 1253, 1263, 121 F. Supp. 2d 690, 701 (CIT 2000) (*Transcom*).
[8] *See* SSAB Rebuttal Brief at 42, citing to *Extension of Time Limits*, 78 FR 57790, 57793 (September 20, 2013) (*Extension of Time Limits*).
[9] Trade Preferences Extension Act of 2015, Public Law No. 114-27, 129 Stat. 362 (2015) (TPEA).

In addition, the Department will post the Q&V questionnaire along with filing instructions on the Enforcement and Compliance website at http://www.trade.gov/enforcement/news.asp. Exporters/producers of CTL plate from the PRC that do not receive Q&V questionnaires by mail may still submit a response to the Q&V questionnaire and can obtain a copy from the Enforcement and Compliance website. The Q&V response must be submitted by all PRC exporters/producers no later than May 12, 2016, which is two weeks from the signature date of this notice. All Q&V responses must be filed electronically via ACCESS.[10]

The *Initiation Notice* served as public notice of our procedural deadlines and explicitly provided the May 12, 2016, deadline for Q&V responses.[11] Thus, there is no basis for Tiangong to claim that it did not have adequate notice of the deadline for Q&V responses.[12] Tiangong had ample opportunity, at a minimum, to file a timely request for an extension of the Q&V response deadline or simply contact the Department to notify it of any difficulties with the Q&V response filing procedures, as provided for in the *Initiation Notice*.

Second, Tiangong has not demonstrated a sufficient basis for the Department to accept its submission after the May 12, 2016, deadline. The *Initiation Notice* indicated that the Q&V responses received by the established deadline would be used to select respondents. Because this process is time-sensitive, due to the statutorily mandated schedule of a LTFV investigation, the importance of receiving timely Q&V responses is critical. The Department considered whether to accept Tiangong's submission after the deadline had passed pursuant to 19 CFR 351.302(c), which provides that an untimely filed extension request will not be considered unless the party

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[10] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, Brazil, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the People's Republic of China, South Africa, Taiwan, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations*, 81 FR 27089, 27095 (May 5, 2016) (*Initiation Notice*).

[11] *See*, *e.g.*, *Suntec Industries Co., Ltd., v. United States*, 2016 WL 1621088, *6 (Ct. Int'l Trade April 21, 2016) ("…because it had constructive notice of the initiation and therefore cannot claim having suffered substantial prejudice as a result of lack of notice prior to the initiation."); *Transcom, Inc. v. United States*, 294 F.3d 1371, 1380 (Fed. Cir. 2002) ("…we conclude that the notice of initiation was sufficient to give reasonable notice"); *see also Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 20891 (April 8, 2013) and accompanying Issues and Decision Memorandum at Comment 1, where the Department notes that its initiation notices serve as public notice to parties regarding deadlines established for the proceeding.

[12] Furthermore, the unpublished initiation notice was signed on April 28, 2016 and uploaded to ACCESS on May 2, 2016. *See* (unpublished) Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, Brazil, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the People's Republic of China, South Africa, Taiwan, and the Republic of Turkey: Initiation of Less-Than-Fair-Value Investigations, ACCESS Barcode: 3465473-01. On April 29, 2016, the Department uploaded the Q&V questionnaire to ACCESS, which, as a public document, was available to any persons that create an account with ACCESS for viewing and downloading public documents. *See* Letter to All Interested Parties, re: "Quantity and Value Questionnaire for Antidumping Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China," dated April 29, 2016; ACCESS Barcode: 3465355-01. The Q&V questionnaire provided the May 12 deadline on the first page of the questionnaire.

demonstrates that an "extraordinary circumstance" exists.[13] The regulation further provides that an "extraordinary circumstance" is an unexpected event that: (1) could not have been prevented if reasonable measures had been taken; and (2) precludes a party or its representative from timely filing an extension request through all reasonable means.[14] Moreover, *Extension of Time Limits* provides that "examples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party's representative to access the Internet on the day on which the submission was due..."[15]

Here, Tiangong did not provide an adequate explanation demonstrating "extraordinary circumstances" that prevented it from filing a timely extension request for its Q&V response by the established deadline. Tiangong claims that "the failure by the Department to post the questionnaire on time or to release the list of recipients until the deadline had passed in {the PRC} constituted *force majeure* in that a foreign government was taking unpredictable and prejudicial actions over which Tiangong had no control."[16] As an initial matter, Tiangong provides no citation and it is unclear to what it is referring when it references "the list of recipients." In any event, and as discussed above, the Department provided Tiangong with notice of the May 12, 2016, deadline when the *Initiation Notice* published in the *Federal Register* on May 5, 2016. Furthermore, Tiangong could have accessed the Q&V questionnaire as early as the May 2, 2016, the date we uploaded the Q&V questionnaire to our website. For all these reasons, we disagree that the date the questionnaire was posted precluded Tiangong from filing a timely submission or from filing a timely extension request.

Moreover, the *Extension of Time Limits* states that "...examples that are unlikely to be considered extraordinary circumstances include insufficient resources, inattentiveness, or the inability of a party's representative to access the Internet on the day on which the submission was due ...."[17] Thus, Tiangong's claimed ignorance of this proceeding in an industry in which Tiangong takes part by exporting subject merchandise to the United States amounts to a case of inattentiveness, as described in *Extension of Time Limits*. In sum, the Department finds that even if Tiangong was unable to gather its information, translate it, and submit it by the established deadline, Tiangong had sufficient time to contact the Department and relay its difficulty in filing a response by the established deadline, or request an extension of the Q&V response deadline before its expiry.

Additionally, Tiangong's continued reliance on *Artisan*[18] is inapposite here. As we previously articulated to Tiangong, *Artisan*:

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[13] *See*, *e.g.*, *Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 75032 (October 28, 2016) and accompanying Issues and Decision Memorandum at Comment 10; *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 80 FR 51779 (August 26, 2015) and accompanying Issues and Decision Memorandum at page 1.

[14] *See* 19 CFR 351.302(c)(2).

[15] *See Extension of Time Limits*, 78 FR at 57792-57793.

[16] *See* Tiangong Case Brief at 7.

[17] *Id*.

[18] *See* Tiangong Case Brief at 10 (citing to *Artisan)*.

> is inapplicable because it was not decided under the "extraordinary circumstance" standard applicable in this investigation…While Tiangong provided a variety of reasons to justify its untimely filing, the Department continues to find that none of them demonstrate extraordinary circumstances as defined in 19 CFR 351.302(c)(2), *i.e.,* an unexpected event that could not have been prevented if reasonable measures had been taken and that precluded Tiangong from timely filing an extension request through all reasonable means.[19]

Tiangong's reference to *Grobest* is also misplaced.[20] In *Artisan* and *Grobest*, the Court of International Trade's (CIT) rulings were based on the unique facts of those cases and unrelated to the submission of a Q&V response, which, in this investigation, is the starting point for separate rate consideration and the respondent selection process for the first time in the proceeding. *Grobest* is distinguishable in that the company in that case had previously established its eligibility for a separate rate, and because in the fourth administrative review, it simply submitted a certification to renew its separate rate, the CIT, therefore, held that it would not have been unduly burdensome for the Department to accept the certification and to continue to assign the company a separate rate.[21] The burden on the Department in this investigation that would result from accepting the untimely filing is different than the burden in *Grobest*.

The Federal Circuit's ruling in *Dongtai Peak* is relevant and instructive with regard to the Department's need and ability to set and enforce its deadlines. The Federal Circuit found that it "cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered."[22] Moreover, the Federal Circuit also rejected arguments that the Department has a standard of approving untimely extension requests.[23] Here, the Department followed its regulation and rejected an untimely submission and denied an untimely extension request. As the Federal Circuit acknowledged, any cases where the Department has accepted any late filings or late extension requests is at the Department's discretion and based on the facts of that case[24]

Furthermore, the Federal Circuit "has made clear Commerce's rejection of untimely-filed factual information does not violate a respondent's due process rights when the respondent had notice of the deadline and an opportunity to reply."[25] As noted above, our *Initiation Notice* served as sufficient notice to parties of established deadlines for separate rate status consideration and for respondent selection.

The Department also disagrees with Tiangong's argument that it should have been selected as a voluntary respondent. In the *Initiation Notice*, we stated that "the Department requires that

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[19] *See* Letter from the Department to Tiangong dated June 3, 2016.
[20] *See* Tiangong Case Brief at 10-11 (citing to *Grobest*).
[21] *See Grobes*t, 815 F. Supp. 2d at 1367.
[22] *See Dontgtai Peak Honey Industry Co., Ltd. v. United States*, 777 F. 3d 1343, 1352 (Fed. Cir. 2015) (*Dongtai Peak*) (citing to *PSC VSMPO-Avisma Corp. v. United States,* 688 F.3d 751, 760-761 (Fed. Cir. 2012)).
[23] *See Dongtai Peak*, 777 F. 3d at 1350, 1352 ("Appellant's argument regarding Commerce's 'long practice' of approving untimely extension requests is equally unpersuasive.").
[24] *Id.*, at 1352.
[25] *Id.*

respondents from the PRC submit a response to **both** the Q&V questionnaire and the separate-rate application by their respective deadlines in order to receive consideration for separate-rate status."[26] Nevertheless, Tiangong continued to re-file its untimely and twice-rejected Q&V response, a separate rate application, and a voluntary questionnaire response. Our rejection of these unsolicited filings and subsequent treatment of Tiangong in the *Preliminary Determination* was predicated on our established practice, clearly stated in the *Initiation Notice*.[27]

We also informed Tiangong that our regulations state that "in no case will the official record include any document that the Secretary rejects as untimely filed, or any unsolicited questionnaire response unless the response is a voluntary response accepted under §351.204(d) (*see* §351.302(d))."[28] Contrary to Tiangong's argument, the Department did not state, at any point, that it would accept Tiangong's non-market economy (NME) questionnaire responses for individual examination. Rather, we informed Tiangong that, generally, a Section A response would be timely if submitted by the deadline established for the mandatory respondent, pursuant to 19 CFR 351.204(d)(2).[29] However, we also informed Tiangong that, in the event that it filed a Section A questionnaire response, it "may be rejected if other reasons apply pursuant to the Department's regulations."[30] We subsequently rejected Tiangong's Sections A-D questionnaire responses, stating that "Tiangong did not file a timely Q&V response and, as a result, was not considered for respondent selection purposes. A party which fails to cooperate with the Department's process for mandatory respondent selection purposes cannot be considered for voluntary respondent treatment."[31]

Thus, consistent with section 782(a)(1)(A) of the Act as recently amended by the TPEA, and 19 CFR 351.401(a)(2)(ii), the Department did not consider Tiangong's unsolicited questionnaire responses, and in accordance with the Department's practice regarding entities which are ineligible for a separate rate, treated Tiangong as part of the PRC-wide entity.

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[26] *See Initiation Notice*, 81 FR at 27095 (emphasis added). *See also* Letter from the Department to Tiangong, re: "Tiangong's Separate Rate Application," dated June 14, 2016, under Barcode: 3477900-01, where we stated that "pursuant to Department practice and as explained in the notice of initiation of this case, the Q&V questionnaire, and the SRA, companies must also submit timely Q&V information to receive consideration for a separate rate… Because a timely response to the Q&V questionnaire is necessary to be considered for receipt of a separate rate, we are rejecting Tiangong's SRA. We have removed it from the record and will not rely upon it in our investigation."
[27] *Id.*; *see also* Letter from the Department to Tiangong, re: "Tiangong's Separate Rate Application," dated June 14, 2016.
[28] *See* 19 CFR 351.104(2)(iii); *see also* Letter from the Department to Tiangong, re: "Tiangong's Section A Questionnaire Response," dated June 29, 2016, under Barcode: 3482388-01, where we stated that "Tiangong did not file a timely Q&V response and, as a result, was not considered for respondent selection purposes. A party which fails to cooperate with the Department's process for mandatory respondent selection purposes cannot be considered for voluntary respondent treatment. As a result, there is no basis for us to maintain the unsolicited questionnaire response on the record and we have removed it from the record and will not rely upon it in our investigation."
[29] *See* Letter from the Department to Tiangong, re: "Response to Tiangong's June 16, 2016 Letter," dated June 16, 2016, under Barcode: 3478931-01, where we stated that "as an initial matter, we note that the Department has not selected Tiangong as a voluntary respondent for individual examination in this investigation."
[30] *Id.*
[31] *See* Letter from the Department to Tiangong, re: "Tiangong's Section A Questionnaire Response," dated June 29, 2016, and Letter from the Department to Tiangong, re: "Tiangong's Sections C, D, and E Questionnaire Response," dated July 18, 2016.

