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Investigation
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November 13, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Polyester Textured Yarn from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) finds that polyester textured yarn (yarn) from the People's Republic of China (China) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is April 1, 2018 through September 30, 2018.

After analyzing the comments submitted by interested parties, we have made no changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

II. BACKGROUND

On July 1, 2019, Commerce published in the *Federal Register* its preliminary affirmative determination in the LTFV investigation of yarn from China. We invited parties to comment on the *Preliminary Determination*. On August 7, 2019, STR Importers[2] and Fujian Billion Polymerization Fiber Technology Industrial Co., Ltd. (Fujian Billion)[3] filed case briefs. On August 14, 2019, Nan Ya Plastics Corporation, America and Unifi Manufacturing, Inc. (collectively, the petitioners) filed their rebuttal briefs, responding to STR Importers[4] and Fujian

[1] *See Polyester Textured Yarn from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 84 FR 31297 (July 1, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).
[2] STR Importers are, collectively, Fils Promptex Yarns Inc., Antex Knitting Mills Div. Matchmaster Dye & Finishing, Inc., Chori America Inc., and CS America, Inc. *See* STR Importers' Submission, "Antidumping Case Brief," dated August 7, 2019 (STR Importers Case Brief).
[3] *See* Fujian Billion Submission, "Billion Case Brief," dated August 7, 2019 (Fujian Billion Case Brief).
[4] *See* Petitioners' Submission, "Rebuttal Brief to STR Importers," dated August 14, 2019 (Rebuttal to Importers).

Billion,[5] under separate submissions. Commerce held a public hearing on September 19, 2019, based on timely hearing requests filed by STR Importers and Fujian Billion.

III. DISCUSSION OF THE ISSUES

Comment 1: Separate Rate Status of Fujian Billion Polymerization Fiber Technology Industrial Co., Ltd.

Billion's Case Brief:

- Commerce should reverse its decision that Fujian Billion is owned and controlled by the Chinese government, verify Fujian Billion's questionnaire responses, and calculate a dumping duty margin for Fujian Billion.
- Contrary to the petitioners' assertions:
  - Fujian Billion was fully responsive to Commerce's questions on its corporate structure and provided Billion Industrial Holding Limited (Billion Parent) complete audited financial statements with the auditors' report and all notes, comprising 93 pages, as Commerce requested.[6]
  - Fujian Billion did not omit one page from Billion Parent's audited financial statements, auditors' report and notes or withhold one iota of information from Commerce.
  - Commerce is aware of the distinction between an annual report and audited financial statements.[7] Had it wanted Billion Parent's 2018 full Annual Report, Commerce would have asked for it. Fujian Billion would have included the entire 2018 Annual Report in its response, had it been aware that Commerce wanted, needed, or expected the additional 74 pages.
  - The Court of International Trade (CIT) has found that Commerce is obligated to let a respondent know what information Commerce requires and to make its questions on significant issues sufficiently clear to the respondent. Otherwise this is simply another instance of error which respondents must have an opportunity to correct under section 782 of the Act.[8]
  - The Export-Import Bank of China (ExIm BOC) does not own 14.12 percent of shares in Billion Parent. This allegation has hindered the progress of this investigation. Nowhere does the Directors' Report reveal that ExIm BOC owns 300,000,000 shares of Billion Parent, but rather under the heading "Substantial shareholders' and other persons' interests and short positions in shares and underlying shares," Billion Parent's Directors' Report states that the ExIm BOC is a "Person having a security interest in shares."
  - A security interest is not equivalent to "owning," nor does the holder of a security interest have any ownership rights whatsoever, such as voting rights or rights of control.

[5] *See* Petitioners' Submission, "Rebuttal Brief to Fujian Billion," dated August 14, 2019 (Rebuttal to Fujian Billion).
[6] *See* Fujian Billion Case Brief at 2-3, citing Fujian Billion Supplemental Section A Response, dated March 28, 2019 (SSAQR), at Exhibit 22(3).
[7] The annual report of a publicly traded company includes: information of interest to the shareholders and potential shareholders; information on financial performance; information on the experience of the company during the past year from management and directors point of view; and plans and investments for the future year.
[8] *See* Fujian Billion Case Brief at 10-11, citing *Ta Chen Stainless Steel Pipe v. United States*, 23 CIT 804 at 48 (CIT 1999) (*Ta Chen*); and *Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 628 (CIT 1997) (*Colombian Flowers*) ("alleged response deficiency cannot support application of {best information available} where the information sought was apparently never requested.").

- Commerce incorrectly echoed the petitioners' allegedly incorrect assertion and determined Fujian Billion to be a State-Owned Enterprise (SOE) based on this information. Rather than holding the petitioners accountable for misrepresenting the record and basic corporate law, Commerce has forced Fujian Billion to brief the preliminary determination on the merits instead of moving forward to verification.[9]
- Commerce's determination implies that the company's shareholders held 108.83 percent of shares of the company, a mathematical impossibility for corporate share ownership, which is capped at 100 percent.
- The record evidence shows that "CECEP[10] indeed owns 37.83 percent shares as a beneficial owner in Billion Parent,"[11] but the Ex-Im Bank does not.

- In its ministerial error allegation decision memorandum, Commerce provided no discussion or rationale on how a person having a security interest differs from, or is the same as, a beneficial owner of shares. Fujian Billion showed in its ministerial error allegation that it is mathematically impossible for any person or entity included under a heading other than "beneficial owners" to hold shares with voting and control rights in Billion Parent.[12]
- During the POI, Zeng Wu was only one of eight directors on the board of Billion Industrial Holdings Limited; thus, Zeng Wu had only 1/8 of the voting rights of the board.
  - According to Article 70 and Article 111 of Billion Parent's Articles of Association, the Chairman of the Board does not have more than a single vote in decision-making.[13]
  - Article 111 of Proceedings of the Directors also regulates that questions arising at any meeting shall be determined by a majority of votes and, thus, regardless of whether the majority vote is more than 1/2 or 2/3, in no case can 1/8 be treated as a majority voting right. Article 101 indicates that the business of the Company must be managed and conducted by the Board; business decisions are made by the Board, no matter how much shareholding one member might have. Thus, Zeng Wu, with only a 1/8 voting right on the Board, had very little say, and no control in the decision making of Billion Parent.[14]
- Fujian Billion acted to the best of its ability in this investigation. In the light of the less than 50 percent of the Chinese government's shareholdings, the link from CECEP Chongqing Industry Co., Ltd. (CECEP Chongqing) all the way down to Billion Parent is nowhere near sufficient for a finding of *de jure* or *de facto* control. Therefore, Commerce must reverse its decision that Billion is controlled by the Chinese government.

[9] *See* Fujian Billion Case Brief at 10.
[10] CECEP is the China Energy Conservation and Environmental Protection Group. Commerce notes that Fujian Billion identified CECEP in its Section A Questionnaire Response, dated February 25, 2019 (SAQR), at Exhibit A-5. However, Fujian Billion did not identify CECEP as a SOE anywhere in its submissions. The information identifying CECEP as a SOE was provided by the petitioners. *See* Petitioners' Submission, "Petitioners' Comments on the Section A Questionnaire Response of Fujian Billion Polymerization Fiber Technology Industrial Co. Ltd. and Its Affiliates," dated March 5, 2019 (March 5 Submission), at Attachment 1, containing the printout of CECEP's website: www.cecep.cn/g3659.aspx "About Us"; *see also* Petitioners' Submission, "Petitioners' Comments on Supplemental Section A Response," dated April 3, 2019 (April 3 Submission).
[11] *See* Fujian Billion Case Brief at 10.
[12] *Id.*, citing Memorandum, "Ministerial Error Allegations in the Preliminary Determination," dated July 23, 2019 (Ministerial Error Memo).
[13] *Id*. at 11, citing SSAQR at Exhibit SA-8.
[14] *Id*.

- At a minimum, Commerce should continue its investigation of Fujian Billion through verification of its questionnaire responses--including issues concerning Fujian Billion's ownership and *de jure* and/or *de facto* control of its operations.[15]
  - Commerce will continue an investigation of a respondent, even when it assigns an AFA rate in its *Preliminary Determination*, when the circumstances so demand.
  - Fujian Billion deserves the opportunity to present its data in an on-site verification, where it will be able to trace all its reported data to books and records kept in the ordinary course of business and in accordance with GAAP.
  - If Commerce verifies Fujian Billion and determines to assign an individual dumping margin to the company, the parties should be afforded the opportunity to address surrogate and methodological issues at that time.

Petitioners' Rebuttal Brief:[16]

- Fujian Billion's claim of cooperation is belied by its selective and piecemeal submission of its parent company's annual report.
  - When a public company publishes its financial statements in the context of a complete annual report, material information is normally included in the reports made to shareholders. In a supplemental questionnaire, Commerce specifically (and properly) instructed Fujian Billion to provide a "complete" document, which Fujian Billion failed to do.
  - The context of the full annual report is critical, particularly when material facts are included in the company managers' and directors' reports. This is evident because Fujian Billion, when instructed to submit documentation regarding the role of its non-executive directors, specifically provided only page 52 of Billion Parent's 2018 Annual Report. Thus, Commerce can reasonably conclude that Fujian Billion reviewed and understood the materiality of the omitted managerial, directorship and corporate governance reports contained in the annual report because it extracted, and submitted to Commerce, a single page of the report. Notably, the pages revealing the vertical ownership structure are found at pages 63 and 64.
  - Even without a published report, Fujian Billion has knowledge of the full nature of its ownership structure and the role of SOEs and should have disclosed those facts.
  - Under the *Nippon* standard, Fujian Billion clearly failed to cooperate to the maximum extent of its ability.[17]
- The missing pages of Billion Parent's 2018 Annual Report make clear the national strategic importance of Fujian Billion's operations and the central role played by the ultimate parent

[15] *See* Fujian Billion Case Brief at 11, citing *Firth Rixson Special Steels Ltd. v. United States*, Court No. 02-00273, Slip Op. 03-70 (CIT 2003) (*Rixson*); and *Certain Plastic Decorative Ribbon from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 84 FR 1055 (February 1, 2019) (*Ribbons*), and accompanying Issues and Decision Memorandum (IDM) at Comment 13.

[16] The petitioners' rebuttal to Fujian Billion contains argument at pages 5 through 7 that the petitioners acknowledged at the public hearing does not actually rebut any affirmative arguments in Fujian Billion's case brief. Therefore, Commerce has not summarized or addressed the petitioners' arguments at pages 5 through 7 of their rebuttal brief in this final determination; *see also* Public Hearing Transcript under ACCESS Barcode 3894590-01.

[17] *See* Rebuttal to Fujian Billion at 4, citing *Nippon Steel Corp. v. United States*, 337 F. 3d 1373 (Fed. Cir. 2003) (*Nippon*).

company, CECEP Chongqing, because the missing pages, including the Director's Report, note that CECEP Chongqing was actively involved in the respondent's operations.[18]

- Commerce should reject Fujian Billion's claim that Commerce's SOE ownership calculations are incorrect because the ExIm BOC's status as a beneficial owner of shares cannot be counted as cumulative with the shares held by other persons "having a security interest in" company shares, as cumulating all shareholdings would result in a 108.83 percent.[19]
- Commerce should reject Fujian Billion's argument that Commerce incorrectly determined that Fujian Billion's ministerial error allegation was a methodological issue, not a clerical error.
- Fujian Billion, the owner of this information, and the only party that could have and should have both revealed and explained any material differences between "security interest" and "beneficial" ownership forms, has no legitimate basis to complain that the agency was unable to distinguish technical ownership rights. The burden of creating a complete and accurate administrative record lies with Fujian Billion.[20]
    - Fujian Billion withheld the critical ownership information from its responses. Nevertheless, once the petitioners provided the missing documentation and documented the apparent majority state ownership, Fujian Billion could have rebutted the new factual information (NFI) with clarification or additional documentation[21] to demonstrate why the two ownership stakes at issue allegedly were not mutually exclusive, but Fujian Billion elected not to file rebuttal comments.
    - Instead, Fujian Billion waited for three months until after the petitioners submitted the missing 73 (of 74) pages of Billion Parent's 2018 Annual Report to claim that there was "a 75 % chance" that Commerce's preliminary determination analysis of SOE control over Fujian Billion was flawed.[22]
    - An examination of Fujian Billion's calculations, however, demonstrates that some degree of mutual exclusivity must exist because the removal of the ExIm BOC's 14.12 percent interest leaves an ownership balance of 94.71 percent.[23]
    - Billion's argument that a security interest holder is not a beneficial holder in the company ignores the fact that the claims on the securities held by the ExIm BOC provide it a means of control over the voting "beneficial" owner who relinquished full rights to the

[18] *See* Rebuttal to Fujian Billion at 4, citing April 3 Submission at 12 and Attachment 1 ("Through introducing the strategic partner Hong Kong (Rong An) Investment Limited ('Hong Kong Rong An'), a substantial shareholder of the Company and a wholly-owned subsidiary of CECEP Chongqing, which is in turn a subsidiary of CECEP the largest state-owned enterprise in the PRC specializing in energy saving and environmental protection projects, the relationship between the Group and CECEP has become closer in terms of cooperation opportunities and synergy. Thus, the annual report itself demonstrates the key, and increasingly close relationship between Fujian Billion and CECEP.")

[19] *See* Rebuttal to Fujian Billion at 7.

[20] *Id.*, citing *Ta Chen Stainless Steel Pipe. Inc. v. United States*, 298 F. 3d 1330, 1336 (Fed. Cir. 2002) (respondent "bore the burden of creating an accurate record," citing *Zenith Elecs. Corp. v. United States*, 988 F. 2d 7513,1583 (Fed. Cir. 1993) ("The burden of production {belongs} to the party in possession of the necessary information."); *Alloy Piping Prods. v. United States*, 26 CIT 330, 349-50, 201 F. Supp. 2d 1267,1284 (2002) ("The general rule with regard to a respondent's submission of data to Commerce during the course of an AD investigation or review is that the respondent bears the burden and responsibility of creating an accurate record within the statutory timeline.") (citations omitted), *affd*, 334 F. 3d 1284 (Fed. Cir. 2003).

[21] *See* Rebuttal to Fujian Billion at 8, citing 19 CFR 351.301(c)(l)(v) (providing that a respondent may submit rebuttal new factual information under these circumstances).

[22] *Id.* at 8, citing Fujian Billion Submission, "Ministerial Error Allegation," dated July 1, 2019 (Ministerial Error Allegation), at 5.

[23] *Id.* at 9, citing Fujian Billion Case Brief at Attachment 1.

share ownership precisely because that owner owed a significant obligation to the ExIm BOC.

- Fujian Billion's citations to *Ta Chen* and *Colombian Flowers* to argue that Commerce did not explicitly request the full Annual Report are inapposite.[24] Fujian Billion ignores that Commerce's original questionnaire[25] instructed that Fujian Billion's questionnaire response: (1) provide complete documents; and (2) fully explain and document its ownership structure.
- Commerce should reject the argument that Zeng Wu "had very little say, and no control in the decision making" of Billion Parent because Zeng Wu was only one of eight directors on the board, and the articles of the Association require management by the board.[26] Indeed, the Chairman has particular managerial rights that extend beyond his board voting rights. That is particularly important given that Chairman Zeng Wu held leadership in multiple affiliates, including Chairmanship of CECEP Chongqing and Hong Kong (Rong An) Investment Limited (Rong An).[27]
- Verification of Fujian Billion is not warranted. The cases on which Fujian Billion relies presented technical issues in the respondents' questionnaire responses or unique factual situations.[28] There is no need to take such action where Commerce's requests for information are as straightforward as in this case and the respondent fails to provide that requested information.

Commerce's Position:

Commerce disagrees with Fujian Billion regarding its eligibility for a separate rate in this investigation. For the final determination, we continue to find that an SOE, directly or indirectly, controls, or has the potential to control, Fujian Billion through its ownership of, and relationship with, CECEP Chongqing, Rong An, and Billion Parent. The factors informing Commerce's final determination are based on the information on the record submitted, in part, by the petitioners, and not sufficiently rebutted by Fujian Billion.

Commerce considers China to be a non-market economy (NME) country under section 771(18) of the Act. In antidumping duty (AD) proceedings involving NME countries, such as China, Commerce has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence.[29] Commerce analyzes whether each entity exporting the merchandise under consideration is sufficiently independent under a test established in *Sparklers*[30] and further developed in *Silicon Carbide*.[31] According to this separate rate test, Commerce will assign a separate rate in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export

[24] *Id.* at 9, citing Fujian Billion Case Brief at 10.
[25] *Id*. at 10-11, citing Commerce's NME AD Questionnaire, dated December 11, 2018, at A-14 and A-16.
[26] *Id*. at 10-11, citing Fujian Billion Case Brief at 11.
[27] *Id*. at 11, citing SAQR at 3-7.
[28] *Id*. at 11, citing *Rixson* and *Ribbons*.
[29] *See*, *e.g.*, *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), and accompanying IDM at Comment 1.
[30] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*).
[31] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

activities. In determining *de facto* government control of an enterprise's export functions, Commerce examines: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.[32] Companies which do not demonstrate an absence of both *de jure* and *de facto* government control are assigned the rate established for the China-wide entity, which applies to all imports from any exporter that has not established its eligibility for a separate rate.

The separate-rate test, where the respondent must demonstrate the absence of both *de jure* and *de facto* government control over its export activities, has been subject to litigation in the courts. In *Sigma*, the Court of Appeals for the Federal Circuit (CAFC) affirmed that it was within Commerce's authority to employ a presumption for state control in an NME country and place the burden on the exporters to demonstrate an absence of central government control.[33] The CAFC found that sections 771(18)(B)(iv)-(v) of the Act recognized a close correlation between an NME economy and government control of prices, output decisions, and allocation of resources and, therefore, Commerce's presumption of government control was reasonable.[34] In *Jiangsu 2015*, the CIT ruled that Commerce could "make reasonable inferences from the record evidence" when examining the totality of the circumstances in determining whether a respondent had demonstrated *de jure* and *de facto* control of its export activities.[35] In *Advanced Tech. II*, the CIT recognized that majority ownership by a government entity, either directly or indirectly, precludes a respondent's ability to demonstrate an absence of *de facto* control.[36] Commerce has

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[32] *See Silicon Carbide*, 59 FR at 22586-89**.**

[33] *See Sigma Corp v. United States*, 117 F. 3d at 1405-06 (Fed. Cir. 1997) (*Sigma*) ("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).

[34] *Id.*; *see also Brake Drum & Rotor Mfrs*, 44 F. Supp. 2d at 243 (quoting *Sigma*, 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 non-market economy'… Under this presumption, all exporters receive one non-market economy country (NME) rate, or country-wide 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'")).

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

[36] *See Jiangsu 2015*, 121 F. Supp. 3d at 1267, citing *Advanced Technology and Materials Co. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech. II*), *aff'd*, 581 Fed. App'x 900 (Fed. Cir. 2014) (*Advanced Tech. III*) ("Specifically, as a result of litigation challenging Commerce's separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies' de facto independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that 'where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},' such majority ownership holding 'in and of itself' precludes a finding of de facto autonomy").

previously explained why evidence of indirect or direct government ownership is a sufficient evidentiary basis on which to conclude that an NME government has the ability to exercise control over a company such that the company is ineligible for a separate rate.[37] Commerce's application of the separate-rate test in NME cases, post-*Advanced Technology*, has developed to address circumstances where the government entity holds either majority ownership (such that the potential for control exists based on ownership alone), or where the government entity holds minority ownership, but the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through its minority ownership under certain factual scenarios.

First, Fujian Billion misunderstands Commerce's required examination of the *de facto* and *de jure* criteria in determining whether a company has rebutted the presumption of government control in a post-*Advanced Technology* environment. In examining the totality of the circumstances and making reasonable inferences from the record evidence, we determine Fujian Billion has not demonstrated an absence of such potential of government control.[38] Specifically, Billion Parent's 2018 Annual Report demonstrates that the GOC not only owns shares of Billion Parent, via SOEs, but is also deeply involved in the company's mission, which includes Fujian Billion's operations as a producer and exporter of subject merchandise.

The record demonstrates that CECEP and the Ministry of Water Resources are a part of the GOC. CECEP and the Ministry of Water Resources own CECEP Chongqing (98.03 percent and 1.97 percent, respectively).[39] CECEP Chongqing wholly owns Rong An.[40] Rong An is the largest shareholder (37.83 percent) of Billion Parent; and Fujian Billion ultimately is a wholly-owned subsidiary of Billion Parent.[41] Accordingly, the record evidence establishes a direct line of ownership by the GOC to Fujian Billion. Further, CECEP Chongqing, an SOE by virtue of being owned by CECEP and the Ministry of Water Resources,[42] is the controlling shareholder of CECEP Costin.[43] Fujian Billion reported that Billion Parent and CECEP Costin are affiliated parties with "material related-party transactions."[44] While this fact is not a factor in our SOE determination, it does establish that Billion Parent has a complex and profound relationship with the GOC, directly and through affiliated parties. As further discussed below, this relationship, as evidenced by Zeng Wu's appointments of directorships at numerous levels of shareholding

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

[38] *See Jiangsu 2015* at 1266.

[39] *See* SAQR at Exhibits 13 and 16, page 7.

[40] *Id.* at Exhibits 13 and 16, page 3.

[41] *Id.* at Exhibits 5, 13, and 16.

[42] *See* April 5 Submission at Attachment 1 (page 70 of Billion Parent's Annual Report).

[43] *Id.* ("CECEP Chongqing is also a controlling shareholder of CECEP COSTIN and controls the composition of a majority of the board of directors of CECEP COSTIN").

[44] *See* SSAQR at Exhibit SA-22(3) at page 162, note 27. Billion Parent provided pages 75 through 167 of its Annual Report, while the petitioners submitted pages 1 through 74. Pages 1 through 74 provided the material information regarding CECEP as the "substantial shareholder" of Billion Parent. Note 27 in Billion Parent's 2018 Annual Report shows related party transactions with CECEP Costin Group. The Annual Report also states that CECEP Chongqing, a SOE, is a controlling shareholder of CECEP Costin, as noted above.

entities, as well as at CECEP Costin, is a critical factor considered in our analysis of *de facto* control.

Fujian Billion is also mistaken in its argument that Commerce is only able to find government control where the government holds majority ownership of a respondent. Commerce is not limited in its evaluation of *de facto* evidence of government control only where government ownership exceeds 50 percent if there is other information on the record that demonstrates the potential to exert control, directly or indirectly, over a company's export activities.[45] Although in *Advanced Tech. II* and *Advanced Tech. III* the respondent was majority-owned by a government entity, in other cases, consistent with *Jiangsu 2015*, Commerce has examined the totality of the circumstances where a respondent is not majority owned by a government entity, and made a reasonable inference that the respondent does not control its export activities. Moreover, the CIT has upheld in the past Commerce's determination that a respondent company failed to rebut the presumption of *de facto* government control where record evidence indicated the ability of a minority government shareholder to exert control over the company.[46]

Indeed, Commerce has made numerous *de facto* control determinations, where the SOE owned less than 50 percent of shares of a respondent. For example, in *China Truck and Bus Tires*, we found that the top four shareholders of a respondent were China State-owned Assets Supervision and Administration Commission (SASAC) entities, *i.e.*, SOEs. These shareholders did not own the majority of shares; they accounted for 49.06 percent of the respondent's ownership.[47] Commerce found that despite minority ownership, record evidence indicated that the respondent was controlled by an SOE, and we denied the respondent a separate rate.[48] In *Containers*, Commerce found that a respondent was indirectly controlled by an SOE, despite owning a minority of shares, and denied that company a separate rate.[49] In that case, two minority shareholders owned a combined 48.2 percent of the respondent, but in turn were 100-percent-owned by a China SASAC.[50] We examined the totality of the circumstances in *Containers* and made a reasonable inference that the China SASAC, through the minority shareholders it owned,

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[45] *See Jiangsu 2015* at 1266; *see also An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350, 1363-64 (CIT 2018) (*An Giang II*).

[46] *See An Giang II* at 1359, 1361 (concluding that "{w}hen conducting a separate rate analysis for a company with less than a majority of SOE ownership, Commerce has considered whether the record contains 'additional indicia of control' sufficient to demonstrate that the company lacks independence and therefore should receive a PRC-wide rate."). Commerce maintained in its remand redetermination that it is the Department's practice to examine whether the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership under certain factual scenarios. *See Final Results of Remand Redetermination Pursuant to An Giang Fisheries Import and Export Joint Stock Company et al., v. United States*, Consol. Court No. 15-00044, Slip Op. 17-4 (January 23, 2017) at 7.

[47] *See 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) (*China Truck and Bus Tires*), and accompanying IDM at Comment 1.

[48] *Id*. ("Record information from the websites of China National Chemical Corporation and Aeolus demonstrates that state-owned China National Chemical Corporation controls Aeolus's operations through China National Chemical Corporation's wholly owned subsidiary China National Tire & Rubber Co., Ltd. The petitioner obtained copies of these websites…Aeolus's response to the petitioner's rebuttal does not dispute the veracity of the information contained on these websites.").

[49] *See 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) (*Containers*), and accompanying IDM at Comment 10.

[50] *Id.*

exercised control over important management organizations, such as board of directors, which had the authority to appoint managers that controlled the operations of the respondent.[51] Finally, in *Vietnam Fish Fillets*, Commerce determined that the respondent was under *de facto* government control, despite minority government ownership, because the government and the government-appointed general director of the company owned a combined percentage of 40.15 percent of the shares that provided them control over the Board of Directors nominations and approvals process.[52] In all of these cases, minority ownership by the SOE was not the controlling factor in the denial of a separate rate. Rather, other record evidence of potential control was weighed against the percentage of shares owned by the SOE.

Therefore, as supported by the analogous cases cited above, Fujian Billion's argument over whether ExIm BOC's ownership shares are classified as "person having a security interest" versus "beneficial owner" is moot.[53] Commerce has evaluated the totality of the information on the record, and finds that, even by excluding the ExIm BOC as a shareholder, resulting in minority, but substantial, ownership by CECEP (and the Ministry of Water Resources), a SOE has the potential to exert control, directly or indirectly, over Fujian Billion, via Billion Parent, as outlined in the Preliminary Separate Rate Memo.[54] For example, Billion Parent's 2018 Annual Report states that "CECEP Chongqing Industry Co., Ltd.,…a subsidiary of China Energy Conservation Protection Group…became the single largest shareholder of the Company {Billion Parent} in September 2012."[55] The Annual Report also states that:

> {t}hrough introducing the strategic partner Hong Kong (Rong An) Investment Limited…a substantial shareholder of the Company {Billion Parent} and a wholly-owned subsidiary of CECEP Chongqing, which is in turn a subsidiary of CECEP, the largest state-owned enterprise in the PRC specialising in energy-saving and environmental protection projects, ***the relationship between the Group and CECEP has become closer in terms of co-operation opportunities and synergy.*** By adhering to the vision of "aspiring to be the world's premier supplier of consumer product materials, providing eco-friendly products for the public", the Group implemented

[51] *Id.*

[52] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 2394 (January 16, 2015) (*Vietnam Fish Fillets*), and accompanying IDM at Comment 1 ("Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company. While the combined holdings of the GOV and General Director are not a majority of shares, it is enough shares that these shareholders control who is nominated and approved to the Board of Directors.").

[53] In its case brief, Fujian Billion provided a dictionary definition of "security interest," which the petitioners alleged to be new factual information (NFI) and requested Commerce to reject the case brief. *See* Fujian Billion Case Brief at 9; *see also* Petitioners' Letter, "Request to Reject Fujian Billion's Case Brief," dated August 12, 2019. Subsequently, in their rebuttal brief, the petitioners rebutted Fujian Billion's arguments with regard to the definition of "security interest." *See* Rebuttal Brief to Fujian Billion at 9. Consequently, Commerce did not act on the petitioners' request to reject Fujian Billion's case brief because the petitioners rebutted the definition they previously alleged as NFI. Furthermore, because Commerce has determined above that the arguments differentiating between "beneficial owners" and "persons having security interest" are moot, there is no purpose to rejecting Fujian Billion's case brief.

[54] *See* Memorandum, "Preliminary Separate Rate Analysis for Fujian Billion Polymerization Fiber Technology Industrial Co., Ltd.," dated June 25, 2019 (Preliminary Separate Rate Memo).

[55] *See* April 3 Submission at Attachment 1, page 4 (.pdf page 26). Attachment 1 contains pages 1 through 75 of Billion Parent's 2018 Annual Report which Fujian Billion omitted from its SSAQR.

> the operation philosophy of "creating green products" and continued to enhance the development of differentiated chemical fiber and functional environmentally-friendly polyester thin film products.[56] (emphasis added).

"The Group" refers to Billion Parent's subsidiaries, which as discussed above, includes Fujian Billion.[57] Accordingly, because the Director's Report identifies CECEP, through Rong An, as a strategic partner "in terms of cooperation and synergy" in the context of Fujian Billion's operation philosophy, Commerce continues to determine that the SOE, CECEP, is in a position to exert control over the production and export activities of Fujian Billion.[58]

Further, in Billion Parent's 2018 Annual Report, at pages 1 through 74, Billion Parent provides a narration that demonstrates a profound relationship with the SOE, CECEP, through Zeng Wu, the Co-Chairman of the Board and Non-Executive Director of Billion Parent. The record shows Zeng Wu, during the period of investigation, held numerous and simultaneous positions of authority within the SOE (CECEP), the SOE's subsidiary companies (CECEP Chongqing, CECEP Costin, Rong An), and Billion Parent:

> In February 2006, {Zeng Wu} joined China Energy Conservation Technology Investment Company Limited…as the general manager, and was subsequently appointed as the chairman of the board of China Energy Conservation Technology Investment Company Limited in January 2008. Mr. Zeng has acted as the supervisor of the strategic management department, assistant to general manager of CECEP since May 2011 and March 2015 respectively.[59]

The Annual Report further states that "Mr. Zeng had been appointed as a non-executive director of CECEP COSTIN New Materials Group Limited, a company listed on the Main Board of The Stock Exchange, from 6 June 2016 to 1 August 2018. Mr. Zeng had been appointed as chairman of CECEP Chongqing from February 2017 to January 2019."[60] Accordingly, as an employee of an SOE during the POI, Mr. Zeng is beholden to his SOE employers because the SOE has the ability to fire Mr. Zeng.[61] Further, evidence on the record demonstrates that Mr. Zeng, as Co-Chairman of the Board at Billion Parent, has exerted relevant control over Billion Parent, the details of which are business proprietary information.[62] The CIT has affirmed Commerce's determination in the past to deny a company a separate rate due, in part, to the exertion of government control through the existence of overlapping management/directorship in respondent

[56] *Id.* at Attachment 1, page 12 (.pdf page 34); *see also* Preliminary Separate Rate Memo.
[57] *See* April 3 Submission at Attachment 1, page 2 (.pdf page 24).
[58] *See* Preliminary Separate Rate Memo at 8-9.
[59] *See* April 3 Submission at Attachment 1, page 12 (.pdf page 34).
[60] *Id.* CECEP COSTIN has been reported by Fujian Billion as an affiliated company, within the Billion Parent 2018 Annual Report, which declares CECEP Costin as a "related company" ("CECEP Chongqing is also a controlling shareholder of CECEP COSTIN and controls the composition of a majority of the board of directors of CECEP COSTIN Group which in turn owns 100 percent of the shares of each of the Subsidiaries of CECEP COSTIN Group…"). *See* April 3 Submission at Attachment 1, page 70 (.pdf page 92).
[61] *See, e.g.*, *An Giang II* at 1362 ("The prospective component of Commerce's beholden theory {*i.e.*, that the government could fire the government-employed director in respondent company} in this review is reasonable").
[62] *See* Preliminary Separate Rate Memo at 8.

and an SOE.[63] Furthermore, "if board members are properly presumed subject to governmental control, directly or indirectly," the CIT has concluded, "then true independence and autonomy remain in doubt until proven otherwise."[64]

Second, Fujian Billion argues that it has been completely cooperative in the investigation. However, it is relevant here that Fujian Billion omitted specific pages from Billion Parent's Annual Report and that these omitted pages of the Annual Report demonstrate a complex and expansive partnership with, and ownership by, a SOE. While we have not made any adverse inferences under sections 776(a) or (b) of the Act because Billion provided sufficient responses to our questionnaires, we do find that, with regard to the separate-rate information, Fujian Billion did not provide the full depiction of CECEP's ownership of, and relationships with, Fujian Billion, Billion Parent, Billion Parent's largest shareholder, Rong An, and Rong An's owner, CECEP Chongqing, which are all companies that Fujian Billion reported as affiliates.[65]

Specifically, rather than reporting outright that the substantial shareholder of Billion Parent is an SOE, Fujian Billion preemptively proffered an argument in the "Separate Rates" portion of the SAQR that there was no *de facto* government control, by singling out Zeng Wu as a non-executive director with no authority to exert control or influence.[66] The context of this reporting of Zeng Wu was unclear, as Fujian Billion never reported its shareholder relationship with the GOC, nor Zeng Wu's concurrent position at CECEP, the largest shareholder of Billion Parent.

Evidence identifying the full extent of Zeng Wu's simultaneous roles at CECEP, CECEP Chongqing, Rong An, CECEP Costin, and Billion Parent only came to light after Fujian Billion filed its March 29, 2019, SSAQR, wherein we requested Billion Parent's 2018 financial documents,[67] and which was followed by the petitioners' April 3 Submission containing all of the omitted pages (pages one through 74) of Billion Parent's 2018 Annual Report.[68] Only after the April 3 Submission did Commerce come to understand the extent to which Zeng Wu plays a role across several entities: as the Co-Chairman of the Board and concurrently also the Non-Executive Director of Billion Parent;[69] as the Director and Chairman of the Board of Rong An;[70] as the Chairman of the Board of CECEP Chongqing;[71] and as a supervisor and assistant general manager at CECEP since 2015.[72]

Zeng Wu, an employee of an SOE, is the Chairman of that SOE's subsidiary (CECEP Chongqing), and appointed by that subsidiary as the Director and Chairman of a company that the subsidiary owns Rong An, the largest shareholder of Billion Parent, and thus, also the largest

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[63] *See Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1326 (CIT 2017) (*Yantai 2017*) ("Commerce also found actual exercise of control through the appointment of officials and the overlap in management between the companies...Accordingly, the court sees no reason to disturb Commerce's finding.").
[64] *See Advanced Technology and Materials Co. v. United States*, 885 F. Supp 2d 1343, 1358-59 (CIT 2012).
[65] *See* SAQR at Exhibit 5.
[66] *See* SAQR at 11-12 under "De Facto Control."
[67] *See* Commerce's Supplemental Questionnaire, dated March 12, 2019, at question 31.
[68] *See* April 3 Submission at Attachment 1, wherein pages 1 through 74 of Billion Parent's public 2018 Annual Report were placed on the record to fill the gaps of information left by Fujian Billion. Fujian Billion only submitted pages 75 through 167 of Billion Parent's 2018 Annual Report on the record. *See* SSAQR at Exhibit SA-22(3).
[69] *See* SAQR at Exhibit A-5, Exhibit A-16.
[70] *See* SAQR at 11-12, Exhibit A-5; *see also* SSAQR at 24.
[71] *See* SAQR at Exhibit A-16 at page 8 of 8.
[72] *See* April 3 Submission at Attachment 1, page 52 (.pdf page 74).

shareholder of Fujian Billion. Zeng Wu, is, at the same time, a director and Co-Chairman of the Board of Billion Parent. The record demonstrates that Zeng Wu has discussed an issue directly related to one of the criteria pertaining to Commerce's evaluation of the *de facto* government control.[73] As Zeng Wu has opined, with voting rights, on the *de facto*-related issue, the potential for control, direct or indirect, is demonstrated on the record. Moreover, despite Fujian Billion's claim that Zeng Wu "has very little say, and no control in the decision making of Billion Parent,"[74] Fujian Billion failed to point to record evidence demonstrating that the government was not able to, either directly or indirectly, exercise control over Billion through Zeng Wu's demonstrated ability to exert control in Billion Parent during the POR.[75]

While it is true that Fujian Billion timely responded to our questionnaires, it is also true, and the record demonstrates, that Fujian Billion was fully cognizant of the fact that the GOC owns the largest percentage of shares of its direct parent company, but did not concede this fact until well after the petitioners placed that evidence on the record.[76] Fujian Billion and its parent company, as the "owners" of the 2018 Annual Report, necessarily knew that reporting Rong An[77] on the ownership chart at Exhibit 5 of the SAQR, where Rong An is shown as a 37.88 percent (37.83 percent on page 63 of the Annual Report) shareholder of Billion Parent, was not the full depiction of ownership. Specifically, while Fujian Billion discreetly reported in its Affiliation List (Exhibit 16 of its SAQR) that CECEP and the Ministry of Water Resources own CECEP Chongqing,[78] it did not report that CECEP and the Ministry of Water Resources are SOEs and a part of the GOC. Moreover, CECEP and the Ministry of Water Resources were excluded from all narrative discussion in the responses. Specifically, CECEP and the Ministry of Water Resources were also missing from the "Ownership Structure and Information" chart at Exhibit 5 and the "Affiliation Structure" at Exhibit 13 of Fujian Billion's SAQR. In other words, Fujian Billion did not report the ultimate owners of Rong An in the relevant sections of its questionnaire responses, as required.[79] Had Fujian Billion reported the ultimate owners, as required, it would have reported the chain of ownership all the way from the GOC to CECEP and the Ministry of Water Resources down to Billion Parent and Fujian Billion.[80] Fujian Billion did not do so. The reasons for such an omission are subject to conjecture but the fact that respondents in an NME

[73] The information referenced here is business proprietary information and discussed in detail in the Preliminary Separate Rate Memo. *See* Preliminary Separate Rate Memo at 8-9; *see also* SSAQR at Exhibit SA-16 (.pdf page 220); *Silicon Carbide*, 59 FR at 22586-89; and *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).
[74] *See* Fujian Billion Case Brief at 11.
[75] *See, e.g.*, *An Giang II* at 1361-62.
[76] *See* Fujian Billion Case Brief at 6 ("In truth, the record evidence shows that CECEP indeed owns 37.83% shares as a beneficial owner in Billion Parent."). However, even this acknowledgment does not concede that CECEP is part of the GOC.
[77] The largest shareholder of Billion Parent is Rong An with 37.83 percent ownership. *See* Preliminary Separate Rate Memo at 5; *see also* SAQR at Exhibits A-5, A-13, and A-16. Fujian Billion, alternatively, reported that Rong An owns 37.88 percent shares of Billion Parent as of June 30, 2018, as reported in SSAQR at Exhibit SA-7.
[78] *See* SAQR at Exhibit 16: List of Affiliates.
[79] *See* NME AD Questionnaire issued on December 11, 2018. Question 1 under the "De Facto Control" section of the Section A portion of the NME AD Questionnaire requires the respondent to "indicate the names and contact information (full business address, telephone, fax, e- mail address) of the legal entities which are the intermediate and **ultimate** owners of your company (also indicate the percent ownership of your company by each entity)…"
[80] CECEP Chongqing is a majority-owned subsidiary of CECEP, a SOE, with 98.03 percent shares. The remaining 1.97 percent of shares is owned by the Development of Management Center of Ministry of Water Resources (Ministry of Water Resources), a part of the GOC. *See* Preliminary Separate Rate Memo at 5; *see also* SAQR at Exhibit A-16; March 5 Submission at Attachment 1 regarding CECEP; and April 3 Submission at Attachment 2.

proceeding are required to rebut the presumption of government control to obtain a separate rate may be a factor in Fujian Billion's behavior. A respondent cannot rebut such a presumption without first acknowledging, in its initial questionnaire responses, that there is even a miniscule degree of government ownership, which Fujian Billion did not do.

The courts have long held that "the burden of creating an adequate record lies with respondents and not with Commerce."[81] As the record stands now, and based on the type of information included in the initial responses submitted by Fujian Billion, without the petitioners' submission of the missing pages of the Annual Report, Commerce may have had to issue additional supplemental questionnaires to Fujian Billion only to receive piecemeal information from Fujian Billion, while it omitted significantly pertinent information from its responses, such as the ultimate ownership of its intermediate owners. Indeed, Fujian Billion claims that if Commerce wanted the Annual Report, it would have explicitly requested the Annual Report because Commerce "is aware" of the difference between financial statements and an annual report.[82] However, we addressed this fact in the Preliminary Separate Rate Memo, wherein we stated that "{w}hile Commerce did not explicitly request Fujian Billion provide an "Annual Report" (in part because Commerce was unaware that an Annual Report exists unless the respondent provides one), it is the responsibility of the respondent to build the record with complete information."[83] Commerce possesses no inherent knowledge of a company's information if that information is not on the record.

Third, Fujian Billion's argument that Commerce failed to provide any explanation for its ministerial error allegation response is misplaced. Commerce's legal obligation with regard to ministerial error allegations was clearly explained in the Ministerial Allegation Memo.[84] Fujian Billion fails to acknowledge that Commerce made no errors in addition, subtraction, or other arithmetic function, or any other unintentional error.[85] In making its *Preliminary Determination*, Commerce relied on Fujian Billion's own information, which the petitioners submitted on the record, and which Fujian Billion could have provided itself or clarified.

Fujian Billion's ministerial error allegation, which was actually a methodological argument, attempted to explain how ExIm BOC is not a "beneficial" shareholder (and, thus, should not be included in the SOE ownership cumulation). However, this argument contradicts the Director's Report, which identifies ExIm BOC as a shareholder, in the column entitled "Name of Shareholder."[86] Instead, Fujian Billion compared ExIm BOC's "ownership" of shares to "holding shares mortgaged by other owners."[87] However, Fujian Billion failed to explain how ExIm BOC does not own shares in Billion Parent despite ExIm BOC being identified as a shareholder in Billion Parent's publicly disclosed financial documents and Director's Report.[88]

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[81] *See*, *e.g.*, *Longkou Haimeng Mach. Co. v. United States*, 617 F. Supp. 2d 1363, 1372 (CIT 2009).
[82] *See* Fujian Billion Case Brief at 3-4.
[83] *See* Preliminary Separate Rate Memo; *see also* Commerce's Supplemental Questionnaire, dated March 12, 2019, at question 31.
[84] *See* Ministerial Error Memo at 2; *see also* 19 CFR 351.224.
[85] *See*, *e.g.*, *Alloy Piping Products, Inc. v. United States*, 201 F. Supp. 2d 1267, 1285 (CIT 2002) ("The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error.").
[86] *See* April 3 Submission at Attachment 1, page 63 (.pdf page 85).
[87] *See* Ministerial Error Allegation at 2.
[88] *See* April 3 Submission at Attachment 1, page 63 (.pdf page 85).

Further, Fujian Billion's argument that "one of the actual owners of shares in the list has mortgaged a percentage of their shares to this bank as collateral," does not explain how ExIm BOC would not still have the potential for control as a shareholder, even as a custodian of mortgaged shares. Most importantly, Fujian Billion failed to disclose the complete ownership structure of this "mortgage" scenario and which of the purported "beneficial" owner(s) "mortgaged" its/their shares to ExIm BOC. However, of primary relevance here, is the fact that the entirety of Fujian Billion's ministerial error argument was methodological, not ministerial, because Commerce did not make its intentional SOE determination in the *Preliminary Determination* based solely on shareholder ownership data in isolation of all other *de facto* separate-rate criteria that Commerce considers in making separate-rate determinations.[89]

We also disagree with Fujian Billion's claim that Commerce was required to hold "the petitioners accountable for misrepresenting the record and basic corporate law…{which}…forced Fujian Billion to brief this preliminary determination on the merits instead of moving forward to verification."[90] Fujian Billion's argument that Commerce relied on the petitioners' April 3 Submission, without question, is unavailing. Commerce relied on Fujian Billion's own information, which, as noted above, the petitioners submitted on the record. Commerce would have cited to Billion Parent's Annual Report as the basis for its *Preliminary Determination* regardless of which interested party submitted it on the record. The fact is, Commerce relied on Fujian Billion's and Billion Parent's information in this investigation to make its separate rate determination. Additionally, following the petitioners' April 3 Submission, Commerce's regulations under 19 CFR 351.301(c)(1)(v) afforded Fujian Billion with the opportunity to comment on the petitioners' April 3 Submission (containing the omitted pages evidencing SOE ownership). If the petitioners' April 3 Submission included information and arguments that were factually incorrect, Fujian Billion had ample opportunity to rebut, clarify, or correct the petitioners' April 3 Submission, within the regulatory deadline. Fujian Billion did not do so.

Fujian Billion has not provided an acceptable reason for omitting relevant parts of Billion Parent's 2018 Annual Report from its responses, nor did Fujian Billion provide the complete explanation of the claimed "mortgaged shares" scenario when it did finally comment on the existence of SOE ownership (in its Ministerial Comments after the *Preliminary Determination*). Even Fujian Billion does not claim, with 100 percent certainty, that Commerce made an error in its determination of SOE ownership, arguing that there is "a 75 % chance that {Commerce's} entire preliminary determination analysis of SOE control over Billion was flawed."[91] On its face, we find that Fujian Billion's logic is flawed and its arguments divert from the fact that its largest shareholder, affiliate, and "strategic partner" is the GOC through the GOC's subsidiary entities: CECEP and the Ministry of Water Resources, CECEP Chongqing, CECEP Costin, and Rong An.[92] This strategic partnership, as identified in the Annual Report, with SOEs, which is supplemented by Zeng Wu's employment at CECEP and appointments as Chairman and/or Director of CECEP Chongqing, CECEP Costin, Rong An, and Billion Parent, is sufficient record evidence to support a finding of actual control, especially because Zeng Wu, as a representative of the SOEs and their substantial ownership of Billion Parent, has actively participated in Billion

[89] *See* Ministerial Error Memo at 3-4.
[90] *See* Fujian Billion Case Brief at 10.
[91] *See* Ministerial Error Allegation at 5.
[92] *See* April 3 Submission at Attachment 1, page 12 under "Chairman's Statement."

Parent's operations.[93] In this case, the evidence of the SOE's (CECEP's), non-majority but substantial ownership of Fujian Billion, and the SOE's appointment of its representative Zeng Wu as Chairman and/or Director across several SOE-owned affiliates, including Billion Parent,[94] is sufficient to conclude that the respondent has failed to rebut the presumption of government control required under the separate-rate test.

Finally, we disagree with Fujian Billion's argument that Commerce is required to verify its responses. The separate-rate test is conjunctive; thus, "Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status."[95] The Courts have stated that, "{b}ecause {the respondent} failed to satisfy one *de facto* criterion, 'Commerce had no further obligation to continue with the analysis.'"[96] Thus, the separate-rate analysis concluded, no separate rate was granted, and further inquiry (*i.e.*, at an on-site verification) ceases to be meaningful.[97] It is the obligation of respondents to provide an accurate and complete response prior to verification so that Commerce may have the opportunity to fully analyze the information and other parties are able to review and comment on it.[98] Fujian Billion's reference to *Rixson* is unavailing here. In *Rixson*, Commerce met with the respondent after the preliminary determination, at the respondent's request, to discuss record-keeping of financial information relied upon in the reporting of sales.[99] Nevertheless, in *Rixson*, the Court affirmed Commerce's decision not to verify the respondent. In this case, Fujian Billion was entirely silent on the subject of SOE ownership until after the *Preliminary Determination*. Further, other than its ministerial error allegation, there was no other communication from Fujian Billion with Commerce to discuss or rebut the presumption of government control.[100] Furthermore, Fujian Billion's reliance on *Ribbons* is also unavailing here. In *Ribbons*, Commerce addressed whether to apply total AFA to the respondent, Ricai. Commerce has not applied AFA to Fujian Billion in this investigation. While Fujian Billion appears to equate separate rate ineligibility with the application of adverse inferences, the use of AFA and the need to establish certain facts to obtain a separate rate are distinct concepts.[101]

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[93] *See*, *e.g.*, *An Giang II* at 1361-64 (affirming Commerce's denial of a separate rate in light of evidence of minority ownership plus instances of actual control).

[94] Fujain Billion reported CECEP Chongqing, CECEP Costin, and Rong An as its affiliates in Exhibit 5 of its SAQR.

[95] *See Yantai 2017*, 203 F. Supp. 3d at 1326, citing *Advanced Tech III*, 938 F. Supp. 2d at 1349.

[96] *See Yantai 2017*, 203 F. Supp. 3d at 1326.

[97] *See*, *e.g.*, *Jiangsu Changbao Steel Tube Co. v. United States*, 884 F. Supp. 2d 1295, 1311 (CIT 2012), citing *Watanabe Gr. v. United States*, No. 09-00520, 2010 CIT LEXIS 144 at 14 (CIT 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.").

[98] *See Final Determination of Sales at Less Than Fair Value: Photo Albums and Filler Pages from Korea*, 50 FR 43754, 43755-56 (October 29, 1985).

[99] *See Rixson*, 27 CIT at 876-878.

[100] *Id.* at 890 ("FRSS also argues that Commerce's decision not to conduct verification of FRSS's responses was unlawful. The Court rejects the argument. 19 U.S.C. § 1677m(i)(1) requires Commerce to verify 'all information' relied upon in making a final determination in an investigation. Positive proof of the nonexistence of the requested Spencer Clark data may be a logical impossibility, but it was nonetheless incumbent upon FRSS to make out a prima facie case for verification…substantial evidence on the record supports Commerce's determination that verification was unnecessary.") (internal citations omitted).

[101] *See Advanced Tech II*, 938 F. Supp. 2d at 1351; *see also Watanabe Group v. United States*, 34 CIT 1545, 1551 n. 8 (CIT 2010) ("'These are two distinct legal concepts: a separate AFA rate applies to a respondent who has received a separate rate but has otherwise failed to cooperate fully whereas the {countrywide} rate applies to a respondent who has not received a separate rate.' As discussed above, in antidumping proceedings involving NME countries, Commerce presumes that all entities operating within the country are subject to government control.").

Here, we found, and continue to find, that Fujian Billion is not eligible for a separate rate, which is not an adverse finding under sections 776(a) and (b) of the Act.[102] We determined that the single entity, comprising Fujian Billion and Fujian Baikai Textile Chemical Fiber Co., Ltd., is part of the China-wide entity. In the *Preliminary Determination*, we clearly stated that, because there were no calculations performed in this investigation, and that the assigned dumping margins were based on the Petition, there would be no verification. This is not a novel decision; Commerce frequently determines it will not conduct verification if the only rates established in the investigation are based entirely on petition rates or AFA rates, for example.[103]

For the final determination, we continue to find that Fujian Billion is not eligible for a separate rate, because it is substantially owned by, affiliated and partnered with, the GOC and, thus, unable to rebut the presumption of government control. Because the record evidence is unchanged from the *Preliminary Determination*, our final determination to deny separate rate status to the single entity comprising Fujian Billion and Fujian Baikai Textile Chemical Fiber Co., Ltd. is based on the same facts that formed the basis of the *Preliminary Determination*.

Comment 2: Authority to Collect Cash Deposits Based Upon an Affirmative Preliminary Critical Circumstances Determination

STR Importers Case Brief:[104]

- Commerce must revise its instructions to CBP, because it is not authorized to instruct CBP to require retroactive cash deposits.
- Following a preliminary affirmative critical circumstances determination, the antidumping duty statute only authorizes Commerce to order suspension of liquidation of subject entries. Commerce is not authorized to require retroactive cash deposits pursuant to a valid preliminary finding of critical circumstances. Commerce must issue customs instructions consistent with U.S. law.
- Commerce cannot instruct CBP to collect retroactive cash deposits for entries made prior to the *Preliminary Determination* publication at this time. Commerce may only instruct the

[102] *See Yantai 2017*, 203 F. Supp. 3d at 1326-27 ("The fact that the countrywide rate in this instance stemmed from an earlier application of AFA does not mean that Commerce must meet the statutory requirements for applying AFA to Yantai CMC in this review; Yantai CMC simply receives the countrywide rate currently in effect as the result of its failure to qualify for a separate rate.").

[103] *See*, *e.g.*, *Certain Carbon and Alloy Steel Cut-To-Length Plate from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 79450, 79452 (November 14, 2016) ("Because the only rate established in this investigation is based entirely on AFA, we do not intend to conduct verification."), unchanged in *Certain Carbon and Alloy Steel Cut-To-Length Plate from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 8510 (January 26, 2017). In this case, Commerce determined that the mandatory respondent was ineligible for a separate rate because it was SOE-owned, and, thus, placed in the China-wide entity. Commerce then assigned AFA to the China-wide entity, including other companies, that did not respond to Commerce's requests for information (*i.e.*, Quantity and Value Questionnaire recipients that did not respond). Commerce did not make an adverse inference directly to the respondent, but to the China-wide entity.

[104] In their case brief, STR Importers also "support the case briefs filed…by other respondent interested parties and hereby adopt and incorporate these case briefs by reference to the extent they dispute the Commerce's preliminary determinations." *See* STR Importers Case Brief at 4. As such, Commerce has addressed the only other respondent case brief arguments raised in Comment 1 above, and, hereby, applies our determination regarding Comment 1 to STR Importers' adopted argument.

suspension of liquidation for entries of subject merchandise and collection of cash deposits (or other security) for entries made after the publication of the *Preliminary Determination*.
- Commerce's regulations under 19 CFR 351.206(d) also limit Commerce's affirmative critical circumstances determinations to the retroactive suspension of liquidation: "{i}f the Secretary makes an affirmative preliminary finding of critical circumstances, the provisions of section 703(e)(2) or section 733(e)(2) of the Act (whichever is applicable) regarding the retroactive suspension of liquidation will apply."

Petitioners' Rebuttal Brief:
- STR Importers' argument is based on an incomplete and incorrectly narrow reading of the statute. This narrow focus ignores that the statute contemplates the collection and subsequent refund of any cash deposits collect{ed} retroactively as a result of a preliminary affirmative critical circumstances determination.
- Commerce rejected the same legal argument in *China Quartz*.[105] Commerce has explicitly and repeatedly affirmed its authority to instruct CBP to collect cash deposits retroactively when it reaches a preliminary affirmative critical circumstances determination and should do so again in the final determination.
- The authority to suspend liquidation of entries retroactively is authorized precisely so that deposits may be collected, and final duties assessed, at some point in the future.
- The CIT has acknowledged that the statute allows for the retroactive collection of cash deposits in connection with a preliminary affirmative critical circumstances determination.[106]
- Several additional cases demonstrate that Commerce's preliminary cash deposit instructions were consistent with its statutory directive, where Commerce issued refund instructions upon a negative critical circumstances determination made by the International Trade Commission.[107] The language in those notices demonstrates that Commerce preliminarily instructed CBP to collect cash deposits 90 days retroactively from the date of the preliminary determinations.

Commerce's Position:

Commerce disagrees with the STR Importers' limited interpretation of the antidumping statute and Commerce's regulations regarding the intended result of suspending liquidation and collection of cash deposits with regard to preliminary affirmative critical circumstances determinations.

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[105] *See* Rebuttal to Importers at 1, citing *Certain Quartz Surface Products from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23767 (May 23, 2019) (*China Quartz*), and accompanying IDM at Comment 3.

[106] *Id.* at 4-5, citing *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1315 n.19 (CIT 2013) ("Trade remedy duties are only imposed on goods imported after the date of a preliminary determination unless Commerce also finds that critical circumstances exist, in which case the duties may cover unliquidated entries or goods withdrawn from warehouse on or after the later of 90 days prior to the order to suspend liquidation or the publication date for the initiation.").

[107] *Id.* at 5-6, citing *Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 FR 48390, 48392-93 (July 25, 2016); and *Certain Potassium Phosphate Salts from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Inquiry*, 75 FR 30377, 30379 (June 1, 2010).

Section 733(d)(1)(B) of the Act directs that Commerce "shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable." Section 733(d) of the Act provides the general rules for the suspension of liquidation, directing that Commerce "shall order the posting of a cash deposit…" when it makes an affirmative preliminary determination under section 733(b) of the Act.[108] Section 733(e)(2) of the Act provides the specific rule for the suspension of liquidation applicable to an affirmative preliminary determination of critical circumstances in an antidumping duty investigation – specifying that "any suspension of liquidation ordered under subsection (d)(2) shall apply."

Because an affirmative determination of critical circumstances affects the date of applicability of suspension of liquidation under section 733(d)(2) of the Act, the rule for collection of cash deposits is the same as in the event of an affirmative preliminary determination under section 733(d)(1)(B) of the Act, *i.e.*, that Commerce "shall order the posting of a cash deposit… for each entry" in the case of an affirmative determination.

STR Importers limit their narrow reading of the law to section 733 of the Act, and 19 CFR 351.206(d), and in doing so, they failed to acknowledge the unambiguous provisions under section 735(c)(4) of the Act, providing that:

> (4) If the determination of the administering authority under subsection (a)(3) is affirmative, then the administering authority shall,
>
> (A) in cases where the preliminary determinations by the administering authority under sections 733(b) and 733(e)(1) were both affirmative, **continue the retroactive suspension of liquidation and the posting of a cash deposit, bond, or other security previously ordered under section 733(e)(2)**; (emphasis added).

The law is quite clear that the intention of retroactively ordering the suspension of entries, in affirmative critical circumstances determinations, is *exactly* for the purpose of collecting cash deposits, by virtue of the law's inclusion of "previously ordered under section 733(e)(2)" within section 735(c)(4) of the Act.

Likewise, section 735(c)(3)(B) of the Act specifies that, in the event of a final negative determination of critical circumstances, Commerce should "release any bond or other security, and refund any cash deposit required, under section 733(d)(1)(B) with respect to entries of the merchandise the liquidation of which was suspended retroactively under section 733(e)(2)." If Congress did not intend retroactive bonding or cash deposits, these provisions of the Act would be superfluous because there would be nothing to release or refund.[109] As we recently determined in *China Quartz*,

> since section 735(c) of the Act contemplates either 1) continuation of retroactive suspension and posting of a cash deposit in case of an affirmative final determination by Commerce, or 2) the refunding of cash deposits in the case of a

[108] *See* section 733(d)(1)(B) of the Act.
[109] *See Trade and Tariff Act of 1984*, Pub. L. No. 98-573, § 605, 98 Stat 2948, (1984); *see also Antidumping Duties*, 54 FR 12742, 12750 (March 28, 1989).

> negative critical circumstances determination, then clearly Commerce has the authority to collect cash deposits on the retroactively suspended entries in the case of an affirmative preliminary circumstances determination under section 733(e) of the Act. This reading of the relevant provisions of the Act is also consistent with Commerce's long-established practice of instructing CBP to collect cash deposits during the entirety of the suspension of liquidation period.[110]

Thus, because STR Importers' argument that Commerce has no authority to collect retroactive cash deposits in affirmative determinations of critical circumstances is based on an overly narrow reading of a single provision of the Act without reference to other relevant provisions, we have made no changes to the instructions we issued to CBP upon the publication of the *Preliminary Determination*.

IV. RECOMMENDATION

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

☒ ☐

Agree Disagree

11/13/2019

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Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[110] *See China Quartz* IDM at Comment 3; *see also Steel Wire Rod 2014*; and *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970 (June 5, 2008).