Guizhou Tyre Co., Ltd. & Guizhou Tyre Import & Export Co., Ltd., et al. v. United States
Consol. Court No. 17-00100; Slip Op. 19-64 (CIT 2019)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (Commerce) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT), issued on May 24, 2019, in *Guizhou Tyre Co., Ltd. & Guizhou Tyre Import & Export Co., Ltd., et al. v. United States*, Consol. Court No. 17-00100, Slip Op. 19-64 (Ct. Int'l Trade May 24, 2019) (*Guizhou Tyre*). This final redetermination concerns the final results of the administrative review of the antidumping duty order on off-the-road (OTR) tires from the People's Republic of China (China), covering the period of review (POR) September 1, 2014 through August 31, 2015.[1] Previously, Commerce issued to interested parties the draft results of redetermination pursuant to remand.[2]

Specifically, on remand, the CIT ordered that: (1) Commerce shall submit a new determination upon remand in which it recalculates export price (EP) and constructed export price (CEP) without making deductions for Chinese value-added tax (VAT) for Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. (collectively,

---

[1] *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 18733 (April 21, 2017) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM), *amended by Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 27224 (June 14, 2017) (*Amended Final Results*).

[2] *See* "*Guizhou Tyre Co., Ltd. & Guizhou Tyre Import & Export Co., Ltd., et al. v. United States*, Consol. Court No. 17-00100; slip op. 19-64 (CIT 2019): Draft Results of Redetermination Pursuant to Court Remand," released on August 9, 2019 (Draft Results).

Xugong), and redetermine the weighted-average dumping margin for Xugong;[3] (2) Commerce shall reconsider its decisions not to assign separate rates to Aeolus Tyre Co., Ltd. (Aeolus) and Guizhou Tyre Co., Ltd., and Guizhou Tyre Import and Export Co., Ltd. (collectively, GTC);[4] and (3) Commerce will recalculate the margins for all other qualifying separate rate respondents that are plaintiffs in the action.[5]

As set forth in detail below, consistent with the CIT's remand order, we have: (1) recalculated EP and CEP for Xugong without making deductions for Chinese VAT, and redetermined Xugong's weighted-average dumping margin; (2) reconsidered our decisions not to assign separate rates to Aeolus and GTC; and (3) recalculated the margins for all other qualifying separate rate respondents that are plaintiffs in this action (based on the weighted-average dumping margin calculated for Xugong), consistent with the CIT's instructions.

On August 9, 2019, we released the Draft Results to all interested parties, and provided all parties the opportunity to comment.[6] On August 23, 2019, we received timely-filed comments from GTC and Aeolus.[7] We respond to arguments raised by interested parties in their comments on the Draft Results, below. Our redetermination analysis, materially unchanged from the analysis provided in the Draft Results, is provided immediately below in Section II, "Final Analysis"; we address comments received in Section III, "Discussion of Interested

---

[3] *See Guizhou Tyre* at 32-33.

[4] *Id*.

[5] *Id.* Separate rate respondents that are plaintiffs in the action are: Trelleborg Wheel Systems (Xingtai) Co., Ltd.; Qingdao Qihang Tyre Co., Ltd.; Qingdao Free Trade Zone Full-World International Trading Co., Ltd.; Weihai Zhongwei Rubber Co., Ltd. (Zhongwei); Aeolus; and GTC.

[6] *See* Draft Results.

[7] *See* GTC's and Aeolus's letter, "GTC and Aeolus' Comments on the Department's Draft Results Redetermination Remand Redetermination Pursuant to Guizhou Tyre Co. v. United States, Consol. Court No. 17-00100," dated January 23, 2017 (GTC's and Aeolus's Draft Comments).

Parties' Comments"; and the corrected weighted-average margins are listed below in Section IV, "Final Results of Redetermination."

II. FINAL ANALYSIS

1. Xugong's Irrecoverable VAT Deduction

Background

In the *Final Results* of the underlying review, we stated that, pursuant to section 772(c)(2)(B) of the Tariff Act of 1930, as amended (Act), when Commerce calculates EP or CEP, it deducts from its calculation any "export tax, duty or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States."[8]

In its opinion, the CIT held that "Commerce has made downward adjustments in calculating the EP and CEP for subject merchandise exported by Xugong based on an impermissible construction of the export tax provision of {section 772(c)(2)(B) of the Act}."[9] Specifically, the CIT recognized that "Congress expressly confined the export tax provision to export taxes, duties, and other charges on the *exportation* of the subject merchandise to the United States."[10] The CIT further explained that the export tax provision could not permissibly be construed to apply to a domestic home market tax such as a value-added tax, whether or not recoverable due to export. Thus, the CIT held that Commerce's deductions from Xugong's EP and CEP starting prices for Chinese value-added taxes were, therefore, unlawful.[11]

As a result, the CIT directed Commerce to recalculate EP and CEP without a downward adjustment for irrecoverable VAT.[12]

---

[8] *See Final Results* IDM at 37.
[9] *See Guizhou Tyre* at 15.
[10] *Id.* at 12.
[11] *Id.*
[12] *Id.* at 15.

Analysis

We respectfully disagree with the CIT's decision in *Guizhou Tyre*, concerning the irrecoverable VAT adjustment used in Xugong's weighted-average margin calculation. Nevertheless, following the CIT's explicit directive that Commerce recalculate EP and CEP for Xugong without making deductions for Chinese VAT, under respectful protest,[13] we have recalculated EP and CEP in the margin program for Xugong to exclude the irrecoverable VAT deduction.

2. Aeolus's Separate Status

In the *Final Results* of the underlying review, we determined, based on substantial record evidence, that a state-owned enterprise (SOE), China National Chemical Corporation, (ChinaChem), is Aeolus's largest and controlling shareholder.[14] In the *Final Results*, we found that the record showed that Aeolus was 42.58 percent owned by its parent company (China Chemical Rubber Co., Ltd. (also known as, China National Tire & Rubber Corp.)), a company which is 100 percent owned by an SOE (*i.e.*, ChinaChem) and supervised by a "State-owned Assets Supervision and Administration Commission{}" (SASAC).[15] Additionally, we found three other shareholders of Aeolus to be SOEs that are supervised by SASACs.[16] As such, we found the total SOE ownership in Aeolus to be 49.06 percent.[17]

---

[13] *See Viraj Group, Ltd. v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

[14] *See Final Results* IDM at 10 (citing *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 (PDM) at 16; and Memorandum, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Denial of Separate Rate," dated October 5, 2016 (Preliminary Separate Rate Memo) at 2).

[15] *Id.* (citing Aeolus's Letter, "Separate Rate Application in the Seventh Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated December 11, 2016 (Aeolus's SRA) at 13; and Aeolus's Letter, "Separate Rate Application Supplemental Questionnaire Response in the Seventh Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated August 2, 2016).

[16] *Id.* (citing Aeolus's SRA at 13).

[17] *Id*.

We found that, based on information contained in Aeolus's Articles of Association (AoA), the company did not demonstrate that it was free from *de facto* government control over its export activities because its AoA allows its majority shareholders to control the selection of its board of directors, a board which in turn selects Aeolus's general manager and deputy general manager.[18] Thus, we found that Aeolus did not demonstrate an absence of government control in making decisions regarding the selection of its management.[19]

Furthermore, we found that the website printouts provided by the petitioner in which Aeolus states that it is under the control of an SOE, specifically, under the control of ChinaChem, to be reliable.[20] Therefore, we found that the website information corroborated the ownership information provided by Aeolus in its separate rate application.[21] Thus, we found that Aeolus was not eligible for a separate rate in the *Final Results* of the underlying review.[22]

During litigation, Aeolus argued, *inter alia*, that Commerce failed to consider important contrary record evidence in its determination not to grant Aeolus a separate rate.[23] Notably, Aeolus argued that Commerce failed to consider a "Rectification Report" Aeolus placed on the record, which, it argues, demonstrates its independence from the Chinese government.[24]

In its opinion, the CIT held that Commerce failed to address significant contrary evidence when making its determinations in the underlying review.[25] Specifically, the CIT held that,

---

[18] *Id.* (citing Preliminary Separate Rate Memo at 2).
[19] *Id.* at 11-12.
[20] *Id.* (citing Petitioner's Letter, "Administrative Review of the Antidumping Duty Order on New Pneumatic Off-The-Road Tires from China (A-570-912): Petitioners' Rebuttal Information and Deficiency Comments on Aeolus' Separate Rate Application," dated December 30, 2016, at Attachment 3).
[21] *See* Aeolus's SRA at 13 and Exhibit 11.
[22] *Id.* at 12.
[23] *See Guizhou Tyre* at 6.
[24] *Id.* (citing Aeolus's Case Brief, "Aeolus Direct Case Brief in the Seventh Administrative Review of the Antidumping Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated December 16, 2016 (Aeolus's Case Brief), at 12-13).
[25] *Id.* at 7 (citing Aeolus's Case Brief).

because Commerce did not refer to the Rectification Report in the *Final Results* of the underlying review, it could not conclude that Commerce considered the report or the evidence therein when determining that Aeolus was not free from government control over its export activities.[26] As such, the CIT ordered Commerce to reconsider its separate rate determination concerning Aeolus in light of all evidence on the record, including the evidence in the Rectification Report.[27]

Analysis

Per the CIT's instructions, we have reconsidered our separate rate determination regarding Aeolus, in light of all evidence on the record, including the evidence in the Rectification Report, and we continue to determine that Aeolus is ineligible for a separate rate because it has not demonstrated that it operates free from *de facto* control by the Chinese government.

Under the broad authority delegated to it by Congress, Commerce employs a presumption of state control for exporters in a non-market economy (NME).[28] Under this presumption, exporters in an NME receive the country-wide rate, unless the exporter can rebut this presumption by affirmatively demonstrating its entitlement to a separate, company-specific margin by showing an absence of government control, both in law and in fact, with respect to its export activities.[29]

Commerce considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated

[26] *Id*.
[27] *Id*.
[28] *See Sigma Corp. v. United States*, 117 F. 3d 1401, 1405 (Fed. Cir. 1997) (*Sigma*).
[29] *Id*.

with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.[30] Typically, Commerce considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government authority; (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 disposition of profits or financing of losses.[31]

In the instant case, as noted by the CIT, it is "undisputed that Aeolus is 42.58 percent owned by China National Tire & Rubber Co., Ltd. (China National Tire), a 100 percent-owned subsidiary of China National Chemical Corporation (ChinaChem), an SOE supervised by China's SASAC, and . . . 6.48 percent owned by other SOEs supervised by local SASACs."[32] Further, we continue to determine that ChinaChem, an SOE, through its 100 percent-owned subsidiary China National Tire, controls Aeolus's board member selection process, including the selection of Aeolus's Chairman and Vice-Chairman.[33] Thus, we continue to find that the Chinese government, through an SOE, exerts control over Aeolus's management selection process, through control of its board member selection process.[34]

---

[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 Final Determination of Sales at Less than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22586-22587 (May 2, 1994) (*Silicon Carbide*); *see also 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) (*Furfuryl Alcohol*).

[32] *See Guizhou Tyre* at 5.

[33] *See* Aeolus SRA at Exhibit 11.

[34] *See Final Results* IDM at 10.

Specifically, Aeolus's AoA states that the board of directors shall be composed of [

].[35] The board of directors, board of supervisors, and shareholders [

].[36] Aeolus's AoA only requires that [ ]. The board of directors, board of supervisors, or shareholders [

]. In this case, the record indicates that no public shareholder has ever nominated a director to the board, despite any mechanisms that may be in place in Aeolus's AoA [ ].[37]

During the POR, [ ].[38] Additionally, we note, [ ] of Aeolus's AoA [

].[39] Furthermore, candidates are elected if they receive [

].[40] The board elected during the POR [

[35] *See* Aeolus SRA at Exhibit 11, [ ].
[36] *Id.* at Exhibit 11.
[37] *See* Aeolus's August 2, 2016 Supplemental Separate Rate Application Response at 1 (Aeolus's Supp. SRA); *see also* Aeolus's SRA at Exhibit 11.
[38] *See* Aeolus's SRA at Exhibit 13A (Exhibit 13A illustrates ChinaChem's dominance of the shareholder meetings, as its voted shares were approximately seven times higher than all other shares present at the shareholders meeting confirming its Board).
[39] *See* Aeolus's SRA at Exhibit 11.
[40] *Id.* (citing Aeolus's AoA at art. 83); *see also* Aeolus's SRA at Exhibit 13A; and Aeolus's SRA at Exhibit 6 (Exhibit 6 illustrates ChinaChem's total voting shares and Exhibit 13A illustrates ChinaChem's voted shares together the exhibits illustrate ChinaChem's voted shares were approximately [ ]).

].[41]

In addition, the record evidence indicates that during the POR, China National Tire and Aeolus shared multiple board members, and one of the overlapping board members is Aeolus's Chairman.[42] We note that Aeolus describes its Chairman as a representative of China National Tire, which is 100 percent owned by ChinaChem, who votes on behalf of China National Tire.[43] Furthermore, Aeolus's AoA grants its Chairman [

].[44] In previous proceedings, we have found such connections as described above between a controlling shareholder and a separate rate applicant warrant denying the applicant a separate rate, and the CIT has upheld such determinations.[45]

However, as stated above, in its opinion, the CIT held that Commerce failed to address significant contrary evidence concerning whether Aeolus is entitled to a separate rate, specifically the "Rectification Report" that Aeolus put on the record as evidence to support its claim that it is free from government control over its export activities.[46] According to the petitioners, the Rectification Report indicates that the SOE ChinaChem: (1) maintained direct control over Aeolus's operations; (2) could access Aeolus's financial information at any time through software it shared with Aeolus; and (3) required Aeolus to submit "investment, key

[41] *See* Aeolus's SRA at Exhibit 13A; *see also* Aeolus's SRA at Exhibit 6.
[42] *See* Preliminary Separate Rate Memo at 2; *see also* Petitioner's Letter, "Administrative Review of the Antidumping Duty Order on New Pneumatic Off-The-Road Tires from China (A–570–912): Petitioners' Rebuttal Information and Deficiency Comments on Aeolus' Separate Rate Application," dated December 30, 2015 (Petitioners' Aeolus SRA Rebuttal), at 6; Aeolus's SRA at Exhibit 13B.
[43] *See* Aeolus's Supp. SRA at 2.
[44] *Id.* at Exhibit 11.
[45] *See, e.g., Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 350 F. Supp. 3d 1308, 1320-21 (CIT 2018) (*Zhejiang Quzhou*).
[46] *Id.* at 7 (citing Aeolus's Case Brief).

projects, and tender process" for ChinaChem's approval during the POR.[47] In contrast, Aeolus claims, the Rectification Report demonstrates that, as of the commencement of the POR, the government control issues identified in the Rectification Report showed a "Rectification Status" of "{c}ompleted," *i.e.*, that the Rectification Report did not address issues during the POR, but, instead, described past issues that had been identified as improper connections between Aeolus and ChinaChem that were rectified.[48] Aeolus further explained that the Rectification Report illustrates that "as of the publication of the Rectification Report, Aeolus's SOE shareholders could not access the company's financial information and that review, and approval of key projects, did not depend on the company's SOE shareholders, but only on Aeolus's board of directors."[49]

As stated above, Aeolus's board selects its management, a board whose confirmation process is controlled by ChinaChem through China National Tire, its 100 percent-owned subsidiary.[50] As detailed above, Aeolus's board was nominated or voted in by an SOE, which in turn selected the management of the company.[51] Hence, despite Aeolus's contention that Aeolus's SOE shareholders could not access the company's financial information, Aeolus's management, which was ultimately appointed by the SOE, has control over the company's financial management system. Moreover, Aeolus remains on a financial system that is under the control of ChinaChem, a known SOE that continues to have a business interest in monitoring

---

[47] *See* Petitioners' Aeolus SRA Rebuttal at 6-7 and Attachment 3.

[48] *See* Aeolus's Letter, "Aeolus Rebuttal Factual Information Submission: Seventh Administrative Review of the Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated January 8, 2016 (Aeolus's Information Rebuttal) at 2, Exhibit 1A; *see also* Petitioners' Aeolus SRA Rebuttal at Attachment 3. We note that regardless of the translated version, the "Rectification Report" refers to ChinaChem, an SOE, as Aeolus's largest shareholder and actual *controlling* party in both the petitioners' and Aeolus's translations of the document.

[49] *See* Aeolus's Information Rebuttal at Exhibit-1A.

[50] *See* Aeolus's SRA at 13.

[51] *Id.* at Exhibit 13A.

Aeolus's business operations.[52] Also, that ChinaChem still maintains the ability to access Aeolus's financial information through the software it shares with Aeolus is not contradicted by the Rectification Report. Rather, because ChinaChem maintains the SAP enterprise resource planning (ERP) systems of the entities under its corporate umbrella,[53] we find that only ChinaChem's *statement* to "fully respect the independence of a listed company . . ." may serve as a safeguard preventing it from continuing to engage in the behaviors that the Chinese administering authority found to be unacceptable connections.[54] Notably, the Rectification Report contains no details about any structural changes that would address the independence issues identified, and relies instead on the apparently voluntary restraint promised by ChinaChem. Moreover, the Rectification Report contains no mention of any consequences or enforcement mechanisms to ensure that ChinaChem acts consistently with the Rectification Report. Considering the record evidence, we find that the Rectification Report does not establish Aeolus's independence, but rather represents an unenforceable promise by an SOE.

Additionally, Aeolus states that it "uses the same SAP system as ChinaChem because the companies invested by ChinaChem usually are of the same or related industry and have a similar business. Therefore, for cost consideration, they adopted the SAP system."[55] However, that cost considerations are the reason Aeolus maintains an SAP system with an SOE is not probative. The fact remains that Aeolus has a *shared* financial management system in the SAP ERP system

[52] *See* Aeolus's Information Rebuttal at Exhibit-1A; *see also* Aeolus's SRA at 13 and Exhibit 6.

[53] *See* Aeolus's Information Rebuttal at Exhibit-1A, p. 2. Aeolus's version of the rectification report states, "{a}lthough accounting and financial information of the Company is operated through ChinaChem's SAP system, ChinaChem fully respects the independence of a listed company and has never inquired about financial information of the Company." We note that it does not say that ChinaChem is unable to access Aeolus's financial information.

[54] *See* Aeolus's Information Rebuttal at 3 and Exhibit-1A.

[55] *Id.* at 3.

maintained by ChinaChem, and ChinaChem therefore remains in a position to monitor Aeolus's financial information.[56]

Aeolus attempts to mitigate this fact by stating that different entities use the SAP system independently from each other, and the SAP system requires a different approved account and password to log in for different entities.[57] Aeolus further submits that a sample screenshot, which shows that an Aeolus employee can log in to Aeolus's SAP system but not the system of other companies such as ChinaChem, demonstrates the separation of Aeolus's SAP system from ChinaChem. However, a subsidiary company not having access to its parent company's financial information does not prove that the inverse is also true, *i.e.*, that ChinaChem does not have access to Aeolus's financial system. The employee's lack of access to ChinaChem's SAP module merely illustrates that Aeolus's employee does not have access to ChinaChem's SAP module.[58]

Neither the Rectification Report nor exhibit 1B of Aeolus's Information Rebuttal establishes that ChinaChem no longer maintains the SAP system, but rather states that Aeolus uses ChinaChem's SAP system for cost reasons. As the Rectification Report states, "{t}he controlling shareholder and actual controller will work with the Company. . . and *guarantee* the Company's independent accounting activities and financial management in the SAP ERP system . . . , and forbid any person from accessing the Company's financial information without the Company's authorization."[59] Rather than establishing the independence of Aeolus with respect to the SAP system, we find that this statement suggests the conditions providing ChinaChem

[56] *Id*.
[57] *Id*.
[58] *Id.* at Exhibit 1B.
[59] *Id.* at Exhibit 1A, p. 2 (emphasis added).

access to Aeolus's information via the shared SAP system remain. Specifically, if the conditions did not still exist there would be no reason to "*guarantee*" the independence of Aeolus's financial system or "*forbid*" parties from accessing Aeolus's financial information without the company's permission.[60] Thus, as the entity that maintains the system, and despite the promises described in the Rectification Report, the record suggests that ChinaChem remains in a position to access Aeolus's financial information.[61]

Furthermore, as stated above, it is immaterial whether ChinaChem examines Aeolus's "investment, key projects, and tender{s} process" directly, because it has placed its preferred leadership in management positions using Aeolus's AoA's prescribed processes.[62] Because we find ChinaChem remains in a position to select Aeolus's board of directors, we find the exhibit submitted by Aeolus showing that investment, key projects, and tender process are now reviewed and approved by the internal management of Aeolus unpersuasive.[63] Specifically, the record evidence does not address or otherwise mitigate the issue that an SOE effectively selects its board of directors.[64] The purpose of the Rectification Report is to describe how certain improper connections between ChinaChem and Aeolus that had been identified were addressed by Aeolus and ChinaChem. Particularly, the companies shared an SAP system, which both companies still in fact share. The report describes steps taken to ensure that Aeolus has an independent accounting system, but whether those steps are effective remains unaddressed in the Rectification Report. As stated above, the only purported safeguard is ChinaChem's mere promise to not interfere with a listed company's business operations. Therefore, we find that,

---

[60] *See* Aeolus's Information Rebuttal at Exhibit-1A, p. 2.
[61] *Id.* at Exhibit-1A, p. 2 and Exhibit-1B.
[62] The leadership includes Aeolus's board chairman who is a known representative of China National Tires.
[63] *See* Aeolus's Information Rebuttal at Exhibit 2.
[64] *Id.* at 4 and Exhibit 2.

despite the Rectification Report showing specific government control issues being "rectified," there remains *de facto* government control over Aeolus by virtue of its board of directors and management being nominated and appointed by its SOE shareholders.

3. GTC's Separate Status

In the *Final Results* of the underlying review, we determined, based on substantial evidence, that GTC was not eligible for a separate rate. Specifically, we found that Guiyang SASAC, through its 100 percent-owned affiliate Guiyang Industry Investment Group Co., Ltd. (GIIG), an SOE who owns 25.20 percent of GTC, is GTC's single largest and *de facto* controlling shareholder.[65] Furthermore, we found that even with less than a majority number of shares in GTC, Guiyang SASAC, through its 100 percent-owned affiliate GIIG, remained in a position to control the export activities of Guizhou Tyre Import and Export Corporation (GTCIE) through its control of GTC.[66]

In the underlying review, we found that record evidence showed that GTC "elected members of its board of directors through shareholders' meetings *not available* to all shareholders" and made decisions affecting the distributions of profits at these meetings.[67] Specifically, we found that the AoA allowed GTC to circumvent a more inclusive board election

[65] *See Final Results* IDM at 13.

[66] *Id.* at 13-14; *see also 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). Commerce previously collapsed GTC and GTCIE into a single entity in the initial investigation. This decision has been unchallenged in each subsequent review, including the instant review; thus, Commerce continues to treat GTC and GTCIE as a single entity in this review.

[67] *See Final Results* IDM at 14 (emphasis added).

process; GTC was able to elect specific board members of its preference and its preferred profit distribution scheme.[68]

Also, we found that GTC's AoA failed to insulate GTC from government interference through its prescribed nomination processes for the selection of GTC's board of directors and senior management. Specifically, we found that GTC's nomination and voting processes for directors and management under Articles 40, 43, 83, and 117 of the AoA allowed Guiyang SASAC, through GIIG, to influence the board nomination process even with a less than majority number of voting shares.[69] Thus, we found that GTC was not eligible for a separate rate in the *Final Results*.[70]

However, during litigation, GTC explained that the particular shareholders' meeting of GTC referenced in the IDM, which we found was not available to all shareholders, was publicly announced and open to all shareholders.[71] Because this finding of fact calls into question our understanding of the record evidence and has the potential to impact the analysis concerning whether to grant GTC a separate rate in the underlying review, we requested a voluntary remand to reconsider and explain our determination concerning whether to grant a separate rate to GTC.

The CIT granted our request for a remand. Specifically, the CIT opined that "{Commerce's} concern, in this case, is 'substantial and legitimate' and will order a remand for Commerce to reconsider and explain its separate rate analysis with respect to the collapsed GTC entity."[72] As such, the CIT ordered Commerce to "reconsider its separate rate determination as

[68] *Id.* (citing Preliminary Separate Rate Memo at 2-3; and GTC's September 13, 2016 Supplemental Section A Questionnaire Response (GTC's 3rd SAQR)).
[69] *Id.* (citing GTC's 3rd SAQR at 2, Exhibits 2, 4, and 6-8; and Preliminary Separate Rate Memo at 2-3).
[70] *Id.* at 15.
[71] *See Guizhou Tyre* at 15.
[72] *Id.* at 8.

to GTC in the entirety, *i.e.*, in light of all record evidence."[73] The CIT did not reach any conclusions regarding the other arguments GTC made concerning the underlying results of the review.[74]

Analysis

In the underlying review, we stated, "{r}ecord evidence shows that GTC elected members of its board of directors through shareholders' meetings *not available* to all shareholders. Because GIIG circumvented a *more inclusive* board election process, it was able to elect specific board members of its preference and preferred profit distribution schemes."[75] In our attempt to clarify our view concerning the significance of the July 16, 2015 interim shareholders meeting, we inadvertently stated that the meeting was *not available* to *all shareholders*.[76] However, we now understand our phrasing was inaccurate.

Thus, per the CIT's order, we reconsidered our separate rate determination regarding GTC in the entirety, *i.e.*, in light of all record evidence, including the evidence related to the July 16, 2015, interim shareholders' general meeting.[77] After reconsidering all of the evidence on the record, we continue to find that GTC is ineligible for a separate rate in the underlying review because it is not free from *de facto* government control over its export activities.

As stated above, under the broad authority delegated to it by Congress, Commerce employs a presumption of state control for exporters in an NME.[78] Under this presumption, as outlined above, exporters in an NME-country receive the country-wide rate, unless the exporter

---

[73] *Id*.
[74] *Id*.
[75] *See Final Results* IDM at 14 (citing GTC's 3rd SAQR at 3, and Exhibits 2, 4, and 6-8).
[76] *Id.* at 14.
[77] *See Guizhou Tyre* at 8.
[78] *See Sigma* at 1405.

can rebut this presumption by affirmatively demonstrating its entitlement to a separate, company-specific margin by showing an absence of government control, both in law and in fact, with respect to its export activities.[79]

In the instant case, we find that GTC is not free from government control in making decisions regarding the selection of its management and thus is subject to *de facto* government control of its export functions.[80]

Notably, we continue to determine, and record evidence supports, that an SOE, GIIG, is GTC's single largest, and thus, controlling shareholder with 25.20 percent ownership.[81] Generally, we would expect any large shareholder, including a government entity, to control the operations of the company in which it holds the largest number of shares if its shareholder rights afford it that ability.[82] In the instant case, GTC's single largest shareholder with the opportunity and ability to exert influence on it is GIIG, an SOE. Specifically, GIIG is 100 percent owned and supervised by Guiyang SASAC, and through its large ownership stake, GIIG can control, and has an interest in controlling, the operations of GTC, including the selection of management and the profitability of the company.[83] In this case, the record evidence indicates that GIIG has exercised this ability to control the operations of GTC using its status as GTC's single largest, and *de facto* controlling, shareholder.[84] Notably, [

---

[79] *Id*.

[80] *See Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1326 (CIT 2017) (recognizing that "Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status" and sustaining Commerce's decision not continue with the separate rate analysis where one of the factors is not met).

[81] *See* GTC's January 20, 2016 Section A Questionnaire Response at 16 and Exhibit A-7 (GTC's AQR).

[82] *See, e.g.*, *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), and accompanying IDM (*Steel Wire Rod*).

[83] *See* Preliminary Separate Rate Memorandum at 2-3; *see also* GTC's AQR at Exhibit A-7. GTC is the producer, and GTCIE is its affiliate in charge of export sales.

[84] *See* GTC's 3rd SAQR at Exhibit 6.

], a board of directors that remained in effect for the majority of the POR.[85]

Specifically, we continue to find that Chinese law and GTC's AoA shareholders' safeguards in place during the POR were ineffective at preventing influence by an SOE that is a controlling shareholder. GTC's nomination and voting processes for directors and management under Articles 40, 43, 83, and 117 of its AoA allowed the Guiyang SASAC, through GIIG, to influence the board nomination process during the POR.[86] Specifically, Article 83 only allows shareholders with ten percent or more of voting shares held individually or jointly to nominate "*non-independent*" directors, and GIIG is the only ***individual*** shareholder with more than ten percent of voting shares for the majority of the POR. Further, record evidence fails to demonstrate any nominations of directors without GIIG involvement.[87] Moreover, record evidence suggests that no other individual shareholder owns the requisite percentage to nominate "non-independent" directors to GTC's board.[88] Furthermore, certain articles in GTC's AoA allow GIIG to remain in a supervisory position over GTC despite its number of ownership shares. Specifically, as noted above, Article 32(3) of GTC's AoA allows individual shareholders, including GIIG, the ability to supervise the operations of the Company and put forward suggestions and raise inquiries.[89] In addition, Article 49 of GTC's AoA allows

---

[85] *Id*.
[86] *See* GTC's May 25, 2016 Supplemental Section A Questionnaire Response at Exhibit 1 (GTC's 1st SAQR).
[87] *Id*.
[88] *Id.* at Exhibit 1. Although, we note that Article 83 also allows candidates for "independent director" to be nominated by the Board of Directors, Board of Supervisors or ***shareholders individually or jointly holding more than one percent*** of the shares of the Company. However, despite the one percent threshold required to nominate independent directors, GTC failed to demonstrate through record evidence of a nomination of an independent director by any individual shareholder or shareholders acting in concert.
[89] *See* GTC's 3rd SAQR at Exhibit 6.

"shareholders individually or jointly holding ten percent of the shares of the company . . . to propose to the Board of Directors to convene an interim shareholders' meeting." In the instant case, only GIIG individually has the requisite number of shares to convene a shareholders meeting.[90] Thus, other than GIIG's own restraint, nothing in GTC's AoA prevents GIIG from engaging in behavior that interferes with the autonomy of GTC.[91]

Moreover, though we acknowledge that the AoA cited by GTC appears on its face to place safeguards against undue influence by large shareholders in the selection of GTC's senior managers, the record demonstrates that those safeguards were unsuccessful in the instant case.[92] GIIG was ultimately able to dominate GTC's decision-making process, despite such safeguards, and appoint its preferred members to GTC's board.[93] In addition, because Article 130 of GTC's AoA explicitly states that the board of directors shall appoint or remove GTC's general manager and four deputy general managers, we find that GTC does not have autonomy from the government in making decisions regarding the selection of management because GIIG controls the board selection process. In addition, Article 161 (IV) of GTC's AoA states, "The Board of Director shall put forward {an} annual profit distribution proposal. . . ." As a result, GIIG ultimately controls the selection of GTC's senior management, as well as profit distributions through its influence on GTC's board selection process.[94,95]

We further continue to find that GTC's Chairman's relationship with GIIG is indicative of government control over GTC. Specifically, GTC's Chairperson, who is also [

[90] *See* GTC's AQR at Exhibit A-8.
[91] *Id*.
[92] *Id*.
[93] *See* GTC's 3rd SAQR at Exhibits 6 and Exhibit 8 (the exhibits illustrate that GIIG's voting shares determined the outcomes regarding almost all proposals during the POR).
[94] *See* GTC's 2nd SAQR at Exhibit 7.
[95] *See* GTC's AQR at 11-12 and Exhibit A-2.

].[96] The record describes GTC's Chairman as the former secretary of the party committee.[97] The record therefore indicates close ties to the Chinese government, as the Chairman was voted [ ], which is 100 percent owned and supervised by the Guiyang SASAC.[98] Additionally, Article 118 of GTC's AoA allows the Chairperson to conduct unilateral company decisions.[99]

Thus, we continue to find that GIIG, through its 25.20 percent ownership stake, controls GTC's board nomination process. As noted above, GTC's board is responsible for the selection of senior management, which controls the day-to-day decisions regarding the company's export activity.[100] Hence, we continue to find that Chinese law and GTC's AoA shareholders' safeguards in place during the POR were ineffective at preventing influence by an SOE that is a controlling shareholder, *i.e.*, GIIG.[101]

III. DISCUSSION OF INTERESTED PARTIES' COMMENTS

As discussed above, on August 9, 2019, Commerce released the Draft Results to interested parties for comment.[102] On August 23, 2019, GTC and Aeolus submitted comments on the separate rate findings in the Draft Results. No interested party submitted comment regarding the recalculation of Xugong's EP and CEP without making deductions for Chinese VAT.

Issue 1: GTC's Separate Status

---

[96] *See* GTC's 2nd SAQR at Exhibit 7C.
[97] *See* GTC's 1st SAQR at Exhibit 3 (Guizhou Tyre Co., Ltd. Annual Report of 2015, p. 41).
[98] *See* GTC's 1st SAQR at Exhibit 1.
[99] *Id.* (citing GTC's AoA at art. 118).
[100] *See* GTC's 1st SAQR at Exhibit 1 (citing GTC's AoA at art. 134).
[101] *See* GTC's 3rd SAQR at Exhibit 6.
[102] *See, generally*, Draft Results.

GTC's Comments:

- Extensive legal requirements and safeguards prevent GIIG from dominating GTC management decisions, which include not only GTC's AoA but also relevant Chinese company laws and codes.[103]
- GTC has successfully provided the *minimum quantum* of evidence and successfully shifted the burden to Commerce to provide affirmative evidence of government control.[104] Thus, Commerce's denial of GTC's separate rate is unlawful.
- Commerce misplaces its reliance on GIIG having accounted for most of the votes electing the 6th Board of GTC, almost 2 years prior to the POR.[105] As Commerce itself recognized, such occurrences that "predate the POR . . . are thus not pertinent to this review."[106] Moreover, these board members were nominated by the Nomination Committee, and GIIG had no involvement with said nomination.[107]
- In the prior review of this order, Commerce reviewed GTC as a mandatory respondent, conducted onsite verification, and found no discrepancies with GTCs qualification for a separate rate where the exact same board constitution was in place as in this review.
- Since prior reviews granting GTC a separate rate, GIIG has *decreased* its investments in GTC between AR5 and AR 7, *i.e.*, GIIG's investment reduced from 33.36 percent to 25.20 percent and the Guiyang SASAC ceased conducting performance reviews during that period of time.
- The Draft Results improperly fixate on a July 2015 shareholder meeting to find control by GIIG, while ignoring the May 2015 shareholder meeting that disproves GIIG's control.[108] At the May 15, 2015 meeting, two managerial candidates advocated by GIIG were voted upon but not elected due to dissenting votes from shareholders other than GIIG.[109] If GIIG controlled GTC, it would have been able at that time to appoint its preferred members to GTC's board.[110] Although, two months later, GIIG was able to elect its preferred members to GTC's board, the record only demonstrates that GIIG did so within the bounds of GTC's decision-making processes through the normal courses granted to all shareholders.[111] Thus, there is no record evidence of any instance of control by GIIG.
- GIIG does not have any rights not granted to every shareholder individually or jointly and is limited in its ability to nominate director candidates to no more than one-fifth of all directors.[112]
- The Draft Results misplaces reliance on GTC's Chairman in a strained attempt to manufacture government control emphasizing that he *serves as the proxy representing GIIG*

[103] *See* GTC's and Aeolus's Draft Comments at 9.
[104] *Id.* at 10.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 13.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 12.
[112] *Id.* at 12-13.

at GTC's shareholders' meetings. GTC's board chairman may have served as GIIG's proxy, but he did not work for GIIG or any other governmental entity.[113]

- Commerce did not and cannot find overlapping management between GTC and GIIG, having been advised that GTC's board members and senior managers did not work in any government entities during the POR or three previous years.[114] Further, during the POR, the second-largest shareholder owned 9.87 percent of shares and the third-largest owned 7.74 percent.[115] Being under the 10 percent threshold, the shareholders could have joined together or with other shareholders to nominate non-independent directors.[116]

Commerce's Position: The separate rate analysis has been subject to litigation in multiple cases before the CIT and the Court of Appeals for the Federal Circuit (CAFC), and Commerce's current practice is in accordance with the holdings of those Court decisions. For example, in *Sigma*, the CAFC affirmed that it is 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.[117] The CAFC held that sections 771(18)(B)(iv)-(v) of the Act recognize 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 is reasonable.[118] Likewise, 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*

---

[113] *Id.* at 15.

[114] *Id.* (citing GTC's 3rd SQR at 4).

[115] *Id.* at 17 (citing GTC's AQR at Exhibit A-8).

[116] *Id.*

[117] *See Sigma* 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).

[118] *Id.*; *see also 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*, 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.'")).

control of its export activities.[119] Furthermore, in *Advanced Technology*, the CIT ruled that majority ownership by a government entity, either directly or indirectly, rules out a respondent's ability to demonstrate an absence of *de facto* control.[120]

In *Wire Rod*, Commerce 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:

> the majority ownership holding in and of itself means that the government exercises or has the potential to exercise control over the company's operations generally, which may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.[121]

Although in *Advanced Tech* the respondent was majority owned by a government entity,[122] in other cases, consistent with the facts in *Jiangsu 2015*, Commerce has examined the totality of the circumstances where a respondent is not majority owned by a government entity

---

[119] *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) (*Jiangsu 2014*) ((quoting *Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61759 (November 19, 1997) and *Sigma* 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") (quotation marks and citation omitted)).

[120] *See Jiangsu 2015*, 121 F. Supp. 3d at 1266 (citing *Advanced Technology & Materials Co., Ltd., et al. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012) (*Advanced Tech I*), remand *aff'd* in *Advanced Technology & Materials Co., Ltd., et al. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech II*), *aff'd* in *Advanced Technology & Materials Co., Ltd. v. United States*, Case No. 2014-1154 (Fed. Cir. Oct. 24, 2014) (*Advanced Tech III*) (collectively, *Advanced Tech*) ("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.")).

[121] *See, e.g., Steel Wire Rod.*

[122] *See Advanced Tech I*, 885 F. Supp. 2d 1343.

and made a reasonable inference that the respondent does not control its export activities. For example, in *Containers*, we found that a respondent was indirectly controlled by an SOE, despite owning a minority of shares, and denied that company a separate rate.[123] In that case, two minority shareholders owned a combined 48.2 percent of the respondent but, in turn, were 100-percent owned by a Chinese SASAC.[124] We examined the totality of the circumstances in *Containers* and concluded that a Chinese SASAC, though the minority shareholders it owned, had the ability to exercise control over important management organizations, such as the board of directors, which had the authority to appoint managers that controlled the operations of the respondent.[125]

Therefore, following these cases, in evaluating whether a respondent has rebutted the presumption of government control, it is Commerce's practice to examine whether the government might 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.[126]

---

[123] *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.

[124] *Id*.

[125] *Id*.

[126] *See Truck and Bus Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 8606 (January 27, 2017) (*Truck & Bus Tires*), and accompanying IDM at Comment 1; *see also 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part*, 82 FR 12192 (March 1, 2017) (*Tetra*), and accompanying IDM at Comment 1 ("The Department continues to evaluate its practice with regard to the separate rates analysis in light of the Diamond Sawblades 2014 AD proceeding, and the Department's determinations therein. In particular, we note that in litigation involving the Diamond Sawblades 2014 proceeding, the CIT found the Department's existing separate rates analysis deficient in the specific circumstances of that case, in which a government-controlled entity had significant ownership in the respondent exporter. Following the Court's reasoning, as affirmed by the Court of Appeals for the Federal Circuit ("CAFC"), in recent proceedings, we concluded that where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.").

Specifically, the Court has upheld Commerce's practice of finding that a respondent company could not rebut the presumption of *de facto* government control where the government owns, either directly or indirectly, only a minority of shares in the respondent company, and where the record contains requisite "additional indicia" of control.[127] Consistent with normal business practices, we would expect any controlling 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.[128] In addition, in other cases, after an examination of the facts of the case, we have examined whether the government may be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership.[129]

GTC asserts that the Draft Results are devoid of any indication with respect to government control over GTC, let alone the requisite "additional indicia." We disagree. Our analysis above demonstrates that we have considered the factual record with respect to the potential to exercise government control and identifies the evidence that is the basis for our finding that GTC is not eligible for a separate rate. We also disagree with GTC's claim that the burden of proof shifted to Commerce to provide such direct evidence of government control based on a minimum quantum of information provided by GTC which purports to establish the non-existence of such control. Commerce's separate rate practice requires respondents to rebut the presumption of government control if it wishes to demonstrate its eligibility for a separate rate. GTC cites to the various provisions in the AoAs and Chinese company law that ostensibly provide safeguards to minority shareholders, which it purports to represent specific evidence

[127] *See An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350, 1359 (CIT 2018), *appeal dismissed*, No. 18-1713, 2018 WL 4562795 (CAFC August 22, 2018) (*An Giang II*).
[128] *Id.*
[129] *See*, *e.g.*, *Truck & Bus Tires* IDM at Comment 1.

demonstrating *de facto* independence from the government.[130] However, GTC ignores the other evidence on the record identified by Commerce, particularly the shareholder voting record that, in contrast to the above evidence which pertains to *de jure* independence, illustrates which shareholders *in fact* elected GTC's board of directors, that belies the effect that those safeguards were intended to have.[131]

Additionally, GTC cites to the Draft Results at 18, which it asserts is {Commerce's} "own 'acknowledge{ment}' these safeguards rebut the presumption that GTC is government controlled." However, GTC's reliance on our statement on page 18 of the Draft Results is misplaced. In our Draft Results we stated:

> {T}hough we acknowledge that the AoA cited by GTC appears *on its face* to place safeguards against undue influence by large shareholders in the selection of GTC's senior managers, the record demonstrates that *those safeguards were unsuccessful in the instant case*. (emphasis added)

As such, GTC's argument relies only on the first part of this statement, without recognizing that Commerce found, based on other record evidence, that those safeguards were unsuccessful in this case – and thus that such safeguards were insufficient to constitute the minimum quantum necessary to rebut the presumption of *de facto* government control.

GTC contends that Commerce misplaces reliance on the 2012 shareholder vote (which elected the Board of Directors of the company that was in place during the majority of the POR in question), because occurrences pre-dating the POR are not pertinent to the review. Further, because the board nominations were made by the Nomination Committee and not the directors themselves, GTC argues that GIIG was not involved in the nomination stage as Commerce suggests. This argument wholly ignores that the board members elected in 2012 [

[130] *See* GTC's 1st SAQR at Exhibit 6.
[131] *Id.*

], including the [

], and thus [ ].[132] Thus, the record establishes that while the extant board members [ ] and GIIG had no direct role in the nomination process, those directors were then elected to the board in a shareholder vote where [ ] in the shareholder meeting. As such, the nomination process notwithstanding, GIIG's votes effectively selected the board. Thus, GIIG's votes effectively selected the board in existence for the majority of the POR.

GTC argues that the extent to which other shareholders did or did not participate in the pre-POR election of the Board of Directors is irrelevant because, as Commerce recognized in the underlying review, such occurrences that "pre-date the POR . . . are thus not pertinent to this review."[133] However, the statement cited by GTC concerned a performance review of GTC performed by the Guiyang SASAC which pre-dated the POR and was thus deemed not pertinent to this review.[134] In contrast, and we find that evidence of a shareholder vote installing a Board of Directors whose composition remained the same during the majority of the instant POR is, indeed, *specifically pertinent* to the issue at hand, regardless of when such a vote was held.

GTC then asserts that the Draft Remand improperly fixates on the July 2015 Meeting to find GIIG control, while ignoring the May 2015 Meeting that disproves GIIG control. However, GTC focuses on the results of the May 2015 meeting, without consideration of the results of the May and July 2015 shareholder votes taken together and the reasonable conclusion that may be drawn from these votes. GTC emphasizes that the May annual shareholder meeting and vote

[132] *See* GTC's 1st SAQR at Exhibit 11.

[133] *See* GTC's and Aeolus's Draft Comments at 10 (citing *Final Results* IDM at 15).

[134] *See Final Results* IDM at 15 ("the Department rejects Petitioners' assertion that we deny GTC's separate rate because of unsubstantiated claims of Guiyang SASAC's review during the POR. Petitioners have failed to demonstrate their claim through record evidence").

demonstrate that GIIG does not and cannot control the board selection process. GTC claims that GIIG's election of its preferred candidates two months later does not demonstrate control, but rather, participation in GTC's decision-making in the normal course available to all shareholders.[135] Regardless of whether the July 2015 meeting was convened in accordance with all relevant Articles of Association and relevant law we find that the re-vote evinces the limitations of such protections. The July 2015 shareholder vote demonstrates that the largest, albeit minority, SOE shareholder, GIIG, exerts influence over GTC. Prior to 2015, there is no record evidence that any proposal which went before the shareholders for a vote did not pass and, indeed, [ ].[136] Thus, the independent director and profit-sharing votes in May 2015 represent the first instance on the record where the largest shareholder and SOE supported proposals did not pass a shareholder vote. The record thus demonstrates that, upon this first instance of a GIIG-supported proposal failing to secure majority shareholder support, an interim shareholder vote was immediately called, and the prior failed proposals were submitted for re-vote. Article 49 of GTC's AoA allows "[ ]."[137] Thus, only GIIG individually has the requisite number of shares to convene an interim shareholders meeting.[138] As such, GIIG's sole ability to convene interim shareholders meetings means GIIG can effectively hold re-votes on GIIG's favored proposals until such a time where such proposals would prevail, which they did in the July 2015 re-vote, where GIIG dominated the vote and its

[135] *Id.* at 13 (citing GTC's 2nd SAQR at 10).
[136] *See* GTC's 1st SAQR at Exhibit 7; GTC's 2nd SAQR at Exhibit 7; and GTC's 3rd SAQR at Exhibits 4-8.
[137] *See* GTC's 1st SAQR at Exhibit 1.
[138] *See* GTC's AQR at Exhibit A-8.

preferred proposals prevailed.[139] We continue to conclude that this fact pattern demonstrates an additional indicium of the potential for GIIG to control the board, and thus the day-to-day operations, of GTC, regardless of any minority shareholder protections included in the company AoAs or otherwise.

GTC also contends that the Draft Remand misplaces reliance on GTC's Chairman by emphasizing that he [ ]. GTC asserts that the board chairman, Ma Shichun, may have served as GIIG's proxy, but he did not work for GIIG or any other governmental entity and was merely instructed by GIIG to vote a certain way.[140] While we do not solely rely on Mr. Shichun's status as the GIIG proxy as evidence of control, we disagree that our reliance on the relationship between Mr. Shichun and the SOE in question is misplaced. In particular, Commerce uses this fact to illustrate that GTC's Chairperson does, in fact, communicate with and receives suggestions regarding nominations and profit distribution from a government entity, to which he is beholden for his position at GTC, as GIIG's shares determined the selection of GTC's board.

GTC further asserts that the fact that all shareholders have the ability to nominate directors shows GIIG does not control the board selection process; that the fact that directors have to date only been nominated by the board does not prevent shareholders from doing so in the future; and that Commerce improperly conflates actions of the GTC board with actions of GIIG. Similarly, GTC argues that Commerce ignores that provisions of the AoAs allow [

[139] *See* GTC's 1st SAQR at Exhibit A-7.
[140] *See* GTC's and Aeolus's Draft Comments at 16 (citing GTC's 2nd SAQR at Exhibit 7A).

], and, thus, that a constituency of two or more of GTC's non-majority shareholders could indeed undertake such actions represents evidence of the lack of GIIG control of the company. While such actions may, indeed, be sufficient to rebut a presumption of control with respect to the largest shareholder, absent evidence on the record that such actions were actually undertaken, the mere potential for such actions remains insufficient to rebut evidence of GIIG's exercise of control during the POR, as discussed above.

Furthermore, GTC is correct in its assertion that the second-largest shareholder owned 9.87 percent of shares and the third largest owned 7.74 percent of GTC shares.[141] However, GTC fails to consider that these are funds managed by government entities (*i.e.*, ICBC Credit Suisse Fund-Industrial and Commercial Bank of China-ICBC Credit Suisse Asset Management Co., Ltd., Tianhong Fund-China Everbright Bank-Minmetals International Trust -Jin Niu No 6, Private Placement, Aggregate Asset Trust Plan).[142] Commerce has long considered Chinese financial institutions to be arms of the Chinese government.[143] Moreover, when reviewing separate rate applications, Commerce considers whether an SOE takes an active or a passive role in the business activity of the company under consideration.[144] As the record did not indicate that the funds exercised their shareholder rights, Commerce did not consider the funds in its SOE ownership analysis; however, GTC's hypothetical argument would make the funds not merely passive investors and would only serve to increase the potential for government control over

---

[141] *See* GTC's AQR at Exhibit 3.

[142] *See* Petitioner's Letter, "Administrative Review of the Antidumping Duty Order on New Pneumatic Off-The-Road Tires from China (A–570–912): Petitioners' Rebuttal Information and Deficiency Comments on Aeolus' Separate Rate Application," dated December 30, 2015 at Attachment 6 and Attachment 9 (the petitioners' AQR Comments).

[143] *See Coated Paper* IDM at Comment 17.

[144] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 FR 55625, 55628 (November 8, 1994).

GTC's management selection and profit distribution, not decrease the potential for government control over the selection of its board of directors and profit distribution.[145]

Issue 2: Aeolus's Separate Status

Aeolus's Comments:

- The Draft Results improperly continues to deny separate rate status for Aeolus, despite its being 49.06-percent SOE-owned.[146] Extensive legal requirements and safeguards prevent any one shareholder from dominating Aeolus, including relevant provisions of Aeolus's AoAs and relevant Chinese company law.[147]
- Commerce conflates actions by the board with actions of the SOE shareholder.[148] Though Commerce concludes that the board confirmation and management selection processes are controlled by ChinaChem, the shareholders democratically select Aeolus's board in a meeting open to all shareholders.[149]
- There is no record support for these assertions that [ ] at the time of the POR.[150] Thus, the Draft Results improperly denied Aeolus a separate rate based on unsupported assertions concerning ChinaChem's voted shares.[151]
- The Draft Results also misconstrue record evidence concerning Aeolus's Chairman.[152] Specifically, there is no record support for Aeolus describing its Chairman as a representative of China National Tire. Also, government control is not evidenced merely because Aeolus's AoA grants its Chairman broad authorities, including [ ].[153]
- The Draft Results incorrectly discount the Rectification Report, which constitutes compelling evidence of cessation of intertwined operations between ChinaChem and Aeolus before the POR of the seventh administrative review.[154] The Draft Results mischaracterized the Rectification Report as a voluntary restraint promised by ChinaChem and an unenforceable promise by an SOE.[155] Commerce ignores the explanation in the Rectification Report that it is being entered into as a means of compliance with a decision rendered by the Henan Security Regulatory Commission (Henan SRC), as the Henan SRC is analogous to the

---

[145] *See* GTC's and Aeolus's Draft Comments at 17 (citing GTC's AQR at Exhibit A-8).
[146] *See* GTC's and Aeolus's Draft Comments at 22.
[147] *Id.* Aeolus cites to PRC Company Law Articles 37 and 99; Articles 20 and 21 of the Chinese Code for Listed Companies; and Articles [ ] of its AoAs.
[148] *Id.* at 23.
[149] *Id.* (citing Aeolus's SRA 13-14).
[150] *Id.* at 24.
[151] *Id.* at 25.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 26.
[155] *Id.*

Securities and Exchange Commission (SEC).[156] The Draft Results interpret the terms of the Rectification Report contrary to their plain meaning.[157] The Rectification Report evidence established that the steps taken to ensure that Aeolus has an independent accounting system are effective.

- The Draft Results thus rest only on speculative statements that ChinaChem could control Aeolus, whereas Aeolus has presented the *minimum quantum* of evidence necessary to shift the burden of proof to Commerce to affirmatively show *de facto* government control.[158]

Commerce's Position: Aeolus makes arguments similar to GTC's with respect to Commerce's separate rate practice, generally. In response, we refer to our discussion of our separate rate practice, generally, in Comment 1, *supra*, and the change to our practice in Comment 3, *infra*. Regarding its claim that it has identified sufficient evidence that rebuts the presumption of government control, we disagree. We address comments with respect to Commerce's specific findings concerning Aeolus in the Draft Results and support for the additional indicia of SOE control herein.

Aeolus first asserts that the Draft Results misconstrue the evidence of its board of directors being nominated and appointed by its shareholders, emphasizing that it is the board of directors, not the shareholders, who nominate directors, whereas shareholders then vote for the selections (thus, no shareholder, ChinaChem or otherwise *nominates* candidates for board positions). We inadvertently conflated the board nomination and selection process in our discussion, whereas the intent of the analysis was to focus on the latter. Nevertheless, because each board member was approved in ChinaChem-dominated shareholder votes, the fact that board members, not shareholders, nominate other potential board members does not undermine our finding that ChinaChem exercises control over the board selection process. Aeolus would prefer that Commerce focus on the provisions of the AoAs and relevant company law that

[156] *Id.*
[157] *Id.* at 26.
[158] *Id.* at 27-28.

hypothetically allow for public shareholders to approve board members; however, Commerce based its findings on record evidence that belies the effectiveness of such provisions, *e.g.*, the actual shareholder voting record demonstrating ChinaChem's dominance of the board selection process.[159]

Furthermore, Aeolus misplaces its reliance on the Chinese company law, Aeolus's AoA, and the Code for Listed Companies, as evidence of *de facto* independence from the government. Crucially, the shareholder voting record illustrates which shareholders *in fact* elected Aeolus's board of directors. ChinaChem, a known SOE, dominated the vote concerning the election of Aeolus's board of directors through its 100 percent owned subsidiary China National Tire & Rubber. The record indicates that ChinaChem through its 100 percent owned subsidiary, in fact, elected the directors of ChinaChem's choosing during the POR.[160]

Aeolus next contends that the Draft Results incorrectly stated that the AoA allows [

] whereas [

].[161] We thus clarify the statement as follows: non-independent director candidates *may* remain in their position in perpetuity so long as they are re-elected.[162] While our statement in the Draft Results may have been imprecise, our critical finding remains unchanged: non-independent directors may remain in their position in perpetuity if first re-nominated by Aeolus's nomination committee and re-elected.[163] As Aeolus asserts, to maintain their positions as board members, the "non-independent" board members must be voted in by the

---

[159] *See* Draft Results at 8 (citing Aeolus's SRA at Exhibit 11).
[160] ChinaChem's votes presents were [
], thus electing the board members of its choosing.
[161] *See* GTC's and Aeolus's Draft Comments at 24 (citing Aeolus's SRA at Exhibit 11 (emphasis added)).
[162] *Id.*
[163] *See* Aeolus's SRA at Exhibit 11, Exhibit 13A.

shareholders present at the particular shareholders meeting electing the board officials.[164] In the instant case, the AoA still allows directors to remain in perpetuity, as long as they are re-elected by the *shareholders*, whose votes are dominated by an SOE. As such, the board of directors is beholden to its SOE shareholders, one of which the Henan SRC has referred to as Aeolus's actual controlling shareholder, *i.e.*, ChinaChem.[165]

Aeolus contends that Commerce erred in finding that ChinaChem represented an [

].[166] Aeolus contends that that the exhibit cited by Commerce does not provide the voting information recited in the Draft Remand.[167] Although Commerce cited only to Aeolus's SRA at Exhibit 13A (demonstrating the shareholder vote), Exhibit 6 of Aeolus's SRA demonstrates Aeolus's ownership (and thus, the proportion of the voting shares held by the shareholders).[168] To be clear, contrary to Aeolus's assertions, the record indeed indicates that SOEs made up [

] of all shares voted to elect Aeolus's Board during the POR, with ChinaChem itself making up [ ] of all shares voted to choose Aeolus's Board.[169] Specifically, Exhibit 6 of Aeolus's SRA shows that ChinaChem owns 159,642,148 of Aeolus's shares. Exhibit 13A illustrates there were [ ] shares ([ ] percent of total voting shares) present at the vote which elected Aeolus's board during the POR, with a total of [ ] of the shares held by [ ].[170] No constituency of [ ] could

---

[164] *See* Aeolus's SRA at Exhibit 6 and Exhibit 13A.
[165] *See* Aeolus's SRA at Exhibit 6 and Exhibit 13A; *see also* Aeolus's Information Rebuttal at Exhibit-1A ([ ]).
[166] *See* Aeolus's Draft Comments at 24-25.
[167] *Id.*
[168] *See* Aeolus's SRA at Exhibit 6 and Exhibit 13A ([ ]).
[169] *Id.*
[170] *Id.*

otherwise account for the [ ] shares in attendance without ChinaChem; thus, ChinaChem was necessarily a party to that vote.[171] As stated above, ChinaChem owns 159,642,148 of the shares voting at the meeting which equates to [ ].[172]

Aeolus contends that the record does not support Commerce's finding that Aeolus' Chairman is a representative of China National Tire, which is 100 percent owned by ChinaChem, who votes on behalf of China National Tire. However, our finding is based on Aeolus' response to a question regarding Wang Feng's responsibilities and duties at both entities: "China National Tire & Rubber Corp. is a shareholder of Aeolus. A representative of China National Tire & Rubber Corp. attends the Shareholder's Meeting of Aeolus and votes at the meeting."[173] Thus, the record is vague as to whether the China National Tire representative and Mr. Wang are one and the same. However, even if the representative and Mr. Wang are distinct, the record still reflects an Aeolus Board of Directors which includes Chairman Wang Feng, who is also a board member of China National Tire, a [ ] owned subsidiary of ChinaChem. Moreover Mr. Wang sits on the nomination committee for Aeolus, and also holds the position of [

[171] *Id.*

[172] *Id.* Commerce notes that its [ ].

[173] *See* Aeolus's Supp. SRA at 2.

].[174] Thus, Mr. Wang, a fiduciary of China National Tire, votes at Aeolus's board meetings.[175]

As such, Aeolus's assertion does not undermine Commerce's finding that the record provides substantive indicia of ChinaChem's control of Aeolus by way of Mr. Wang's position as chairman of Aeolus's board of directors and as a board member of a wholly-owned SOE subsidiary, China National Tire.[176] Furthermore, as a fiduciary of both China National Tire and Aeolus, he has a responsibility to maximize profits for both entities, meaning that if it is in the best interest of China National Tire, an SOE subsidiary, [ ], and it does not explicitly violate provisions of the AoA or China corporate law, he must do so. As China National Tire is 100 percent owned by an SOE, he, in essence, has a fiduciary responsibility to an SOE; thus, he is beholden to an SOE.[177] Moreover, we have found such connections between a controlling shareholder and a separate rate applicant warrant denying the applicant a separate rate, and the CIT has upheld such determinations.[178]

Further, Aeolus argues that the Draft Results incorrectly discount the Rectification Report and maintains that the document constitutes compelling evidence of a cessation of intertwined operations between ChinaChem and Aeolus before the AR7 POR.[179] Commerce has fully analyzed the Rectification Report and has interpreted the Rectification Report in light of the

---

[174] *See* Aeolus's SRA at Exhibit 10A (Aeolus Tyre Co., Ltd. 2014 Annual Report at p. 24); *see also* Petitioners' Letter, "Administrative Review of the Antidumping Duty Order on New Pneumatic Off- The-Road Tires from China (A–570–912): Petitioners' Rebuttal Information and Deficiency Comments on Aeolus' Separate Rate Application," December 30, 2015, at Attachment 4 (citing Aeolus Tyre Co., Ltd. 2014 Annual Report at 24) (Petitioners' SRA Comments).

[175] *Id.*

[176] *Id.*

[177] *See* Aeolus's SRA at Exhibit 11, [ ]; Aeolus's Supp. SRA at 2; and Petitioners' SRA Comments at Attachment 4.

[178] *See, e.g.*, *Zhejiang Quzhou*, 350 F. Supp. 3d at 1320-21.

[179] *See* Aeolus's Information Rebuttal at Exhibit-1A.

plain language of the report, which lists ChinaChem as actual controlling party of Aeolus, as well as the party maintaining the ERP system.[180] In addition, Commerce lists further concerns regarding the enforceability of the report (*i.e.*, that it fails to list any reviewable steps that the Henan SRC took to monitor and ensure compliance, or any penalty or threat of penalty for continued non-compliance before the POR).[181] Aeolus may characterize these concerns as speculative but, nevertheless, it fails to rebut our finding that the report itself lists ChinaChem as the actual controlling party of Aeolus and a custodian of the ERP system.[182]

Issue 3: New Separate Rate Analysis Contradicts Findings in Prior Segments

GTC and Aeolus's Comments:

- Commerce's denial of separate rates for GTC and Aeolus contradicts Commerce's longstanding separate rate analysis. Specifically, Commerce focuses on management selection, instead of examining the "totality of the circumstances." Under the holistic approach, both respondents indisputably set their export prices without government approval and have independent authority to negotiate and sign contracts demonstrating their eligibility for a separate rate. Commerce's new approach does not examine whether the government controls the companies' export activities, and instead focuses on management selection. Commerce did not even bother to analyze the respondents' export activities before denying their separate rates.[183]
- Commerce treated government ownership as dispositive, using a truncated analysis that relied upon SOE ownership percentages to deny separate rate status. Decades ago Commerce determined that ownership 'by all the people' in and of itself cannot be considered dispositive in establishing whether a company can receive a separate rate.[184]
- Commerce relied solely upon the government's potential to nominate a manager or a board member, deviating from its practice of requiring that the government either actually appoint management or be directly or indirectly involved in the management of the company.[185]

---

[180] *Id.* at Exhibit 1.

[181] *Id.*

[182] *Id.*

[183] *See* GTC's and Aeolus's Draft Comments at 29-30 (citing *Jiasheng I* (quoting *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 FR 61754, 61759 (November 19, 1997); *Jiasheng II*; Policy Bulletin 05.1; *Sparklers*, 56 FR at 20588; *Silicon Carbide*, 59 FR at 22587; *Furfuryl Alcohol*, 60 FR at 22545; and *Structural Steel Beams from China*, 66 FR at 67199).

[184] *Id.* at 30 (citing *Silicon Carbide*, 59 FR at 22586; and *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, 6174 (February 11, 1997).

[185] *Id.* at 31 (citing *Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China*, 71 FR 10009 (February 28, 2006), and accompanying IDM at Comment 3; *An Giang I*, 203 F. Supp. 2d at 1292; and *Jiangsu 2015*, 121 F. Supp. 3d at 1269).

- Commerce has thus established a new separate rate analysis inconsistent with separate rate findings in the LTFV investigation and prior reviews and lacking reasonable explanation of the change in practice.[186]

Commerce's Position: First, we disagree with GTC and Aeolus that denying GTC and Aeolus a separate rate contradicts Commerce's long-standing separate rate analysis. In NME proceedings, there is a rebuttable presumption that companies are subject to government control and, thus, should be assessed a single antidumping duty rate.[187] It is Commerce's policy to assign exporters of the subject merchandise from an NME country a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its export activities. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, Commerce analyzes each exporting entity in an NME country under the test established in *Sparklers*,[188] as amplified by *Silicon Carbide*.[189]

Under the separate rates test, Commerce considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) legislative enactments decentralizing control over export activities of the companies; and (3)

---

[186] *Id.* at 31-32 (citing *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1276 (2008); *SKF USA, Inc. v. United States*, 630 F. 3d 1365, 1373 (CAFC 2011); *WelCom Prods., Inc. v. United States*, 865 F. Supp. 2d 1340, 1344 (CIT 2012); and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)).

[187] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079, 53082 (September 8, 2006); *see also 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, 29307 (May 22, 2006).

[188] *See Sparklers*, 56 FR at 20589.

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

other formal measures by the government decentralizing control over export activities of companies.[190]

Further, Commerce typically considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (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.[191]

Commerce continues to evaluate its practice with regard to the separate rates analysis in light of the *Diamond Sawblades from China* AD proceeding, and Commerce's determinations therein.[192] In particular, we note that in litigation involving the *Diamond Sawblades* proceeding, the CIT found Commerce's existing separate rates analysis deficient in the circumstances of that proceeding, in which a government-controlled entity had significant ownership in the respondent exporter.[193] We have concluded that, where a government entity holds a majority ownership

---

[190] *See Sparklers*, 56 FR at 20589.

[191] *See Silicon Carbide*, 59 FR at 22586-89; *see also Furfuryl Alcohol*, 60 FR at 22545.

[192] *See* Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China, (May 6, 2013), in *Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012) (*Advanced Technology*), affirmed in *Advanced Technology & Materials Co., Ltd. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013). This remand redetermination is available on the Enforcement and Compliance website at http://enforcement.trade.gov/remands/12-147.pdf; *see also Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77098 (December 20, 2013), and accompanying PDM at 7, unchanged in *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014), and accompanying IDM at Comment 1.

[193] *See, e.g.*, *Advanced Technology*, 885 F. Supp. 2d at 1349 ("The court remains concerned that Commerce has failed to consider important aspects of the problem and offered explanations that run counter to the evidence before it."); *see also id*. at 1351 ("Further substantial evidence of record does not support the inference that SASAC's {state-owned assets supervision and administration commission} 'management' of its 'state-owned assets' is restricted to the kind of passive-investor de jure 'separation' that Commerce concludes.") (footnotes omitted); *id*. at 1355 ("The point here is that 'governmental control' in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a 'degree' of it can obviously be traced from the controlling shareholder, to the

share in an exporter, either directly or indirectly, the majority ownership holding in and of itself means that the government exercises (or has the potential to exercise) control over the company's operations generally. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect that a 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. Accordingly, we have considered the level of government ownership, where necessary.

Thus, Commerce has not changed its separate rate practice, but rather examined the level of government ownership more closely in light of the *Diamond Sawblades* proceedings. The less than fair value investigation of this proceeding occurred prior to *Advanced Tech*, and the 2012-2013 review where Commerce previously granted GTC a separate rate took place when Commerce began to evaluate its separate rates practice in light of *Advanced Tech*. Since then, Commerce has employed this refined practice in several NME proceedings.

Next, GTC and Aeolus take issue with Commerce focusing on management selection, instead of examining the "totality of the circumstances." We disagree and find that GTC and Aeolus misconstrue Commerce's separate rate analysis. Commerce has a rebuttable presumption that companies within an NME are under government control.[194] A respondent may rebut this presumption, unless record evidence demonstrates that the majority shareholder is controlled by

board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms, financing, and inputs into finished product for export."); and *id*. at 1357 ("AT&M itself identifies its 'controlling shareholder' as CISRI {owned by SASAC} in its financial statements and the power to veto nomination does not equilibrate the power of control over nomination.") (footnotes omitted).

[194] *See* Policy Bulletin 05.1 at 1.

the government.[195] The CIT has confirmed that a respondent must rebut all four *de facto* criteria in order to qualify for a separate rate:

> The absence of *de facto* government control can be shown by evidence that the exporter sets its prices independently of the government and of other exporters, negotiates its own contracts, keeps the proceeds of its sales (taxation aside), *and* selects its management autonomously. The 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." Because Plaintiffs failed to satisfy one *de facto* criterion, "Commerce had no further obligation to continue with the analysis."[196]

Here, as detailed extensively above, both GTC and Aeolus were unable to show absence of *de facto* control over their management selection. GTC and Aeolus argue that Commerce disregards the nexus to export activities by focusing on management selection, without finding government control over the export activities of the companies. However, Commerce's separate rate test examines all four *de facto* criteria: (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 in determining whether a respondent is

---

[195] *See Jiangsu 2015*, 121 F. Supp. 3d at 1266 (reiterating Commerce's revised practice as to precluding companies that have majority government shareholders from rebutting the presumption of de facto control); *see also Tetra* IDM at 8; *Steel Wire Rod* at 6-7 (explaining Commerce's practice). The burden of rebutting the presumption of control is on the respondent company.

[196] *See Zhejiang Quzhou*, 350 F. Supp. 3d at 1313 (citations omitted); *see also Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1325-26 (CIT 2017) (*Yantai*) (affirming Commerce's determination that the respondent company was ineligible for a separate rate based on its failure to satisfy the third criterion in establishing an absence of *de facto* government control *i.e.*, autonomy from government control in making decisions in the selection of management); *id.*, 203 F. Supp at 1326 ("{a}s an exporter in an NME country that is indirectly majority-owned by the government, Yantai CMC has the burden to show that it has such autonomy…Yantai CMC failed to meet the third factor of the test. *Given that all four factors must be satisfied, Commerce had no further obligation to continue with the analysis.*" (emphasis added)).

subject to *de facto* government control of its export functions.[197] If a respondent is unable to rebut one of the four *de facto* criteria, the company is ineligible for a separate rate.[198]

Additionally, GTC and Aeolus argue that Commerce treated government ownership as dispositive, relying on SOE ownership to deny separate rate status, when in the past, Commerce granted separate rates to companies "owned by all the people." Again, Commerce's practice has evolved in light of the *Diamond Sawblades* proceeding, where the CIT found Commerce's existing separate rates analysis deficient in the circumstances of that proceeding, in which a government-controlled entity had significant ownership in the respondent exporter. Also, as detailed above, in cases where a respondent was not majority owned by the government,[199] Commerce has examined the totality of the circumstances and made a reasonable inference that the respondent does not control its export activities by examining the four *de facto* criteria, as Commerce has done here.

Finally, GTC and Aeolus argue that Commerce relied solely on the government's potential to nominate a manager or a board member with control over day-to-day company operations, deviating from its practice of requiring that the government either actually appoint management or be directly or indirectly involved in the management of the company. However, the respondents' characterization of Commerce's practice is incorrect. As this Court has observed, in majority ownership situations the ability to exert control *is* control, whether or not that ability is exercised.[200] The Court observed that, because of Commerce's practice of requiring additional indicia of control in minority ownership situations, Commerce cannot rely

---

[197] *See AMS Assocs. v. United States*, 719 F. 3d 1376, 1376 (CAFC 2013).
[198] *See Zhejiang Quzhou*, 350 F. Supp. 3d at 1313 (citations omitted); *see also Yantai*, 203 F. Supp. 3d at 1326.
[199] *See*, *e.g.*, *Containers* IDM at Comment 10; *see also An Giang II*, 284 F. Supp. 3d 1350.
[200] *See An Giang II*, 284 F. Supp. 3d at 1359.

solely on potentiality because "without more, 'potential control' suggests the potential to influence management rather than the potential to actually control management."[201] Here, Commerce has not relied on mere potentiality, without more, but rather identified additional indicia of control as explained in Issues 1 and 2, above.

IV. FINAL RESULTS OF REDETERMINATION

These final results of redetermination have resulted in a dumping margin of 16.78 percent for Xugong.[202] Furthermore, because this remand redetermination has resulted in changes to the weighted-average dumping margin for Xugong, the respondent for which we based the margin for the separate respondents,[203] we have assigned this rate to the following separate rate respondents: (1) Qingdao Qihang Tyre Co., Ltd.; (2) Qingdao Free Trade Zone Full-World International Trading Co., Ltd.; (3) Trelleborg Wheel Systems (Xingtai) Co., Ltd.; and (4) Weihai Zhongwei Rubber Co., Ltd.

9/23/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[201] *Id.* at 1360.
[202] *See* Memorandum, "Draft Results of Redetermination Pursuant to Court Remand in the 2013-14 Antidumping Duty Administrative Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Draft Results Analysis Memorandum for Xuzhou Xugong Tyres Co.," dated August 9, 2019.
[203] *See Final Results*, 82 FR at 18734.