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MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Edward Yang
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Investigation of Magnesia Carbon Bricks from the People's Republic of China: Issues and Decision Memorandum for the Final Determination

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SUMMARY

We have analyzed the case and rebuttal briefs submitted by the Petitioner[1], the government of the People's Republic of China ("PRC")[2] and RHI Refractories Liaoning Co., Ltd. ("RHI") in the investigation of magnesia carbon bricks ("bricks") from the PRC. The Department of Commerce ("Department") published in the *Federal Register* the *Preliminary Determination* on March 12, 2010.[3] The Department published in the *Federal Register* the *Amended Preliminary Determination* on April 21, 2010.[4] The Department published in the *Federal Register* the *Preliminary Critical Circumstances Determination* on May 20, 2010.[5] The Department conducted a sales verification from April 12-16, 2010 and a factors of production ("FOPs") verification May 17-20, 2010.[6] The period of investigation ("POI") is January 1, 2009 - June 30, 2009.

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[1] The petitioner is Resco Products, Inc. (hereinafter referred to as the "Petitioner").
[2] The government of the PRC will be hereinafter referred to as "GOC."
[3] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 11847 (March 12, 2010) ("*Preliminary Determination*").
[4] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value*, 75 FR 20813 (April 21, 2010) ("*Amended Preliminary Determination*").
[5] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Notice of Preliminary Affirmative Determination of Critical Circumstances*, 75 FR 28237 (May 20, 2010) ("*Preliminary Critical Circumstances Determination*").
[6] For sales, we conducted verification of RHI's North American affiliates, Veitsch Radix America, Inc. (incorporated in Canada) ("VRC") and Veitsch Radix America, Inc. (incorporated in the U.S.) ("VRA"), which

Following the *Preliminary Results*, *Amended Preliminary Results*, *Preliminary Critical Circumstances Determination*, verification and analysis of the comments received, we made changes to RHI's margin calculation.[7] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:[8]

Comment 1: Surrogate Values
- **a. Magnesia**
- **b. Labor**

Comment 2: Deductions to Gross Unit Price
- **a. Indirect Selling Expenses**
- **b. Discounts**

Comment 3: RHI's Separate Rate
Comment 4: Service Contracts
Comment 5: Exclusion of Resin-bonded Magnesia Carbon Functional Refractory Products from the Scope
Comment 6: Double Remedy
Comment 7: FOP Allocation Ratio

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handled all of RHI's POI sales. *See* Memo to the File, through Scot T. Fullerton, Program Manager, from Paul Walker and Dana Griffies, Case Analysts, "Investigation of Magnesia Carbon Bricks from the People's Republic of China: Sales Verification of Veitsch Radix America, Inc.," dated June 10, 2010 ("VRC Verification Report"). For FOPs, we conducted verification of RHI, which produced the merchandise under consideration. *See* Memo to the File, through Scot T. Fullerton, Program Manager, from Paul Walker and Dana Griffies, Case Analysts, "Investigation of Magnesia Carbon Bricks from the People's Republic of China: Factors of Production Verification of RHI Refractories Liaoning Co., Ltd.," dated June 11, 2010 ("RHI Verification Report").

[7] *See* Memorandum to the File, through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst, "Investigation of Magnesia Carbon Bricks from the People's Republic of China: Final Analysis Memo for RHI Refractories Liaoning Co., Ltd.," dated concurrently with this notice ("Final Analysis Memo"); *see also* Memorandum to the File through Scot Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst, "Investigation of Magnesia Carbon Bricks from the People's Republic of China: Surrogate Factor Valuations for the Final Determination," dated concurrently with this notice ("Final Factors Memo").

[8] The Petitioner additionally contended that RHI holds interests in certain U.S. companies and that these affiliations could be significant if these companies purchased bricks from RHI. The Petitioner makes no specific arguments concerning these companies or how these affiliations would impact RHI's separate rate. Accordingly, we have not addressed this statement below. *See* Petitioner's June 18, 2010 Case Brief at 9. We do note, however, that among the numerous sales reviewed in detail, as well as the sales reconciliation data examined in detail, we found no evidence of sales by RHI to these U.S. companies.

DISCUSSION OF THE ISSUES

Comment 1: Surrogate Values

A. *Magnesia*[9]

RHI's Arguments

- In its case brief, RHI provided three alternative methodologies to value its magnesia (dead-burned magnesia and fused magnesia) FOPs. RHI contends that the Department value its magnesia FOPs by subtracting out the difference between the Indian import values used in the *Preliminary Determination* and the actual magnesia prices paid by RHI during the POI, *i.e.*, the Department should use RHI's actual prices for magnesia.
- RHI maintains that employing such an adjustment to magnesia surrogate values is consistent with the Department's conclusion in the companion PRC bricks countervailing duty ("CVD") investigation, *i.e.*, that such magnesia prices essentially act as market economy ("ME") prices in that they respond to market forces.
- RHI argues that the economic assumptions the Department made in the companion CVD investigation, that export restraints decrease magnesia exports and consequently increase available magnesia supply, with a consequent depressive effect on domestic magnesia prices, necessarily lead to the conclusion that the export restraints also artificially increase magnesia prices in export markets, including India.
- RHI asserts that the Indian import values are distorted by the alleged Chinese export restraints, and therefore, require adjustment to account for such distortion, an assertion that is supported by the Petitioner's statements and other evidence it submitted in its antitrust litigation.
- According to RHI, as a second alternative, the Department should value its magnesia FOPs using the market based benchmarks established in the companion CVD investigation, after making adjustments for certain distortions.
- RHI notes that in determining its magnesia benchmark pricing in the companion CVD investigation, the Department established world market prices for magnesia using annual world export prices for dead-burned magnesia and fused magnesia from Global Trade Atlas ("GTA") data.[10]
- RHI claims that the Department should make the following corrections for distortions present in the world-wide benchmark: certain countries which are not significant magnesia producers should be excluded, certain countries which were arbitrarily and inconsistently excluded should be included, aberrational data should be excluded, adjustments are needed for China being the dominant firm, and the POI for the antidumping ("AD") investigation should be used.
- As a third alternative for valuing its magnesia FOPs, RHI contends that the Department should adjust the Indian import statistics used in the *Preliminary Determination* by using the weighted-average value of magnesia from major magnesia sources, excluding

[9] RHI also stated that the surrogate value for electricity should be adjusted, but made no specific arguments concerning what adjustments should be made. *See*, *e.g.*, RHI's June 18, 2010 Case Brief at 13. Accordingly, we are unable to address this statement.

[10] Because the POI for the companion CVD investigation (January through December 2008) is different from the POI of the antidumping investigation, the data would need to be updated to cover the appropriate time period.

aberrational data and revising the resultant values downward by an amount sufficient to offset the distortive influence of the Chinese prices.

- RHI maintains that, in the *Preliminary Determination*, the Department included data for countries which are not significant producers of magnesia, and excluded countries which are significant producers of magnesia, in the magnesia surrogate value calculations.[11] RHI argues that major magnesia-producing countries (Russia, South Korea and North Korea) were excluded, without explanation, from the calculation of the magnesia surrogate value.
- RHI asserts that, inconsistent with past cases,[12] the Department failed to exclude from its magnesia surrogate value certain aberrational values, specifically, Indian imports from the United Kingdom.
- According to RHI, Chinese magnesia dominates world magnesia markets and inflates world magnesia prices by artificially reducing supply. Citing the Petitioner's filings in U.S. district court antitrust litigation against PRC magnesia suppliers, RHI claims that, among other things, Chinese magnesia dominates the international market for magnesia,[13] collusive pricing has directly affected U.S. commerce by increasing the price of Chinese magnesia to the United States,[14] and Chinese groups involved in price fixing were able to affect worldwide magnesia price increases from 2000 onward.[15]
- RHI contends that the magnesia surrogate values used by the Department in the *Preliminary Determination* cannot constitute "market-determined" surrogate values unless they are adjusted to eliminate the artificial inflationary effects of the dominant Chinese magnesia prices. According to RHI, its arguments to make adjustments under the Dominant Firm Model[16] are consistent with Department precedent.
- In determining an appropriate adjustment to account for the distortive effects of Chinese magnesia prices, RHI maintains that the Department should apply an adverse inference against the Petitioner's failure to cooperate fully with the Department's investigation because they did not identify the large body of relevant information found in their antitrust litigation, comment on that information, or respond to RHI's submission of the information.[17]

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[11] RHI notes that for fused magnesia the Department relied on Indian import data from three countries, Ireland, Japan and the United Kingdom, that represent 13 percent of India's total fused magnesia imports; and for dead-burned magnesia, five countries, Australia, Slovakia, Germany, Ireland and the Czech Republic, which represent 54 percent of India's total dead-burned magnesia imports.

[12] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 FR 34125 (June 18, 2004) and accompanying Issue and Decision Memorandum at Comment 6 (the Department typically excludes aberrational data based on extreme average unit values combined with low quantities that indicate unusual trading patterns).

[13] *See, e.g.*, RHI's January 7, 2010 submission at Exhibit 6.

[14] *See, e.g.*, RHI's February 11, 2010 submission at Exhibit 5.

[15] *Id.* at Exhibit 4.

[16] *See, e.g., United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber in Canada*, Report of the Appellate Body, WT/DS57/AB/R (February 17, 2004) at paras. 99-106, 100, 103 (affirming that "when it has established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods," that "an investigating authority may use a benchmark other than private prices of goods in question in the country of provision").

[17] RHI argues that the courts have previously upheld the application of adverse facts available to the domestic industry for a material omission. *See, e.g., Elkem Metals Co. v. United States*, 276 F. Supp. 2d 1296, 1310-13 (CIT 2003) (sustaining the agency's finding, based on the use of adverse facts available ("AFA") supported with

- According to RHI, in applying an adverse inference, after taking into account the omission of data from major magnesia producers and aberrational values included in the Indian imports statistics, the Department should adjust the magnesia surrogate values by the largest indicated distortion of world magnesia prices attributed to Chinese pricing, and reduce the surrogate values by 75 percent.[18]

Petitioner's Argument

- In its rebuttal to RHI's argument that the Department should use the prices RHI paid for magnesia as the surrogate values for RHI's magnesia FOPs, the Petitioner contends that it is directly contrary to the statute to define a surrogate value as the very non-market economy ("NME") value for which a surrogate is needed.
- The Petitioner maintains that the Department's goal in an NME proceeding is to determine a representative value that the Chinese manufacturer would have paid had it been located in a ME, in this case, India.
- The Petitioner asserts that the Department is not required to seek values in all countries that are major producers of an input, but find the actual market value in the surrogate country. Additionally, the Petitioner claims that there is no requirement or practice of seeking values from all countries with production of an input. The Petitioner notes, that information placed on the record by RHI indicates that the majority of countries for which Indian import data are available, Japan, the United Kingdom, Australia, Slovakia and Ireland, are significant producers of magnesia.
- The Petitioners note that the allegedly excluded values for Russia, South Korea and North Korea did not appear in WTA in the first place, and thus, could not be missing. The Petitioner also notes that the Department's practice is to exclude North Korean and South Korean values in surrogate value calculations.[19]
- According to the Petitioner, the magnesia surrogate values used in the *Preliminary Determination* are not aberrational. The Petitioner contends that the Indian financial statements placed on the record by RHI contain magnesia values which are consistent with, and thus probative of, the broad-based surrogate values used in the *Preliminary Determination*.
- The Petitioner maintains that it is irrelevant whether the Chinese pricing of magnesia is causing market distortions because the Department seeks to determine the reality facing a market-economy producer manufacturing the subject merchandise. The Petitioner argues that other factors such as supply and demand, as well as the historically unprecedented peak in 2008 for steel and other commodities, have influenced world market pricing.

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substantial evidence, that the domestic industry's conspiracy was a significant condition of competition that affected prices).

[18] RHI claims that the Petitioner stated that Chinese pricing actions have resulted increases the price of magnesite products (magnesia) by as much as 400 percent during the relevant period.

[19] *See Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 4175 (January 24, 2008) and accompanying Issues and Decision Memorandum at Comment 3.

Department's Position:

We disagree with RHI on the selection of magnesia surrogate values. In valuing FOPs, section 773(c)(1) of the Tariff Act of 1930, as amended ("the Act"), instructs the Department to use "the best available information" from the appropriate ME country. With respect to surrogate value selection, "it is the Department's stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data."[20] As a consequence, the Department first attempts to find publicly available surrogate values from the primary surrogate country that are contemporaneous and representative of the FOPs being valued. In applying the Department's surrogate value selection criteria as mentioned above, the Department has found in numerous NME cases[21] that the import data from WTA represent the best available information for valuation purposes because they represent an average of multiple price points within a specific period and are tax-exclusive. In some instances, the Department has disregarded import data where record evidence demonstrates that per-unit values are aberrational with respect to the product at issue, or the time period in question. The Department determines whether data are aberrational on a case-by-case basis after considering the totality of the circumstances.[22]

In this case, we selected India as our primary surrogate country, a selection that no party has challenged. In fact, both the Petitioner and RHI have made statements supporting the use of India as the surrogate country.[23] Because the Department has selected India as the surrogate country, our first preference in selecting surrogate value data for this investigation is to utilize publicly available prices within India. With respect to the surrogate values for dead-burned magnesia and fused magnesia in the *Preliminary Determination*, the Department relied on Indian import data for HTS 2519.90.20, described as "Dead-burned Magnesia," and HTS 2519.90.10, described as "Fused Magnesia." For purposes of this final determination, and as outlined below, we continue to find that the Indian import data for HTS 2519.90.20 and HTS 2519.90.10 are exact matches[24] to the inputs in question, are from the primary surrogate country, are contemporaneous and represent the best available information for valuing RHI's magnesia FOPs. As such, we have relied upon these data for margin calculation purposes in this final determination.

With respect to RHI's request that we adjust the magnesia surrogate values by subtracting out the difference between the Indian import values and the actual magnesia prices paid by RHI during the POI, *i.e.*, that we should use RHI's actual prices, we do not agree. As we stated in the

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[20] *See Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process*, March 1, 2004 ("*Policy Bulletin*") at 4; *see also Diamond Sawblades and Parts Thereof from the People's Republic of China, Final Determination in the Antidumping Duty Investigation*, 71 FR 29303 (May 22, 2006) ("*Sawblades*") and accompanying Issues and Decision Memorandum at Comment 11.

[21] *See, e.g.*, *Sawblades* at Comment 11.

[22] *See, e.g.*, *Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) ("*LWTP*") and accompanying Issues and Decision Memorandum at Comment 10.

[23] *See* the Petitioner's December 24, 2010 submission at 1-2; *see also* RHI's December 24, 2010 submission at 1.

[24] We also note that no party has argued that HTS 2519.90.20 and HTS 2519.90.10 are not exact matches to RHI's magnesia FOPs.

Preliminary Determination, the Department considers the PRC to be a NME country and, in accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority.[25] No party has challenged the designation of the PRC as an NME country in this investigation, and therefore, for the final determination we have continued to treat the PRC as an NME country and calculated normal value in accordance with Section 773(c) of the Act which applies to all NME countries. Section 773(c)(1) of the Act provides that the Department shall determine normal value ("NV") using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on FOPs because the presence of government controls on various aspects of NMEs renders price comparisons, and the calculation of production costs, invalid under the Department's normal methodologies.[26] As a consequence, in accordance with the Act and case precedent, we do not find RHI's argument to use its own NME prices in determining the magnesia surrogate values to be persuasive.

With regard to RHI's arguments that we value its magnesia FOPs with world-wide prices, we disagree. At the outset we note that the world-wide price information cited by RHI is not on the record of this investigation.[27] Therefore, the Department is unable to evaluate these data and consider them in valuing RHI's magnesia FOPs. Assuming, *arguendo*, that this information were on the record of this investigation, we note that world-wide prices are not specific to the surrogate country, India. Moreover, the use of a world-wide price for a surrogate value would contravene the plain language of the Act. Section 773(c)(1)(B) of the Act states that the valuation of the FOPs 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*, and section 773(c)(4) of the Act states that the administering authority shall utilize, to the extent possible, prices in one or more market economy countries that are *at a level of economic development comparable to that of the nonmarket economy country* (emphasis added). By definition, a world-wide price for magnesia cannot be specific to any appropriate country or countries. As such, we find that a world-wide price would not be a reliable indicator of prices in a market economy at a comparable level of economic development to the PRC.

Regarding RHI's arguments on adjusting the Indian import statistics used in the *Preliminary Determination*, we disagree, in part. RHI argues that that several major magnesia-producing countries were excluded from the calculation of magnesia surrogate values, such as Russia, South Korea and North Korea. Firstly, record evidence indicates that none of these countries

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[25] *See Preliminary Determination*, 75 FR at 11848.

[26] *See Prestressed Concrete Steel Wire Strand from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560 (May 21, 2010) and accompanying Issues and Decision Memorandum at Comment 5.

[27] We note that section 351.301(c)(3)(i) of the Department's regulations provides that factors of production data may be submitted 40 days after the publication of the preliminary determination. However, RHI attempted twice to submit this information on the record, 41 and 63 days after this statutory deadline. As a consequence, once the Department determined that this information constituted new factual information, which was untimely filed in accordance with section 351.301(c)(3)(i) of the Department's regulations, this information was rejected as untimely and removed from the record of the investigation.

exported magnesia to India during the POI.[28] Secondly, it is unclear from RHI's case brief what data from these countries the Department should include in the surrogate value calculation, since Russia, South Korea and North Korea made no entries of magnesia, either dead-burned or fused, into India during the POI. Accordingly, we are unable to include data from these countries in our final results.

Regarding the aberrational import data from the United Kingdom, we agree with RHI that this data should be excluded from the fused magnesia surrogate value calculation. We note that RHI submitted India Infodrive ("Infodrive") data to show that imports from the United Kingdom into India during the POI are not specific to the input in question. Due to the Department's well-established reservations regarding the use of Infodrive data, either as a corroborative tool or price benchmark, the viability of this particular Infodrive dataset must be analyzed in accordance with Department practice regarding the use of Infodrive data.[29] However, in cases where evidence from Infodrive indicates that, for specific countries, imports from these countries do not contain the product in question, the Department will diverge from its strong preference for using the entirety of the HTS classification.[30] Specifically, in this case Infodrive data indicate that the exports from the United Kingdom into India were entered under HTS 2519.90.10, fused magnesia, but are described as "Electromag Powder." Infodrive data indicate that imports from the United Kingdom into India represent 100% coverage of the corresponding WTA quantity.[31] Also, by value the United Kingdom's WTA import value is 100% equal to its Infodrive counterpart. As a consequence, a comparison of corresponding average unit values ("AUVs") shows no variations between datasets. We find that the country-specific Infodrive data for the United Kingdom demonstrate that the Infodrive data for HTS 2519.90.10 provide an adequate representation of the United Kingdoms' WTA data. Thus, because the United Kingdom's imports of "Electromag Powder." are not specific to the input in question, it has been excluded from the fused magnesia surrogate value calculation for the final determination.

Regarding RHI's arguments that, after making the above-named adjustments to the magnesia surrogate values used in the *Preliminary Determination*, the resulting magnesia surrogate values should be adjusted downward by 75 percent to 2000 prices, as an application of facts available to the Petitioner, we disagree. We note that in its arguments RHI relies heavily on allegations made by the Petitioner in an ongoing district court antitrust case. We also note that no final judgment has been made in that case. Moreover, it would appear that RHI is unaware of the Department's practice with regards to the selection of surrogate values. As noted above, section 773(c)(1)(B) of the Act states that the valuation of the FOPs shall be based on the best available information

[28] *See* Memorandum to the File through Scot Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, "Investigation of Magnesia Carbon Bricks from the People's Republic of China: Surrogate Factor Valuations for the Preliminary Results," dated March 3, 2010 ("Preliminary Surrogate Values Memo") at Exhibit 3.

[29] *See, e.g., LWTP* at Comment 9 (where the Department has stated that it will consider Infodrive data to further evaluate import data, provided: 1) there is direct and substantial evidence from Infodrive reflecting the imports from a particular country; 2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive India data; and 3) distortions of the AUV in question can be demonstrated by the Infodrive data; but that the Department will not use Infodrive data when they do not account for a significant portion of the imports which fall under a particular HTS subheading).

[30] *See Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 20, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[31] *See, e.g.,* RHI's February 12, 2010 submission at Exhibit 7.

regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority, and section 773(c)(4) of the Act states that the administering authority shall utilize, to the extent possible, prices in one or more market economy countries that are at a level of economic development comparable to that of the NME country, and a significant producer of comparable merchandise. Further, as noted above, it is the Department's stated practice to use contemporaneous period-wide price averages to value FOPs[32] from the primary surrogate country. Therefore, the Department's focus is concentrated upon the prices of magnesia in India at the time of the POI, not the effect market forces may have had on those prices, or historical price fluctuations. Thus, we find no credible reason to deflate RHI's magnesia surrogate values to 2000 levels.

Furthermore, we find RHI's argument that the Department should apply adverse facts available to the Petitioner because it did not place documents from its ongoing antitrust case, or comment on RHI's placement of those documents on the record of this investigation, unpersuasive. Sections 776(a)(1) and 776(a)(2) of the Act, provide that the Department shall use, subject to subsection 782(d) of the Act, facts otherwise available in reaching the applicable determination, if necessary information is not available or on the record, or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified. Because the Department never requested such information from the Petitioner, nor requested supplemental information from the Petitioner, the Petitioner could not have submitted it in an untimely manner, impeded this proceeding or been subject to the verification of this information. Accordingly, we have no basis to apply facts available to the Petitioner in accordance with sections 776(a)(1) and 776(a)(2) of the Act.

B. *Labor*

Between June 14, 2010 and July 14, 2010, the Department placed labor wage rate data on the record, and invited parties to comment on the Department's labor wage rate methodology.[33] As noted below, RHI and the Petitioner submitted comments on several dates.

RHI's Argument

June 18, 2010

- In their June 18, 2010 submission, RHI argues that of the twenty-two market economy countries placed on the record by the Department that are at levels of economic development comparable to the PRC, four - India, the Philippines, Thailand and the Ukraine - account for over 87 percent of these countries' total exports and therefore are the only significant producers of comparable merchandise.[34]
- RHI contends that there are only six economically comparable countries with wage rate data on the record in this investigation: El Salvador, Guatemala, India, Nicaragua, Sri

[32] *See Policy Bulletin* at 4.1; *see also Sawblades* at Comment 11.
[33] *See* the memoranda to the file dated June 15, 2010, June 22, 2010, July 6, 2010 and July 14, 2010.
[34] *See* RHI's June 18 submission at 27 and Exhibit 1.

Lanka and Ukraine. RHI claims that because India and Ukraine are the only two countries that are economically comparable to the PRC, are significant producers of comparable merchandise, and have wage rate data on the record in this investigation, they are the only two countries with statutorily permissible surrogate data on the record to value labor.

- According to RHI, because the CAFC in *Dorbest II* invalidated paragraph (d)(3), there should be no exemption for labor from the Department's normal practice of valuing all factors of production using data from a single surrogate country.[35]
- RHI maintains that India is the primary surrogate country for which all other factors of production have been derived, and Indian wage rates are not aberrational, nor do they lack in sufficient quality in comparison to Ukraine. RHI asserts that there is no substantial evidence on the record demonstrating that the Ukraine is a significant producer of MCB's and the labor data on the record for Ukraine consists of an average wage rate for workers engaged in all manufacturing sectors.
- RHI finds that there is information on the record for India that is specific to workers engaged in the manufacture of non-metallic mineral products, therefore the Department should value labor using Indian wage rate data for workers engaged in the manufacturing of non-metallic mineral products because this data represents the best available information on the record.

June 30, 2010

- In their June 30, 2010 submission, RHI argues there are several inaccuracies in the Department's labor wage rate data. Specifically, RHI contends that: (a) the GNI data released by the Department does not match that of the World Bank's *World Development Report* (2009) for Colombia, Dominican Republic, Fiji, Guyana, Honduras, Indonesia, Jordan, Macedonia, Mongolia and Thailand;[36] (b) the wage data reported by the Department for Guatemala is in accurate;[37] and the calculation of the average working hours is arbitrary and without explanation. According to RHI, the ILO offers a published list of countries specific average working hours.[38]
- RHI argues that the Department has not stated how the list of countries representative of market economy countries of similar economic development or are significant producers of subject merchandise. For example, RHI notes that Bosnia and Herzegovina, Dominican Republic and Fiji and Iran do not appear on the list of exporters. Moreover, RHI contends that there is no record evidence which indicates that Albania, Bosnia and Herzegovina, Dominican Republic, Fiji, Guyana, Iran, Macedonia and Mongolia produce comparable merchandise.
- RHI reiterates its argument from its June 18, 2010 submission, stating that the Department should use the Indian wage rate for Indian laborers involved in manufacturing non-metallic mineral products.[39] According to RHI, India is the surrogate

[35] *See Dorbest Limited et. al. v. United States*, 2009-1257, -1266, CAFC (May 14, 2010).
[36] *See* RHI's June 30, 2010 submission at Exhibit 2.
[37] *Id*. at Exhibit 3.
[38] RHI states that the ILO's average working hours is found in Chapter 4B of the *Main Statistics (Annual): Hours of Work in Manufacturing*, available at laborsta.ilo.org.
[39] *See* RHI's February 12, 2010 submission at Exhibit 9. RHI notes that this data is taken from Chapter 5B of the ILO's *Yearbook of Labour Statistics*.

country, is economically comparable to the PRC and produces a significant quantity of comparable merchandise. RHI notes that, as compared to the countries listed in the Surrogate Country Memo, India is the only significant exporter of comparable merchandise.[40]

- RHI argues that a regression based labor wage rate presents numerous problems and if used, the Department should: use wages and not earnings data[41]; not use countries for which wage data does not exist[42]; use country specific hourly conversions[43]; and Ukrainian data should not be used because it contains socialist concepts such as a 40-hour workweek.
- RHI contends that once countries with data problems are eliminated from the regression analysis, the analysis becomes statistically insignificant since the only countries left are the Philippines, Egypt and Jordan.

July 9, 2010

- In their July 9, 2010 submission, RHI reiterates its previous arguments that the data in the third release of export data fails to meet the two-part statutory standard under *Dorbest II* and continues to suffer from previously noted inaccuracies.
- RHI maintains that the Department did not indicate the methodology it plans to use in calculating the surrogate value for labor and the Department's failure to give notice of its intended methodology, improperly and unlawfully denies parties the opportunity to comment on that methodology.
- RHI states again that the Indian labor data from the ILO is the only data on the record without inaccuracies and meets the statutory requirements.
- RHI rebuts Petitioner's suggestion to use labor wage data from Ukraine and Guatemala based on a comparison of their GNIs with that of China, as it fails to satisfy both statutory criteria. RHI claims that Petitioner did not place any evidence on the record that either country produces any bricks or comparable products. RHI asserts that the export data included in the Department's previous releases show small amounts of exports of products classified under three basket HTS categories, which indicates only the possibility of production of small amounts of products that may or may not be sufficiently comparable to bricks, and therefore, provides no basis for a finding that either country is in fact a "significant" producer of comparable merchandise.
- RHI notes that the Departments is inflating the wage rates to represent hypothetical 2009 wages, while continuing to use reported 2007 GNI per capita data. According to RHI, such a regression is based on the faulty premise that past GNI per capita affect wages two year in the future and that in reality, GNI per capita may, and likely does, change

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[40] *See* Memorandum to Scot T. Fullerton, Program Manager, Office 9, AD/CVD Operations, from Kelly Parkhill, Acting Director, Office for Policy, "Request for List of Surrogate Countries for an Antidumping Duty Investigation of Magnesia Carbon Bricks from the People's Republic of China," dated October 28, 2009 ("Surrogate Country Memo").

[41] RHI notes that wages data does not exist, and therefore, should not be used for the following countries: Honduras, Indonesia, Peru and Thailand.

[42] These are: Colombia, El Salvador, Guatemala, Honduras, Paraguay and Sri Lanka.

[43] RHI notes that hourly conversion rates do not exist, and thus, should not be used for the following countries: Guatemala, Honduras, Indonesia, Nicaragua, Paraguay and Sri Lanka.

significantly over a two-year period, and such changes are not reflected in the regression comparing different time periods of data. RHI contends argues that the Department historically has recognized a relationship between GNI per capita and wage rates, as opposed to the relationship between a country's past economic development and its future wages.

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- RHI notes that the Department added Nicaragua's wage rates and income data back into the revised basket of countries and removed West Bank and Gaza from the income data. RHI continues to argue that the data in the fourth data release still suffers from the inaccuracies that RHI argued in previous submissions.
- RHI again reiterates its argument that the Department should use the Indian wage-rate labor data to value labor.

Petitioner's Argument

- In their June 30, 2010 submission the Petitioner argues that Indian wage data should not be used to value labor and that the Department should value labor on one or more countries which have a similar GNI to the PRC.
- The Petitioner contends that only two countries, Ukraine and Guatemala, had GNI's with 10 percent of the PRC's GNI, and therefore, should be averaged to calculate the labor wage rate.
- The Petitioner claims that while the counties on the list have product comparability, the most important factor affecting labor rates is GNI.

Department's Position: As a consequence of the CAFC's ruling in *Dorbest II*, the Department is no longer relying on the regression-based wage rate described in section 351.408(c)(3) of the Department's regulations.[44] The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. For the final determination, we have calculated an hourly wage rate to use in valuing RHI's reported labor FOP by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

RHI argues that the Department should use the hourly wage rate for India from the ILO as an alternative to our previous regression-based wage rate. The Department disagrees. While information from a single surrogate country can reliably be used to value other FOPs, wage data from a single surrogate country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and GNI. While there is a strong worldwide relationship between wage rates and GNI, too much variation exists among the wage rates of comparable MEs. As a result, we find reliance on wage data from a single country to be unreliable and arbitrary. For example, when examining the most recent wage data, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation (*e.g.*, countries with GNIs between USD 950 and USD 4,100), the wage rate spans from USD

[44] *See Dorbest Limited et. al. v. United States*, 2009-1257, -1266, CAFC (May 14, 2010).

0.41 to USD 2.08.[45] Additionally, although both India and Guatemala have GNIs below USD 2500, and both could be considered economically comparable to the PRC, India's observed wage rate is USD 0.47, as compared to Guatemala's observed wage rate of USD 1.14 – over double that of India.[46] There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For this reason, and because labor is not traded internationally, the cross-country variability in labor rates, as a general rule, does not characterize other production inputs or impact other factor prices. Accordingly, the large variance in these wage rates illustrates the arbitrariness of relying on a wage rate from a single country. For these reasons, the Department maintains its longstanding position that, even when not employing a regression methodology, more data are still better than less data for purposes of valuing labor. Accordingly, the Department's has employed a methodology that relies on a larger number of countries in order to minimize the effects of the variability that exists between wage data of comparable countries.

To achieve a labor value that is based on the best available information for the final determination, we have relied on labor data from several countries determined to be both economically comparable to the PRC, and significant producers of comparable merchandise.

First, in order to determine the economically comparable surrogate countries from which to calculate a surrogate wage rate, the Department looked to the Surrogate Country Memo.[47] Early in this investigation, the Department selected six countries for consideration as the surrogate country for this review. To determine which countries were at comparable levels of economic development to the PRC, the Department placed primary emphasis on GNI.[48] The Department relies on GNI to generate its initial list of countries considered to be economically comparable to the PRC. In this investigation, the list of potential surrogate countries found to be economically comparable to the PRC included India, the Philippines, Indonesia, Colombia, Thailand, and Peru. The Department used the high- and low-income countries identified in the Surrogate Country Memo list as "bookends" and then identified all countries in the World Bank's *World Development Report* for 2007 with per capita incomes (using the 2007 GNIs from the 2009 Expected Wages of Selected NME Countries) that placed them between these "bookends". This resulted in 51 countries, ranging from India with USD 950 GNI to Colombia with USD 4,100.[49]

Regarding the second criterion of "significant producer," the Department identified all countries which have exports of comparable merchandise (defined as HTS 6902.10, 6815.91 and 6815.99), which are identified in the scope of this investigation) between 2007 and 2009.[50] After screening for countries that had exports of comparable merchandise, we found that 29 of the 51 countries

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[45] *See* "Expected Wages of Selected NME Countries," revised in December 2009, available at http://ia.ita.doc.gov/wages/index.html.
[46] *Id*.
[47] *See* Memorandum to Scot T. Fullerton, Program Manager, Office 9, AD/CVD Operations, from Kelly Parkhill, Acting Director, Office for Policy, regarding "Request for List of Surrogate Countries for an Antidumping Duty Investigation of Magnesia Carbon Bricks from the People's Republic of China" ("Surrogate Country Memo").
[48] *See* 19 CFR 351.408(b).
[49] *See* the memoranda to the file dated June 15, 2010, June 22, 2010, July 6, 2010 and July 14, 2010 (collectively, "Labor Wage Rate Data").
[50] The export data is obtained from the Global Trade Atlas. *Id*.

designated as economically comparable to the PRC are also significant producers. In this case, we have defined a "significant producer" as a country that has exported comparable merchandise from 2007 through 2009. We disagree with RHI that *only* net exporters or major exporters to the United States can be considered significant producers. The antidumping statute and regulations are silent in defining a "significant producer," and the antidumping statute grants the Department discretion to look at various data sources for determining the best available information.[51] Moreover, while the legislative history provides that the "term 'significant producer' *includes* any country that is a significant net exporter,"[52] it does not preclude reliance on additional or alternative metrics. In practice, the Department has relied on other indices for determining whether a country is a significant producer. For example, in *PRC Furniture*[53] the Department relied on production data for selecting the primary surrogate country. In this case, we have relied on countries with exports of comparable merchandise as significant producers.

For purposes of valuing wages in this investigation, the Department determines the following 29 countries to be both economically comparable to the PRC, and significant producers of comparable merchandise: Albania, Algeria, Bhutan, Bolivia, Bosnia & Herzegovina, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Honduras, India, Indonesia, Jordan, Macedonia, Morocco, Namibia, Nicaragua, Paraguay, Peru, Philippines, Sri Lanka, Swaziland, Thailand, Tunisia, Ukraine and Yemen.

Third, from the 29 countries that the Department determined were both economically comparable to the PRC and significant producers of comparable merchandise, the Department identified those with the necessary wage data. In doing so, the Department has continued to rely upon ILO Chapter 5B data "earnings", if available and "wages" if not.[54] We used the most recent data within five years of the base year (2007) and adjusted to the base year using the relevant Consumer Price Index.[55] Of the 29 countries that the Department has determined are both economically comparable and significant producers of comparable merchandise, 8 countries, *i.e.*,

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[51] *See* section 733(c) of the Act.

[52] *See Conference Report to the 1988 Omnibus Trade & Competitiveness Act*, H.R. Conf. Rep. No. 576, 590, 100th Cong. 2nd Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988).

[53] *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review*, 75 FR 9581, 9584 (March 3, 2010) ("*PRC Furniture*").

[54] The Department maintains its current preference for "earnings" over "wages" data under Chapter 5B. However, under the previous practice, the Department was typically able to obtain data from somewhere between 50-60+ countries. Given that the current basket now includes 16 countries, the Department found that our long-standing preference for a robust basket outweighs our exclusive preference for "earnings" data. We note that several countries that met the statutory criteria for economic comparability and significant production, such as Indonesia and Thailand, reported only a "wage" rate. Thus, if earnings data is unavailable from the base year (2007) of the previous five years (2002-2006) for certain countries that are economically comparable and significant producers of comparable merchandise, the Department will use "wage" data, if available, from the base year or previous five years. The hierarchy for data suitability described in the 2006 *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, (October 19, 2006) ("*Antidumping Methodologies*") still applies for selecting among multiple data points within the "earnings" or "wage" data. This allows the Department to maintain consistency as much as possible across the basket.

[55] Under the Department's regression analysis, the Department limited the years of data it would analyze to a two-year period. *See Antidumping Methodologies*, 71 FR at 61720. However, because the overall number of countries being considered in the regression methodology was much larger than the list of countries now being considered in the Department's calculations, the pool of wage rates from which we could draw from two years-worth of data was

Algeria, Bhutan, Bolivia, Morocco, Namibia, Swaziland, Tunisia and Yemen, were not used in the wage rate valuation because there were no earnings or wage data available. The remaining countries reported either earnings or wage rate data to the ILO within the last five years.[56]

The Department relied on data from the following countries to arrive at its wage rate in the final determination: Albania, Bosnia & Herzegovina, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Honduras, India, Indonesia, Jordan, Macedonia, Nicaragua, Paraguay, Peru, Philippines, Sri Lanka, Thailand and Ukraine. The Department calculated a simple average of the wage rates from these 21 countries. This resulted in a wage rate derived from comparable economies that are also significant producers of the comparable merchandise, consistent with the CAFC's ruling in *Dorbest II* and the statutory requirements of section 773(c) of the Act.

In response to RHI's argument concerning Ukraine, the Department determined in 2006 that Ukraine was a market economy, which included an analysis of that country's labor market and labor laws.[57] It may be true that Ukraine's wages reflect labor laws and policies that differ from those in certain other market economies, which is not unexpected given the Department's understanding of the differing labor laws and policies across countries described above. Indeed, as we have explained, this very point supports the Department's preference for the use of an average wage rate derived from a basket of countries, instead of relying on a single surrogate country. Thus, we do not believe that Ukraine's labor laws undermine its usefulness for purposes of our surrogate value methodology.

The Department further finds that calculating the cost of labor that is contemporaneous with the POI constitutes the best available information. Previously, the Department performed a regression on GNI per capita and wage data using the same time period. Under the new interim methodology, this mathematical relationship no longer exists since the Department is now taking the simple average of wages. The wage data is adjusted forward to the POI of the case using the actual CPI. The Department recognizes that a list of countries based on a 2009 GNI per capita may differ, in part, from the list that was derived using the Surrogate Country Memorandum, but many of the countries found economically comparable based on 2005 GNI per capita are the same countries as those found economically comparable based on 2007 GNI per capita, *e.g.* India, the Philippines and Indonesia.

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still significantly larger than the pool from which we may now draw using five years worth of data (in addition to the base year). The Department believes it is acceptable to review ILO data up to five years prior to the base year as necessary (as we have previously), albeit adjusted using the Consumer Price Index. *See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology*, 70 FR 37761, 37762 (June 30, 2005). In this manner, the Department will be able to capture the maximum amount of countries that are significant producers of comparable merchandise, including those countries that choose not to report their data on an annual basis. *See also* the CPI data placed on record, obtained from the International Monetary Fund's *International Financial Statistics*, found in Labor Wage Rate Data.

[56] *See* International Labour Organization's *Yearbook of Labour Statistics*.

[57] *See Final Results of Inquiry Into Ukraine's Status as a Non-Market Economy Country*, 71 FR 9520, February 24, 2006 ("*Ukrainian Graduation*") and accompanying Decision Memorandum.

With respect to the World Bank source of data from which the Department determines economic comparability, there is a two year lag between the time a country reports its GNI and when that GNI is published in the data source.[58] The Department relied on the most recent GNI per capita data available for this proceeding at the time that economic comparability was determined for this case. Accordingly, the Department believes that its use of the most contemporaneous labor rates on the administrative record is consistent with the Department's practice in selecting factor information for other surrogate values, and therefore is the best available information on the record.

Comment 2: Deductions to Gross Unit Price

A. *Indirect Selling Expenses*

RHI's Argument

- RHI notes that in the *Preliminary Determination* the Department reduced RHI's gross unit price for indirect selling expenses ("INDIRSU") incurred by VRC.
- According to RHI, in past NME cases, the Department has concluded that the gross unit price should not be adjusted for INDIRSU because the Department cannot determine the requisite offsetting INDIRSU adjustment to the normal value side of the dumping margin under the NME methodology. RHI argues that the courts have agreed with such reasoning.[59]
- RHI contends that it is not engaged in U.S. sales activities, only the Chinese production of bricks, and notes that intercompany transfer prices set the amount it is paid for sales.
- Thus, RHI asserts if in the dumping margin calculation, RHI's U.S. price is reduced for INDIRSU, then the normal value side should similarly be reduced for INDIRSU (as indicated in the Indian company surrogate financials), for a fair apples-to-apples comparison.

Petitioner's Argument

- In its rebuttal brief, the Petitioner asserts that the Department properly deducted INDIRSU in accordance with both the statute and its regulations, citing to specific sections where adjustments to constructed export prices ("CEP") are discussed.
- The Petitioner notes that RHI fails to cite to any past cases where the Department concluded it should not adjust U.S. sales prices for INDIRSU.
- According to the Petitioner, *Shandong Huarong*, citied by RHI in support of its assertions, is inapposite. The Petitioner notes that in that case, the court affirmed the Department's decision not to attempt to calculate or apply a commission offset adjustment to normal value.
- Finally, the Petitioner notes that the financial ratio calculations for the two companies selected as surrogates for the *Preliminary Determination* do not involve significant levels

[58] *See* World Bank's *World Development Report* for 2007. We note that subsequently the World Bank has updated reported GNIs. *See also* the 2009 Expected NME Wage rates that were used to update the 2007 GNIs, found at http://ia.ita.doc.gov/wages/07wages/final/final-2009-2007-wages.html.

[59] *See Shandong Huarong Machinery Co. v. United States*, 31 CIT 1815, 1830-34 (CIT 2007) ("*Shandong Huarong*").

of selling expenses as distinct from general and administrative expenses.[60] Accordingly, if the Department were to consider an adjustment for INDIRSU to the normal value, the Petitioner argues there would be no appropriate expense category on which to base the adjustment.

Department's Position:

We agree with the Petitioner. We find that the plain language of the Act and the Department's regulations require that incurred INDIRSU expenses be deducted from the starting price in CEP situations. Section 351.412(f)(2) of the Department's regulations states that indirect selling expense ("ISE") in the context of CEP sales, is defined as selling expenses, other than direct selling expenses or assumed selling expenses, that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales.

Section 772(d)(4) of the Act states that the Department must reduce the price used to establish constructed export price by: (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added); (A) commissions for selling the subject merchandise in the United States; (B) expanses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties (C) any selling expenses that the seller pays on behalf of the purchaser; and (D) any selling expenses not deducted under subparagraph (A), (B), or (C).

Moreover, section 351.402(b) of the Department's regulations state:

> "In establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act."

Regarding RHI's citation to *Shandong Huarong*, we also disagree. In that case the court remanded the Department to "further explain its determination that the record here was devoid of substantial evidence to permit a circumstances-of-sale adjustment."[61] The court sustained the Department's finding that there was not enough evidence on the record to make the adjustment. The Department does not request PRC respondents to report U.S. ISE for sales in export price situations, as those expenses are internal PRC expenses, and thus, considered unreliable.[62] Therefore, for these final results, we will continue to deduct INDIRSU from the gross unit price.

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[60] *See* Preliminary Surrogate Values Memo at Exhibit 11.
[61] *See* Final Results of Redetermination Pursuant to Court Remand, *Shandong Huarong Machinery Co., Ltd. v. United States*, Court No. 04-00460 at 32.
[62] *Id.* at 34.

B. *Discounts*

Petitioner's Argument

- The Petitioner argues that the verification process necessarily relies on a sample of all data reported, and therefore, argues that the Department should apply a previously unreported discount found at verification to all of RHI's sales.
- The Petitioner contends that, should the Department choose not to apply this discount to all sales, it should, at a minimum, apply the discount to all sales for the customer to which the discount applied.

RHI's Argument

- In its rebuttal brief, RHI asserts that the unreported discount was reported to the Department as a minor correction at verification, which the Department accepted.
- RHI argues that the Department should not apply this discount to all sales, but only sales for which this discount applied.

Department's Position:

We agree with RHI. During our sales verification, we reviewed numerous sales transactions. As RHI notes, the sales with the unreported discount were properly identified at the outset of verification, and accepted as a minor correction. Among the numerous sales reviewed in detail, as well as the sales reconciliation data examined in detail, we found no evidence of any systematic omission of similar adjustments. Accordingly, other than making the necessary sale-specific revisions, there is no basis to make any further adjustments to RHI's sales data in this regard.

Comment 3: RHI's Separate Rate

Petitioner's Argument

- The Petitioner notes that RHI stated that the government sets minimum and maximum prices for bricks. The Petitioner argues that because the PRC government sets minimum and maximum prices for bricks, it exercises control over export pricing.[63]
- According to the Petitioner, at verification, RHI demonstrated no mitigating circumstances to counter the admission of government control of pricing, instead stating that U.S. prices are set by its North American affiliate, VRC.[64]
- The Petitioner contends that there is no evidence that the pricing established by RHI's affiliates was not directly influenced by the PRC government because the VRC's pricing guidelines must be influenced by the minimum and maximum prices set by the PRC government.
- The Petitioner maintains that because RHI did not demonstrate that its minority shareholder was not owned controlled or affiliated with the PRC government, RHI should not receive a separate rate.[65]

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[63] *See* RHI's January 15, 2010 submission at 6 & 9.
[64] *See* VRC Verification Report at 4.
[65] The Petitioner made a general comment about certain RHI affiliates, but made no specific arguments concerning them. *See* Petitioner's June 18, 2010 Case Brief at 8.

- The Petitioner argues that RHI did not provide sufficient evidence with respect to other separate rate tests, such as foreign currency exchange, disposition of profits and the appointment of managers and directors, to show its *de jure* independence. As thus, RHI should not receive a separate rate.

RHI's Argument

- In its rebuttal brief, RHI argues that the Department verified RHI's information regarding its ownership by private, non-governmental entities and established its eligibility for a separate rate.
- RHI contends that the Department reviewed all of RHI's relevant business records, and if the PRC government had been dictating RHI's pricing or other terms of sales, it would have been detected by the Department.
- RHI claims that the Chinese Customs internal price guidelines, setting the highest and lowest prices for exports, is a broad guideline for exports of entire industries, with the purpose of assuring accurate reporting of export values for trade data purposes and the tax base for applicable value added taxes. RHI asserts that this is exactly the type of macroeconomic price guideline the Department does not consider to constitute significant government control.
- Finally, RHI notes that they fully cooperated in this investigation by responding to the Department's requests for information.

Department's Position:

We continue to find that RHI has established that it is free from government control over its export activities, and accordingly, is eligible for a separate rate. With respect to the lack of *de jure* control over RHI's export activities, in accordance with *Sparklers*, the Department considers the following *de jure* criteria in determining whether an individual company may qualify for a separate rate: 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; 3) any other formal measures by the government decentralizing control of companies.[66] The Department typically 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 subject to the approval of, a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.[67]

With respect to the Petitioner's emphasis of Chinese Customs pricing guidelines on the merchandise under consideration, we note that the focus of Department's separate rate test is on

[66] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) ("*Sparklers*").
[67] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585, 22587 (May 2, 1994) ("*Silicon Carbide*"); *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

export decisions made at the individual firm level, and generally not with macroeconomic border-type controls.[68] Consistent with our criteria outlined above with respect to finding absence of *de jure* control, we examined RHI's business licenses and export certificate of approval in addition to the *Customs Import and Export Tariffs of the PRC*, published by Chinese Customs and noted no "supervision conditions" listed for bricks.[69] In addition, in our examination of RHI's sales activities we found no evidence of government pricing guidelines or export approval. As a result, we found no indication of restrictive stipulations. Therefore, evidence on the record does not support a finding of direct government involvement in day-to-day export activities/operations at the firm level. Rather, the record evidence supports the conclusion that there is a lack of *de jure* control over RHI's export activities.

With respect to *de facto* government control over RHI's export activities, again, we find that RHI has demonstrated independence from the government. RHI's board of directors, appointed by Radex Vertriebsgesellschaft m.b.H (a partner of RHI's parent company, RHI AG), determines the distribution of profits and selects lower level managers.[70] Additionally, RHI's affiliated entities set prices based upon RHI's costs and freely converts foreign currency.[71] Moreover, record evidence indicates that RHI makes independent decisions with respect to its profit distribution, and retains the profits from its export sales.[72]

With respect to RHI's minority shareholder, Liaoning Jinhe Investment Co., Ltd ("Jinhe"), we find that they are not owned, controlled or affiliated with the PRC government. RHI provided the name and percentage ownership of the 14 individuals who own Jinhe.[73] The Department verified information provided by RHI in regards to Jinhe, as well as provided further documentation that Jinhe is not involved in day-to-day activities with RHI.[74]

Here, as outlined above, RHI provided evidence rebutting the presumption of *de jure* control in the form of a business license, certification of approval, and the *Customs Import and Export Tariffs of the PRC*.[75] Additionally, as outlined above, RHI rebutted the presumption of *de facto* control by demonstrating that it negotiates its own contracts, sets its own prices, selects its own management, makes independent decisions with respect to its profit distribution, and retains the proceeds from its export sales. Accordingly, the Department finds that record evidence

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[68] *See Policy Bulletin 05.1: "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,"* April 5, 2005 at 1, stating:

> The Department's separate rate test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices). Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61757 (November 19, 1997); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

[69] *See* RHI Verification Report at 3-4.

[70] *See* RHI's November 9, 2009 Section A response at 13-15 and Exhibit 7, RHI's January 15, 2010, Supplemental Section A response at 4-5; *see also* RHI Verification Report at 4-5.

[71] *See* RHI Verification Report at 4 and RHI's November 9, 2009, Section A response at 12-16 and Exhibits 1 & 6.

[72] *See* RHI's November 9, 2009 Section A response at 14-15 and RHI Verification Report at 4.

[73] *See* RHI's January 15, 2010 Supplemental Section A response at 11 and Exhibit S-K.

[74] *See* RHI Verification Report at 3 and Exhibits 1, 3, and 5.

[75] *See* RHI Verification Report at 3-4.

demonstrates that RHI was able to operate with a degree of independence with regard to its export activities. In other words, despite the presumption of broad government control, substantial record evidence supports the Department's finding that the government does not control RHI's export activities. Therefore, in accordance with *Sparklers* and *Silicon Carbide*, based on the above outlined criteria, because it has shown an absence of *de jure* and *de facto* control with respect to its export activities, we find that RHI continues to be eligible for a separate rate.

Comment 4: Service Contracts

Petitioner's Argument

- The Petitioner maintains that in the future the Department should require RHI to provide its internal analyses of all cost components of full line service ("FLS") contract materials and services, and to provide the total values and unit values that were assigned to bricks, as well as the quantities sold, pursuant to such contracts during the POI.
- The Petitioner notes that at verification the Department observed that an internal value for bricks consumed under FLS contracts was recorded and, even if this value was not a per-unit value for the bricks, RHI could easily calculate per-unit values based on the data it maintains in its accounting system.
- The Petitioner argues that if the Department continues to permit respondents to exclude reporting of bricks consumed under FLS contracts or similar arrangements, exporters may be able to use these arrangements to evade antidumping duties should an antidumping duty order be issued.
- The Petitioner contends that, if the Department continues to allow RHI to withhold transaction-specific information on bricks consumed under FLS contracts, at a minimum, the Department should state that it will require the reporting of per-unit values for bricks sold at a bundled price along with other goods and services in any future administrative review, and that such values would be tested against reasonable benchmarks.

RHI's Argument

- In its rebuttal brief, RHI maintains that at verification the Department found no instance of any cost or value that could be used as a price for bricks shipped to fulfill FLS contracts.
- RHI asserts that the Department verified that all of the FLS-related information reviewed was consistent with RHI's descriptions in its questionnaire responses.
- RHI argues that, accordingly, the Department verified that these transactions were properly excluded from the Department's margin calculations because there is no reasonable or reliable method for determining a price of the bricks consumed under FLS contracts.
- RHI contends that the Petitioner's concerns regarding any potential evasion of duties through FLS contracts should be addressed in future reviews or circumvention proceedings should such issues actually arise.

Department's Position:

The Department agrees with RHI that its FLS contracts involve complicated transactions in which the subject merchandise is bundled with additional products and services when delivered to the unaffiliated customer. For the final determination, the Department has continued to exclude these transactions from its dumping analysis because of their complex nature and because they constitute a relatively small percentage of bricks shipped to U.S. customers during the POI.[76]

Nevertheless, if an antidumping duty order is issued and an administrative review is subsequently requested, we may reconsider our treatment of these transactions and seek guidance from all interested parties on how to account for these transactions in calculating cash deposit and assessment rates. We note that entries of bricks into the United States that are shipped under FLS contracts will be covered if an antidumping duty order on bricks from the PRC is published, regardless of whether the transactions are part of the margin calculation in this investigation.

Comment 5: Exclusion of Resin-bonded Magnesia Carbon Functional Refractory Products from the Scope

RHI's Argument

- RHI explains that the resin-bonded magnesia carbon functional refractory products at issue are taphole surround blocks, sleeves, and sets (commonly known as "tapholes")[77] and are outside the scope of the investigation.
- In particular, RHI states the scope of the investigation includes the specific term "bricks" (*i.e.*, solid, compressed blocks that are generally rectangular in shape), rather than broader terms such as "components," "shapes," "products" or "parts," because the Department intended to limit the scope of the proceeding to "bricks," as opposed to other types of products containing magnesia carbon.
- RHI argues that the bricks covered by the investigation are solid, generally rectangular in shape (with modest variations from strict rectangularity appropriate to conform to curved walls), and are fitted together to build refractory linings for electric arc furnaces, basic oxygen furnaces and steel ladles.
- RHI contends that bricks are produced in large volumes and are used for lining large surface areas that are essentially flat and smooth. According to RHI, other magnesia carbon products that RHI produces are outside the scope of the investigation have significantly more complex, non-brick shapes, and therefore, are produced in much smaller quantities and are used for more specialized applications.
- RHI contends that, although the Department did not formally state that non-brick shapes were outside the scope of the investigation within the "Scope Comments" section of the *Preliminary Determination*, the Department effectively acknowledged that position by excluding the reported non-brick magnesia carbon product sales from the preliminary calculations.

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[76] The precise percentage is proprietary. *See* RHI's March 1, 2010 submission at 3.
[77] *See* RHI's February 5, 2010 submission at 3-4.

- Finally, RHI notes that the Petitioner has not objected to RHI's assertions throughout this investigation that resin-bonded magnesia carbon functional refractory products are not the merchandise under consideration.

Petitioner's Argument

- In its rebuttal brief, the Petitioner acknowledges that, it has no objection to the exclusion from this investigation of resin-bonded magnesia carbon functional refractory products from the antidumping duty margin calculations, it contends that such criteria as "more complex" shapes, or different end uses and customer perceptions, are not appropriate, objective criteria for revising the scope language to bricks of a particular shape or dimension.
- The Petitioner expresses its concern that the scope language should not be weakened to facilitate circumvention through minor dimensional alterations or fraud (*e.g.*, incorrect or misleading labeling of subject merchandise as "complex" or destined for a different end use).
- Accordingly, the Petitioner asserts that the Department should not alter the scope to exclude any products based on their end use, characterization as "non-brick" shape or customer perceptions.
- Instead, the Petitioner believes that the Department has correctly left such scope matters to be analyzed by U.S. Customs and Border Protection, and any questions can be resolved through formal scope determinations provided for under the statute and the regulations.

Department's Position:

We continue to consider resin-bonded magnesia carbon functional refractory products, as described by RHI, to be non-subject merchandise because, as RHI notes, they do not meet the description of covered merchandise under the scope. Further, the Petitioner has not objected to this interpretation, nor proposed that such merchandise be captured in the Department's dumping calculations. We are not, however, amending the scope of the investigation to include a specific exclusion for such products because we are unable to provide an adequate description for these products. We agree with the Petitioner that an exclusion based on this shape may lead to potential circumvention under an antidumping duty order. Thus, at this time, we are not revising the scope description of the merchandise under investigation.

Comment 6: Double Remedy

RHI's Argument

- RHI argues (as noted above) that the Department should adjust the magnesia surrogate values to avoid double counting because the application of both the AD and CVD laws to the same products from the same NME country is unlawful and results in application of duplicate remedies to the same alleged distortions.
- RHI cites to previous cases where the Department has dismissed claims for adjustments to the NME methodology to avoid double remedies on the basis that a respondent has failed to meet its burden to establish entitlement to such adjustment.

- RHI contends that because the post-preliminary determination in the companion CVD investigation was released at such a late stage in the proceeding, and the Department did not allow RHI to introduce new evidence supporting the need for an adjustment of the NME methodology, the Department has prevented RHI from fully addressing the double remedy issue.
- In its rebuttal brief, RHI states that it agrees with, and adopts, the GOC's arguments outlined below.

Government of China's Argument

- The GOC argues that the Department should terminate both the AD and CVD investigations because the U.S. Court of International Trade ("CIT") ordered the Department "to forego the imposition of CVDs on the merchandise at issue or for Commerce to adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies on merchandise from the PRC."[78] The GOC asserts that the Department has not published any policy or procedure on this issue, and therefore, respondents have had no notice of how to defend their interests in this proceeding.
- The GOC claims that the Department's NME AD methodology captures and offsets the same phenomenon offset by CVDs.
- The GOC asserts that if there is a positive finding in both cases, an attempt to apply adjustments, after the fact, to account for a double remedy would be unfair, as respondents have not had an opportunity to comment on such adjustments.
- The GOC contends that in the case of a positive finding in both cases, a simple offset of the AD margin by any CVD margin is not a reasonable application of the law because it would force respondents to participate in costly investigations and reviews without knowing which remedy would apply.

Petitioner's Argument

- The Petitioner argues that the Department properly issued concurrent AD and CVD findings on RHI, and that no double counting exists. The Petitioner notes that neither the statute nor judicial precedent precludes the Department from applying the CVD law to China as a NME country.

Department's Position:

The Department disagrees with the GOC and RHI that the concurrent application of AD duties calculated under the Department's NME methodology, and the imposition of CVDs, creates a double remedy for domestic subsidies in the PRC. As such, we find that the Department is not required to terminate the AD and/or CVD or make adjustments to the magnesia surrogate values.

The Department notes that the Act is silent with respect to this issue. The AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies.[79] Such subsidies

[78] *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1242-1243 (CIT 2009) ("*GPX*").
[79] *See* section 701(a) of the Act.

may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value.[80] With one exception, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

The one point of contact between the AD and CVD regimes is section 772(c)(1)(C) of the Act. This provision requires that the price used to establish the export price shall be increased by "the amount of any CVD imposed on the subject merchandise . . . to offset an *export subsidy* (emphasis supplied)." The GOC and RHI suggest that the Department erred in refusing to interpret this provision as if it actually read, "to offset an export subsidy *or, where the NME antidumping methodology is applied, a domestic subsidy* (emphasis supplied)." In other words, the GOC and RHI would have the Department read an automatic 100-percent offset for domestic subsidies in NME AD proceedings into the Act, based upon the logic purportedly inherent in Congress's decision to provide an automatic offset for export subsidies to implement the requirements of Article VI(5) of the General Agreement on Tariffs and Trade ("GATT"). Plainly, the highlighted language is not in the Act. As the Department previously noted, Congress amended the Act to provide for an adjustment to the AD calculation to offset CVDs for export subsidies.[81] If anything, the absence of the additional language related to a domestic subsidy implies that Congress intended to not provide additional adjustment for domestic subsidies.

In fact, the legislative history of the export subsidy adjustment establishes only that Congress considered it to satisfy the obligations of the United States under Article VI(5) of the GATT. The legislative history does not appear to be based on any specific assumption about whether foreign government subsidies lower prices in the United States and, in fact, is not solely concerned with the effects of subsidies in the United States.[82] Thus, although the Act requires a full adjustment of AD duties for CVDs based on export subsidies in all AD proceedings, it provides no basis for concluding that Congress's action was based on any specific assumptions about the effect of subsidies upon export prices. It may be simply that Congress recognized the complexity of the issues that would have had to have been resolved in order to provide anything less than a complete offset for export subsidies, and simply opted for a full offset to avoid those potential problems.

It is not clear whether Congress considered the economic assumptions that might have been behind the silence of the GATT contracting parties with respect to domestic subsidies in Article VI(5). In any event, all that the contracting parties may have assumed was that domestic subsidies had a symmetrical effect upon export and domestic prices. This presumed symmetrical impact may have been a *pro rata* or *de minimis* reduction in these prices. Thus, it is not correct to conclude that Congress assumed that the GATT contracting parties assumed that domestic

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[80] *See* section 731(a) of the Act.

[81] *See Notice of Final Results of First Antidumping Administrative Review: Low Enriched Uranium From France*, 69 FR 46501, 46505-06 (August 3, 2004).

[82] *See* Trade Agreements Act of 1979, Report of the Committee on Finance United States Senate on H.R. 4537, July 17, 1979, 96th Cong. 1st Sess. Rep. No. 96-249.

subsidies lower export prices, *pro rata*, still less that Congress built any assumptions about the price effects of domestic subsidies into the antidumping law.

Indeed, RHI cited no statutory provision that would be a basis for imposing such an adjustment because there are no such provisions in the Act. The various theories advanced by respondents in prior cases to support their requests for an automatic 100-percent offset, or an adjustment of AD duties determined under the NME methodology by any CVD duties are based on mistaken premises. Accordingly, the Department has consistently and properly rejected these claims.[83]

Although the GOC and RHI have asserted that the Department should terminate the AD and/or CVD investigations or make adjustments to the magnesia and electricity surrogate values, they cite no statutory provision that would provide a basis for permitting or requiring the Department to adopt any of these measures. Section 701 of the statute requires the Department to impose CVDs equal to the full amount of the subsidy "in additional to any other duty imposed." The Department does not see how any matter related to dumping could alter this statutory command. Thus, the Department has always considered that this issue of a potential offset arises under the AD law, rather than the CVD law. Moreover, section 773(c)(1)(B)(2) states that the valuation of the FOPs 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, and pursuant to section 351.408(c)(1) of the Department's regulations, where an FOP is purchased from a ME and paid for in an ME currency, the Department will use the price paid to the ME supplier. Therefore, there is no provision in the statute or provided by the Department's regulations to value FOPs using prices paid for these inputs to NME suppliers as an adjustment to certain inputs, more specifically magnesia, as RHI suggests.

We disagree with the GOC's and RHI's characterization of the Department's previous practice with respect to NME countries and, by implication, of the decision of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Georgetown Steel.*[84] The GOC and RHI imply that the Department did not apply the CVD law to NMEs concurrently with the NME AD methodology before 2007 because the distortions allegedly offset by the NME methodology remedied any distortions from countervailable subsidies. In fact, the Department declined to apply the CVD law to the Soviet Bloc countries in the mid-1980s because of the difficulties involved in identifying and measuring subsidies in the context of those command-and-control economies at that time.

Georgetown Steel concerned potash imported from the USSR and the German Democratic Republic, and carbon steel wire rod from Czechoslovakia and Poland. In those proceedings, the Department determined that the concept of a subsidy had no meaning in an economy that had no markets and in which activity was controlled according to central plans.[85]

The Federal Circuit noted the broad discretion due the Department in determining what constituted a subsidy (then called a bounty or grant), and held that:

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[83] *See, e.g., Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32905 (June 10, 2010) and accompanying Issues and Decision Memorandum at Comment 1.
[84] *See Georgetown Steel Corp. v. United States,* 801 F.2d. 1308 (Fed. Cir. 1986) at 1310 ("*Georgetown Steel*").
[85] *Id.*

> We cannot say that the administrations' conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law, or an abuse of discretion.[86]

As the Court noted, even if one were to label these incentives as a subsidy, in the loosest sense of the term, the governments of these NMEs would in effect be subsidizing themselves.[87] Thus, *Georgetown Steel* did not hold that the CVD law could never be applied to exports from a NME country. It simply upheld the Department's determination that it could not identify a subsidy in the conditions of the Soviet Bloc that were before it.

Because the Department's previous refusal to apply the CVD law to NME countries was not based on the theory that the NME AD methodology already remedied any domestic subsidies in NME countries, the Department's current practice of applying the CVD law to exports from China is not inconsistent with that earlier practice.

Another argument put forth by the GOC and RHI, *i.e.*, that AD and CVD proceedings against NME countries result in the application of a double remedy, is also without merit. The GOC and RHI argue that the effects of countervailable domestic subsidies can pass through to normal value under the Department's NME methodology, so that AD duties on Chinese exports, by themselves, remedy all subsidies attributable to that merchandise. In other words the GOC and RHI assert that the NME methodology inherently provides a remedy for any and all countervailable subsidies such that concurrent application of CVDs is necessarily duplicative. Apparently, the GOC and RHI conclude that the NME methodology arrives at this result mechanically because of the lack of any statutory provision that requires or achieves this result.

It appears that the general premise of this argument is that concurrent ADs and CVDs do not create automatic double remedies in ME proceedings, because domestic subsidies automatically lower normal value, and hence the dumping margins, *pro rata*. The NME AD methodology, on the other hand, produces a normal value that is not affected by subsidies in any way, so that it necessarily exceeds what would have been the ME dumping margin by the full amount of the subsidy, thus creating a double remedy, which the statue requires the Department to offset. We reject this proposition.

There are several reasons why subsidies in ME cases would not necessarily lower the normal value calculated by the Department, *pro rata,* below what it would have been absent any subsidies. Subsidies often come with conditions attached that reduce the cost savings to the recipient below the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimum, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored sources, and so forth. Even if subsidies come with no strings attached, there is no guarantee that they will result in a lower cost of production. Subsidies could be paid out as dividends, used to increase executive pay, or wasted in any number of ways.

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86 *Id.* at 1318.
87 *Id.* at 1316.

Moreover, the Act provides that normal value in ME cases is to be based on home market prices, where possible. Where normal value is based on prices, the relationship of subsidies to normal value becomes yet more tenuous. Not only is the extent to which the subsidies will affect costs uncertain but, even to the extent that subsidies may lower costs, the extent to which the producer will pass these cost savings through to home market or third-country prices is uncertain. Basic economic principles indicate that the prices are a function of the supply and demand for the product in the relevant market, so that any cost savings will be reflected in prices only indirectly. Finally, to the extent that domestic subsidies lower normal value in ME cases, they may lower export prices commensurately, so that the dumping margins may not change. Thus, it is not safe to conclude that subsidies in MEs automatically reduce dumping margins, still less that they automatically reduce dumping margins, *pro rata.*

The counterpoint to the argument that domestic subsidies automatically lower normal values (and, thus, dumping margins) in ME cases, *pro rata*, is that domestic subsidies have no effect whatsoever on normal values (and, thus, dumping margins) determined under the NME methodology. The GOC and RHI argue that domestic subsidies do not affect normal value in NME cases because normal value is essentially imported from surrogate, ME, countries. This premise is also incorrect, as there are several ways in which subsidies can lower NME normal values.

For instance, although NME subsidies may not affect the factor values used to calculate NV in a NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the subject merchandise. The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the surrogate values ("SVs") are multiplied by the NME producer's lower factor quantities, they result in lower NVs and, hence, lower dumping margins.[88] Any reduction in factor usage by NME producers would reduce NV in a second manner, because the final factor valuations are also used to calculate the amounts for overhead, SG&A, and profit that are additional components of NV.[89]

Moreover, the whole idea of comparing AD margins under the NME methodology to the theoretical margins that the Department would find if it treated China as an ME country is dependent upon other things being equal, so that any actual difference could be attributed to the difference in the distortion from subsidies. But this is not the case. The most obvious difference between normal values determined in ME and NME situations involves exchange rates. In ME proceedings, normal values are converted from the home-market currency to the currency of the importing country at prevailing exchange rates. In NME proceedings, however, normal values are derived from the actual FOPs, valued based on information from the surrogate country using the currency of that surrogate country. Thus, normal values in NME proceedings are not influenced by the exchange rate between the exporting country and the importing country. How the different roles that currencies play in NME and ME antidumping proceedings affect any

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[88] *See* section 773(c)(3) of the Act.

[89] *See Hebei Metals & Mineral Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1277 (CIT 2005); *Dorbest Ltd. v. United States*, 452 F. Supp. 2d 1262, 1300-01 (CIT 2007).

difference in dumping margins calculated under the two methodologies is uncertain, and highly complex. What is certain, however, is that this key difference would prevent any simple comparison of NME and ME AD margins.

The GOC and RHI assert that the fact that the Department may find that an input for a particular product was provided for less than adequate remuneration in a CVD case, and then used an SV for that input in the AD case, proves that the subsidy lowered normal value, *pro rata*. This conclusion is not logical. NME methodology involves more than the simple addition of input costs. It is a complex calculation that takes into consideration operating efficiencies, administrative expenses, the cost of capital, and numerous other factors. An SV for one factor of production that is higher than the price actually paid by the respondent company does not necessarily result in a higher dumping margin, nor does a lower SV for one factor of production necessarily result in a lower dumping margin. The individual elements of the NME methodology do not exist in a vacuum; the various elements necessarily work together. Moreover, respondents did not provide evidence demonstrating how the CVD the Department found on inputs in the companion CVD case lowered normal value in this AD case.

The Department is charged with calculating dumping margins as accurately as possible. The GOC and RHI fail to identify any item in the dumping margin calculation that is being counted twice. Rather, because the GOC and RHI argue that the CVD law cannot be applied concurrently with the NME AD methodology, they argue that the Department should terminate the AD and/or CVD or make adjustments to the magnesia and electricity surrogate values. Contrary to the GOC and RHI's assertions, nothing is being double counted in the dumping margin calculation and, as such, we find that the Department is not required to terminate the AD and/or CVD or make adjustments to the magnesia and electricity surrogate values based on subsidies findings. In other words, the accurately calculated dumping margin should be collected in full as the remedy for pricing at less than normal value.

The Department disagrees with the GOC's and RHI's claim that the concurrent imposition of CVDs and the NME surrogate value methodology imposes a double remedy. The GOC and RHI cite to *GPX* as evidence that the Department must adopt additional policies to address possible double counting of duties.[90] However, this reliance on *GPX* is misplaced as the decision is not final and a final order has not yet been issued by the Court, nor have all appellate rights been exhausted. Further, even if reliance on *GPX* were not misplaced, *GPX* does not support the GOC and RHI's claims of double counting of duties. *GPX* did not find that a double remedy necessarily occurs through concurrent application of the CVD statue and NME provision of the AD statue, only that the "potential" for such double counting may exist.[91]

Comment 7: By-product Offset

Petitioner's Argument

- The Petitioner argues that because RHI does not record the actual amount of scrap brick reintroduced into the production process, for those control numbers which consume scrap

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[90] *See GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d at 1251.
[91] *Id.* at 1240.

brick, the Department should apply an allocation ratio to each of the applicable direct materials.

RHI's Argument

- In its rebuttal brief, RHI asserts that the Department verified the methodology used by RHI to report its reintroduced by-products, and thus, should not apply an allocation ratio to each of the applicable direct materials.

Department's Position:

We agree with RHI. RHI produces some waste brick in the production of MCBs. This waste brick is then reintroduced into the production process.[92] The Department verified RHI's allocation methodology and found no discrepancies.[93] We note that all FOPs used to produce reintroduced scrap brick were reported by RHI. Thus, to apply an allocation ratio to certain CONNUMs, as the Petitioner suggests, would result in double-counting of the adjustment, which the Department has a long standing practice to avoid.[94] Consequently, for these final results, we find no reason to apply an allocation ratio to those CONNUMs for which RHI reintroduced scrap bricks.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margins in the *Federal Register*.

AGREE___________ DISAGREE___________

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date

[92] *See* RHI's February 19, 2010 submission at 15-18 for a detailed discussion of RHI's reporting methodology.
[93] *See* RHI Verification Report at 10-11.
[94] *See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58642 (October 16, 2007) and accompanying Issues and Decision Memorandum at Comment 2.