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April 11, 2018

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review and New Shipper Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015-2016

I. SUMMARY

The Department of Commerce (Commerce) analyzed the case and rebuttal briefs of interested parties in the eighth administrative review (AR) and new shipper review (NSR) of the antidumping duty (AD) order on certain new pneumatic off-the-road tires (OTR Tires) from the People's Republic of China (China) for the period of review (POR) September 1, 2015, through August 31, 2016. The NSR concerns a request for review submitted by Carlstar.[1] The mandatory respondents for the AR are Guizhou Tyre Co., Ltd and Guizhou Tyre Import and Export Co., Ltd. (GTC)[2] and Weihai Zhongwei Rubber Co., Ltd. (Zhongwei). The petitioners in

[1] The NSR was requested by Carlstar Group LLC (formerly dba CTP Transportation Products) (Carlstar Group), a U.S. producer, importer and seller of subject merchandise; concerning merchandise produced by Carlisle (Meizhou) Rubber Manufacturing Co., Ltd. (Carlisle Meizhou), its affiliated producer of OTR tires from China, and exported by CTP Distribution (HK) Limited (CTP HK), an affiliated trading company located in Hong Kong (collectively, Carlstar).

[2] Commerce previously collapsed GTC and Guizhou Tyre Import and Export Corporation (GTCIE), into a single entity in the initial investigation. *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 FR 9278, 9283 (February 20, 2008), unchanged in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) (*OTR Final AD Investigation)*. This

this review are Titan Tire Corporation (Titan) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the USW) (collectively, the petitioners). Based upon our analysis of the comments received, we made changes from the *Preliminary Results*[3] with respect to Zhongwei and the companies eligible for a separate rate. We continue to find that GTC is ineligible for a separate rate due its failure to rebut the presumption of *de facto government* control, and we continue to find that Carlstar is ineligible for an NSR on the basis that the request was not timely submitted in accordance with 19 CFR 351.214(c).

We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from parties:

Comment 1: Carlstar's Eligibility for a New Shipper Review (NSR)
Comment 2: GTC's Separate Rate Eligibility
- A. The Statutory Authority to Issue a Country-Wide Rate
- B. The Presumption of Chinese Government Control
- C. The Government Control of GTC's Export Activities
- D. WTO Obligations
- E. A New China-Wide Rate Applicable to GTC
- F. Adjustments for Domestic and Export Subsidies Found in the Parallel CVD Review

Comment 3: Surrogate Value for Mixed Rubber
Comment 4: Overhead and Selling, General and Administrative Expenses (SG&A) Ratios Used to Calculate Zhongwei's Margin
Comment 5: CVD Rates Used to Calculate Double-Remedies Adjustment for Zhongwei
Comment 6: Irrecoverable Value-Added Tax (VAT) Rate for Zhongwei

II. BACKGROUND

On October 10, 2017, Commerce published in the *Federal Register* the *Preliminary Results* of this administrative review and, in accordance with 19 CFR 351.309, invited interested parties to comment on the *Preliminary Results*.[4] On December 11, 2017, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), Commerce extended the period for issuing the final results of this review by 60 days, to April 9, 2018.[5] On January 23, 2018,

decision is unchallenged in the instant review; thus, Commerce continues to treat GTC and GTCIE as a single entity (collectively, GTC).

[3] *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission of New Shipper Review; 2015–2016*, 82 FR 46965 (October 10, 2017) (*Preliminary Results*) and accompanying memorandum, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015-2016," dated October 2, 2017 (Preliminary Decision Memorandum).

[4] *See Preliminary Results* 82 FR at 46967.

[5] *See* memorandum, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2015-2016," dated December 11, 2017.

Commerce exercised its discretion to toll all deadlines affected by the duration of the closure of the Federal Government from January 20 through 22, 2018.[6] As a result, the period for issuing the final results of this review has been extended to April 12, 2018.[7]

On December 21, 2017, Commerce received timely filed case briefs from GTC;[8] Zhongwei;[9] and Valmont, an interested party;[10] and the petitioners,[11] with respect to the AR. On January 4, 2018, Commerce received timely filed rebuttal briefs from the petitioners[12] and Zhongwei.[13]

For the NSR, Commerce's *Preliminary Results* stated that it would request additional entry packages for shipments.[14] On October 18, 2017, Commerce requested entry packages for shipments from CBP.[15] On January 8, 2018, Commerce placed those packages on the record and invited comments.[16] Commerce received comments from Carlstar.[17] In Carlstar's Post-Prelim Entry Package Comments, Carlstar requested that Commerce issue a post-preliminary determination. On February 27, 2018, Commerce issued a Case Brief Schedule, setting deadlines for submissions of final case briefs. In that memorandum, Commerce also declined to issue a post-preliminary determination.[18] On March 6, 2018, Commerce received timely filed

[6] *See* memorandum, "Deadlines Affected by the Shutdown of the Federal Government," dated January 23, 2018 (Tolling Memorandum). All deadlines in this segment of the proceeding have been extended by three days.
[7] *Id*.
[8] *See* GTC's letter, "GTC's Case Brief: Certain New Pneumatic Off-the-Road Tires from China," dated December 21, 2017 (GTC's Case Brief).
[9] *See* Zhongwei's letter, "Case Brief of Weihai Zhongwei Rubber Co., Ltd.," dated December 21, 2017 (Zhongwei's Case Brief).
[10] *See* Valmont Industries Inc.'s (Valmont) letter, "Case Brief of Valmont Industries, Inc.: Administrative Review of the Antidumping Duty Order on New Pneumatic Off-the Road Tires from the People's Republic of China," dated December 21, 2017 (Valmont's Case Brief).
[11] *See* the petitioners' letter, "Case Brief of The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC," dated December 21, 2017 (Petitioners' Case Brief).
[12] *See* the petitioners' letter, "Rebuttal Brief of The United Steel, Paper and Forestry, Rubber, Manufacturing, energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC," dated January 4, 2018 (Petitioners' Rebuttal Brief).
[13] *See* Zhongwei's letter, "Rebuttal Brief of Weihai Zhongwei Rubber Co., LTD.," dated January 4, 2016 (Zhongwei's Rebuttal Brief).
[14] *See* memorandum, "New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Rescission of New Shipper Review," dated October 2, 2017 (Preliminary NSR Rescission Memorandum) at footnote16.
[15] *See* memorandum, "New Shipper Review of New Pneumatic Off-the-Road Tires from the People's Republic of China: U.S. Entry Documents Requested Post-Preliminary Results," dated November 27, 2017.
[16] *See* memorandum, "New Shipper Review of New Pneumatic Off-the-Road Tires from the People's Republic of China: Placing U.S. Entry Documents on the Record," dated January 8, 2018.
[17] *See* Carlstar's letter, "New Pneumatic Off-the-Road Tires from the People's Republic of China Response CBP Entry Documents Placed on the Record and Request for Post-Prelim Determination," dated January 16, 2018. (Carlstar Post-Prelim Entry Package Comments).
[18] *See* memorandum, "New Shipper Review of New Pneumatic Off-the-Road Tires from the People's Republic of China: Case Brief Schedule for Final Results," dated February 27, 2018 (Case Brief Schedule).

case briefs from the petitioners[19] and Carlstar[20] in reference to the NSR. On March 12, 2018, Commerce received timely filed rebuttal briefs from the petitioners[21] and Carlstar.[22]

III. SCOPE OF THE ORDER

The products covered by the order are new pneumatic tires designed for off-the-road and off-highway use, subject to exceptions identified below. Certain OTR tires are generally designed, manufactured and offered for sale for use on off-road or off-highway surfaces, including but not limited to, agricultural fields, forests, construction sites, factory and warehouse interiors, airport tarmacs, ports and harbors, mines, quarries, gravel yards, and steel mills. The vehicles and equipment for which certain OTR tires are designed for use include, but are not limited to: (1) agricultural and forestry vehicles and equipment, including agricultural tractors,[23] combine harvesters,[24] agricultural high clearance sprayers,[25] industrial tractors,[26] log-skidders,[27] agricultural implements, highway-towed implements, agricultural logging, and agricultural, industrial, skid-steers/mini-loaders;[28] (2) construction vehicles and equipment, including earthmover articulated dump products, rigid frame haul trucks,[29] front end loaders,[30] dozers,[31] lift

[19] *See* the petitioners' letter, "Case Brief of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC," dated March 6, 2018 (Petitioners' NSR Case Brief).
[20] *See* Carlstar's letter, "New Pneumatic Off-the-Road Tires from the People's Republic of China Case Brief," dated March 6, 2018 (Carlstar's Case Brief).
[21] *See* the petitioners' letter, "Rebuttal Brief of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC," dated March 12, 2018 (Petitioners' NSR Rebuttal Brief).
[22] *See* Carlstar's letter, "New Pneumatic Off-the-Road Tires from the People's Republic of China Rebuttal Brief," dated March 12, 2018 (Carlstar's Rebuttal Brief).
[23] Agricultural tractors are dual-axle vehicles that typically are designed to pull farming equipment in the field and that may have front tires of a different size than the rear tires.
[24] Combine harvesters are used to harvest crops such as corn or wheat.
[25] Agricultural sprayers are used to irrigate agricultural fields
[26] Industrial tractors are dual-axle vehicles that typically are designed to pull industrial equipment and that may have front tires of a different size than the rear tires.
[27] A log-skidder has a grappling lift arm that is used to grasp, lift and move trees that have been cut down to a truck or trailer for transport to a mill or other destination.
[28] Skid-steer loaders are four-wheel drive vehicles with the left-side drive wheels independent of the right-side drive wheels and lift arms that lie alongside the driver with the major pivot points behind the driver's shoulders. Skid-steer loaders are used in agricultural, construction and industrial settings.
[29] Haul trucks, which may be either rigid frame or articulated (*i.e.*, able to bend in the middle) are typically used in mines, quarries and construction sites to haul soil, aggregate, mined ore, or debris.
[30] Front loaders have lift arms in front of the vehicle. They can scrape material from one location to another, carry material in their buckets, or load material into a truck or trailer.
[31] A dozer is a large four-wheeled vehicle with a dozer blade that is used to push large quantities of soil, sand, rubble, *etc.*, typically around construction sites. They can also be used to perform "rough grading" in road construction.

trucks, straddle carriers,[32] graders,[33] mobile cranes,[34] compactors; and (3) industrial vehicles and equipment, including smooth floor, industrial, mining, counterbalanced lift trucks, industrial and mining vehicles other than smooth floor, skid-steers/mini-loaders, and smooth floor off-the-road counterbalanced lift trucks. The foregoing list of vehicles and equipment generally have in common that they are used for hauling, towing, lifting, and/or loading a wide variety of equipment and materials in agricultural, construction and industrial settings. Such vehicles and equipment, and the descriptions contained in the footnotes are illustrative of the types of vehicles and equipment that use certain OTR tires, but are not necessarily all-inclusive. While the physical characteristics of certain OTR tires will vary depending on the specific applications and conditions for which the tires are designed (*e.g.*, tread pattern and depth), all of the tires within the scope have in common that they are designed for off-road and off-highway use. Except as discussed below, OTR tires included in the scope of the order range in size (rim diameter) generally but not exclusively from 8 inches to 54 inches. The tires may be either tube-type[35] or tubeless, radial or non-radial, and intended for sale either to original equipment manufacturers or the replacement market. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00. While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Specifically excluded from the scope are new pneumatic tires designed, manufactured and offered for sale primarily for on-highway or on-road use, including passenger cars, race cars, station wagons, sport utility vehicles, minivans, mobile homes, motorcycles, bicycles, on-road or on-highway trailers, light trucks, and trucks and buses. Such tires generally have in common that the symbol "DOT" must appear on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Such excluded tires may also have the following designations that are used by the Tire and Rim Association:

Prefix letter designations:

- P - Identifies a tire intended primarily for service on passenger cars;
- LT - Identifies a tire intended primarily for service on light trucks; and,
- ST - Identifies a special tire for trailers in highway service.

Suffix letter designations:

- TR - Identifies a tire for service on trucks, buses, and other vehicles with rims having specified rim diameter of nominal plus 0.156" or plus 0.250";
- MH - Identifies tires for Mobile Homes;

[32] A straddle carrier is a rigid frame, engine-powered machine that is used to load and offload containers from container vessels and load them onto (or off of) tractor trailers.

[33] A grader is a vehicle with a large blade used to create a flat surface. Graders are typically used to perform "finish grading." Graders are commonly used in maintenance of unpaved roads and road construction to prepare the base course on to which asphalt or other paving material will be laid.

[34] *I.e.*, "on-site" mobile cranes designed for off-highway use.

[35] While tube-type tires are subject to the scope of this proceeding, tubes and flaps are not subject merchandise and therefore are not covered by the scope of this proceeding, regardless of the manner in which they are sold (*e.g.*, sold with or separately from subject merchandise).

- HC - Identifies a heavy duty tire designated for use on "HC" 15" tapered rims used on trucks, buses, and other vehicles. This suffix is intended to differentiate among tires for light trucks, and other vehicles or other services, which use a similar designation.
- Example: 8R17.5 LT, 8R17.5 HC;
- LT - Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service; and
- MC - Identifies tires and rims for motorcycles.

The following types of tires are also excluded from the scope: pneumatic tires that are not new, including recycled or retreaded tires and used tires; non-pneumatic tires, including solid rubber tires; tires of a kind designed for use on aircraft, all-terrain vehicles, and vehicles for turf, lawn and garden, golf and trailer applications. Also excluded from the scope are radial and bias tires of a kind designed for use in mining and construction vehicles and equipment that have a rim diameter equal to or exceeding 39 inches. Such tires may be distinguished from other tires of similar size by the number of plies that the construction and mining tires contain (minimum of 16) and the weight of such tires (minimum 1500 pounds).

IV. CHANGES SINCE THE *PRELIMINARY RESULTS*

Based on our review and analysis of the comments received from parties, we made certain changes to our margin calculations for Zhongwei. Specifically, we revised Zhongwei's overhead and SG&A ratios,[36] and we revised the double remedy adjustment for Zhongwei.[37]

V. DISCUSSION OF THE ISSUES

Comment 1: Carlstar's Eligibility for an NSR

In the *Preliminary Results*, Commerce rescinded Carlstar's request for an NSR on the basis that it was not timely submitted in accordance with 19 CFR 351.214(c). Commerce continues to find Carlstar ineligible for an NSR. In accordance with 19 CFR 351.214(c), an exporter or producer may request a new shipper review within one year of the date on which subject merchandise was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of the first entry, then the date on which it first shipped the merchandise for export to the United States. Commerce continues to find that subject merchandise produced and exported by Carlstar's predecessor entered the United States prior to one year before its request for an NSR. Due to the proprietary nature of the arguments, a complete summary of parties' arguments, as well as a full discussion of Commerce's decision, can be found in the separate NSR Final Rescission Memorandum.[38]

[36] *See* Comment 4 below; *see also* memorandum, "Final Results of the 2015-2016 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Zhongwei Final Analysis Memorandum," dated concurrently with this memorandum (Final Analysis Memorandum).

[37] *See* Comment 5 below.

[38] *See* memorandum, "New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Analysis of Comments Regarding the Determination to Rescind the New Shipper Review," dated concurrently with this memorandum (NSR Final Rescission Memorandum).

Comment 2: GTC's Separate Rate Eligibility

Background: In the *Preliminary Results,* Commerce determined that GTC failed to rebut the presumption of *de facto* government control over the company's selection of the board of directors, management, and profit distribution and therefore was ineligible for a separate rate. GTC's case brief claimed that it is eligible for a separate rate for several reasons, each discussed separately below.[39]

A. The Statutory Authority to Issue a Country-Wide Rate

GTC argues:

- The statute authorizes only two types of AD margins. Sections 735(c)(1)(B)(i)(I) and (II) of the Act, allow Commerce to determine: (I) "the weighted average dumping margin for each exporter and producer individually investigated;" and (II) "the estimated all others rate for all exporters and producers not individually investigated."[40] These options exhaust the range of all possibilities because every company is either "individually investigated" or not.
- Under the canon *expressio unius est exlusio alterius,* Congress' identification of these two types of AD rates prohibits Commerce from adopting and imposing a different kind of AD rate, such as a country-wide rate, that is applied regardless of whether a company has been "individually investigated."[41]
- In addition, the antidumping rates allowed under section 735(c) of the Act contrast markedly with the parallel provisions for countervailing duty (CVD) rates found in section 705 of the Act and adopted at the same time. For CVD investigations, the statute explicitly provides three possible rates: (1) section 705(c)(1)(B)(i)(I) of the Act provides a rate for any "exporter and producer individually investigated;" (2) section 705(c)(1)(B)(i)(I) of the Act also provides an "all-others rate for all exporters and producers not individually investigated;" and, (3) section 705(c)(1)(B)(i)(II) of the Act provides "a single estimated country-wide subsidy rate." The first and second provisions closely parallel the two authorized AD rates, but the third provision creates an additional option for a CVD rate that does not exist for AD purposes.[42] Thus, Congress expressly gave Commerce the authority to establish three different types of countervailing duty rates, but only two types of antidumping duty rates.[43]
- The United States Court of Appeals for the Federal Circuit (Federal Circuit or CAFC) has repeatedly recognized that, when Congress explicitly grants authority in one part of a statute,

[39] Valmont submitted a case brief stating that it "hereby incorporates by reference the relevant arguments by GTC and GTCIE concerning this issue." *See* Valmont's Case Brief at 1. However, Valmont's Case Brief did not contain substantive comment and is, thus, not further summarized or addressed below.
[40] *See* GTC's Case Brief at 4.
[41] *Id.* at 4-5; (citing, *e.g., Archuletta v. Hopper*, 786 F.3d 1340, 1348 (Fed. Cir. 2015) (citing *United States v. Smith,* 499 U.S. 160, 167 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied …") (quoting *Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616-17 (1980)); *Adair v. United States,* 497 F.3d 1244, 1255 (Fed. Cir. 2007))).
[42] *Id.* at 5.
[43] *Id.*

and not in another, that is a clear indication that Congress' failure to provide that authority elsewhere in the same statute is deliberate.[44]

- Even though the statute does not allow any "country-wide" AD rate that is applied regardless of whether companies are individually investigated, Commerce has created a "fictitious" country-wide China-entity rate in AD cases involving China.[45] When it first created this category of AD margin in 1991, Commerce failed to cite a statutory or regulatory basis for this rate.[46] When formalizing this new rate in 1995, Commerce also cited no statutory authority.[47]
- Although some courts have examined Commerce's country-wide China-entity rate, the statutory basis for such a rate has never been directly challenged.[48] Consequently, although Commerce appears never to have articulated any legal basis for its creation of a country-wide China-rate,[49] that legal defect has not previously been raised in the courts.[50]
- Section 735(c)(1)(B)(i)(I) explains that, "the administering authority shall determine the estimated weighted-average dumping margin for each exporter and producer individually investigated." Under its current practice, Commerce never sends antidumping duty questionnaires to, or investigates, the China-wide entity or any of its member companies.[51] Thus, the China-wide rate cannot be an "individually-investigated rate," because, by definition, the China-wide rate applies to the residual companies (*i.e.*, non-investigated exporters) that do not receive a separate rate.[52]
- Similarly, the China-wide rate cannot be an "all others" rate as defined in section 735(c)(1)(B)(i)(II) of the Act, because that rate can apply only to entities that are "not investigated." Moreover, the methodology for calculating "all others" rate is specified by statute in section 735(c)(5) of the Act, and must be constructed from the rates for investigated companies, subject to certain rules.[53] Neither section 735(c)(1)(B)(i)(II), nor section 735(c)(5) of the Act, allows a country-wide rate applicable to both investigated and un-investigated entities, and the methodology used to calculate the China-wide rate is not consistent with section 735(c)(5).[54]

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[44] *Id.* (citing *Heinzelman v. Secretary of Health and Human Services*, 681 F.3d 1374, 1382 (Fed. Cir. 2012); and *Heartland By-Products, Inc. v. United States*, 568 F.3d 1360, 1366 (Fed. Cir. 2009)).
[45] *Id.* at 6.
[46] *Id.* (citing *Iron Construction Castings from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 56 FR 2742 (January 24, 1991) (*Iron Construction Castings*)).
[47] *Id.* (citing Import Administration Policy Bulletin No. 05.1, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (April 5, 2005) (Policy Bulletin 05.1)).
[48] *See, e.g., Id.* at 7 (citing *Jiangsu Changbao Steel Tube Co., Ltd. v. United States,* 884 F. Supp.2d 1295, 1310 (CIT 2012) (*Jiangsu Changbao*) ("Changbao makes no specific objections to the dumping margin calculated for the China-wide entity in this investigation, arguing only that this rate should not have been applied to Changbao."); *UCF Am. v. United States*, 919 F. Supp. 435, 440 (CIT 1996) ("Commerce has pointed to no authority for establishing a China rate.")).
[49] *Id.* (citing *United States – Antidumping Measures on Certain Shrimp from Vietnam* (DS429) (November 2014) *and United States – Antidumping Measures on Certain Shrimp from Vietnam* (DS404) (September 2011) (finding the country-wide China-entity rate to be inconsistent with the terms of the Antidumping Agreement)).
[50] *Id.* at 7.
[51] *Id.* at 7-8.
[52] *Id.* (citing Policy Bulletin 05.1 at 1).
[53] *Id.* at 8.
[54] *Id.*

- Under the Supreme Court's *Chevron* ruling, courts defer to agencies to reasonably fill gaps in statutory interpretation when the language of the statute is ambiguous. However, Commerce's adoption of a country-wide China-entity rate is not authorized under *Chevron* either. When Congress has spoken, the issue has been resolved and there is no ambiguity or deference to the agency.[55] Here, the specific authorization of a country-wide rate only for CVD cases means that Congress knew how to authorize a country-wide rate, and intentionally did not give Commerce the same authority for antidumping cases.[56] There is no ambiguous statutory language and Commerce has never pointed to any.
- The courts have faced similar statutory interpretative issues under the trade remedy laws in three prior cases: *FAG Italia*, *Ad Hoc Committee*, and *Zenith Electronics*. In all three, courts have found that when Congress expressly requires action in one context, but withholds that authority in another context, Congress has spoken clearly.[57] Indeed, because Commerce is attempting to create law merely because the statute does not expressly prohibit it from doing so, this case is another example of Commerce attempting "to derive statutory authority from the absence of prohibitory language," which the Federal Circuit in *FAG Italia* found to be inconsistent with *Chevron*.[58]
- When defending its PRC-wide entity rate, Commerce routinely cites to court decisions that do no actually support its practice. The Federal Circuit's *Sigma Corp.* and *Transcom* decisions, for example, described Commerce's country-wide rate policy, but did not address the legal basis for the policy.[59]

The petitioners rebut:

- Commerce correctly determined that GTC is ineligible for a separate rate, as it has done in multiple reviews and investigations,[60] and should continue to find GTC to be a member of

[55] *Id.* at 10 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984) (*Chevron*)).
[56] *Id.* at 5.
[57] *Id.* at 6 (citing *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 815-16 (Fed. Cir. 2002) (*FAG Italia*) (authority to conduct duty absorption reviews in certain years precludes discretion to conduct such reviews in other years); *Ad Hoc Committee v. United States*, 13 F.3d 398, 401-02 (Fed. Cir. 1994) (authority to deduct transportation costs from U.S. price precludes discretion to subtract such expenses from foreign market value); *Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1580-82 (Fed. Cir. 1993) (authority to adjust U.S. price for taxes precludes discretion to adjust foreign market value for such taxes)).
[58] *Id.* (citing *Elkem Metals Co. v. United States*, 468 F.3d 795, 801 (Fed. Cir. 2006) (citing *FAG Italia* at 817)).
[59] *Id.* at 11 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (*Sigma Corp*) (appeal of Commerce's factual findings of *de jure and de facto* control); *Id.* at 1407 (affirming Commerce's "reasonable conclusion that {the respondent, D & L}'s evidentiary showing was insufficient") and *Transcom Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002) (*Transcom*); *Id.* at 1377 (appeal of which company had to be named in the review); *Id.* at 1380 (appeal of application of facts available)).
[60] *See* Petitioners' Rebuttal Brief at 3 (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014– 2015*, 82 FR 18733 (April 21, 2017) (*OTR Tires China AR 14-15*), and accompanying Issues and Decision Memorandum at 2-15; *Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires 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*, 80 FR 34893 (June 18, 2015) (*PVLT China*), and accompanying Issues and Decision Memorandum at Comment 38 (pages 72-74); *Truck and Bus Tires From the People's Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 FR 8599 (January 27, 2017) (*Truck and Bus Tires*), and accompanying Issues and Decision Memorandum at Comment 8 (pages 24-28). In the 2012-2013 review of this order, Commerce granted GTC a separate rate. *See Certain New Pneumatic Off-the-Road*

the China-wide entity and apply the dumping rate applicable to that entity.[61]

- Contrary to GTC's claim that courts have not upheld Commerce's application of this rebuttable presumption, Commerce's NME practice has been repeatedly upheld by the courts, including by the Federal Circuit in *Sigma Corp.* and *Transcom*.[62] In *Sigma Corp.*, the Federal Circuit upheld Commerce's authority to create a rebuttable presumption for exporters to demonstrate the absence of government control. The Court also recognized in *Transcom* that the presumption of a single entity necessarily leads to the assignment of a single rate to that entity.[63]
- Commerce also explained why these arguments fail in light of its statutory and regulatory authority to issue a rate for the China-wide entity in *Truck and Bus Tires*, where Commerce found that its presumption of government control over the export activities of all firms in NMEs is "reasonable under sections 771(18)(B)(iv)-(v) of the Act, which recognized a close correlation between an NME economy and government control of prices."[64]
- GTC's arguments that the statute does not allow Commerce to apply a China-wide entity rate, but only an individual rate or an all-others rate, is based on a misunderstanding of Commerce's practice, and has been rejected by Commerce in the past.[65] GTC mistakes a China-wide "entity" rate for a country-wide dumping rate.[66] Commerce is not, as GTC claims, creating a "country-wide" rate for all exporters from a certain country. Instead, Commerce has properly used the authority granted to it by Congress to define the entity that is the "exporter" or "producer" to which Commerce applies a single dumping margin. In the

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Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012–2013, 79 FR 61291 (October 10, 2014) (*OTR Tires China AR12-13 Prelim*), and accompanying Preliminary Decision Memorandum at 10-11, unchanged in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 FR 20197 (April 15, 2015) (*OTR Tires AR 12-13*). However, Commerce has since recognized that determination was based on an incomplete record regarding the government's control of GTC. *See* PVLT IDM at Comment 38 (stating that the information regarding the government's control "was not on the record of that proceeding….")).

[61] *Id.* at 12.

[62] *Id.* at 6 (citing *Diamond Sawblades Manufacturers Coalition v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017) (*Diamond Sawblades 2017*) (citing *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017) (*Changzhou Hawd*); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1390 (Fed. Cir. 2014) (*Michaels Stores*); *Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1370 (Fed. Cir. 2012) (*Changzhou Wujin*))).

[63] *Id.* (citing *Transcom* at 1381), noting that, in the very unusual instance where Commerce has received information from all producers that make up the entire NME-wide entity, it has calculated a margin from the entity by examining the submitted information from all facilities. *See* 53-*Foot Domestic Dry Containers From the People's Republic of China: Preliminary Determination of Sales at Less than Fair Value; Preliminary Negative Determination of Critical Circumstances; and Postponement of Final Determination and Extension of Provisional Measures*, 79 FR 70501 (November 26, 2014) (*53-Foot Containers Prelim*), and accompanying Preliminary Decision Memorandum (53-Foot Containers PDM) at 14, 16-17 (China-wide entity rate calculated from data reported by single affiliated group of companies that record evidence indicated comprised the entire China-wide entity); unchanged in final, *53-Foot Domestic Dry Containers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 FR 21203 (April 17, 2015) (*53-Foot Containers*).

[64] *Id.* at 4 (citing Truck and Bus Tires IDM at 13-14).

[65] *Id.* at 3 (citing GTC's Case Brief at 4-13).

[66] *Id.* at 7.

case of non-market economies, Commerce treats firms that have failed to demonstrate their independence from the government as part of a single NME-wide entity.[67]

- The Federal Circuit upheld this interpretation in *Transcom*, referring to the NME-wide entity rate as "the single rate given to the NME entity" and the entity to which it applies as "the state-controlled NME entity."
- Commerce's single-entity NME practice is analogous to its collapsing practice: in both cases, Commerce finds it necessary to treat multiple companies as a single entity for purposes of determining a dumping margin and preventing manipulation of that margin.[68]

Commerce's Position: Commerce has both statutory and regulatory authority to issue a China-wide rate. Commerce's NME practice has been upheld in the courts on multiple occasions, including its application of a single rate for all NME exporters who do not qualify for a separate rate.[69] Under section 771(18) of the Act, Commerce considers China to be an NME,[70] and in AD proceedings, Commerce has a long-standing rebuttable presumption that, unless otherwise demonstrated, the export activities of all firms in China are subject to government control and influence. As a result, we apply a rate established for the China-wide entity to all imports from exporters who have not established eligibility for a separate rate.[71] In NME proceedings, Commerce places the burden on the exporters to demonstrate eligibility for a separate rate *via* independence from government control. It is within our authority to employ a presumption of state control in an NME country and place the burden on the exporters to demonstrate an absence of central government control.[72] Under section 771(18)(B)(iv)-(v) of the Act, this burden is reasonable, as it recognizes the correlation between NME economies and government price control, resource allocation, and production decisions.[73] *Transcom* upheld the application of a

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[67] *Id.* at 7-8.

[68] *Id.* at 8 (citing 19 CFR 351.401 (Commerce's collapsing regulation, where Commerce "will treat two or more affiliated producers as a single entity"); *see also Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007) ("In essence, collapsing entities means that Commerce will treat the collapsed entities as a single entity for the purpose of calculating anti-dumping margins.")).

[69] *See, e.g., Sigma Corp*, 117 F.3d at 1405; *see also 1,1,1,2-Tetrafluoroethane from the People's Republic of China: Final Determination of Sales at Less Than Fair Value Antidumping Duty Investigation*, 79 FR 62597 (October 20, 2014), and accompanying Issues and Decision Memorandum at Comment 1.

[70] *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 FR 50858, 50861 (November 2, 2017) and accompanying decision memorandum, "China's Status as a Non-Market Economy;" unchanged in *Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 FR 9282 (March 5, 2018).

[71] *See* 19 CFR 351.107(d) ("in an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers").

[72] *See Sigma Corp*, 117 F.3d at 1405-06 ("We agree with the government that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control.") (internal citations omitted).

[73] *See Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 44 F.Supp.2d 229, 243 (CIT 1999), quoting *Sigma Corp.*, 117 F.3d at 1405 ("Under the broad authority delegated to it from Congress, Commerce has employed 'a presumption of state control for exporters in a nonmarket economy'…. Under this presumption, all exporters receive one non-market economy country rate, or country-wide

China-wide rate to all parties not eligible for a separate rate and the use of a rate based on best information available (BIA) as non-punitive.[74]

Contrary to GTC's assertion, the courts have consistently upheld our authority to apply a presumption of state control in NME countries and to apply a single rate to all exporters that fail to rebut that presumption. The courts have agreed that, once a respondent has been determined to be part of the NME-wide entity, inquiring into said respondent's separate sales behavior ceases to be meaningful.[75] Because GTC failed to rebut the presumption of government control, as discussed further below, it is treated as part of the China-wide entity and receives the rate assigned to the entity.

B. The Presumption of Chinese Government Control

GTC argues:

- The China-wide rate is unlawful because it is based exclusively on an outdated factual presumption that "China is a state controlled economy in which all entities are presumed to export under the control of the state."[76]
- Commerce's decision to apply the CVD law to China based on significant changes in the Chinese economy and the decrease of all-encompassing state control cannot be reconciled with Commerce's continued reliance on an outdated presumption in the AD context.[77]
- Commerce has determined that the "current nature of China's economy does not" give rise to the same issues that were litigated in *Georgetown Steel*, many of which were "Soviet-style

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rate, unless an exporter can 'affirmatively demonstrate' its entitlement to a separate, company specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports."); *see also Michaels Stores, Inc. v. United States,* 931 F. Supp. 2d 1308. 1315 (CIT 2013), quoting *SKF USA Inc. v. United States,* 254 F.3d 1022, 1030 (Fed. Cir. 2001) ("The regulations clarify, however, that for nonmarket economies, 'rates may consist of a single dumping margin applicable to all exporters and producers.' Moreover, whenever the statute is silent on a particular issue, it is well-settled that Commerce may 'formulate policy' and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'") (internal citations omitted).

[74] *See Transcom* at 1381-83, "The China-wide rate, and its adverse inference are applicable to all companies which were initiated on yet failed to show their entitlement to a separate rate. "Accordingly, while Section 1677e provides that Commerce may not assign a BIA-based rate to a particular party unless that party has failed to provide information to Commerce or otherwise failed to cooperate, the statue says nothing about whether Commerce may presume that parties are entitled to independent treatment under 1677e in the first place." *Id.* at 1376. "Instead, the objective of BIA is to aid Commerce in determining dumping margins as accurately as possible." *Id.* The litigation in *Transcom* covered three periods of review between June 1990 and May 1993. *See Transcom* at 1374-75 and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews*, 61 FR 65527 (December 13, 1996). BIA is the precursor to facts available and AFA under the current statute. *See, e.g., Transcom* at 1376, and PVLT IDM at Comment 39.

[75] *See Advanced Tech. & Materials Co. v. United States*, 938 F. Supp. 2d 1342, 1351 (CIT 2013) (*Advanced Technology II*), citing *Watanabe Group v. United States*, 34 CIT 1545, 1551 (2010) ("Commerce's permissible determination that {a respondent} is part of the PRC-wide entity means that inquiring into {that respondent}'s separate sales behavior ceases to be meaningful.") and *Jiangsu Changbao Steel Tube Co., Ltd. v. United States*, 884 F. Supp. 2d 1295, 1312 n.21 (CIT 2012) ("losing all entitlement to an individualized inquiry appears to be a necessary consequence of the way in which Commerce applies the presumption of government control, … applying a countrywide AFA rate without individualized findings of failure to cooperate is no different from applying such a countrywide AFA rate without individualized corroboration").

[76] *Id.* at 14 (citing *Iron Construction Castings* 56 FR at 2742, 2744).

[77] *Id.* at 13.

economies" that were essentially comprised of a single central authority or characterized by central control.[78]

- There is no justification for Commerce's refusal to apply its most recent finding in CVD proceedings (that China's economy has modernized and no longer consists of a single economic entity with the government controlling all exports) to the antidumping context.[79] Specifically:
  - A major basis for Commerce's change in the application of countervailing duty laws was the factual finding "that market forces now determine the prices of more than 90 percent of products traded in China,"[80] and the decision to begin enforcing the countervailing duty laws based on the above conclusions indicates that, at least with *de jure* control, interference by the government in a company's export activities can no longer simply be presumed.[81]
- In other cases, Commerce has tried to dismiss these arguments as an indirect challenged to China's status as an NME. The issue as to whether China remains an NME, however, is a red herring. GTC is, instead, challenging Commerce's determination that, just because China has been designated as an NME, there is a presumption that every company in China is controlled by the government. Indeed, the distinction between China as a country and the situation of individual companies appears to be the reason that Commerce now treats China as subject to countervailing duty law.[82]
- Commerce should not base its presumption of government control on cases like *Sigma Corp.* which reflect a particular period of time and a particular set of circumstances dating back to the 1980s.[83] The 1997 decision in *Sigma Corp.*, for example, discussed whether evidence before Commerce was sufficient to rebut the presumption of state control in a particular region of China in the late 1980s.
- The CIT has repeatedly recognized the need to have a factual basis for Commerce's decisions as well as the disconnect between a presumption based on the factual situation of the late

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[78] *Id.* at 14 (citing *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (*Georgetown Steel*) and memorandum, "Countervailing Duty Investigation of Coated Free Sheet Paper from China- Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy," dated March 29, 2007 (Georgetown Memorandum)).

[79] *Id.* at 15 (citing *OTR Tires 2012-13* and accompanying Issues and Decision Memorandum at Comment 1).

[80] *Id.* (citing Georgetown Memorandum).

[81] *Id.* at 16 -17 (citing *Certain Cut-To-Length Carbon Steel Plate from The People's Republic of China: Final Results of the 2007-2008 Administrative Review of The Antidumping Duty Order*, 75 FR 8301 (February 24, 2010) (*CTLP*) and accompanying Issues and Decision Memorandum at Comment 2 (CTLP IDM); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from The People's Republic Of China: Final Results of Antidumping Duty Administrative Reviews And Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews*, 71 FR 54269 (September 14, 2006); *Honey From the People's Republic of China: Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review*, 69 FR 77184, 77186-87 (December 27, 2004); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) (*Diamond Sawblades Investigation*) and accompanying Issues and Decision Memorandum; and *Notice of Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as amended, In Certain Non-Market Economy Proceedings*, 77 FR 36481 (June 19, 2012) (Methodological Change)).

[82] *See* GTC's Case Brief at 19.

[83] *Id.* at 19-20.

1980s and the modern realities in China.[84] For example, *Qingdao Taifa* held that Commerce's reliance on a presumption of government control, without evidence, is incompatible with the agency's duty to support its decision with substantial evidence.[85]

The petitioners rebut:

- GTC's argument that Commerce's NME methodology is outdated is based on out-of-context quotes taken from the Georgetown Steel Memorandum, which Commerce explained focused only on the concept of the single economic entity that characterized the economies in *Georgetown Steel,* and it would be incorrect to conflate that concept with the concept of the NME-wide entity for AD assessment purposes….the analysis in the Georgetown Steel Memorandum is inapplicable to the issue of the China-wide entity in antidumping proceedings.[86]
- Commerce's NME practice has been repeatedly upheld by the courts, including the Federal Circuit in *Diamond Sawblades 2017,*[87] which states: "{s}ince our decision in *Sigma Corp.*, we consistently have sustained Commerce's application of a rebuttable presumption of government control to exporters and producers in NME countries, such as China."[88]
- The Court explained, "{i}f a company from an NME country rebuts the presumption by showing its independence from state control, it can qualify for a separate rate; if the company fails to rebut the presumption, however, it receives the single state-wide dumping rate."[89]
- GTC mistakes a China-wide "entity" rate for a country-wide dumping rate. Commerce is not creating a "country wide" rate, but rather creating a rate applicable to the presumptive exporter in an NME country.[90] The Federal Circuit has referred to this rate as "the single rate given to the NME entity."[91] As the Court recognized in *Transcom,* the presumption of a single entity, necessarily leads to the assignment of a single rate to that entity.[92]

Commerce's Position: Commerce has the statutory authority to apply a presumption of government control to companies in NMEs. *Sigma Corp.* upheld the presumption underlying the separate rates test and affirmed our separate rates test as reasonable, stating that the statute recognizes a close correlation between an NME and government control of prices, output decisions, and the allocation of resources.[93] *Sigma Corp*. also stated that it was within our authority to employ a presumption of state control for exporters in an NME country and to place

[84] *Id.* at 20.
[85] *Id.* at 21 (citing *Qingdao Taifa Group Co. v. United States*, 760 F. Supp. 2d. 1379, 1385 (CIT 2010) (*Qingdao Taifa*) and *Jiangsu Jiasheng Photovoltaic Technology v. United States*, 28 F. Supp. 3d 1317, n. 107 (CIT 2014) (*Jiangsu Jiasheng*)).
[86] *See* Petitioners' Rebuttal Brief at 5 (citing Truck and Bus Tires IDM at 18 and PVLT IDM at Comment 36).
[87] *Id.* at 6.
[88] *Id.*
[89] *Id.* at 6 (citing *Diamond Sawblades 2017* at 1311).
[90] *Id.* at 7.
[91] *Id.*
[92] *Id.* at 7 (citing *Transcom* at 1381 and noting that in the very unusual instance where Commerce has received information from all producers that make up the entire NME-wide entity, it has calculated a margin from the entity by examining the submitted information from all facilities, citing 53-Foot Containers PDM at 14, 16-17 (China-wide entity rate calculated from data reported by single affiliated group of companies that record evidence indicated comprised the entire China-wide entity); unchanged in *53 Foot Containers* final).
[93] *See Sigma Corp.*, 117 F.3d at 1405-06.

the burden on the exporters to demonstrate an absence of central government control.[94] Firms that do not rebut the presumption are assessed a single AD rate, *i.e.*, the NME country-wide entity rate.[95] GTC argues that *Sigma Corp* recognizes that the presumption is just the first step and that in *Jiangsu Changbao,* the Court noted that presumption without evidence is open to question.[96] GTC further cites to *Qingdao Taifa* as evidence that presumption without evidence is insufficient.[97] However in *Diamond Sawblades 2017,* the Court upheld Commerce's NME practice noting "{s}ince our decision in *Sigma Corp.*, we consistently have sustained Commerce's application of a rebuttable presumption of government control to exporters and producers in NME countries, such as the PRC."[98]

In recognition that parts of China's economy are transitioning away from the state-controlled economy, we developed the separate rates test. In an economy comprised of a single, monolithic state entity, it would be impossible to identify separate firms, let alone rebut government control. Rather, China's economy today is neither command-and-control nor market-based; government control and/or influence is omnipresent (which gives rise to the presumption) but not omnipotent (and hence, the presumption is rebuttable).[99]

In our experience applying the separate rate test, the *de jure* factors are not overridingly indicative of the absence of control of export activities in the typical case but, rather, they demonstrate an ability on the part of the exporter to control its own commercial decision making. In large part, the laws and regulations that we have examined over the years indicate that a certain level of control has devolved in that the commercial decision-making can lie with the various corporate entities operating under these laws and regulations, which in turn, merits an analysis of the record evidence to ensure that there is an absence of *de facto* aspects of government control over export activities. This is supported by our findings over the years that numerous Chinese respondents operating under such laws also maintain *de facto* control over their export functions. These situations where parties are found to be entitled to a separate rate are, however, based on the individual facts with respect to each such party. Because of the centralized control inherent in China's status as an NME country, we presume that decision making of an enterprise in an NME country is under a form of centralized government control (whether at the central, provincial, or local level). Nevertheless, the China Company Law and other laws and regulations demonstrate that, within China's NME, distance can exist between decisions made at the central government level and decisions made at the firm level with respect to exports. Thus, an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude us from granting a separate rate.[100]

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[94] *Id.* at 1405
[95] *See* 19 CFR 351.107(d) ("in an antidumping proceeding involving imports from a non-market economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers.").
[96] *See Jiangsu Changbao* at n.21.
[97] *See Qingdao Taifa* at 1385 and *Jiangsu Jiasheng* at n. 107.
[98] *See Diamond Sawblades 2017,* 866 F.3d at 1311 (citing *Changzhou Hawd*, 848 F.3d at 1009; *Michaels Stores*, 766 F.3d at 1390; and *Changzhou Wujin*, 701 F.3d at 1370).
[99] *See* Georgetown Steel Memorandum at 9; *see also* PVLT IDM at Comment 36.
[100] *Id.*

Furthermore, contrary to GTC's claims, the analysis in the Georgetown Steel Memorandum focused only on the concept of a single economic entity that characterized the economies in *Georgetown Steel*. Commerce's NME wide entity for AD assessment purposes is not analogous.[101] In antidumping proceedings involving NME countries such as China, the rebuttal presumption is that all export activities of firms within the country are subject to government control and influence. This presumption stems not from an economy comprised entirely of the government, *e.g.*, a firm is nothing more than a government work unit, but rather from the NME-government's use of a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the assembly of economic actors across the economy. As such, this presumption is patently different from a presumption that all firms are one and the same as the government, such that they comprise a monolithic economic entity.

Given the reforms discussed in the Georgetown Steel Memorandum, we found that a single central authority no longer comprises China's economy and that the policy that gave rise to the *Georgetown Steel* litigation does not prevent us from concluding that the Chinese government has bestowed a countervailable subsidy upon a Chinese producer. As such, we find that the analysis in the Georgetown Steel Memorandum is inapplicable to the issue of the China-wide entity in antidumping proceedings.

We disagree with GTC's claim that the presumption is based on outdated factual information, and we note that GTC does not point to any record evidence supporting this claim. We also disagree with GTC's reliance on a partial quote regarding prices in China. The Georgetown Steel Memorandum states that, "although price controls and guidance remain on certain 'essential' goods and services in China, the Chinese Government has eliminated price controls on most products; market forces now determine the prices of more than 90 percent of products traded in China."[102] This quote is a reference to deregulation of prices, *i.e.*, phasing out of the direct, administrative price-setting common in command-and-control economies. It is not a reference, for example, to an absence of direct government control over resource allocations or government control or influence over economic actors that can fundamentally distort the price formation process. Therefore, the reference is not relevant to our requirements that NME companies seeking a separate rate demonstrate the absence of *de jure* or *de facto* control.

C. The Government Control of GTC's Export Activities

GTC argues:

- In the *Preliminary Results*, Commerce applied the two-pronged test established in *Sparklers* and *Silicon Carbide* in light of *Diamond Sawblades Investigation*, and determined that GTC was not eligible for a separate rate.[103]

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[101] *See, e.g., Diamond Sawblades and Parts Thereof from the People's Republic of China; Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 FR 32344 (June 8, 2015) (*Diamond Sawblades 12-13*) and accompanying Issues and Decision Memorandum at Comment 4.

[102] *See* Georgetown Steel Memorandum at 5, citing The Economist Intelligence Unit, Country Commerce: China, 2006 at 73; *see also* PVLT IDM at Comment 36.

[103] *See* GTC's Case Brief at 21-22 (citing Preliminary Decision Memorandum at 12-13 and 16-17, citing *Diamond Sawblades Investigation*); *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*); and, *Notice of Final Determination of Sales at Less*

- For its final determination, Commerce must consider factual evidence on the record of this review, including new evidence that was not on the record in the previous review, which demonstrates that GTC's export activities are not controlled by the Chinese government.[104]
- Commerce "must analyze *de jure* control and thereby inform its *de facto* analysis of control over GTC's export activities," which it did not do in the *Preliminary Results*.[105] Instead, Commerce "completely ignores evidence of *de jure* control (or lack thereof) with regard to GTC."[106] There is no evidence that the Chinese government exercised *de facto* control specifically over GTC's export activities; in fact, all the record evidence is to the contrary.[107]
- Commerce's conclusion regarding possible government control over GTC's export activities is unreasonable and not supported by evidence on the record.[108]
  - As a publicly listed company, GTC is governed by specific rules.[109]
  - Neither the Guiyang Industry Investment Group Co., Ltd (GIIG)'s nor the Guiyang SASAC infringed on GTC's autonomy.[110]
  - All of GTC's shareholders have full right and opportunity to participate and vote in shareholder meetings.[111]
  - There are many safeguards in place to protect GTC's independence from shareholders such as GIIG.[112]
  - GTC has independent directors.[113]
  - There is no record evidence that either GIIG or the Chinese government exercise control over GTC's day-to-day operations.[114]
- Since many of GTC shareholders are short-term owners of tradable shares, they often are not interested in being involved in long-term or strategic decision making. However, GTC's shareholder meetings are always available to all shareholders who wish to attend.
- The CIT has disagreed with Commerce's reliance on government majority ownership as dispositive of *de facto* control.[115] Commerce has said that "the separate rates test focuses specifically on whether there is government control of a nonmarket economy's export activities."[116]
- In applying a China-wide rate to GTC in the instant case, Commerce has denied GTC separate rate status eligibility, despite the fact that the record contains no evidence that GTC's export prices were influenced by "central government control."[117]

Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

[104] *See* GTC's Case Brief at 23.

[105] *Id.* at 24.

[106] *Id.*

[107] *Id.* at 25.

[108] *Id.* at 25-38.

[109] *Id.* at 27-31.

[110] *Id.* at 31-33.

[111] *Id.* at 33-36.

[112] *Id.* at 36-38.

[113] *Id.* at 38.

[114] *Id.* at 39-44.

- Even if Commerce disagrees with GTC's contention that that the Chinese government cannot influence its day-to-day activities, it must still conclude that GTC passes the *de facto* control test because there is no evidence on the record that the Chinese government exercised *de facto* control over GTC's export activities.[118]
    - Policy Bulletin 05.1, sets forth a four-factor test to determine whether a company's "export functions" are, *de facto*, subject to government control.[119]
    - Nothing in the Policy Bulletin indicates that any single factor, such as, "whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management," is sufficient in and of itself to disqualify a company from separate rate.[120]
    - Rather, all four factors are intended to provide a basis for determining whether a company's export functions are free from government control,[121] especially, to the extent that such control allows "a government seeking to channel exports through companies with relatively low dumping rates."[122]
- For two decades the primary focus in applying Commerce's *de facto* control test was whether the respondent is able to negotiate selling prices with U.S. customers free of Chinese government influence.[123] Thus, during this time, Commerce agreed that, provided that the respondent could demonstrate actual price negotiations with U.S. customers, the respondent was eligible for separate rate status.[124] Nevertheless, Commerce denied GTC separate rate status in the *Preliminary Results* despite the fact that the record contains zero evidence that GTC's export prices were influenced by "central government control."[125]

The petitioners rebut:

- Because the Guiyang SASAC still controls GTC and GTCIE through GIIG's shares, Commerce properly determined that GTC is ineligible for a separate rate, since the record continues to demonstrate that the SASAC exercises fundamental *de facto* control over GTC, particularly over its selection of management.[126] This in, turn, translates into control of GTC's day to day operations.[127]
- GTC erroneously claims that *Diamond Sawblades 2017* stands for the principle that Commerce must recalculate the China-wide entity rate to be "as accurate and current as

[118] *Id.* at 41.
[119] *Id.* at 41.
[120] *Id.* at 41-42.
[121] *Id.* at 42.
[122] *Id.* (citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results and Partial Termination of Antidumping Duty Administrative Review*, 62 FR 6173, 6175 (February 11, 1997) ("A finding that a company is entitled to a separate rate indicates that the company has sufficient control over its export activities such that the manipulation of such activities by a government seeking to channel exports through companies with relatively low dumping rates is not a concern.")).
[123] *Id.* at 43.
[124] *Id.*
[125] *Id.* (citing detailed record evidence concerning the absence of government control with respect to GTC's price negotiations).
[126] *See* Petitioners' Rebuttal Brief at 12.
[127] *Id.* (citing *Advanced Tech. & Materials Co. v. United States*, 885 F. Supp. 2d 1343, 1355, 1359 (CIT 2012), *aff'd*, 581 F. App'x 900 (Fed. Cir. 2014) (explaining that board members should be considered "beholden" to shareholders that "have the ability to hire and fire each board member and decide their pay" and that managers are in

possible."[128] However, as noted in the Diamond Sawblades Remand, Commerce stopped that practice, beginning when the notice of opportunity was published after December 4, 2013.[129] Thus, Commerce did not initiate a review of the China-wide entity for this POR.[130] Therefore, Commerce's stated practice is to make no change to the China-wide entity rate.[131] Where the China-wide entity rate is not subject to change, the existing China-wide entity rate is instead applicable.[132]

- GTC has failed to rebut, and in fact has corroborated, the accuracy of Commerce's presumption that it is state-controlled.[133] Commerce should continue to treat GTC as part of the China -wide entity in the final determination and apply the dumping margin applicable to that entity as a whole to GTC's exporters for this review.[134]

Commerce's Position: For the final results, we continue to find, based on record evidence, that GTC is not eligible for a separate rate, because it has failed to demonstrate the absence of *de facto* government control over its export activities. To demonstrate independence from government control and qualify for a separate rate, exporters must affirmatively demonstrate both the *de jure* and *de facto* absence of governmental control over their export activities.[135] Commerce typically considers four factors in evaluating whether a respondent is subject to *de facto* governmental control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[136]

We determined in the prior review that GTC had failed to demonstrate the absence of *de facto* government control over its export activities.[137] Our determination was based on several factors.

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turn "beholden to the board that controls their pay, in particular to the chairman of the board as the *de facto* company head under the China model.")).

[128] *Id.* at 13 (citing GTC's Case Brief at 46).

[129] *Id.* (citing Final Results of Redetermination Pursuant to Court Remand in *Diamond Sawblades Manufacturers' Coalition v. United States*, Court No. 13-00078; Slip Op. 14-50 (CIT 2015) (April 10, 2015) (Diamond Sawblades Remand) at 10)).

[130] *Id.* at 14 (citing *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 78778, 78783 (November 9, 2016) (listing the ten companies that the instant review was initiated upon and not listing the China-wide entity).

[131] *Id.* at 14.

[132] *Id.* (citing *Watanabe Grp. v. United States*, 34 CIT 1545, 1551 (2010); *see also Jiangsu Changbao* (Commerce's NME practice implies that "…any inquiry into individual pricing behavior is essentially meaningless absent extraordinary circumstances. It also implies that if the record contains no evidence of such extraordinary circumstances…then it is reasonable to assume, without evidence, that no further inquiry into individual pricing behavior is necessary").

[133] *Id.*

[134] *Id.*

[135] *See Silicon Carbide* at 22586-87.

[136] *See* Policy Bulletin 05.1.

[137] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 18833 (April 21, 2017) (*OTR Tires AR 14-15*), and accompanying Issues and Decision Memorandum at 13.

First, we determined that a state-owned enterprise, GIIG, was the largest and controlling shareholder of GTC with a 25.20 percent share of the company.[138]

Second, record evidence demonstrated that GIIG circumvented an inclusive board election process to elect members of GTC's board through a shareholder's meeting that was not available to all shareholders.[139] Because we found that there was no "practical difference" between the shareholder elections and GIIG "directly appointing board members by direct decree," we determined that "GIIG appointed a majority of the members of GTC's board of directors as evidence in the voting record for the shareholder meetings."[140] We also determined that the voting records demonstrated that GIIG "controlled profit distribution during the POR." Because GTC is the sole owner of its affiliated exporter, GTCIE, we found that GIIG also selected the management and controlled the profit distribution for GTCIE.

Third, although GTC also asserted during the prior review that its Articles of Association (AoA) insulated it from government interference through its proscribed nomination process for its board of directions and senior management, we found that GTC's AoA, in fact, allowed GIIG to influence the board nomination process, and that the safeguards that appeared to be in place to prevent undue influence did were unsuccessful in stopping GIIG from exercising its influence.

In the *Preliminary Results* of this review, we determined, and record evidence supports, that GTC failed to present any new information regarding the company's policies or revisions to its AoA from the prior review.[141] In fact, GTC noted that GIIC had *increased* its ownership of shares to 25.33 percent, while the next nine largest shareholders *decreased* ownership to a combined 4.7 percent, further consolidating Guiyang SASAC's position as the controlling party.[142] As a result of the dilution of other shareholders holdings, only GTC currently maintains the ability to put items on the agenda for discussion at shareholders' meetings. Consequently, GIIG's ability to exert *de facto* control over the management and operational decisions of GTC has been strengthened through the dilution of shares by other shareholders during this POR in relation to the prior POR. Therefore, Commerce continues to find that the *de facto* control over GTCIE's selection of management through GIIG and GTC, and GTCIE's profit distribution, is indicative of being a state-controlled entity and precludes GTC from eligibility for a separate rate.

GTC makes several arguments that misconstrue Commerce's standard and are not relevant to Commerce's decision-making processes. For example, GTC claims that Commerce "must analyze *de jure* control and thereby inform its *de facto* analysis of control over GTC's export activities," which is unsupported by citations to prior determinations or evidence.

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[138] *Id.* at 13.
[139] *Id.* at 14.
[140] *Id.* at 14.
[141] *See Preliminary Determination* at 4 (citing *OTR Tires China AR 14-15* and accompanying Issues and Decision Memorandum at Comment 1.B, pages 14-15 (citations omitted)).
[142] *See* GTC's letter, "GTC's First Supplemental Section A Response Certain New Pneumatic Off-the-Road Tires from China," dated June 16, 2017, at Exhibit 3.

Since the *Preliminary Results*, GTC has, therefore, cited no evidence nor put forth novel argument on this issue not previously considered that would require Commerce to reconsider its preliminary finding of *de facto* government control. For a more detailed analysis of Commerce's separate rate determination for GTC, *see* Commerce's Preliminary Separate Rate Memorandum, which we incorporate here by reference.[143]

D. WTO Obligations

GTC argues:

- Two separate World Trade Organization (WTO) panels have addressed the propriety of Commerce's policy of adopting a presumption that all exporters in an NME country are controlled by the government, and, in each instance, the WTO panel determined that Commerce's policy to be WTO inconsistent.[144]
    - Specifically, the WTO Panel's conclusion in DS471 agreed with China's "as such" argument, and thus, the DS471 conclusion applies to all instances in which Commerce applies this practice. As a result, the U.S. antidumping measures being currently imposed against imports from China have been found to be deeply flawed and inconsistent with U.S. international obligations.[145]

No other party provided comments on this issue.

Commerce's Position: Findings of WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).[146] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of Commerce's discretion in applying the statute.[147] Moreover, as part of the URAA process, Congress has provided a procedure through which we may change a regulation or practice in response to WTO reports, but we have not so far employed this procedure in response to the

[143] *See* memorandum, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Separate Rate Determination for GTC," dated October 2, 2017 (Preliminary Separate Rate Memorandum).

[144] *See* GTC's Case Brief at 45 (citing *United States - Anti-Dumping Measures on Certain Shrimp from Vietnam, Panel Report* (DS 429) (November 2014) (the U.S. practice of applying a presumption that all exporters in an NME country belong to single NME-wide entity was "as such" inconsistent with the WTO Antidumping Agreement) and *United States - Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China, Panel Report* (DS 471) (October 2016) (the U.S practice of presuming government control over exporters from NME countries and treatment of NME exporters as part of a single NME wide entity was "as such" inconsistent with the WTO Antidumping Agreement)).

[145] *Id.* at 45.

[146] *See Corus Staal BV v. United States*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007); and *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007).

[147] *See* 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

WTO reports issued in 2014 and 2016[148] on this issue.[149] As such, the WTO reports cited by GTC are currently without effect under U.S. law.

E. A New China-Wide Rate Applicable to GTC

GTC argues:

- As Commerce has done in the past, it should calculate a dumping margin using GTC-specific data and calculate a new China-wide rate based on GTC-specific rate to reflect the fact that GTC is a determined portion of the China-wide entity.[150]

The petitioners rebut:

- GTC argues, citing *Diamond Sawblades 2017*, that even if it has not failed to rebut the presumption of control, Commerce is still required to calculate a new China-wide entity rate for GTC in this review, claiming that *Diamond Sawblades 2017* stands for the principle that Commerce must recalculate the China-wide entity rate to be "'as accurate and current as possible.'" However, *Diamond Sawblades 2017* was an unusual situation and under Commerce's standard practice, as noted in the Diamond Sawblades Remand, beginning with reviews where the notice of opportunity was published after December 4, 2013, Commerce has stopped the practice of reviewing the China wide-rate with each review.[151]
- Commerce did not initiate a review of the China-wide entity for this POR;[152] therefore, Commerce's stated practice is to make no change to the China-wide entity rate.

Commerce's Position: It is Commerce's practice to review the China-wide entity only when requested.[153] In the Diamond Sawblades Remand, Commerce noted that the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[154] Because no parties requested a review of the China-wide, the entity is not under review and the entity's rate is not subject to change. Accordingly, Commerce will not calculate a new China-wide rate in this administrative review.

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[148] *See United States – Antidumping Measures on Certain Shrimp from Vietnam* (DS 429) (November 2014) and *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China* (DS 471) (October 2016).
[149] *See* 19 USC 3533(g); *see also* H*ydrofluorocarbon 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), and accompanying Issues and Decision Memorandum at Comment 9.
[150] *See* GTC's Case Brief at 46 (citing *Diamond Sawblades 2017*, 866 F.3d at 1315); *see also OTR Tires 2012-2013*.
[151] *See* Petitioners' Rebuttal Brief at 13 (citing Diamond Sawblades Remand at 10).
[152] *Id.* at 14.
[153] *See Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).
[154] *See* Diamond Sawblades Remand at 10.

F. Adjustments for Domestic and Export Subsidies Found in the Parallel CVD Review

GTC argues:

- Congress made clear that any CVD imposed must not double count an AD margin already imposed.[155] If a domestic subsidy has reduced the average price of imports and, thus, led to a dumping margin, Commerce must adjust the dumping margin accordingly.[156]
- In the parallel CVD review, Commerce preliminarily determined that GTC benefited from several subsidies provided by the Government of China.[157] In this AD review, GTC provided the information necessary to demonstrate that: (1) a countervailable subsidy(ies) (other than an export subsidy) has been provided to subject merchandise; (2) such countervailable subsidy has reduced the average price of subject merchandise imports during the relevant period; and (3) the extent to which such countervailable subsidy, in combination with the use of normal value, has increased the weighted-average dumping margin for subject merchandise can be reasonably estimated.[158] Therefore, even if Commerce continues to find GTC to be part of the China-wide entity, it must apply the double remedy adjustment to the margin for GTC, as required by section 777A(f) of the Act, as it has consistently applied the double remedy adjustment to the China-wide rate in other proceedings.[159]
- In accordance with section 772(c)(1)(C) of the Act, Commerce must also adjust GTC's AD cash deposit rate by the amount of export subsidy found in the parallel CVD administrative review for GTC.[160]

The petitioners rebut:

- Commerce's established practice is to use the subsidy rates from the last completed segment of the CVD order, rather than rates from the concurrent CVD review.[161]

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[155] *See* GTC's Case Brief at 47.

[156] *Id.* (citing section 707 of the Act).

[157] *Id.* (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2015*, 82 FR 46754 (October 6, 2017) (*2015 CVD Preliminary Determination*)).

[158] *Id.* (citing GTC's letter, "GTC's Double Remedy Questionnaire Response: Certain New Pneumatic Off-the-Road Tires from China," dated February 28, 2017).

[159] *Id.* at 48 (citing, *e.g.*, *PVLT China* and accompanying memorandum "Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Double Remedies Final Calculation Memorandum," at 3. *See also, Truck and Bus Tires from the People's Republic of China: Amended Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 71051, October 14, 2016, and accompanying memorandum, "Truck and Bus Tires from the People's Republic of China: Post-Preliminary Double Remedy Memorandum," dated October 13, 2016 at 2), sustained in final, *Truck and Bus Tires.* We note, however, that the memoranda cited are illustrative and ripe for consideration in this case only to the extent that they are available on the underlying record.

[160] *Id.*

[161] *See* Petitioners' Rebuttal Brief at 14 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 40998 (July 14, 2015) (*Solar Cells*), and accompanying Issues and Decision Memorandum (Solar Cells IDM) at Comment 28, stating "Commerce's practice is to rely on the export subsidy rates found in the most recently completed segment of the companion CVD proceeding (*i.e.*, the most recently published CVD final determination or final results of administrative review) rather than the concurrent CVD segment.")).

- Rather, when the China-wide entity receives a total AFA rate, Commerce's practice is to apply adjustments based on the "lowest export subsidy rate determined for any party" and "the lowest estimated domestic subsidy pass-through determined for any party."[162] In the 2013-2014 and the 2014-2015 reviews of this order, Commerce determined a zero domestic subsidy pass-through for a respondent, because that respondent had failed to submit any information showing that it passed through any domestic subsidies.[163]
- Because the lowest domestic subsidy pass-through determined for any party under this order has been zero, Commerce should make no adjustment to the China-wide entity rate for domestic subsidy pass-through.[164]

Commerce's Position: We disagree with GTC that adjustments for domestic and export subsidies found in the parallel CVD review are appropriate. Commerce's practice of adjusting domestic and export subsidies in administrative reviews is to adjust the respondent's U.S. price,[165] in contrast to its practice in less-than-fair-value investigations, which is to make the adjustments to a respondent's cash deposit rate. In this review, as explained above, Commerce continues to find GTC to be ineligible for a separate rate for purposes of these final results and, thus, is treating GTC as part of the China-wide entity. However, because the China-wide entity is not under review, and the China-wide rate currently in effect is not subject to change, no adjustments for domestic and export subsidies are appropriate.

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[162] *Id.* at 15 (citing *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value; Preliminary Affirmative Determination of Critical Circumstances; In Part and Postponement of Final Determination,* 80 FR 4250 (January 27, 2015) (*PVLT Prelim*), and accompanying Preliminary Decision Memorandum at 35 (PVLT PDM) (sustained in final).

[163] *Id.* (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61166 (October 9, 2015) (*OTR 2013-2014 Prelim*) and accompanying Preliminary Decision Memorandum at 37 (referencing Xugong), unchanged in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272 (April 20, 2016) (*OTR Tires AR 13-14*); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 71068 (October 14, 2016) and accompanying Preliminary Decision Memorandum at 30 ("In order to examine the effects of concurrent countervailable subsidies in calculating antidumping margins for respondents in this review, Commerce provided Xugong with an opportunity submit information with respect to subsidies relevant to their eligibility for an adjustment to the calculated weighted-average dumping margin. However, Xugong did not submit a response to this questionnaire; therefore, no adjustments based on countervailable subsidies will be made."), unchanged in *OTR Tires AR 14-15*).

[164] *Id.* at 15.

[165] *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 11690 (March 16, 2018) and accompanying Issues and Decision Memorandum at Comment 3 ("Consistent with its established practice, Commerce has increased U.S. price by the applicable export subsidy and double-remedy adjustment for these final results."); *Antidumping Duty Investigation of Stainless Steel Sheet and Strip From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 9716, 9718 (February 8, 2017) ("Unlike in administrative reviews, the Department makes an adjustment for export subsidies in investigations not in the margin-calculation program, but to the cash-deposit rate.").

Comment 3: Surrogate Value for Mixed Rubber

Zhongwei argues:

- The surrogate value (SV) that Commerce used in the *Preliminary Results* to value mixed rubber inputs, *i.e.*, price data for imports of mixed rubber into Thailand under Harmonized Tariff Schedule (HTS) category 400280 (mixtures of natural rubber or natural gums with synthetic rubber), is aberrational and not in accordance with law.[166]
- In selecting SVs, Commerce prefers to use data that reflects a broad market average value, is publicly available, is contemporaneous with the review period, is specific to the input in question, and is exclusive of export taxes.[167] The SV information submitted by Zhongwei on September 5, 2017, demonstrates that the Thai import prices for mixed rubber do not meet this standard.[168]
    - Specifically, the Thai import price of $9.15 per kilogram (kg) for mixed rubber was based on an import quantity of only 1,825 kg from two countries, Japan and Malaysia.[169] In the same time period, Thailand exported 193,437,533 kg at a price of $1.29 per kg, which is similar to the worldwide average import price.[170] Thus, the per-unit value of mixed rubber exported from Thailand is only 14.05 percent of the weighted-average import value of mixed rubber into Thailand.[171]
- Therefore, the Thai import values are aberrational and unreliable.[172] The CIT supports this analysis in *Baoding Mantong Fine Chemistry*, where the Court instructed Commerce to reconsider its choice of an aberrational SV on remand.[173]
- Commerce also attempts to avoid using prices that are derived from import quantities in less than commercial quantities when there are alternative choices.[174] Commerce should determine that the imports of mixed rubber into Thailand were not made in commercial quantities, because these imports consist of only two shipments, one of 25 kg from Malaysia, and the other of 1800 kg from Japan.[175]
- Commerce should, instead, use mixed rubber imports into Bulgaria, Mexico or Romania, or use a weighted-average value of imports to the three companies.[176]

[166] *See* Zhongwei's Case Brief at 5.
[167] *Id.* at 3 (citing *Fuwei Films (Shandong) Co., Ltd. v. United States*, 837 F.Supp.2d 1347, and, *OTR Final AD Investigation* and accompanying Issues and Decision Memorandum at Comment 10).
[168] *Id.* at 3 (citing letter from Zhongwei, "Submission of Surrogate Values - Off-the-Road Tires from the People s Republic of China" dated September 5, 2017 (Zhongwei's September 5, 2017, SV Submission) at Exhibit SV-3b.
[169] *Id.*
[170] *Id.* at 4.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 4 (citing *Baoding Mantong Fine Chemistry Co., Ltd. v. United States*, 222 F.Supp.3d 1231, 1253 (CIT 2017) (*Baoding Mantong*)).
[174] *Id.* (citing *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (September 24, 2008), and accompanying Issues and Decision Memorandum at pages 2-3.
[175] *Id.* at 4.
[176] *Id.* at 5.

The petitioners rebut:

- If Commerce chooses not to use the Thai import values, Commerce should use the POR import values for Romania. Out of the five countries Commerce determined to be economically comparable to China, Romania had the largest import volume and, therefore, would represent the "broadest market average."[177]

Commerce's Position: For the *Preliminary Results*, Commerce used Thai import prices for merchandise classified under HTS 400280 as a surrogate value for Zhongwei's mixed rubber inputs. Zhongwei argues that this SV is aberrational, because it is representative of an import quantity of only 1,825 kg from just two countries and is, thus, unrepresentative of a broad market average and not corroborated by the price of the substantial quantity of Thai exports during the same period. Zhongwei recommends that imports to either Bulgaria, Mexico or Romania are a more appropriate SV, or in the alternative, that Commerce could use a weighted-average value of the three, because the import volumes are much larger.

When determining whether prices are aberrational, Commerce has found that the existence of high or low prices alone does not necessarily indicate that the prices are distorted or misrepresentative, and thus, it is not a sufficient basis upon which to exclude a particular SV.[178] Rather, it is our practice to require interested parties to provide specific evidence demonstrating that the value is aberrational. In considering the reliability of SVs based on import statistics and alleged to be aberrational, Commerce's practice is to examine GTA import data from the same HTS number for: (a) the same surrogate country over multiple years to determine if the current data appear aberrational compared to historical values; or (b) POR-specific data for other potential surrogate countries for a given case.[179] In order to evaluate whether a value is aberrational or unreliable because it significantly deviates from the norm, it is necessary to have multiple points of comparison.[180] In *Xanthan Gum*, Commerce stated that "having only two values to compare could result in finding either the higher value aberrational in comparison to the lower value or the lower value aberrational in comparison to the higher value."[181]

The record shows GTA data for mixed rubber imports in the equivalent HTS category for six countries, Bulgaria, Mexico, Romania, Thailand, South Africa and Brazil.[182] Of the six countries, three – Romania, Bulgaria and Mexico – have both higher quantities of imports than the Thai GTA data, and lower average prices. However, both South Africa and Brazil have

[177] *See* Petitioners' Case Brief at 18.
[178] *See, e.g., Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2012-2013*, 80 FR 13332 (March 13, 2015) and accompanying Issues and Decision Memorandum at Comment 5.
[179] *See Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) and accompanying IDM at Comment 6.
[180] *See, e.g., Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011) (*Wood Flooring*) and accompanying Issues and Decisions Memorandum at Comment 14.
[181] *See Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (*Xanthan Gum*) and accompanying Issues and Decisions Memorandum at Comment 16.A.
[182] *See* Zhongwei's September 5, 2017, SV Submission at Exhibit SV-3a.

lower quantities of imports than the Thai data, and higher prices.[183] This fact pattern contrasts with that in *Baoding Mantong,* which Zhongwei cites for the purposes of comparison, where the Court determined that average unit value (AUV) of Indonesian import data that was no lower than 5 times and as much as 23 times higher than the other comparative countries constituted an aberrational value.[184] In this case, the price of mixed rubber imports into Thailand is twice Romania's price for mixed rubber imports, but nearly equivalent to the price for South Africa, and one third the price of Brazil's imports.[185] Thus, Thailand's import price is not an outlier in the range of prices on the record. Additionally, Thailand's quantity of imports is also greater than South Africa's and on a par with Brazil.[186]

Zhongwei further argues that mixed rubber imports to Thailand are aberrational because the source data from the two countries do not represent a broad market average. However, the record demonstrates that the price data from other potential surrogates, including sources suggested for use in the alternative, are comprised of price data from a similar number of source countries: *i.e.*, price data from Mexico is composed of import data from only two countries, South Africa from three countries, Bulgaria from four countries, Romania from four countries, and Brazil from only one country.[187] Further, Zhongwei cites to no precedent demonstrating that the availability of data from only two countries within an SV has been a basis used by Commerce in finding that a potential surrogate value is not representative of a broad market average. Indeed, Commerce regularly uses SV data composed of import price data from a limited number of countries where such data otherwise represent the best available information on the record sourced from the primary surrogate country.

Commerce has not affirmatively determined that the pricing, quantity, or broad market average of the Thai data are aberrational, nor that alternative information suggested by Zhongwei (or the petitioners) represents a more-specific or otherwise superior source from which to value the input in question, such that Commerce should set aside its preference for data from a single surrogate country. Because it is Commerce's preference to use data from a single country, and Thailand is also the surrogate country in this review, Commerce continues to find that Thailand mixed rubber is an appropriate SV and will continue to use it for the final margin calculation.

Comment 4: Overhead and SG&A ratios used to calculate Zhongwei's margin

Zhongwei argues:

- Commerce should revise its margin calculation program for the final determination using the simple average of the overhead and SG&A ratios derived from the 2014 financial statements of S.R. Tyres and Hwa Fong.[188] The values recorded on the Master Surrogate Value Summary Sheet are different from those in the SV Memorandum and used in the preliminary

[183] *Id*.
[184] *See Baoding Mantong* at 1326.
[185] *See* Zhongwei's September 5, 2017, SV Submission at Exhibit SV-3a.
[186] *Id*.
[187] *Id*.
[188] *See* Zhongwei's Case Brief at 2.

calculations, which reflects a mathematical error.[189] Therefore, Commerce should correct its calculations for the final results.[190]

The petitioners rebut:

- Commerce should use the same ratios it has calculated from this financial statement in the last two reviews and should only correct its worksheet for S.R. Tyres to comport with the figures reported in its financial statements.[191]
- The source of the error is Commerce's unexplained and unsupported change to its treatment of certain line items (*e.g.*, salary and bonus, fund contributions, social security premium, and welfare fees) in S.R. Tyres' reported costs.[192] These line items are treated in Commerce's workbook as production labor costs rather than SG&A expenses, despite being specifically listed as selling and administrative expenses in S.R. Tyres' financial statements.[193] S.R. Tyres explicitly lists direct labor costs separately, under cost of production.[194]
- Reclassifying these costs as production labor, rather than SG&A, is contrary to the way that Commerce treated the same line items in the same 2014 financial statements in the last two reviews of this order.[195] Commerce should, instead, continue to use the same ratios it has calculated from these financial statements in the last two reviews and should revise its worksheet for S.R. Tyres in this review to comport with the figures reported in the financial statements.[196]

Commerce's Position: For the *Preliminary Results*, Commerce inadvertently treated the line items for salary and bonuses, fund contributions, social security premiums, and welfare fees in S.R. Tyres' financial statements as production labor costs, rather than SG&A expenses.[197] After reviewing S.R. Tyres' financial statements, Commerce agrees with the petitioners that those line items should be treated as SG&A expenses, rather than production labor costs. Consequently, we will revise them for the final determination to be consistent with what is on the record.[198] By

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[189] *Id.* (citing memorandum, "2015-2016 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results Surrogate Value Memorandum," dated October 2, 2017 (Preliminary SV Memorandum)).
[190] *Id.*
[191] *See* Petitioners' Rebuttal Brief at 17
[192] *See* Petitioners' Rebuttal Brief at 16 (citing Preliminary Results Surrogate Value Memorandum dated October 2, 2017, Attachment 1 (Master Surrogate Value Summary Sheet), "S.R. Tyres" tab (lines 49-51 and 63) (*Preliminary SV Memo*)).
[193] *Id.* (citing S.R. Tyres Co., Ltd. Audited 2014 Financial Statement at 10, included in Attachment 15 to the petitioners' letter, "Administrative Review of the Antidumping Duty Order on New Pneumatic Off-the-Road Tires from China (A–570–912): Petitioners' First Surrogate Value Submission," dated April 20, 2017.
[194] *Id.* (citing *Id.* at 9).
[195] *Id.* at 17.
[196] *Id.* at 17-18.
[197] *See* memorandum, "2015-2016 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Analysis of the Preliminary Results Margin," dated October 2, 2017 (Zhongwei Preliminary Analysis Memorandum).
[198] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014–2015*, 27 FR 27224 (June 14, 2017) and accompanying memorandum, "Analysis for the Amended Final Results of 2014-2015 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated June 9, 2017.

classifying the above line items as SG&A expenses, we have revised the ratios for overhead and SG&A to reflect their treatment in previous reviews and to correct the mathematical error that Zhongwei identified.[199]

Comment 5: CVD Rates Used to Calculate Double-Remedies Adjustment for Zhongwei

The petitioners argue:

- Commerce should correct the CVD rates used to calculate Zhongwei's double remedies adjustment to make it consistent with its practice and statements.[200]
- The way that Commerce made the adjustment in the *Preliminary Results* does not reflect Commerce's statement in either the Preliminary Decision Memorandum or the Zhongwei Preliminary Analysis Memorandum.[201] Commerce should recalculate the double remedies adjustment it applied to Zhongwei to be consistent with its explanation and practice.[202]
- In the Zhongwei Preliminary Analysis Memorandum, Commerce stated that it relied on the countervailing less than adequate remuneration (LTAR) subsidy rates determined for 'all-others' in the most recently completed segment of this order, which was the investigation. However, Commerce then referenced the final determination in the 2014 administrative CVD review of the OTR Tires from China in a footnote.[203]
- Because Zhongwei was not subject to the 2014 review, Commerce should use the rates from the investigation to make its double remedies adjustment.[204]
- The only CVD rate from the investigation relevant to Commerce's adjustment in this review was the all-others rate for the provision of rubber at less than adequate remuneration; which was 0.08 percent.[205]

Zhongwei rebuts:

- The double remedies adjustment used by Commerce is supported by the record evidence and is otherwise in accordance with law.[206] Specifically, as noted in the Issues and Decision Memorandum for the 2013-2014 review, Zhongwei responded to the double remedies questionnaire in which it identified eight potential programs for adjustment. From those, Commerce confirmed and verified that LTAR programs for natural rubber, nylon cord, and carbon black impacted Zhongwei's cost of manufacturing thus establishing a subsidies-to-cost linkage for those programs.[207]

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[199] *See* memorandum, "2015-16 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Analysis of the Final Results Margin Calculation for Weihai Zhongwei Rubber Co., Ltd.," dated concurrently with this memorandum.
[200] *See* Petitioners' Case Brief at 5.
[201] *Id.* at 5-6.
[202] *Id.*
[203] *Id.* at 6.
[204] *Id.* at 7.
[205] *Id.* (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 FR 40480 (July 15, 2008) (*OTR Tires CVD Investigation*) and accompanying Issues and Decision Memorandum at 12 (the simple average of a 0.17 percent, a 0.08 percent and a 0.00 percent rate for the three mandatory respondents).
[206] *See* Zhongwei's Rebuttal Brief at 4-7.
[207] *Id.* at 5 (citing *OTR Tires AR 13-14* and accompanying Issues and Decision Memorandum at 29-30; *see also* memorandum, "2015-2016 Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-

- Commerce is not bound to apply the rates from the original investigation for Zhongwei's double remedy adjustments, particularly when they are not contemporaneous with information under current review.[208]
- While each segment of the proceeding has its own set of unique facts and covers different transactions, Commerce is not precluded from exercising its discretion to use the results of a specific segment which best corroborates the data in the segment under immediate review.[209] The Federal Circuit has instructed that "{t}o corroborate secondary information, Commerce must find the information has 'probative value,' by demonstrating the rate is both reliable and relevant."[210] In other words, "Commerce must select secondary information that has some grounding in commercial reality."[211]
- The results of the 2014 review have a particular relationship with the entries suspended under the current review as they most closely resemble the current commercial reality of China's OTR industry and serve as reliable guideposts for calculating Zhongwei's double remedy adjustments.[212] Hence, the last completed CVD segment that is relevant to Zhongwei is, in fact, the 2014 review, not the investigation.[213] The CVD rates calculated in that segment are the most contemporaneous and representative of the adjustments applicable to Zhongwei.[214]
- In CVD proceedings, just as in AD proceedings, mandatory respondents serve as proxies for the companies not individually examined.[215] Thus, the most recent CVD rates from the 2014 review calculated for the mandatory respondents are the most probative of the current conditions of China's OTR industry and companies examined in the 2015-2016 review.[216]
- The SAA confirms that Commerce's respondent selection methodology is "designed to give representative results based on the facts known at the time the sampling method is designed."[217] Commerce should not elect to ignore current economic reality and give primacy to outdated circumstances from the original investigation over the instructive results from the most recent annual review.[218]

Commerce's Position: For the *Preliminary Results*, Commerce stated in both the Preliminary Decision Memorandum and in the Zhongwei Preliminary Analysis Memorandum, that, in order to calculate the extent of the Zhongwei's domestic subsidy pass-through, we relied on the

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the-Road Tires from the People's Republic of China: Verification of the Sales and Factors Response of Weihai Zhongwei Rubber Co., Ltd.," dated October 2, 2017 (Zhongwei's Verification Report) at 18-19.

[208] *Id.* at 6.

[209] *Id.*

[210] *Id.* (citing A*d Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015) (quoting *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010)).

[211] *Id.* (citing *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, at 1324).

[212] *Id.* at 6.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 6-7.

[216] *Id.* at 7.

[217] *Id.* (citing 19 USC 3512(d) and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. I 03-316, vol. I, 827, reprinted in 1994 U.S.C.C.A.N. 3773, 4172) (SAA). (The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and {the Uruguay Round Agreements Act} in any judicial proceeding in which a question arises concerning such interpretation or application.")).

[218] *Id.* at 7.

countervailing LTAR subsidy rates determined for all-others in the most recently completed segment of this order, which was the investigation.[219] However, in a footnote to that statement, Commerce referenced the 2014 CVD administrative review, in which Zhongwei was not subject to the review.[220] The calculations used in the preliminary margin program were also based on the 2014 CVD review, in which Commerce made an adjustment for nylon cord, carbon black and natural rubber.[221] Since Zhongwei was not one of the 47 specifically named companies subject to the 2014 review, and since Commerce specifically stated that, for all non-reviewed firms, "the most-recent company-specific or all-others rate would remain in effect,"[222] Commerce erred in using the 2014 CVD administrative review as a basis for Zhongwei's double remedy adjustment for the *Preliminary Results.* As the most recent corresponding CVD segment of this proceeding to which Zhongwei was subject is indeed the investigation, the CVD rate currently applicable to Zhongwei is the all-others rate from the investigation.

It is Commerce's practice to apply double remedies adjustments based on the most recently completed CVD determination in which the individual company under consideration was under review. For example, in the 2013-14 review of this order, Commerce applied a double remedies adjustment for the respondent Qihang, stating that "{s}ince the all others rate for the CVD companies is based upon the parallel CVD investigation, Commerce's finding in that investigation is pertinent."[223] Commerce did not look at more recently completed segments of the CVD proceeding, because they were not applicable to Qihang.[224] Because Zhongwei had not been subject to review in any segment of the parallel CVD case since the investigation, as with Qihang in the prior segment, the applicable double remedies pass through adjustment should be based on rates determined in the investigation.[225] As a result, Commerce will make a double remedies adjustment only for the LTAR finding on rubber, as calculated in the investigation, as opposed to the LTAR's for natural rubber, nylon cord and carbon black, which were determined in the 2014 CVD annual review and mistakenly relied upon for purposes of a double remedy adjustment in the *Preliminary Results*.[226]

[219] *See* Preliminary Decision Memorandum and Zhongwei Preliminary Analysis Memorandum**.**
[220] *See* Zhongwei Preliminary Analysis Memorandum.
[221] *Id*.
[222] *Id*.
[223] *See OTR Tires AR 13-14* and accompanying Issues and Decision Memorandum at Comment 2.
[224] *Id*. Commerce applies the same practice (looking to the last completed CVD segment relevant to the respondent is question) in applying export subsidy adjustments as well. *See, e.g.*, *Aluminum Extrusions from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 32347 (June 8, 2015) and accompanying Preliminary Decision Memorandum at 35 (Commerce stated that it was basing its double remedies adjustment for the separate rate companies that were not individually reviewed on the rates from the second CVD review of that order "since all of these companies participated in the second CVD administrative review."), unchanged in *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 80 FR 75060 (December 1, 2015).
[225] *See OTR Tires CVD Investigation***.**
[226] *See* Preliminary Decision Memorandum.

Comment 6: Irrecoverable Value-Added Tax (VAT) rate for Zhongwei

The petitioners argue:

- Commerce should not use Zhongwei's reported VAT adjustment, which Zhongwei calculated based on refund rates adjusted by a "planned distribution ratio" from its bonded inputs.[227] Rather, Commerce should apply its standard irrecoverable VAT adjustment (*i.e.*, standard VAT rate minus the export rate), since Zhongwei's calculations were not specific to the subject merchandise.[228]
- Commerce's practice of rejecting such non-product specific adjustments is based on 19 CFR 351.401(c), which requires Commerce to apply price adjustments that are "reasonably attributable to the subject merchandise."[229]
- In the recent *Truck and Bus Tires* investigation, Commerce "did not take into consideration the allocation ratio under the bonded warehousing scheme {the respondent} used in its calculation of the reported VAT deduction amount."[230]
- Commerce has rejected non-product specific bonded warehouse adjustments in multiple other recent determinations.[231]
- Accepting Zhongwei's adjusted irrecoverable VAT calculations would allow Zhongwei to make adjustments to its U.S. prices that are not reasonably attributable to the subject merchandise, contrary to Commerce's regulations and its established practice.[232]

[227] *Id.* at 2 (citing Zhongwei's Verification Report at 17-18).
[228] *Id.*
[229] *Id.* at 3.
[230] *Id.* (citing Truck and Bus Tires IDM at Comment 13).
[231] *Id.* at 4 (citing PVLT IDM at Comment 34 (rejecting the bonded warehouse adjustment because "record evidence does not support the contention that all of the bonded materials that were exempted from input VAT were actually used in the production of subject merchandise" and "neither respondent could demonstrate that the materials entered under bonded warehouse, or the 'bonded ratio,' was calculated for subject merchandise only.")); *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 81 FR 56584 (August 22, 2016) and accompanying Preliminary Decision Memorandum at 25-26 (rejecting a bonded warehouse adjustment where the respondent did not show "what portion of the inputs at issue is consumed in the production of subject merchandise exported to the United States"), unchanged in the final determination, *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 82 FR 3284 (January 11, 2017); *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 FR 32087 (June 5, 2015) and accompanying Issues and Decision Memorandum at Comment 1 (rejecting a bonded warehouse adjustment where the respondent was "unable to sufficiently demonstrate that only raw materials imported under bond were used in the production of subject merchandise"). In cases where Commerce has accepted a bonded warehouse adjustment to the irrecoverable VAT rate, it has been because the respondent has placed evidence on the record that tied the bonded warehouse rate specifically to the subject merchandise. *See Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013– 2014*, 81 FR 39893 (June 20, 2016) and accompanying Issues and Decision Memorandum at Comment 5 (accepting a bonded warehouse adjustment where evidence on the recorded showed that the respondent's "U.S. sales were produced exclusively from VAT-exempt" inputs).
[232] *Id.* at 5.

Zhongwei rebuts:

- Commerce correctly applied Zhongwei's irrecoverable VAT adjustment to U.S. sales.[233] Some of the inputs used to produce the products exported to the United States were imported into China through a bonded warehouse, and such imports are not subject to VAT.[234]
- Pursuant to China's VAT law, Zhongwei's VAT rebate should be adjusted to account for inputs purchased and not charged VAT.[235]
- In its questionnaire responses and during verification, Zhongwei provided worksheets explaining its calculation of the amount reported as irrecoverable VAT in detail.[236]
- The petitioners attempt to support its argument that Zhongwei's calculations were not specific to the subject merchandise, by citing 19 CFR 351.401(c), which requires price adjustments to be "reasonably attributable to the subject merchandise." In this review, however, Commerce determined that Zhongwei's calculations were "reasonably attributable" to the subject merchandise and that there was a linkage between the VAT adjustment and the merchandise.[237]

Commerce's Position: For the *Preliminary Results*, Commerce relied on Zhongwei's calculation for its reported irrecoverable VAT adjustment.[238] For the reasons explained below, we have made no changes to our calculations for the final results, and continue to apply this irrecoverable VAT amount for the final results.

Commerce's current practice in NME cases is to adjust export price (EP) or constructed export price (CEP) for the amount of any unrefunded (herein "irrecoverable") VAT in certain non-market economies, in accordance with section 772(c)(2)(B) of the Act.[239] When an NME government imposes an export tax, duty, or other charge on subject merchandise, or on inputs used to produce subject merchandise, from which the respondent was not exempted, Commerce's practice is to reduce the respondent's EP and CEP prices by the amount of the tax, duty or charge paid, but not rebated.[240] Where the irrecoverable VAT is a fixed percentage of EP or CEP, Commerce explained that the final step in arriving at a tax neutral dumping comparison is to reduce the EP or CEP downward by this same percentage.[241]

According to the Chinese VAT schedule, the standard VAT is 17 percent and the rebate rate for subject merchandise is nine percent.[242] Zhongwei reported that it imported some inputs through

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[233] *See* Zhongwei's Rebuttal Brief at 2-4.
[234] *Id.* at 2.
[235] *See* Zhongwei's Rebuttal Brief at 2 (citing the Preliminary Decision Memorandum at 23).
[236] *Id.* at 3.
[237] *Id.*
[238] *See* Preliminary Decision Memorandum at 23-24.
[239] *See* Methodological Change.
[240] *Id. see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 4875 (January 30, 2014), and accompanying Issues and Decision Memorandum at Comment 5.A.
[241] *Id.*
[242] *See, e.g.*, Zhongwei's letter, "Section C-D Questionnaire Response: New Pneumatic Off-the-Road Tires from the People s Republic of China," dated April 13, 2017 (Zhongwei CDQR) at C-37-42 and Exhibits C-5 to C-12. Though the title of the letter indicates this is the Section A response, Zhongwei had already submitted its Section A response and this was submission was actually its initial Sections C and D response.

a bonded warehouse, and it did not pay VAT on these purchases.[243] During verification and in its questionnaires responses, Zhongwei explained how it calculated the irrecoverable VAT tax for each sale and demonstrated how this reconciled to actual VAT returns.[244]

In the *Preliminary Results*, Commerce concluded, based on record evidence and its verification results, that Zhongwei's "adjustment to the standard rebate rate of nine percent was adequately supported."[245] The petitioners argue that Commerce should reject Zhongwei's VAT adjustment and, instead, apply Commerce's standard irrecoverable VAT adjustment.[246] However, Zhongwei provided detailed evidence that there was a linkage between the VAT adjustment and the merchandise, including the Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Services which lays out the procedure for calculating irrecoverable VAT, as well as official government documents from the taxation authority stating the exempt amounts.[247] Further, Zhongwei's third SCDQR at exhibit SC3-1[248] states that all bonded imported inputs were identified with ratios of bonded imported material to the entire purchase of such raw material, as well as Zhongwei's irrecoverable VAT calculation formula.[249] Commerce verified these submissions, and accepted Zhongwei's alternative irrecoverable VAT calculation.[250]

The petitioners cite to the recent *Truck and Bus Tires* investigation, where Commerce noted that none of the documents the respondent presented to claim its eligibility for bonded warehousing scheme proved that the percentage of the bonded warehousing allocation ratio it used to calculate the reported VAT deduction amount was specific to the subject merchandise only. The petitioners' argument is inapplicable here because, unlike the respondent in *Truck and Bus Tires*, Zhongwei was able to provide worksheets demonstrating how it calculated the amount reported in the U.S. database as VATTAXU,[251] and was able to reconcile this amount to actual VAT returns, accompanied by a detailed narrative explanation that describes the calculations.[252]

Commerce's methodology, as applied in this review, incorporates two basic steps: (1) determine the irrecoverable VAT on subject merchandise; and, (2) reduce the U.S. price by the amount determined in step one. For the purpose of the *Preliminary Results*, we removed the irrecoverable VAT amount reported as VATTAXU from the U.S. price, consistent with Commerce's longstanding policy and the intent of the statute, that dumping comparisons be tax-neutral.[253] Because no new information has been presented to Commerce to reverse its

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[243] *See* Zhongwei CDQR at C-39-42; and Zhongwei's Verification Report.
[244] *Id*.
[245] *See* Zhongwei's Verification Report.
[246] *See* Petitioners' Case Brief at 2.
[247] *See* Zhongwei's Verification Report at Verification Exhibit 18.
[248] *See* Zhongwei's letter, *"*Responses to Supplemental Sections C and D Questionnaires dated August 1, 2 and 3, 2017: New Pneumatic Off-the-Road Tires from the People's Republic of China," dated August 15, 2017. (Zhongwei's SCDQR3).
[249] *Id*.
[250] *Id*.
[251] *See* Zhongwei's SCDQR at Exhibit SC2-1 where VATAXU is reported as the irrecoverable input VAT.
[252] *Id*.
[253] *See Methodological Change*, (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27369 (May 19, 1997); SAA at 827; *see also Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China:*

Preliminary Results, Commerce will continue to accept Zhongwei's reported irrecoverable VAT calculation.

VI. RECOMMENDATION

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

☒	☐
Agree	Disagree

4/11/2018

X

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

Preliminary Results of Antidumping Administrative Review; 2011- 2012, 78 FR 78333 (December 26, 2013) and accompanying Preliminary Decision Memorandum at Issue 9, unchanged in *Final Results Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Administrative Review; 2011- 2012*, 79 FR 37715 (July 2, 2014).