Contrary to Tiangong's arguments, we did not assign a dumping margin based on AFA to Tiangong. The Department's application of AFA to the PRC-wide entity was a determination applied to the PRC-wide entity, which includes, among other unknown entities, the 39 unresponsive companies to which we issued a Q&V questionnaire (in addition to Tiangong and Jiangyin Special).[32] The PRC-wide entity failed to cooperate to the best of its ability when responding to our requests for information and it is based on this failure that the PRC-wide entity, including Tiangong, is receiving an AFA rate. This explains why the Department did not make an AFA determination that was specific only to Tiangong.

The Department also disagrees with Tiangong's argument that the statute requires the Department to provide parties with an opportunity to remedy an untimely filed response. Section 782(d) of the Act applies to "deficient submissions" and we agree with petitioners that the Q&V response was not "deficient"; rather, it was untimely. Furthermore, this statutory provision explicitly recognizes the importance of the statutory deadlines for completing investigations and reviews which is also one of the reasons why the Department must enforce its deadlines for submissions such as Q&V responses.[33]

Finally, contrary to Tiangong's assertion, we retained copies of four letters from Tiangong on the record, which include argument and narrative for the limited purposes of establishing the basis for rejection of the untimely Q&V response.[34] Per 19 CFR 351.104(a)(2) (ii), the Department was not otherwise required to retain the untimely questionnaire responses on the record.

Comment 2: Separate Rate Treatment of Jiangyin Special

Jiangyin Special Case Brief:

- The *Preliminary Determination* did not provide any meaningful analysis of, or evidence of, the PRC government actually exercising its control over Jiangyin Special's export activities, management, and operations.
- The standard for assessing *de facto* governmental control was clarified in *Advanced Technology*: while the PRC government's majority ownership of an exporter creates the

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[32] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at page 8, footnote 42.

[33] *See*, generally, section 782(d) of the Act: "Deficient Submissions: If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority…shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title."

[34] *See* Letter from Tiangong, re: "Request for Expedited Reconsideration of Rejection of May 14 and May 16 Filings," dated May 23, 2016, under Barcode: 3472161-01 (rejected and retained) (this May 23, 2016, letter alone contains six pages of argument regarding the Department's rejection of the untimely Q&V response and denial of an out-of-time extension request); Letter from Tiangong, re: "Request for Extension," dated May 31, 2016, under Barcode: 3474023-01; Letter from Tiangong, re: "Refiling of Request for Expedited Reconsideration of Rejection of May 14, and May 16 Filings," dated June 3, 2016, under Barcode: 3475465-01; and Letter from Tiangong, re: "Confirmation of Due Date to Submit Voluntary Section A Response," dated June 16, 2016, under Barcode: 3478835-01.

potential for control of its export activities, that potential must be exercised to establish *de facto* control under the separate-rates test.[35]

- There is no evidence of the PRC government, directly or indirectly, influencing Jiangyin Special's operations, including its export activities. Moreover, the Department's claim that Company C[36] makes decisions regarding sales, prices, and management for Jiangyin Special is contradicted by record evidence.
- The Department did not consider that important limitations are imposed on the PRC government's ability to use its ownership position to exert control over the company's export activities through Company B, an intermediate Hong Kong holding company. Thus, Department's analysis of *de facto* control under the *Advanced Technology* separate-rate test is incomplete.
- The Department misread emails between Company D and its customer showing that the material terms of sale were established through negotiations between these two entities, and that Company C was not involved. The Department was wrong to conclude that Company C set the terms of Jiangyin Special's export sales.
- The expiration of subparagraph 15(a)(ii) to China's Protocol of Accession to the WTO requires the Department to use exporter/producer-specific prices and costs in determining Jiangyin Special's AD margin.

Petitioners' Rebuttal Briefs:

- Record evidence confirms that Jiangyin Special fails the separate-rates test because it is not *de facto* independent from government control. Thus, the Department applied the proper legal framework, pursuant to *Advanced Technology*[37] to determine that Jiangyin Special does not operate separately from the PRC government.
- In the *Preliminary Determination*, the Department explained that "where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally."[38]
- The record shows that Company A, which owns Jiangyin Special, is a state-owned enterprise (SOE) and is, thereby, subject to the control of the PRC government, regardless of Jiangyin Special's claim that Company B operates independently as a Hong Kong company. Consistent with Department practice, through Company A, the PRC government holds a

[35] *See* Jiangyin Special Case Brief at 3, citing to *Advanced Tech. & Materials Co., Ltd. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Technology*).
[36] The names of Company A, B, C, and D are business proprietary information and cannot be disclosed in this memorandum. All details regarding any business proprietary information is provided in Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Irene Darzenta Tzafolias, Director, Office VIII, from Irene Gorelik, Senior Analyst, re: "Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from the People's Republic of China: Preliminary Separate Rate Analysis for Jiangyin Xingcheng Special Steel Works Co., Ltd." dated November 4, 2016 (Preliminary Separate Rate Memo).
[37] *See* AMUSA Rebuttal Brief at 2, and SSAB Rebuttal Brief at 12, citing to *Advanced Technology*, 938 F. Supp. 2d 1342 (CIT 2013), as aff'd R.36, 36 Int'l Trade Rep. 883 (Fed. Cir. 2014).
[38] *See* AMUSA Rebuttal Brief at 5, citing to Preliminary Separate Rate Memo at 3 and *Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 42314 (June 29, 2016) (*HFCs*) and accompanying Issues and Decision Memorandum at Comment 8.

majority share in Jiangyin Special, and has the ability to control, and an interest in controlling, the operations of Jiangyin Special.

- The expiration of paragraph 15(a)(ii) of PRC's Protocol of Accession to the WTO has no bearing on this investigation. Absent implementation by the United States, the Department does not rely on WTO jurisprudence or developments in its administrative proceedings and must continue to implement its NME policy pursuant to the statute and regulations until such time the U.S. statute and the Department's regulations are changed.

Department's Position:

The Department disagrees with Jiangyin Special regarding its eligibility for a separate rate in this investigation. Jiangyin Special does not challenge the Department's determination that the company, through various entities, is majority-owned by the PRC government. The Court's ruling and language applied in *Advanced Technology* is unambiguous. Indeed, the CIT has reiterated the language applied in its *Advanced Technology* ruling:

> Specifically, as a result of litigation challenging Commerce's separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies' de facto independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that '**where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},' such majority ownership holding 'in and of itself' precludes a finding of de facto autonomy**.[39]

The CIT's ruling contradicts Jiangyin Special's arguments that the PRC government does not have the ability to exert control over its export activities as a result of the majority ownership through Company A, B, C, and D.

Moreover, in the *Preliminary Determination*, the Department cited to the numerous facts on the record, as reported by Jiangyin Special itself, which demonstrate the overwhelming evidence that Jiangyin Special has not rebutted the presumption of *de facto* control by the PRC government. The record demonstrates that the PRC government, through a chain of directly-owned companies, has the ability to exert control over Jiangyin Special's export activities, pricing, production, and selection of management.[40]

Contrary to Jiangyin Special's argument that the *Preliminary Determination* failed to conduct a meaningful analysis of the facts on the record, the Department conducted a full analysis[41] of Jiangyin Special's response and determined that the plain language of its court-affirmed practice

[39] *See Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1267 (CIT 2015) (*Jiangsu 2015*), citing to *Advanced Technology*, aff'd, 581 Fed. App'x 900 (Fed. Cir. 2014) (emphasis added).

[40] *See* Preliminary Separate Rate Memo at 5-8; *see also* Jiangyin Special's Section A Questionnaire Response (SAQR) at pages 17-18, 26; Exhibit A-13, 2015 (Financial Statements, note 2, page 17; and note 38a, page 640, which establishes control by Company A, the SOE, over Company C), Exhibits A-19, A-21 and A-22.

[41] *See* Preliminary Separate Rate Memo, which includes cites to specific documents on the record, submitted by Jiangyin Special, that demonstrate the absence of *de facto* autonomy from PRC government control.

supports its finding with regard to Jiangyin Special. As we stated in the *Preliminary Determination*, Jiangyin Special itself reported that it is owned and controlled by a SOE, Company A, through a chain of companies owned by the SOE. Company A owns and controls Company B, Company C, Company D, and Jiangyin Special. Based on information contained within Jiangyin Special's Section A Questionnaire Response (SAQR), the record shows that Jiangyin Special is majority owned and controlled by the PRC government, by way of Company A, the SOE,[42] a fact which was reported to the Department by Jiangyin Special. The record, established by Jiangyin Special's SAQR, shows that the PRC government has the ability to exert control over Jiangyin Special, through its SOE (Company A), and Company A's subsidiary holding companies, Company B, C, and D, to select management and elect board members across its subsidiary companies, including Jiangyin Special.[43] Consequently, we found that Company A, a PRC government-owned company, controls the selection of Jiangyin Special's management and its disposition of profits, and may exert control over pricing and production, which precludes a finding of *de facto* autonomy, as stated by the courts.[44]

The CIT has determined that:

> Commerce's essential inquiry with regard to whether a particular respondent's circumstances warrant the grant of separate-rate status focuses on whether, 'considering the totality of circumstances,' the respondents in question 'had sufficient independence in their export pricing decisions from government control to qualify for separate rates.' To that end, the relevant *de jure* autonomy 'can be demonstrated by reference to legislation and other governmental measures that decentralize control,' and the relevant *de facto* autonomy 'can be established by evidence that {the} exporter sets its prices independently of the government and of other exporters, and that {the} exporter keeps the proceeds of its sales.' In both its *de jure* and *de facto* determinations, Commerce may make reasonable inferences from the record evidence.[45]

Here, the Preliminary Separate Rate Memo includes detailed cites to specific information within Jiangyin Special's SAQR that directly support our determination of *de facto* control; and regardless of how Jiangyin Special now re-characterizes those facts, the record continues to demonstrate overwhelming evidence that supports our determination that Jiangyin Special is not entitled to a separate rate. In this regard, Jiangyin Special's SAQR provides extensive documentation demonstrating PRC government ownership and control over each of the companies in the corporate chain, starting with Company A, the SOE, that own Jiangyin

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[42] *See* Preliminary Separate Rate Memo at pages 3-4; *see also* SAQR dated June 27, 2016, at pages 13, 17-18, and Exhibits A-5, A-13, A-14, A-30.

[43] *See* Preliminary Separate Rate Memo at pages 6; SAQR at pages 17-18 and Exhibits A-21 and A22.

[44] *See* Preliminary Separate Rate Memo at pages 3-8.

[45] *See Jiangsu 2015*, 121 F. Supp. 3d 1263, 1266, citing to *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1339 (CIT 2014) (*Jiangsu 2014*) ((quoting Certain *Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61759 (November 19, 1997) and *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (citation omitted), respectively; and citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record") (quotation marks and citation omitted)).

Special.[46] Moreover, these documents also demonstrate that several of these companies, which are under the ultimate control of a SOE, share managers and shareholders.[47] The documents also demonstrate that Jiangyin Special does not negotiate its own pricing and sales;[48] rather, the negotiations are conducted by Company D, a subsidiary of Company C (which, in turn is owned by Company B and Company A, the SOE). Similarly, the disposition of profits is not controlled by Jiangyin Special. Rather, Jiangyin Special reported that Company D (a subsidiary of Company C, owned by the SOE) may exert influence on profit disposition due to the decision-making capabilities of the management and board members, who work at both Company D and Jiangyin Special.[49]

The Department also disagrees with Jiangyin Special's contention that we misread the price negotiation emails that it placed on the record.[50] Jiangyin Special argues that the price negotiation documents (*i.e.*, emails to customers) show evidence that the PRC government does not exert control over its pricing of sales of the merchandise under consideration. Jiangyin Special contends that "the emails between Company D and a customer show that all the material terms of sale (such as price, product characteristics, quantity) were established through negotiations between officials in {Company D} and their customer."[51] However, Company D is owned by Company C, which, in turn, is directly owned and controlled by the SOE, Company A.[52] Record evidence, provided by Jiangyin Special, irrefutably shows that Company A is owned and controlled by the PRC government;[53] thus, by extension of the chain of ownership, the PRC government also owns and controls Company B, Company C, Company D and Jiangyin Special. The Department has previously explained why evidence of indirect or direct government ownership is a sufficient evidentiary basis on which to conclude that the PRC government has the ability to exercise control over a company such that the company is ineligible for a separate rate:

> . . .the majority ownership holding in and of itself means that the government exercises or has the potential to exercise control over the company's operations generally, which may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient

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[46] *See* Preliminary Separate Rate Memo at pages 4-5; SAQR at Exhibit A-13, 2015 Financial Statements, note 2b, page 17; note 38, page 640; note 39, page 644; note 41, pages 111-123, in which Company C identifies Company D and Jiangyin Special as its subsidiaries; note 48, page 297; note 1, page 171 (where Company B identifies Company A as a SOE owned by the PRC government); and note 57a, page 311 (which identifies Company B's ownership of Company C).
[47] *See* Preliminary Separate Rate Memo at pages 5-7; SAQR at pages 17-18 and Exhibits A-21 and A-22.
[48] *See* Preliminary Separate Rate Memo at page 7; SAQR at page 26 and Exhibits A-15, A-16, and A-19.
[49] *See* SAQR at19 and Exhibits 21 and 22, (demonstrating that several individuals maintained simultaneous management and/or board positions within Company D and Jiangyin Special during the POI. Company D is a direct subsidiary of Company B and C, which are -subsidiaries of Company A, the SOE). *See also* Preliminary Separate Rate Memo at page 8.
[50] *See* Jiangyin Special Case Brief at 14.
[51] *Id*.
[52] *See* Preliminary Separate Rate Memo at page 7; SAQR at page 26 and Exhibit A-13, 2015 Financial Statements, note 41, pages 111-123, Exhibits A-15 and A-16.
[53] *See* Preliminary Separate Rate Memo at page 5; SAQR at Exhibit A-14, 2015 Financial Statements, note 1, page 171.

> independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.[54]

Thus, regardless of whether the PRC government did, or did not, exert actual control over Jiangyin Special with respect to any given sale, the ability to exert control over export activities existed such that Jiangyin Special has not demonstrated that it is entitled to a separate rate. Similarly, regardless of any purported absence of control because Company B is listed on the Hong Kong stock exchange, the evidence of the PRC government's majority ownership and control of Company A (the SOE), B, C, and D, demonstrates *de facto* control over Jiangyin Special's operations, which is sufficient to determine that Jiangyin Special is ineligible for a separate rate. Furthermore, Jiangyin Special's argument that Company B is a publicly-traded company listed on the Hong Kong stock exchange and, thus, not subject to PRC government control, is contradicted by Company B's financial statements, which Jiangyin Special placed on the record.[55] Company B's financial statements explicitly show that it is subject to the *ultimate ownership and control* of Company A, which is a PRC company owned and controlled by the PRC government. In turn, Company B owns and controls Company C and Company D, which, through other companies, own Jiangyin Special.[56]

Jiangyin Special also argues that the CIT, in *Advanced Technology,* found that the potential to control must be actually exercised to establish *de facto* control under the separate-rates test. We disagree. Jiangyin Special misunderstands the Department's current judicially-affirmed practice in NME proceedings. Once the Department determined that Jiangyin Special was majority owned by a SOE, that evidence establishes that the government has the ability to control the export activities of Jiangyin Special and the Department was not also obligated to determine that this ownership interest resulted in the government actually exerting control over Jiangyin Special in any given sale. The Department's finding that Jiangyin Special is majority owned by a SOE, a fact which is conceded, is in and of itself sufficient for the Department to conclude that Jiangyin Special is not eligible for a company-specific rate.

Finally, the Department disagrees with Jiangyin Special's argument with respect to the PRC's WTO Protocol of Accession. Antidumping duty proceedings conducted by the Department are governed by U.S. law, which provides that the Department determines, on the basis of a comprehensive, fact-intensive analysis of a country's economy, whether NME status is warranted for antidumping purposes. That determination remains in effect until it is reviewed

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[54] *See Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 79 FR 53169 (September 8, 2014) and accompanying Preliminary Decision Memorandum at "Separate Rates," unchanged in *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014).

[55] *See* Preliminary Separate Rate Memo at page 5; *see also* SAQR at Exhibit A-14, 2015 Financial Statements, note 48, page 297; 2015 Financial Statements, note 1, page 171; 2015 Financial Statements, note 1, page 139 (.pdf page 843); 2015 Financial Statements, note 57a, page 311.

[56] *See* SAQR at Exhibit 14, 2015 Financial Statements, note 1, page 171 and note 48, page 297 (emphasis added).

again. In this investigation, no party requested that the Department review the PRC's NME status. As such, the Department continues to treat the PRC as a NME in this investigation, and we have made determinations that are consistent with the statute, legislative history, and regulations governing antidumping duty proceedings with respect to NME countries.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation and the final dumping margin in the *Federal Register*.

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Agree Disagree

Ronald K Lorentzen

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Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance