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***Shandong Rongxin Import & Export Co., Ltd. v. United States*, Court No. 15-00151, Slip Op. 17-11 (February 3, 2017)**

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. Summary

The Department of Commerce (the Department or Commerce) has prepared these final results of redetermination (final remand results) pursuant to the decision and remand order issued by the U.S. Court of International Trade (CIT or the Court) in *Shandong Rongxin Import & Export Co., Ltd. v. United States*, 203 F. Supp. 3d 1327 (CIT 2017) (*Rongxin II*). This action arises out of the final results of the administrative review of the antidumping duty order on certain cased pencils from the People's Republic of China (PRC), covering the period of review (POR) December 1, 2012, through November 30, 2013.[1] At issue in this remand is whether Shandong Rongxin Import and Export Co., Ltd. (Rongxin) is entitled to a separate rate.[2] As discussed below, upon consideration of the evidence, the Department continues to find that Rongxin has not demonstrated an absence of *de facto* government control, and, therefore, is not entitled to a separate rate.

[1] *See Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 26897 (May 11, 2015) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM) at 3-8.
[2] *Rongxin II*, 203 F. Supp. 3d at 1333.

II. Background

On May 11, 2015, the Department published the *Final Results* of the 2012-2013 administrative review of certain cased pencils from the PRC in which we found Rongxin ineligible for a separate rate based on its failure to rebut the presumption that companies operating in non-market economy (NME) countries are subject to government control. Specifically, we found that, although Rongxin had demonstrated an absence of *de jure* government control, it had failed to demonstrate an absence of *de facto* government control. In so doing, the Department determined that Rongxin's majority shareholder is wholly owned by a state-owned enterprise, and that, as a result of the control such ownership established, it did not have autonomy from the PRC government in making decisions regarding the selection of management, one the four criteria necessary to establish an absence of *de facto* government control.[3]

Before the Court, Rongxin challenged two aspects of the Department's *Final Results.* First, it challenged whether the petitioner in the underlying case, Dixon Ticonderoga Company (Dixon) had standing to request an administrative review of Rongxin, pursuant to section 771(9) of the Tariff Act of 1930, as amended (the Act), which defines interested parties. Second, it challenged the Department's determination that Rongxin was not eligible for a separate rate.

Thereafter, in *Shandong Rongxin Import & Export Co. Ltd., v. United States*, 163 F. Supp. 3d 1249 (CIT 2016) (*Rongxin I*), the CIT remanded to the Department for further explanation or reconsideration, as to whether Dixon is a producer of domestic like product, and, thus, qualified as a domestic interested party to request the administrative review of Rongxin in

[3] *See* IDM at 3-8; *see also* Memorandum to File, "Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013 – Final Separate Rate Analysis Memorandum for Shandong Rongxin Import & Export Co., Ltd.," dated April 30, 2015.

the underlying proceeding.[4] The Court stated that it would not reach the issue of whether Rongxin was eligible for a separate rate "until the threshold issue of standing is resolved."[5]

In the Department's first remand redetermination, we re-opened the administrative record and reviewed Dixon's submissions in response to questionnaires. Specifically, we reviewed Dixon's work orders, production record screen shots, and documents and certifications demonstrating that Dixon applied for and received distributions from U.S. Customs and Border Protection (CBP) under the Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. 1675c (2000) (repealed 2006) (CDSOA) under the antidumping duty order for certain cased pencils from the PRC, during the POR. We found that this record evidence supported the finding that Dixon is a U.S. producer of domestic like product, during the POR, and, thus, an interested party within the meaning of section 771(9)(C) of the Act. As a result, we continued to find on remand that Dixon is a domestic interested party with standing to request an administrative review of a foreign exporter.

Rongxin challenged the Department's remand redetermination, arguing that the Department was not authorized to reopen the record on remand and that it erred in finding Dixon to be a domestic producer with interested party status with standing to request an administrative review.[6] In *Rongxin II,* the CIT sustained Commerce's determination that it was authorized to reopen the record on remand, and further, that Dixon's work orders, production screen shots, and documentation associated with CDSOA distributions were credible evidence that Dixon was a U.S. producer of domestic like product during the POR.[7] As such, Commerce concluded, and the Court agreed, that Dixon is an interested party, as defined in section 771(9)(C) of the Act,

[4] *See Rongxin I*, 163 F. Supp. 3d at 1254.
[5] *Id.* at 1254.
[6] *See Rongxin II*, 203 F. Supp. 3d at 1333.
[7] *See id.* at 1337-1340.

because it was a producer in the United States of domestic like product and that is entitled to request an administrative review of Rongxin.[8]

The CIT next turned to the second issue that was before the Court in *Rongxin I*; whether Rongxin was entitled to a separate rate.

The Court remanded this case to the Department for further determination regarding its separate rate analysis. According to the Court, the Department's reliance on *Advanced Tech. & Materials Co. v. United States,* 938 F. Supp. 2d 1342 (CIT 2013),[9] as a basis for its separate rate analysis was misplaced, because that case does not stand for the proposition that a respondent's failure to demonstrate autonomy in selection of management necessarily ends the analysis or renders consideration of information related to the other three prongs unnecessary.[10] The Court explained that, in *Advanced Tech.,* in contrast to the case here, the respondent exporter had only provided evidence, ultimately not deemed persuasive by the Court, seeking to rebut the purported absence of autonomy from the government in making decisions regarding the selection of management.[11] In other words, there was an absence of evidence, and under those circumstances, the respondent had not met its burden to rebut the presumption of *de facto* control.[12]

The Court also noted that the Court of Appeals for the Federal Circuit has observed, in recounting how the Department allows the presumption of government control to be overcome, that "{t}he absence of *de facto* government control can be shown by evidence that the exporter sets its prices independently of the government and of other exporters, negotiates its own

[8] *See id.* at 1344.
[9] *Advanced Tech. & Materials Co. v United States,* 938 F Supp. 2d 1342 (CIT 2013) (*Advanced. Tech.), aff'd mem.* pursuant to Fed. Cir. R. 36, 581 Fed. Appx. 900 (Fed. Cir. 2014).
[10] *See Rongxin II*, 203 F. Supp. 3d at 1348.
[11] *Id.* at 1348, citing *Advanced Tech.* at 1342.
[12] *Id.*

contracts, keeps the proceeds of its sales (taxation aside), and selects its management autonomously."[13] In light of this, the Court remanded to the Department for "further determination regarding consideration of the other separate rate criteria, as well as a determination of the ultimate calculus, including the impact of the finding regarding autonomous selection of management."[14] In so doing, the Court "expresse{d} no view as to whether the question of entitlement to a separate rate is to be determined under a totality of the circumstances, whether a respondent must satisfy each of the four criteria, or whether, for example, the failure to establish autonomy from the government in the selection of management, or a finding of lack of such autonomy, can alone justify denial of a separate rate, even when there is evidence supportive of the exporter offered with respect to the other criteria."[15] However, the Court upheld the Department's determination that Rongxin has not shown that it selects its management autonomously of the PRC government.[16]

On April 24, 2017, we issued the draft remand redetermination. Interested parties were given an opportunity to comment. On April 28, 2017, Rongxin submitted comments. As explained below, for this final remand determination, we continue to find that Rongxin is not eligible for a separate rate.

III. Separate Rate Eligibility of Rongxin

Legal Framework

In antidumping duty proceedings involving NME countries such as the PRC, the Department has a rebuttable presumption that the export activities of all firms operating within

[13] *See Rongxin II*, 203 F. Supp. 3d at 1348 (citing *AMS Assocs., Inc. v. United States*, 719 F.3d 1376, 1379 (Fed. Cir. 2013).
[14] *See id.* at 1348-49.
[15] *See id.* at 1348-49.
[16] *See id.* at 1349.

the country are subject to government control and influence. This presumption is based on the NME government's access to a variety of legal and administrative levers that it can use to exert influence and control, (both direct and indirect) over and through the economic actors within the NME's economy. This centralized control is a defining characteristic of a NME, and it is defined by statute.[17] In light of the statute's direction, the Department presumes that decision-making of an enterprise operating in a NME-country occurs under a form of centralized government control (whether at the central, provincial, or local level).[18] Consistent with this presumption, it is the Department's policy to assign all exporters of the merchandise subject to review in a NME country a single rate unless an exporter can affirmatively demonstrate an absence of government control both in law (*de jure*) and in fact (*de facto*), with respect to exports.[19] Thus, while the PRC remains a NME, the separate rate test recognizes that individual firms may demonstrate autonomy from the government with respect to export activities.[20] To establish that a company is independent of government control and, therefore, entitled to a separate rate, the Department analyzes each exporting entity in a NME country under the test

[17] *See* section 771(18)(A) of the Act ("The term 'nonmarket economy country' means any foreign country that the administering authority 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."); *see also* section 771(18)(C)(i) of the Act ("Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority.").

[18] *See Sigma Corp. v. United States,* 117 F.3d 1401, 1405-06 (Fed. Cir. 1997) ("We agree with the government that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping duty statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources," *citing* 19 U.S.C. 1677(18)(B)(iv, (v).)

[19] *See, e.g., Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries,*69 FR 77722 (December 28, 2004). For a description of our practice *see* Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (April 5, 2005), available at http;//enforcement.trade.gov/policy/bull05-1.pdf. (Policy Bulletin 05.1). *See also* 19 C.F.R. 351.107(d) ("in an antidumping proceeding involving imports from a non-market economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers.").

[20] *See* section 771(18)(D) of the Act.

established in *Sparklers*,[21] and further developed in *Silicon Carbide*.[22] Together, these tests require a respondent to demonstrate an absence of both *de jure* and *de facto* government control with respect to exports.[23] The consequences of failing to do so means the exporter will be assigned the single rate given to the NME-entity.[24] In sum, the Department is trying to determine if the exporter has demonstrated an ability to control its own commercial decision making. That is, whether decisions at the firm level are separate and apart from decisions made at the central government level with respect to exports.

First, the Department considers the following *de jure* criteria in determining whether a respondent may be granted a separate rate: (1) an absence of restrictive stipulations associated with an exporter's business and export licenses; (2) legislative enactments decentralizing control over export activities of the companies; and (3) other formal measures by the government decentralizing control over export activities of companies.[25]

Next, the Department considers the following factors in evaluating whether the respondent has established an absence of *de facto* government control: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority independent of the government to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions

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[21] *See Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) (*Sparklers*).
[22] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585, 22586-89 (May 2, 1994) (*Silicon Carbide*).
[23] S*ee Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2014-2015*, 82 FR 4844 (January 17, 2017) and accompanying IDM at 12.
[24] The Federal Circuit has upheld the application of the "NME presumption," in *Sigma Corp. v. United States,* 117 F.3d 1401 (Fed. Cir. 1997). In setting forth its NME policy, "Commerce made clear the consequences to an exporter of not rebutting the presumption of state control and establishing its independence: the exporter would be assigned the single rate given to the NME entity. Shortly thereafter, the Court of International Trade acknowledged and sustained Commerce's NME policy." *Transcom Inc. v. United States,* 294 F.3d 1371, 1381-82 (Fed. Cir. 2002).
[25] *See also* Policy Bulletin 05.1.

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.[26]

Analysis

A. Whether *De Jure* Control Exists

In the *Final Results*, the Department found that Rongxin demonstrated an absence of *de jure* governmental control.[27] This determination was not remanded to the Department, and so we have not reexamined our determination with respect to *de jure* government control.

B. Whether *De Facto* Control Exists

The Department modified its separate rates analysis following litigation involving the *Diamond Sawblades from the PRC* proceeding.[28] In that proceeding, the CIT found the Department's initial separate rates analysis deficient where a government controlled entity had significant ownership of the respondent exporter.[29]

In the final determination, the Department found the respondent, Advanced Technology and & Materials Co., Ltd. (AT&M) eligible for a separate rate, even though the majority owner

[26] *See Michaels Stores, Inc. v. United States,* 766 F.3d 1388, 1392 (Fed. Cir. 2014) ("Indeed, it has been Commerce's policy since 1991 to apply a country-wide rate to all exporters doing business in the PRC unless the exporter…establishes *de jure* and *de facto* independence from state control in an administrative review… This court has endorsed this presumption on multiple occasions." (*citing Sparklers,* 56 Fed. Reg. at 20,589; *Transcom,* 294 F.3d at 1373; *Sigma Corp.*, 117 F.3d at 1405-06); Policy Bulletin 05.1.

[27] *See* IDM at 7.

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

[29] *See Advanced Technology & Materials Co, Ltd,, v. United States*, Consol. Ct. No. 09-00511, Slip Op. 11-122 (CIT 2011), at 22.

of the AT&M entity, the Central Iron and Steel Research Institute (CISRI), was wholly PRC-government-owned. The petitioners challenged the Department's determination before the CIT, arguing that the Department erred in refusing to consider evidence demonstrating that AT&M's majority shareholder, the CISRI, is owned by the State-Owned Assets Supervision and Administration Commission (SASAC) which the Government of China established to administer state-owned enterprises (SOEs).[30] The Court agreed, stating that "a parent company's *control* or influence {on an individual firm} would seem entirely relevant,"[31] to a company's decision-making, and remanded the determination to the Department for clarification of the separate rate test and including an explanation as to why the Department essentially considered irrelevant the shareholder control over the AT&M entity that appeared traceable to the PRC government.[32]

On remand, the Department continued to conclude that the AT&M entity was entitled to a separate rate.[33] The Court again remanded to the Department to explain the extent of "government control" that would preclude, or lack thereof which would permit, the grant of a separate rate, particularly with regards to the third and fourth *de facto* factors.[34] In its subsequent remand redetermination, the Department found that "ownership is relevant to the separate rates

[30] *Id.* at 15.
[31] *Id.* at 35 (emphasis in original).
[32] *Id.* at 35-36.
[33] *Advanced Tech. & Materials Co. v. United States,* 885 F. Supp. 2d 1343, 1347-48 (CIT 2012).
[34] *Id.* at 1349. ("The court remains concerned that Commerce has failed to consider important aspects of the problem and offered explanations that run counter to the evidence before it."); *id*. at 1351 ("Further substantial evidence of record does not support the inference that SASAC's {State-owned Assets Supervision and Administration commission} 'management' of its 'state-owned assets' is restricted to the kind of passive-investor *de jure* 'separation' that Commerce concludes.") (footnotes omitted); *id*. at 1355 ("The point here is that 'governmental control' in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a 'degree' of it can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms, financing, and inputs into finished product for export."); *id*. at 1357 ("AT&M *itself* identifies its 'controlling shareholder' as CISRI {owned by SASAC} in its financial statements and the power to veto nomination does not equilibrate the power of control *over* nomination.") (emphasis in original)(footnotes omitted); *id.* at 1361 ("For the above reasons, the court remains unclear as to the extent of "governmental control" that would preclude, or lack thereof permit, the grant of a separate rate, particularly with regard to the third and fourth *de facto* factors, as previously pondered.").

analysis to the extent that ownership, as well as the degree of ownership, affects *de facto* control."[35]

In more recent cases, the Department, partly reflecting the decision of the Court in the *Advanced Tech.* line of cases, has determined that respondents that are wholly or majority owned by, and thus under the control of, the SASAC, are presumptively not entitled to separate rates.[36] Specifically, the Department has consistently 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 generally.[37]

In light of the above, and turning to the case at hand, in its questionnaire response, Rongxin indicated that that it was [ ] percent owned by Shandong International Trade Group (SITG), which was wholly-owned by the SASAC during the POR.[38] Given that SITG holds a

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[35] *See "Final Results of Redetermination Pursuant to Remand Order, Diamond Sawblades and Parts Thereof from the People's Republic of China, Advanced Technology & Materials Co., Ltd., Beijing Gang Yan Diamond Product Company, and Gang Yan Diamond Products, Inc. with Bosun Tools Group Co. Ltd. v. United States and Diamond Sawblades Manufacturers Coalition, Wehai Xiangguang Mechanical Industrial CO., Ltd., and Qingdao Shinhan Diamond Industrial Co., Ltd.*, Consol. Court No. 09-00511, Slip Op. 12-147, (November 30, 2012)," at 3.

[36] *See Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Par*t, 79 FR 53169 (September 8, 2014) and accompanying PDM at 6-7, unchanged in final *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part,* 79 FR 68860 (November 19, 2014); *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 8510 (January 26, 2017) and accompanying IDM at 12.

[37] *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 81 FR 75 (January 4, 2016) and accompanying Decision Memorandum at 15*;* unchanged in final *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Critical Circumstances Determination, in Part,* 81 FR 35316 (June 2, 2016); *see also 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Preliminary Determination of Sales at Less - Than-Fair Value and Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination,* 81 FR 69786 (October 7, 2016) and accompanying PDM at 17, unchanged in final *1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part,* 82 FR 12192 (March 1, 2017) and accompanying IDM at 12-16.

[38] *See* Letter from Rongxin, re: "Certain Cased Pencils from the People's Republic of China: Rongxin Section A Response," dated April 3, 2014, at 2 (Rongxin's Section A response); *see also* Letter from Rongxin, re: "Certain

majority ownership share in Rongxin, we continue to conclude that SITG exercises, or has the potential to exercise, control over Rongxin's day-to-day operations, including the ability to control the selection of management. Since Rongxin failed to demonstrate an absence of *de facto* control in the selection of management, we found in the *Final Results,* and continue to find now, that Rongxin is ineligible for a separate rate. This determination is consistent with our finding in *Hydrofluorocarbon from the PRC*,[39] in which the Department concluded that, "where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally. This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate."[40]

Our finding in this case is also consistent with our recent determination in *Truck and Bus Tires from the PRC.*[41] There, the Department explained, "{f}ollowing the Court's reasoning, in recent proceedings, we have concluded that where a government entity holds a majority equity

Cased Pencils from the People's Republic of China: Rongxin First Supplemental Questionnaire Response," dated October 16, 2014, at 1 (Rongxin First Supplemental).

[39] S*ee Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination in the Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances,* 81 FR 42314 (June 29, 2016) and accompanying IDM at Comment 8.

[40] *Id.* at Comment 8 (citing C*arbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part,* 79 FR 53169 (September 8, 2014), and accompanying PDM at 5-9, unchanged in *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014)).

[41] *See 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 FR 61186 (September 6, 2016) (*Truck and Bus Tires from the PRC*) and accompanying PDM at 13, unchanged in *Truck and Bus Tires from the People's Republic of China: Final Affirmative Determinations of Sales at less Than Fair Value and Critical Circumstances,* 82 FR 8599 (January 27, 2017) and accompanying IDM at Comment 2.

ownership, either directly or indirectly, in the respondent exporter, this interest in and of itself means that the respondent is not eligible for a separate rate."[42]

First, notwithstanding that the CIT affirmed the Department's determination on this prong,[43] we have re-examined whether Rongxin established that it has autonomy from the government in making decisions regarding the selection of management. In so doing, we have re-examined Rongxin's Articles of Association, which establish that the shareholders appoint five of the six directors on the Board of Directors, and according to Article 12, SITG, separate and apart from the other shareholders, appoints one of those six directors.[44] Yet, [

], which, therefore, indicates that SITG has a major role in the selection of the five remaining board members because the company owns [ ] percent of Rongxin's shares. Because SITG owns a majority of Rongxin's shares, and most of the remaining shareholders own very small percentages of Rongxin in comparison, it is reasonable to conclude that SITG has influence proportionate to its majority shareholding. Further, [

[42] *Id.*
[43] *See Rongxin II*, 203 F. Supp. 3d at 1349.
[44] In Rongxin's Section A response at Exhibit A-23, [ ] provided the following: [

]. In its case brief, submitted February 2, 2015, Rongxin stated on page 11 in footnote 1: "The original Chinese version of the Articles of Association is the legally-valid document. The English translation previously supplied was not certified and is, indeed, still incorrect for Article 12. The correct translation is: "Article 12: Company sets up the board of directors and there are 6 directors, among which one director should represent SITG and recommended by SITG .{sic} During his term, if SITG regards he can not protest its interest, {sic} it can change this director based on the related regulation. All the directors should be elected by all the shareholders. The board of director set up the chairman and he is elected by all the directors of the board. The chairman of the board is the legal person of the company." However, this translation is contradictory insofar as the revised Article 12 states that one director is chosen by SITG, but all directors are elected by all the shareholders.

]. In light of the above, we conclude that SITG has effective control in the selection of the remaining five directors.

The Articles of Association describe the responsibilities of the Board of Directors, with regards to the company's management.[45] [

].”

In summation, record evidence demonstrates that the Articles of Association authorize and direct that the Board of Directors exert control over the day-to-day management and regular business functions of Rongxin. The Articles of Association did not list any exemptions applicable to the Board of Directors regarding control over Rongxin's day-to-day functions. Because Rongxin was majority government-owned and SITG, through its majority vote on the Board of Directors, and via direction authorized in the Articles of Association, has a role in selecting Rongxin's management, the Department continues to find that Rongxin cannot rebut the presumption that the management-selection factor of the *de facto* analysis is not satisfied.[46] Furthermore, the Court sustained our determination that Rongxin did not demonstrate that it selects its management autonomously of the PRC government.[47]

[45] *See* Rongxin's Section A Response at Exhibit A-23.
[46] *See also* IDM at 7.
[47] *See Rongxin II*, 203 F. Supp. 3d at 1349.

Because Rongxin did not demonstrate autonomy from the government in making decisions regarding the selection of management, as discussed above, the Department has not examined whether the respondent has established that it operates free of government control with respect to the other three *de facto* prongs. The Department has repeatedly found that failure to provide evidence of an absence of *de facto* control from the government with respect to one of the four factors is sufficient to conclude that a company has failed to prove an absence of *de facto* government control, and that it is unnecessary to analyze the other *de facto* criteria. For example, in *Tetrafluoroethane from the PRC,* the Department did not grant respondent, Lianzhou, a separate rate, concluding "Lianzhou's section A questionnaire response stated that it is 100 percent owned by Zhejiang Judua, which is 55.86 percent owned by the Juhua Group, a state-owned company supervised by the {SASAC} of Zhejiang province. Based on this {one} factor, and other business proprietary information…, we find that Juhua Group SASAC controls the selection of Zhejiang Juhua's management and thus *de facto* control over Lianzhou exists."[48]

Similarly, in *Stainless Steel Sheet and Strip from the PRC*, the Department determined that the respondent, Taigang, a company majority owned by Taiyan Iron and Steel Co., Ltd. (TISCO), which, in turn, was majority owned by the Shanxi SASAC, was ineligible for a separate rate based on the one criterion: inability to demonstrate autonomy from government control in the selection of management.[49] Specifically, the Department stated, "{c}onsistent

[48] *See 1,1,1,2-Tetrafluoroethane from the People's Republic of China: Preliminary Determination of Sales at Less-Than-Fair Value and Affirmative Determination of Critical Circumstances, in Part and Postponement of Final Determination,* 81 FR 69786 (October 7, 2016) (*Tetrafluoroethane from the PRC*) and accompanying PDM at 17; unchanged in final, *1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part,* 82 FR 12192 (March 1, 2017) and accompanying IDM at 12-16.

[49] *See Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, (Stainless Steel Sheet and Strip from the PRC*, 81 FR 64135 (September 19, 2016) and accompanying PDM at 12-13, unchanged in final *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic*

with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company including the selection of, management," and denied Taigang a separate rate.[50] Consequently, and in line with these previous cases, where the Department determined that the respondent was ineligible for a separate rate if it did not meet one of the factors in the *de facto* analysis, the Department continues to deny Rongxin's request for a separate rate.

This approach has been upheld by the Court. In *Yantai*, which involves a fact pattern similar to Rongxin, the CIT affirmed the Department's position that the respondent company was ineligible for a separate rate based on its failure to satisfy the third criterion in establishing an absence of *de facto* government control; autonomy from government control in making decisions in the selection of management.[51] In the administrative review at issue in *Yantai,* the Department found that the majority owner of Yantai CMC, China National Machinery Import & Export Corporation (CMC), was indirectly owned by the SASAC and that CMC had the authority to appoint the majority of Yantai CMC's directors, as well as the power to nominate the general manager, and to appointment the company's general management.[52] As a result, in that proceeding the Department determined that Yantai CMC was ineligible for a separate rate.

Yantai CMC argued that the Department, "focus{ed} on majority government ownership to the exclusion of all other traditional *de facto* factors," and that the Department's "reli{ance} upon the notion of a theoretical 'potential' for Chinese government control…{was} problematic from a basic evidentiary perspective" because there was "no record evidence . . . that there was

of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, 82 FR 9714 (February 8, 2017) and accompanying IDM at 28-29.
[50] *Id.*
[51] *See Yantai CMC Bearing Co. Ltd. v. United States*, 203 F. Supp. 3d 1317, 1325-26 (CIT 2017) (*Yantai*).
[52] *Id.* at 1323-24.

any involvement of the shareholders of Yantai in its export activities."[53] However, the Court held that Yantai CMC's references to "theoretical, 'potential' government control" are belied by evidence in the record and that the Department properly found "actual exercise of control through the appointment of officials and the overlap in management between the companies."[54] Furthermore, the Court stated that the Department "requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status."[55] The Court continued, stating, "{a}s an exporter in an NME country that is indirectly majority-owned by the government, Yantai CMC has the burden to show that it has such autonomy…Yantai CMC failed to meet the third factor of the test. *Given that all four factors must be satisfied, Commerce had no further obligation to continue with the analysis*."[56]

In light of the above, the Department continues to find, for purposes of this final remand redetermination, that, by failing to demonstrate an absence of government control in the day-to-day company management, one of the four *de facto* factors, Rongxin has failed to rebut the presumption of government control. Accordingly, we continue to find that Rongxin is not eligible for a separate rate.

IV. Comments On Draft Results of Redetermination

Comment 1: Consideration of *De Facto* Criteria

Rongxin contends that the Court's remand directed the Department to consider all four prongs of its *de facto* criteria for a separate rate, but the Department, contrary to the Court's order continues to rely on only one criterion: selection of management.[57] Rongxin claims that

[53] *Id.* at 1325.
[54] *Id.* at 1326.
[55] *Id.* at 1326 (citing *Advanced Tech.*, 938 F. Supp. 2d at 1349 (quoting Commerce's second remand redetermination "each of the *de facto* prongs must be satisfied for a company to get a separate rate"), and Policy Bulletin 05.1 at 2).
[56] *Id.* at 1326 (*citing Sigma Corp.*, 117 F.3d at 1406 (emphasis added)).
[57] *See* Letter to the Department of Commerce, "Cased Pencils from the People's Republic of china: Comments on Draft Remand of Redetermination Pursuant to court Remand," dated April 28, 2017 (Rongxin's Comments) at 2.

the Court found that the Department's reliance on *Advanced Tech* was misplaced, in part, because the respondent in that proceeding only addressed one *de facto* factor, government control in the selection of management, whereas Rongxin has addressed all four criteria in its responses in the instant review. Moreover, Rongxin argues that, in *AMS Assocs., Inc v. United States*, the Federal Circuit observed that a respondent can show absence of government control through evidence that it "sets its prices independently of the government and other exporters, negotiates its own contracts, keeps the proceeds of its sales, (taxation aside), and selects its management autonomously."[58]

Rongxin claims that the Department cannot cite to *Yantai* for as support for its position that failure to meet only one of the four *de facto* criteria was necessary to determine that a respondent is was ineligible for a separate rate, because the facts in *Yantai* are not sufficiently similar to those in this proceeding.[59] Rongxin avers that: (1) in *Yantai,* CMC owned the majority of Yantai CMC's shares, and the majority of CMC's shares were held by Genertec, which was wholly owned by the SASAC; and (2) that the Department stated, in the separate rate memorandum concerning Yantai CMC, that "it would expect any majority shareholder, including a government, to have the ability to control…the operations of the company, and that the record in this case supports that expectation."[60] Additionally, Rongxin alleges that the record in this proceeding does not compare to those in *Yantai,* because SITG had the power to nominate only one director to protect its interests and, thus, asserts that the Department erred in finding that SITG controls Rongxin on the basis that it is reasonable to conclude that SITG has influence proportionate to its shareholding.[61] Moreover, Rongxin contends that it met its burden to

[58] *Id.*
[59] *See* Rongxin's Comments at 2-3.
[60] *Id.*
[61] *See* Rongxin's Comments at 4.

demonstrate an absence of government control with respect to the three remaining *de facto* criteria and that the Department has not cited any evidence of Rongxin not meeting its burden regarding those criteria.[62]

Department's Position:

We disagree with Rongxin. The Department complied with the Court's order, which remanded "{the Department's} determination regarding Rongxin's eligibility for a separate rate for further consideration consistent with {its} opinion."[63] Although the Court's opinion explained that it was remanding the Department's separate rate determination for "consideration of the other criteria, as well as a determination of the ultimate calculus, including the impact of the criterion regarding autonomous selection of management,"[64] it also stated that:

> *{it} expresse{d} no view as to* whether the question of entitlement to a separate rate is to be determined under a totality of the circumstances, whether a respondent must satisfy each of the four criteria, or *whether, for example, the failure to establish autonomy from the government in the selection of management, or a finding of lack of such autonomy, can alone justify denial of a separate rate,* even when there is evidence supportive of the exporter offered with respect to the other criteria. *These are issues that may be addressed on remand*.[65]

Accordingly, the Court directed the Department to consider the facts within the context of the *de facto* separate criteria, but did not require the Department to make findings with respect to each criterion. Indeed, the Court expressly stated that the question of whether a finding of a failure to establish autonomy from the government in the selection of management could alone justify denial of a separate rate was an "issue{} that may be addressed on remand."[66] The Department has addressed this issue on remand, explaining that, having determined in this case

[62] *Id.*
[63] *See Rongxin II*, 204 F. Supp. 3d at 1350.
[64] *Id.* at 1348-49 (emphases added).
[65] *Id.*
[66] *Id.*

that Rongxin did not demonstrate autonomy from the government in making decisions regarding the selection of management, it is not necessary to examine further whether Rongxin operates free of government control with respect to the other three *de facto* prongs. This is because *all* four factors in the *de facto* analysis must be satisfied for a respondent to establish its eligibility for a separate rate.[67] This determination is not only consistent with determinations in other proceedings that failure to provide evidence of an absence of *de facto* control from the government with respect to one of the four factors is sufficient to conclude that a company has failed to prove an absence of *de facto* government control,[68] but this approach has also been affirmed by the CIT in *Yantai*.[69]

Citing Article 12 of its Articles of Association, which provides that SITG appoints one of Rongxin's six directors, Rongxin asserts of that the Department erred in finding that SITG has effective control in the selection of the remaining five directors.[70] In so arguing, Rongxin disregards that the Court has upheld the Department's determination that Rongxin did not demonstrate autonomy from the government in making decisions regarding the selection of management.[71] In particular, the CIT held that because "Article 10 … is silent as to the number of votes needed to elect the Board," the Department "reasonably concluded that the Board is elected by a majority of the shareholders."[72] The Court further rejected Rongxin's claim that shareholders vote as individual members, because [

[67] *See Yantai*, 203 F. Supp. at 1326 ("Commerce requires that exporters satisfy all four factors of the *de facto* control test in order to qualify for separate rate status.").
[68] *See supra* n. 47 & 48.
[69] *See Yantai*, 203 F. Supp. at 1326.
[70] *See* Rongxin Comments at 3.
[71] *See Rongxin II*, 204 F. Supp. 3d at 1349.
[72] *Id*.

]"[73] As we explained above, because SITG owns [ ] percent of Rongxin's shares, [

].

As explained above, we find that it is unnecessary to address the remaining three *de facto* factors, given the requirement that a company must demonstrate freedom from government control with respect to all four *de facto* factors to be eligible for a separate rate. Nevertheless, in an effort to comply with the Court's remand order, and in light of Rongxin's claims that record information rebuts the presumption of government control, the Department has reviewed anew whether Rongxin established an absence of *de facto* government control with respect to the three other prongs of the *de facto* analysis. Specifically, the Department reviewed the information provided by Rongxin regarding the setting of its export prices, the negotiation of contracts, and the disposal of its profits.

In its questionnaire response, Rongxin claimed that its prices are established through direct competitive negotiation with the customer and are not subject to review or guidance by any government organization, and that its head of Stationery and Tools negotiates directly with the U.S. customer and has authority to bind the company on its sales.[74] However, the Articles of Association contradicts Rongxin's assertion because [ ] stipulates that the Board decides Rongxin's [ ], which would include overseeing the setting of prices for subject merchandise and negotiation of contracts. Specifically, [ ] specifies that the Board of Directors, [

]. Furthermore, while Rongxin claimed in its questionnaire response that the head of Stationery and Tools negotiates

[73] *Id.* at 1350 (emphasis added).
[74] *See* Rongxin's Section A response at 6, Exhibit A-5 and Exhibit 23.

directly with the U.S. customer and no organization outside of Rongxin reviews or approves any aspect of the transaction, this fact is not dispositive as to whether Rongxin negotiates its contracts autonomously of government control. Indeed, [

],[75] and [

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[76]

Because SITG has effective control over the Board, and SITG is wholly-owned by the SASAC, the above demonstrates that Rongxin is not free to set its prices or make autonomous decisions regarding the negotiation of contracts. As a result, we find that Rongxin has failed to demonstrate an absence of government control with respect to the first and second factors of the *de facto* analysis.

Similarly, the record does not support Rongxin's claim in its questionnaire response that there are no restrictions on its export revenues and that profits are disposed of in accordance with the dictates of the Board of Directors.[77] As noted above, [

] and [

]. In addition, [

]." That SITG owns [ ] percent of Rongxin, and proceeds of sales and profits made for the benefit of Rongxin are returned to SITG

[75] [

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[76] [

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[77] *See* Rongxin's Section A response at 8.

in proportion to its majority investment, and in turn, are transferred to the PRC government via the SASAC, demonstrates that Rongxin does not make autonomous decisions regarding the disposition of profits or financing and fails to rebut the fourth factor of the *de facto* analysis. In summary, because SITG has effective control over Rongxin's board of directors and the board makes decisions involving each of the four *de facto c*riteria, Rongxin has failed to demonstrate an absence of government control with respect to each of the four *de facto* criteria.

Furthermore, the Department disagrees with Rongxin that *Yantai* is not relevant to this case. Rongxin notes that in *Yantai*, CMC owned a majority of the respondent Yantai CMC, CMC was majority owned by Genertec, and Genertec was wholly-owned by the SASAC, but does not elaborate on why it views these facts to be distinguishable from those present here.[78] Crucially, the Department had not found that the same ownership chain exists in both cases. Rather, the cases are similar in that Yantai CMC and Rongxin are both indirectly majority owned by the SASAC and, thus, the chain of ownership links to the Chinese government.[79] In both *Yantai* and the 2012-2013 administrative review of the antidumping duty order on pencils, the Department found the respondents to be ineligible for a separate rate based on record evidence of showing the SASAC's potential to exercise authority via the ownership chain and its review of the respondents' respective Articles of Association.[80] As a result, the Department found both Yantai CMC and Rongxin to be ineligible for a separate rate.[81] In both *Yantai* and *Rongxin II* the

[78] Rongxin Comments at 2-3 (citing *Yantai*, 203 F. Supp. at 1323).
[79] *See* Rongxin's Section A response at 2; Rongxin First Supplemental at 1; *Yantai*, 203 F. Supp. at 1323.
[80] *See Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review;2012-2013*, 80 FR 26897 (May 11, 2015) and accompanying separate rate memorandum at 3-5.; *supra* at 8-14; *Yantai*, 203 F. Supp. at 1323.
[81] *See id.*

Court upheld the Department's determination of *de facto* government control in the selection of management.[82]

Comment 2: Determination of Rongxin's Margin

Rongxin argues that the Department erred in denying it a separate rate, and cites *China Mfrs. Alliance, LLC v. United States*,[83] for the proposition that a policy can never overrule a statutory provision.[84] Rongxin did not expressly state how this case was relevant or would direct a different separate rate determination by the Department, but appears to rely upon *China Mfrs. Alliance* to argue that it is entitled to its own weighted-average dumping margin.

Department's Position:

We disagree with Rongxin that *China Mfrs. Alliance* is relevant to this case or requires the Department to reach a different determination with respect to Rongxin's separate rate eligibility and the antidumping margin determined for the company. First, and foremost, the administrative proceeding at issue in *China Mfrs. Alliance* is still on remand to the Department, the CIT has not issued a final judgement, and the action is not yet final and conclusive. Second, the review at issue in *China Mfrs. Alliance* is distinguishable from this proceeding.[85] In the review underlying *China Mfrs. Alliance,* the Department calculated a weighted-average margin for the mandatory respondent Double Coin Holdings Ltd. and its two affiliates using verified

[82] *See Yantai*, 203 F. Supp. at 1326; *Rongxin II*, 204 F. Supp. 3d at 1349-50.
[83] *China Manufacturers Alliance, LLC and Double Coin Holdings Ltd., Titan Tire Corporation, Et Al., and Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export CO., Ltd., v. United States*, 205 F. Supp. 3d 1325 (CIT 2017) (*China Mfrs. Alliance*).
[84] Rongxin's Comments at page 5-7.
[85] *See* the underlying proceedings of that case was published as *Certain Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013,* 79 FR 61291 (October 10, 2014) and accompanying PDM (Tires PDM); *see also Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China; 2012-2013,* 80 FR 20199 (April 8, 2015) and accompanying IDM (Tires Final).

sales information.[86] However, because Double Coin failed to rebut the presumption of *de facto* government control and, therefore, failed to qualify for a separate rate, the Department considered Double Coin to be part of the PRC-wide entity and assigned the PRC-wide entity a revised margin of 105.31 percent that was calculated by averaging the existing entity rate of 210.48 percent with Double Coin's margin of 0.14 percent.[87] The CIT remanded the proceeding, holding that the Department was required by section 777A(c)(1) to apply to Double Coin's subject merchandise an individual weighed-average dumping margin,[88] and ordered the Department to assign Double Coin a weighted-average margin of 0.14 percent.[89] Here, in contrast to the proceeding at issue in *China Mfrs. Alliance*, the Department did not calculate a margin for Rongxin based on verified sales information, nor did it revise the PRC-wide entity rate. Rather, the rate applicable to Rongxin, as part of the PRC-wide entity, is the existing PRC-wide entity rate of 114.90 percent, which is not subject to change, because no party requested a review of the PRC-wide entity.[90]

V. Final Results of Redetermination

The Department continues to find that Rongxin failed to demonstrate *de facto* autonomy from government control, based on the Chinese government's exercise, or potential to exercise,

[86] *China Mfrs. Alliance,* 205 F. Supp. 3d at 1335.
[87] *Id.*
[88] *China Mfrs. Alliance, LLC* 205 F. Supp. 3d 1342.
[89] *Id.*
[90] *See Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 FR 26897, which states that the review covers one exporter only, Shandong Rongxin. The PRC-wide entity was not subject to review as no party requested a review. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013). Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self- initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in this review, the entity's rate (i.e., 114.90 percent) is not subject to change. *See Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 FR 59049 (September 19, 2002).

separate rate, and the rate applicable to this company is the PRC-wide entity rate of 114.90 percent.

5/19/2017

X Ronald K. Lorentzen

Signed by: RONALD LORENTZEN

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Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance