

Zhejiang Machinery Import & Export Corp. v. United States,
Court No. 19-00039, Slip Op. 20-122 (CIT August 21, 2020)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND**

I. SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination (Final Redetermination) pursuant to the opinion and remand order of the U.S. Court of International Trade (the Court) in *Zhejiang Machinery Import & Export Corp. v. United States*, Court No. 19-00039, Slip. Op. 20-122 (August 21, 2020) (*Remand Order*). This Final Redetermination concerns Commerce’s final results in the 2016-2017 administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished, (tapered roller bearings) from the People’s Republic of China (China).¹

In its *Remand Order*, the Court remanded the *Final Results* to Commerce with respect to Commerce’s determination that Zhejiang Machinery Import & Export Corp. (ZMC) was ineligible for a separate rate because it failed to establish an absence of *de facto* government control over ZMC’s export activities.² Specifically, Commerce determined that the government of China (GOC) had the potential to control ZMC’s export activities through its parent company, Zhejiang Sunny I/E Corp (Sunny), whose majority owner was its labor union under the ultimate

¹ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China*, 84 FR 6132 (February 26, 2019) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

² See *Remand Order*, Slip Op. 20-122 at 2, 11-12, 45.

control of the Chinese Communist Party (CCP).³ The Court remanded to Commerce to: (1) consider ZMC's revised translations for certain articles of association (AOAs) that pertain to Sunny's Employee Stock Ownership Committee (ESOC) and that Commerce had rejected as untimely filed new factual information; (2) address how Sunny's labor union had the potential to exercise majority shareholder rights in light of evidence regarding the ESOC's ability to do so; and (3) address how the revised translation impacts Commerce's analysis.⁴

Pursuant to the *Remand Order*, but under respectful protest,⁵ Commerce has accepted ZMC's revised translation and placed it on the record of this remand redetermination.⁶ In further accordance with the *Remand Order*, Commerce has addressed: (1) the impact of the revised translation of the ESOC's AOAs on our analysis of ZMC's eligibility for a separate rate; and (2) how Sunny's labor union had the potential to exercise majority shareholder rights in light of the ESOC's activities. In addition, Commerce has addressed ZMC's comments regarding Commerce's draft results of redetermination. In this Final Redetermination, Commerce continues to find that ZMC failed to demonstrate an absence of *de facto* government control over its export activities and is therefore not eligible for a separate rate.

II. BACKGROUND

On August 1, 2017, Commerce initiated an administrative review of the antidumping duty order on tapered roller bearings from China for the period June 1, 2016 through May 31,

³ See *Final Results* IDM at 4-14.

⁴ See *Remand Order*, Slip Op. 20-122 at 11-12, 45.

⁵ See *Viraj Group, Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003).

⁶ See Memorandum, "2016-2017 Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Restoring Zhejiang Machinery Import & Export Corp.'s Case Brief," dated September 22, 2020 (Initial Case Brief). We note that we uploaded the business proprietary and public summary versions to the record of this remand proceeding but cite only to the business proprietary version in this Final Redetermination.

2017, and for which a review was requested of ZMC.⁷ In the *Preliminary Results*, Commerce analyzed ZMC's separate rate application and its ownership structure, explaining the relationship between Sunny, the ESOC, and Sunny's labor union as follows:

{ZMC} is wholly owned by {Sunny}... {who} is, in turn, owned by: (1) Zhejiang Province Metal & Minerals Import and Export Co., Ltd. (Zhejiang MMI&E), a company ultimately wholly-owned by a {State-owned Assets Supervision and Administration Commission of the State Council (SASAC)}; and (2) Sunny's "{ESOC} under the name of labor union." Sunny's labor union is governed by the Labor Union Law of the People's Republic of China and is registered before the Zhejiang Federation of Trade Unions, a local branch of the All-China Federation of Trade Unions (ACFTU). In the China NME Status Memo, we determined that "{l}abor unions are under the control and direction of the {ACFTU}, a government affiliated and {Chinese Communist Party (CCP)} organ" and that "{a}ll trade unions are affiliates of the government-controlled ACFTU and its branches at the local and enterprise level."... Through SASAC-ownership, and control of Sunny's labor union, the government of China exercises its rights inherent in majority ownership as would be expected; for instance, Sunny has control over the composition of {ZMC}'s board of directors, which in turn chooses the company's management.⁸

Therefore, Commerce preliminarily determined that ZMC did not demonstrate an absence of *de facto* government control over its export activities as it is wholly owned by a company with two shareholders, one of which is linked to a SASAC and the other, its labor union, that is ultimately controlled by the CCP.⁹

In both its Initial Case Brief and its Revised Case Brief, ZMC argued that Sunny was not controlled by its labor union, but rather the ESOC, whose individual members own shares in

⁷ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 82 FR 35749 (August 1, 2017); and Timken's Letter, "Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China (06/01/16-05/31/17): The Timken Company's Request for Administrative Review," dated June 30, 2017 at 2.

⁸ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Intent To Rescind the Review in Part; 2016-2017*, 83 FR 32263 (July 12, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM) at 11 (internal citations omitted).

⁹ *Id.*

Sunny.¹⁰ According to ZMC, because Chinese law and regulations do not permit an ESOC to be registered as a legal person, the labor union was registered as the nominal shareholder, while in fact the ESOC exercised majority shareholder rights independent of the labor union.¹¹ In its Initial Case Brief, ZMC argued that one of its prior supplemental questionnaire responses contained a translation error in the first two articles of the ESOC’s AOAs.¹² The original English translation stated that the ESOC was [

] and [

].¹³ In its Initial Case Brief, ZMC argued that the words “labor union” do not appear in the original Chinese text and submitted a revised translation of the first two AOAs that stated that the ESOC was [] and [

].¹⁴ Commerce rejected the revised translations of the AOAs in ZMC’s Initial Case Brief as untimely filed new factual information that was due by May 4, 2018 (the deadline for the supplemental questionnaire response), and requested that ZMC resubmit its case brief without the revised translation,¹⁵ which it did.¹⁶

In the *Final Results*, Commerce continued to find that ZMC failed to rebut the presumption of *de facto* government control and was, therefore, ineligible for a separate rate.¹⁷ Commerce explained that its practice, as developed through prior proceedings and case law, is

¹⁰ See Initial Case Brief at 1-3; see also ZMC’s Case Brief, “Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People’s Republic of China: Resubmission of Case Brief,” dated December 6, 2018 at 1-3 (Revised Case Brief).

¹¹ *Id.*

¹² See Initial Case Brief at 3.

¹³ See ZMC’s May 4, 2018 Supplemental Questionnaire Response Separate Rate Application (ZMC Supp SRA) at Exhibit 7 Articles 1-2.

¹⁴ See Initial Case Brief at 3.

¹⁵ See Commerce Letter, “30th Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People’s Republic of China: Rejection of Untimely-Filed New Factual Information,” dated December 3, 2018 (NFI Rejection Letter).

