# U.S. Customs and Border Protection

## COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security (DHS).

**ACTION:** Committee management; notice of federal advisory committee meeting.

**SUMMARY:** The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, June 14, 2023, in Arlington, VA. The meeting will be open for the public to attend in person or via webinar. The in-person capacity is limited to 75 persons for public attendees.

**DATES:** The COAC will meet on Wednesday, June 14, 2023, from 1:00 p.m. to 5:00 p.m. EDT. Please note that the meeting may close early if the committee has completed its business. Registration to attend and comments must be submitted no later than June 9, 2023.

**ADDRESSES:** The meeting will be held at Renaissance Arlington Capital View Hotel, 2800 S. Potomac Ave., Arlington, VA 22202 in Salons 5 and 6. For virtual participants, the webinar link and conference number will be posted by 5:00 p.m. EDT on June 13, 2023, at *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.* For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2023–0014. To submit a comment, click the "Comment" button located on the top-left hand side of the docket page.
- *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2023–0014 in the subject line of the message.

Comments must be submitted in writing no later than June 9, 2023, and must be identified by Docket No. USCBP–2023–0014. All sub-

missions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov.*

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the authority of the Federal Advisory Committee Act, Title 5 U.S.C., ch. 10. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of the Department of Homeland Security, the Secretary of the Department of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

*Pre-Registration:* Meeting participants may attend either in person or via webinar. All participants must register using one of the methods indicated below:

For members of the public who plan to participate in person, please register online at *https://teregistration.cbp.gov/index.asp?w=321* by 5:00 p.m. EDT on June 9, 2023. For members of the public who are pre-registered to attend the meeting in person and later need to cancel, please do so by 5:00 p.m. EDT on June 9, 2023, utilizing the following link: *https://teregistration.cbp.gov/cancel.asp?w=321.*

For members of the public who plan to participate via webinar, the webinar link and conference number will be posted by 5:00 p.m. EDT on June 13, 2023, at *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

The COAC is committed to ensuring that all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202) 344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

There will be multiple public comment periods held during the meeting on June 14, 2023. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

**Agenda**

The COAC will hear from the current subcommittees on the topics listed below:

1. The Next Generation Facilitation Subcommittee will provide updates on its task forces and working groups. It is expected there will be recommendations for the committee's consideration from the 21st Century Customs Framework (21CCF) Task Force and Focus Group, along with a close out report for this task force. The Customs Interagency Industry Working Group (CII) (formerly the One U.S. Government Working Group) will provide an update on the work addressed this past quarter, which included identifying possible Partner Government Agencies for representation on the working group and discussion of the legislative trade proposals stemming from the 21CCF Task Force and Focus Group. An update is expected on the progress of the Automated Commercial Environment (ACE) 2.0 Working Group regarding its review of the CBP ACE 2.0 Concept of Operations processes. The E-Commerce Task Force will provide updates regarding its discussions this past quarter pertaining to duplicate messaging related to security and trade filings. The Passenger Air Operations (PAO) Working Group aims to identify ways to modernize passenger processing rules and regulations, streamline the passenger experience at U.S. ports of entry, and identify challenges that affect operations. While this is a new group, the expectation is that recommendations will be developed and submitted for consideration at future COAC public meetings.

2. The Rapid Response Subcommittee will provide updates from the Broker Modernization Working Group and the United States-Mexico-Canada Agreement (USMCA) Chapter 7 Working Group. The Broker Modernization Working Group meets monthly and continues to focus on the 19 CFR part 111 final rules relating to Modernization of the Customs Broker Regulations, Continuing Education for Licensed Customs Brokers, and Customs Broker Licensing Exams. The USMCA Chapter 7 Working Group meets bi-weekly. Its current focus

is to review the Chapter 7 articles of the USMCA and identify gaps in implementation between the United States, Mexico, and Canada.

3. The Secure Trade Lanes Subcommittee will provide updates on its five active working groups: the Export Modernization Working Group, the In-Bond Working Group, the Trade Partnership and Engagement Working Group, the Cross-Border Recognition Working Group, and the Pipeline Working Group. The Export Modernization Working Group has continued its work on the electronic export manifest pilot program and will provide updates on its progress. The In-Bond Working Group may provide recommendations for the committee's consideration and will provide updates on the implementation of previously submitted recommendations. The Trade Partnership and Engagement Working Group has focused its work on previous recommendations to refine the language of possible benefits for Customs Trade Partnership Against Terrorism Trade Compliance partners and may provide additional recommendations for the committee's consideration. The Cross-Border Recognition and Pipeline working groups will provide updates on their work toward developing recommendations for the committee's consideration.

4. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups. The Antidumping/Countervailing Duty (AD/ CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Intellectual Property Rights Working Group (IPRWG) will provide updates relating to the development of a portal on the CBP Intellectual Property Rights (IPR) web page and to CBP's implementation of the IPRWG's past recommendations concerning the automation of detention and seizure. The Bond Working Group will report on the ongoing discussions and status updates for eBond requirements. The Forced Labor Working Group will provide updates regarding its work and discussions regarding the Uyghur Forced Labor Prevention Act (UFLPA) and anticipates making recommendations for the committee's consideration during the meeting.

Meeting materials will be available on June 5, 2023, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

Dated: May 18, 2023

FELICIA M. PULLAM,
*Executive Director,*
*Office of Trade Relations.*

[Published in the Federal Register, May 24, 2023 (88 FR 33622)]

## 19 CFR PART 177

## REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLEA DROPS

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of two ruling letters and of revocation of treatment relating to the tariff classification of flea drops

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters concerning tariff classification of flea drops under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 51, on December 29, 2021. Three comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 6, 2023.

**FOR FURTHER INFORMATION CONTACT:** Steven Hess, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–1804.

**SUPPLEMENTARY INFORMATION:**

### BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 51, on December 29, 2021, proposing to revoke two ruling letters pertaining to the tariff classification of flea drops. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY F86615 and NY A84405, CBP classified flea drops in heading 3004, HTSUS, specifically in subheading 3004.90.9003, HTSUSA, which provides for "[M]edicaments ... consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use."[1] CBP has reviewed NY F86615 and NY A84405 and has determined the ruling letters to be in error. It is now CBP's position that flea drops are properly classified, in heading 3808, HTSUS, specifically in subheading 3808.91.50, HTSUS, which provides for "Insecticides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Insecticides: Other: Other..."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY F86615 and NY A84405 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H232357, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

[1] Classified in subheading 3004.90.9203, HTSUSA, in the 2021 edition of the HTSUS.

YULIYA A. GULIS,
*Director*
*Commercial and Trade Facilitation Division*

HQ H232357
May 11, 2023
OT:RR:CTF:CPMMA H232357 SPH
CATEGORY: Classification
TARIFF NO.: 3808.91.2501

MS. DODY TROMBLEY
NORMAN G. JENSEN, INC.
*P.O. BOX 2457*
*CHAMPLAIN, NY 12919*

RE: Revocation of NY F86615 and NY A84405: Classification of Flea Drops

DEAR MS. TROMBLEY:

This is in reference to New York Ruling Letter (NY) F86615, dated May 24, 2000, issued to you for your client, Confab Laboratories, Inc., concerning the tariff classification of a flea treatment for dogs and cats under the Harmonized Tariff Schedule of the United States (HTSUS). In that ruling, U.S. Customs and Border Protection (CBP) classified the subject merchandise in subheading 3004.90.9003, HTSUSA, which provided for veterinary medicaments.[1] We have reviewed NY F86615 and find it to be in error. For the reasons set forth below, we hereby revoke NY F86615 and one other ruling with substantially similar merchandise: NY A84405, dated June 17, 1996, which was issued to Bayer Corporation.[2]

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 55, No. 51, on December 29, 2021. Three comments, which will be addressed below, were received in response to this notice.

**FACTS:**

The subject merchandise, Gentle Touch™ Flea Drops, consists of six, snap-open, plastic tubes put up for retail sale in a paperboard container. Each tube contains a formulated insecticide indicated for topical application on dogs and cats to kill fleas. The two active ingredients contained in the formulation are sodium lauryl sulfate (seven percent) and citric acid (five percent). Both of these active ingredients are considered pesticides by the U.S. Environmental Protection Agency (EPA)[3]. The inert ingredients are hydrogenated vegetable oil, soybean oil and glycerin.

[1] Prior to the 2002 HTSUSA, this subheading was 3004.90.9003. The 2021 HTSUSA subheading is 3004.90.9203.

[2] In NY A84405, the subject merchandise is a topical flea treatment, with the product name Advantage. The product contains Imidacloprid (CAS-138261–41–3) as the active ingredient, which is considered to be an insecticide by EPA. Advantage is available only through licensed practicing veterinarians. It is put up in small tubes of various sizes, the size and number of tubes used depending on the weight and type of animal on which it will be applied (e.g., "cats over 9 lbs.", "dogs over 20 lbs."). The tubes, in turn, are blister-packed and put up in retail packaging.

**ISSUE:**

Are the subject flea drops classified in subheading 3004.90.9203, HTSUSA, which provides for, in pertinent part, "Medicaments ... put up in measured doses or in forms or packings for retail sale: Other: Other: For veterinary use...", or in subheading 3808.91.2501, HTSUSA, which provides for: "Insecticides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Other: Other..."?

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2023 HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 3004 | Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale: |
| 3004.90 | Other: |
| 3004.90.92 | Other: |
| 3004.90.9203 | For veterinary use ... |
| 3808 | Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packing for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers): |
| | Other: |
| 3808.91 | Insecticides: |
| | Other: |
| | Containing any aromatic or modified aromatic insecticide: |
| 3808.91.2501 | Other... |

* * *

Note 1(e) to Chapter 38 provides as follows:

This chapter does not cover:

***

(e) Medicaments (heading 3003 or 3004) ...

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System at the international level and are generally indicative of the proper interpretation of these headings. *See* Treas. Dec. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 30.03 states that:[4]

> This heading covers medicinal preparations for use in the internal or external treatment or prevention of human or animal ailments. These preparations are obtained by mixing together two or more substances. However, if put up in measured doses or in forms or packings for retail sale, they fall in **heading 30.04**.

EN 30.04(f) states that:

> The heading also excludes:
>
> ***
>
> (f) Insecticides, disinfectants, etc., of **heading 38.08**, not put up for internal or external use as medicines.

EN 38.08(I) states that:

> The products of heading 38.08 can be divided into the following groups:
>
> (I) **Insecticides**
>
> Insecticides include not only products for killing insects, but also those having a repellent or attractant effect. The products may be in a variety of forms such as sprays or blocks (against moths), oils or sticks (against mosquitoes), powder (against ants), strips (against flies), cyanogen gas absorbed in diatomite or paperboard (against fleas and lice).
>
> Many insecticides are characterized by their mode of action or method of use. Among these are:
>
> - insect growth regulators: chemicals which interfere with biochemical and physiological processes in insects.
> - fumigants: chemicals which are distributed in the air as gases.
> - chemosterilants: chemicals used to sterilize segments of an insect population.
> - repellents: substances which prevent insect attack by making their food or living conditions unattractive or offensive.
> - attractants: used to attract insects to traps or poisoned baits ...

EN 38.08(c) states that:

> This heading excludes:
>
> (c) Disinfectants, insecticides, etc., having the essential character of medicaments, including veterinary medicaments (**heading 30.03 or 30.04**) ...

* * *

Heading 3004, HTSUS, provides for medicaments for therapeutic or prophylactic uses. Note 1(d) to Chapter 38 excludes medicaments of heading 3004, HTSUS, from classification in Chapter 38. Therefore, if the flea treatments are classifiable as medicaments, they cannot be classified as insecticides of heading 3808, HTSUS. In *Inabata Specialty Chems. v. United States*, 29 C.I.T. 419, 423 (Ct. Int'l Trade 2005), the U.S. Court of International Trade ("CIT") defined "therapeutic" as follows:

[4] Heading 3003, HTSUS, provides in pertinent part for "Medicaments ... not put up in measured doses or in forms or packings for retail sale ..."

> In determining the common meaning of the term "therapeutic" for purposes of classifying an article under HTSUS Heading 3004, the court in *Warner-Lambert Co. v. United States, 341 F. Supp. 2d 1272, 1277, 28 Ct. Int'l Trade 939 (Ct. Int'l Trade 2004)*, referred to Stedman's Medical Dictionary, which provides that "therapeutic" is "relating to . . . the treatment, *remediating,* or curing of a disorder or disease." STEDMAN'S MEDICAL DICTIONARY 1821 (27th ed. 2000) (emphasis added). The term "therapeutic" has been defined for tariff purposes as embracing "the alleviative or palliative, as well as the curative or healing qualities." *J.E. Bernard & Co., Inc. v. United States,* 58 Cust. Ct. 23, 28, 262 F. Supp. 434, 438, C.D. 2872 (1967); *see also id.* at 29 (finding that hearing aids which ease the affection of deafness without curing it are therapeutic devices); *United States v. Alltransport, Inc.,* 44 C.C.P.A. 149, 152 (1957) (a product is a medicinal if it is "of use or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affliction of the human frame").

A medicament is therapeutic it if treats, remediates, or cures a disease or affliction of a human or animal body. Similarly, a medicament is prophylactic if it prevents a disease or affliction of a human or animal body. To be classified under heading 3004, HTSUS, a medicament must either be therapeutic or prophylactic.

The instant flea drops are not a treatment for a disease or an affliction because the flea drops do not have an effect on the pet's body. Rather, the flea drops kill fleas and ticks. While some of the chemicals may be absorbed into the pet's skin, the intent is not to have an effect on the pet.[5] The flea drops attract and interfere with the life cycles of the infesting pests. As the flea drops kill fleas and ticks but do not prevent or treat any disease or affliction of the pet's body, they cannot be classified as medicaments of heading 3004, HTSUS. Accordingly, Note 1(d) to Chapter 38 does not exclude the flea drops from classification in Chapter 38.

Heading 3808, HTSUS, provides for insecticides packaged for retail sale. EN 38.08(I) states that the heading includes products in a variety of forms, such as oils and sprays. The instant merchandise consists of liquid drops to be used as a topical application on dogs and cats. The drops include two active pesticide ingredients, sodium lauryl sulfate and citric acid. The drops are formulated to kill fleas. At importation, the subject merchandise is packaged for retail sale. As such, the subject merchandise is classified as an insecticide of heading 3808, HTSUS. This outcome is consistent with prior rulings issued by CBP on similar products.[6]

In the three comments we received, the commenters argue that the subject merchandise have therapeutic and prophylactic functions. The commenters argue that because fleas can cause illnesses in animals such as flea allergy dermatitis, anemia, tapeworm, flea-borne typhus, etc., that the flea drops prevent and remedy these illnesses. While fleas can lead to illness in animals, the subject merchandise does not treat any of these illnesses nor does it prevent them; it merely kills fleas and ticks. For example, if an animal were to develop dermatitis, they would not be treated with flea drops. Instead, they would use a medicament to remedy the dermatitis.

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[5] *See* Headquarters Ruling Letter (HQ) H310592, dated October 7, 2020 (classified hand sanitizer in heading 3808).

[6] *See* NY M86008, dated September 7, 2006, and NY I83323, dated June 20, 2002.

The commenters also argue that the subject merchandise is principally used as a medicament. The commenters assert that heading 3004, HTSUS, is a principal use provision where classification is controlled by the principal use of "goods of that class or kind to which the imported goods belong." In determining whether the flea drops fall within the class or kind of merchandise principally used in the manners described by heading 3004, HTSUS, the commenters apply the factors set forth in *United States v. Carborundum Co.*, 536 F.2d 373, 377, (C.C.P.A. 1976).[7] The commenters argue that the subject merchandise is principally used as a medicament because, among other reasons, it is put up in measured doses, it can be purchased from licensed veterinarians, and it is advertised to pet owners as a product to protect the health of their pets.

While we agree that heading 3004, HTSUS, is a principal use provision, application of the *Carborundum* factors to the subject merchandise weighs against classifying the flea drops as part of a "class or kind of goods" of heading 3004, HTSUS. The physical characteristics of the product differ from the class or kind of goods of heading 3004, HTSUS, as they do not include any ingredients with a therapeutic or prophylactic function. In addition, the purchasers do not expect the product to be a medicament. Although the product is purchased with the intent of eliminating a pet's pain, it is advertised as a "flea drop" used to eliminate the source of the pain. The product description makes clear that it does not have a general medicinal use for irritated skin, but that the product is an insecticide. Finally, the commentors state that the other *Carborundum* factors are consistent with the merchandise's use as a medicament, such as the product's pricing. However, these factors are also consistent with its use as an insecticide. In sum, the totality of the factors demonstrate that the flea drops are not of a "class or kind of goods" of heading 3004, HTSUS.

Thus, the subject merchandise is properly classified as an insecticide of heading 3808, HTSUS.

**HOLDING:**

By application of GRI 1, the subject flea treatments are classified in subheading 3808.91.2501, HTSUSA, which provides for: "Insecticides, rodenticides, fungicides ...put up in forms or packings for retail sale or as preparations ...: Other: Insecticides: Other: Other..." The 2023 column one, general rate of duty is 6.5 percent *ad valorem*.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided at https://hts.usitc.gov/current.

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[7] In *United States v. Carborundum* Co., 536 F.2d 373, 377 (C.C.P.A. 1976), the court held that to determine whether an article is included in a particular class or kind of merchandise, it must consider a variety of factors (known as the *Carborundum* factors): 1. general physical characteristics of the merchandise; 2. expectations of the ultimate purchasers; 3. channels, class or kind of trade in which the merchandise moves; 4. environment of sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed); 5. usage, if any, in the same manner as merchandise which defines the class; 6. economic practicality of so using the import; and 7. recognition in the trade of the use.

**EFFECT ON OTHER RULINGS:**

NY F86615, dated May 24, 2000, and NY A84405, dated June 17, 1996, are hereby revoked.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

*Sincerely,*

YULIYA A. GULIS,
*Director*
*Commercial and Trade Facilitation Division*

# U.S. Court of Appeals for the Federal Circuit

CANADIAN SOLAR INTERNATIONAL LIMITED, CANADIAN SOLAR MANUFACTURING (CHANGSHU), INC., CANADIAN SOLAR MANUFACTURING (LUOYANG), INC., CSI SOLAR POWER (CHINA) INC., CSI-GCL SOLAR MANUFACTURING (YANCHENG) CO., LTD., CSI CELLS CO., LTD., CANADIAN SOLAR (USA), INC., SHANGHAI BYD CO., LTD., YINGLI GREEN ENERGY HOLDING CO., LTD., BAODING TIANWEI YINGLI NEW ENERGY RESOURCES CO., LTD., TIANJIN YINGLI NEW ENERGY RESOURCES CO., LTD., HENGSHUI YINGLI NEW ENERGY RESOURCES CO., LTD., LIXIAN YINGLI NEW ENERGY RESOURCES CO., LTD., BAODING JIASHENG PHOTOVOLTAIC TECHNOLOGY CO., LTD., BEIJING TIANNENG YINGLI NEW ENERGY RESOURCES CO., LTD., HAINAN YINGLI NEW ENERGY RESOURCES CO., LTD., SHENZHEN YINGLI NEW ENERGY RESOURCES CO., LTD., YINGLI GREEN ENERGY INTERNATIONAL TRADING CO., LTD., YINGLI GREEN ENERGY AMERICAS, INC., YINGLI ENERGY (CHINA) CO., LTD., CHANGZHOU TRINA SOLAR ENERGY CO., LTD., TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., YANCHENG TRINA SOLAR ENERGY TECHNOLOGY CO., LTD., CHANGZHOU TRINA SOLAR YABANG ENERGY CO., LTD., TURPAN TRINA SOLAR ENERGY CO., LTD., HUBEI TRINA SOLAR ENERGY CO., LTD., TRINA SOLAR (U.S.) INC., SOLARWORLD AMERICAS, INC., Plaintiffs NINGBO QIXIN SOLAR ELECTRICAL APPLIANCE CO., LTD., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2020–2162

Appeal from the United States Court of International Trade in Nos. 1:17-cv-00173-CRK, 1:17-cv-00187-CRK, 1:17-cv-00193-CRK, 1:17-cv-00197-CRK, 1:17-cv-00200-CRK, Judge Claire R. Kelly.

Decided: May 19, 2023

ADAMS LEE, Harris Bricken McVay Sliwoski, LLP, Seattle, WA, argued for plaintiff-appellant.

JOSHUA E. KURLAND, Commercial Litigation Branch,Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON, PATRICIA M. MCCARTHY; LESLIE MAE LEWIS, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

Before DYK, LINN, and CHEN, *Circuit Judges*.

DYK, *Circuit Judge*.

Ningbo Qixin Solar Electrical Appliance Co. Ltd. ("Qixin") appeals a final judgment of the United States Court of International Trade ("CIT"). The CIT sustained a remand determination by the Department of Commerce ("Commerce") that Qixin was not eligible for a

separate rate in an antidumping administrative review and held that Commerce did not err in declining to rescind the review.[1]

On appeal, Qixin contends that (1) the CIT should have granted Qixin's motion for leave to file new factual material and (2) Commerce should have rescinded the administrative review because Commerce had determined that Qixin had made no entries during the period of review. Because (1) the CIT did not abuse its discretion in denying Qixin's motion to file new material out of time and (2) Commerce did not make a conclusive finding that Qixin had no entries in the period of review as required to rescind a review under the applicable regulation, we affirm.

## BACKGROUND

### I

Commerce imposes antidumping duties when it "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," resulting in actual or threatened harm to a domestic industry. 19 U.S.C. § 1673. Foreign exporters of merchandise that is subject to an antidumping duty order must deposit preliminary estimated antidumping duties when the merchandise enters the United States, but the final antidumping duty rate is determined later, during annual retrospective administrative reviews. *See* 19 C.F.R. § 351.212(a).

An administrative review requires Commerce to review the antidumping duty rate applicable to specific entries in the period of review. As the government agrees, where it is established that there are no entries of subject merchandise in the period, Commerce "cannot" initiate an administrative review. *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1372 (Fed. Cir. 2003).

In the case of nonmarket economy ("NME") countries, such as the People's Republic of China ("PRC"), all exporters are presumed to be controlled by the state and, accordingly, are subject to a single country-wide duty rate, unless an exporter is able to affirmatively demonstrate the absence of state control, in which event the exporter is entitled to a separate rate. *See Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349–50 (Fed. Cir. 2015); *see also* 19 C.F.R. § 351.107(d). An exporter seeking a separate rate from an NME country-wide rate has the burden of demonstrating that it was free of state control and that it had entries of subject merchandise

[1] *Canadian Solar Int'l Ltd. v. United States*, 415 F. Supp. 3d 1326 (Ct. Int'l Trade 2019).

that entitled it to a separate rate for the period of review. *See Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017).

II

This appeal relates to the third administrative review of a 2012 antidumping duty order for solar cells from the PRC.[2] The 2012 antidumping duty order had assigned Qixin a separate rate lower than the PRC-wide rate, as did the first two administrative reviews for the periods from May 25, 2012, through November 30, 2013, and from December 1, 2013, through November 30, 2014,[3] evidently finding that Qixin had entries during these review periods and was not government controlled.

For the third administrative review, for the review period from December 1, 2014, through November 30, 2015, Qixin filed a request for administrative review and was included as a party in Commerce's initiation notice.[4] That initiation notice explained that a party seeking a separate rate would have to submit a separate rate application or certification.[5] The separate rate application explained that "an exporter cannot obtain a separate rate without providing [Commerce] the relevant U.S. Customs 7501 Entry Summary." J.A. 118. Qixin filed a separate rate application in March 2016 with a U.S. Customs 7501 Entry Summary for a single sale Qixin claimed was a sale of merchandise during the 2014 to 2015 period of review. In response to two supplemental questionnaires from Commerce, Qixin maintained that the sale was of subject merchandise. Commerce continued to assert that Qixin had not provided an entry number that corresponded to subject merchandise.

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[2] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018 (Dec. 7, 2012).

[3] *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012–2013, 80 Fed. Reg. 40,998, 41,002 (July 14, 2015); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013–2014, 81 Fed. Reg. 39,905, 39,907, 39,908 (June 20, 2016).

[4] Initiation of Antidumping and Countervailing Duty Administrative Reviews, 81 Fed. Reg. 6,832, 6,835 (Feb. 9, 2016).

[5] *Id.* at 6,834. The notice also explained that "[i]f a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review . . . , it must notify [Commerce] within 30 days of publication of this notice." *Id.* at 6,832.

In December 2016, Commerce issued the preliminary results of the administrative review.[6] The preliminary results did not mention Qixin's eligibility for a separate rate. Qixin submitted a case brief commenting on the preliminary results, arguing that Commerce had erroneously omitted Qixin from the preliminary results of the administrative review and should correct the error and calculate a separate rate for Qixin. Qixin argued, in the alternative, that if Commerce concluded that there had been no entries during the period of review, it should have rescinded the review with respect to Qixin. The effect of rescinding the administrative review with respect to Qixin would have been that the separate rate established in the previous administrative review would continue going forward as the cash deposit for any new Qixin entries.

In June 2017, Commerce issued the final results of its administrative review.[7] In the final results, Commerce explained that Qixin had failed to provide evidence of an entry of subject merchandise during the period of review and, without "conclusive evidence" of such an entry, Qixin was not entitled to a separate rate. J.A. 762. As for Qixin's alternative argument—that if Commerce found there had been no entry of merchandise in the period of review, Commerce should have rescinded the review—Commerce simply "determined not to rescind the review" without further explanation. J.A. 762.

Qixin challenged the final results before the CIT, and Commerce requested a remand, agreeing that Qixin "had no opportunity to respond to Commerce's denial of its separate rate application and, likewise, Commerce lacked the opportunity to respond to the arguments Qixin may have made, had it had the opportunity." *Canadian Solar Int'l Ltd. v. United States*, 378 F. Supp. 3d 1292, 1324–25 (Ct. Int'l Trade 2019) (citing Def.'s Response in Opposition to Plaintiff's Motion for Judgment on the Agency Rec. at 44–45 (J.A. 834–35)). The CIT granted Commerce's remand motion, ordering Commerce to reconsider its decision regarding Qixin's separate rate application. *Id.* at 1325.

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[6] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2014–2015, 81 Fed. Reg. 93,888 (Dec. 22, 2016); *see also* J.A. 613–44 (Preliminary Decision Memorandum).

[7] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014–2015, 82 Fed. Reg. 29,033 (June 27, 2017); *see also* J.A. 672–764 (Issues and Decision Memorandum). Commerce amended the final results, but the amended results did not change with respect to Qixin. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014–2015, 82 Fed. Reg. 40,560 (Aug. 25, 2017).

On remand, Commerce reopened the record and issued a third supplemental questionnaire to Qixin requesting, among other information, explanation and documentation regarding the sale Qixin had put forward as a sale of subject merchandise. Qixin responded:

> Ningbo Qixin has been unable to obtain the information requested by the Department of Commerce and thus is supplying this letter in lieu of a substantive response. Ningbo Qixin notes that all of the information . . . is in the possession of the United States government and official copies of all of these documents can be readily obtained from [U.S. Customs and Border Protection ("Customs")].

J.A. 901.

In June 2019, Commerce issued draft remand results reaffirming the denial of Qixin's separate rate application in the pre-remand final results, giving Qixin an opportunity to respond. Commerce explained that "because Qixin had failed to provide conclusive evidence it had a sale or shipment of subject merchandise . . . , Qixin had not satisfied the requirements for obtaining a separate rate." J.A. 925. Commerce noted that the burden rested on Qixin to show it was entitled to a separate rate, and that Qixin had failed to provide documentation of any entry of subject merchandise "[d]espite [the] repeated opportunities" provided by Commerce to do so. J.A. 926.

Qixin submitted no comments on the draft remand results. Accordingly, in July 2019, Commerce issued the final remand results, which reaffirmed the determination that Qixin had failed to demonstrate it had an entry of subject merchandise in the period of review and, therefore, that Qixin was not entitled to a separate rate.

Thereafter, when the final remand results were before the CIT, Qixin moved for leave to file new information out of time. Qixin no longer contested that the previously identified sale was not a sale of subject merchandise. For the first time, Qixin identified five additional entries that Qixin claimed were of subject merchandise during the review period. Qixin apparently sought to provide this information to the CIT so that the information could be considered by Commerce in the event of a further remand.

In October 2019, the CIT denied Qixin's motion to file new information. The CIT explained that Qixin was required to submit this information to Commerce in the first instance, and, if Qixin needed an extension of time, it had to submit such request first to Commerce. The CIT could not, in the absence of such request, "consider evidence that Commerce itself never considered." *Canadian Solar Int'l Ltd. v. United States*, 399 F. Supp. 3d 1379, 1383 (Ct. Int'l Trade 2019).

In a separate decision, the CIT sustained Commerce's denial of a separate rate for Qixin. The CIT noted that Commerce had "reopened the record to provide Qixin an opportunity to demonstrate that any entry it may have made during the review period qualified as a sale of subject merchandise." *Canadian Solar Int'l Ltd. v. United States*, 415 F. Supp. 3d 1326, 1335 (Ct. Int'l Trade 2019) (internal quotation marks and citation omitted). Despite having the "burden to populate the record with all relevant information[,] Qixin failed to provide Commerce with the information it requested." *Id.* (citation omitted). Furthermore, Qixin had not "challenge[d] Commerce's redetermination on this matter" by filing comments on the draft remand results. *Id.*

Following several additional remands to Commerce and CIT decisions unrelated to Qixin, the CIT entered a final judgment denying Qixin a separate rate. *See Canadian Solar Int'l Ltd. v. United States*, 548 F. Supp. 3d 1373 (Ct. Int'l Trade 2021). Qixin appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## DISCUSSION

### I

On appeal, Qixin first argues that the CIT should have granted Qixin's motion for leave to file new factual information out of time because Qixin had good cause for not presenting the information before Commerce's deadlines. Qixin had the burden to create the record during the administrative review and had no fewer than four opportunities—the original separate rate application and the three supplemental questionnaires—to provide complete documentation establishing entries of subject merchandise during the period of review. Normally, supplementation of the record is not permitted, because "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009). Accordingly, the CIT did not abuse its discretion in denying Qixin's motion to file new factual material out of time, as Qixin now apparently admits.[8] *See Dongtai Peak Honey*, 777 F.3d at 1353 ("Commerce's rejection of untimely-filed factual information

[8] Qixin admits that "[Commerce] did provide an opportunity to submit information necessary to respond fully to [Commerce's] supplemental questionnaire[,] . . . that [Qixin] perhaps could have and should have requested an extension of time to submit its response to [Commerce's] remand supplemental questionnaire[, and] . . . that the CIT and this Court generally will not consider matters outside the administrative record unless the omission prevents effective judicial review." Appellant's Br. 26 (citing *Axiom Res. Mgmt., Inc.*, 564 F.3d at 1379–80).

does not violate a respondent's due process rights when the respondent had notice of the deadline and an opportunity to reply."); 19 C.F.R. § 351.302(d) (providing that Commerce will not consider untimely filed materials). Nonetheless, Qixin asks us as a matter of equity to allow the filing. We have no such authority.

II

Qixin alternatively argues that Commerce should have rescinded the administrative review for Qixin rather than assigning Qixin the PRC-wide rate, relying on our decision in *Allegheny Ludlum* in which we explained that "where there are no entries . . . during a period of review there is no subject merchandise and thus nothing to review and no basis for revising cash deposit rates—so Commerce need not (indeed, cannot) conduct a review." 346 F.3d at 1372.

The government contends that Qixin's argument was forfeited because it was not raised before Commerce or the CIT, except in Qixin's pre-remand case brief. We need not decide whether the issue was properly raised below because we conclude that Qixin's argument lacks merit in any case.

The applicable regulation states that Commerce "*may* rescind an administrative review . . . if [it] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." 19 C.F.R. § 351.213(d)(3) (emphasis added). According to the government, "[t]he regulation's use of the permissive term 'may' means that Commerce is not required to rescind a review in such circumstances and has discretion in making its determination." Gov't's Br. 32 (citation omitted).

However, the government was unable to identify any circumstances in which a review could continue in the absence of any entries of subject merchandise in the review period, and its effort to dismiss *Allegheny Ludlum* as inapplicable to NME cases is unconvincing. We doubt that continuing a review where it was conclusively established that there were no entries during the period of review could ever be appropriate.

But that is not the situation here. Despite some language in Commerce's original (pre-remand) final results that suggested Commerce may have affirmatively concluded Qixin had no entries, *see* J.A. 762 ("[Commerce] finds that Ningbo Qixin did not have a suspended entry of subject merchandise during the [review period]."), read in context, Commerce merely found that Qixin had not met its burden to establish entries. The final remand results clearly state that Commerce concluded only that it "determine[d] that, because Qixin ha[d] failed

to provide conclusive evidence that it had a sale or shipment of subject merchandise, Qixin has not satisfied the requirements for obtaining a separate rate." J.A. 962; *see also* J.A. 963 ("[B]ecause Qixin has failed to demonstrate that it had a sale or entry of subject merchandise during the [review period], Commerce continues to find for purposes of this remand redetermination that Qixin is not eligible for a separate rate.").

Neither the regulation nor *Allegheny Ludlum* requires rescission of an administrative review where the exporter has failed to establish the absence of entries, and indeed, Qixin continues to argue that it did have entries. In *Allegheny Ludlum*, two parties had claimed they had not exported any subject merchandise to the United States during the period of review, and Commerce affirmatively verified those claims, including by "review[ing] Customs' databases and [finding] that they showed no entries . . . during the period of review." 346 F.3d at 1370. The regulation provides for rescission if Commerce "concludes" there are no entries of subject merchandise in the period of review. § 351.213(d)(3). Here, Commerce in its final remand decision never "concluded" that Qixin had no entries in the period of review. In fact, Qixin has never even maintained that it had no entries. In its motion for leave to file new factual material out of time, Qixin pointed to additional entries it claimed were of subject merchandise during the period of review. And at argument, the government suggested that its records indicate Qixin did in fact have entries of subject merchandise during the review period. It is not inconsistent for Commerce to find that Qixin failed to establish there were no entries (necessary for rescission), and also to conclude that Qixin failed to establish there were entries (necessary for a separate rate). Qixin simply failed to resolve an ambiguity necessary for it to secure relief.

**AFFIRMED**

# U.S. Court of International Trade

Slip Op. 23–70

AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Plaintiff, v. UNITED STATES, Defendant and, JIANGSU SENMAO BAMBOO AND WOOD INDUSTRY CO., LTD., et al., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 20–03948

[U.S. Department of Commerce's final results are sustained in part, and remanded.]

Dated: May 5, 2023

*Stephanie M. Bell*, Wiley Rein LLP, of Washington, D.C., argued for Plaintiff American Manufacturers of Multilayered Wood Flooring. With her on the brief were *Timothy C. Brightbill* and *Tessa V. Capeloto*.

*Sonia M. Orfield*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Defendant-Intervenors Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., Jiangsu Keri Wood Co., Ltd., and Sino-Maple (Jiangsu) Co., Ltd. With him on the brief was *Jeffrey S. Neeley*.

*Wenhui (Flora) Ji*, Mowry & Grimson, PLLC, of Washington, D.C., for Defendant-Intervenor Yihua Lifestyle Technology Co., Ltd. With her on the brief was *Kristin H. Mowry* and *Sarah M. Wyss*.

*Mark R. Ludwikowski*, Clark Hill PLC, of Washington, D.C., for Defendant-Intervenor Jiangsu Guyu International Trading Co., Ltd. With him on the brief was *Courtney G. Taylor*.

*Ronald M. Wisla*, Fox Rothschild LLP, of Washington, D.C., for Defendant-Intervenors Metropolitan Hardwood Floors, Inc., Galleher Corp., and Galleher LLC. With him on the brief were *Lizbeth R. Levinson* and *Brittney R. Powell*.

## *OPINION AND ORDER*

**Eaton, Judge:**

This case involves a challenge to the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") seventh administrative review of the antidumping duty order ("Order") covering multilayered wood flooring from the People's Republic of China ("China"). *See Multilayered Wood Flooring From the People's Republic of China*, 85 Fed. Reg. 78,118 (Dep't of Commerce Dec. 3, 2020) ("Final Results") and accompanying Issues and Decision Mem. (Nov. 20, 2020) ("Final IDM"), PR 468; *see also Multilayered Wood Flooring From the People's Republic of China*, 76 Fed. Reg. 76,690 (Dep't of

Commerce Dec. 8, 2011), *amended by Multilayered Wood Flooring From the People's Republic of China*, 77 Fed. Reg. 5,484 (Dep't of Commerce Feb. 3, 2012) (Order).

Before the court is the motion for judgment on the agency record of Plaintiff American Manufacturers of Multilayered Wood Flooring ("Plaintiff"), "an *ad hoc* association whose members manufacture the domestic like product in the United States." Compl. ¶ 3, ECF No. 7; *see* Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 39 ("Pl.'s Br."); Pl.'s Reply Br., ECF No. 46. By its motion, Plaintiff asks the court to remand Commerce's determination of the zero percent dumping margin calculated for each of the two mandatory respondents: Jiangsu Guyu International Trading Co., Ltd. ("Guyu"), a Defendant-Intervenor in this case,[1] and a collapsed entity comprised of Dalian Qianqiu Wooden Product Co., Ltd., Fusong Jinlong Wooden Group Co., Ltd., Fusong Jinqiu Wooden Product Co., Ltd., and Fusong Qianqiu Wooden Product Co., Ltd. (collectively, "Jinlong").[2] *See* Pl.'s Br. at 4, 29. The determination of these zero percent margins resulted in a rate of zero percent as the "all-others" rate for those respondents not individually examined.[3] *See* Final Results, 85 Fed. Reg. at 78,119.

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[1] Guyu is a Defendant-Intervenor, along with Metropolitan Hardwood Floors, Inc., Galleher Corp., and Galleher LLC ("Metropolitan & Galleher"); Jiangsu Senmao Bamboo and Wood Industry Co., Ltd., Jiangsu Keri Wood, Co., Ltd., and Sino-Maple (Jiangsu) Co., Ltd. ("Jiangsu"); and Yihua Lifestyle Technology Co., Ltd. ("Yihua") (collectively, "Defendant-Intervenors").

[2] Jinlong is not a party to this action.

[3] Here, the respondents not individually examined that are eligible for the "all others" rate are those companies that have rebutted Commerce's presumption that "all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate," which Commerce terms the "NME-wide rate." Imp. Admin., U.S. Dep't of Com., *Separate-Rates Practice & Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Policy Bulletin 05.1 at 1 (Apr. 5, 2005), https://enforcement.trade.gov/policy/bull05–1.pdf ("Policy Bulletin 05.1") (last visited Apr. 20, 2023). Respondents rebut this presumption—which has been called into question by this Court— by demonstrating "the absence of both *de jure* and *de facto* governmental control over its export activities." *Id.*; *see Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 47 CIT __, __, 617 F. Supp. 3d 1343, 1354 (2023). By demonstrating their independence from the Chinese government, the respondents not individually examined receive a separate rate. *See* Policy Bulletin 05.1 at 1.

"While this 'separate rate' is not technically an 'all-others' rate—an 'all-others' rate is limited solely to investigations under the statute—it is often referred to as the 'all-others' rate in administrative reviews." *Fusong Jinlong Wooden Grp. Co. v. United States*, 46 CIT __, __, 617 F. Supp. 3d 1221, 1232 n.22 (2022) (citations omitted). Commerce determines the all-others rate in investigations by taking a "weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(A). Commerce has used the same method to determine the all-others rate in administrative reviews. *See* Final Results, 85 Fed. Reg. at 78,119 ("Generally, we look to [19 U.S.C. § 1673d(c)(5)], which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents not individually examined in an administrative review.").

Plaintiff also contests this determination. *See* Pl.'s Br. at 28.

Plaintiff primarily contests Commerce's calculation of the surrogate financial ratio for manufacturing overhead and further argues that the surrogate values for labor and glue are unsupported by substantial evidence. *See id.* at 1–2.

Defendant the United States ("Defendant") opposes Plaintiff's motion and asks the court to sustain Commerce's Final Results. *See* Def.'s Resp. Br., ECF No. 43 ("Def.'s Br."). Defendant-Intervenors, including Guyu, also ask the court to sustain Commerce's Final Results and deny Plaintiff's motion. *See* Def.-Int.'s Resp. Br., ECF No. 44 ("Guyu Br."); Def.-Ints.' Resp. Br., ECF No. 45 ("Metropolitan & Galleher Br."); Def.-Ints.' Resp. Br., ECF No. 41 ("Jiangsu Br."); Def.-Int.'s Resp. Br., ECF No. 42 ("Yihua Br.").

Jurisdiction lies under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (B)(iii).[4] For the following reasons, the court finds that Commerce's calculations of the manufacturing overhead ratio, and the surrogate labor value are unsupported by substantial evidence and remands these calculations to Commerce for action consistent with this Opinion and Order. Because the court finds that Commerce's determination of the surrogate glue value is supported by substantial evidence, it is sustained. Because the separate rate (i.e., the "all-others" rate) for the respondents not individually examined depends on the margin assigned to the mandatory respondents, the court also remands the all-others rate determination.

## BACKGROUND

The antidumping duty Order on multilayered wood flooring from China has been in place since 2011. *See* Order, 76 Fed. Reg. at 76,690.

On December 3, 2018, Commerce published a notice of opportunity for interested parties[5] to request an administrative review of the Order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 83 Fed. Reg. 62,293 (Dep't of Commerce Dec. 3, 2018).

After receiving requests to conduct an administrative review from interested parties, including Plaintiff, Commerce initiated the seventh review of the Order on March 14, 2019, covering the December

[4] All references to the U.S. Code are to the 2018 edition.

[5] The term "interested party," defined by statute, includes foreign manufacturers, producers, exporters, and U.S. importers of subject merchandise. *See* 19 U.S.C. § 1677(9)(A). Interested parties also include domestic manufacturers and producers of a domestic like product as well as associations of such manufacturers or producers, among others. *See id.*§ 1677(9)(C), (E)-(F). Under Commerce's regulations, a request for an administrative review may be made by a domestic interested party or a foreign government, an exporter or producer covered by an order, and an importer of the merchandise. 19 C.F.R. § 351.213(b) (2018).

1, 2017, to November 30, 2018, period of review ("POR"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9,297 (Dep't of Commerce Mar. 14, 2019); Letter from Wiley Rein LLP to Sec'y of Commerce (Dec. 31, 2018) ("Request for Administrative Review"), PR 27. On May 21, 2019, Guyu and Jinlong were selected as mandatory respondents. *See* Mem. from Sergio Balbontin & Alexis Cherry to Irene Darzenta Tzafolias, re: Antidumping Administrative Review of Multilayered Wood Flooring from the People's Republic of China: Respondent Selection (May 21, 2019) ("Resp. Selection Mem.") at 6, PR 208, CR 116 (noting Guyu and Jinlong "account[ed] for the largest volume of subject merchandise imports during the POR").

On February 6, 2020, Commerce issued its preliminary results. *See Multilayered Wood Flooring From the People's Republic of China*, 85 Fed. Reg. 6,911 (Dep't of Commerce Feb. 6, 2020) ("Preliminary Results") and accompanying Preliminary Decision Mem. (Jan. 31, 2020) ("PDM"), PR 387. In the Preliminary Results, Commerce calculated a zero percent dumping margin for each of the mandatory respondents. *See* Preliminary Results, 85 Fed. Reg. at 6,912. Using the weighted average of this dumping margin, the Department determined a zero percent rate for the respondents not individually examined (the "all-others" rate). *See id.*

On December 3, 2020, Commerce published its Final Results. *See* Final Results, 85 Fed. Reg. at 78,118. In the Final Results, Commerce modified its calculations to incorporate revisions to the financial ratios. *See* Mem. from Alexis Cherry & Sergio Balbontin to File, re: Antidumping Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China; 2017–2018: Surrogate Values for the Final Results (Nov. 20, 2020) ("Final SV Mem.") at 2, PR 475. Even with these modifications, Commerce continued to calculate a zero percent margin for the mandatory respondents and to determine a zero percent rate for the respondents not individually examined (the "all-others" rate). *See* Final Results, 85 Fed. Reg. at 78,119.

## STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## LEGAL FRAMEWORK

In an antidumping case, Commerce must determine whether goods are being sold, or are likely to be sold, in the United States at less than fair value. *See* 19 U.S.C. § 1673. To make this determination,

Commerce compares normal value and export price. *See id.* § 1677b(a).

To determine normal value, when subject merchandise is exported from a nonmarket economy ("NME") country[6] such as China, Commerce uses surrogate values both for the various factors of production used to make the subject merchandise, and for general expenses and profit. *See Nantong Uniphos Chems. Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1345, 1352–53 (2019); *see also Heze Huayi Chem. Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1318 (2021) (citation omitted). Factors of production include, but are not limited to, the "hours of labor required," the "quantities of raw materials employed" (e.g., the input for glue), and "amounts of energy and other utilities consumed." 19 U.S.C. § 1677b(c)(3)(A)-(C). To determine general expenses and profit, "Commerce usually calculates separate values for [1] selling, general and administrative ('SG&A') expenses, [2] manufacturing overhead and [3] profit." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004). Financial ratios are used "to account for those production inputs that *cannot be wholly* attributed to a finite batch of subject merchandise." *CP Kelco U.S., Inc. v. United States*, 39 CIT __, __, No. 13–00288, 2015 WL 1544714, at *2 (Mar. 31, 2015) (not reported in Federal Supplement) (emphasis added). In other words, the financial ratios account for production inputs that do not solely correspond to the subject merchandise, but also are used repeatedly in making products or are attributable to more than one product. *See id.* Thus, here the surrogate financial ratio for manufacturing overhead was used to account for the percentage of overhead that should be attributed to the cost of manufacture of the multilayered wood flooring.

In order to find the surrogate value for the labor factor of production, Commerce usually uses industry-specific wage data from the primary surrogate country. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,093 (Dep't of Commerce June 21, 2011) ("Labor Rate Policy") ("[T]he Department finds that using the data on industry-specific wages from the primary surrogate country is the best approach for valuing the labor input in NME antidumping duty proceedings."); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 41 CIT __, __, 234 F. Supp. 3d 1315, 1319 (2017).

[6] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

In valuing the factors of production, including the glue used to manufacture multilayered wood flooring, Commerce must use "the best available information." 19 U.S.C. § 1677b(c)(1); *see also Solar-World Ams., Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1254, 1275 (2017). When doing so, the statute requires Commerce to use, "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce additionally considers and "selects . . . surrogate values that are [1] publicly available, [2] are product-specific, [3] reflect a broad market average, and [4] are contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citation omitted). In making these selections, when determining what constitutes the best available information, Commerce must act according to the statute's purpose: "to obtain the most accurate dumping margins possible." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 719 (2001) (citation omitted), *aff'd*, 60 F. App'x 797 (Fed. Cir. 2003). Thus, Commerce's choice of the best available information must "evidence[] a rational and reasonable relationship to the factor of production it represents." *Id.* (citations omitted).

## DISCUSSION

### I. Commerce's Determination of the Manufacturing Overhead Ratio Lacks the Support of Substantial Evidence

#### A. Components of the Ratio to Determine Manufacturing Overhead

Manufacturing overhead is one component of the value for general expenses and profit, used to determine normal value. *See* 19 U.S.C. § 1677b(c)(1); *Shanghai Foreign Trade Enters. Co.*, 28 CIT at 482, 318 F. Supp. 2d at 1341. To find the manufacturing overhead value, Commerce first performs a ratio calculation using information derived from surrogate financial statements, i.e., "financial statements of one or more companies that produce identical or comparable merchandise in the surrogate country." *See Shanghai Foreign Trade Enters. Co.*, 28 CIT at 482, 318 F. Supp. 2d at 1341. The ratio for manufacturing overhead is found by "divid[ing] total manufacturing overhead expenses by total direct manufacturing expenses." *Id.* This

ratio is "converted to [a] percentage[]." *Id.* The resulting percentage reflects the relationship of overhead to manufacturing expenses. Commerce, then, multiplies this rate "by the derived manufacturing cost of the product," which consists of the values for material, labor, and energy costs. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1715 n.36, 462 F. Supp. 2d 1262, 1301 n.36 (2006). The result is the manufacturing overhead value. *See id.* In other words, Commerce performs the ratio calculation for manufacturing overhead, then multiplies the result by the direct costs (materials, labor, and energy) to reach the manufacturing overhead value, i.e., the percentage of manufacturing overhead attributable to the manufacture of subject merchandise. Commerce then includes this value (as part of the amount for general expenses and profit) in "the normal value of the merchandise in question" by adding it to the factors of production. *Id.*; *see Nantong Uniphos Chems. Co.*, 43 CIT at __, 415 F. Supp. 3d at 1351.

### B. Commerce's Determination of Manufacturing Overhead

To construct manufacturing overhead for use in the manufacturing overhead ratio's numerator, Commerce used data from the 2018 annual report of a Romanian company called Sigstrat S.A. ("Financial Statement").[7] *See* Final IDM at 8; Final SV Mem., attach. I, PR 476; *see also* Letter from Clark Hill PLC to Sec'y of Commerce (Aug. 23, 2019) ("Guyu SV Submission") Ex. SV-9, PR 318. When doing so, however, the only financial statement entries Commerce summed to find the numerator were (1) depreciation, (2) other materials, and (3) third-party service expenses. *See* Final SV Mem., attach. I; Final IDM at 8. Commerce did not include the entry (or any part of it) for indirect production expenses, which is found in Note 7 of the Financial Statement as a component of the cost of goods sold. *See* Guyu SV Submission, Ex. SV-9. Commerce's reason for not using the entry for indirect production expenses was that "the components of the [overhead] figure [i.e., indirect production expenses][8] . . . may include indirect

[7] Selection of the Financial Statement is not at issue here, as Plaintiff and the mandatory respondents all "proposed relying on the 2018 annual report for Romanian producer Sigstrat S.A. . . . for the surrogate financial ratios." Pl.'s Br. at 5. This is the only financial statement on the record. *See* Def.'s Br. at 5.

[8] There is no item labeled "overhead figure" in the Financial Statement. The notes of the Financial Statement, however, contain an "indirect production expenses" entry (Note 7), which Plaintiff raised in its administrative case brief. *See* Pet'r's Case Br. (July 8, 2020) at 4–5, PR 444, CR 351. Commerce, therefore, by mentioning the "overhead figure," is referencing the indirect production expenses entry in Note 7. *See* Final IDM at 8. Defendant, also, when stating "overhead figure" means the indirect production expenses entry in Note 7. *See* Def.'s Br. at 22.

labor expenses," which would have been taken into account elsewhere in the labor factor of production. Final IDM at 8. Commerce claimed that it took this step in order to prevent "potentially overstating [overhead]." *Id.*

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Similarly, when Plaintiff references "Sigstrat's identified overhead expenses" or "Sigstrat's reported overhead expenses," Plaintiff is referencing the entry for indirect production expenses, reported in Note 7 of the Financial Statement. *See* Pl.'s Br. at 17–18. Note 7 is titled "Analysis of operating result," and contains a breakdown of the cost of goods sold (expenditures on basic activity plus indirect production expenses). *See* Guyu SV Submission, Ex. SV-9.

It should be noted that the cost of goods sold entry in Note 7 is nearly identical to the cost of goods sold entry in Note 4. *Compare* Guyu SV Submission, Ex. SV-9 (Note 7), *with id.* (Note 4). Significantly, the line for "indirect production expenses" in Note 7 and the line for "production overheads" in Note 4 each contain the same amount (RON 8,512,590). *See* Guyu SV Submission, Ex. SV-9. Plaintiff, therefore, refers to these entries interchangeably. *See* Pl.'s Br. at 15 ("Sigstrat's financial statement explicitly states that its 'Indirect production expenses' or 'Production overheads' totaled RON 8,512,590."). These entries, found in line five of the tables below, are part of the cost of goods sold.

The entry for indirect production expenses is contained in Note 7 of the Financial Statement, the relevant parts of which are reproduced below:

| **Note 7. Analysis of Operating Result** | | | |
|---|---|---|---|
| **No.** | **INDICATOR** | **PREVIOUS EXERCISE (2017)** | **CURRENT EXERCISE (2018)** |
| 1 | Net turnover + stocks fluctuation | 32.347.136 | 34.682.935 |
| 2 | Cost of goods sold and services rendered (3+4+5) | 27.626.962 | 30.703.287 |
| 3 | Expenditure on basic activity | 18.568.260 | 21.270.123 |
| 4 | Expenditure on basic activity | 864.543 | 920.574 |
| 5 | *Indirect production expenses* | *8.194.159* | *8.512.590* |

Guyu SV Submission, Ex. SV-9 (emphasis added).

The entry for production overheads is contained in Note 4 of the Financial Statement, the relevant parts of which are reproduced below:

| **Note 4. Operating Result Analysis** | | |
|---|---|---|
| **INDICATOR** | **PREVIOUS FINANCIAL YEAR (2017)** | **CURRENT FINANCIAL YEAR (2018)** |
| 1. Net turnover + stocks variation | 32.347.136 | 34.682.935 |
| 2. Cost of sold goods and services rendered (3+4+5) | 27.626.962 | 30.703.287 |
| 3. Main activity expenses | 18.568.260 | 21.270.123 |
| 4. Auxiliary activities | 864.543 | 920.574 |
| 5. *Production overheads* | *8.194.159* | *8.512.590* |

*See id.* (emphasis added).

Plaintiff insists that by including only depreciation, other materials, and third-party service expenses the Department understated the overhead value. Plaintiff argues:

> Under Commerce's calculation, only three items, totaling RON[9] 3,466,553 have been treated as overhead: depreciation, other materials, and third-party services. As a result, only 41% of Sigstrat's identified overhead expenses [i.e., indirect production expenses] have actually been included as overhead by Commerce (*i.e.*, 3,466,553 / 8,512,590). Given the numerous items that are typically encompassed by overhead expenses and the limited types of expenses treated as overhead in Commerce's calculation, it is not reasonable to presume that the remaining 59% of Sigstrat's reported overhead expenses exclusively, or even largely, covers indirect labor expenses. Instead, the most reasonable assumption is that the remaining overhead expenses at least partially cover other types of expenses. Thus, by treating this amount of Sigstrat's overhead expenses as part of materials, labor, and energy as opposed to overhead, the overhead expense has been understated.

Pl.'s Br. at 17–18.

For Plaintiff, Commerce erred in its calculation of the manufacturing overhead ratio by not placing the full amount (or at least a large part) of the entry for indirect production expenses in the numerator of the ratio. Plaintiff claims that it was not reasonable for Commerce to "allocate[] only RON 3,466,553 to overhead expenses despite the fact that [the Financial Statement] explicitly states that its 'Indirect production expenses' or 'Production overheads' totaled RON 8,512,590." Pl.'s Br. at 15.

For its part, in its entirety, Commerce claims that, "the petitioner's methodology may also be distortive, as we do not know the components of the [overhead][10] figure *which may include indirect labor*

[9] All references to RON are to Romanian currency, the Romanian leu.

[10] Commerce is here referencing the indirect production expenses entry stated in Note 7 of the Financial Statement. *See* Def.'s Br. at 19.

*expenses*, thus potentially overstating [overhead]."[11] Final IDM at 8 (emphasis added). Apparently, Commerce believed that there was potential to double count indirect labor expenses if it placed the full amount of indirect production expenses in the numerator of its ratio calculation.

The double counting could occur if indirect labor expenses were included twice in Commerce's determination of normal value: once as a factor of production and again as a portion of overhead.[12] *See Risen Energy Co. v. United States*, 46 CIT __, __, 569 F. Supp. 3d 1315, 1335 & n.35 (2022), *appeal docketed*, No. 23–1550 (Fed. Cir. Mar. 3, 2023). Thus, to address the potential of "overstating labor costs" (by accounting for indirect labor expenses twice in its calculation of normal value), Commerce has previously indicated that it would "adjust the surrogate financial ratios when the available record information—in the form of itemized indirect labor costs—*demonstrates* that labor

[11] Commerce additionally stated:

> However, we agree with the petitioner that the ratio calculations should incorporate certain additional information from the notes to the financial statement with respect to [the cost of goods sold]. Accordingly, for the final results, we adjusted the [cost of goods sold] for the change in finished goods and removed the [cost of goods sold] of traded goods to derive the cost of manufacture of manufactured goods. We backed out the items that can be reasonably identified as [overhead] (*e.g.*, depreciation, other materials, third party expenses). We also used the [selling, general, and administrative] expenses indicated in the notes by adding the revenue and costs from note 4 of the financial statement (these are the bolded items) and then demonstrated how the figures from the notes agree with the total revenues, expenses, and profit from the income statement. We note also that the [selling, general, and administrative expenses] ratio denominator is the [cost of goods sold] and the profit denominator is the [cost of goods sold] plus the [selling, general, and administrative] expenses. Under this methodology we arrive at ratios of 12.68 percent for [overhead], 19.53 percent for [selling, general, and administrative expenses], and 1.29 percent for profit.

Final IDM at 8.

[12] As Commerce states in its Antidumping Manual, "[i]f indirect labor is included in the surrogate value for factory overhead . . . it need not be valued separately. If, however, it is not included in the surrogate value for factory overhead, it should be valued as part of labor." U.S. Dep't of Com., *Antidumping Manual*, *in* 1 JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS 1065, app. B at 17 (2018 ed.).

costs are overstated."[13] Labor Rate Policy, 76 Fed. Reg. at 36,093–94 (emphasis added). In other words, if it was demonstrated that indirect labor costs[14] were included in the numerator of the manufacturing overhead ratio, and that these same costs were included in the labor factor of production, the result would be distortive because this double counting would impermissibly increase normal value.

To avoid what it saw as the potential for distorting normal value, Commerce sought to exclude any indirect labor expenses from the numerator of its manufacturing overhead ratio calculation. To do this, the Department looked to the cost of goods sold entry in Note 7 of the Financial Statement. The cost of goods sold is calculated by adding "beginning inventory plus cost of goods purchased or manufactured minus ending inventory." SIDNEY DAVIDSON, CLYDE P. STICKNEY & ROMAN L. WEIL, FINANCIAL ACCOUNTING 805 (4th ed. 1985) (emphasis omitted). The cost of manufacture would normally be roughly equal to the sum of the factors of production plus manufacturing overhead. The cost of manufacture, used to find the cost of goods sold, is "the sum of material, fabrication and other processing costs incurred to produce the products under . . . review." U.S. Dep't of Com., *Antidumping Manual*, *in* 1 JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS 1318, app. B Glossary of Terms (2018 ed.) ("*Antidumping Manual*"). Commerce "backed out" from the cost of goods sold entry "the items that can be reasonably identified as [overhead] (*e.g.*, depreciation, other materials, third party expenses)." Final IDM at 8. Commerce identified these three items from the profit and loss

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[13] Commerce's Labor Rate Policy further states:

> [T]he Department will determine whether the facts and information available on the record warrant and permit an adjustment to the surrogate financial statements on a case-by-case basis. If there is evidence submitted on the record by interested parties *demonstrating that the NME respondent's cost of labor is overstated*, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items.

Labor Rate Policy, 76 Fed. Reg. at 36,094 (emphasis added). In other words, when overhead and selling, general, and administrative expenses are itemized, such that they indicate an amount for indirect labor expenses, and those indirect labor expenses are included in the labor factor of production, Commerce will not include the indirect labor expenses in its calculation of the surrogate financial ratios. This way, Commerce avoids including indirect labor expenses in both the ratios and the labor factor of production, and thus, avoids double counting such expenses.

[14] In its Labor Rate Policy, Commerce uses "costs" rather than "expenses." In the Final Results, it speaks of "labor expenses." Final IDM at 8. The use of the words "costs" and "expenses" interchangeably is not uncommon. *See* SIDNEY DAVIDSON, CLYDE P. STICKNEY & ROMAN L. WEIL, FINANCIAL ACCOUNTING 804, 817 (4th ed. 1985).

account/income statement of the Financial Statement. *See* Final SV Mem., attach. I; Def.'s Br. at 19–20. Commerce then used these three amounts as the value for overhead in the numerator of the overhead ratio. *See* Final SV Mem., attach. I.

After taking out these three amounts from the cost of goods sold, and adjusting the cost of goods sold for inventory, Commerce placed what remained of the cost of goods sold entry in the denominator of the manufacturing overhead ratio. *See id.*; Final IDM at 8. Commerce labeled this amount in the denominator as "Total Material, Direct Labor, and Energy Inputs." Final SV Mem., attach. I. Put another way, Commerce found the amount for manufacturing overhead expenses by identifying the amounts for depreciation, other materials, and third-party service expenses from the profit and loss account in the Financial Statement. *See id.*; Def.'s Br. at 19–20. Then, after adjusting for inventory, Commerce subtracted these three line items from the cost of goods sold to reach the denominator of the ratio for manufacturing overhead (i.e., total direct manufacturing expenses). *See* Final SV Mem., attach. I. The amount of the numerator is less than half the amount of the indirect production expenses entry, found in the surrogate financials. *See id.*; Guyu SV Submission, Ex. SV-9.

### C. Significance of Plaintiff's Argument on Allocation of Costs Within Ratio for Manufacturing Overhead

For Plaintiff, Commerce's decision not to place the entire indirect production expenses entry, found in Note 7 of the Financial Statement, in the numerator of the ratio is unsupported by substantial evidence because the Department (1) did not explain why Plaintiff's preferred entry (indirect production expenses) was not the best available information to measure overhead, and (2) did not explain why the use of the indirect production expenses entry would be distortive. *See* Pl.'s Br. at 15–17. Regarding the best available information, Plaintiff argues that "Commerce has failed to calculate surrogate financial ratios in a manner consistent with the record such that the resulting financial ratios are distorted and do not constitute the best available information."[15] *Id.* at 15. Plaintiff, having proposed at the administrative level that the full amount of the entry for indirect production expenses be placed in the numerator, claims that "Commerce pointed to no information on the record demonstrating that double counting would occur if [Plaintiff's] proposed calculation was used." *Id.* at 19; *see also* Pet'r's Case Br. (July 8, 2020) at 5, Ex. 1, PR 444, CR 351. Plaintiff argues, "Commerce's reliance on speculation

[15] Although Plaintiff refers to the "surrogate financial ratios" in this quote, it only contests one ratio, the manufacturing overhead ratio.

regarding the double counting of costs was not a sufficient basis for excluding amounts identified as indirect expenses in [the Financial Statement] from overhead in its financial ratio calculation."[16] Pl.'s Br. at 17. In other words, for Plaintiff, Commerce's finding that the indirect production expenses entry might include indirect labor expenses is based on speculation and does not render its decision supported by substantial evidence.

### D. Commerce Did Not Substantiate Its Concern with Double Counting

Here, the problem lies with Commerce's decision to rely solely on those entries it could identify as overhead from the profit and loss account/income statement when constructing the numerator for the manufacturing overhead ratio. For Plaintiff, this decision is not reasonable, primarily because it understates the amount of overhead, and because it is based on guesswork. *See* Pl.'s Br. at 19. Plaintiff notes that "only 41% of Sigstrat's identified overhead expenses [i.e., indirect production expenses] have actually been included as overhead by Commerce (*i.e.*, 3,466,553 / 8,512,590)." *Id.* at 17. Plaintiff faults Commerce for the lack of factual detail in its explanation for not using Plaintiff's proposed financial entry in Note 7 of the Financial Statement. In addition, Plaintiff points to the absence, from Commerce's calculation, of a large number of items that would normally constitute overhead—i.e., depreciation, insurance, taxes, repairs and maintenance, supervisory salaries, manufacturing supplies, and power. *See id.*; *see also Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1102, 938 F. Supp. 885, 896 (1996).

Plaintiff is right to point out that overhead normally includes many more things than the three that Commerce included in the numerator of the ratio. *See* DAVIDSON, STICKNEY & WEIL, *supra*, at 139 ("Manufacturing overhead includes a variety of indirect costs that provide a firm with productive capacity (depreciation, insurance, and taxes on manufacturing facilities, supervisory labor, and supplies for factory equipment)."); *see also What is Manufacturing Overhead and What Does It Include?*, ACCT. COACH, https://www.accountingcoach.com/blog/what-is-manufacturing-overhead-and-what-is-included (last visited

[16] Apparently, allocating the entire amount of indirect production expenses to the numerator is important to Plaintiff because it results in a larger manufacturing overhead value, and thus a greater difference between normal value and export price. This is because the larger the numerator of the ratio for manufacturing overhead and the smaller the denominator, the larger the value determined as manufacturing overhead. The larger the value for manufacturing overhead, the larger the amount for general expenses and profit. The larger the amount for general expenses and profit, the larger normal value will be when this amount is added to the factors of production. *See* 19 U.S.C. § 1677b(c)(1). Plaintiff's goal, then, is to increase normal value in hopes that Commerce will determine a positive dumping margin.

Apr. 21, 2023) (indicating that manufacturing overhead includes "depreciation, rent and property taxes on the manufacturing facilities[;] depreciation on the manufacturing equipment[;] managers and supervisors in the manufacturing facilities[;] repairs and maintenance employees in the manufacturing facilities[;] electricity and gas used in the manufacturing facilities[;] indirect factory supplies, and much more"). Considering that these costs are normally incurred by a manufacturer, it is unreasonable for Commerce to not have found a way to include more from the universe of these items.

Moreover, as Plaintiff states, the Financial Statement explicitly identifies an entry for indirect production expenses (production overheads). *See* Pl.'s Br. at 17–18; *see also* Pl.'s Reply Br. at 3–4 ("[The overhead] figure ties directly to the amount expressly identified in Sigstrat's financial statement as 'Production overheads.' Thus, Sigstrat's financial statement leaves no doubt that this amount constitutes overhead expenses."). The entry for indirect production expenses contains the same amount as the entry for production overheads. *See* Guyu SV Submission, Ex. SV-9; *see also* Pl.'s Br. at 15. While the Financial Statement does not break down exactly what the indirect production expenses entry includes, Commerce still must explain its statement that using it might be distortive. *See* Guyu SV Submission, Ex. SV-9; *NSK Corp. v. United States*, 33 CIT 1185, 1190, 637 F. Supp. 2d 1311, 1318 (2009) (citation omitted) ("To provide the requisite support, [Commerce] must offer more than conjecture and reasonably explain the basis for its decisions."); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citations omitted) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court. Specifically, in the anti-dumping context, a final determination by Commerce must include 'an explanation of the basis for its determination that addresses relevant arguments[] made by interested parties who are parties to the investigation or review.'").

In its entirety, Commerce's explanation for not using the indirect production expenses entry is that "the petitioner's methodology may also be distortive, as we do not know the components of the [overhead] figure which may include indirect labor expenses, thus potentially overstating [overhead]." Final IDM at 8. Speculatory conclusions are not supported by substantial evidence. *See OSI Pharms., LLC v.*

*Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir. 2019) ("'Mere speculation' is not substantial evidence." (quoting *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1331 (Fed. Cir. 2017))). Since Commerce provided no such explanation, its claim that using the indirect production expenses entry in the numerator of the manufacturing overhead ratio may be distortive is mere speculation. Moreover, limiting the overhead expenses in the numerator to depreciation, other materials, and third-party service expenses is unreasonable considering the universe of expenses normally thought of as overhead. Therefore, the court remands Commerce's determination of the manufacturing overhead ratio.

## II. Commerce's Determination of the Surrogate Labor Value Lacks the Support of Substantial Evidence

### A. Commerce's Calculation of the Hourly Labor Value

To calculate the surrogate hourly labor value (i.e., the surrogate value Commerce uses to determine the labor factor of production),[17] Commerce used data from Chapter 16 of the National Institute of Statistics of Romania.[18] *See* Mem. from Alexis Cherry & Sergio Balbontin, re: Antidumping Duty Administrative Review and New Shipper Review of Multilayered Wood Flooring from the People's Republicof China; 2017–2018: Surrogate Values for the Preliminary Results (Jan. 31, 2020) ("Prelim. SV Mem.") at 6, PR 392; Final IDM at 12.

[17] To determine the value for the labor factor of production, Commerce multiplies the mandatory respondent's reported hours used in producing the subject merchandise by the surrogate value for wages per hour (e.g., 150 hours x $0.97/hr. = $144.50). *See Antidumping Manual*, *supra*, at 1066–68, app. B at 18–20. The result of this multiplication is the value for the labor factor of production ($144.50). *See id.* at 1067–68, app. B. at 19–20.

[18] While Plaintiff contested the selection of this data at the administrative level, it does not do so here. *See* Pet'r's Case Br. at 5–7; Pl.'s Reply Br. at 5 & n.2. Thus, the court will not address Defendant's arguments pertaining to the data selection. *See* Def.'s Br. at 8–10, 12; *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (citation omitted) ("Our law is well established that arguments not raised in the opening brief are waived.").

This data stated monthly average net earnings,[19] in Romanian leu (RON), of RON 1,772 but did not specify the hourly labor value. *See* Final IDM at 13; Prelim. SV Mem. at 6. To calculate the hourly labor value, Commerce divided monthly average net earnings by twenty-four working days per month, and eight working hours per day to reach an hourly rate of RON 9.23.[20] *See* Final IDM at 12–13. Commerce used twenty-four working days and eight hours because

[19] Although Commerce's Labor Rate Policy expresses the Department's preference of using Chapter 6A data from the International Labor Organization ("ILO") to value labor, the Department stated that this preference "d[oes] not preclude reliance on data from another source." Final IDM at 12; *see also* Labor Rate Policy, 76 Fed. Reg. at 36,094. In other words, Commerce still must act consistent with the statute's direction of selecting the best available information to determine surrogate values. *See* 19 U.S.C. § 1677b(c)(1); *see also* PDM at 31. Here, Commerce did not use the ILO data because it found that "the National Institute of Statistics of Romania data for the POR are the best available information for valuing labor because the data are contemporaneous with the POR, industry-specific, and reflect all costs related to labor, including wages, benefits, housing, and training." PDM at 31. Commerce stated that this Romanian labor data was "specific to the manufacture of wood products" and "specific to the wood flooring industry." Final IDM at 12.

[20] Commerce's calculation is as follows:

RON 1,772 ÷ 24 working days ÷ 8 hours = 9.23 RON per hour.

*See* Mem. to File from Alexis Cherry, re: Antidumping Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China; 2017–2018: Preliminary Results Margin Calculation for Jiangsu Guyu International Trading Co., Ltd. (Jan. 31, 2020), attach. VI, PR 397, CR 323–328.

The mandatory respondents reported their hours of labor in response to Commerce's request for the number of direct and indirect "labor hours required to produce a unit of the merchandise under consideration," i.e., the multilayered wood flooring. *See, e.g.*, Jinlong's Resp. Sec. C & D Quest. (July 16, 2019), at D-11 to D-12, PR 278, CR 185. Mandatory respondent Jinlong reported three companies' hours of labor required as follows: Fusong Jinlong's direct labor hours were [[ ]] and its indirect labor hours were [[ ]]; Fusong Jinqiu's direct labor hours were [[ ]] and its indirect labor hours were [[ ]]; and Fusong Qianqiu's direct labor hours were [[ ]] and its indirect labor hours were [[ ]]. Jinlong's Resp. Sec. C & D Quest. (July 16, 2019), Ex. D-8, CR 213. Accordingly, Jinlong reported a total of [[ ]] direct labor hours and [[ ]] indirect labor hours. *Id.* Its "average" (i.e., the result from dividing Jinlong's total direct or indirect labor hours by its total output of multilayered wood flooring, in square meters) was [[ ]] for direct labor and [[ ]] for indirect labor. *Id.*

Mandatory respondent Guyu reported its hours of labor required in an exhibit in its questionnaire response. *See* Guyu's Resp. Sec. C & D Quest. (July 10, 2019), Ex. D-6–5, PR 275, CR 182. The total indirect labor hours were [[ ]] and the total direct labor hours were [[ ]]. *Id.* The factor of production was [[ ]] for indirect labor and [[ ]] for direct labor. *Id.*

it was "in accordance with our practice."[21] Final IDM at 13. The practice, to which Commerce refers, is found in its Labor Rate Policy, which states, "[w]here data is not available on a per-hour basis, the Department converts that data to an hourly basis based on the premise that there are 8 working hours per day, 5.5 working days a week and 24 working days per month." Labor Rate Policy, 76 Fed. Reg. at 36,094 n.11. It is worth noting that this policy is found in a footnote to the Labor Rate Policy, and no explanation is provided as to its source or why it is reasonable to employ. Moreover, while the Labor Rate Policy as a whole, was the subject of notice-and-comment rulemaking and appears as a notice in the Federal Register, it is not a regulation. *See id.* at 36,092.

Plaintiff argues that the Department's "assumption of 24 working days per month" is unreasonable. Pl.'s Br. at 19. For Plaintiff, using twenty-four working days per month "overstates the total number of working hours in a month and, consequently, results in an understated surrogate hourly labor rate."[22] *Id.* at 23.

Plaintiff makes two major points. First, while Commerce states how its policy works, it does not state how it was developed or if its assumptions are based on substantial evidence. *See id.* at 22; *see also* Pl.'s Reply Br. at 6–8. Relatedly, Plaintiff insists that the policy does not represent the best available information:

> [R]elying on 24 working days per month to calculate the surrogate labor rate solely because that is the agency's normal practice does not constitute a sufficient explanation of the agency's determination here and fails to demonstrate that Commerce relied upon the best available information to value the labor surrogate value based on the record before it as required by the statute.

[21] Commerce's Labor Rate Policy states:

> [T]he Department will determine whether the facts and information available on the record warrant and permit an adjustment to the surrogate financial statements on a case-by-case basis. If there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items.

Labor Rate Policy, 76 Fed. Reg. at 36,094.

[22] Plaintiff's assertion is based on the idea that, if hours worked per month is higher/overstated because of a higher number of working days per month, the hourly labor value will be lower/understated. For instance, assuming monthly wages are $1,000 and there are 20 working days per month and 8 hours per day, the hourly labor value is $6.25 per hour. If, however, there are 24 working days per month and 8 hours per day (resulting in an "overstatement" of hours worked per month), the hourly labor value is $5.21 per hour (an "understated" labor value).

Pl.'s Br. at 22.

In addition, Plaintiff claims that Commerce's rejection of Plaintiff's proposed data for calculating the hourly labor value is also unsupported by substantial evidence. Plaintiff argues that neither of the two reasons Commerce stated in its Final IDM "provide a reasoned basis for following the methodology used in the final determination or for rejecting [Plaintiff's] data." *Id.* at 20–21. The two reasons Commerce provided for using the numbers in its Labor Rate Policy were: (1) doing so was "in accordance with our practice" and (2) "[t]o use the [Organization for Economic Cooperation and Development] data suggested by the petitioner would employ a methodology that is not specific to Romania and that utilizes secondary sources that are unrelated to the source used to value labor." Final IDM at 13. Plaintiff maintains, "[a]s Commerce failed to adequately address [Plaintiff's] arguments and to sufficiently explain its determination in light of the record as a whole, its calculation of the surrogate labor rate based on an assumption of 24 working days per month is not supported by substantial evidence and otherwise in accordance with law." Pl.'s Br. at 19–20.

As an initial matter, it is important to note that, unlike with some unexplained policies, *see Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 47 CIT __, __, 617 F. Supp. 3d 1343 (2023), Commerce has identified the statutory source for establishing its Labor Rate Policy. In the notice in the Federal Register containing this policy, Commerce cites section 773(c) of the Tariff Act of 1930, which is codified at 19 U.S.C. § 1677b(c). *See* Labor Rate Policy, 76 Fed. Reg. at 36,092. This section of the statute states that, in an NME case:

> [Commerce] shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1). The statute then states that, when Commerce is valuing the factors of production, it "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4). Thus, the legal authority for establishing the policy is not at issue.

What is at issue, however, is Commerce's failure to identify the source of the numbers in its Labor Rate Policy and its reasons for using them. As Plaintiff argues, "there is no information on the record concerning how the 24 working days per month assumption was derived or what data, if any, were used to develop this assumption." Pl.'s Reply Br. at 7–8; *see also* Pl.'s Br. at 22 (arguing that, while Commerce faulted Plaintiff for using data to calculate the hourly labor value that is not specific to Romania and that utilizes secondary sources unrelated to the source used to value labor, "there is nothing on the record to suggest that the assumption Commerce relied on is specific to Romania, is from a primary source, or relates to the source used to value labor").

Commerce's sole justification is that its use of twenty-four working days per month was "in accordance with our practice." Final IDM at 13. As noted, this policy appears in a footnote[23] to Commerce's Labor Rate Policy and states its assumption with respect to twenty-four working days, 5.5 working days per week, and eight working hours per day, but no justification for the assumptions. For instance, Commerce offers no explanation for how it settled on twenty-four working days and therefore gives no insight on how its policy was developed. Thus, Commerce has not offered an adequate explanation because conclusory statements are not sufficient to support, with substantial evidence, Commerce's decision. *See Jindal Poly Films Ltd. of India v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1379, 1386 (2019) ("Based on Commerce's conclusory statements, the court cannot discern the path of Commerce's decision-making nor determine that it is supported by substantial evidence." (first citing *NMB Singapore Ltd.*,

[23] The footnote in Commerce's Labor Rate Policy is:

> The Department sorts the ILO data based on data parameters in the following order:
> 1. "Sub-classification," *i.e.,* If there is no industry-specific data available for the surrogate country within the primary data source, *i.e.,* ILO Chapter 6A data, the Department will then look to national data for the surrogate country for calculating the wage rate;
> 2. "Type of Data," *i.e.,* reported under categories compensation of employees and labor cost. We use labor cost data if available and compensation of employees where labor cost data are not available;
> 3. "Contemporaneity," *i.e.,* the Department uses the most recent earnings/wage rate data point available;
> 4. The unit of time for which the wage is reported. The Department selects from the following categories in the following hierarchy: (1) per hour; (2) per day; (3) per week; or (4) per month. Where data is not available on a per-hour basis, the Department converts that data to an hourly basis based on the premise that there are 8 working hours per day, 5.5 working days a week and 24 working days per month.

Labor Rate Policy, 76 Fed. Reg. at 36,094 n.11. The fourth number is the one relevant here.

557 F.3d at 1319; and then citing *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016))); *see also Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 537 (Fed. Cir. 2019) (citations omitted) ("Commerce must provide an explanation that is adequate to enable the court to determine whether its choices are actually reasonable, including as to calculation methods."). Given Commerce's failure to explain why it used twenty-four working days per month, Plaintiff is correct in claiming that there is no evidence that using this number will result in the best available information.

Plaintiff, on the other hand, has offered at least some data tending to show that the number of hours actually worked for 2018 was far fewer than the number resulting under Commerce's calculation, which detracts from the reasonableness of using the numbers in Commerce's policy. *See* Pl.'s Br. at 19, 23.

Specifically, Plaintiff submitted data on "average annual hours actually worked per worker" in Organization for Economic Cooperation and Development ("OECD") countries.[24] *See* Pet'r's Case Br. at 7–8. For these countries, the average number of hours worked per worker in the year 2018 was 1,734. *See* Pl.'s Br. at 19. Calculating annual hours worked by assuming, as Commerce does, that there are twenty-four working days per month and eight hours per day, however, produces 2,304 annual hours worked. *See id.* at 19; *see also* Pet'r's Case Br. at 7. Thus, for Plaintiff, because Commerce's use of twenty-four working days per month results in an annual hours worked number that is incompatible with the OECD data showing actual annual hours worked, Commerce's use of this number in its calculation is not supported by substantial evidence.[25] *See* Pl.'s Br. at 19, 24.

Commerce did not provide a reasonable explanation, supported by substantial evidence, for rejecting Plaintiff's proposed data. In its Final IDM, Commerce stated, "[t]o use the OECD data suggested by

[24] Romania is not an OECD country. *See List of OECD Member Countries – Ratification of the Convention on the OECD*, ORG. ECON. COOP. & DEV., https://www.oecd.org/about/document/ratification-oecd-convention.htm (last visited Apr. 21, 2023); *see also* Letter from Wiley Rein LLP to Sec'y of Commerce (Aug. 23, 2019) Ex. 5C, PR 330, CR 239. It is, however, a European country.

[25] At the administrative level, Plaintiff additionally argued that Commerce should use the OECD data to calculate the surrogate hourly labor value for its Final Results. *See* Pet'r's Case Br. at 7–8. Here, however, Plaintiff argues that Commerce did not provide "a reasoned basis for . . . rejecting the OECD data in favor of its own methodology." Pl.'s Br. at 22–23.

Plaintiff also provided its own analysis of working days per month. *See* Pet'r's Case Br. at 7–8; Pl.'s Br. at 23. Plaintiff indicated that, based on a five-day work week, there are roughly twenty-two working days per month, and, after accounting for government holidays, vacation days, and sick days, there are an estimated nineteen working days per month. *See* Pet'r's Case Br. at 8; Pl.'s Br. at 23.

Before Commerce, Plaintiff argued that "24 working days is even greater than the number of Monday through Friday working days in any given month (*i.e.*, 21.7 = 365 / 12 * 5 working days / 7 days a week)." Pet'r's Case Br. at 7. Plaintiff further argued,

[Plaintiff] would employ a methodology that is not specific to Romania and that utilizes secondary sources that are unrelated to the source used to value labor." Final IDM at 13. Plaintiff points out, however, the same fault that Commerce found with its data applies to Commerce's. *See* Pl.'s Br. at 22. That is, nothing on the record indicates that the use of twenty-four working days per month is in any way specific to Romania. Indeed, there appears to be no source at all for Commerce's number. As relevant here, Plaintiff had introduced the OECD data to demonstrate that it was unreasonable for Commerce to use twenty-four working days per month in its calculation. Other than saying that the OECD data was not specific to Romania, the Department did not attempt to demonstrate that it was reasonable to use the twenty-four working days per month policy in its calculation. Rather, the only justification Commerce gave regarding the reasonableness of its working days figure is that it is in accordance with its policy, which, as the court has explained, is insufficient. Therefore, substantial evidence does not support Commerce's decision to decline to use Plaintiff's data or its use of twenty-four working days per month in calculating the hourly labor value.

Here, it is apparent Commerce has relied on an unexplained policy unsupported by substantial evidence. *See CS Wind Viet. Co.*, 832 F.3d at 1377 ("[A]n agency's statement of what it 'normally' does or has done before is not, by itself, an explanation of 'why its methodology comports with the statute.'" (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1383 (Fed. Cir. 2001))).

Because Commerce has failed to support with substantial evidence its decision to decline to use Plaintiff's data, and its reasons for using its twenty-four working days per month, 5.5 working days per week, and eight working hours per day policy, the court finds that Commerce's determination of the surrogate value for the labor factor of production must be remanded.

## III. Commerce's Determination of the Surrogate Glue Value is Supported by Substantial Evidence

Glue is used in the production process of the multilayered wood flooring to bind together the layers or plies of wood veneers with a

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Furthermore, 21.7 days per month does not count any government holidays, vacation days, or sick days. Even a modest amount for those days off (27–35 days per year) results in 19 working days per month. As Jinlong's estimate demonstrably overstates the total number of working hours in a month, the Department should not rely on these data and instead should rely on the data provided by [Plaintiff] concerning the average annual hours worked per worker in 2018.

*Id.* at 8.

core.[26] *See* PDM at 4 & n.19. To value the glue input, "Commerce used Global Trade Atlas (GTA) data . . . for inputs classified according to Romania's harmonized tariff schedule ["HTS"] codes." Prelim. SV Mem. at 2. Commerce valued both mandatory respondents' glue input under Romanian HTS subheading number 3506.91.10 (covering "[a]dhesives based on polymers of headings 3901 to 3913 or on rubber: . . . [o]ptically clear free-film adhesives and optically clear curable liquid adhesives of a kind used solely or principally for the manufacture of flat panel displays or touch-sensitive screen panels"). *See* Final IDM at 15; Letter from Wiley Rein LLP to Sec'y of Commerce (Aug. 23, 2019) ("Pl.'s Initial SV Cmts.") Ex. 3, PR 330, CR 239. This subheading falls under the more general six-digit subheading, 3506.91, for "[a]dhesives based on polymers of headings 3901 to 3913 or on rubber," and includes "[o]ptically clear free-film adhesives and optically clear curable liquid adhesives of a kind used solely or principally for the manufacture of flat panel displays or touch-sensitive screen panels." Pl.'s Initial SV Cmts., Ex. 3. Commerce stated, by way of explanation, that subheading 3506.91.10 is more specific than other proposed subheadings:

> Jinlong reported HS number 3506.91[27] but did not describe the glue it used in the production of the subject merchandise, *while Guyu reported the more specific HS number 3506.91.10, corresponding with its description of the glue it used*. We preliminarily determined to use the more specific HS number for both companies based on the production processes reported by Guyu and Jinlong.

Final IDM at 15 (emphasis added). Commerce continued to use subheading 3506.91.10 for the Final Results. *See id.*

Plaintiff, on the other hand, argues that Commerce's selection of HTS 3506.91.10 is unsupported by substantial evidence because this subheading's language, which describes glue "used solely or principally for the manufacture of flat panel displays or touch-sensitive screen panels" cannot include the same glue used to manufacture

[26] Commerce stated in its PDM, "[m]ultilayered wood flooring is composed of an assembly of two or more layers or plies of wood veneer(s) in combination with a core. The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product." PDM at 4.

[27] HTS 3506.91 includes "[a]dhesives based on polymers of headings 3901 to 3913 or on rubber." Pl.'s Initial SV Cmts., Ex. 3.

multilayered wood flooring.[28] *See* Pl.'s Br. at 26–27 (emphasis omitted) (quoting Pl.'s Initial SV Cmts., Ex. 3). Plaintiff claims:

> [g]iven [the description of HTS 3506.91.10], there is no reason to believe that this is the same type of glue used in the manufacture of multilayered wood flooring. To the contrary, common sense would dictate that the manufacture of wood flooring *does not* use the same type of glue that is used *solely or principally* for the manufacture of flat panel displays or touch sensitive screen panels.

*Id.* at 26–27. Thus, Plaintiff's primary argument is that glue categorized under 3506.91.10 could not actually have been used to make respondents' product. *See* Pl.'s Reply Br. at 10 (second emphasis added) ("While HTS 3506.91.10 may be *a* more specific category, there is nothing on the record supporting the conclusion that it is more specific to the input that was *actually used*."); *see also* Pl.'s Br. at 26 (emphasis added) ("[Commerce] failed to acknowledge that that [sic] neither Guyu nor Jinlong provided any information demonstrating that HTS 3506.91.10 *does represent* the type of glue used to produce subject merchandise.").

Plaintiff's claims both misstate the record and misunderstand the HTS classification system.

First, Commerce reasonably relied on the mandatory respondents' certified questionnaire responses when reaching its decision. Guyu's response to Commerce's questionnaire identified its input as "[o]verlaying glue; . . ."[29] and *it valued this glue under subheading 3506.91.10* ("[a]dhesives based on polymers of headings 3901 ["Polymers of ethylene, in primary forms"] to 3913 or on rubber: . . . [o]ptically clear free-film adhesives and optically clear curable liquid adhesives of a kind used solely or principally for the manufacture of flat panel displays or touch-sensitive screen panels"). Guyu SV Submission, Ex. SV-1, PR 317; Guyu's Resp. Sec. C & D Quest. (July 10, 2019) Ex. D-1–1, PR 274, CR 169 ("[o]verlaying glue; [[ ]]); Pl.'s Initial SV Cmts., Ex. 3. Unlike Guyu's response, Jinlong's response provided no description of the glue and stated that it valued its glue under the less specific HTS subheading 3506.91. *See* Jinlong's Resp. Sec. C & D Quest. (July 16, 2019) Ex. D-6, PR 278, CR

[28] While Plaintiff proposed two alternative subheadings at the administrative level, here Plaintiff only argues that Commerce's selection of HTS subheading was not supported by substantial evidence. *See* Pl.'s Br. at 24, 28; Pet'r's Case Br. at 9–10.

[29] Guyu's additional description of the glue is confidential: "[[ ]]." Guyu's Resp. Sec. C & D Quest. (July 10, 2019) Ex. D-1–1, PR 274, CR 169.

185; *see also Dalian Meisen Woodworking Co. v. United States*, 46 CIT __, __, No. 20–00110, 2022 WL 1598896, at *10 (May 12, 2022) (not reported in Federal Supplement) ("There is nothing unreasonable about Commerce trusting the certified responses of the mandatory respondents as to the proper classification of the inputs they used to produce subject merchandise."). Thus, despite Plaintiff's arguments to the contrary, the record contains evidence that the glue actually used by one of the two mandatory respondents would be classified under subheading 3506.91.10.

Next, as to Plaintiff's claim that it would not be "common sense" to believe that glue whose "sole or *principal* use" was to bind sensitive screen panels was used to manufacture multilayered wood flooring. Commerce's preferred subheading (3506.91.10), however, is a principal use provision, not an actual use provision. That is, subheading 3506.91.10 includes the language "of a kind used solely or principally for." Pl.'s Initial SV Cmts., Ex. 3; *see BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1378, 1380 (Fed. Cir. 2011) (citations omitted) (concluding that a principal use analysis was appropriate where a Chapter Note required that the units in question be "of a kind solely or principally used in" a system). A principal use provision is "the use 'which exceeds any other *single* use.'" *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (not reported in Federal Supplement) (emphasis original). That a particular entry may be put to another actual use does not prevent that entry from being classified by its principal use. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998) ("[A] principal . . . use provision . . . may function as a controlling legal label, in the sense that even if a particular import is proven to be actually used inconsistently with its principal use, the import is nevertheless classified according to its principal use."); *see also BASF Corp. v. United States*, 30 CIT 227, 251, 427 F. Supp. 2d 1200, 1221 (2006) (citation omitted) ("[A]ctual use of an imported item is irrelevant to classification in a principal use provision."), *aff'd*, 497 F.3d 1309 (Fed. Cir. 2007). In fact, Guyu says that glue that would be classified under 3506.91.10 is just what it used to make its product. *See* Guyu's Resp. Sec. C & D Quest., Ex. D-1–1; Guyu SV Submission, Ex. SV-1. There is simply nothing on the record, common sense or otherwise that would indicate that glue classified under subheading 3506.91.10 could not, or would not, be used to make the mandatory respondents' product.

Because Commerce adequately supported and explained its subheading selection, substantial evidence supports Commerce's determination that HTS subheading 3506.91.10 is the best available in-

formation to value both mandatory respondents' glue input. Therefore, Commerce's selection of the surrogate HTS subheading to value the glue input is sustained.

### IV. Commerce's Calculation of the All-Others Rate Lacks the Support of Substantial Evidence

Since Plaintiff's claim that Commerce must revise the all-others rate depends on whether Commerce's remand results produce a positive dumping margin for the mandatory respondents, the court defers consideration on this issue. *See* Pl.'s Br. at 28; *see also* 19 U.S.C. § 1673d(c)(5)(A).

## CONCLUSION AND ORDER

Based on the foregoing, it is hereby

**ORDERED** that the Final Results are sustained in part and remanded; it is further

**ORDERED** that, on remand, Commerce issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

**ORDERED** that, on remand, Commerce must either put the whole amount of indirect production expenses from the Financial Statement in the numerator of the ratio for manufacturing overhead or explain why not. Should it choose to explain its conclusion not to include the whole amount of indirect production expenses, Commerce shall state why other categories of overhead normally placed in the numerator were not placed in the numerator here; it is further

**ORDERED** that, on remand, Commerce must reconsider the Labor Rate Policy's use in this case. If Commerce continues to use this policy, it must explain its source and the reason why it is reasonable to use it here, including how it would be more specific for use in Romania than the source provided by Plaintiff; and it is further

**ORDERED** that the remand results shall be due ninety (90) days following the date of this Opinion and Order; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: May 5, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–72

SHANTOU RED GARDEN FOOD PROCESSING CO., LTD., SHANTOU RED GARDEN FOODSTUFF CO., LTD., AND OCEAN BISTRO CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 20–03947
**PUBLIC VERSION**

[U.S. Department of Commerce's final results of fourteenth administrative review of the antidumping duty order on frozen warmwater shrimp from the People's Republic of China are sustained.]

Dated: May 12, 2023

*John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiffs Shantou Red Garden Food Processing Co., Ltd., Shantou Red Garden Foodstuff Co., Ltd., and Ocean Bistro Corporation. With him on the brief were *Alexandra H. Salzman* and *J. Kevin Horgan*.

*Kara M. Westercamp*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Sophia J.C. Lin* and *Nathaniel Maandig Rickard*, Picard, Kentz & Rowe LLP, of Washington, D.C., argued for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

## *OPINION*

**Eaton, Judge:**

This case involves the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") fourteenth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("Order"). *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 85 Fed. Reg. 83,891 (Dep't Commerce Dec. 23, 2020) ("Final Results") and accompanying Issues and Decision Mem. (Dec. 17, 2020) ("Final IDM"), PR 185; *see also Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5,149 (Dep't Commerce Feb. 1, 2005) (Order).

Plaintiffs in this action are (1) Shantou Red Garden Food Processing Co., Ltd. ("Shantou Processing"), an exporter and producer of the subject shrimp and the mandatory respondent in the review; (2) Shantou Red Garden Foodstuff Co., Ltd. ("Shantou Foodstuff"), its affiliated exporter; and (3) Ocean Bistro Corporation, a U.S. importer (collectively, "Plaintiffs"). By their motion for judgment on the agency record, Plaintiffs challenge the Final Results. *See* Pls.' Mem. Supp. Mot. J. Agency R. ("Pls.' Br."), ECF No. 24–1; Pls.' Reply, ECF No. 35.

Defendant the United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenor the Ad Hoc Shrimp Trade Action Committee, a coalition of U.S. shrimp producers (the "Ad Hoc Committee"),[1] oppose the motion and ask the court to sustain the Final Results. *See* Def.'s Resp. Opp'n Pls.' Mot. J. Agency R., ECF No. 31; Ad Hoc Committee's Resp. Opp'n Pls.' Mot. J. Agency R., ECF No. 29.

The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018). Commerce's Final Results will be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

For the following reasons, Plaintiffs' motion is denied, and the Final Results are sustained.

## BACKGROUND

### I. Initiation of the Fourteenth Administrative Review of the Order

In May 2019, Commerce initiated the underlying administrative review. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 84 Fed. Reg. 18,777 (Dep't Commerce May 2, 2019). The period of review was February 1, 2018, through January 31, 2019. *Id.* at 18,787.

Commerce selected Shantou Processing to be the sole mandatory respondent in the review.[2] *See Certain Frozen Warmwater Shrimp*

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[1] The Ad Hoc Committee was the petitioner in the original investigation and requested the underlying administrative review. *See* Ad Hoc Committee's Request for Admin. Revs. (Feb. 25, 2019), PR 1.

[2] This Court and the Federal Circuit have noted that Commerce's practice of selecting only one mandatory respondent raises a question as to the representativeness of the rate. *See, e.g.*, *Fusong Jinlong Wooden Grp. Co. v. United States*, 46 CIT __, __, 617 F. Supp. 3d 1221, 1227 n.10 (2022); *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1236 (2021) (footnote omitted) (first citing *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); and then citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009)) ("Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be 'representative' of unexamined respondents for the purpose of calculating the [separate] rate in a review, a [practice] that this Court has regarded with some skepticism."); *Xiping Opeck Food Co. v. United States*, 45 CIT __, __, 551 F. Supp. 3d 1339, 1356–57 (2021) ("There can be little question that, if Commerce were to change its method and name more than two mandatory respondents, separate rate companies would receive more accurate rates, and a great deal of litigation would be avoided."); *see also YC Rubber Co. (N. Am.) LLC v. United States*, No. 21–1489, 2022 WL 3711377, at *3–4 (Fed. Cir. Aug. 29, 2022) (not reported in Federal Reporter) (holding that "Commerce unlawfully restricted its examination to a single respondent" under 19 U.S.C. § 1677f-1(c)(2)).

*From the People's Republic of China*, 85 Fed. Reg. 12,894, 12,894–95 (Dep't Commerce Mar. 5, 2020) ("Preliminary Results") and accompanying Preliminary Decision Mem. (Feb. 28, 2020) ("PDM") at 1, PR 134. Shantou Foodstuff, as Shantou Processing's affiliate, participated in the proceeding by answering Commerce's questionnaires, although Shantou Foodstuff had no sales of its own during the period of review. *See* PDM at 2–3.

Shantou Processing, on the other hand, both produced and exported subject merchandise to the United States during the period of review. It claimed, however, that its sales were not subject to review because it had no "sales of subject merchandise *subject to the antidumping duty order* in the instant administrative review." Certification of No Sales (May 17, 2019), PR 16 (emphasis added); *see* Commerce's Revised No Shipment Mem. (July 23, 2019), CR 1 (stating that Shantou Processing manufactured, exported, and shipped thirteen entries of subject merchandise to importer Ocean Bistro Corporation during the period of review). Shantou Processing based its claim on a 2013 Federal Register notice, in which Commerce partially revoked the Order with respect to merchandise produced and exported by a company called "Red Garden Food Processing Co., Ltd."[3] *See Certain Frozen Warmwater Shrimp From the People's Republic of China*, 78 Fed. Reg. 18,958, 18,959 n.14 (Dep't Commerce Mar. 28, 2013) ("Revocation Notice"); Pls.' Cmts. on New Factual Information Regarding Shipments by Red Garden Food Processing Co., Ltd. (July 29, 2019) at 2, PR 29 (citing Revocation Notice).

Commerce's partial revocation of the Order resulted from a separate proceeding conducted under Section 129 of the Uruguay Round Agreement Act ("URAA").[4] The Revocation Notice excluded from the

[3] The court notes that "Red Garden Food Processing Co., Ltd." (without Shantou preceding it) is the name Commerce used to refer to Shantou Foodstuff's "sister company" in the 2004 final decision memorandum of the original less-than-fair-value investigation that led to the Order. *See* Pls.' Cmts. on New Factual Information Regarding Shipments by Red Garden Food Processing Co., Ltd. (July 29, 2019) Ex. 5 (Final Issues and Decision Mem. for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China at cmts. 3, 6(C) (Dep't Commerce Nov. 29, 2004) ("Investigation IDM")), PR 29.

[4] Section 129 of the URAA "governs the nature and effect of determinations issued by the Department to implement findings by [the World Trade Organization or "WTO"] dispute settlement panels and the Appellate Body." Revocation Notice, 78 Fed. Reg. at 18,958. At the time of the shrimp investigation in 2004, Commerce had a practice of using *zeroing* when calculating dumping margins in investigations. Zeroing is "where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated." *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013). Commerce used zeroing to determine the margins in the shrimp investigation in its 2004 final determination. *See* Investigation IDM cmt. 5.

Order an exporter-producer combination[5] that involved Red Garden Food Processing Co., Ltd. As a result of the partial revocation in 2013, merchandise that was *produced* by Red Garden Food Processing Co., Ltd. (or five other Chinese producers that have since gone out of business[6]) and *exported* by Red Garden Food Processing Co., Ltd. (or Shantou Foodstuff) was excluded from the Order.[7] *See* Revocation Notice, 78 Fed. Reg. at 18,959 n.14.

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In 2005, as a result of a challenge to zeroing brought by the European Communities, the WTO found that zeroing was inconsistent with U.S. international obligations. In 2006, Commerce ceased using zeroing in investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,722 (Dep't Commerce Dec. 27, 2006) ("Final Modification for Investigations") ("[T]he Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.").

In 2011, China successfully challenged Commerce's use of zeroing in the 2004 shrimp investigation before the WTO. In 2012, Commerce initiated a Section 129 proceeding, which resulted in Commerce recalculating Shantou Foodstuff's and Red Garden Food Processing Co., Ltd.'s antidumping rate without the use of zeroing. *See* Revocation Notice, 78 Fed. Reg. at 18,958 ("[T]he Department recalculated the weighted-average dumping margins from the antidumping investigation of shrimp from [China] by applying the calculation methodology described in [Final Modification for Investigations]." (citation omitted)). This resulted in the partial revocation of the Order with respect to an exporter-producer combination involving Red Garden Food Processing Co., Ltd. *Id.* at 18,959 n.14.

[5] Commerce's regulations provide that where "subject merchandise . . . is exported to the United States by a company that is *not* the producer of the merchandise, the Secretary may establish a 'combination' cash deposit rate *for each combination* of the exporter and its supplying producer(s)." 19 C.F.R. § 351.107(b)(1)(i) (2020) (emphasis added). Additionally, Commerce has published a policy bulletin that describes the use of combination rates in nonmarket economy country cases, such as those involving merchandise from China. *See* Imp. Admin., U.S. Dep't of Com., *Separate-Rates Practice & Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Policy Bulletin 05.1 at 6–7 (Apr. 5, 2005), https://enforcement.trade.gov/policy/bull05–1.pdf (last visited Apr. 20, 2023). Under this policy, Commerce "assigns separate rates only to exporters that have demonstrated their independence from *de jure* and *de facto* government control over their export activities," and the exporter's separate rate "will be specific to those *producers that supplied the exporter* during the period of investigation." *Id.* at 6 (emphasis added). The policy only speaks of investigations, but it has been applied in administrative reviews. *See, e.g.*, *Lifestyle Enter., Inc. v. United States*, 35 CIT 158, 186 n.40, 186, 768 F. Supp. 2d 1286, 1313 n.40, 1314 (2011) ("Commerce has a duty to prevent circumvention of [antidumping duty] law and may do so by imposing combination rates." (citations omitted)).

[6] The five Chinese producers were: Chaoyang Jindu Hengchang Aquatic Products Enterprise Co., Ltd., Raoping County Longfa Seafoods Co., Ltd., Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd., Shantou Jinyuan District Mingfeng Quick-Frozen Factory, and Shantou Long Feng Foodstuffs Co., Ltd. *See* Revocation Notice, 78 Fed. Reg. at 18,959 n.14.

[7] The court notes that, though Commerce's regulations contemplate that combination rates apply when "subject merchandise . . . is exported to the United States by a company *that is not the producer of the merchandise*," here, Commerce apparently found that Red Garden Food Processing Co., Ltd. could itself form a "combination" when it was both the producer and exporter of subject merchandise. *See* 19 C.F.R. § 351.107(b)(1)(i); *supra* note 5; *see also* Preliminary Successor-In-Interest Determination (Feb. 28, 2020) at 12, PR 136 (noting that Commerce found that Red Garden Food Processing Co., Ltd. "should be revoked from the order (when it exported goods produced by itself or other specific producers)"). Whether Shantou Processing could be a combination with itself is not in dispute here, but it strikes the court that the regulation, by its plain terms, would not recognize a claim that a single

In August 2019, Commerce asked Shantou Processing to clarify what relationship, if any, it had with Red Garden Food Processing Co., Ltd., the producer and exporter named in the Revocation Notice. *See* Commerce's Request for Clarification of Company's Name (Aug. 8, 2019), PR 30.

The company responded that Red Garden Food Processing Co., Ltd. was the same entity as *Shantou* Red Garden Food Processing Co., Ltd. (i.e., Shantou Processing). *See* Pls.' Resp. to Commerce's Request for Clarification of Company's Name (Aug. 13, 2019), PR 31. For Shantou Processing, the omission of "Shantou" from the name "Red Garden Food Processing Co., Ltd." in the Revocation Notice was merely a clerical error. *Id.* at 2.

In September 2019, Defendant-Intervenor the Ad Hoc Committee disputed the claim that Red Garden Food Processing Co., Ltd. and Shantou Red Garden Food Processing Co., Ltd. (i.e., Shantou Processing) were the same company. The committee alleged that after the Order was issued in 2005 Red Garden Food Processing Co., Ltd. changed its name twice—in 2007 and again in January 2013 prior to the partial revocation of the Order just a few months later, in March 2013. *See* PDM at 3.

In October 2019, Commerce issued its antidumping questionnaire to Shantou Processing and invited comment on the information contained in the Ad Hoc Committee's filing regarding the alleged name changes.

Shantou Processing responded to Commerce's questionnaire and the Ad Hoc Committee's allegations, insisting that Shantou Processing was the same company as the excluded Red Garden Food Processing Co., Ltd. *See* Resp. to Domestic Producers' Letter of Sept. 6, 2019 (Oct. 21, 2019), PR 66 (Part I) & 67 (Part II). Shantou Processing stated that it was established as "Shantou Red Garden Food Processing Co., Ltd." in 2003 as a joint venture between a U.S. company called Red Chamber Co. and Plaintiff Shantou Foodstuff. *See id.*, Part I at 3. Shantou Processing acknowledged, however, that it changed its name twice—first to Shantou Jin Cheng Food Co., Ltd. ("Shantou JCF") in 2007, and then back to Shantou Red Garden Food Processing Co., Ltd. (i.e., Shantou Processing) in 2013. *See id.*, Part I at 9–11. Shantou Processing maintained that despite the name changes, "for all intents and purposes, [Shantou Processing] today is the same company that it was prior to and during the period of investigation."

company could by itself form a combination and receive a combination rate. Since the only U.S. sales at issue in this case were of merchandise produced and exported by Shantou Processing, it is difficult to see how Shantou Processing could claim that any of its sales were excluded because they were made by an excluded combination.

*Id.* at 8. As shall be seen, there are various explanations for the name changes.

Thereafter, the American Shrimp Processors Association[8] asked that Commerce conduct a successor-in-interest analysis, arguing that "the current incarnation of [Shantou Processing] is not eligible to receive the treatment granted the original [Shantou Processing] until Commerce makes a successor-in-interest determination . . . ." Am. Shrimp Processors Ass'n's Resp. (Oct. 24, 2019) at 6, PR 68; *see also* PDM at 7–8.

In this opinion, to distinguish among the different "incarnations" of the entity that became Shantou Processing from its establishment in 2003 to the period of review, the court will use (1) "Red Garden Food Processing Co., Ltd." to refer to the entity as it existed from 2003 to 2007, i.e., the period prior to its first name change in 2007; (2) Shantou Jin Cheng Food Co., Ltd. or "Shantou JCF" will refer to the entity as it existed from 2007 to 2013; and (3) "Shantou Red Garden Food Processing Co., Ltd." or "Shantou Processing" will refer to the entity from 2013 through the period of review.

## II. Commerce's Successorship Inquiry

Following the American Shrimp Processors Association's request that Commerce conduct a successor-in-interest analysis, the Department issued supplemental questionnaires to Shantou Processing, asking for additional information regarding its ownership, management, corporate structure, affiliations, and business operations. *See* PDM 3–4. Shantou Processing timely filed responses to the supplemental questionnaires. *Id.*

At the close of the questionnaire phase, Commerce analyzed whether Shantou Processing was the successor-in-interest to Red Garden Food Processing Co., Ltd. If it was the successor, Shantou Processing would be "entitled to rely on Commerce's revocation finding made with respect to exporter/producer combination[] involving [Red Garden Food Processing Co., Ltd.]." Preliminary Successor-In-Interest Determination (Feb. 28, 2020) ("Successorship Memo") at 5, PR 136, CR 83.

In the Successorship Memo, Commerce stated that it "generally consider[s] a company to be the successor to another company for [antidumping duty] cash deposit purposes if the *operations of the successor are not materially dissimilar* from those of its predecessor."

[8] The American Shrimp Processors Association is a trade association whose members produce the domestic like product in the United States. *See* Am. Shrimp Processors Ass'n's Request for Rev. (Feb. 27, 2019) at 1, PR 2. It participated in the underlying administrative review but is not a party in this action.

*Id.* (emphasis added). When making a successorship finding, Commerce applies a "totality of the circumstances" test, which takes into account a non-exhaustive list of factors, that includes changes in management, production facilities, supplier relationships, and customer base. *Id.* at 5–6.

Ultimately, Commerce found that Shantou Processing was *not* a successor-in-interest to Red Garden Food Processing Co., Ltd. Thus, the Department found that Shantou Processing was *not* entitled to rely on Commerce's revocation of the Order with respect to the excluded exporter-producer combination. *See id.* at 13. In other words, Commerce found that Shantou Processing's U.S. sales of subject shrimp were subject to the Order.

**III. Commerce's Preliminary and Final Results**

Thereafter, in the Preliminary Results, Commerce found that Shantou Processing dumped subject merchandise in the United States during the period of review and determined an antidumping duty rate of 58.61% for the company. *See* Preliminary Results, 85 Fed. Reg. at 12,895.

In the Final Results, Commerce deactivated the exporter-producer combination that involved Red Garden Food Processing Co., Ltd. as producer and exporter, the five Chinese producers other than Red Garden Food Processing Co., Ltd., and Shantou Foodstuff, as exporter. Final IDM at 28 (concluding that it would inform U.S. Customs and Border Protection ("Customs") "that the exclusion for this exporter-producer combination is no longer active"). Specifically, Commerce found that the combination no longer existed because Shantou Processing was not the successor-in-interest to Red Garden Food Processing Co., Ltd., and none of the other Chinese producers listed as part of the excluded combination were still in business. Commerce stated that when it issued the cash deposit instructions for the administrative review to Customs, it would "set up a new company case number for" Shantou Processing and Shantou Foodstuff and would require the companies "to provide cash deposits at the rate established in these final results." Final IDM at 26.

Commerce also collapsed Shantou Processing and Shantou Foodstuff, which are affiliates, into a single entity. The Department continued to find that the collapsed entity dumped subject merchandise during the period of review and determined a final weighted average dumping margin of 58.96% for the collapsed entity. *See* Final Results, 85 Fed. Reg. at 83,892.

Finally, when calculating Shantou Processing's rate, Commerce deducted trucking expenses as an adjustment to U.S. price for certain

sales, i.e., those sales where trucking services from the port to the U.S. customer's warehouse had been contracted for, but were not provided. Commerce reduced the U.S. price based on the record evidence showing that Shantou Processing deducted trucking expenses from the price charged to its customer.

## DISCUSSION

### I. Commerce's Successorship Finding Is Supported by Substantial Evidence and Otherwise in Accordance with Law

The court first turns to Plaintiffs' claim that Shantou Processing is the same company as Red Garden Food Processing Co., Ltd., the company that was excluded from the Order.

In the Final Results, Commerce found that Shantou Processing was not excluded from the Order because it was not the successor-in-interest to Red Garden Food Processing Co., Ltd. *See* Successorship Memo at 12. When making this finding, Commerce applied a "totality of the circumstances" test:

> In evaluating successorship issues, we generally consider a company to be the successor to another company for [antidumping] cash deposit purposes if the operations of the successor are not materially dissimilar from those of its predecessor. In making this determination for purposes of applying the [antidumping] law, Commerce examines a number of factors including, but not limited to, changes in: (1) management, (2) production facilities, (3) supplier relationships, and (4) customer base. Although no single, or even several, of these factors will necessarily provide a dispositive indication of succession, generally, Commerce will consider a company to be a successor if its resulting operation is not materially dissimilar to that of its predecessor. Thus, if the "totality of circumstances" demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the prior company, Commerce will assign the new company the cash deposit rate of its predecessor.

*Id.* at 5–6 (citations omitted). This test or method is the same one that Commerce uses when it conducts changed circumstances reviews. *See Marine Harvest (Chile) S.A. v. United States*, 26 CIT 1295, 1299, 244 F. Supp. 2d 1364, 1369 (2002) (noting that Commerce determined successorship in a changed circumstances review by "considering such factors as the companies' management, production facilities, supplier relationships, and customer base").

Commerce thus considered the record evidence for each factor that provided a comparison of the business operations of Red Garden Food Processing Co., Ltd. and Shantou Processing.

**A. Management**

In conducting its successor-in-interest analysis, Commerce first looked at the management, ownership, and control of Red Garden Food Processing Co., Ltd. and Shantou Processing.

Red Garden Food Processing Co., Ltd. was established in 2003 as a joint venture between Plaintiff Shantou Foodstuff and a U.S. company called Red Chamber Co..[9] *See* Successorship Memo at 6. For its part, Shantou Foodstuff was owned by two individuals, i.e., Zheng Chu Ci and Lin Zhi Quan.[10] *Id.*

In 2003, management of Red Garden Food Processing Co., Ltd. consisted of a board of directors,[11] a general manager, and a vice general manager:

> During the [less than fair value] investigation, [Red Garden Food Processing Co., Ltd.]'s board of directors had three members, two of whom (*i.e.*, Min Bing Kou and Min Shin Kou) were appointed by the foreign owner [i.e., the U.S. owner. Red Chamber] and one by [Shantou Foodstuff]. Min Bing Kou also served as the legal representative and the Board Chairman, and he was solely responsible for authorizing the withdrawal of funds from the bank accounts owned by [Red Garden Food Processing Co., Ltd.].
>
> [Red Garden Food Processing Co., Ltd.] also had a general manager and a vice general manager. The general manager was Zheng Chu Ci; . . . this individual was a part owner of [Shantou Foodstuff] and, thus, was an indirect shareholder of [Red Garden Food Processing Co., Ltd.]. The general manager executed the decisions of the board and asked the board to make important decisions, including those involving company name changes . . . .

*Id.* at 6–7.

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[9] *See* Successorship Memo at 6 ("Red Chamber Co. . . . owned 51 percent through its affiliate Aqua Star Imports, Inc. . . . . [Shantou Foodstuff] owned the remaining 49 percent.").

[10] Zheng Chu Ci and Lin Zhi Quan owned 71.67 percent and 28.33 percent of Shantou Foodstuff, respectively. Successorship Memo at 6.

[11] As to the board's authority, "[Red Garden Food Processing Co., Ltd.]'s constitution states that "the board {of directors} is the most powerful organization . . . and decide (*sic*) on all the important business of the Company". Successorship Memo at 6.

In 2007, Red Garden Food Processing Co., Ltd. changed its name to Shantou JCF. *Id.* at 7. Then, in January 2013, three months prior to the publication of the Revocation Notice, Shantou JCF changed its name to "Shantou Red Garden Food Processing Co., Ltd." (i.e., Shantou Processing). *Id.* There is no dispute that the name changes took place.

In addition to the name change that occurred in 2013, the company's structure, ownership, and control changed. The U.S. owner, Red Chamber Co., "withdrew from the [joint venture] and was no longer a shareholder after July of [2013]." *Id.* Thereafter, the company was reorganized as a limited liability company and was majority owned by two individuals.[12] *Id.* Also, the board of directors was dissolved.

Instead of a board of directors, decision-making authority for Shantou Red Garden Food Processing Co., Ltd. (i.e., Shantou Processing) rested exclusively in one of the two individual owners:

> [Shantou Processing] has no board of directors. [Shantou Processing] claimed that because it is "a small privately-owned corporation . . . the company believes that there is no need for an *independent board of directors*. For the same reason, [an individual owner, Zheng Chu Ci ,] controls all decisions made by the company." [Shantou Processing] confirmed that it "did not establish a board of directors after the change of ownership." [An individual owner, Zheng Chu Ci,] also now serves as the legal representative and has control of the bank accounts owned by [Shantou Processing].

*Id.* at 7–8 (emphasis added). In the Successorship Memo, Commerce found that "there was significant change in ownership, control, and management between [Red Garden Food Processing Co., Ltd.] (as it existed at the time of the [less-than-fair-value] investigation) and [Shantou Processing] (now)."[13] *Id.* at 8. Commerce further found that "[t]hese changes weigh in favor of finding that [Shantou Processing] (now) is *materially dissimilar* to [Red Garden Food Processing Co., Ltd.] (2003), and thus, is not the successor-in-interest to that company." *Id.* (emphasis added). In other words, Commerce found that the management of the company materially changed between 2003 and the underlying 2018–2019 review because of (1) the withdrawal

[12] The two individual owners were Zheng Chu Ci, who owned 41 percent, and his wife Shen Rui Jie, who owned 10 percent, for a total of 51 percent majority ownership. Successorship Memo at 7. Shantou Foodstuff owned the remaining 49 percent. *Id.*

[13] Commerce found: "[Red Garden Food Processing Co., Ltd.] was a Sino-foreign [joint venture] where the foreign party was the majority owner and controlled the board of directors (which in turn controlled the company). [Shantou Processing] is fully owned by Chinese entities/individuals and Zheng Chu Ci maintains complete control over the company." Successorship Memo at 8.

of the U.S. joint venture partner, Red Chamber Co., in 2013; (2) the change in structure from a joint venture to a limited liability company in 2013; (3) the change in majority ownership, i.e., from the U.S. joint venture partner owning a majority of shares to two individuals, Zheng Chu Ci, who owned 41%, and his wife Shen Rui Jie, who owned 10%, owning a majority of shares; and (4) the change in decision-making authority through the dissolution of the independent board of directors and placement of exclusive control of all decisions, legal representation, and bank accounts in one of the owners.[14]

### B. Production Facilities

Next, Commerce found that while Red Garden Food Processing Co., Ltd. (2003 - 2007), Shantou JCF (2007 - 2013), and Shantou Processing (2013 - the period of review) used the same production *facility*, the *products* produced in that facility changed. Successorship Memo at 8.

Specifically, Commerce found that the original Red Garden Food Processing Co., Ltd. processed and sold subject shrimp to the United States. But during the years 2007 to 2013, i.e., after the name change to Shantou JCF, Shantou JCF did *not* ship subject merchandise to the United States. "Instead, Shantou JCF shipped only non-subject merchandise to the United States (*i.e.*, shrimp that was excluded from the order: breaded shrimp and, before 2011 when it was added to the order, dusted shrimp)." *Id.*

Then, after the second name change in 2013 to Shantou Red Garden Food Processing Co., Ltd. (i.e., Shantou Processing), the company "processed and sold subject merchandise to the United States." *Id.* Commerce thus found that "the products and production facility, when viewed together with the totality of the circumstances over this time period and other information on the record, indicate and weighs [sic] in favor of finding that [Shantou Processing] is not the successor-in-interest to [Red Garden Food Processing Co., Ltd.]." *Id.*

### C. Suppliers

Commerce found that the suppliers factor, too, favored a negative successorship determination:

> [Shantou Processing] stated that its suppliers changed many times over the past 15 years. Although we requested more specific information regarding its suppliers, [Shantou Processing] claimed that it does not keep records for its suppliers prior to the [period of review] because it has no business reason to maintain this information.

[14] The owner referred to was Zheng Chu Ci.

> Thus, based on the limited information on the record and based on [Shantou Processing]'s characterization that its suppliers have changed many times in the past 15 years, we find no evidence on the record with respect to this factor which supports [Shantou Processing]'s claim that it continues to operate as [Red Garden Food Processing Co., Ltd.], the company revoked from the *Order*.

Successorship Memo at 9–10.

**D. Customer Base**

Next, Commerce found very little overlap in Red Garden Food Processing Co., Ltd.'s and Shantou Processing's customers. *See* Successorship Memo at 9–10.[15] What is more, Commerce observed that Shantou Processing "has significantly increased its customer base, such that it now sells to a number of new companies, which is a marked contrast to the situation during the period examined in the [less-than-fair-value] investigation." *Id.* at 10. Commerce thus found that the customer base factor "weighs in favor of finding that [Shantou Processing]'s operations are materially dissimilar to [Red Garden Food Processing Co., Ltd.]'s." *Id.*

**E. Other Factors**

Finally, Commerce considered several other factors, which, according to Commerce, further supported a negative successorship finding.

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[15] Commerce stated:

> [Red Garden Food Processing Co., Ltd.] sold to two customers located in the United States, both of whom are affiliated with Red Chamber [i.e., the U.S. owner in the joint venture], as well as to one customer in Canada. Because Red Chamber owned 51 percent of [Red Garden Food Processing Co., Ltd.], none of [Red Garden Food Processing Co., Ltd.]'s sales were made to an unaffiliated customer.
>
> Shantou JCF sold shrimp to at least seven customers in the United States, Canada, Chile, Mexico, and Malaysia. [Shantou Processing] could not recall the name(s) of some of its customers and stated that the documentation was lost in a computer crash. However, [Shantou Processing] also stated that it only maintained sales documentation for five years and, thus, there was no available documentation for this reason as well. Of the seven customers identified, four of the customers were not affiliated with Red Chamber.
>
> [Shantou Processing] sold to 21 customers located in the United States, Canada, Mexico, Saudi Arabia, Chile, the Philippines, South Korea, and Taiwan. Of these customers, only one of the customers was affiliated with Red Chamber.
>
> In short, the only overlap in customers among [Red Garden Food Processing Co., Ltd.], Shantou JCF, and [Shantou Processing] is that they all sold to companies affiliated with Red Chamber. With the exception of Ocean Bistro Corporation, a common customer of Shantou JCF and [Shantou Processing], [Red Garden Food Processing Co., Ltd.], Shantou JCF, and [Shantou Processing] never sold to the same Red Chamber affiliated company.

Successorship Memo at 9–10.

### 1. Commerce Found That the Evidence Did Not Support Shantou Processing's Explanation for Its Name Changes in 2007 and 2013

It is important to keep in mind that for successor-in-interest analyses a company's name is not that important. The question is whether the successor's operations have remained the same as, or are not "materially dissimilar" from, the predecessor's operations. Successorship Memo at 5–6.

As stated in the Successorship Memo, Commerce did not find credible Plaintiff Shantou Processing's explanation for its name changes.[16] For Commerce, the record did not support Shantou Processing's claim that it changed names to avoid harassment by its former landlord's creditors because (1) the landlord's debts were resolved and approved by a local court in China before the company changed its name to Shantou JCF, and (2) Shantou Processing did not

[16] Commerce stated:

> [Shantou Red Garden Food Processing Co., Ltd., i.e., Shantou Processing] claimed it changed its name to Shantou JCF in 2007 in response to harassment from its prior landlord's creditors because their names were similar. [Shantou Processing]'s prior landlord was a company named Shantou Longhu Hong Yuan Quick Frozen Factory (Quick Frozen). Hong Yuan, in Mandarin Chinese, means Red Garden. The name change to Shantou JCF became official on December 26, 2007. Additionally, [Shantou Processing] claimed:
>
> > {s}ubsequently, a separate third party bought the master lease from the prior leaseholder. This removed any continuing exposure for [Shantou JCF], as the formerly similarly named entity no longer had any affiliation with the property. Accordingly, the name was changed back to [Shantou Red Garden Food Processing Co., Ltd. on] January 20, 2013.
>
> In other words, [Shantou Processing]'s position is that it changed its name to avoid harassment from its landlord's creditors and changed its name back once the threat of harassment was gone (*i.e.*, once [Shantou Processing]'s former landlord had no affiliation with the property). The record, however, does not support this explanation.
>
> [Shantou Processing] provided a sales contract that transferred ownership of the property from Quick Frozen to Shen Rui Jie. The property that was transferred was for two buildings located at "No. 51 North Taishan Road." This is the same address in the business licenses for [Red Garden Food Processing Co., Ltd.], Shantou JCF, and [Shantou Processing]. This sales contract is dated October 23, 2007 and was confirmed by the Shantou Longhu Real Estate Exchange Administration Office on November 15, 2007. The Real Estate Certificate for this property shows that the "Source of Ownership" for Shen Rui Jie began in November 2007. Additionally, an agreement was reached between Quick Frozen and what appears to be its creditor. This agreement was recognized by the Shantou Intermediate People's Court of Guangdong Province on October 12, 2007. This ruling also dismissed the seizure of the property at the request of the creditor. Thus, based on record evidence, by the date that [Red Garden Food Processing, Co., Ltd.] changed its name to Shantou JCF (*i.e.*, December 26, 2007), the creditors had already reached an agreement, that agreement had been recognized by the Shantou Intermediate People's Court of Guangdong Province, and Quick Frozen had sold the property to Shen Rui Jie (a part owner of the current [Shantou Processing] and wife of the majority owner).

substantiate with evidence its claim that, notwithstanding the resolution of the former landlord's debts in 2007, harassment continued until 2013.

### 2. Commerce Found That the Name Changes Corresponded to Changes in Cash Deposit Rates

In the Successorship Memo, Commerce found:

> [Shantou Processing] also offered an additional explanation for its final name change:
>
> > Since the name [Shantou Red Garden Food Processing Co., Ltd.] had well known {*sic*} reputation in the seafood industry and also had separate {*sic*} anti-dumping rate case in USA . . . they changed the name from Shantou JCF back to [Shantou Red Garden Food Processing Co., Ltd., i.e., Shantou Processing].
>
> In other words, Shantou JCF changed its name to [Shantou Red Garden Food Processing Co., Ltd.] because [Red Garden Food Processing Co., Ltd.] had its own separate antidumping duty rate (albeit via an exclusion), whereas Shantou JCF is considered part of the China-wide entity.
>
> Rather than unilaterally attempting to claim the cash deposit rate of (or in this case, an exclusion for) a predecessor company, Shantou JCF should have requested a changed circumstance review . . . to prove that it was entitled to that rate. Further, we find it significant that the timeline of the name changes appears to correspond to changes in the cash deposit rates:

- June 25, 2003: [Red Garden Food Processing Co., Ltd.] was established.
- September 12, 2007: [Red Garden Food Processing Co., Ltd.] was assigned a cash deposit rate of 112.81 percent.
- December 26, 2007: [Red Garden Food Processing Co., Ltd.] changed its name to Shantou JCF.

> Given that the record indicates that Quick Frozen's debts were resolved in 2007, [the] claimed reasons for [Red Garden Food Processing Co., Ltd.'s] name change to Shantou JCF and then to [Shantou Processing] appear to be suspect. Additionally, [the] claim that [Shantou JCF] changed its name . . . after "a separate third party bought the master lease from the prior leaseholder," does not explain why it waited until 2013 to make this change, when the master lease was bought in 2007. When asked about this discrepancy, [Shantou Processing] responded that, even after the real estate transfer, the company was still bothered by debt collectors, and, therefore, it changed its name to address this issue. We note that [Shantou Processing] submitted no documentation to support this explanation, despite our request for such evidence.

Successorship Memo at 10–11.

- December 7, 2012: Commerce announced the preliminary results of its Section 129 determination and preliminarily calculated a cash deposit rate of 0.00 percent for [Red Garden Food Processing Co., Ltd.]. Commerce used the same identifying exclusion language in the Section 129 determination that it used in the *Order*, identifying the excluded merchandise as that produced and exported by "Red Garden Food Processing Co., Ltd.," and no party suggested to Commerce that there was any problem with that identifier.
- January 20, 2013: Shantou JCF changed its name to [Shantou Red Garden Food Processing Co., Ltd.].
- March 4, 2013: Commerce announced the final results of its Section 129 determination which found that, because the weight-average margin for [Red Garden Food Processing Co., Ltd.] was 0.00 percent and the determination related to the [less-than-fair-value] investigation, it should be revoked from the order (when it exported goods produced by itself or other specific producers).
- March 28, 2013: The revocation notice is published in the *Federal Register*.

  In summary, we find these additional factors when viewed together with the totality of the circumstances weigh in favor of finding that [Shantou Red Garden Food Processing Co., Ltd., i.e., Shantou Processing] is not the same company as [Red Garden Food Processing Co., Ltd.], and thus, it is not the successor-in-interest to that company.

Successorship Memo at 11–12.

### F. Plaintiffs' Arguments Do Not Detract from the Substantiality of the Record Evidence Supporting Commerce's Successor-in-Interest Finding

Plaintiffs maintain that Shantou Processing was, in fact, excluded from the Order because it is the same company as Red Garden Food Processing Co., Ltd. Moreover, they claim that Shantou Processing "presented substantial evidence on the record to substantiate that it continues to operate in the [administrative review] substantially the same as it [i.e., Red Garden Food Processing Co., Ltd.] did in the [less-than-fair-value] investigation." Pls.' Br. at 30.

Plaintiffs thus urge the court to find that Commerce's successor-in-interest finding that Shantou Processing is not the same company as Red Garden Food Processing Co., Ltd. lacked the support of substan-

tial evidence. In making this case, Plaintiffs challenge Commerce's findings with respect to the successor-in-interest test factors. The court considers each of Plaintiffs' arguments in turn and, for the following reasons, sustains Commerce's finding that Shantou Processing is not the successor-in-interest to Red Garden Food Processing Co., Ltd.

**1. Plaintiffs' Arguments Questioning Commerce's "Management" Finding**

Plaintiffs argue that, when considering the first factor of the totality of the circumstances test, i.e., changes in management, Commerce erroneously analyzed the ownership and control of Red Garden Food Processing Co., Ltd. and Shantou Processing, too. For Plaintiffs, Commerce "was supposed to limit its analysis only to 'management.'" Pls.' Br. at 31. Indeed, Plaintiffs argue, "Commerce did not discuss management at all," but "[r]ather . . . focused on how [Red Garden Food Processing Co., Ltd.] had been a Sino-foreign joint venture in the investigation and was controlled by a board of directors, whereas in the [administrative review] it was owned by Chinese entities/individuals." *Id.* Additionally, Plaintiffs maintain that the record contained management evidence that Commerce failed to consider, "such as (1) the general manager was the same in [Red Garden Food Processing Co., Ltd. and Shantou Processing], (2) the general manager, in both time periods [i.e., at the time of the investigation and during the period of review], owned more than five percent of [the entities, i.e., Red Garden Food Processing Co., Ltd. during the period of investigation and Shantou Processing during the period of review], and (3) there was no need for a board of directors, since the general manager, his wife, and [Shantou Foodstuff] (which the general manager owned), had no need for a board." *Id.* Plaintiffs claim that "Commerce made no finding" regarding changes in the entities' management or operations across the two time periods, i.e., at the time of the investigation (Red Garden Food Processing Co., Ltd.) and during the period of review (Shantou Processing). *Id.*

The court finds Plaintiffs' arguments unpersuasive. Plaintiffs object to Commerce's consideration of changes in ownership and control apparently because the first factor of the successor-in-interest test is changes in "management." This claim both fails to recognize Commerce's authority for conducting the successor-in-interest analysis and demonstrates a misunderstanding of the test itself. Management means not only how the business is conducted day-to-day but also the overall direction of a business and its operations. *See generally* PETER F. DRUCKER, PETER F. DRUCKER ON MANAGEMENT ESSENTIALS 51 (Harvard Bus. Rev. Press 2020) ("top management," i.e. the board of directors,

is the "unifying, determining, and deciding organ of enterprise and management"). Here, the record shows that issues of ownership and structure influenced and indeed affected the existence of a board of directors at all. Thus, it was not unreasonable for Commerce to consider changes in ownership and structure together with management.

Also, contrary to Plaintiffs' argument, not only did Commerce consider the overlaps in management among Red Garden Food Processing Co., Ltd., Shantou JCF, and Shantou Processing, in particular the role of Zheng Chu Ci , but it took into account the record evidence that showed a change in the scope of that individual's decision-making authority,[17] which expanded with the dissolution of the board after 2013. *See* Successorship Memo at 7–8.

Plaintiffs' real argument is that they disagree with the way that Commerce weighed the evidence, but mere disagreement is not enough to demonstrate that Commerce's finding as to the management factor lacks the support of substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (describing substantial evidence as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Thus, the court finds no error with Commerce's management finding. *See* Successorship Memo at 8 (finding that "there was significant change in ownership, control, and management between [Red Garden Food Processing Co., Ltd.] (as it existed at the time of the [less-than-fair-value] investigation) and [Shantou Processing] (now)," and that "[t]hese changes weigh in favor of finding that [Shantou Processing] (now) is materially dissimilar to [Red Garden Food Processing Co., Ltd.] (2003), and thus, is not the successor-in-interest to that company.").

### 2. Plaintiffs' Argument Questioning Commerce's "Production Facilities" Finding

Next, Plaintiffs take issue with Commerce's consideration of changes in "products," instead of only "production facilities." For Plaintiffs, "Commerce admitted that the production facilities and address remained the same," and "[t]hat should have ended the dis-

[17] The record shows that in 2003, when Red Garden Food Processing Co., Ltd. was established as a joint venture, its constitution made its board of directors "the most powerful organization" that "decide (*sic*) on all the important business of the Company". Successorship Memo at 6. But later in 2013, when the change in name to Shantou Processing occurred, and the ownership and structure of the company changed as well, the independent board was dissolved, and the power became concentrated in one individual, Zheng Chu Ci. Successorship Memo at 7–8 ("Zheng Chu Ci controls all decisions made by the company.").

cussion." Pls.' Br. at 31. In Plaintiffs' view, "[s]ince . . . Commerce could not kill [Shantou Processing] on [the production facilities] count, it created a new count: products." *Id.* Plaintiffs claim that Commerce seeks to portray a difference in the companies' products by finding that Shantou JCF sold non-subject merchandise from 2007 to 2013, whereas Red Garden Food Processing Co., Ltd. and Shantou Processing only sold subject merchandise. Plaintiffs assert that during the original investigation "Commerce only asked [Red Garden Food Processing Co., Ltd. and Shantou Foodstuff] to report subject merchandise sold to the [United States]." *Id.* That is, "[t]he record does not show what [these companies] sold in the [period of investigation] . . . other than subject merchandise to the [United States]." *Id.* So, Plaintiffs claim, Commerce "not only has created a new category, but misrepresented what the Red Garden companies did in the [period of investigation]." *Id.* at 32.

The court finds unpersuasive the argument that Commerce's consideration of products was improper. By their claim that Commerce "misrepresented what the Red Garden companies did [i.e., what they sold] during the [period of investigation]," Plaintiffs suggest that Red Garden Food Processing Co., Ltd. and Shantou Foodstuff in fact sold non-subject merchandise to the United States or elsewhere during the original period of investigation, but those sales were not covered by Commerce's questionnaires. The problem is that Plaintiffs' claims of "misrepresentation" are unsupported. Plaintiffs do not contest the accuracy of, or record support for, Commerce's finding that Red Garden Food Processing Co., Ltd. sold subject merchandise, Shantou JCF sold non-subject merchandise, and then Shantou Processing sold subject merchandise. Plaintiffs only imply, without evidence, that Commerce's finding is not the full story. The substantial evidence standard requires more than unsupported assertions of misrepresentation. *Consolo*, 383 U.S. at 620. The court thus finds no error with Commerce's finding regarding production facilities and products.

### 3. Plaintiffs' Argument Against Commerce's "Supplier Relationships" Finding

Regarding supplier relationships, Plaintiffs acknowledge that Shantou Processing "could not ascertain with certainty which of its current suppliers also supplied it in 2003, if any." Pls.' Br. at 32. Plaintiffs argue, however, that because of this uncertainty, it was mere speculation for Commerce "to determine that [Shantou Processing] has changed suppliers too significantly to be the same company it was in the [period of investigation]." *Id.*

Plaintiffs misstate Commerce's finding on supplier relationships and, again, fail to challenge the substantiality of the evidence supporting Commerce's supplier relationship finding in a serious way. In the Successorship Memo, Commerce acknowledged that the record was thin on supplier relationships prior to the period of review. But, based on statements by Shantou Processing that the company's "suppliers changed many times over the past 15 years," and the absence of any evidence of the suppliers' identities over the course of that fifteen-year period, Commerce found "no evidence on the record *with respect to this factor* which [sic] supports [Shantou Processing]'s claim that it continues to operate as [Red Garden Food Processing Co., Ltd.], the company revoked from the *Order*." Successorship Memo at 9 (emphasis added). This factor was one of several factors that Commerce considered in reaching its negative successorship determination, and Plaintiffs fail to demonstrate that Commerce's consideration of, and findings with respect to, this factor were unreasonable.

#### 4. Plaintiffs' Argument Contesting Commerce's Customer Base Finding

For the customer base factor, Plaintiffs argue that Commerce "tries to twist the facts to make it seems [sic] that [Shantou Processing] . . . was no longer operating in the same general way" as Red Garden Food Processing Co., Ltd. Pls.' Br. at 32. Specifically, they assert that Commerce found that Shantou Processing and Red Garden Food Processing Co., Ltd. shared "only one customer," but "the problem with this analysis" is that each of these companies "sold subject merchandise to only one company, an affiliate/subsidiary of Red Chamber Co." *Id.* As to the record evidence showing that Shantou JCF "sold shrimp around the world in 2007–2013," Plaintiffs maintain that drawing any distinction between the companies' operations on that basis is unreasonable because Commerce never asked about global sales for Red Garden Food Processing Co., Ltd. during the *original* investigation, only U.S. sales. *Id.* at 32–33.

Plaintiffs' argument appears to be that it was unreasonable for Commerce to consider Shantou JCF's global sales as evidence that its customer base was different because Commerce did not ask Red Garden Food Processing Co., Ltd. about its sales outside of the United States during the original period of investigation. This argument seems to miss the mark. Commerce found that the customer base factor did not support a finding of successorship because there was very little overlap in Red Garden Food Processing Co., Ltd.'s, Shantou JCF's, and Shantou Processing's customers. Indeed, Commerce found that "the only overlap in customers among [Red Garden Food Processing Co., Ltd.], Shantou JCF, and [Shantou Processing] is that

they all sold to companies affiliated with Red Chamber," and that based on the record there were sales to customers outside of the United States that did not overlap. Successorship Memo at 9–10. Plaintiffs do not dispute that the record supports Commerce's findings, but only that had Commerce asked for other information, the record might support a different finding. *See, e.g.*, Pls.' Br. at 32–33 ("The record of the [less-than-fair-value] investigation does not show to which countries [Shantou Foodstuff] and [Shantou Processing] sold. Why? Commerce never asked that question because it is not important to how these companies do business solely regarding subject merchandise sold to the U.S."). But Commerce must ground its findings in the record evidence that is before it and appears to have done so. Thus, Plaintiffs have failed to show that Commerce's customer base finding is unreasonable or unsupported by the record.

### 5. Plaintiffs' Argument Questioning Commerce's Findings Regarding "Other Factors"

Finally, Plaintiffs dispute Commerce's findings regarding the "other factors" that Commerce considered as a part of its "totality of the circumstances" test. Plaintiffs assert that they provided Commerce with information that showed that the business license number, address, general manager, and manner of doing business were the same for Red Garden Food Processing Co., Ltd., Shantou JCF, and Shantou Processing, and that it explained its rationale for changing names in 2007 and 2013. Pls.' Br. at 33. With respect to the six-year delay between 2007 and 2013 to change names from Shantou JCF to Shantou Processing after the master lease changed ownership, Plaintiffs assert that the harassment did not end in 2007, so Shantou JCF delayed making the change. Plaintiffs deny that the name change in 2013 had anything to do with the Section 129 proceeding. *Id.* at 34.

Plaintiffs again do not argue that the evidence Commerce relied upon is flawed, but rather ask the court to accept their interpretation of the evidence instead of Commerce's. Plaintiffs do not, however, identify a reason for the court to conclude that Commerce's interpretation of the evidence was unreasonable.

So, while individual pieces of evidence (e.g., that the business license number, production facilities address, and the person holding the title of general manager were the same for Red Garden Food Processing Co., Ltd., Shantou JCF, and Shantou Processing) might tend to suggest continuity among the companies, it does not necessarily follow that it was unreasonable for Commerce to conclude that Shantou Processing operated in a materially dissimilar way from its alleged predecessor, Red Garden Food Processing Co., Ltd., after

taking into account the entire record. For example, regarding management, though the same individual held the title of general manager in the different incarnations of the entity, *the record evidence shows that the scope of that individual's authority changed*. The role of the general manager in Red Garden Food Processing Co., Ltd. (which at the time of its formation was a Sino-U.S. joint venture) was to carry out the decisions made by an independent board appointed by the company's owners.[18] After the reported changes in name, ownership, and structure in 2007 and 2013, the independent board was dissolved, and the power became concentrated in the general manager.[19] *See* Successorship Memo at 7.

The facts that Commerce relied upon to conclude that the record did not support Shantou Processing's claim that it changed names to avoid harassment by its former landlord's creditors, i.e., (1) that the landlord's debts were resolved and approved by a local court in China before the company changed its name to Shantou JCF, and (2) that Shantou Processing did not substantiate with evidence its claim that, notwithstanding the resolution of the former landlord's debts in 2007, harassment continued until 2013, are not seriously disputed, only the meaning and weight Plaintiffs would have Commerce attribute to them. But critically, Plaintiffs have failed to demonstrate why Commerce's interpretation of the facts is *unreasonable*. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620 (describing substantial evidence as "something less than the weight of the evidence"). Thus, the court finds no error with Commerce's "other factors" findings.

### G. Plaintiffs' Remaining Arguments Lack Merit

Plaintiffs challenge the Final Results based on other arguments, too, each of which is flawed in its own way.

#### 1. The Underlying Review Was Not Void Ab Initio

Plaintiffs argue that the underlying administrative review was void ab initio because Commerce had no authority to review Shantou Processing.

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[18] Successorship Memo at 6 ("[Red Garden Food Processing Co., Ltd.]'s constitution states that "the board {of directors} is the most powerful organization . . . and decide (*sic*) on all the important business of the Company.").

[19] Successorship Memo at 7–8 ("Zheng Chu Ci controls all decisions made by the company.").

According to Plaintiffs' brief, in 2020, Shantou Processing placed a letter to Commerce on the record of the separate Section 129 proceeding, discussed *supra* note 4. The letter argued that Commerce erred when it excluded Red Garden Food Processing Co., Ltd. from the Order instead of *Shantou* Red Garden Food Processing Co., Ltd. *See* Pls.' Br. at 21 (emphasis added). Because the letter was placed on the Section 129 record, it is not on the record in this case. *Id.* (emphasis added) ("The letter was correctly filed under the Section 129 Proceeding, rather than in the [underlying administrative review] proceeding and, therefore, *is not on this administrative record*. On May 22, 2020, Commerce rejected that request."). In that separate Section 129 proceeding, Shantou Processing asked Commerce to correct the alleged naming error in the Revocation Notice. The request was made seven years after the Revocation Notice was published in 2013. Commerce rejected Plaintiffs' request as untimely. The rejection of the request is not on the record before the court. *Id.*

Plaintiffs now ask the court to direct Commerce to add to the record here all of the documents from the record of the Section 129 proceeding, so the court can review Commerce's rejection of Plaintiffs' request to correct the naming error. For Plaintiffs, if the Department fixed that error, it would necessarily conclude that Shantou Processing was not subject to the administrative review because its merchandise was excluded from the Order. *Id.* at 10–15.

Plaintiffs' void ab initio argument fails for several reasons. First, Plaintiffs bore the "burden of creating an adequate record" during the administrative review before Commerce. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019) (citation omitted). The time for building the administrative record has passed. Plaintiffs do not argue that Commerce improperly rejected information that they attempted to place on the record of the underlying administrative review in this case, or that Commerce improperly relied on Section 129 documents that were not a part of the record.[20] Indeed, early in this review, when Commerce asked Plaintiffs to clarify the relationship between Red Garden Food Processing Co., Ltd. and Shantou Processing, Plaintiffs did not seek to place documents from

[20] The court notes, however, that Commerce has been known to rely on documents that it placed "on the record late in the proceeding, alerting the parties to it only in its Final IDM." *See Jilin*, 45 CIT at __, 519 F. Supp. 3d at 1233 (where Commerce placed on the record documents from the investigation involving aluminum foil from China late in the proceeding without giving the parties an opportunity to comment).

the Section 129 proceeding on the record here.[21] Thus, the court denies Plaintiffs' request "to allow all documents from the Section 129 proceeding to be entered into the record herein." Pls.' Br. at 21. It is simply too late.

Second, the underlying review of Shantou Processing is not "void" because it was commenced in accordance with the applicable statute and regulations. Each year, by statute, interested parties may request an administrative review of an antidumping or countervailing duty order on the anniversary date of the publication of the order. *See* 19 U.S.C. § 1675(a)(1). In an administrative review of an antidumping duty order, Commerce must "review, and determine . . . the amount of any antidumping duty" and publish notice of "any duty to be assessed [and] estimated duty to be deposited[.]" *Id.*

Here, Commerce received timely requests for review of Shantou Processing and Shantou Foodstuff from the domestic producers. *See* Final IDM at 7–8 (stating that Commerce "received timely requests for review, in accordance with 19 CFR 351.213(b)"); *see also* 19 C.F.R. § 351.213(b)(1) (providing that "[e]ach year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party . . . may request in writing that the Secretary conduct an administrative review under [19 U.S.C. § 1675(a)(1)]"). Commerce, accordingly, initiated the underlying review of the Order for the companies that allegedly dumped subject shrimp during the period of review. Final IDM at 8 (noting review covered "102 companies, including [Shantou Processing] and [Shantou Foodstuff] (but only where the exports of this latter company were of merchandise not produced by particular companies [i.e., those excluded from the Order in accordance with the Revocation Notice])."). As the court finds no error with respect to the initiation of the underlying review, Plaintiffs' void ab initio argument lacks merit.

Next, Plaintiffs argue that the initiation of the review as to Shantou Processing was void because Shantou Foodstuff and Shantou Process-

[21] It appears that, as parties to the Section 129 proceeding, Plaintiffs had access to record documents and had notice of the alleged ministerial error. As noted by Commerce:

> Pursuant to 19 CFR 351.224(c)(2), comments concerning ministerial errors must be filed within five days after Commerce has released disclosure documents or held a disclosure meeting. *Commerce released the signed, unpublished Federal Register notice to which the alleged ministerial error pertains to parties on March 25, 2013, and this notice* [i.e., the Revocation Notice] *published on March 28, 2013; thus, the deadline for any ministerial error allegation in that inquiry was April 1, 2013. Parties to the proceeding were on notice at that time and were aware of how Commerce had implemented its determination by March 25, 2013*. In short, interested parties [could] have discovered and alleged a ministerial error in the section 129 inquiry during the time period specified by our regulations.

Final IDM at 8–9 (emphasis added).

ing were collapsed into a single entity during the original less-than-fair-value investigation, and therefore Commerce "implicitly excluded" Shantou Processing's merchandise from the Order when it excluded Shantou Foodstuff's exports in the Section 129 proceeding. *See* Pls.' Br. at 13 ("[E]ven if Commerce does not admit that [Shantou Processing] was specifically excluded from the Order, it was implicitly excluded since, in the [less-than-fair-value] investigation, Commerce determined [Shantou Processing] and [Shantou Foodstuff] were so closely joined that they should be treated as a single entity, i.e., collapsed.").

The gist of Plaintiffs' argument seems to be that Commerce's collapsing decision in the original investigation meant that Shantou Foodstuff and Shantou Processing would be treated as one collapsed entity across different proceedings no matter what the companies' actual future relationships might be. Plaintiffs do not cite any legal authority to support this proposition. Moreover, this claim is refuted by the very documents that Plaintiffs quote in their brief, including the final decision memorandum from the original investigation. There, Commerce stated that the determination "to apply the [Shantou Foodstuff] rate to both [Shantou Foodstuff] and [Red Garden Food Processing Co., Ltd] . . . is *specific to the facts presented in the investigation* and based on several considerations, including the *structure* of the collapsed entity, *the level of control* between [Shantou Foodstuff] and [Red Garden Food Processing Co., Ltd.] and the *level of participation* by *each party* in the proceeding." Investigation IDM at 30 (emphasis added). In making their "implicitly excluded" argument, Plaintiffs appear to have ignored this limiting language.

Plaintiffs also fail to note that nowhere in the Revocation Notice did Commerce mention collapsing with respect to Shantou Foodstuff.[22] Instead, Commerce expressly treated Red Garden Food Processing Co., Ltd. and Shantou Foodstuff as separate entities when identifying the exporter-producer combination whose merchandise was excluded from the Order, and specifically excluded, e.g., merchandise "manufactured by Red Garden Food Processing Co., Ltd. . . . and exported by

[22] The court notes that in those cases where Commerce intended to treat respondents as a single collapsed entity for purposes of revocation, it said so in the Revocation Notice. *See, e.g.*, Revocation Notice, 78 Fed. Reg. at 18,959 n.10 (noting that diamond sawblades respondent Advanced Technology & Materials Co., Ltd., "[c]ollectively with Beijing Gang Yan Diamond Product Company . . . and Yichang HXF Circular Saw Industrial Co., Ltd . . . , [was] a single entity"). The absence of any mention in the Revocation Notice that Shantou Foodstuff and any other company should be treated as a collapsed, single entity for purposes of revocation, is consistent with Commerce's statement that the decision to collapse in the 2004 final determination was "specific to the facts presented in the investigation." Investigation IDM at 30.

[Shantou Foodstuff] or[23] Red Garden Food Processing Co., Ltd." Revocation Notice, 78 Fed. Reg. at 18,959 n.14. In other words, had Commerce intended to treat the entities as collapsed it would have done so, but in fact it treated them as distinct entities.

Most importantly, Commerce has found, and the court has agreed, that Shantou Processing was not the successor-in-interest to Red Garden Food Processing Co., Ltd. and so could not have been excluded from the Order implicitly or otherwise.

### 2. Commerce's Use of the Successor-in-Interest Test in the Context of an Administrative Review Was Lawful

Next, Plaintiffs argue that Commerce unlawfully commenced a changed circumstances review, or something like one, because Commerce's regulations require that there be a request for a changed circumstances review before one may be initiated, and no party made such a request. Pls.' Br. at 27 ("A [change circumstances review] (or anything purport [sic] to utilize the [changed circumstances review] regulation) can be started by one mechanism: an interested party requesting it."). Not only is this argument faulty on the law,[24] but as discussed in the Background, the record shows that Commerce conducted a successor-in-interest analysis in the context of an adminis-

[23] Commerce's use of the word "or" here also indicates that the companies were not treated as collapsed.

[24] A request from an interested party is not required under the statute or the regulations to commence a changed circumstances review. Subsection 1675(b)(1) provides in pertinent part:

> *Whenever* [Commerce] . . . receives information concerning, *or* a request from an interested party for a review of . . . a final affirmative determination that resulted in an antidumping duty order . . . which shows changed circumstances sufficient to warrant a review of such determination . . . , [Commerce] . . . shall conduct a review of the determination . . . after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1) (emphasis added). In other words, Commerce is authorized to initiate a changed circumstances review at any time ("whenever") Commerce either "receives information" *or* receives a request for review from an interested party about a final dumping determination, and, critically, the information or request "shows changed circumstances sufficient to warrant a review of such determination." By the statute's plain terms, then, a request by an interested party is not a prerequisite for review.

Commerce's regulations conform to the statute's direction that Commerce initiate a changed circumstances review "whenever" it receives information, or a request, sufficient to warrant such review. For example, an interested party "may request" a changed circumstances review "[a]t any time." 19 C.F.R. § 351.216(b). The Department also may self-initiate a review: "If the Secretary decides that changed circumstances sufficient to warrant a review exist, the Secretary will conduct a changed circumstances review in accordance with § 351.221." *Id.*§ 351.216(d). Subsection 351.221, in turn, provides for the commencement of a review "[a]fter receipt of a timely request for a review, *or on the Secretary's own initiative when appropriate*." *Id.* § 351.221(b) (emphasis added). Thus, Plaintiffs' argument that a request by an interested party is required before Commerce may consider changed circumstances finds no support in either the statute or the regulations.

trative review (not a changed circumstances review) at the request of the American Shrimp Processors Association.

Moreover, as to Plaintiffs' objection to Commerce's citation of *East Sea Seafoods LLC v. United States* in the Final IDM, the court finds no error. In the Final IDM, Commerce cited this case as an *example* of where this Court "upheld Commerce's decision to find that the respondent was not the [successor-in-interest] to a predecessor company within the context of an [administrative review]." Final IDM at 19. Plaintiffs object to the use of this case because, they argue, it is not on point. *See* Pls.' Br. at 26–27 ("The problem . . . is that *East Sea Seafoods* did not address the issue [of] whether Commerce had the authority to conduct an [successor-in-interest] inquiry."). *East Sea Seafoods* involved the fifth administrative review of an antidumping duty order on merchandise from Vietnam. After the preliminary results were published, Commerce issued a supplemental questionnaire to a voluntary respondent that argued, in its case brief, that it should have received a rate that was determined for its claimed predecessor. The supplemental questionnaire asked for information on changes to the voluntary respondent's name, ownership, management, and suppliers that were reported to have occurred during the period of review. *East Sea Seafoods LLC v. United States*, 34 CIT 438, 449, 703 F. Supp. 2d 1336, 1347 (2010).

Among the issues in that case was whether Commerce had erred by comparing the claimed successor company "with the last version of the alleged predecessor that had been subject to agency review." *Id.*, 34 CIT at 456, 703 F. Supp. 2d at 1352. Stating that "Commerce needs to have a reasonable method for conducting the analysis that will lead to a fair result in light of the totality of circumstances," the *East Sea Seafood* Court went on to find that Commerce's comparison method was "patently reasonable." *Id.* (cleaned up). Thus, the Court upheld Commerce's negative successorship determination as lawful and supported by the record in that case.

The court thus finds no error with Commerce's citation of *East Sea Seafoods* as a case where this Court upheld Commerce's application of the successor-in-interest test in the context of an administrative review of an antidumping duty order.

Ultimately, Plaintiffs' arguments against conducting a successor-in-interest analysis in an administrative review cannot be credited. The Department was not required to take Plaintiffs' word for it that Shantou Processing and Red Garden Food Processing Co., Ltd. were sufficiently the same company such that Shantou Processing could take advantage of the exclusion in the Revocation Notice. Rather, once Plaintiffs made the "same company" claim, Commerce was en-

titled to find out. Thus, just as in *East Sea Seafoods*, here, "Commerce needs to have a reasonable method for conducting the analysis that will lead to a fair result in light of the totality of circumstances." *Id.* (cleaned up). Plaintiffs do not argue that Commerce's successor-in-interest test itself is unreasonable. Rather, they question "whether Commerce had the authority to conduct a 'successor-in-interest' . . . investigation, under the authority of its changed-circumstances regulation, without meeting the requirements of that regulatory provision." Pls.' Br. at 2. Nothing that Plaintiffs have presented to the court demonstrates that Commerce's initiation of a successorship analysis was unlawful or unreasonable.

## II. The Court Finds No Error with Commerce's Deactivation of the Excluded Combination

The court next turns to Plaintiffs' claim that in the Final Results Commerce improperly deactivated the exporter-producer combination that was excluded from the Order by the Revocation Notice.[25]

The excluded combination involved Red Garden Food Processing Co., Ltd., as producer and exporter, five other Chinese producers, and Shantou Foodstuff, an exporter. Specifically, the Revocation Notice stated that Commerce was revoking the Order with respect to

> merchandise *manufactured by Red Garden Food Processing Co., Ltd.*, or Chaoyang Jindu Hengchang Aquatic Products Enterprise Co., Ltd., or Raoping County Longfa Seafoods Co., Ltd., or Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd., or Shantou Jinyuan District Mingfeng Quick-Frozen Factory, or Shantou Long Feng Foodstuffs Co., Ltd., and *exported by* [*Shantou Foodstuff*] *or Red Garden Food Processing Co., Ltd.*

Revocation Notice, 78 Fed. Reg. at 18,959 n.14 (emphasis added).

In the Final Results, based on information that Plaintiffs placed on the record, Commerce found that

> all of the other producers [i.e., other than Red Garden Food Processing Co., Ltd.] listed in the excluded combination are no longer in business. Further, we have determined that [Shantou Processing] is not the same entity as [Red Garden Food Processing Co., Ltd.]. Based on this information, we find that the

[25] Plaintiffs' claim here rests on the argument that Commerce acted unlawfully *in the Section 129 proceeding* by imposing the combination rate in 2013: "Commerce in the Section 129 revocation ha[d] no authority to impose [a combination rate] for the first time – eight years after imposition of the Order. And, hence, Commerce has no authority to deactivate them" in the underlying review. Pls.' Br. at 36. As noted, the record and decisions made in the Section 129 proceeding are not before the court in this case. As will be seen, the court finds no error with Commerce's deactivation of the rate based on the record here.

> producer/exporter combination excluded from the *Order* no longer exists. As a result, Commerce finds it necessary and appropriate to inform [Customs] that the exclusion for this exporter-producer combination is no longer active.

*Id.* at 28. In other words, Commerce found that it was "appropriate to deactivate" this exporter-producer combination because "no companies in the excluded exporter-producer chain are still active." Final IDM at 26, 27.

The court finds no error with Commerce's deactivation of the rate for the excluded exporter-producer combination. As Commerce lawfully found, Shantou Processing is not a successor to Red Garden Food Processing Co., Ltd. Moreover, Plaintiffs concede that none of the other producers named in the Revocation Notice are still in business. Thus, because none of the producers in the excluded exporter-producer combination are still in existence, Commerce's decision to deactivate the combination rate is supported by the record.

Plaintiffs do not seriously dispute the facts underlying Commerce's deactivation decision. Plaintiffs' argument that the now-defunct producers might somehow reinstitute operations in the future, and so for that reason, the combination rate should remain active in the meantime, seems something of a stretch. Pls.' Br. at 36 ("While [Shantou Processing] could not find any activity by these supplier companies [i.e., the five Chinese producers] . . . this does not preclude these companies, if indeed inactive, from renewing business operations and operating in conjunction with [Shantou Processing and Shantou Foodstuff] in the future.").

Thus, the court finds no error with Commerce's decision to deactivate the combination rates in the Final Results.

### III. Commerce's Adjustment to U.S. Price Is Sustained

Plaintiffs object to an adjustment that Commerce made to U.S. price when calculating the antidumping duty rate for Shantou Processing.

Commerce's regulations state that Commerce shall calculate U.S. price net of any price adjustments that are "reasonably attributable" to the subject merchandise. *See* 19 C.F.R. § 351.401(c). The term "price adjustments" is defined as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment, including, under certain circumstances, a change that is made after the time of sale . . . that is reflected in the purchaser's net outlay."" *Id.* § 102(b)(38).

Here, for some U.S. sales, Commerce adjusted U.S. price by subtracting from the invoice price (called the gross unit price[26]) amounts paid to Shantou Processing's ocean carrier but refunded to Shantou Processing. The refunded amounts were for inland U.S. trucking services needed to transport the shrimp from the port to customer warehouses (cold storage) that the carrier did not, in fact, provide. Rather, the U.S. customer paid a different company for that service. Commerce subtracted these amounts from gross unit price "because the record indicated that [these amounts] related to a *reduction* to gross unit price for 'truck fees.'" Final IDM at 29 (emphasis added).

Commerce stated, by way of explanation, why it treated the amount as a deduction to the gross unit price:

> In this case, [Shantou Processing] deducted the truck fees in question from the total invoice price, and *the customer [i.e., the U.S. purchaser] paid [Shantou Processing] this net amount*.
>
> [Shantou Processing] reported that all of its sales of subject merchandise to the United States during the [period of review] were made on a CNF [or "cost and freight"] basis and shipped to a cold storage facility located in the United States. As [Shantou Processing] explained, under these delivery terms, *it was responsible for delivering the products to the cold storage facility*. Therefore, based on the shipping term of CNF, and [Shantou Processing's] own explanation, the expense for trucking the goods from the U.S. port to this facility was part of the invoice price. [Shantou Processing] reported that its international freight provider typically provides door-to-door service at an all-inclusive ocean freight price (*i.e.*, from [Shantou Processing's] factory to the cold storage facility in the United States). However, [Shantou Processing] also stated that, during the [period of review], *its freight provider was unable to provide freight services* from the U.S. port to the cold storage facility on certain shipments, and, instead, [Shantou Processing's] *U.S. customer arranged and paid for that freight*. In compensation, [Shantou Processing] deducted the cost of the trucking expenses paid by its U.S. customer from the invoiced price (which included U.S. inland freight expense that [Shantou Processing] did not pro-

[26] Though not defined in the record, the court understands "gross unit price" to mean the invoice price that is "not adjusted or reduced by deductions or subtractions." *See* SIDNEY DAVIDSON, CLYDE P. STICKNEY & ROMAN L. WEIL, FINANCIAL ACCOUNTING 823 (4th ed. 1985) (defining "gross"); *see also* Final IDM at 29 n.158 (emphasis added) (stating that Shantou Processing "reported the per-unit prices on the invoice in the gross unit price field in the U.S. sales database; therefore, *in order to arrive at the net outlay to the purchaser, it is necessary to deduct the reported per-unit truck fees from those gross unit prices*.").

> vide). Thus, based on the record information, this adjustment is properly considered as a deduction to the gross unit price, and we have treated it as such.

Final IDM at 29–30 (emphasis added). In other words, for some U.S. sales, where trucking services were not provided, Shantou Processing deducted the cost of the trucking expenses to the cold storage facility from the invoiced price. Commerce treated this as a "deduction to the gross unit price," and adjusted the U.S. price accordingly.

Plaintiffs argue that, because the ocean carrier gave Shantou Processing a refund for services it failed to provide on certain U.S. sales, Commerce should have treated the refund as "income" and an addition to the gross unit price. In Plaintiffs' words:

> [T]he ocean carrier would give [Shantou Processing] a "through rate" from its warehouse to the customer's warehouse in the [United States]. [Shantou Processing] paid for that full service . . . . For certain U.S. sales, however, the ocean carrier was unable to deliver to the U.S. customer's warehouse. Rather, it could only deliver to the U.S. port. Because of that, it gave a refund to [Shantou Processing] for that lack of service between the U.S. port and customer's warehouse. *This constitutes income/revenue to [Shantou Processing] which Commerce should have added to the gross unit price.* Instead, Commerce deducted it from the gross unit price. This artificially increased the dumping margin, thereby not resulting in calculation of a dumping margin as accurately as possible.

Pls.' Br. at 37 (emphasis added).

For Plaintiffs, "[a] reduction in an expense equates to increase in net income." *Id.* ("[Shantou Processing] got a refund from the shipping company for these services it failed to provide, i.e., truck transport from the U.S. port to the U.S. warehouse. This is income to [Shantou Processing]. A reduction in an expense equates to increase in net income."). Plaintiffs further argue that by subtracting the "truck fee" amount from gross unit price "Commerce is actually double-counting it, since it was already accounted for in the ocean freight expenses." *Id.* at 38.

Both of these arguments seem to be failures of arithmetic. Shantou Processing was paid by its U.S. customer only for the product and services it received. That is, Shantou Processing's income was an amount for the shrimp and an amount for shipping the shrimp from China to the United States. This latter amount did not contain anything for shipping the shrimp to the U.S. customer's cold storage

facility. These two amounts (1) for the shrimp, and (2) for shipping were booked as income. To be clear, since inland freight was not provided, the customer did not pay Shantou Processing for shipping the shrimp to the cold storage facility. The customer paid the trucker for inland freight, and Shantou Processing's invoice price (the "gross unit price") did not contain any amount for inland freight. Shantou Processing had paid its shipper for inland freight (a service that was not provided) and received a refund for contracted services paid for, but not rendered. The result was a wash, as if Shantou Processing had never paid for the services in the first place.

Even if Plaintiffs reported refunds as "revenue" that does not make it so. Rather, the record shows that Shantou Processing removed trucking expenses from the impacted U.S. sales:

> [R]eviewing [Shantou Processing's] invoice contained in its section A response, one can see that in its commercial invoice there are three lines for shrimp products and a separate line for "DEDUCT TRUCK FEE." In other words, [Shantou Processing] was not receiving a freight revenue, but was reducing the invoice value, and thereby reducing gross unit price. Thus, for these final results, we continue to treat this as a price adjustment and deduct . . . this field from gross unit price.

Final IDM at 30. Thus, the proper way to look at this is as two transactions: (1) Shantou Processing paid for trucking services that were not performed and received a refund; and (2) Shantou Processing's U.S. customer then paid for trucking to the cold storage facility, and the invoice amount did not contain the amount for trucking services paid by the customer. Because Commerce's U.S. price adjustment is supported by substantial evidence and otherwise in accordance with law, it is sustained.

## CONCLUSION

Based on the foregoing, the court denies Plaintiffs' motion and sustains the Final Results. Judgment will be entered accordingly.

Dated: May 12, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–79

GUIZHOU TYRE CO., LTD. AND GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 17–00100

[Sustaining an agency decision issued in response to court order in litigation contesting results of an administrative review of an antidumping duty order on off-the-road tires from the People's Republic of China]

Dated: May 18, 2023

*Richard P. Ferrin*, Faegre Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiff Xuzhou Xugong Tyres Co., Ltd. With him on the briefs was *Douglas J. Heffner*.

*Richard P. Ferrin*, Faegre Drinker Biddle & Reath, LLP, of Washington, D.C., for plaintiff Trelleborg Wheel Systems (Xingtai) Co., Ltd. With him on the briefs was *Douglas J. Heffner*.

*Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, New York, argued for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the briefs were *Jordan C. Kahn*, *Elaine F. Wang*, and *Brandon M. Petelin*.

*Brandon M. Petelin*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for plaintiff Qingdao Qihang Tyre Co., Ltd. With him on the briefs were *Ned. H. Marshak*, *Elaine F. Wang*, and *Jordan C. Kahn*.

*Brandon M. Petelin*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for plaintiff Qingdao Free Trade Zone Full-World International Trading Co., Ltd. With him on the briefs were *Ned. H. Marshak*, *Elaine F. Wang*, and *Jordan C. Kahn*.

*Ned H. Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, New York, for plaintiff Aeolus Tyre Co., Ltd. With him on the briefs were *Brandon M. Petelin*, *Elaine F. Wang*, and *Jordan C. Kahn*.

*Robert K. Williams* and *Lara A. Austrins*, Clark Hill PLC, of Chicago, Illinois, for plaintiff Weihai Zhongwei Rubber Co., Ltd.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel For Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington D.C.

## OPINION

**Stanceu, Judge:**

The plaintiffs in this consolidated action contested an administrative determination the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued to conclude a periodic review of an antidumping duty order on

off-the-road ("OTR") tires from the People's Republic of China ("China" or the "PRC").[1]

Before the court is the "Second Remand Redetermination," which Commerce submitted in response to a previous opinion and order in this litigation, *Guizhou Tyre Co. v. United States*, 45 CIT __, 519 F. Supp. 3d 1248 (2021) ("*Guizhou II*"). *Final Results of Redetermination Pursuant to Ct. Remand* (Sept. 24, 2021), ECF Nos. 109 (Conf.), 110 (Public), ("*Second Remand Redetermination*"). The court sustains the Second Remand Redetermination.

## I. BACKGROUND

### A. The Contested Determination

The determination contested in this litigation (the "Final Results") is *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,733 (Int'l Trade Admin. Apr. 21, 2017) ("*Final Results*"). *See also 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 Fed. Reg. 27,224 (Int'l Trade Admin. June 14, 2017) ("*Amended Final Results*"). Commerce incorporated by reference in the Final Results and the Amended Final Results a final "Issues and Decision Memorandum" containing explanatory discussion. *Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2014–2015* (Int'l Trade Admin. Apr. 12, 2017) (P.R. Doc. 308) ("*Final I&D Mem.*").[2]

### B. The Seventh Review of the Antidumping Duty Order

Commerce issued an antidumping duty order (the "Order") on certain OTR tires from China (the "subject merchandise") in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg.

[1] Consolidated under the lead case, *Guizhou Tyre Co. and Guizhou Tyre Import and Export Co. v. United States*, Court No. 17–00100, are *Aeolus Tyre Co. v. United States*, Court No. 17–00102; *Qingdao Free Trade Zone Full-World International Trading Co. v. United States*, Court No. 17–00103; *Xuzhou Xugong Tyres Co. v. United States*, Court No. 17–00104; *Trelleborg Wheel Systems (Xingtai) Co. v. United States*, Court No. 17–00111; *Qingdao Qihang Tyre Co. v. United States*, Court No. 17–00113; and *Weihai Zhongwei Rubber Co. v. United States*, Court No. 17–00123. Order Granting Motion to Consolidate (June 16, 2017), ECF No. 24.

[2] Documents in the Joint Appendix (July 30, 2018), ECF Nos. 62 (Conf.), 63 (Public), are cited as "P.R. Doc. __" for public documents.

51,624 (Int'l Trade Admin. Sept. 4, 2008). Commerce initiated the review at issue, the seventh periodic administrative review of the Order, on November 9, 2015. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 69,193 (Int'l Trade Admin.). The seventh review pertained to entries of subject merchandise made during the period of review ("POR") of September 1, 2014 through August 31, 2015. *Id.*, 80 Fed. Reg. at 69,196. Commerce published the preliminary results of the review on October 14, 2016. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2014–2015*, 81 Fed. Reg. 71,068 (Int'l Trade Admin.).

For the review, Commerce selected two groups of respondents as "mandatory respondents," i.e., respondents for which it intended to conduct individual examinations. The first group of respondents consisted of Xuzhou Xugong Tyres Co., Ltd., Armour Rubber Co. Ltd., and Xuzhou Hanbang Tyre Co., Ltd. (collectively, "Xugong"), which Commerce treated as a single entity ("collapsed") for purposes of the review. The second group consisted of Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (collectively, "GTC"), which Commerce also treated as a single entity. *Final Results*, 82 Fed. Reg. at 18,733–34 & nn.3–4.

Commerce concluded that Xugong established independence from the government of China by rebutting the Department's presumption of *de jure* and *de facto* government control and therefore, under its practice, qualified for a "separate rate," i.e., an antidumping duty rate other than the rate Commerce assigns to exporters and producers it considers to be part of the "PRC-wide entity," i.e., those Chinese exporters and producers of the subject merchandise that failed to rebut the Department's presumption. *Id.*, 82 Fed. Reg. at 18,734.[3] In the Final Results, Commerce assigned a weighted-average dumping margin of 33.08% to Xugong and assigned to GTC the PRC-wide rate, which in the seventh review was 105.31%. *Id.*, 82 Fed. Reg. at

[3] In addition to the mandatory respondent Xugong, Commerce determined that nine other Chinese companies or groups of companies qualified for a "separate rate": Qingdao Qihang Tyre Co., Ltd.; Qingdao Free Trade Zone Full-World International Trading Co., Ltd.; Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.; Shiyan Desizheng Industry & Trade Co., Ltd.; Qingdao Jinhaoyang International Co., Ltd.; Sailun Jinyu Group Co., Ltd.; Weifang Jintongda Tyre Co., Ltd.; Zhongce Rubber Group Co., Ltd.; and Weihai Zhongwei Rubber Co., Ltd. These nine exporter/producers were not individually examined in the seventh review and therefore did not receive an individually determined rate. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,733, 18,735 (Int'l Trade Admin. Apr. 21, 2017) ("*Final Results*").

18,735.[4] Commerce concluded that GTC, while demonstrating *de jure* independence from government control, had not rebutted the presumption that the government of China exercised *de facto* control over its export functions. *Final I&D Mem.* at 8–9.

Because Xugong was the only individually-examined respondent that Commerce determined to be qualified for a separate rate, Commerce assigned to all other separate rate respondents a rate of 33.08%, equivalent to the margin it calculated for Xugong. *Final Results*, 82 Fed. Reg. at 18,735. In addition to GTC, Commerce determined that Aeolus Tyre Co., Ltd. ("Aeolus") failed to qualify for a separate rate and therefore treated it as part of the PRC-wide entity, assigning it the rate of 105.31%. Commerce made the same determination as to Tianjin Leviathan International Trade Co., Ltd., which is not a party to this case. *Id*.

On June 14, 2017, Commerce issued the Amended Final Results to correct a ministerial error. *Amended Final Results*, 82 Fed. Reg. at 27,224. Commerce determined that the weighted-average dumping margin applicable to Xugong was 33.14% rather than 33.08%. *Id.*, 82 Fed. Reg. at 27,225. Commerce applied this margin to the other "separate rate" respondents. *Id.* The 105.31% rate applied to members of the PRC-wide entity in the Final Results was unchanged. *Id.*

### C. The Parties to this Consolidated Case

The plaintiffs in this litigation include the two mandatory respondents, Xugong (to which Commerce assigned a rate of 33.14%) and GTC (to which Commerce assigned the 105.31% PRC-wide rate). The other plaintiffs are Aeolus (to which Commerce also assigned the PRC-wide rate) and four separate rate respondents, to each of which Commerce assigned the 33.14% rate determined for Xugong in the Amended Final Results: Qingdao Free Trade Zone Full-World International Trading Co., Ltd.; Qingdao Qihang Tyre Co., Ltd.; Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.; and Weihai Zhongwei Rubber Co., Ltd. Defendant is the United States.

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[4] The PRC-wide rate was carried over from the Department's determination in the fifth administrative review. *See Final Results*, 82 Fed. Reg. at 18,735 n.16. This PRC-wide rate was determined by calculating the average of the PRC-wide rate prior to the fifth review (determined in the investigation) and the individually-determined rate Commerce calculated for a respondent in the fifth review, Double Coin Holdings, Ltd., which is not a party to this case. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013* (Int'l Trade Admin. Apr. 15, 2015), 80 Fed. Reg. 20,197, 20,199. The 105.31% rate is based in part on the application of facts otherwise available and an adverse inference and permissibly was carried over from prior reviews. *See China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021). In this case, no party challenges the basis for the PRC-wide rate.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of an antidumping duty order.[5] In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

### B. The Court's Prior Opinions

The court remanded the Final Results to Commerce in its first decision, *Guizhou Tyre Co. Ltd. v. United States*, 43 CIT __, 389 F. Supp. 3d 1350 (2019) ("*Guizhou I*"). Commerce responded in a decision (the "First Remand Redetermination") submitted on October 10, 2019. *Final Results of Redetermination Pursuant to Ct. Remand*, ECF Nos. 74 (Conf.), 81 (Public) ("*First Remand Redetermination*").

In *Guizhou I*, the court held that Commerce unlawfully made deductions from the starting prices used to determine the export price and constructed export price of Xugong's subject merchandise to adjust for Chinese value-added tax ("VAT"). *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d at 1364. In the First Remand Redetermination, Commerce, under protest, redetermined Xugong's weighted average dumping margin by removing the deductions for VAT, reducing Xugong's margin from 33.14% to 16.78%. *Guizhou II*, 45 CIT at __, 519 F. Supp. 3d. at 1254. Because Commerce used Xugong's margin to determine the rate for the other separate rate respondents, Commerce also lowered the rate for those respondents from 33.14% to 16.78%. *Id*.

The court in *Guizhou I* also remanded for reconsideration the Department's decisions in the Final Results that GTC and Aeolus failed to rebut the Department's presumption of *de facto* government control. Defendant requested a remand to allow Commerce to reconsider its decision as to GTC. *Id.*, 45 CIT at __, 519 F. Supp. 3d at 1252

[5] All citations to the United States Code herein are to the 2012 edition.

(citing *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d. at 1360). As to Aeolus, the court's opinion and order in *Guizhou I* concluded that Commerce had failed to consider all record evidence and, in particular, had not addressed a "Rectification Report" that Aeolus claimed demonstrated its independence from government control. *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d. at 1357–59 (citing *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Kleistadt to U.S. Dep't. of Commerce* at Ex. 1A (Jan. 8, 2016) (C.R. Doc. 39) (P.R. Doc. 79) ("*Rectification Report Letter*")). In the First Remand Redetermination, Commerce concluded, as it had in the Final Results, that both Guizhou and Aeolus had failed to rebut the Department's presumption of government control. *Guizhou II*, 45 CIT at __, 519 F. Supp. 3d at 1253. In each of those determinations, Commerce placed considerable weight on a finding that a 100% government-owned entity was the largest shareholder, albeit without majority ownership, and concluded that the government-owned shareholder had the ability to control the selection of members of the board of directors, which in turn selected senior management. *Id.*, 45 CIT at __, 519 F. Supp. 3d. at 1256, 1259–60 (citing *First Remand Redetermination* at 7 (citing *Final I&D Mem*. at 10)).

The opinion and order in *Guizhou II* issued a second remand on the determinations by Commerce that GTC and Aeolus failed to rebut the presumption of government control. The court noted a contradiction in the Department's description of the methodology by which it made those determinations. Commerce identified four criteria for its inquiry as to *de facto* government control over export functions, as follows:

> 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 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 disposition of profits or financing of losses.

*First Remand Redetermination* at 7 (citation omitted). After recounting the four criteria Commerce identified, the court noted that the First Remand Redetermination stated that "Commerce's separate rate test examines all four *de facto* criteria." *Guizhou II*, 45 CIT at __,

519 F. Supp. 3d at 1255 (quoting *First Remand Redetermination* at 41). The court mentioned that the First Remand Redetermination "also states that 'in cases where a respondent was not majority owned by the government, 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.'" *Id*., 45 CIT at __, 519 F. Supp. 3d at 1256 (quoting *First Remand Redetermination* at 42). The First Remand Redetermination also contained "the contradicting statement that '[i]f a respondent is unable to rebut one of the four *de facto* criteria, the company is ineligible for a separate rate.'" *Id*., 45 CIT at __, 519 F. Supp. 3d at 1255 (quoting *First Remand Redetermination* at 42 (citing *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1308, 1313 (2018))).

The Department's assertions that it examined all four of its criteria for *de facto* control, when in fact it had not, required the court to remand the decisions to deny separate rate status to GTC and Aeolus. The court in *Guizhou II* found particularly significant the Department's ignoring, and failing to state findings on, the first criterion, which pertains to independence in setting export prices. After discussing why a finding of fact on that criterion is particularly relevant to the issue of whether an exporter or producer should be included within the PRC-wide entity, the court concluded in *Guizhou II* that Commerce had sidestepped that issue. The court stated that "[b]ecause Commerce, in the [First] Remand Redetermination, did not apply the first of its factors—which inquires as to whether the export prices are set by or are subject to the approval of a government authority—the court has no such finding of fact to subject to judicial review under the substantial evidence standard." *Id*., 45 CIT at __, 519 F. Supp. 3d at 1258.

While pointing out the several shortcomings of the Department's self-contradictory methodology in the First Remand Redetermination, the court in *Guizhou II* did not order Commerce to reverse its decision denying GTC and Aeolus separate rate status. Instead, the court ordered Commerce to "reach new decisions in accordance with this Opinion and Order." *Id*., 45 CIT at __, 519 F. Supp. 3d at 1261.

### C. The Department's Revised Separate Rate Analyses in the Second Remand Redetermination

In the Second Remand Redetermination, Commerce made a finding on each "prong" of its four-criteria test for *de facto* independence from government control, with respect to both Aeolus and GTC. Commerce found that both respondents satisfied the first two prongs. "Based on

our review of the record, we conclude that it does not contain affirmative evidence that the Chinese government 'actually did control' the respondents' export pricing decisions (*i.e.*, the first prong)." *Second Remand Redetermination* at 3. Commerce further found:

> [T]here is no evidence to contradict statements and information in support of claims that Aeolus and GTC have authority to negotiate and sign contracts and other agreements (*i.e.*, the second prong) and, for Aeolus, no explicit evidence to contradict a finding that the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses (*i.e.*, the fourth prong).

*Id*. at 3–4. Despite these findings, Commerce determined that Aeolus and GTC failed to rebut the presumption of government control of their respective export functions, asserting that a respondent must demonstrate independence from government control as described in each of the four prongs of its test. Commerce found that "both companies failed to establish autonomy in the selection of management (*i.e.*, the third prong), and that GTC further failed to rebut the presumption of control with respect to independent decision-making regarding disposition of profits (*i.e.*, the fourth prong)." *Id.* at 4. In making its findings under the third prong, Commerce began its analysis with the ownership structure of Aeolus and GTC, reiterating findings it had made previously.

Commerce found that a parent company of Aeolus, China Chemical Rubber Co., Ltd. (also known as China National Tire & Rubber Corp.), held a 42.58% share of Aeolus during the POR. *Id*. at 5. Commerce found, further, that this parent company was 100% owned by a state-owned enterprise, China National Chemical Corporation ("ChinaChem") and supervised by a State-owned Assets Supervision & Administration Commission ("SASAC"), a government entity. *Id*. Commerce also found that three other shareholders of Aeolus were state-owned enterprises supervised by SASACs, such that the "total SOE ownership in Aeolus" was 49.06%. *Id*. (citation omitted). From these and other findings, Commerce concluded that ChinaChem, a state-owned enterprise, was the "controlling shareholder" of Aeolus. *Id*.

On GTC's ownership structure, Commerce found that Guiyang Industry Investment (Group) Co., Ltd. ("GIIG"), owned 25.20% of Guizhou Tyre Co., Ltd. (of which Guizhou Tyre Import and Export Co., Ltd. was a wholly-owned subsidiary) and that GIIG was entirely owned by the Guiyang Municipal State-owned Assets Supervision &

Administration Commission ("Guiyang SASAC"). *Id*. at 7; *see Guizhou I*, 43 CIT at __, 389 F. Supp. 3d at 1359. Commerce concluded that Guiyang SASAC "is GTC's single largest and *de facto* controlling shareholder." *Second Remand Redetermination* at 7.

From the record evidence on ownership structure and other record evidence, Commerce found that a government entity, as the controlling (although not majority) shareholder in Aeolus and in GTC, controlled the selection of board members and that the board controlled the selection of senior management. Specifically, Commerce found that Aeolus's Articles of Association ("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." *Second Remand Redetermination* at 6. As to GTC, Commerce found that "GIIG, through its 25.20 percent ownership stake, controlled GTC's board nomination process" and that the board "is responsible for the selection of senior management." *Id*. at 9.

Aeolus and GTC oppose the Second Remand Redetermination. Consol. Pl.'s Comments on Second Remand Redetermination (Nov. 24, 2021), ECF Nos. 116 (Conf.), 117 (Public) ("Aeolus's Comments"); Pls.' Comments on Second Remand Redetermination (Nov. 24, 2021), ECF Nos. 114 (Conf.), 115 (Public) ("GTC's Comments").

The Department's revised analysis presents two issues. First, the court must decide whether requiring a respondent to satisfy all four prongs of the Department's test to obtain separate rate status is a permissible methodology. Second, if it is, then the court must decide whether substantial evidence supported the Department's findings that Aeolus and GTC failed to satisfy the third prong, which requires a demonstration of independence in the selection of management. The court addresses these two issues below.

### 1. The Department's Methodology for Effectuating its *De Facto* Test Is Not Impermissible *Per Se*

Both Aeolus and GTC object to the Second Remand Redetermination on the ground that Commerce must base its decision on the total body of record evidence pertaining to all four of its criteria ("prongs"), i.e., the totality of the circumstances. Aeolus's Comments 14–18, 29–31; GTC's Comments 14–18, 28–31. In the Second Remand Redetermination, Commerce based its decision as to Aeolus on only the third prong, "autonomy from the government in making decisions regarding the selection of management," and based its decision as to GTC on the third and the fourth prong, which requires independence in profit distribution decisions. In effect, GTC and Aeolus challenge

the Department's methodology of requiring a separate rate respondent to establish independence from government control as to each of the four criteria.

Aeolus's and GTC's challenges to the Department's application of its four-prong test view the Department's conception of "export functions" as overly broad. According to their arguments, independence in export pricing and in entering into contracts (in the case of GTC) or independence in export pricing, in entering into contracts, and in retaining proceeds of export sales and making independent decisions regarding disposition of profits or financing of losses (in the case of Aeolus) should suffice to rebut the presumption of government control of export functions. In that regard, the opinion and order in *Guizhou II* questioned the Department's application of the four-prong test, noting the significance for the antidumping duty laws of independence in setting prices for exported subject merchandise. *See Guizhou II*, 45 CIT at __, 519 F. Supp. 3d at 1257–60.

Aeolus and GTC argue that in *Guizhou II* the court *required* Commerce to base any denial of separate rate status on evidence of government influence on price-setting. Aeolus's Comments 14–18; GTC's Comments 14–18. The court disagrees. The opinion and order in *Guizhou II* directed Commerce to reconsider its decisions as to Aeolus and GTC but did not rule the Department's application of its four-prong test impermissible *per se*.

The Second Remand Redetermination responded to the court's order by providing an expanded discussion on the Department's reliance on the third criterion:

> Specifically, our finding that neither Aeolus nor GTC have autonomy in the selection of management allows for the reasonable inference, in light of the presumption of government control in NME [nonmarket economy] country proceedings, that their respective government shareholders maintain the potential to control the export operations of each company because the management of a firm controls its operations—including its export functions.

*Second Remand Redetermination* at 19. Commerce also explained that it considers an absence of evidence of direct government involvement in the setting of prices of the exported subject merchandise insufficient to establish a company's independence in "operations—including its export functions," *id.*, because doing so "ignores other aspects of export activities where the government may exert control, such as influence over export quantities/quotas, terms of sale, financ-

ing, customer relationships, contract negotiation, transportation, customs requirements, management directives, selection of export markets, export-related investment, *etc*.," *id*. at 23–24 (footnote omitted).

To place a company within the PRC-wide entity, Commerce considers it sufficient that an entity of the Chinese government have effective control over the selection of company management, which it views as signifying the power to influence all of a company's business activities, including export functions. *Final I&D Mem*. at 13. The question presented is whether the court must reject the rationale Commerce stated in the Second Remand Redetermination and thereby conclude that this agency practice is impermissible *per se*. Based on the explanation provided in the Second Remand Redetermination, the court cannot reach that conclusion. For the reasons discussed below, the circumstances of this case do not place the court in a position to substitute its judgment for the agency's on the question of just how much governmental "control" over export functions sufficed to place an exporter or producer within the PRC-wide entity.

Commerce has not grounded its regulatory scheme to effectuate its rebuttable presumption of *de facto* government control in a specific provision of the Tariff Act or implementing regulations. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, No. 23–14, 2023 WL 1867677, at *9 (Ct. Int'l Trade Feb. 9, 2023). Because it exists apart from the provisions in the Tariff Act and regulations, there is no statutory language, legislative history, or regulatory language or preamble to guide the court in deciding whether the Department's methodology is *ultra vires* or unreasonable *per se*. In that circumstance, the court cannot conclude that it necessarily was unreasonable for Commerce to infer control of "export functions," broadly defined, from record facts showing that a governmental agency had control over the selection of company management and thus, indirectly, over business activity in general, which includes activity related to the exportation of merchandise. In addition, a court must recognize an agency's discretion to draw reasonable inferences from record evidence. *See SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 845 (Fed. Cir. 2020) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) for the principle that "substantial evidence includes 'reasonable inferences from the record'").

The court also is guided by binding precedent of the Court of Appeals for the Federal Circuit ("Court of Appeals"), which repeatedly has affirmed the Department's authority to apply a rebuttable presumption of government control in determining which exporters and producers of a nonmarket economy ("NME") country, such as China,

to include within the NME-wide entity. *China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028, 1039 (Fed. Cir. 2021) ("*CMA*"); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1313 (Fed. Cir. 2017) ("*Diamond Sawblades*"). In light of the breadth of the Department's discretion to craft its own antidumping duty procedures for exports from NME countries, as the Court of Appeals recognized in its holdings in *CMA* and *Diamond Sawblades*, the court is unable to agree with Aeolus and GTC that Commerce lacked the discretion to implement its *de facto* test for government control based principally on the third prong of that test. According to the reasoning in those cases, Commerce should be allowed broad discretion not only in applying its presumption but also in setting forth the criteria by which it will effectuate it. In other words, the greater power to create an entire regulatory scheme for an NME-wide entity, which the case law establishes, implies the lesser power to effectuate it through criteria and procedures, such as those Commerce applied in this case, that define what the agency means when it uses the term "government control" of export functions.

### 2. Commerce Permissibly Found that Aeolus Did Not Establish Independence from Government Control in the Selection of Company Management

Commerce identified record evidence that ChinaChem was, by far, the dominant shareholder casting votes for the election of members of Aeolus's board of directors. *Second Remand Redetermination* at 54 ("ChinaChem represented the vast majority of votes electing the board.") (citation omitted); *see also First Remand Redetermination* at 34–35 (showing the specific, proprietary percentages of votes by ChinaChem and comparing them to percentages for votes of other shareholders). Commerce also considered that the votes cast by shareholders other than ChinaChem and other than the three other SOE shareholders were a very small percentage of the votes cast during the POR. *First Remand Redetermination* at 34. Commerce considered this significant because the board controlled the selection of Aeolus's general manager and deputy general manager. *Id*. at 5; *Second Remand Redetermination* at 6.

Aeolus argues that Commerce erred in relying on the data on voting percentages because "[t]his Commerce calculation conflates the shareholder vote conducted on December 12, 2014, with the shareholder information provided as of December 31, 2014." Aeolus's Comments 24 (citation omitted). Aeolus posits that "Commerce concedes it does not know if the shareholder percentage changed in the 19 days between the vote and year-end, wrongly faulting Aeolus for Commerce's failure to have requested ownership data at the vote to sup-

port its denial." *Id*. (citing *Second Remand Redetermination* at 55). According to Aeolus, Commerce impermissibly relied upon speculation because "[w]ithout such data, Commerce improperly made assumptions 'about ChinaChem's presence at the vote.'" *Id*. at 24–25 (citing *Second Remand Redetermination* at 55). This argument is unconvincing. Commerce reasonably interpreted the shareholder voting evidence on the record, which contained no evidence that the ownership data changed during the 19-day period. Aeolus did not submit information for the record to show that it did or, if it did, that the change cast doubt on the Department's findings that ChinaChem could exert control over the selection of board members and that the non-government shareholders did not cast votes in any meaningful percentage.

Aeolus argues, further, that because its government ownership was only minority ownership, denial of separate rate status required more indicia of government control than the record indicated and that, accordingly, Aeolus rebutted the presumption of government control. According to Aeolus, Commerce failed to base its separate rate denial on "on actual government control as opposed to mere potential to control." Aeolus's Comments 18–22. In support of this argument, Aeolus cites several decisions of this Court, *An Giang Fisheries Import & Export Joint Stock Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1350, 1359 (2018) ("*An Giang II*"), *An Giang Fisheries Import & Export Joint Stock Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1256, 1291–92 (2017) ("*An Giang I*"), and *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 38 CIT __, __, 28 F. Supp. 3d 1317, 1348–50 (2014). Aeolus's Comments 20–21. The court rejects this argument because the facts underlying these cases are not analogous to the record facts here.

In the *An Giang* cases, the government-controlled entity that was the largest, but still minority, shareholder did not have "the authority to appoint Directors without the approval of 65% of the General Meeting of Shareholders." *An Giang I*, 41 CIT at __, 203 F. Supp. 3d at 1290. Ultimately, concluding that the respondent had "not demonstrated how the protective rights available in the 2012 Articles of Association could have been exerted during the first 61 days of the POR, when the 2006 Articles of Association remained in effect," this Court held that the respondent failed to rebut the presumption of government control, concluding that "[a]s a result, Commerce's determination that there existed the potential for actual control by the minority government shareholder during the POR was reasonable." *An Giang II*, 42 CIT at __, 284 F. Supp. 3d at 1364.

*Jiangsu Jiasheng Photovoltaic Tech. Co.* is also inapposite, having turned on an issue not presented by this case. A domestic producer contested the Department's granting separate rate status to respondents "whose senior managers and/or board directors held membership or positions in certain state-owned enterprises or government entities." *Jiangsu Jiasheng Photovoltaic Tech. Co.*, 38 CIT at __, 28 F. Supp. 3d at 1348. Commerce found that the respondents had satisfied all four prongs of the Department's *de facto* test, reasoning that the "record does not show that the membership or position of senior managers or board directors . . . resulted in a lack of autonomy on the part of the respondent[s] to set prices, negotiate and sign agreements, *select management*, or decide how to dispose of profits or financing of losses." *Id*., 38 CIT at __, 28 F. Supp. 3d at 1349 (quoting the Department's *Issues & Decision Memorandum*) (emphasis added). This Court sustained the Department's determinations that the respondents established *de facto* independence from government control.

Aeolus argues, also, that the AoA and various provisions of Chinese law ensured "that the process was democratic" and subject to "myriad protections." Aeolus's Comments 25. Aeolus surmises that "[r]ather than indicate impropriety, the board election reveals that Aeolus is an ordinary publicly listed company operating transparently through normal procedures, subject to legal restrictions." *Id*. Aeolus adds that the AoA precludes ChinaChem's domination of the nomination of board members by providing, for example, that all board members "must be re-elected to retain their positions" and that non-independent directors may be nominated by multiple shareholders. *Id*. at 26. These arguments also fail to persuade the court. In denying separate rate status to Aeolus, Commerce did not rely upon a finding that Aeolus's governance procedures were other than transparent and democratic, or that non-government shareholders were barred from participating in those procedures, including procedures for nominating board members. The Department's conclusions instead reflected record data on shareholder voting, which supported a finding that a government-owned shareholder had the ability to control board membership through its predominance in the voting process, and the finding that the board controlled the selection of senior management. That a publicly-held company is governed by transparent and democratic procedures, including procedures for electing board members open to all shareholders, does not suffice to demonstrate autonomy from government control of decisions on the selection of management where, as here, a government entity was the dominant shareholder in the election of board members.

Aeolus argues that "[t]he Rectification Report does not prove government control." *Id*. at 27. That may be true, but the salient point is that the information concerning the Rectification Report that Aeolus placed on the record does not suffice to establish that Aeolus was independent from government control in the selection of management during the POR. In the Second Remand Redetermination, Commerce stated that it "interpreted the Rectification Report in context and concluded that the corrective actions outlined in the Rectification Report did not prevent ChinaChem's control of the board election process or establish Aeolus's independence from government control." *Second Remand Redetermination* at 56 (citing *First Remand Redetermination* at 11).

As the court noted in *Guizhou I*, Aeolus placed on the record a translation of the Rectification Report containing the statement, "'ChinaChem fully respects the independence of a listed company and has never inquired about financial information of the Company.'" *Guizhou I*, 43 CIT at __, 389 F. Supp. 3d at 1358 n.9 (quoting *Rectification Report Letter* at Ex. 1A). The document further stated:

> Regarding the Company's investment, key projects, and tender process being reviewed and approved by ChinaChem. ChinaChem and China National Tire & Rubber Corp. will strictly comply with the provisions of the *Company Law, Code of Corporate Governance for Listed Companies* and other relevant law and regulations, exert their investors' rights, fully respect the independence of a listed company, and let the Company's shareholders' meeting, board of directors and the management team perform their internal approvals on investments, key projects, and tender process based on their respective obligations, authority and rules of procedure.

*Id*. Aeolus argued that "as of the publication of the Rectification Report (i.e., before the POR), 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." *Id*., 43 CIT at __, 389 F. Supp. 3d at 1358 (citing *Rectification Report Letter* at Ex. 1A).

The Rectification Report, while constituting evidence that certain safeguards were implemented prior to the POR to ensure Aeolus's independence from government control in certain particular respects identified therein, is not evidence refuting a finding that ChinaChem, through its wholly-owned subsidiary China Chemical Rubber Co., Ltd., had the ability to control the election of directors during the POR, by which time the Rectification Report, according to Aeolus, had

been implemented. While containing the general assertion that ChinaChem and China National Tire & Rubber Corp. will "fully respect the independence" of Aeolus, it is in the context of company governance by the "board of directors and the management team." *Rectification Report Letter* at 3–4, Ex. 1A. The evidence Aeolus put on the record pertaining to the Rectification Report does not demonstrate that, after implementation, ChinaChem, through China National Tire & Rubber Corp., no longer was able to exert effective control over the election of directors or that the board, as constituted following board elections, was divested of the power to select senior management.

In summary, substantial evidence supported the findings by Commerce that ChinaChem, through its 100% ownership of China Chemical Rubber Co., Ltd., had the ability to control the selection of board members and that the board selected senior management of the company. Commerce, therefore, permissibly determined that Aeolus had not demonstrated autonomy from the government in making decisions regarding the selection of management and, under the Department's methodology, failed to rebut a presumption of government control over its export activities.

### 3. Commerce Permissibly Found that GTC Did Not Establish Independence from Government Control in the Selection of Company Management and in the Distribution of Profits

The Second Remand Redetermination, like the First Remand Redetermination, concluded that GTC failed to rebut the presumption of government control because it failed to establish independence from government control with respect to the third prong, i.e., autonomy from the government in making decisions regarding the selection of management. Among the Department's principal findings was a finding that "GIIG effectively selected GTC's board," based on evidence of GIIG's percentage of the total shares present at a meeting in December 2012 that elected the board, which remained in place during the POR. *Second Remand Redetermination* at 45–46 (stating the actual percentage, for which proprietary treatment is claimed).

Commerce also found that the company's articles of association provided that shareholders holding individually or jointly ten percent of the total shares have the right to convene shareholder meetings and that no individual shareholder other than GIIG met that requirement, the second-and third-largest shareholders having owned 9.97 and 7.74 percent of the total shares, respectively. *Id*. at 49.

Commerce found, further, that the board selected the company's management and also, with respect to the fourth prong of the De-

partment's test, influenced the company's decisions on the distribution of profits. Commerce found that after GIIG's preferred proposals on profit distribution and on the selection of managers failed at a shareholder meeting in May 2015, GIIG called another meeting, held in July 2015, at which GIIG's preferred proposals were adopted. *Id*. at 43, 48–49.

In its comments on the Second Remand Redetermination, GTC argued that Commerce overlooked the evidence that shareholders were not involved in the nomination of board members and the evidence that the election of the board "complied with all legal requirements proscribed by GTC's AoA, the PRC Law, and the Code for Listed Companies—including protections against domination by any one shareholder." GTC's Comments 23–24. GTC added that "[r]ather than indicate impropriety, the 2012 Meeting reveals GTC acting as an ordinary publicly listed company operating transparently and democratically through normal procedures, subject to legal restrictions." *Id.* at 24. GTC argued that even assuming, *arguendo*, that GIIG selected GTC's Board, the "Board and management operate the company independently from shareholders including GIIG." *Id*. GTC pointed to various provisions of its articles of association that limit the control that GIIG may exert, including provisions limiting GIIG from nominating more than one-third of the board and providing for cumulative voting. *Id*. at 28.

GTC contests as unwarranted the Department's inference that a government-owned shareholder may exert control over a company's business operations where, as here, that shareholder controls the composition of the board of directors, as evidenced by its percentage of the total shares present at the meeting that elected the board, and where, as here, the board selects senior management. But as discussed above, the court must afford Commerce broad discretion to fashion the criteria by which it will determine whether a respondent has rebutted the presumption of government control over its business operations, including its export functions. Commerce based its denial of separate rate status on what it determined to be GTC's failure to demonstrate independence in the selection of management and the distribution of profits. It did so based on findings, supported by record evidence, that GIIG had the ability to control the election of board members and influence the distribution of the company's profits. Commerce did not base its determination on the company's noncompliance with the articles of association or applicable Chinese law.

In summary, the court sustains the Department's decision to deny separate rate status to GTC, based on the findings and reasoning set forth in the Second Remand Redetermination.

## III. CONCLUSION

Commerce applied a permissible methodology and reached findings supported by substantial evidence in determining that Aeolus and GTC did not qualify for separate rate status. Therefore, the court will enter judgment sustaining the Second Remand Redetermination.

Dated: May 18, 2023
New York, New York

*/s/ Timothy C. Stanceu*
TIMOTHY C. STANCEU, JUDGE

Slip Op. 23–80

GUIZHOU TYRE CO., LTD. AND GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 18–00099

[Sustaining an agency decision responding to court order in an action contesting the results of an administrative review of an antidumping duty order on off-the-road tires from the People's Republic of China]

Dated: May 22, 2023

*Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd., Guizhou Tyre Import and Export Co., Ltd., and GTC North America, Inc. With him on the briefs were *James C. Beaty* and *James P. Durling*.

*Richard P. Ferrin*, Faegre Drinker Biddle & Reath LLP, of Washington, D.C., for plaintiff Valmont Industries, Inc. With him on the brief was *Douglas J. Heffner*.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne D. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the briefs was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

## OPINION

**Stanceu, Judge:**

In this litigation, plaintiffs contested an administrative determination (the "Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in an antidumping duty proceeding. Before the court is the decision (the "Remand Redetermination") Commerce submitted to the court in response to the court's opinion and order in *Guizhou Tyre Co. v. United States*, 44 CIT __, 469 F. Supp. 3d 1338 (2020) ("*Guizhou I*"). *Redetermination Pursuant to Ct. Remand Order in Guizhou Tyre Co., Ltd. v. United States, Consol. Ct. No. 18–00099* (Jan. 6, 2021), ECF Nos. 56 (Conf.), 57 (Public) ("*Remand Redetermination*"). The court sustains the Remand Redetermination.

## I. BACKGROUND

Background on this case is presented in the court's prior opinion and is summarized and supplemented herein. *See Guizhou I*, 44 CIT at __, 469 F. Supp. 3d at 1340–43.

The determination contested in this action concluded the eighth periodic administrative review ("eighth review") of an antidumping duty ("AD") order (the "Order") on certain off-the-road ("OTR") tires

from the People's Republic of China ("China" or the "PRC"). *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2015–2016*, 83 Fed. Reg. 16,829 (Int'l Trade Admin. Apr. 17, 2018) ("*Final Results*"). Commerce incorporated by reference into the Final Results an "Issues and Decision Memorandum" as an explanatory document. *Issues and Decision Memorandum for the Antidumping Duty Administrative Review and New Shipper Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2015–2016* (Int'l Trade Admin. Apr. 11, 2018) (P.R. Doc. 300) ("*Final I & D Mem.*").[1]

Guizhou Tyre Co., Ltd., a Chinese producer of OTR tires, and its wholly-owned subsidiary, Guizhou Tyre Import and Export Co., Ltd., are plaintiffs in this consolidated action. In this Opinion, the court refers to Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. collectively as "GTC." For the eighth review, Commerce decided to treat these two companies as a single entity (an "exporter-producer"), a decision not contested here. GTC North America, Inc., an importer of OTR tires exported by GTC and a wholly-owned affiliate of Guizhou Tyre Import and Export Co., Ltd., is also a plaintiff, as is Valmont Industries, Inc. ("Valmont"), an unaffiliated importer of tires produced by Guizhou Tyre Co., Ltd.

Commerce issued the Order in 2008. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Int'l Trade Admin. Sept. 4, 2008). Commerce initiated the eighth review in November 2016, covering entries of Chinese OTR tires made during the period of review ("POR") of September 1, 2015 through August 31, 2016. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 78,778, 78,783 (Int'l Trade Admin. Nov. 9, 2016). Commerce designated GTC as a "mandatory respondent," i.e., a respondent Commerce selected for individual examination in the eighth review. *Id*. Also selected as a mandatory respondent was Weihai Zhongwei Rubber Co., Ltd. ("Zhongwei"). *Id*.

In the Final Results, Commerce concluded that GTC and two other exporter-producers failed to demonstrate independence from the PRC government and, for that reason, assigned GTC and these other two companies an AD rate of 105.31%. *Final Results*, 83 Fed. Reg. at 16,831. This was the rate Commerce assigned to the "PRC-wide

[1] Citations to the Joint Appendix (Jan. 28, 2019), ECF Nos. 31 (Public), 32 (Conf.), are cited as "P.R. Doc. __" for references to the public version and "C.R. Doc. __" for references to the confidential version.

entity" (or "China-wide entity"), which Commerce designated as a single entity comprised of those Chinese exporters of OTR tires that failed to rebut the Department's presumption of control by the PRC government. Under the Department's practice, such companies are ineligible to receive a "separate rate," i.e., a rate separate from the rate Commerce assigns to the PRC-wide entity. *Id*. at 16,830–31.

Concluding that Zhongwei had rebutted its presumption of government control, Commerce assigned Zhongwei an individually determined weighted average dumping margin of 11.87%. *Id.* at 16,830. Based on the margin it assigned to Zhongwei, Commerce assigned a rate of 11.87% to two respondents it also found to have rebutted the presumption of government control but did not select for individual examination in the review, Qingdao Qihang Tyre Co., Ltd. and Shandong Zhentai Group Co., Ltd. *Id*.

In contesting the Final Results, plaintiffs moved for judgment on the agency record. Mot. for J. on the Agency R. & Br. of Pls. Guizhou Tyre Co. Ltd., Guizhou Tyre Import and Export Co., Ltd. and GTC North America, Inc. in Supp. of Mot. for J. on the Agency R. (Sept. 17, 2018), ECF Nos. 22 (Conf.), 23 (Public) ("GTC's Br."); Mot. of Consol. Pl. Valmont Indus., Inc. for J. on the Agency R. under Rule 56.2 (Sept. 17, 2018), ECF No. 24 (adopting in full the arguments in GTC's Br.).

Following two requests by defendant for remands to allow Commerce to address certain issues raised by plaintiffs' claims, and after oral argument, the court issued *Guizhou I*, remanding the Final Results to Commerce for reconsideration. 44 CIT at __, 469 F. Supp. 3d at 1358–59. In response, Commerce, on January 6, 2021, filed the Remand Redetermination, in which it made no change to the 105.31% rate it assigned to GTC in the Final Results but changed the rationale for its decision. *Remand Redetermination* at 31. GTC and its affiliated importer filed a comment submission in opposition. Comments on Final Remand Redetermination Results Pursuant to Ct. Remand (Feb. 5, 2021), ECF Nos. 62 (Conf.), 63 (Public) ("GTC's Comments"). Valmont did not comment on the Remand Redetermination. Defendant responded to the comments, arguing that the Remand Redetermination should be sustained. Def.'s Resp. to Comments on Remand Results (Mar. 4, 2021), ECF Nos. 66 (Conf.), 67 (Public).

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of

1930, *as amended*, 19 U.S.C. § 1516a (the "Tariff Act"), including an action contesting a final determination that Commerce issues to conclude an administrative review of an antidumping duty order.[2]

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

### B. Plaintiffs' Claims Contesting the Final Results

Plaintiffs' challenge to the Final Results involved four claims, which are summarized below.

#### 1. Plaintiffs' Challenge to the Legal Basis for Assigning a Rate to the PRC-Wide Entity

Plaintiffs challenged the practice Commerce applies when the subject merchandise is exported from a non-market economy ("NME") country, such as China. As the court in *Guizhou I* described the first claim, "[p]laintiffs, in effect, challenge the legal basis for the Department's practice of determining and assigning a rate for the PRC-wide entity as applied in the eighth review." 44 CIT at __, 469 F. Supp. 3d at 1344. Plaintiffs relied on Section 735(c)(1)(B)(i) of the Tariff Act, 19 U.S.C. § 1673d(c)(1)(B)(i), in arguing that the Tariff Act "does not empower Commerce to write a whole new type of AD margin from scratch for non-market economies." *Id.* (citation omitted). Plaintiffs maintain that "in an antidumping duty proceeding (as opposed, specifically, to a countervailing duty proceeding), the statute confines Commerce to assigning respondents either an individually determined margin or an 'all-others' rate, and that the rate Commerce determined for the PRC-wide entity and assigned to GTC falls into neither of these categories." *Id*. (citation omitted).

Defendant asked for a remand "for Commerce to reconsider its explanation of its statutory authority to apply NME-wide rates in light of this Court's findings in *Thuan An*." *Id*., 44 CIT at __, 469 F. Supp. 3d at 1347 (citing *Thuan An Production Trading & Service Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1340 (2018) ("*Thuan An*

[2] All citations to the United States Code herein and all citations to the Code of Federal Regulations herein are to the 2018 editions.

*I*")). In *Thuan An I*, this Court remanded to Commerce the final results of an administrative review of an antidumping duty order on certain frozen fish fillets from Vietnam, an NME country. The court in *Guizhou I* noted that this Court, in *Thuan An Production Trading & Service Co. v. United States*, 43 CIT __, 396 F. Supp. 3d 1310 (2019) ("*Thuan An II*")), "sustained the Department's remand redetermination, which offered a new explanation for the Department's decision." *Guizhou I*, 44 CIT at __, 469 F. Supp. 3d at 1348 (citing *Thuan An II*, 43 CIT at __, 396 F. Supp. 3d at 1319).

### 2. Plaintiffs' Claim that GTC Was Entitled to a Rate Based on Its Own Sales

Plaintiffs' second claim was that even were Commerce presumed to have authority to invent a new type of rate for the PRC-wide entity, it still would be unlawful for Commerce to carry over the 105.31% rate from prior reviews (which was derived in part from "facts otherwise available" and an "adverse inference" (collectively, "adverse facts available" or "AFA"), determined under Section 776 of the Tariff Act, 19 U.S.C. § 1677e), and apply it to GTC, a fully cooperative respondent. "They argue that Commerce, even under such a presumption, would have been required to calculate a new rate for the PRC-wide entity in the eighth review and was required to do so using GTC-specific data." *Guizhou I*, 44 CIT at __, 469 F. Supp. 3d at 1344 (citation omitted).

In support of their second claim, plaintiffs "take issue with the Department's rationale for not reviewing the PRC-wide entity, which was that no review of the PRC-wide entity was requested." *Id*. (citation omitted). For the Final Results, Commerce based its justification for assigning GTC the PRC-wide rate partly on a conclusion that no party requested that Commerce review the PRC-wide entity when conducting the eighth review of the Order. *Id*., 44 CIT at __, 469 F. Supp. 3d at 1355 (citing *Final I&D Mem*. at 22).

### 3. Plaintiffs' Challenge to the Determination that GTC Was Subject to Government Control

Plaintiffs' third claim is that "Commerce erred in concluding that GTC had not put forth information establishing independence from the Chinese government and, specifically, in determining that the government of the PRC controls GTC's export activities." *Id*., 44 CIT at __, 469 F. Supp. 3d at 1344 (citation omitted). "They argue that in making these determinations, Commerce did not follow the correct criteria . . . and reached a determination unsupported by substantial evidence on the record of the review." *Id*. (citations omitted).

#### 4. Plaintiffs' Challenge to the Calculation of the 105.31% Margin Assigned to GTC

Plaintiffs' final claim is that in assigning GTC the rate of 105.31%, Commerce "unlawfully refused to make adjustments" for domestic and export subsidies found in the parallel administrative review of a countervailing duty order on off-the-road tires from the PRC. *Id*., 44 CIT at __, 469 F. Supp. 3d at 1344–45 (citation omitted).

### C. The Court's Opinion and Order in *Guizhou I*

The court in *Guizhou I* addressed the first three of plaintiffs' claims, remanding the Final Results to Commerce with respect to them and deferred any ruling on the remaining claim. *Id*., 44 CIT at __, 469 F. Supp. 3d at 1358 ("The court considers it premature to address this claim at this time because the issue raised by this claim may be mooted by the remand redetermination the court is ordering.").

Addressing plaintiffs' first two claims, and the government's request for a remand as to those claims, the court in *Guizhou I* directed Commerce to reconsider its decision not to review, and therefore not individually examine, GTC and on that basis decline to assign GTC a margin based on its own sales. *Id*. The court cited the "general rule" in Section 777A(c)(1) of the Tariff Act, 19 U.S.C. § 1677f-1(c)(1), that Commerce must determine an individual weighted average dumping margin for each known exporter and producer of the subject merchandise. *Id*., 44 CIT at __, 469 F. Supp. 3d at 1349–50. The court also mentioned that the statutory exception to that rule, 19 U.S.C. § 1677f-1(c)(2), which allows Commerce to determine individual margins for fewer than all known exporters and producers due to the "large number" of such exporters and producers, did not apply here, Commerce itself having selected GTC as one of the two mandatory respondents in the review. *Id*. The court noted that in the eighth review Commerce concluded that GTC was not under review, reasoning that it was part of the PRC-wide entity, for which, Commerce concluded, no review had been requested. *Id*. The court in *Guizhou I* stated that 19 U.S.C. § 1677f-1(c) does not authorize Commerce "to decline to *review*, as opposed to examine individually, a known exporter or producer" for which a review had been requested in a related section of the Tariff Act, 19 U.S.C. § 1675(a)(1). *Id*.

The court in *Guizhou I* distinguished plaintiffs' claim from the claim adjudicated in the *Thuan An* cases, explaining that the opinions in those cases "do not indicate that the plaintiff in that litigation contested the Department's conclusion that the plaintiff could have requested a review of the Vietnam-wide entity" and that "plaintiffs in this case argue that the Department's regulations did not permit

them to request a review of the PRC-wide entity." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1348 (citation omitted). Upon analyzing the applicable regulation, 19 C.F.R. § 351.213(b), the court in *Guizhou I* agreed with plaintiffs, concluding that the regulation did not include parties in GTC's position among those who could request a review of a party other than itself. *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1355. Pointing to § 351.213(b)(2) in particular, the court concluded that GTC "could not invoke this provision to request a review of unidentified members of the China-wide entity and GTC, not being the China-wide entity itself, could not invoke this provision for the entire entity." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1356 (footnote omitted).

Based on the plain meaning of 19 C.F.R. § 351.213(b), the court in *Guizhou I* ruled that "in the eighth review it was impermissible for Commerce to assign the PRC-wide rate to GTC on the proffered justification that parties (including these plaintiffs) had a right to submit a request for a review of the China-wide entity but failed to do so." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1358 (citations omitted). The court directed Commerce to address the question of "whether, in the circumstances of the eighth review, Commerce was (as plaintiffs argue) required to review GTC and assign GTC, as a mandatory respondent, GTC's own individual dumping margin, regardless of any treatment Commerce accorded to what it regarded as the PRC-wide entity." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1348–49. The court in *Guizhou I* concluded that "[d]efendant has not responded to plaintiffs' claims in a way that demonstrates that Commerce lawfully could refuse to review GTC in the particular circumstances of the eighth review." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1358–59. The court added that "but because defendant has asked for a remand related to this issue, the court will reserve any decision on this issue until it is presented with the Department's position and its reasoning therefor." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1359.

In *Guizhou I*, the court remanded the agency decision contested in plaintiffs' third claim—i.e., that GTC failed to rebut the presumption of government control—in response to defendants' request. Commerce supported that decision, in part, with a finding that GTC elected members of its board of directors through a shareholder's meeting that was not available to all shareholders, a finding GTC disputed and for which defendant requested that Commerce be given an opportunity to reconsider. *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1346. The court directed Commerce to reconsider in the entirety the determination that GTC had failed to rebut the presumption of government control, directing that "[i]f Commerce determines that GTC

has rebutted its presumption of government control, it must assign GTC, which Commerce selected as a mandatory respondent, an individual weighted average dumping margin." *Id.*, 44 CIT at __, 469 F. Supp. 3d at 1347.

### D. The Department's Remand Redetermination in Response to *Guizhou I*

In the Remand Redetermination, Commerce made no change to the 105.31% rate to be applied to GTC's subject merchandise but put forth a different rationale for its decision not to assign to GTC an individual weighted average dumping margin. Reversing its previous position that GTC did not qualify for a review, Commerce now asserted that in fact it had conducted a review of GTC, describing as a "review" its determining that GTC had failed to rebut the presumption of government control, but maintained its earlier position that the PRC-wide entity was not under review. *Remand Redetermination* at 15–16. Also, as discussed below, Commerce now agreed with plaintiffs, and with the court's holding in *Guizhou I*, that individual respondents such as GTC were precluded by the Department's regulation from requesting a review of the PRC-wide entity. *Id*. at 22.

#### 1. The Finding of Government Control of GTC's Export Functions

The Remand Redetermination stated that in determining whether a respondent has rebutted its presumption of government control over its export functions, "Commerce typically considers four factors," as follows:

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 disposition of profits or financing of losses.

*Id.* at 4–5 n.17 (citations omitted). Commerce took the position that all four factors must be met in order for a respondent to rebut the Department's presumption. *Id*. at 5 n.18 (citation omitted). As discussed below, Commerce concluded that the third factor was not satisfied and, with respect to the fourth factor, also found that GTC did not have independent control of the distribution of profits.

Commerce found "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." *Id.* at 4–5 (footnotes omitted). Commerce cited record evidence that the Guiyang State-owned Assets Supervision and Administration Commission ("Guiyang SASAC"), through its 100-percent-owned affiliate, Guiyang Industry Investment Group Co., Ltd. ("GIIG"), held 25.33% of GTC's shares during the POR. *Id.* at 3–5 (citing *GTC's First Supplemental Section A Response* at Ex. SA-3 (June 16, 2017) (C.R. Docs. 240–248) ("*SAQR*")). Commerce found that "GIIG is 100 percent owned and supervised by Guiyang SASAC" and inferred that "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." *Id*. at 5 (citing *Section A Questionnaire Response* at 3–4 & Ex. A-1 (Feb. 7, 2017) (P.R. Docs. 57, 59–61, 63–66) (C.R. Docs. 11, 21, 22–33, 37–38) ("*AQR*")). Commerce found, further, that the next nine shareholders held only a combined 4.7% share, *id*. at 3 (citing *SAQR* at Ex. SA-3), and that no individual shareholder other than GIIG held even a one percent ownership share, *id*. at 6 (citing *AQR* at Ex. A-1).

Commerce considered the position of GIIG within GTC's ownership structure to be significant in light of GTC's Articles of Association ("AoAs"), according to which, Commerce found, "GIIG is able to exert control through shareholders' meetings, the selection of directors, and in turn, the selection of the chairperson." *Id*. Commerce further found that "because GIIG is the only shareholder with more than three percent of shares, GIIG is the only shareholder with the requisite shares to individually put forward proposals for consideration at shareholders' meetings, pursuant to Article 54 of GTC's AoA's." *Id*. (citing *AQR* at Ex. A-2). Commerce noted that Article 83 of the AoAs "states that the list of candidates for directors and supervisors shall be based upon proposal/motion at the shareholders' general meeting." *Id*. (citing *AQR* at Ex. A-2). Commerce also found that the AoAs provide that "the board of directors shall appoint or remove GTC's general manager and four deputy general managers." *Id*. at 7–8 (citing *AQR* at Ex. A-2). Therefore, GTC, according to Commerce, did not have autonomy in the selection of management due to the control of the board of directors over senior management selection. *Id*. at 8–9. Commerce also found that the AoAs, in Article 161 (IV), allowed GIIG to affect the company's distribution of profits. *Id*. at 8 (citing *AQR* at Ex. A-2). In summary, the Department's principal findings supporting the conclusion that the presumption was unrebutted were that GIIG effectively had control over the composition of GTC's board of direc-

tors and the selection of its chairperson and that the board, having the authority to appoint or remove GTC's general manager and four deputy general managers, also could control the selection of management. *Id.* at 9 ("GTC's board is responsible for the selection of senior management, which controls the operations of the company including the company's export activity.").

As they did in contesting the Final Results, GTC and its affiliated importer raise a general objection to the methodology Commerce used in the Remand Redetermination, which did not ground the determination in all four of the factors Commerce identified for deciding whether a respondent rebutted the presumption of *de facto* government control of its export functions. *See* GTC's Comments 6–8. These plaintiffs do not convince the court that Commerce acted impermissibly in requiring a respondent to demonstrate independence as to all four of its factors and, in this instance, in basing its decision on only two of them.

The Department's use of its rebuttable presumption of *de facto* government control by the Chinese government does not effectuate any specific provision of the Tariff Act or the Department's regulations. *See*, *e.g.*, *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 47 CIT __, __, 617 F. Supp. 3d 1343, 1356 (2023). As a result, there is no statutory language, legislative history, or regulatory language or preamble to serve as guidance under which the court may disallow the Department's methodology as *ultra vires* or unreasonable *per se*. At the same time, the court is guided by binding precedent of the Court of Appeals for the Federal Circuit ("Court of Appeals"), which repeatedly has affirmed the Department's authority to apply a rebuttable presumption of government control, even to a cooperative mandatory respondent such as GTC. *China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028, 1039 (Fed. Cir. 2021) ("*CMA*"); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1313 (Fed. Cir. 2017) ("*Diamond Sawblades*"). Commerce, therefore, must be allowed broad discretion in selecting the methodology by which it interprets and effectuates its presumption of government control over export functions. The breadth of this discretion requires the court to reject these plaintiffs' general objection to the methodology Commerce applied in the Remand Redetermination, which placed substantial weight on the ability of a single, government-owned shareholder to control the selection of board members and company management.

GTC and its importer also argue that Chinese domestic law limits "the rights of shareholders with a majority or controlling interest" and "grant[s] certain rights of supervision and control to minority shareholders." GTC's Comments 4–5 (citation omitted). Responding

to findings by Commerce that GIIG was able to dominate GTC's decision-making process and appoint its preferred members to GTC's board, they submit that "Commerce fails . . . to confront important contrary record evidence or show how the events it identifies lead to the conclusion that GIIG is acting in a manner that would cause GTC to export subject merchandise to the United States at distorted prices." *Id*. at 5.

They argue, further, that Commerce ignored evidence that GIIG's level of control over the selection of board members "did not result in control of management." *Id*. at 7. They point to evidence of management autonomy from the board of directors in making certain types of ordinary business decisions (for which they claim confidentiality as to the specific content).[3] *Id*. (citing *AQR* at Ex. A-9). In so doing, GTC and its importer direct their argument to the question of control over ordinary business decisions of a type that would be expected to be the province of management, not the board of directors. GTC and its importer validly may object that Commerce did not cite record evidence that GIIG or the board exerted effective control over such day-to-day decisions, but that objection is insufficient for the court to disallow the Department's ultimate conclusion that GTC did not rebut the presumption of government control of the company's export functions. An agency may draw reasonable inferences from the record evidence considered as a whole. *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 845 (Fed. Cir. 2020) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) for the principle that "substantial evidence includes 'reasonable inferences from the record'"). In this case, the record evidence pertaining to the ownership structure, where no shareholder other than GIIG held even a one percent share, and to the Articles of Association, supported a finding that a governmental entity, alone among all shareholders, had the power to control the selection of the board and the selection of senior management.[4]

From the record evidence and the findings of fact it supported, Commerce reasonably could infer that GTC's management would be influenced by the governmental entity in their day-to-day business decisions, having owed their appointment to, and being subject to removal by, the board of directors. In short, Commerce was permitted

[3] The court has not included in this Opinion the specific record information concerning those types of decisions but notes that the claim of confidentiality appears to be unsubstantiated; i.e., it does not appear that public disclosure could result in harm to any party's competitive position or otherwise be injurious to its business interests.

[4] The court does not hold or imply that a 25.33% ownership share by a government-owned shareholder that is the largest shareholder is by itself sufficient to support a finding of government control over selection of management.

to draw the inference from ownership structure and the AoAs that GTC's management, while having some autonomy over the day-to-day operations, had not been demonstrated to be independent of the overall influence of the company's largest, government-owned, shareholder. Based on its methodology, according to which GTC was required to satisfy all four factors of the Department's test, and on the record evidence, Commerce permissibly determined that GTC failed to demonstrate independence from "*de facto* government control of its export functions." *Remand Redetermination* at 4–5 (citation omitted).

**2. Authority to Assign the PRC-Wide Rate to GTC**

The Remand Redetermination responded to the directive in *Guizhou I* that Commerce, even if concluding that GTC failed to establish independence from government control, decide whether the Tariff Act required the assigning of an individual weighted average dumping margin to GTC in the circumstances of the eighth review. Commerce decided, once again, to assign GTC the PRC-wide rate of 105.31% instead of a rate based on an examination of GTC's own sales. In doing so, Commerce employed different reasoning than it put forth in support of the Final Results. As discussed above, the court in *Guizhou I* rejected one of the reasons Commerce offered for why it was permissible to assign GTC the China-wide rate of 105.31%, which was that no party requested a review of the China-wide entity. *Guizhou I*, 44 CIT at __, 469 F. Supp. 3d at 1355. The court concluded in *Guizhou I* that the Department's regulation, 19 C.F.R. § 351.213(b), did not allow GTC to do so. *Id*., 44 CIT at __, 469 F. Supp. 3d at 1356.

In the Remand Redetermination, Commerce agreed with the court's conclusion in *Guizhou I* that, according to 19 C.F.R. § 351.213(b), only a domestic interested party or the government of China, but not a foreign exporter/producer such as GTC, was eligible to request a review of the PRC-wide entity. *Remand Redetermination* at 22. The Remand Redetermination also states: "That Commerce's regulations do not provide exporters or producers with the ability to request a review of the NME-entity as a whole does not result in prejudice to the exporters or producers." *Id*. Commerce reasoned that GTC was not prejudiced because it was, in fact, "reviewed." *Id*. ("[W]e conducted a review of GTC, and as part of that review we determined GTC to be a part of the China-wide entity, which resulted in our assigning GTC the China-wide entity rate.").

The court disagrees with the Department's conclusion that GTC was not prejudiced by its inability to request a review of the PRC-wide entity. Under the Department's methodology, a review of the PRC-wide entity potentially would have allowed GTC to obtain a rate

different than the 105.31% rate it was assigned, based on record data in the eighth review, including its own data.

The court also is unconvinced by the Department's reasoning that GTC was not prejudiced because it was, in fact, reviewed. A "review" conducted under Section 751 of the Tariff Act, 19 U.S.C. § 1675(a), is not the statutory equivalent of an individual examination conducted according to Section 777A(c)(1) of the Tariff Act, 19 U.S.C. § 1677f-1(c)(1). Thus, under the Tariff Act, a "reviewed" respondent is not necessarily an individually examined respondent. Commerce neither allowed GTC to obtain a review based on an individual examination of its own sales nor allowed GTC to request a review based on an examination of all the sales made by the PRC-wide entity, which Commerce treated as a single exporter, yet one that was beyond the scope of any review request that GTC could submit under § 1675(a).[5]

Even though GTC was prejudiced by its inability to request a review of the PRC-wide entity, the Department's statement to the contrary does not suffice to require the court to issue a second remand order to Commerce. Guizhou and its importer make several arguments in objecting to the assignment of the PRC-wide rate to GTC, but they present all of these arguments as grounds in support of the same claim: that Commerce was required by statute to treat GTC as a separate rate respondent, i.e., one that must be assigned either an individual dumping margin or an all-others rate. *See* GTC's Comments 15 (arguing that GTC was "under review and thus eligible for either an individually examined rate or an all-others rate"). They do not claim, in the alternative, that the court should issue a second remand order directing Commerce to review the PRC-wide entity. Nor do they claim that the Department's regulation, 19 C.F.R. § 351.213(b), should be declared invalid as contrary to the Tariff Act, with the result that the court now must order Commerce to place the PRC-wide entity under review. As the court discusses below, binding precedent of the Court of Appeals forecloses relief on these plaintiffs' claim that GTC, even if failing to rebut the presumption of government control, is entitled to a separate rate.

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[5] In *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 47 CIT __, 617 F. Supp. 3d 1343 (2023) ("*Jilin*"), the Court of International Trade recently rejected a rationale by Commerce that was similar in certain respects to the one Commerce offered in decision at issue, *Redetermination Pursuant to Ct. Remand Order in Guizhou Tyre Co., Ltd. v. United States, Consol. Ct. No. 18–00099* at 17 (Jan. 6, 2021), ECF Nos. 56 (Conf.), 57 (Public). As stated in *Jilin*:

> While Commerce may apply facts available or adverse facts available to a mandatory respondent when certain conditions are met (*e.g.*, to fill gaps in the record of necessary information), the statute does not indicate that Commerce can simply assign a rate to a mandatory respondent based on its relationship to an NME government.

*Id*., 47 CIT at __, 617 F. Supp. 3d at 1353 (citing 19 U.S.C. § 1677e).

In its comments opposing the Remand Redetermination, GTC and its importer assert the "absence of a statutory basis for applying a PRC-Wide rate to a cooperating company under review." *Id*. at 9. They present two arguments in support of this position.

Plaintiffs argue, first, that the PRC-wide rate could not be applied lawfully to GTC because it is neither an "all-others" rate as provided for in 19 U.S.C. § 1673d(c)(1)(B)(i)(II), *id*. at 11, nor an "individually investigated" rate as provided for in 19 U.S.C. § 1673d(c)(1)(B)(i)(I), Commerce not having individually examined the PRC-wide entity in the eighth review, *id*. at 10. They maintain that Commerce impermissibly confined its procedure to "carrying over a rate from a prior period with different respondents, different market conditions, and different volumes and prices of sales of subject merchandise." *Id*.

The court is not persuaded by this first argument because the Court of Appeals rejected essentially the same argument in *CMA*, 1 F.4th at 1037, a decision issued after Commerce filed the Remand Redetermination in this proceeding and after the submission of comments thereon. *CMA* arose from the fifth review of the same antidumping duty order that was at issue in this proceeding; in fact, it was in the fifth review that Commerce originally determined the 105.31% rate for the PRC-wide entity, which Commerce continued to carry forward and assigned to GTC in the eighth review. The Court of Appeals noted that Commerce based its initial PRC-wide rate in the original investigation on facts otherwise available and an adverse inference, on the ground that only thirty of ninety-four identified Chinese exporters of the subject merchandise responded to the Department's quantity and value questionnaire. *CMA*, 1 F.4th at 1037 ("The PRC-wide entity rate resulting from Commerce's initial investigation constitutes an 'individually investigated' weighted average dumping margin within the meaning of § 1673d(c)(1)(B)(i)(I) because 'Commerce treats the companies comprising the China-wide entity as a single entity and investigated them as such in the original investigation.'" (quoting Appellant's Reply Br.)). Reasoning that no "additional investigation" by Commerce "into the country-wide entity is required in order to comport with the statute in carrying this investigated rate forward into later administrative review proceedings," *id*., the Court of Appeals concluded in *CMA* that "[w]e now confirm that the resulting country-wide NME entity rate may be an 'individually investigated' rate within the meaning of 19 U.S.C. § 1673d(c)(1)(B)(i)(I), which Commerce may determine using its ordinary techniques of investigation," *id*., 1 F.4th at 1039.

Two facts underlying the Department's assigning the PRC-wide rate to GTC in the eighth review and the Remand Redetermination

parallel those of *CMA*. Like GTC, the exporter in the antidumping review at issue in *CMA*, Double Coin Holdings Ltd. ("Double Coin"), fully cooperated in the administrative review; also, like GTC, Double Coin was selected by Commerce as a mandatory respondent. The Court of Appeals considered those two facts to be insufficient to qualify Double Coin for an individual weighted average dumping margin under 19 U.S.C. § 1677f-1(c)(2).

GTC and its importer base their second argument on the court's holding in *Guizhou I* that "it was impermissible for Commerce to assign the PRC-wide rate to GTC on the proffered justification that parties (including these plaintiffs) had a right to submit a request for a review of the China-wide entity but failed to do so." GTC's Comments 14 (quoting *Guizhou I*, 469 F. Supp. 3d at 1358). According to their argument, "[t]hat is, however, exactly what Commerce has offered this Court as its justification" in the Remand Redetermination. *Id*. at 15. In their view, "Commerce has failed to grapple with the essential question posed by it to this Court" and "[i]f GTC was under review and thus eligible for either an individually examined rate or an all-others rate it could not be assigned a rate that reflects a notional entity of which it was not a part and was not eligible to request a review of." *Id*. They maintain that "Commerce['s] remand results do nothing to resolve this discrepancy between the strictures of the statute and Commerce's practices regarding its implementation of the regulations." *Id*. In other words, they rely on their inability to request a review of the PRC-wide entity as one of the reasons why, in their view, the court now must order Commerce to treat GTC as a separate rate respondent, i.e., an exporter or producer that is "eligible for either an individually examined rate or an all-others rate." *Id*. The court must reject this argument.

The binding precedents of *CMA* and *Diamond Sawblades* preclude the court from ordering any remedy on these plaintiffs' claim that GTC, even if found not to have rebutted the presumption of government control, must be treated as a separate rate respondent. In *CMA*, the Court of Appeals stated that its prior precedents "uniformly sustained Commerce's recognition of an NME-wide entity as a *single exporter* for purposes of assigning an antidumping rate to the individual members of the entity." *CMA*, 1 F.4th at 1036–37 (citing *Michaels Stores, Inc. v. United States*, 766 F.3d 1388, 1390–91 (Fed. Cir. 2014)) (emphasis added). The necessary implication of the principle applied by the Court of Appeals is that an individual respondent such as GTC, even if a mandatory respondent, is not itself a "known exporter or producer" within the meaning of 19 U.S.C. § 1677f-1(c) unless it rebuts the presumption of government control. Under the

holdings in *CMA* and *Diamond Sawblades*, that is so even though the respondent is a "reviewed" exporter or producer for purposes of an administrative review of an antidumping duty order conducted under 19 U.S.C. § 1675(a) and 19 C.F.R. § 351.213(b)(2) (". . . an exporter or producer covered by an [antidumping duty] order . . . may request in writing that the Secretary [of Commerce] conduct an administrative review of only that person."). Thus, under the Department's methodology, the PRC-wide entity, and not GTC, is the actual "known exporter or producer," within the meaning of that term as used in 19 U.S.C. § 1677f-1(c), of the merchandise GTC exported to the United States during the POR. But in commenting on the Remand Redetermination, these plaintiffs, who claim that GTC must be treated as a separate rate respondent, do not seek a review of the PRC-wide entity. *See* GTC's Comments 15.

The court next considers whether Commerce is required by the circumstances of this case to assign a new rate for the PRC-wide entity that is based partly on the individual sales data of GTC. If so, the court would issue a second remand order directing Commerce to consider that question.

*CMA* and *Diamond Sawblades* held that Commerce acts within its broad discretion when it decides that a redetermined rate for a PRC-wide entity may be based in part on a pre-existing, AFA-based rate. *CMA*, 1 F.4th at 1038 (citing *Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343, 1356); *Diamond Sawblades*, 866 F.3d at 1314–15. Referring to its previous decision in *Diamond Sawblades*, the Court of Appeals stated in *CMA* that "[i]n that case, as in this case, Commerce did not review the composition of the PRC-wide entity, or data particular to the exports of members of the PRC-wide entity, but did review the PRC-wide rate." *CMA*, 1 F.4th at 1038 (citing *Diamond Sawblades*, 866 F.3d at 1309). Commerce reached an analogous result in the fifth review of the Order, which *CMA* affirmed.

Both *CMA* and *Diamond Sawblades* arose from the Department's assigning the mandatory respondent a new rate calculated for the PRC-wide entity by averaging the respondent's rate, determined in the review from the respondent's own data, with a rate for the PRC-wide entity that was carried forward from the prior review. *See CMA*, 1 F.4th at 1038 ("Commerce determined that the proper PRC-wide entity rate for the fifth annual review is a simple average of the carried-forward AFA-based PRC-wide rate of 210.48% and Double Coin's 0.14% investigated rate, for a PRC-wide rate 105.31%); *Diamond Sawblades*, 866 F.3d at 1309 (explaining that Commerce determined a new PRC-wide rate by averaging the carried-forward PRC-

wide rate of 164.09% with the calculated final margin for the respondent, 0.15%, to yield a new PRC-wide entity rate of 82.12%). In *Diamond Sawblades*, the Court of Appeals opined that "the fact of cooperation may help an entity in a NME country seek a reduction of the country-wide rate, as it did here, but it does not, without more, save it from that rate." *Diamond Sawblades*, 866 F.3d at 1315. Nevertheless, the court concludes that a second remand to direct Commerce to consider a redetermined rate for the PRC-wide entity is not warranted in this case, for two reasons.

First, plaintiffs waived the opportunity to challenge the Remand Redetermination on a claim that Commerce should have averaged an individually determined rate with the PRC-wide rate and applied the result to GTC. GTC and its importer filed comments on the Remand Redetermination on February 5, 2021, which, although occurring before the Court of Appeals decided *CMA* later that year, was after the August 7, 2017 date the Court of Appeals decided *Diamond Sawblades*. The *Diamond Sawblades* opinion placed them on notice that, while claiming that GTC must have its own individual margin, they also could have claimed in the alternative that any PRC-wide rate applied to GTC should have been derived through a methodology that reflected, in part, GTC's own data. As the *Diamond Sawblades* opinion explained, a cooperating respondent that is part of the country-wide entity, under the Department's methodology, could "seek a reduction of the country-wide rate." *Id*.

Instead, GTC and its importer made only two claims in their February 5, 2021 comment submission to the court: that GTC had rebutted the presumption of government control over its export functions, GTC's Comments 3–8, and that, regardless of whether it had done so, Commerce was prohibited by the Tariff Act from "applying a PRC-Wide rate to a cooperating company under review," *id.* at 9. Throughout the comment submission, these plaintiffs directed their arguments to a claim that GTC qualified for a separate rate. Nowhere does the submission claim in the alternative that even were Commerce presumed to have the authority to assign GTC a rate for the PRC-wide entity, Commerce first was required to recalculate the PRC-wide rate by averaging it with a rate based on GTC's sales. Any such argument is, therefore, waived.

Second, the court does not interpret the holding of *CMA* or of *Diamond Sawblades* to require the court, *sua sponte*, to remand a decision (such as the Remand Redetermination at issue here) to direct Commerce to consider averaging the carried-forward rate with an individually-determined rate before applying it to a respondent that

did not seek that remedy.[6] *CMA* and *Diamond Sawblades* hold that Commerce may assign the NME country-wide rate, rather than a separate rate, to a nonmarket economy country respondent, even a fully-cooperating mandatory respondent, that failed to rebut the presumption of government control. That is what Commerce did in the Remand Redetermination.[7]

### 3. Adjustment of the 105.31% Rate for Domestic and Export Subsidies

Plaintiffs claimed that Commerce was required by 19 U.S.C. § 1677f-1(f)(1) to make a countervailing duty "double counting" adjustment to the rate applied to GTC to account for domestic subsidies determined in parallel countervailing duty proceedings. GTC's Br. 54 (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 Fed. Reg. 16,055 (Int'l Trade Admin. Apr. 13, 2018) (revised by *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2015*, 83 Fed. Reg. 32,078 (Int'l Trade Admin. July 11, 2018)). They also claimed that Commerce failed to adjust the antidumping duty cash deposit rate for export subsidies, as required by 19 U.S.C. § 1677a(c)(1)(C). *Id*. For the Final Results, Commerce refused to make these adjustments, reasoning that "Commerce continues to find GTC to be ineligible for a separate rate for purposes of these final results and, thus, is treating GTC as

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[6] In neither of the cases did the Court of Appeals for the Federal Circuit ("Court of Appeals") decide the issue of whether the "simple average" method employed by Commerce to redetermine the PRC-wide rate was reasonable, as the parties in those cases did not raise that issue on appeal. *China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028, 1038 n.8 (Fed. Cir. 2021) ("*CMA*"); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1309 n.3 (Fed. Cir. 2017).

[7] In addition to *CMA*, another precedential decision of the Court of Appeals, *YC Rubber Co. (North America) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) ("*YC Rubber*"), was decided after the briefing on the Remand Redetermination was completed and potentially affects dumping margins in proceedings such as this one. In the review at issue here, Commerce assigned the rate of 11.87% to the reviewed, but unexamined, separate rate respondents even though it determined that rate based on the dumping margin of only one individually examined (and separate rate) respondent, Weihai Zhongwei Rubber Co., Ltd. That method was held to be impermissible in *YC Rubber*. But because the court is ruling in this case that Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. (collectively, "GTC") are ineligible to be assigned an individually-determined margin or a separate rate due to their failure to rebut the presumption of government control, these plaintiffs could not benefit from a redetermined rate for the unexamined separate rate respondents and, therefore, would lack standing to claim that the agency's failure to select GTC as an additional respondent for individual examination was unlawful under the holding of *YC Rubber*. Neither of the two unexamined separate rate respondents assigned the 11.87% rate, who potentially would have had standing to make such a claim, are plaintiffs in this case.

part of the China-wide entity." *Final I&D Mem*. at 24. Commerce concluded that "because the China-wide entity is not under review, and the China-wide rate currently in effect is not subject to change, no adjustments for domestic and export subsidies are appropriate." *Id*.

Commerce did not err in refusing to make an adjustment under 19 U.S.C. § 1677f-1(f)(1). That provision requires Commerce, in defined circumstances, to "reduce the antidumping duty by the amount of the increase in the weighted average dumping margin" that was caused by a countervailable domestic subsidy. 19 U.S.C. § 1677f-1(f)(1). Any adjustment is conditioned on the ability of Commerce to "reasonably estimate the extent to which the countervailable subsidy . . . in combination with the use of normal value determined pursuant to section 1677b(c) of this title, has increased the weighted average dumping margin for the class or kind of merchandise." *Id*. § 1677f-1(f)(1)(C).

The 105.31% rate is considered to be an individually investigated weighted average dumping margin according to the holding in *CMA*, 1 F.4th at 1037. Regardless, that rate is not individual to GTC but is the rate assigned to the PRC-wide entity, which was not under review, as Commerce recognized in denying the adjustment. Therefore, Commerce was not required to make any adjustment to that rate under 19 U.S.C. § 1677f-1(f)(1).

For the same reason, Commerce did not err in declining to make an adjustment for export subsidies according to 19 U.S.C. § 1677a(c)(1)(C). Under that provision, Commerce must increase the price used to establish export price or constructed export price by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy. Like an adjustment under 19 U.S.C. § 1677f-1(f)(1), this adjustment is made in determining a respondent's individual weighted average dumping margin. Commerce was not required to make this adjustment to the rate applied to the PRC-wide entity, which was not under review.

## III. CONCLUSION

For the reasons stated in the foregoing, the court concludes that Commerce permissibly determined in the Remand Redetermination that GTC did not rebut the Department's presumption of government control of its export functions and, therefore, did not qualify for a separate rate. The court concludes, further, that in the Remand Redetermination Commerce permissibly assigned to GTC the PRC-wide entity rate of 105.31%. For these reasons, the court will enter judgment sustaining the Remand Redetermination.

Dated: May 22, 2023
New York, New York

/*s*/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

Slip Op. 23–81

GUIZHOU TYRE CO., LTD. AND GUIZHOU TYRE IMPORT AND EXPORT CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 19–00031

[Sustaining a decision issued in response to court order in an action contesting final agency determination in an antidumping duty investigation of imports of certain truck and bus tires from the People's Republic of China.]

Dated: May 22, 2023

*Ned H. Marshak*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the briefs were *Jordan C. Kahn*, *Elaine F. Wang*, and *Brandon M. Petelin*.

*Daniel L. Porter,* Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for consolidated plaintiffs Shanghai Huayi Grp. Corp. Ltd., formerly known as Double Coin Holdings Ltd., and China Manufacturers Alliance LLC. With him on the brief were *James P. Durling*, *James C. Beaty*, and *Kimberly Reynolds*.

*Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the briefs was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

## OPINION

**Stanceu, Judge:**

In this action, plaintiffs contested a final affirmative less-than-fair-value determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in an antidumping duty investigation of certain truck and bus tires from the People's Republic of China ("China" or the "PRC") and the resulting antidumping duty order. Before the court is the decision (the "Remand Redetermination") Commerce submitted in response to the court's opinion and order in *Guizhou Tyre Co. v. United States*, 46 CIT __, 557 F. Supp. 3d 1302 (2022) ("*Guizhou Tyre I*"). *Final Results of Redetermination Pursuant to Ct. Remand* (April 25, 2022), ECF Nos. 66–1 (Conf.), 67–1 (Public) ("*Remand Redetermination*"). The court sustains the Remand Redetermination.

## I. BACKGROUND

Background on this case is presented in the court's previous opinion, *Guizhou Tyre I*, 46 CIT at __, 557 F. Supp. 3d at 1304–06, and is supplemented herein.

### A. The Parties to this Consolidated Action

There are two groups of plaintiffs in this consolidated action. One group ("Guizhou Tyre") consists of Guizhou Tyre Co., Ltd. ("GTC"), a Chinese producer of truck and bus tires, and its affiliated exporter, Guizhou Tyre Import and Export Co., Ltd. ("GTCIE"), a Chinese exporter of this merchandise. Compl. ¶ 3 (Apr. 15, 2019), ECF No. 7. The other group of plaintiffs consists of a Chinese producer and exporter of truck and bus tires, Shanghai Huayi Group Corporation Ltd., to which its counsel referred by its former name, Double Coin Holdings Ltd., and its affiliated U.S. importer, China Manufacturers Alliance LLC ("CMA"). Compl. ¶ 3 (Mar. 18, 2019), Ct. No. 19–00034, ECF No. 7. The court refers to these two plaintiffs collectively as "Double Coin." Double Coin Holdings Ltd. was one of the two "mandatory" respondents in the investigation, i.e., respondents for which Commerce intended to conduct an individual investigation. *Truck and Bus Tires From the People's Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 Fed. Reg. 8,599, 8,604 (Int'l Trade Admin. Jan. 27, 2017) (the "*Final LTFV Determination*"). Defendant is the United States.

### B. The Antidumping Duty Investigation and the Contested Determinations

Two related agency decisions stemming from an antidumping duty investigation are contested in this consolidated action.[1] They are a "Final Less-Than-Fair Value ('LTFV') Determination," *Final LTFV Determination*, and the subsequently-issued antidumping duty order ("Order"), *Truck and Bus Tires From the People's Republic of China: Antidumping Duty Order*, 84 Fed. Reg. 4,436 (Int'l Trade Admin. Feb. 15, 2019) (the "*Order*"). Incorporated by reference in the Final LTFV Determination is an "Issues and Decision Memorandum" containing specific findings and explanatory discussion. *Truck and Bus Tires from the People's Republic of China: Issues and Decision Memorandum for the Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances* (Int'l Trade Admin. Jan. 19, 2017) (P.R. Doc. 855) ("*Final I&D Mem.*").[2]

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[1] Consolidated with the lead case, *Guizhou Tyre Co., Ltd. et al. v. United States*, Court No. 19–00031, is *China Mfrs. All. LLC et al. v. United States*, Court No. 19–00034. *See* Order (June 7, 2019), ECF No. 24.

[2] All citations to documents from the Joint Appendix (Mar. 30, 2020), ECF Nos. 55 (Conf.), 56 (Public) are to public documents and are cited as "P.R. Doc. __." All citations to documents from the Joint Appendix to Remand Comments and Reply (June 28, 2022), ECF Nos. 76 (Conf.), 77 (Public) are cited as "P.R.R. Doc. __."

Commerce initiated the antidumping duty investigation of certain truck and bus tires from the PRC (the "subject merchandise") in early 2016, *Truck and Bus Tires From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 81 Fed. Reg. 9,434 (Int'l Trade Admin. Feb. 25, 2016), with a period of investigation ("POI") of July 1, 2015 through December 31, 2015, *id*. at 9,435.

Commerce published a Preliminary Affirmative LTFV Determination later in 2016, *Truck and Bus Tires From the People's Republic of China: Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination*, 81 Fed. Reg. 61,186 (Int'l Trade Admin. Sept. 6, 2016), which incorporated by reference the "Preliminary Decision Memorandum." *Truck and Bus Tires from the People's Republic of China: Decision Memorandum for the Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, and Postponement of Final Determination* (Int'l Trade Admin. Aug. 26, 2016) (P.R. Doc. 716) ("*Prelim. Decision Mem.*"). Commerce also published an Amended Preliminary LTFV Determination. *Truck and Bus Tires From the People's Republic of China: Amended Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 71,051 (Int'l Trade Admin. Oct. 14, 2016).

In the Final LTFV Determination, Commerce calculated an estimated weighted average dumping margin of 22.57% for what it considered to be a nationwide entity (the "PRC-wide" or "China-wide" entity) consisting of all exporters of the subject merchandise that it determined not to have rebutted its presumption of control by the PRC government. *Final LTFV Determination*, 82 Fed. Reg. at 8,604. Commerce included in the China-wide entity 102 companies that did not respond to the Department's requests for information during the preliminary phase of the antidumping duty investigation, *Prelim. Decision Mem.* at 4, and ten other companies that responded but were determined by Commerce to have failed to rebut its presumption of government control, *Prelim Decision Mem.* at 16–17*; Final I&D Mem.* at 6–8. Among the ten companies were Double Coin, *Prelim. Decision Mem.* at 16*; Final I&D Mem.* at 11–13, and GTCIE, *Prelim Decision Mem.* at 16*; Final I&D Mem.* at 24–28.

Commerce calculated an individually determined estimated weighted average dumping margin of 9.00% for Prinx Chengshan (Shandong) Tire Co., Ltd., the other mandatory respondent in the investigation, which Commerce considered to have rebutted its presumption of government control and thus was a "separate rate" respondent, i.e., a respondent entitled to receive a margin separate

from the rate assigned to the PRC-wide entity. *Final I&D Mem.* at 6–7. Commerce assigned the 9.00% rate to the numerous other companies that Commerce also determined to have rebutted the presumption of government control and therefore qualified for a separate rate but, not having been individually investigated, did not receive an individually determined margin. *Final LTFV Determination*, 82 Fed. Reg. at 8,600–04; *Final I&D Mem.* at 6–7.

### C. Proceedings Before the Court

Following the court's issuing its opinion and order in *Guizhou Tyre I*, Commerce submitted the Remand Redetermination for the court's consideration on April 25, 2022. Guizhou Tyre and Double Coin submitted comments on the Remand Redetermination. Pls.' Comments on Remand Redetermination (May 25, 2022), ECF Nos. 69 (Conf.), 70 (Public) ("Guizhou Tyre's Comments"); Consol. Pls. Comments on Remand Redetermination (May 25, 2022), ECF No. 71 ("Double Coin's Comments"). Defendant responded to the comment submissions. Def.'s Response to Comments on Remand Redetermination (June 14, 2022), ECF Nos. 74 (Public), 75 (Conf.) ("Def.'s Response").

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended* 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.[3]

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)).

[3] All citations to the United States Code herein are to the 2012 edition, except where otherwise indicated.

### B. The Court's Opinion and Order in *Guizhou Tyre I*

In *Guizhou Tyre I*, the court found merit in a claim by Guizhou Tyre that Commerce invalidly issued the Order prior to the effective date of an affirmative injury determination of the U.S. International Trade Commission ("ITC"). *Guizhou Tyre I*, 46 CIT at __, 557 F. Supp. 3d at 1307–16. The court concluded that the earliest date Commerce validly could have published an antidumping duty order following a decision of the Court of International Trade ("CIT") sustaining an affirmative remand redetermination of the ITC was February 21, 2020. *Id*., 46 CIT at __, 557 F. Supp. 3d at 1315. The court concluded, further, that "the Tariff Act requires that entries made prior to that date not be assessed antidumping duties" and stated its intention "to order Commerce to direct Customs [i.e., U.S. Customs and Border Protection] to liquidate these entries without regard to antidumping duties and to refund all cash deposits collected on these entries, with interest as provided by law." *Id*., 46 CIT at __, 557 F. Supp. 3d at 1315–16. The court invited the parties to comment on the remedy the court identified, including the date the court identified as the earliest date the Order lawfully could have issued. *Id*.

In response to Guizhou Tyre's claim that Commerce should have ruled that GTCIE was a separate rate respondent, the court concluded that Commerce invalidly based its decision, in part, on a finding that GTC's meeting to elect board members was not open to all shareholders. *Id*., 46 CIT at __, 557 F. Supp. 3d at 1318. The court concluded, additionally, that "the Department's reasoning is flawed, being vague and ambiguous as to whether its inquiry is focused on government control of export activities." *Id*. The court reached this same conclusion with respect to the analysis Commerce applied to the issue of whether Commerce should have granted separate rate status to Double Coin. *Id*., 46 CIT at __, 557 F. Supp. 3d at 1324–26.

Based on the holdings in *China Mfrs. Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021) ("*CMA*"), the court rejected a claim by Double Coin that Commerce lacked statutory authority to establish an estimated dumping duty rate for the PRC-wide entity. *Id*., 46 CIT at __, 557 F. Supp. 3d at 1323–24.

Finally, the court deferred any ruling on Double Coin's claim that Commerce impermissibly declined to conduct a verification of the factual information on which Commerce based its decision to deny Double Coin separate rate status. *Id*., 46 CIT at __, 557 F. Supp. 3d at 1326–27.

### C. The Department's Decisions in the Remand Redetermination

#### 1. The Issuance of the Antidumping Duty Order Prior to an Affirmative ITC Determination

In the Remand Redetermination, Commerce stated that "[s]hould the Court proceed with its intended remedy and it is necessary to identify the earliest date that Commerce hypothetically could have published the *Order* following the CIT's February 18, 2020 decision sustaining the ITC's affirmative redetermination, Commerce believes the Court's choice of February 21, 2020, is reasonable." *Remand Redetermination* at 4. Commerce also stated that the remedy "will necessarily only apply to entries of subject merchandise exported by GTCIE," noting that "all other entries of subject merchandise from the date of the *Order* through February 21, 2020 have been liquidated."[4] *Id*. at 5.

Guizhou Tyre agrees with the court's determining that entries prior to February 21, 2020 should be addressed in any remedy the court would order on its claim and "requests affirmance of this aspect of the Remand so that [antidumping duty] cash deposits collected on such entries are refunded with interest per 19 U.S.C. § 1677g." Guizhou Tyre's Comments 31. The Remand Redetermination also refers to 19 U.S.C. § 1677g in citing "section 778 of the Act" as governing the payment of interest on overpayments of antidumping duty deposits.[5] *Remand Redetermination* at 5. The provision directs that interest shall be payable on antidumping duty cash deposits made on and after "the date of publication of a countervailing or antidumping duty order under this subtitle." 19 U.S.C. § 1677g(a)(1). Commerce stated, further, that "[s]hould the Court hold that the [antidumping duty] Order was prematurely issued and order its intended remedy when it enters a final judgment in this case, Commerce intends to publish a notice of amended order in the *Federal Register* and issue appropriate customs instructions to [U.S. Customs and Border Protection]." *Remand Redetermination* at 68.

Even though the Department's publication of the Order on February 15, 2019 occurred in the absence of an affirmative ITC determi-

[4] Double Coin did not make a claim pertaining to the timing of the issuance of the antidumping duty order and, in its comments on the Remand Redetermination, did not address any issue pertaining to Guizhou Tyre's claim or any remedy thereon.

[5] Section 778 of the Tariff Act of 1930, as amended ("Interest on Certain Overpayments and Underpayments") provides, in pertinent part, that "Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order under this title . . . ." 19 U.S.C. § 1677g.

nation, it nevertheless was a publication of an antidumping duty order for purposes of the court's ordering an adequate remedy on Guizhou Tyre's claim. Therefore, the court will order Commerce to publish an amended antidumping duty order and to direct U.S. Customs and Border Protection to liquidate without regard to antidumping duties, and refund all estimated antidumping duties deposited on, entries of truck and bus tires exported by GTCIE that were made prior to February 21, 2020 and to pay interest, pursuant to 19 U.S.C. § 1677g, on any such antidumping duty cash deposits that were made on or after February 15, 2019 and prior to February 21, 2020.

### 2. The Department's Decision that GTCIE Did Not Rebut the Presumption of Government Control

The Remand Redetermination concluded, once again, that GTCIE was not independent of government control with respect to its export activities and, therefore, did not qualify for a separate rate. In response to the court's questioning the Department's finding that GTC's board members were elected in a meeting not open to all shareholders, Commerce stated in the Remand Redetermination that "[w]e acknowledge that details of the May 2015 and July 2015 meetings indicate that public notices were available to all shareholders. However, as we explain below, other record evidence demonstrates that GTCIE did not operate independent [*sic*] of government control." *Id*. at 8.

Commerce relied on record evidence that a state-owned enterprise, the Guiyang Industry Investment Group Co., Ltd., ("GIIG") "is GTC's single largest, and thus controlling, shareholder with 25.20 percent ownership," *id*. at 10 (footnote omitted) and that "GTC owned 100 percent" of GTCIE, *id*. at 6. In addition to the latter finding, Commerce cited record evidence (designated as confidential by Guizhou Tyre) bearing on the issue of an operational relationship between GTC and GTCIE. *Id.* at 23. Commerce also found that GIIG is 100% owned by a government entity, the Guiyang State-owned Assets Supervision and Administration Commission ("Guiyang SASAC"). *Id*. at 6. Commerce concluded that this evidence, as well as record evidence gleaned from GTC's Articles of Association ("AoAs"), *GTC and GTCIE Rebuttal Factual Information Submission* at Ex. 4 (May 6, 2016) (P.R. Docs. 438–440), demonstrated GTC's lack of independence from GIIG's ability to control or influence: (1) the composition of GTC's board of directors, including the selection of the chair and vice chair; (2) the putting forth of proposals for consideration at the company's shareholders' meetings; (3) the calling of interim shareholders' meetings; and (4) the appointment and removal of the company's general

manager and four deputy general managers. *Remand Redetermination* at 11–13. Commerce listed a number of provisions of GTC's AoAs that supported its conclusion.

Commerce noted, for example, that Article 83 of the AoAs provided that "non-independent directors are nominated by the board of directors or shareholders holding individually or jointly more than ten percent of the company's shares" and that "independent directors are nominated by the board of directors, board of supervisors, or shareholders individually or jointly holding more than one percent of company shares." *Id*. at 11 (footnotes omitted). Commerce also noted that "Article 117 states that the chairperson and vice chairperson shall be elected and dismissed by the votes of more than half of all directors." *Id*. at 11–12 (footnote omitted). Commerce considered it significant that "[w]ith its 25.20 percent ownership share, GIIG is the only individual shareholder with more than ten percent or even one percent of shares" and that "because GIIG is the only shareholder with more than three percent of shares, GIIG is the only shareholder with the requisite shares to individually put forward proposals for consideration at shareholders' meetings, pursuant to Article 54 of GTC's AoAs." *Id*. at 12 (footnotes omitted). On the issue of the board's ability to control GTC's management, Commerce pointed to Article 130 of the AoAs, which "states that the board of directors shall appoint or remove GTC's general manager and four deputy managers." *Id*. at 13 (footnote omitted).

In response to *Guizhou Tyre I*, the Remand Redetermination provided a revised explanation for its methodology. Commerce restated the four factors that it "typically considers" in determining "whether a respondent is subject to *de facto* 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.

*Id*. at 9 (footnote omitted). Commerce explained that its "practice is to deny a request for a separate rate if an applicant fails to demonstrate separation from the government with respect to any one of the factors

(the aforementioned *de facto* factors) and that if an applicant fails to establish any one of the criteria, Commerce is not required to continue its analysis with respect to the remainder of the criteria." *Id*. (footnote omitted).

Based on the record evidence summarized above, Commerce concluded "that GTCIE is not free from government control in making decisions regarding the selection of its management," *id*. at 10, and, under its practice, considered that finding sufficient to support a denial of separate rate status, *id*. at 15. Commerce acknowledged that GTCIE satisfied the first factor in its four-part test, stating that "sales manager(s) set export prices for GTCIE" and that "there was no indication of direct involvement or approval on behalf of any government authority regarding price-setting." *Id*. at 21. Commerce also found that GTCIE satisfied the second factor because it demonstrated "authority to negotiate and sign contracts and other agreements on its own behalf." *Id*. (citation omitted). Commerce cited evidence that GTCIE was not independent from GIIG's exercising control over distribution of profits, and, thus, that GTCIE did not satisfy the fourth factor. *Id*. at 15, 21.

On the question of government control of "export functions," Commerce further explained that its finding as to the second factor, autonomy from the government in making decisions regarding the selection of management, "allows for the reasonable inference, considering the presumption of government control in NME [nonmarket economy] country proceedings, that their respective government shareholders maintain the potential to control the export operations of GTC and its wholly owned subsidiary, GTCIE, because the management of a firm controls its operations, including its export functions." *Id.* at 19.

Commerce also explained why it considered independence in setting export prices insufficient to show independence from control of export functions. In addition to explaining that control over selection of management supports an inference of control over operations generally, including export operations, Commerce explained that independence from government control over setting of export prices does not necessarily mean independence from government control of other individual company activities affecting export functions. *Id.* at 22–23.

Guizhou Tyre challenges the Remand Redetermination on three grounds. It argues, first, that the decision does not comply with *Guizhou Tyre I*. Guizhou Tyre's Comments 4–19. Second, it argues that substantial evidence on the record does not support the denial of separate rate status to GTCIE. *Id*. at 23–28. Third, it argues that Commerce unlawfully implemented a new analysis that is inconsis-

tent with its past practice. *Id*. at 28–31. The court addresses each of these arguments below.

In support of its first argument, Guizhou Tyre maintains that the court in *Guizhou Tyre I* "rejected Commerce's effort to avoid the first and second *de facto* factors" and that Commerce "claims authority to deny GTCIE's separate rate based on management selection and profit distribution—without considering other factors." *Id*. at 6 (citing *Guizhou Tyre I*, 557 F. Supp. 3d at 1318–20 and *Remand Redetermination* at 15–16, 18–21, 23, 40–42). In the view of these plaintiffs, Commerce must consider all four factors in light of the evidence on the whole and, specifically, demonstrate government control of prices of truck and bus tire exports before denying separate rate status. *Id*. at 13–17. These arguments are not convincing for two reasons: they read too much into the court's decision in *Guizhou Tyre I*, and they incorrectly presume that Commerce lacked any discretion to apply its four-part test so as to require independence from government control as to each of the four factors.

*Guizhou Tyre I* did not hold that the Department's practice of requiring a separate rate respondent to demonstrate independence as to all four factors was unlawful *per se*. Although questioning the Department's rationale as to the first factor, the court's decision did not go so far as to require Commerce to recognize separate rate status absent evidence of government control of export prices. Instead, the court viewed the reasoning Commerce put forth in support of its less-than-fair-value determination as "flawed, being vague and ambiguous as to whether its inquiry is focused on government control of export activities." *Guizhou Tyre I*, 557 F. Supp. 3d at 1318. In response, the Remand Redetermination offers new reasoning for the court's consideration, and the issue presented is whether that reasoning suffices to support the Department's ultimate conclusion to deny separate rate status to GTCIE.

Commerce must be afforded broad discretion in crafting a methodology for making its *de facto* determination. As this Court has recognized, neither the adoption of the rebuttable presumption of government control, nor the methodology by which Commerce effectuates it, implements any specific provision of the Tariff Act or a procedure set forth in the Department's regulations. *See*, *e.g.*, *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 47 CIT __, __, 617 F. Supp. 3d 1343, 1356 (2023). As a result, the court is guided by no statutory language, legislative history, or regulatory language or preamble in judging whether the Department's methodology is *ultra vires* or un-

reasonable *per se*. At the same time, binding precedent of the Court of Appeals for the Federal Circuit ("Court of Appeals") repeatedly has affirmed the Department's authority to apply a rebuttable presumption of government control. *CMA*, 1 F.4th at 1039; *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1313 (Fed. Cir. 2017). A court, therefore, must afford Commerce the discretion to select the methodology by which it interprets and effectuates its presumption of government control over export functions and thereby will decide which exporters are included within the PRC-wide entity, so long as that methodology is reasonable. The breadth of this discretion requires the court to reject Guizhou Tyre's general objection to the methodology Commerce applied in the Remand Redetermination, which placed weight on the ability of a single, government-owned shareholder to control the selection of board members and to control indirectly the selection of the senior managers who operated the company. From record evidence demonstrating that ability, Commerce reasonably could find or infer that GIIG had the power to exert significant control or influence over the business operations of GTC and its wholly-owned affiliate, GTCIE, including operations involving exports. An agency has the discretion to draw reasonable inferences from the record evidence. *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 845 (Fed. Cir. 2020) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) for the principle that "substantial evidence includes 'reasonable inferences from the record'"). While Guizhou Tyre objects on the ground that GIIG was not a majority shareholder, that fact alone is not sufficient to refute the Department's findings as to the third and fourth factors of its *de facto* test.

Guizhou Tyre argues that after it placed on the record evidence sufficient to rebut the presumption of government control, it then became the Department's burden to establish government control of GTCIE's export functions, Guizhou Tyre's Comments 11–15, a burden Commerce did not meet, *id*. at 23–27. In addition, it argues, Commerce could not lawfully deny separate rate status absent evidence of "actual state control" as opposed to "potential to control." *Id*. at 19–23. These arguments are also unconvincing.

The Department's third criterion requires a respondent to rebut the presumption by demonstrating "autonomy" from the government in making decisions regarding the selection of management and "independent" decisions regarding the disposition of profits. Guizhou Tyre is, essentially, taking issue with the criteria the Department chose to apply, which focus on the government's *ability* to exert influence or control. Guizhou Tyre argues, further, that Commerce ignored evi-

dence that a Nomination Committee under GTC's board of directors, and not GIIG, was responsible for the nominations of board members and that the election of board members was in compliance with the AoAs and all applicable legal requirements. *Id*. at 24. It argues, in addition, that "[w]hile managers are selected by the board, they must work for the best interests of GTC; board members and management owe fiduciary duties to GTC and **all** of its shareholders." *Id*. at 25 (citation omitted). The evidence concerning the formalities of the nomination process does not refute evidence, including evidence on ownership, the AoAs, and proprietary information on voting records, *see Remand Redetermination* at 12–13, that together demonstrate GIIG's ability to control or influence the general business operations of GTC and GTCIE and, specifically, profit distribution. Also, Commerce did not base its determination on a finding that GIIG or GTC's board of directors did anything improper, inimical to the company's interests, or in derogation of a fiduciary duty.

Guizhou Tyre's third argument is based on the notion that Commerce departed from "longstanding" practice in adopting a new methodology that "myopically fixates on management selection and to a lesser extent profit distribution." Guizhou Tyre's Comments 28. In a related argument, it points out that Commerce conferred separate rate status on GTC for the fifth review of the antidumping duty order on off-the road tires from the PRC in 2015, when GIIG's ownership share was 33.6% and the Guiyang SASAC was conducting performance reviews, which it no longer was doing during the POI. *Id*. at 25 (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197 (Apr. 15, 2015)).

An agency may change its practice if it provides an adequate explanation. *See, e.g.*, *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) (citing *Atchison*, 412 U.S. at 808) ("Commerce is permitted to deviate from this past practice, at least where it explains the reason for its departure," where the "past practice" was "not a burden imposed by statute or regulation" but was merely "a general practice of Commerce."). Commerce explained that its practice has evolved upon its considering decisions of this Court, including *Advanced Technology & Materials Co. v. United States*, 37 CIT 1487, 938 F. Supp. 2d 1342 (2013), which, although differing from this case in involving majority government ownership, sustained a denial of separate rate status based on a government shareholder's ability to control the composition of the board of directors and the selection of management. *Remand Redetermination* at 15–17.

In summary, Commerce employed a methodology that is not *per se* unreasonable, is adequately explained, and is reasonable in light of the wide discretion the agency is afforded under applicable precedent of the Court of Appeals.[6] Applying that methodology, Commerce acted upon a sufficient basis in the record evidence when it denied separate rate status to GTCIE.

### 3. The Department's Decision that Double Coin Did Not Rebut the Presumption of Government Control

Commerce found that Shanghai Huayi (Group) Company ("Shanghai Huayi") held a 72.15 percent ownership share in Double Coin during the POI and, in turn, was 100 percent owned by the Shanghai State-owned Assets Supervision and Administration Commission ("Shanghai SASAC"), a government entity. *Remand Redetermination* at 24. Commerce found, further, that Shanghai Huayi, as the majority shareholder, "has rights to elect directors at the shareholders' general meetings in accordance with the number of shares it owns, *i.e.*, 72.15 percent" and that "Double Coin's board appoints its general manager, and the general managers appoints other managers, including deputy general managers." *Id*. at 26. Finding also that "[t]hree of four directors are general manager and deputy general managers," Commerce concluded from these uncontested facts that "Shanghai SASAC controls the selection of Double Coin's management and the *de facto* control over Double Coin exists." *Id.* (footnote omitted).

Commerce also made findings pertaining to CMA, Double Coin's affiliated U.S. importer. Commerce found that Double Coin "can effectively appoint CMA's directors and managers, who control the operations (including export activities) of CMA, by virtue of being the majority shareholder of CMA." *Id*. at 29. While Commerce also found that while "there was no indication of direct involvement or approval on behalf of any government authority regarding price-setting (the first factor)," *id.* at 30, CMA's negotiating prices with unaffiliated U.S. customers does not suffice to rebut the presumption of government control over export functions in light of the ability of Double Coin's board to "effectively appoint CMA's directors and managers, who control the operations (including export activities) of CMA," *id*. at 29.

[6] In this proceeding, neither group of plaintiffs argued that the *de facto* test for separate rate status was invalid for the failure to adhere to notice-and-comment rulemaking. *See Guizhou Tyre Co., Ltd. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1302, 1326 n.18 (2022). In its comment submission, Double Coin observed that "[t]his test is a matter of agency practice untouched by the legislature or even notice and comment," Consol. Pls. Comments on Remand Redetermination 17 (May 25, 2022), ECF No. 71, but the submission does not state a claim that the failure to engage in notice-and-comment rulemaking invalidated the agency's decision.

Double Coin objects to the decision in the Remand Redetermination by raising three arguments: (1) Commerce essentially is applying an "irrebuttable presumption" that majority government ownership establishes control over export functions, Double Coin's Comments 3–6; (2) Commerce failed to show a "compelling basis" for linking potential influence over the selection of management to actual control of export activities, *id*. at 7–10; and (3) "the record does not support" the Department's conclusion, *id*. at 11–16.

On the first argument, Double Coin validly can object that majority ownership by a government entity such as a SASAC will make it impossible for a respondent to obtain a separate rate. The Department's reliance on the decision of this Court in *Advanced Technology & Materials Co. v. United States*, supports such an objection. In explaining the decision in the Remand Redetermination, Commerce struggled to leave room for the remote possibility that a majority-government-owned company could be organized and governed such as to prevent the Chinese government's ability to control the company's operations. Commerce discussed that possibility in this way:

> To clarify, if the majority ownership by a SASAC entity entitles the SASAC entity to make decisions regarding the selection of management of a respondent, then the respondent will necessarily not be able to show that it has autonomy from the government in making decisions regarding the selection of management (the third factor) and, thus, it will necessarily be ineligible for a separate rate. We disagree, however, that a finding of majority ownership by a SASAC entity is a bright line test for which there is no evidentiary escape. While we acknowledge that we would expect such instances to be rare, if a respondent were to show that the SASAC entity could not make decisions regarding the selection of management of the respondent despite owning a majority share of the respondent, then the respondent may satisfy the third factor and, assuming it satisfied all of the other *de facto* and all of the *de jure* factors, it would be eligible for a separate rate.

*Remand Redetermination* at 64. Double Coin objects, justifiably, that the Remand Redetermination itself contradicts this explanation. As Double Coin points out, Double Coin's Comments 4, the Remand Redetermination contains the following statement:

> In evaluating the *de facto* factors, Commerce has found 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.

*Remand Redetermination* at 26 (citation omitted). "This may include control over, for example, the selection of management, which is a key factor in determining whether a company has sufficient independence in its export activities." *Id*. The Remand Redetermination includes these statements even though also stating that "[w]e clarify that Commerce did not find that a lack of autonomy in management selection equates to a direct finding of government control of export activities." *Id*. at 25–26.

Commerce itself acknowledged that the possibility of a majority-government owned respondent's obtaining a separate rate under the Department's practice is more theoretical than real. Moreover, the ambivalent way the Remand Redetermination approached this possibility was, at best, inartful. Nevertheless, the Department's inartful and internally-inconsistent approach does not give the court a basis to order another remand. This case does not present the question of whether a majority government-owned respondent could place on the record evidence demonstrating that the majority shareholder could not control the selection of management. The evidentiary record in this proceeding, under which Commerce permissibly could find that Double Coin was not free of government control or influence on the issue of management selection, does not demonstrate such a possibility. Commerce permissibly found that the majority shareholder had the power to select the members of the board, that the board appointed the company's general manager, and that the general managers appointed other managers, including deputy general managers. *Id*. at 26. These findings were adequate to support a conclusion that Double Coin did not demonstrate its right or ability to select management independently of the government-owned shareholder.

Double Coin quotes *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 (Fed. Cir. 1986) for the principle that "[a]n irrebutable presumption of fact violates due process." Double Coin's Comments 6. This argument is unavailing. The Court of Appeals made that statement in reversing a decision of the Court of Claims that a contractor had violated the Truth and Negotiations Act, 10 U.S.C. § 2306(f), when it failed to disclose its actual overhead to the government, as required by a standard contract term, during negotiations for a building renovation project. *Universal Restoration*, 798

F.2d at 1406 (citing *Vlandis v. Kline*, 412 U.S. 441, 453 (1973)). The principle the Court of Appeals identified referred to an established presumption, which the contractor could rebut, that the contract price would have been lower but for the nondisclosure. *Id*. Based on the "due process" principle identified in *Universal Restoration*, Double Coin argues that "Commerce's redetermination is premised on a prohibited analytical approach and must be remanded as unlawful." Double Coin's Comments 6. In its opinion in *Universal Restoration*, the Court of Appeals ruled that the contractor actually did rebut the presumption. *Universal Restoration*, 798 F.2d at 1406. Double Coin's reliance on the case is misplaced because in this instance, Commerce permissibly relied on record evidence to conclude that Double Coin did *not* rebut the presumption of government control over the selection of management.

Double Coin's argument that Commerce lacked a "compelling basis" for linking potential influence over the selection of management to actual control of export activities, Double Coin's Comments 7–10, is also unpersuasive. This argument essentially is a contention that Commerce lacked discretion to deny separate rate status when a respondent failed to demonstrate independence from the government in the selection of management, i.e., it failed to satisfy the third criterion. But as explained above, a court must afford Commerce the discretion to devise and apply reasonable criteria for deciding the composition of the PRC-wide entity.

Double Coin's final argument is that the Department's denial of separate rate status is not supported by substantial record evidence. *Id*. at 11–16. Double Coin highlights evidence that "CMA negotiated its prices free of government control," *id*. at 11, but this argument also takes issue with the *de facto* criteria *per se* and the Department's practice of requiring a separate rate respondent to satisfy each of them. Double Coin objects that the decision "fail[s] to account for affirmative evidence submitted by Double Coin that shows that, with respect to Double Coin, the Company Law, the Code of Corporate Governance, and Double Coin's articles of association were effective during the investigation and actually prevented the type of influence that Commerce has inferred." *Id.* at 13. It points to an affidavit from Double Coin's Legal Director certifying that "[t]he Corporate Governance Code, much like the Company Law, provides that a publicly traded company should act independently from the controlling shareholder for all issues of substantial relevance for the company *and* that directors and management *must act* in the interests of the company." *Id*. (quoting *Double Coin's Separate Rate Application* at Ex. 17 (May 23, 2016) (P.R.R. Doc. 297)).

The Legal Director's opinion, although record evidence, is not the only evidence relevant to whether Double Coin demonstrated that its management was *de facto* independent of a majority shareholder entirely owned by a government entity. Other evidence established that shareholder's ability to control, directly or indirectly, the selection of the company's senior management. Commerce could infer that the Legal Director, unlike Commerce itself, did not consider this ability to be among the "issues of substantial relevance to the company." The broad, indefinite language of the Legal Director's opinion begs the question of what, if any, influence the Legal Director would consider the government-owned majority shareholder to have. Also, Commerce was aware of evidence that could support a conclusion that Chinese laws, in some respects, treated companies in which the government held a majority interest in the same way it treated other public companies, but that evidence did not require Commerce to base a denial of separate rate status on a company's having violated those laws or having acted contrary to the company's business interests.

### 4. Double Coin's Claim that Commerce Failed to Verify Double Coin's Information on Separate Rate Status

In *Guizhou Tyre I*, the court deferred a decision on Double Coin's claim that Commerce was required to, but did not, verify the information Double Coin submitted in seeking separate rate status, reasoning that "it is not known at this time what record information will form the basis for the Department's new decision, as set forth in a redetermination submitted upon remand, and whether any factual determinations underlying that redetermination will be in dispute." *Guizhou Tyre I*, 46 CIT at __, 557 F. Supp. 3d at 1326–27. The Remand Redetermination did not address this claim. Double Coin, while commenting that the Remand Redetermination was unsupported by record evidence, did not renew or otherwise preserve its claim that verification was required for the record information it submitted. *See* Double Coin's Comments 3–17. The claim, therefore, is waived.

## III. CONCLUSION

The Remand Redetermination permissibly determined that GTCIE and Double Coin failed to rebut the presumption of *de facto* control of their respective export functions and, as a result, did not qualify for separate rate status. The Remand Redetermination also achieves a satisfactory resolution of the issue posed by the Department's premature issuance of the Order, to which resolution plaintiff does not object.

The court will enter judgment in accordance with this Opinion.

Dated: May 22, 2023
New York, New York

*/s/ Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

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