¹⁶ See Revised Case Brief.

¹⁷ See *Final Results* IDM at 4-14.

that where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, then the majority ownership holding, in and of itself, constitutes evidence that the government exercises, or has the potential to exercise, control over the company's operations, including ZMC's export activities.¹⁸ Accordingly, any ability to control, or possess an interest in controlling, the operations of the company (including the selection of board members, management, and the profit distribution of the company) by a government entity is subject to Commerce's rebuttable presumption that all companies within the non-market economy (NME) are subject to government control.¹⁹ In examining the organizational structure of ZMC and its owners in light of these standards, Commerce determined in the *Final Results* that ZMC had not rebutted the presumption of *de facto* government control.²⁰ Specifically, the record evidence showed ZMC to be wholly owned by Sunny, and Sunny was, in turn, owned by: (1) Zhejiang MMI&E (minority shareholder), which was wholly owned by a SASAC; and (2) Sunny's labor union (majority shareholder), which was ultimately controlled by the ACFTU, which is an extension of the CCP.²¹ Commerce therefore concluded that the GOC had the ability to exert control over ZMC through Zhejiang MMI&E and Sunny's labor union.²² Moreover, Commerce cited ZMC's original translation of the ESOC's AOA's as support for its conclusion that the ESOC is connected to the labor union because the individual owners of the ESOC are all labor union members.²³

ZMC challenged the *Final Results* before the Court and, on August 21, 2020, the Court remanded Commerce's decision. In its *Remand Order*, the Court directed Commerce to consider

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.* at 9-10.

²² *Id.* at 10-11.

²³ *Id.* at 11.

the revised translation of Sunny’s ESOC’s AOA’s that Commerce rejected from the record and to provide a more reasoned explanation of its denial of a separate rate for ZMC.²⁴ Specifically, the Court found that Commerce did not sufficiently explain how Sunny’s labor union has the potential to exercise majority shareholder rights, such as selecting management and appointing board members, in light of record evidence indicating such majority control was actually exercised by the individual shareholders of Sunny’s ESOC.²⁵ The Court also found that the revised translation did not fall under any of Commerce’s regulatory definitions of factual information, but rather it was corrective information.²⁶ The Court further held that Commerce abused its discretion in rejecting the revised translation, particularly when Commerce cited the original, potentially incorrect translation in the *Final Results* to support its conclusion that Sunny’s ESOC members were also members of its labor union.²⁷ Because the Court found that Commerce had improperly rejected the revised translation, it also held that Commerce’s conclusion that all ESOC members are labor union members was not supported by the evidence.²⁸ The *Remand Order* accordingly directed Commerce to consider the revised translation, including sections that contradict Commerce’s finding of common membership between the labor union and ESOC, or to address whether that finding was necessary to Commerce’s determination that ZMC failed to rebut the presumption of *de facto* government control.²⁹ The Court stated that it “takes no position on the issue of whether, with more robust analysis, explanation, and consideration of the evidence, Commerce’s determination may be supported by substantial evidence.”³⁰

²⁴ See *Remand Order*, Slip Op. 20-122 at 2.

²⁵ *Id.* at 39-43.

²⁶ *Id.* at 13-19.

²⁷ *Id.* at 19-21.

²⁸ *Id.* at 43-44.

²⁹ *Id.* at 44.

³⁰ *Id.* at 45.

On November 2, 2020, Commerce released the draft results of redetermination to all interested parties and invited them to comment.³¹ ZMC filed timely comments on November 6, 2020.³² Complete responses to ZMC’s comments are provided below, following the Final Redetermination.

III. REMANDED ISSUES

A. Legal Framework

As explained in the *Final Results*, Commerce considers China to be an NME.³³ In accordance with section 771(18)(C)(i) of the Act, a determination that a country is an NME shall remain in effect until revoked by the administering authority. Since no party submitted a request to reconsider China’s NME status as part of this administrative review, Commerce continued to treat China as an NME in the *Final Results*.³⁴ In evaluating whether to grant separate rate status to a company in an NME, Commerce has a rebuttable presumption that the export activities of all firms are subject to government control and influence.³⁵ It is Commerce’s policy to assign all

³¹ See “Draft Results of Redetermination Pursuant to Court Remand; *Zhejiang Machinery Import & Export Corp. v. United States*, Court No. 19-00039, Slip. Op. 20-122 (CIT August 21, 2020),” released on November 2, 2020 (Draft Redetermination).

³² See ZMC’s submission, “Tapered Roller Bearings from People’s Republic of China: Comments on Draft Redetermination,” dated November 6, 2020 (ZMC Draft Redetermination Comments).

³³ See *Final Results* IDM at 7 (citing *Antidumping Duty Investigation of Certain Aluminum Foil from the People’s Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 FR 50858, 50861 (November 2, 2017) (citing China NME Status Memorandum), unchanged in *Certain Aluminum Foil from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 FR 9282 (March 5, 2018)).

³⁴ *Id.*

³⁵ 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), and accompanying IDM; and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2011- 2012*, 78 FR 40692 (July 8, 2013), and accompanying PDM at 5-7, unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of the 2011-2012 Antidumping Duty Administrative Review and New Shipper Reviews*, 79 FR 4327 (January 27, 2014); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2014-2015*, 82 FR 4844 (January 17, 2017).

exporters in an NME proceeding 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 exports.³⁶ To establish that a company is independent of government control and, therefore, entitled to a separate rate, Commerce analyzes each exporting entity under the test established in *Sparklers*,³⁷ as further developed in *Silicon Carbide* and *Diamond Sawblades I*.³⁸ Together, these tests require a respondent to demonstrate an absence of both *de jure* and *de facto* government control with respect to exports.³⁹ The consequences of failing to do so are that the exporter will be found to be part of the NME-wide entity.⁴⁰ In sum, Commerce determines whether an exporter has demonstrated an ability to control its own commercial decision-making concerning export activities, *i.e.*, whether decisions at the firm level are separate and apart from decisions made by the government with respect to exports.

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

³⁶ See, e.g., *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791, 63793 (October 17, 2012), and accompanying IDM.

³⁷ See *Sparklers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 56 FR 20588 (May 6, 1991), and accompanying IDM at Comment 1 (*Sparklers*) (“We have determined that exports in nonmarket economy countries are entitled to separate, company-specific margins when they can demonstrate an absence of central government control, both in law and in fact, with respect to export activities.”).

³⁸ See *Silicon Carbide from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*) (explaining that an exporter may receive a separate rate if it establishes on a *de jure* and *de facto* basis that there is an absence of governmental control) and *Diamond Sawblades Redetermination in Advanced Tech I*, 885 F. Supp. 2d 1343, 1343 (CIT 2012) (*Diamond Sawblades I*), sustained in *Advanced Tech. & Materials Co. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech II*), affirmed in *Advanced Tech. & Materials Co. v. United States*, 581 F. App'x 900 (Fed. Cir. 2014) (*Advanced Tech III*); see also *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) (*Diamond Sawblades 11-12*), and accompanying IDM at Comment 1.

³⁹ See *Tapered Roller Bearings Final Results*, 82 FR 4844 and accompanying IDM at Comment 3.

⁴⁰ The Court of Appeals for the Federal Circuit upheld the application of the “NME presumption” in *Sigma Corp. v. United States*, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997). In setting forth its NME policy, “Commerce made clear the consequences to an exporter of not rebutting the presumption of state control and establishing its independence: the exporter would be assigned the single rate given to the NME entity. Shortly thereafter, the Court of International Trade acknowledged and sustained Commerce’s NME policy.” *Transcom Inc. v. United States*, 294 F.3d 1371, 1381-82 (Fed. Cir. 2002) (citation omitted).

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) other formal measures by the government decentralizing control over export activities of companies.⁴¹ 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.⁴²

In this Final Redetermination, we are complying with the Court's *Remand Order* to consider the revised translation of the Sunny ESOC's AOA's and to reassess our separate rate determination for ZMC.⁴³ For the reasons discussed below, we continue to find that ZMC failed to rebut the presumption of *de facto* government control. Accordingly, we continue to find that ZMC is not eligible for a separate rate and, therefore, is part of the China-wide entity with a weighted-average dumping margin of 92.84 percent.

⁴¹ See *Sparklers*, 56 FR at 20589.

⁴² See *Silicon Carbide*, 59 FR at 22586-89; *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).

⁴³ See *Remand Order*, Slip Op. 20-122 at 2.

B. Analysis

Pursuant to the *Remand Order* and under respectful protest,⁴⁴ we accepted ZMC’s revised translation of Articles 1 and 2 of the ESOC’s AOA’s for our Final Redetermination.⁴⁵ ZMC asserts that the revised translation shows that the term “labor union” does not appear in the official Chinese version of Articles 1 and 2 of the AOA’s.⁴⁶ This revised translation, according to ZMC, supports ZMC’s contention that Sunny’s ESOC operates independently from its labor union.⁴⁷ However, because other record evidence demonstrates a connection between the labor union and the ESOC, the revised translation does not alter our determination that ZMC has failed to rebut the presumption of *de facto* government control.

First, ZMC’s revised translation of Articles 1 and 2 is inconsistent with other articles in the AOA’s, for which ZMC did not revise the translation.⁴⁸ Specifically, Article 20 states:

[
],⁴⁹

Therefore, even though the revised Articles 1 and 2 state that the ESOC is [

], rather than [] as indicated in the original translations, Article 20 still demonstrates [].

⁴⁴ See *Viraj Group Ltd.*, 343 F.3d at 1376-77. We are accepting the revised translation under respectful protest because we disagree with the Court’s holding that the translation does not fall under any of the regulatory definitions of factual information. Translations of Sunny’s ESOC’s AOA’s were due by the May 4, 2018 deadline for ZMC’s supplemental questionnaire response. See NFI Rejection Letter. Accordingly, translations of the AOA’s constituted evidence submitted in response to a supplemental questionnaire, within the meaning of 19 CFR 351.102(b)(21)(i). Therefore, in our view, the revised translation, submitted three months after the deadline for the supplemental questionnaire responses, was untimely filed new factual information.

⁴⁵ See Initial Case Brief.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.*

⁴⁸ See ZMC Supp SRA at Exhibit 7.

⁴⁹ *Id.* at Exhibit 7, Article 20 (emphasis added).

Other information on the record demonstrates that ESOC members are also labor union members. On October 2, 2017, ZMC submitted rebuttal information in which it stated, “Sunny is owned by {Zhejiang MMI&E} ([] percent of shares) and *labor union* ([] percent of shares).”⁵⁰ ZMC further explained:

Sunny is majoritively {sic} owned by its *labor union*, which consists of [] private individuals. In Exhibit 1, please see the Articles of Association of Sunny and the list of *labor union members* who own the shares of Sunny. Based upon the Articles of Association, the majority shareholder, *i.e.*, Sunny’s *labor union*, takes majority members of the board of directors and majority voting rights over all important decisions of Sunny within the board of directors. The board of directors, which is controlled by the *majority shareholder*, also appointed the general manager who is in return responsible for all daily activities of Sunny.⁵¹

This description indicates that the individual shareholders who exercise majority rights, such as board of director decisions and a role in the appointment of Sunny’s general manager, are also labor union members. Furthermore, the above referenced Exhibit 1, entitled “List of Labor Union Members Own {sic} the Shares of Sunny,” provides the names of the [] individuals who are shareholding labor union members.⁵²

In a subsequent supplemental questionnaire, Commerce requested that ZMC “{p}rovide the percentage of either Sunny’s shares, or the labor union’s shares, owned by each of the individual owners of Sunny’s labor union.”⁵³ In its May 4, 2018 response, ZMC reiterated that Sunny’s labor union holds [] of the company.⁵⁴ ZMC further explained that the [] was actually owned by Sunny’s individual employees, but, because Chinese laws and

⁵⁰ See ZMC’s Letter, “Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People’s Republic of China: Factual Information regarding Zhejiang Machinery,” dated October 2, 2017 (ZMC Rebuttal Facts) at 2 and Exhibit 1, Sunny’s AOA at Article 11 (emphasis added).

⁵¹ *Id.* at 2 (emphases added).

⁵² *Id.* at Exhibit 1.

⁵³ See Commerce Letter, “2016-2017 Administrative Review of Tapered Rollers Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Separate Rate Supplemental Questionnaire,” dated April 13, 2018 at 5.

⁵⁴ See ZMC Supp SRA at 4.

regulations do not allow ESOCs to register as legal persons, the ESOC was registered as the company's shareholder in the name of the labor union.⁵⁵ Although ZMC argued that the ESOC is independent from the labor union, it also provided an Exhibit entitled "List of Individuals Owned {sic} Sunny's shares" that provided the names of the [] individual owners of Sunny's ESOC.⁵⁶ The names listed are the exact same as those listed as shareholding labor union members in Exhibit 1 of Sunny's October 2, 2017 submission.⁵⁷ Therefore, the record evidence indicates there is commonality of membership between Sunny's labor union and individual shareholders of Sunny's ESOC.

Furthermore, ZMC states that only one ESOC member, [], holds a position in Sunny's union as a [].⁵⁸ ZMC attempts to minimize the significance of [] role by stating that "her interest in Sunny is small ([] {percent}) and she has no government affiliation...{and} is entitled to only one vote at the ESOC Members' General Meeting."⁵⁹ ZMC's argument that [] interest in Sunny is "small" is misleading and irrelevant, given that [], and all are connected to the labor union through their membership.⁶⁰ ZMC further attempts to underplay the linkages with the labor union by stating that other ESOC members have no position in the labor union.⁶¹ In this, ZMC appears to be making a distinction between labor union membership and labor union leadership. However, Commerce does not make such a distinction because the GOC has the ability to control labor union members to the same extent as labor union leaders, and collectively, these individuals,

⁵⁵ *Id.* at 4-5.

⁵⁶ *Id.* at 5 and Exhibit 6.

⁵⁷ *Id.* at Exhibit 6; *see also* ZMC Rebuttal Facts at Exhibit 1.

⁵⁸ *See* ZMC Supp SRA at Exhibit 6; *see also* Revised Case Brief at 4.

⁵⁹ *See* Revised Case Brief at 4.

⁶⁰ *See* ZMC Supp SRA at Exhibit 7 Article 29.2.

⁶¹ *See* Revised Case Brief at 4-5.

who are members of the labor union, direct [] of the equity ownership of Sunny through the ESOC.

ZMC also contends that the ESOC members are not otherwise employed by or affiliated with the Chinese government or directly hold positions or membership within the AFCTU.⁶² However, Sunny’s shareholding ESOC members need not hold direct membership with the ACFTU, or be otherwise affiliated with the GOC, for the GOC to have the potential to control Sunny. As we stated in the *Final Results*:

Sunny’s labor union is governed by the Labor Union Law of the People’s Republic of China and is registered before the Zhejiang Federation of Trade Unions, a local branch of the AFCTU. In the China NME Status Memorandum, we determined that “{1}abor unions are under the control and direction of the {ACFTU}, a government affiliated and {Chinese Communist Party (CCP)} organ” and that “{a}ll trade unions are affiliates of the government-controlled ACFTU and its branches at the local and enterprise level.”⁶³

In its *Remand Order*, the Court sustained Commerce’s determination that the GOC can influence all labor union activities through the ACFTU⁶⁴ and further held that substantial record evidence “supports Commerce’s conclusions... that Sunny’s labor union had sufficient activities that the ACFTU could influence.”⁶⁵ The Court further cited [] as additional evidence of the ACFTU’s ability to influence the labor union.⁶⁶

The Court further stated in its *Remand Order* that if the ESOC and labor union are connected, “since ZMC claims the ESOC actually exercises majority shareholder rights, this may support a finding of potential government control.”⁶⁷ As explained above, [] shareholding

⁶² *Id.* at 3-5.

⁶³ *See Final Results* IDM at 9 (citing China NME Status Memorandum at 5, 21-22, and 31) (internal citations omitted).

⁶⁴ *See Remand Order*, Slip Op. 20-122 at 35-37.

⁶⁵ *Id.* at 39.

⁶⁶ *Id.* at 38-39.

⁶⁷ *Id.* at 43.

members of Sunny's ESOC are also labor union members. Thus, even if the ESOC does actually exercise majority shareholder rights, the common membership of ESOC members with the labor union means that the GOC can exercise control over the ESOC through its labor union members and, consequently, exercise control over Sunny. Specifically, we find that the GOC can influence the composition of Sunny's board of directors since the ESOC and labor union are connected and the majority shareholders can elect three out of five of Sunny's board members, while Zhejiang MMI&E, a SASAC-controlled entity, elects the other two board members.⁶⁸ Therefore, we find that the GOC has the ability to control the appointment of all five of Sunny's board members. Because ZMC is wholly owned by Sunny, the GOC can through Sunny, in turn exercise influence over ZMC's selection of management and export activities.

In sum, record evidence—independent of the revised translation of the AOAs—indicates that Sunny's labor union is not simply a nominal majority shareholder unconnected to the ESOC. Rather, this additional evidence indicates that the labor is able to exert control over Sunny through the common union membership of the shareholding ESOC members. Thus, the revised translation of the AOAs does not change our determination that ZMC has failed to rebut the presumption of *de facto* government control, and, therefore, ZMC is ineligible for a separate rate.

IV. ZMC's COMMENTS ON DRAFT RESULTS OF REDETERMINATION

Comment 1: Whether Commerce's Denial of ZMC's Separate Rate Based on the Labor Union Membership of Sunny's ESOC Members Is Supported by Record Evidence

ZMC argues that, because Commerce accepted the revised translation of Articles 1 and 2 of the ESOC AOAs, Commerce has recognized that only the ESOC can exercise majority shareholder rights over Sunny and control ZMC.⁶⁹ Consequently, according to ZMC, Commerce

⁶⁸ See ZMC Rebuttal Facts at Exhibit 1; and Initial Case Brief at 2.

⁶⁹ See ZMC Draft Redetermination Comments at 2.

can no longer argue that the labor union's status as the nominal majority shareholder of Sunny is sufficient evidence to establish potential CCP control over Sunny.⁷⁰ ZMC further asserts that Commerce's Draft Redetermination advanced a new explanation for Chinese government control over ZMC through the common membership of Sunny's labor union and the shareholding ESOC members.⁷¹ According to ZMC, the focus of Commerce's Draft Redetermination on the common membership between Sunny's ESOC and its labor union is in juxtaposition to Commerce's prior assertions that such common membership was "relevant" but not "necessary" to Commerce's primary determination that the GOC controlled Sunny through the nominal majority shareholder status of its labor union.⁷² ZMC asserts that Commerce's focus on the common membership of Sunny's ESOC and labor union represents an "abandonment" of its conclusion in the *Final Results* that Sunny's labor union has the potential to exercise majority shareholder rights in Sunny.⁷³ ZMC contends that the common membership of Sunny ESOC's individual shareholders and the labor union is now Commerce's *only* reason for denying ZMC a separate rate and is weakened by Commerce's prior position that common union and ESOC membership was not the primary basis for denying ZMC separate rate status in the *Final Results*.⁷⁴

ZMC also contends that Commerce's assertion that the CCP exerts control over the ESOC through its individual members, who are also members of the labor union, is flawed.⁷⁵ ZMC disagrees with Commerce's assessment that the revised translation for Articles 1 and 2 of the AOAs are inconsistent with other provisions in the AOAs, such as Article 20.⁷⁶ ZMC argues

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 2-3.

⁷² *Id.* at 3.

⁷³ *Id.* at 8, 11-12.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

that Commerce failed to acknowledge that although Article 20 of the AOAs states that labor union members are eligible to become ESOC members, there is no requirement that labor union members become members of the ESOC, or that ESOC members join the labor union.⁷⁷ ZMC acknowledges that one of its submitted exhibits containing a “list of labor union members who own the shares of Sunny” identifies the [] individual members who were employees, shareholders, and labor union members of Sunny.⁷⁸ Nevertheless, ZMC contends that Commerce’s finding that the common membership between the individual shareholders of the ESOC and Sunny’s labor union establishes government control disregards the language of the AOAs that states that labor union membership is not a requirement to be in the ESOC.⁷⁹ Further, ZMC argues that Sunny employees who are shareholders participate in the ESOC as Sunny employees and shareholders, not as labor union members.⁸⁰ ZMC also argues that Commerce failed to consider other relevant provisions of the Sunny ESOC AOAs by only selecting Article 20 as proof of an inconsistency with Articles 1 and 2.⁸¹ ZMC claims that, when read as a whole, Articles 1, 2, 19, 20, and 21 indicate that ESOC members must be Sunny employees first, and, while labor union members may be eligible to join the ESOC, labor union membership is not a requirement.⁸²

⁷⁷ *Id.* at 3-4. Because the text of Sunny’s ESOC’s AOAs are BPI in the record submissions, Commerce accorded BPI treatment to its discussion of Articles 1, 2 and 20 in its Draft Redetermination. However, in its ZMC Draft Redetermination Comments, ZMC has not treated Articles 1, 2, and 20 as BPI. The ZMC Draft Redetermination Comments also discuss additional Articles in Sunny’s ESOC’s AOAs – including Articles 19 and 21 – that were submitted as BPI on the record of the administrative review but not accorded BPI treatment in the ZMC Draft Redetermination Comments. Therefore, ZMC has seemingly made the text of certain Articles of the Sunny ESOC’s AOAs public. Consequently, for this *Final Remand*, Commerce has not accorded BPI treatment to the text and discussion of Sunny’s ESOC’s AOAs that ZMC has made public in the ZMC Draft Redetermination Comments.

⁷⁸ *Id.* at 4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 4-5.

⁸² *Id.*

Commerce's Position:

We disagree with ZMC's assertion that Commerce's analysis of the connections between Sunny's ESOC and its labor union represents an "abandonment" of its determination in the *Final Results* that the GOC has the potential to exercise control over ZMC when ZMC is wholly owned by Sunny, whose labor union is its majority shareholder.⁸³ As explained in the *Final Results*, Commerce has concluded in recent proceedings that where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, the majority ownership holding, in and of itself, means that the government exercises, or has the potential to exercise, control over the company's operations.⁸⁴ The Court's *Remand Order* directed Commerce to provide additional analysis of how Sunny's labor union could exercise such potential majority rights in Sunny in light of evidence that Sunny's ESOC did so.⁸⁵ The Court also directed Commerce to accept and consider the revised translations of Sunny's ESOC's AOAs as part of its analysis.⁸⁶ Acceptance of the revised translation and consideration of the connections between Sunny's ESOC and labor union are not concessions that the labor union's status as nominal majority shareholder of Sunny is insufficient evidence to establish the potential for CCP control over Sunny, but rather compliance with the Court's *Remand Order*. Furthermore, an analysis of how Sunny's labor union and ESOC are connected through common membership supplements, rather than undercuts, Commerce's conclusion that the labor union has the potential to exercise majority shareholder rights in Sunny. Specifically, the common identity between the labor union members and the individual shareholders of the ESOC demonstrates how the labor union has the actual ability to exercise majority shareholder rights within Sunny.

Further, we disagree that Commerce's analysis of Article 20 in the Draft Redetermination was misplaced or incomplete in light of Articles 19 and 21. We cited to Article 20 to

demonstrate that, irrespective of the revised translations of Articles 1 and 2, the Sunny ESOC's AOA's demonstrate [

] ZMC's citations to Articles 19 and 21 to argue that union membership is not *required* of ESOC members is rendered irrelevant by other record evidence demonstrating *actual* union membership of the individual shareholders of Sunny's ESOC. As Commerce explained in the Draft Redetermination, ZMC's October 2, 2017 and May 4, 2018 submissions demonstrate that the [] individual shareholders of Sunny's ESOC are also members of its labor union.⁸⁷

Therefore, we have relied on ample evidence across ZMC's submissions, and not only the AOA's, that shows common membership between Sunny's ESOC and its labor union in fact existed during the period of review. This evidence supports Commerce's overarching conclusion that ZMC has not rebutted the presumption of *de facto* government control because the CCP has the ability to exert control over Sunny, ZMC's sole owner through Sunny's union members who are also its individual shareholders in the ESOC.

Comment 2: Whether a Finding of Government Control Through Union Membership is in Accordance with Law

ZMC continues its disagreement with Commerce's finding that labor union membership within the ESOC demonstrates government control by arguing that Commerce's lack of distinction between labor union membership and leadership improperly expands Commerce's test for CCP control.⁸⁸ ZMC argues that Commerce has never before relied on a company's relationship with a labor union or labor union membership as the basis for denying a separate

⁸³ See *Final Results* IDM at 9-10.

⁸⁴ *Id.* at 8.

⁸⁵ See *Remand Order*, Slip Op. 20-122 at 45.

⁸⁶ *Id.*

⁸⁷ See ZMC Rebuttal Facts at 2 and Exhibit 1; ZMC Supp SRA at 5 and Exhibit 6.

⁸⁸ See ZMC Draft Redetermination Comments at 5.

rate.⁸⁹ ZMC contends that Commerce’s analysis of labor union control is particularly “troubling” in light of the fact that Commerce has never considered even CCP membership as relevant to its separate rate analysis.⁹⁰ Specifically, citing *Stainless Steel Sheet and Strip from China*, ZMC contends that in prior proceedings Commerce has not considered CCP membership of board members to be relevant in separate rate analyses.⁹¹ ZMC also cites to public comment Commerce solicited in 2013 with respect to its criteria for determining *de facto* government control and asserts that, during that comment process, Commerce rejected the notion that leadership positions held by managers, directors, and shareholders in the CCP was sufficient for finding government control.⁹² According to ZMC, commentators on Commerce’s *de facto* criteria indicated that only individuals who held CCP leadership positions, and not those who were simply CCP members, should be relevant to the separate rate analysis.⁹³ Further, ZMC argues that since so many Chinese individuals are members of the CCP, mere party membership would not be a realistic indicator of Chinese government control.⁹⁴ ZMC contends that Commerce has never asked about labor union membership or CCP membership in any prior determinations and it would be unprecedented to rely on Sunny’s common ESOC and labor union membership to find government control because most Chinese employees are members of a labor union or the CCP.⁹⁵ ZMC further states that reliance on labor union status would undermine Commerce’s separate rate practice regarding wholly foreign-owned entities because

⁸⁹ *Id.* at 5-6.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* (citing *Antidumping Duty Investigation of Stainless Steel Sheet and Strip from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 9716 (February 8, 2017) (*Stainless Steel Sheet and Strip*), and accompanying IDM at 30).

⁹² *Id.* (citing *De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Countries*, 78 FR 40430, 40433 (July 5, 2013)) (*Separate Rates in NMEs*).

⁹³ *Id.* (citing *Separate Rates in NMEs*).

⁹⁴ *Id.*

⁹⁵ *Id.* at 6-7.

any employees holding a position in those wholly-owned companies that are members of a labor union would indicate government control.⁹⁶

ZMC also contends that even if the GOC, through the ACFTU, controls all labor unions, there is no indication that Sunny's ESOC is controlled by its labor union.⁹⁷ ZMC argues that, because the Court notes that the individual owners of Sunny's shares actually controlled Sunny, the issue is whether or not the individual owners were precluded from taking an independent action because of their labor union membership status.⁹⁸ ZMC denies that any overlap in labor union and ESOC membership is an indication of government control through the ACFTU because there is no evidence on the record to show that the ACFTU is able to exert its influence over the individual shareholder's actions outside of the union.⁹⁹ Finally, although the Court noted that it is possible for the labor union to control the ESOC if the two are connected, ZMC contends that a mere overlap of membership between the two entities is insufficient to establish a controlling relationship.¹⁰⁰ Therefore, ZMC concludes that there is insufficient evidence to suggest that the labor union controls the ESOC and that the ESOC members voted as Sunny shareholders and not as labor union members.¹⁰¹

Commerce's Position:

ZMC inaccurately describes Commerce's separate rate analysis and prior determinations. First, CCP membership or leadership of board members, shareholders, managers, and directors is a central factor in Commerce's separate rate analysis. As explained in the *Final Results*, the GOC's control over a company's operations can include the ability to exert influence over the

⁹⁶ *Id.* at 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 8-9.

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 10.

selection of board members and management, “which are key factors in determining whether a company has sufficient independence in its export activities to merit a separate rate.”¹⁰²

Commerce further explained in the *Final Results*: “Consistent with our normal separate rate practice, any ability to control, or possess an interest in controlling, the operations of the company (including the selection of board members, management, and the profit distribution of the company) by a government entity is subject to Commerce’s rebuttable presumption that all companies within the NME are subject to government control.”¹⁰³ It is therefore inaccurate for ZMC to assert that the CCP membership or leadership of board members, shareholders, managers, and directors—all of whom have the ability to make decisions for the company—is not a factor in Commerce’s separate rate analysis.

Accordingly, contrary to ZMC’s assertions, Commerce requests in Section IV of the separate rate application (*i.e.*, “De Facto Control”) that all separate rate applicants report affiliations of the requesting entity’s top ten shareholders regarding any significant relationship with a Chinese state asset management company, Chinese national government and its ministries (*i.e.*, agencies), Chinese provincial governments, Chinese local governments (*i.e.*, municipal or village governments) or agencies.¹⁰⁴ Regarding each shareholder entity’s managers and board of director members, Commerce requests information about the relationship between these personnel and any level of government.¹⁰⁵ Commerce also requests that, for the top ten individual owners of the intermediate and ultimate shareholder entities (*i.e.*, shareholders that are not individuals) of the separate rate applicant, the separate rate applicant should state whether the individuals held office at any level of the Chinese government or at any Chinese agency during

¹⁰² See *Final Results* IDM at 8-9.

¹⁰³ *Id.* at 9.

¹⁰⁴ See Hangzhou Hanji Auto Parts CO., Ltd.’s August 31, 2017 Separate Rate Application at 15.

¹⁰⁵ *Id.*

the three years prior to the submission and identify the office held by each individual, the level of government at which a position was or is currently held, and the official role of the individual's position.¹⁰⁶ Under the subheading "Selection of Management," Commerce requests that the separate rate applicant state whether any of the entity's managers or board members worked for the government at any level or for any government entity in the past three years and to describe the individual's involvement with the CCP, if any.¹⁰⁷ Commerce also requests that the applying firm affirmatively state if it must submit its candidates for managerial positions for government approval at any government level.¹⁰⁸ Correspondingly, the separate rate certification document, which ZMC submitted, requests that the certifying entity affirm that "during the POR, the largest 10 individual or entity shareholders of the firm and all of their shareholders had no significant relationship with any of the following: China state asset management company (government-owned and/or private chartered); China national government and/or its ministries/agencies; China provincial governments; and China local/municipal/village government(s)/agency(ies)."¹⁰⁹

Moreover, ZMC mischaracterizes Commerce's finding in *Stainless Steel Sheet and Strip* by selectively removing the statement that "the parties' arguments concerning the relevance of the CCP membership of certain TISCO board members are largely moot" from its broader context.¹¹⁰ In that proceeding, Commerce determined that TISCO, the majority shareholder of a respondent company, was wholly-owned by a SASAC.¹¹¹ In light of this determination, Commerce offered the following full analysis (from which ZMC selectively removed the statement above):

¹⁰⁶ *Id.* at 15-16.

¹⁰⁷ *Id.* at 17-18.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ See ZMC's August 31, 2017 Separate Rate Certification at 6.

¹¹⁰ See ZMC Draft Redetermination Comments at 6 (citing *Stainless Steel Sheet and Strip* IDM at 30).

¹¹¹ See *Stainless Steel Sheet and Strip* IDM at 27-30.

The parties' arguments concerning the relevance of the CCP membership of certain TISCO board members are largely moot. In the instant investigation, we have ample evidence that the 100 percent SASAC-owned majority owner of Taigang, TISCO, exerts considerable influence over the board of directors (and, thus, the management and operations of the company), and that the factual record does not provide sufficient information to rebut the presumption of government control.¹¹²

Therefore, Commerce did *not* assert that CCP membership of board members is irrelevant to its separate rate inquiries. Rather, in that particular case, it was not necessary to consider such CCP board membership because other record evidence so overwhelmingly demonstrated government control over the company at issue. Consequently, *Stainless Steel Sheet and Strip* does not, as ZMC contends, support its proposition that "Commerce has not even considered Communist party membership to be relevant to its separate rates analysis."¹¹³

Furthermore, the 2013 public comments on Commerce's *de facto* analysis criteria also do not support ZMC's position.¹¹⁴ In the section of summarized public comments cited by ZMC, commentators suggested Commerce make dispositive determinations of government control or ownership when shareholders, managers, and board members had certain ties to the GOC or positions in the CCP.¹¹⁵ Although Commerce did not adopt that specific suggestion, it also *did not accept*—as ZMC seems to argue—that CCP membership of managers and directors is irrelevant to Commerce's analysis of *de facto* government control or that Commerce recognizes a clear distinction between CCP membership and leadership.¹¹⁶ Most critically, Commerce's current standard for determining whether a company is independent of *de facto* and *de jure* government control and, therefore, entitled to a separate rate is guided by the test established in

¹¹² *Id.* at 30.

¹¹³ See ZMC Draft Redetermination Comments at 6.

¹¹⁴ See *Separate Rates in NMEs*, 73 FR at 40433.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Sparklers,¹¹⁷ as further developed in *Silicon Carbide* and *Diamond Sawblades I*.¹¹⁸ 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.¹¹⁹ This is the standard applied in the underlying administrative review and this Final Redetermination.¹²⁰

ZMC also incorrectly asserts that Commerce has never considered the role of labor unions in determining a company's separate rate eligibility. In the 2015-2016 administrative review of *Multilayered Wood Flooring from China*, Commerce considered that several members of a respondent company's board of directors were selected by its labor union in its determination to deny the company a separate rate.¹²¹ In *Multilayered Wood Flooring*, Commerce rejected arguments that the labor union was free of government control by citing the NME status memo, stating: "Labor unions are under the control and direction of the {ACFTU}, a government-affiliated and CCP organ."¹²² The *Multilayered Wood Flooring* decision, in which the respondent was denied a separate rate, was issued several months before the *Preliminary*

¹¹⁷ See *Sparklers* IDM at Comment 1.

¹¹⁸ See *Silicon Carbide*, 59 FR 22585; *Diamond Sawblades I*; and *Diamond Sawblades 11-12* IDM at Comment 1.

¹¹⁹ See *Preliminary Results* PDM at 7.

¹²⁰ *Id.*

¹²¹ See *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Rescission of Review, in Part; 2015-2016*, 83 FR 2137 (January 16, 2018) (*MLWF 2015-2106 Preliminary Results*) unchanged in *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission; 2015-2016*, 83 FR 35461 (July 26, 2018) (*MLWF 2015-2106 Final Results*), and accompanying IDM at 7-8.

¹²² See *06 Final Results* IDM at 8 (citing NME Status Memo at 5).

Results in this review.¹²³ In a subsequent administrative review of *Multilayered Wood Flooring from China*, Commerce denied a company separate rate status based on the role played by a labor union.¹²⁴

Furthermore, although ZMC disagrees with Commerce’s conclusion that there is no distinction between labor union membership and leadership in terms of the ability of the GOC to exert control, it does not cite to any source indicating that Commerce’s conclusion is contrary to law or Commerce’s past practice. Further, we disagree with ZMC’s claim that greater emphasis should be placed on leadership in labor unions because employees in China “are usually, if not always, a member of a labor union and/or the Chinese Communist Party.”¹²⁵ In asserting that labor union and CCP membership is not a useful indicator of government control due to widespread membership, ZMC misapprehends the consequences of China’s status as an NME. In a non-market economy such as China, Commerce applies a rebuttable presumption of government control that the Federal Circuit has repeatedly upheld.¹²⁶ This presumption is based on the premise that all exporters and producers in China constitute a single entity and are under state control.¹²⁷ The CCP is itself a government entity, and, as we have explained above,

¹²³ Compare *MLWF 2015-2106 Preliminary Results* (published January 16, 2018) with *Preliminary Results* (published July 12, 2018).

¹²⁴ See *Multilayered Wood Flooring from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016-2017*, 84 FR 38002 (August 5, 2019) (*MLWF 2016-2017 Final Results*), and accompanying IDM at 50 (“Thus, we continue to conclude that Jilin Forest’s government-owned entity, the Labor Union, which is under control of the ACFTU, exercises, or has the potential to exercise, control over Jilin Forest’s export operations.”).

¹²⁵ See ZMC Draft Redetermination Comments at 6-7.

¹²⁶ See, e.g., *Diamond Sawblades Manufacturers Coalition v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017) (“{W}e consistently have sustained Commerce’s application of a rebuttable presumption of government control to exporters and producers in NME countries, such as {China}.”); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1390 (Fed. Cir. 2014) (“In NME proceedings, Commerce begins with a rebuttable presumption that a company operating within a NME is subject to state control.”); *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1370 (Fed. Cir. 2012) (“In proceedings involving {NME} countries, including China, Commerce presumes that exporters and producers are state-controlled, and assigns them a single state-wide rate.”).

¹²⁷ See *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017) (Commerce “presumes that each Chinese exporter and producer is state-controlled, and thus covered by a single China-wide antidumping-duty rate, but a firm may rebut the presumption.”).

Commerce has found that labor unions are also under government control through the ACFTU, an arm of the CCP.¹²⁸ The Court's *Remand Order* held that the NME status memo constitutes substantial evidence that the GOC can control all union activity through the ACFTU.¹²⁹ Therefore, the widespread membership of employees in the CCP or a labor union is not, as ZMC contends, an unconstructive indicator of government control, but, rather, is a demonstration of the pervasiveness of government involvement in exporting and producing entities that underlies the very reason for the presumption of government control and the existence of a single NME-wide entity.

We further disagree that consideration of union membership in our separate rates analysis undercuts our treatment of wholly-foreign owned entities. If an NME company is wholly-foreign owned, then there is no direct or indirect ownership of the company by a labor union as part of Commerce's separate rate analysis. ZMC's argument concerning labor union members at a wholly-foreign owned company is unpersuasive because the labor union, by definition, has no ownership roll in that company.

Finally, we disagree with ZMC's claim that an overlap in membership between the ESOC and labor union is not sufficient evidence to establish *de facto* government control of Sunny. ZMC's characterization of an "overlap" between the union and ESOC members downplays the fact that *all* ESOC members are also labor union members. The Court stated in its *Remand Order* that if the ESOC and labor union are connected, "since ZMC claims the ESOC actually exercises majority shareholder rights, this may support a finding of potential government control."¹³⁰ We have established that connection by demonstrating that each of the []

¹²⁸ See *Final Results* IDM at 9 (citing NME Status Memo at 5, 21-22, and 31).

¹²⁹ See *Remand Order*, Slip Op. 20-122 at 37.

¹³⁰ *Id.* at 43.

shareholding members of the ESOC are also labor union members. Therefore, we continue to find that the GOC has the potential to exert control over ZMC through Sunny, via the common membership of Sunny’s labor union and the majority shareholders in the ESOC.

Comment 3: Whether Sunny’s Corporate Structure Allows the Labor Union to Exert a Controlling Influence Over Sunny and the ESOC

ZMC reiterates that Commerce’s determination that the GOC controls the ESOC through overlapping union and ESOC membership is untenable because there is a difference between labor union membership and leadership.¹³¹ ZMC claims that all but one of the members of the ESOC are “passive” labor union members and there is no evidence that they could exert a controlling influence over others in the labor union or the ESOC at the behest of the ACFTU.¹³² ZMC also asserts that there is no indication that any of the ESOC members hold direct positions of leadership or membership in the ACFTU.¹³³ ZMC argues that only the sole union member who held a leadership position could possibly have the ability to extend the ACFTU’s controlling influence to Sunny’s labor union and that this individual member, [], could not control the ESOC because that individual “only had a small [] percentage share of Sunny’s shares and did not hold any position with any other union or government affiliated entity.”¹³⁴ Further, ZMC argues that even though [] was one of the ESOC council members, the ESOC council is subordinate to the powers of the ESOC general meeting where each individual may cast a single vote, and one vote would not be the deciding factor in decisions of the ESOC.¹³⁵

¹³¹ See ZMC Draft Redetermination Comments at 10.

¹³² *Id.*

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 10-11.

¹³⁵ *Id.* at 11.

Commerce's Position:

We disagree with ZMC's assertion that the ACFTU could not exert control over Sunny's ESOC because no ESOC members held direct positions of leadership or membership in the ACFTU and because only one ESOC member held a position of leadership in Sunny's labor union. As explained in the China NME Status Memorandum, "{l}abor unions are under the control and direction of the {ACFTU}, a government affiliated and {CCP} organ;" "{t}he Chinese government prohibits independent unions and has systemically and, in some cases, forcibly repressed efforts to organize independent unions;" and "{a}ll trade unions are affiliates of the government-controlled ACFTU and its branches at the local and enterprise level. The legal and institutional relationship with the government inhibits unions from acting as true advocates of workers' rights and as a meaningful counterweight to management."¹³⁶ The Court's *Remand Order* held that "substantial evidence on the record supports Commerce's conclusions that the GOC can control labor union activity through the ACFTU and that Sunny's labor union had sufficient activities that the ACFTU could influence."¹³⁷ ZMC's effort to distinguish labor union membership from labor union leadership mischaracterizes the issue by attempting to minimize the influence the GOC is able to exert through the ACFTU over all labor unions and their members, regardless of the leadership hierarchy within a labor union. Commerce does not distinguish between labor union members and leaders because the GOC has the ability to control labor union members to the same extent as labor union leaders. Because each of the [] members of Sunny's ESOC are also members of its labor union, the ACFTU has the ability to exert control over the ESOC and influence the votes of all labor union members of the ESOC regardless of whether they hold a position of union leadership.

¹³⁶ See China NME Status Memorandum at 5, 21, and 31.

¹³⁷ See *Remand Order*, Slip Op. 20-122 at 39.

Comment 4: Whether the ESOC is under Government Control

ZMC argues that record evidence rebuts the presumption of government control by Sunny's labor union as a nominal majority shareholder because the labor union lacks any potential to exercise majority shareholder rights.¹³⁸ ZMC asserts again that Commerce has discarded its original position that the labor union has the potential to exercise majority rights over Sunny in favor of an examination on remand of the links between Sunny's ESOC and labor union.¹³⁹ ZMC contends that on remand Commerce has not, as the Court requested, explained how the labor union could exercise majority rights and has not addressed ZMC's arguments that the ESOC exercises majority shareholder rights independent of the labor union.¹⁴⁰

To further support its position, ZMC contends that, even though Sunny's ESOC lacks official registration status as a shareholder, the ESOC retains its own structure, operation, and activities, which is demonstrated by the lack of any AOA's demanding review or control by an outside entity, including the union.¹⁴¹ ZMC argues that Article 8 vests supreme power in the general meeting of the ESOC, including the appointment of members to the ESOC council, management of ESOC funds, dividend distribution planning, and decisions regarding employee capital.¹⁴² ZMC further explains that Articles 12 and 13 lay out the structure of the ESOC council and the authorities of its three members, including the ability of its chairman to attend shareholder meetings on behalf of Sunny's ESOC employees.¹⁴³ ZMC reiterates that during the

¹³⁸ See ZMC Draft Redetermination Comments at 11.

¹³⁹ *Id.* at 11-12.

¹⁴⁰ *Id.* at 11.

¹⁴¹ *Id.* at 12.

¹⁴² *Id.* (citing ZMC Supp SRA at Exhibit 7 Article 8). Commerce notes that Article 8 was treated as BPI in ZMC's submissions to the administrative record and does not appear to have been publicly summarized in any submission prior to ZMC Draft Redetermination Comments. Because ZMC appears to now be treating Article 8 as public information, Commerce will accordingly not accord it BPI treatment in this *Final Remand*.

¹⁴³ *Id.* (citing ZMC Supp SRA at Exhibit 7 Articles 12 and 13).

POR, the ESOC council chairman, [], held no position in Sunny’s labor union, any another union, or any government entity.¹⁴⁴

ZMC argues that according to *Diamond Sawblades*, Commerce should examine the entity actually exerting control as a majority shareholder, which ZMC claims to be the ESOC.¹⁴⁵ According to ZMC, ESOC members participated in the ESOC as employees, not labor union members, and the common membership of labor union and ESOC members did not grant the union the ability to exercise rights reserved for the ESOC.¹⁴⁶ ZMC argues that any reference to labor union members in the AOA is limited to explaining that union members may join Sunny’s ESOC, but there is no requirement for joining the ESOC other than holding shares of Sunny as an employee.¹⁴⁷ Finally, ZMC again asserts that membership in the ESOC and labor union is not sufficient evidence to establish that the ACFTU exerts control over the ESOC through Sunny’s labor union members.¹⁴⁸

Commerce’s Position:

Contrary to ZMC’s assertions, and as explained above, Commerce has not abandoned its determination that Sunny’s labor union has the potential to control Sunny, nor has it failed to provide the explanations requested by the Court in its *Remand Order*. The Court asked Commerce to explain how Sunny’s labor union could exercise majority shareholder rights in light of evidence of the ESOC’s ability to do so.¹⁴⁹ The Court further noted that if the ESOC and the labor union are connected, “since ZMC claims the ESOC actually exercises majority shareholder rights, this may support a finding of potential government control.”¹⁵⁰ In this Final

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 12-13.

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *Remand Order*, Slip Op. 20-122 at 45.

¹⁵⁰ *Id.* at 43.

Redetermination, Commerce has provided record evidence of such a link between Sunny's ESOC and its labor union. This evidence is not only Article 20 of Sunny's ESOC's AOA's, but also ZMC's October 2, 2017 and May 4, 2018 submissions showing that [] members of Sunny's ESOC also belong to its labor union.¹⁵¹

Based on this record evidence, we continue to find that the CCP, through the ACFTU, is capable of exerting control over Sunny's ESOC. We reiterate the finding in the China NME Status Memorandum that “the Chinese government prohibits independent unions and has systemically and, in some cases, forcibly repressed efforts to organize independent unions.”¹⁵² In arguing that ZMC's AOA's reserve functions to the ESOC that are independent of the labor union, ZMC attempts to build a wall between the labor union and ESOC that does not in fact exist. The shareholders exercising the authorities enumerated for the ESOC in the AOA's are the same individuals who are under the control of the ACFTU through their simultaneous membership in the ESOC and labor union. As explained above, we disagree that membership in a labor union is not sufficient evidence to establish potential government control because Commerce does not make a distinction between labor union members and leaders as the CCP's influence is exerted on all members of labor unions. Therefore, the GOC, through common membership of Sunny's ESOC and labor union, is able to exert control over the functions allocated to the ESOC.

¹⁵¹ See ZMC Supp SRA at Exhibit 7, Article 20; ZMC Rebuttal Facts at 2 and Exhibit 1; ZMC Supp SRA at 5 and Exhibit 6.

¹⁵² See China NME Status Memorandum at 21.

V. FINAL RESULTS OF REDETERMINATION

As a result of our redetermination and after reviewing the comments on the Draft Redetermination, we continue to find that ZMC is ineligible for a separate rate because the GOC is able to exercise influence over ZMC's selection of management and export activities through Sunny via the common membership of Sunny's ESOC and labor union. Therefore, ZMC will remain part of the China-wide entity with a weighted-average dumping margin of 92.84 percent.

11/19/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance