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Investigation
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**Public Document**

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

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

**DATE:** July 26, 2010

**SUBJECT:** Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain Magnesia Carbon Bricks from the People's Republic of China

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## I. Summary

The respondents in this proceeding are the GOC, and the mandatory company respondents, RHI, and Mayerton.[1] On December 23, 2009, the Department published the Preliminary Determination in this investigation. On April 1, 2010, Mayerton informed the Department that it would no longer be participating in the instant investigation. Subsequent to the Preliminary Determination, on May 6, 2010, the Department issued a Post-Preliminary Determination containing a preliminary analysis for the programs "Provision of Electricity at LTAR" and Export Restraints of Raw Materials."[2]

The "Subsidies Valuation Information" and "Analysis of Programs" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. In the instant investigation, we received case briefs from the Petitioner, the GOC, and RHI regarding the Preliminary Determination and the Post-Preliminary Determination. Rebuttal briefs were submitted by Petitioners, the GOC, and RHI.

We have analyzed the comments submitted by the parties in their case briefs and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have described in this memorandum. Below is a complete list of the issues in this investigation about which we received comments from the Petitioner, the GOC, and RHI:

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[1] For this Issues and Decision Memorandum, we are using short citations to various references, including administrative determinations, court cases, acronyms, and documents submitted and issued during the course of this proceeding, throughout the document. We have appended to this memorandum a table of authorities, which includes these short citations as well as a guide to the acronyms used throughout this memorandum.
[2] See Post-Preliminary Determination.

**Comment 1: Whether the Department Has the Authority to Apply the CVD Law to the PRC While Treating the PRC as A Non-Market Economy In The Parallel Antidumping Investigation**

**Comment 2: Whether the Simultaneous Application of the CVD Law and the Antidumping Non-Market Economy Methodology in This Case Would Lead to Impermissible Double Remedies**

**Comment 3: Whether the Department's Application of Countervailing Duties to a Non-Market Economy Country Violates the Administrative Procedures Act**

**Comment 4: Whether the Department's Decision to Initiate an Investigation of Export Restraints at Issue Was Contrary to Law and Unsupported by Fact**

**Comment 5: Whether the Export Restraints at Issue Can be Found to Confer a Financial Contribution to the Industry Producing MCBs**

**Comment 6: Whether the Use of Facts Available with Adverse Inferences Is Warranted For the Export Restraint Subsidy**

**Comment 7: Whether the Department Should Adjust the Manner It Calculates the Export Restraints Benefit**

**Comment 8: Whether the Department Correctly Applied AFA and Treated the Provision of Electricity as a Countervailable Subsidy**

**Comment 9: Whether the Provision of Electricity Is Specific and Provides a Financial Contribution**

**Comment 10: Whether the Department Should Use RHI's Revised 2008 Sales Amount in the Department's Final Calculations**

**Comment 11: Whether the Department Should Examine Income Tax Credits for Purchases of Domestically Produced Equipment in Detail**

**Comment 12: Whether the Department Should Apply AFA with Respect to VAT Rebates Associated with RHI's Purchases of Domestically Produced Equipment**

**Comment 13: Whether the Department Should Apply Total AFA When Assigning Mayerton's Final Countervailing Duty Rate**

## II. Background

Since the publication of the Preliminary Determination, the Department has issued various supplemental questionnaires to the GOC and RHI. As detailed fully in the "Case History" section of the Federal Register notice issued simultaneously with this Issues and Decision Memorandum, the parties submitted timely responses to the Department's supplemental questionnaires. On January 22, 2010, the GOC submitted a request for a hearing pursuant to 19 CFR 351.310(c) and the Department's Preliminary Determination.

The Department conducted verification of the questionnaire responses submitted by RHI from May 4 through May 7, 2010. The Department issued verification reports on June 1, 2010.[3] The Department issued the Post-Preliminary Determination on May 6, 2010. On June 17, 2010, the GOC withdrew its request for a hearing.[4]

## III. Subsidies Valuation Information

### A. Date of Applicability of CVD Law to the PRC

Consistent with recent CVD determinations, we have determined that the date from which it is appropriate and administratively feasible to identify and measure subsidies in the PRC for purposes of the CVD law is December 11, 2001, the date on which the PRC became a member of the WTO. Thus, only subsidies provided on or after December 11, 2001, are included in the "Programs Determined to be Countervailable" section, below.

### B. Allocation Period

In the Preliminary Determination, consistent with 19 CFR 351.524(d)(2), we used an AUL period as the allocation period for non-recurring subsidies provided on or after December 11, 2001. The AUL applicable to the MCB industry is 15 years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System. No party in this proceeding has disputed this allocation period. Thus, we have continued to use a 15-year AUL in this final determination.

### C. Cross-Ownership

As stated in the Preliminary Determination and the RHI Cross-Ownership Memorandum, a company named RHI AG is the ultimate majority shareholder in RHIL, RHID, and RHIJ.[5] We also preliminarily determined that RHI AG has indirect majority voting ownership interest in RHIL, RHID, and RHIJ. RHIL and RHID produce and sell MCBs, while RHIJ produces and sells magnesia. Pursuant to 19 CFR 351.525(b)(6)(ii), we preliminarily determined that RHIL and RHID are cross-owned, while RHIL, RHID, and RHIJ are cross-owned pursuant to 19 CFR 351.525(b)(6)(iv). We attributed the subsidies received by RHI accordingly for the Preliminary Determination and the Post-Preliminary Determination. Our findings regarding the attribution of subsidies to RHI remain unchanged from the Preliminary Determination.[6] However, we have made some adjustments to the sales denominators of the RHI companies based on information acquired at verification. See the Final Calculation Memorandum for more details regarding the adjustments.

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[3] See RHI Verification Report.
[4] See Hearing Request Withdrawal.
[5] The ownership percentages are proprietary. See RHI Cross-Ownership Memorandum.
[6] See Preliminary Determination at 68244-45.

## IV. Application of Facts Available, Including the Application of Adverse Inferences

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record.

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[7] The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[8] In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less."[9]

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[10] The Department considers information to be corroborated if it has probative value.[11] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.[12]

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[7] See Semiconductors From Taiwan.
[8] See SAA at 870.
[9] See Rhone Poulenc I.
[10] See SAA at 870 and URAA at 4199.
[11] See SAA at 870.
[12] See id. at 869.

## A. Application of Adverse Inferences: Export Restraints of Raw Materials

As noted in the Post-Preliminary Determination, the Department preliminarily determined that, pursuant to section 776(a)(2)(A) of the Act, the use of facts available is warranted, given that the GOC has withheld information necessary for this investigation. For example, instead of responding to the Department's questions regarding export restraints, the GOC objected to the Department's line of questioning on export restraints, reiterated its positions regarding the non-countervailability of export restraints as well as the Department's decision to initiate with respect to export restraints, and ultimately stated that "it will not respond to the questions posed by the Department with respect to export restraints in this investigation."[13] In addition to the use of facts available, we preliminarily determined that an adverse inference was appropriate under section 776(b) of the Act because in deciding not to cooperate, the GOC has failed to act to the best of its ability to comply with our repeated requests for information.[14] The Department continues to find that the application of adverse inferences is warranted for the Final Determination. For further discussion of this topic see the "Analysis of Programs" section and "Comment 6: Whether the Use of Facts Available with Adverse Inferences Is Warranted for the Export Restraint Subsidy" below.

When the Department applies AFA, section 776(c) of the Act directs the Department, to the extent practicable, to corroborate whether such information has probative value by evaluating the reliability and relevance of the information used. With respect to the reliability aspect of corroborating the rates selected, the Department is calculating a rate using RHI's reported information regarding raw material purchases, but we are relying on information from GTA to determine the benchmark prices for DBM and FM. Based on the record evidence of this proceeding, we find this information, which is specific to the respondent under investigation as well as the product subject to export restraints, to be reliable for purposes of corroboration.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.[15] Based on the record evidence of this proceeding, we find this information, which is specific to the party under investigation and the product subject to export restraints, to be relevant for purposes of corroboration.

For further information regarding the rate applied to this program, see the "Analysis of Programs" section below.

## B. Application of Adverse Inferences: Provision of Electricity for LTAR

As noted in the Post-Preliminary Determination, the Department repeatedly requested information necessary to our analysis of electricity prices in the PRC and whether these prices are consistent with market principles, and noted that the GOC decided not to provide the requested information within the deadlines established. Further, the Department considered the

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[13] See GOC SQR2-1 at 8, and GOC SQR2-2 at 19.
[14] See Post-Preliminary Determination at 7.
[15] See Flowers From Mexico.

GOC's decision not to provide the requested information to have significantly impeded the proceeding by hindering the Department's analysis of electricity prices.

With regard to the Provision of Electricity for LTAR, the GOC did not provide the requested information that was essential to the Department's evaluation of whether the GOC's provision of electricity is countervailable. As explained in more detail in the "Analysis of Programs" section and "Comment 8: Whether the Department Correctly Applied AFA and Treated the Provision of Electricity as a Countervailable Subsidy" below, with regard to our analysis of the Provision of Electricity for LTAR, we are relying on facts otherwise available, and in selecting from among the facts available, we are drawing an adverse inference. As a result, we determine that the GOC, in its provision of electricity, is providing a financial contribution that is specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively. In measuring the adequacy of remuneration, we are applying an adverse inference in selecting the benchmark electricity rate. We are comparing the rates paid by RHI to the highest rates that they would have paid in the PRC during the POI. Specifically, we have selected the highest rate charged in the PRC to large industrial users, for the peak, valley, and normal ranges, as shown in the electricity rate schedules provided by the GOC as Exhibit 1 to GOC SQR2-1.

When the Department applies AFA, section 776(c) of the Act directs the Department, to the extent practicable, to corroborate whether such information has probative value by evaluating the reliability and relevance of the information used. With respect to reliability, the Department has relied upon electricity usage rates submitted by RHI as well as PRC-wide electricity rates provided by the GOC to determine the benchmark. Because this information has been submitted by the parties under investigation, we find this information to be reliable. With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.[16] In this case, because the information is specific to both the program and the party under investigation, we find this information to be relevant.

For further information regarding the rate applied to this program, see the "Analysis of Programs" section below.

### C. Application of Adverse Inferences: Non-Cooperative Company

As noted in the "Summary" section above, Mayerton informed the Department on April 1, 2010 that they would no longer be participating in the instant investigation. By refusing to participate further in the investigation, Mayerton withheld requested information and significantly impeded this proceeding. Thus, for the final determination, pursuant to sections 776(a)(2)(A) and (C) of the Act, we are basing the CVD rate for Mayerton on facts otherwise available.

We further determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. By failing to participate further in the instant investigation, Mayerton did not cooperate to the best of its ability in this investigation. Accordingly, we find that an adverse inference is

[16] See Flowers From Mexico.

warranted to ensure that the non-cooperating companies will not obtain a more favorable result than had they fully complied with our request for information.

It is the Department's practice to select, as AFA, the highest calculated rate in any segment of the proceeding.[17] In previous CVD investigations of products from the PRC, we adapted the practice to use the highest rate calculated for the same or similar program in other PRC CVD investigations.[18] For this final determination, consistent with the Department's recent practice, we are computing a total AFA rate for Mayerton generally using program-specific rates calculated for the cooperating respondent, RHI, in the instant investigation or calculated in prior PRC CVD cases. Specifically, for programs other than those involving income tax exemptions and reductions, we are applying the highest calculated rate for the identical program in this investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, we are using the highest non-de minimis rate calculated for the same or similar program in another PRC CVD investigation. Absent an above-de minimis subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by Mayerton.[19]

Further, where the GOC can demonstrate through complete, verifiable, positive evidence that non-cooperative companies (including all of their facilities and cross-owned affiliates) are not located in particular provinces whose subsidies are being investigated, the Department will not include those provincial programs in determining the countervailable subsidy rate for the non-cooperative companies.[20] In this investigation, the GOC did not provide any such information. Therefore, we are making the adverse inference that Mayerton had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs on which the Department initiated.

For the income tax rate reduction or exemption programs, we are applying an adverse inference that Mayerton paid no income taxes during the POI. The four tax programs are: (1) Two Free, Three Half Tax Exemptions for FIEs, (2) Income Tax Exemptions for Export-Oriented Enterprises, (3) Preferential Income Tax Policy for Enterprises in the Northeast Region, and (4) Preferential Tax Programs for FIEs Recognized as High or New Technology Enterprises. The standard income tax rate for corporations in the PRC is 30 percent, plus a three percent provincial income tax rate.[21] The highest possible benefit for all income tax reduction or exemption programs combined is 33 percent. Therefore, we are applying a CVD rate of 33 percent on an overall basis for these four income tax programs (i.e., these four income tax programs combined provide a countervailable benefit of 33 percent). This 33 percent AFA rate

[17] See, e.g., LWS from the PRC IDM at "Selection of the Adverse Facts Available."
[18] See id. and Lawn Groomers from the PRC IDM at "Application of Facts Available, Including the Application of Adverse Inferences."
[19] See, e.g., LWTP from the PRC IDM at "Selection of the Adverse Facts Available Rate."
[20] See, e.g., Kitchen Shelving and Racks from the PRC IDM at "Use of Facts Otherwise Available and Adverse Facts Available."
[21] See GOC QR at Exhibits D-1 and H-2.

does not apply to tax credit or tax refund programs. This approach is consistent with the Department's past practice.[22]

The 33 percent AFA rate does not apply to the following three income tax credit and rebate or accelerated depreciation programs because such programs may not affect the tax rate and, hence, the subsidy is conferred in the current year: (1) Income Tax Credit for Domestically-Owned Companies Purchasing Domestically-Produced Equipment, (2) Forgiveness of Tax Arrears for Enterprises in the Old Industrial Bases of Northeast China, and (3) Income Tax Credits for FIEs Purchasing Domestically Produced Equipment. RHI did not use the first two programs; it did use the third one but did not receive any benefits from it. Therefore, we are using the highest non-de minimis rate for any tax credit program from a PRC CVD investigation. The rate we select is 1.68 percent, calculated for the "Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically-Owned Companies" program in Steel Grating from the PRC.[23]

We preliminarily determined that Mayerton received preferential loans and directed credit due to its status as a manufacture of MCBs. However, we preliminarily determined that RHI did not use this program. Therefore, for the program "Preferential Loans and Directed Credit to the Magnesia Carbon Bricks Industry," we determine to apply the highest non-de minimis subsidy rate for any loan program in a prior PRC CVD investigation. The highest non-de minimis subsidy rate is 8.31 percent calculated for the "Government Policy Lending Program," from LWTP from the PRC-Amended.[24]

We initiated an investigation for the "Provision of Land-Use Rights to SOEs for LTAR"; however we determined that this program was not used by RHI. Therefore, for the program "Provision of Land-Use Rights to SOEs for LTAR," we determine to apply the highest non-de minimis subsidy rate for any land for LTAR program in a prior PRC CVD investigation. The highest non-de minimis subsidy rate is 13.36 percent calculated for the "Provision of Land for LTAR" program from LWS from the PRC.[25]

We also initiated investigations for a number of grant programs; however we determined that the following programs were not used by RHI: (1) Northeast Revitalization Program and Related Provincial Policies, (2) The State Key Technology Renovation Project Fund, (3) Famous Brands Programs, (4) Grants to Companies for "Outward Expansion" and Export Performance in Guandong Province, (5) Fund for Supporting Technological Innovation for Technological Small- and Medium-Sized Enterprises (SMEs), (6) Development Fund for SMEs, (7) Fund for International Market Exploration be SMEs, and (8) Zhejiang Province Program to Rebate Antidumping Costs. The Department has not calculated an above de minimis rates for any of these programs in prior investigations, and, moreover, all previously calculated rates for grant programs from prior PRC CVD investigations have been de minimis. Therefore, as AFA for each of these grant programs, we determine to use the highest calculated subsidy rate for any program otherwise listed, which could have been used by Mayerton. We determine that this rate

[22] See, e.g., CWP from the PRC IDM at "Use of Adverse Facts Available" section and LWTP from the PRC IDM at "Selection of the Adverse Facts Available Rate."
[23] See Steel Grating from the PRC IDM at 14.
[24] LWTP from the PRC-Amended at 70958.
[25] LWS from the PRC IDM at 51.

is 21.24 percent for the "Export Restraints of Raw Materials" program from the instant investigation.

Finally, the Department will use the RHI subsidy rates calculated for the following programs as Mayerton's AFA rate. Therefore, Mayerton's AFA rates for the following programs are: (1) Export Restraints of Raw Materials, 21.24 percent; (2) Provision of Electricity for LTAR, 2.12 percent; (3) Location-Based Income Tax Reduction Programs for FIEs, 0.34 percent; (4) Local Income Tax Exemption and Reduction Programs for Productive FIEs, 0.03 percent; and (5) VAT Rebates on Purchases of Domestically Produced Equipment, 0.51 percent.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[26] The Department considers information to be corroborated if it has probative value.[27] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.[28]

With regard to the reliability aspect of corroboration, we note that these rates were calculated in recent final CVD determinations. Further, the calculated rates were based upon verified information about the same or similar programs. Moreover, no information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Finally, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.[29]

In the absence of record evidence concerning these programs due to the decision of Mayerton to cease participating in the investigation, we have reviewed the information concerning PRC subsidy programs in this and other cases. For those programs for which the Department has found a program-type match, we find that, because these are the same or similar programs, they are relevant to the programs of this case. For the programs for which there is no program-type match, we have selected the highest calculated subsidy rate for any PRC program from which Mayerton could receive a benefit to use as AFA. The relevance of these rates is that it is an

[26] See, e.g., SAA, at 870 and URAA at 4199.
[27] See SAA at 870.
[28] Id. at 869.
[29] See Flowers From Mexico.

actual calculated CVD rate for a PRC program from which Mayerton could actually receive a benefit. Further, these rates were calculated for periods close to the POI in the instant case. Moreover, the failure of Mayerton to respond to requests for information by the Department has "resulted in an egregious lack of evidence on the record to suggest an alternative rate."[30] Due to the lack of participation by Mayerton and the resulting lack of record information concerning its use of the programs under investigation, the Department has corroborated the rates it selected to use as AFA to the extent practicable.

On this basis, we determine the AFA countervailable subsidy rate for Mayerton to be 253.87 percent ad valorem. See Final Calculation Memorandum.

## V. Analysis of Programs

### A. Programs Determined to Be Countervailable

1. VAT Rebates on Purchases of Domestically Produced Equipment

In its questionnaire responses, RHI reported receiving VAT rebates under this program during the POI as well as in preceding years. In the Preliminary Determination, the Department determined that the rebate of the VAT paid on purchases of domestically produced equipment by FIEs confers a countervailable subsidy. The rebates are a financial contribution in the form of revenue foregone by the GOC and they provide a benefit to the recipients in the amount of the VAT rebate. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a)(1). We further determined in the Preliminary Determination that the VAT rebates are contingent upon the use of domestic over imported goods and, hence, specific under section 771(5A)(C) of the Act.

No new information was provided or obtained after the Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Preliminary Determination. To calculate the countervailable subsidy for RHI, we used our standard methodology for non-recurring benefits. See 19 CFR 351.524(b) and the "Allocation Period" section above. Specifically, we used the discount rate described in the "Benchmarks and Discount Rates" section of the Preliminary Determination to calculate the amount of the benefit attributable to the POI. In accordance with 19 CFR 351.525(b)(6)(ii) and (iv), we divided the benefits attributable to the POI by the appropriate sales denominators to calculate the countervailable subsidy rate of 0.51 percent ad valorem exists for RHI. See Final Calculation Memorandum.

2. Location-Based Income Tax Reduction Programs for FIEs

In their questionnaire responses, both the GOC and RHI reported that RHI received a reduced income tax rate under this program. In the Preliminary Determination, the Department determined that the exemption/reduction is a financial contribution in the form of revenue foregone by the GOC and it provides a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily

[30] See Shanghai Taoen at 1348.

determined that the exemption/reduction is limited to enterprises located in designated geographical regions and, hence, is specific under section 771(5A)(D)(iv) of the Act.

No new information was provided or obtained after the Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Preliminary Determination. To calculate the benefit from this program to RHI, we treated the income tax exemption claimed by RHIL as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of tax savings, we multiplied RHIL's taxable income by the standard income tax rate for corporations (i.e., 30 percent) and subtracted that actual amount of income tax paid by RHIL. In accordance with 19 CFR 351.525(b)(6)(ii), we attributed the benefit received to the appropriate sales denominator. On this basis, we determine a countervailable subsidy rate of 0.34 percent ad valorem for RHI for this program. See Final Calculation Memorandum.

3. Local Income Tax Exemption and Reduction Programs for "Productive" FIEs

In its questionnaire response, RHI reported that RHIL participated in this program but none of the other cross-owned RHI companies in the group did. The GOC confirmed that RHIL received benefits under this program during the POI. In the Preliminary Determination, the Department determined that the exemption/reduction is a financial contribution in the form of revenue foregone by the government and it provides a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily determined that the exemption/reduction afforded by this program is limited as a matter of law to certain enterprises, "productive" FIEs, and, hence, is specific under section 771(5A)(D)(i) of the Act.

No new information was provided or obtained after the Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Preliminary Determination. To calculate the benefit from this program to RHI, we treated the income tax exemption claimed by RHIL as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of tax savings, we compared the tax rate paid (1.5 percent) to the rate that would have been paid by RHIL otherwise (the standard local rate is 3 percent) and multiplied the difference by RHIL's taxable income. In accordance with 19 CFR 351.525(b)(6)(ii), we attributed the benefit received to the appropriate sales denominator. On this basis, we determine a countervailable subsidy rate of 0.03 percent ad valorem for RHI. See Final Calculation Memorandum.

4. Income Tax Credits for FIEs Purchasing Domestically Produced Equipment

RHI reported receiving income tax credits on domestically purchased equipment under this program. In the Preliminary Determination, the Department determined that the tax credits are a financial contribution in the form of revenue foregone by the government and provide a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determined that these tax credits are contingent upon use of domestic over imported goods and, hence, are specific under section 771(5A)(C) of the Act.

No new information was provided or obtained after the Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Preliminary Determination. To calculate the benefit for this program, we treated the income tax savings as a recurring benefit, consistent with 19 CFR 351.524(c)(1). Based on the information in the RHI QR, RHI claimed through subsequent tax returns these income credits under this program prior to the POI and that none of the credits were carried forward into the tax returns filed in the POI. Accordingly, we determine that RHI did not receive benefits under this program during the POI. See Final Calculation Memorandum.

5. Provision of Electricity for LTAR

The GOC and RHI reported in their respective questionnaire responses that no benefits were provided under this program. In the Preliminary Determination, we stated that we intended to seek the additional information necessary to conduct a complete analysis. Supplemental questionnaires were issued to the GOC on December 8, 2009, February 22, 2010, and March 26, 2010. The GOC filed responses to these questionnaires, respectively, on January 5, 2010, March 15, 2010, March 22, 2010, and April 2, 2010.

On May 6, 2010, the Department issued its Post-Preliminary Determination regarding the provision of electricity for LTAR. The Department applied facts otherwise available and found that the use of adverse inferences was warranted in making the determination that the GOC provided electricity to MCB producers for LTAR. For the reasons stated in the Post-Preliminary Determination and in the Department Position to Comment 8 below, we continue to find that facts available, with adverse inferences, is warranted with respect to this program. In applying adverse inferences under section 776(b) of the Act, we continue to find the provision of electricity for LTAR is a financial contribution that is specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.

No new information was provided or obtained after the Post-Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Post-Preliminary Determination. To calculate the benefit for this program, we calculated the fees that RHI should have paid for electricity during the POI at the benchmark rates. We subtracted from this total the actual electricity payments made by RHI during the POI. In accordance with 19 CFR 351.525(b)(6)(ii) and (iv), we divided the resulting benefit by the appropriate sales denominators. At verification, we obtained additional information regarding RHIJ's electricity usage and have adjusted the benefit for this program accordingly. See the Final Calculation Memorandum for more details regarding the changes to the Department's calculation for the Provision of Electricity for LTAR. On this basis, we determine a countervailable subsidy rate of 2.12 percent ad valorem for the RHI Companies.

6. Export Restraints of Raw Materials

The GOC and RHI reported in their respective questionnaire responses that no benefits were provided under this program. In the Preliminary Determination, we stated that we intended to seek the additional information necessary to conduct a complete analysis. Supplemental questionnaires were issued to the GOC on December 8, 2009, and February 22, 2010. The GOC filed responses to these questionnaires, respectively, on January 5, 2010, March 15, 2010, and March 22, 2010.

On May 6, 2010, the Department issued its Post-Preliminary Determination regarding export restraints of magnesia. The Department applied facts otherwise available and found that the use of adverse inferences was warranted in making the determination that this program provided a countervailable subsidy. For the reasons stated in the Post-Preliminary Determination and in the Department Position to Comment 6 below, we continue to find that facts available, with adverse inferences, is warranted with respect to this program. In applying adverse inferences under section 776(b) of the Act, we continue to find that the export restraints of raw materials provide a financial contribution that is specific pursuant to sections 771(5) (B) and (D) as well as 771(5A) of the Act, respectively.

No new information was provided or obtained after the Post-Preliminary Determination to warrant reconsideration of this finding. Therefore, for purposes of this final determination, we are continuing to find this program to be countervailable, for the same reasons stated in the Post-Preliminary Determination. To calculate the subsidy rate, we compared the weighted-average price paid by RHI for DBM and FM to the world market prices for DBM and FM inclusive of international and domestic freight, as well as PRC import charges. We treated the difference between the amount that RHIL and RHID would have paid for DBM and FM using the respective world market prices and the amounts that RHIL and RHID actually paid for DBM and FM as the benefit. In accordance with 19 CFR 351.525(b)(6)(ii), we divided the benefit by the appropriate sales denominator. On this basis, we determine a countervailable subsidy rate of 21.24 percent ad valorem for RHI. See Final Calculation Memorandum.

**B. Programs Determined To Be Not Used by RHI During the POI**

1. Provision of Land-Use Rights to SOEs for LTAR

2. Two Free/Three Half Program for FIEs

3. Income Tax Reductions for Export-Oriented FIEs

4. Preferential Income Tax Policy for Enterprises in the Northeast Region

5. Forgiveness of Tax Arrears for Enterprises in the Old Industrial Bases of Northeast China

6. Income Tax Credits for Domestically Owned Companies Purchasing Domestically Produced Equipment

7. Preferential Tax Programs for Enterprises Recognized as High or New Technology Enterprises

8. Northeast Revitalization Program and Related Provincial Policies

9. The State Key Technology Renovation Project Fund

10. Famous Brands Programs

11. Grants to Companies for "Outward Expansion" and Export Performance in Guangdong Province

12. Fund for Supporting Technological Innovation for Technological Small- and Medium-Sized Enterprises (SMEs)

13. Development Fund for SMEs

14. Fund for International Market Exploration by SMEs

15. Zhejiang Province Program to Rebate Antidumping Costs

## VI. Analysis of Comments

**Comment 1: Whether the Department Has the Authority to Apply the CVD Law to the PRC While Treating the PRC as A Non-Market Economy in the Parallel Antidumping Investigation**

The GOC argues that, as a matter of law, the Department lacks the authority to conduct a CVD investigation against the PRC while simultaneously treating the PRC as a NME for AD purposes. Essentially, the GOC argues there is an unambiguous statutory scheme prohibiting the application of the CVD law to NMEs, which has been confirmed by specific Congressional acquiescence both before and after Georgetown Steel, a case the GOC states "remains the touchstone for any consideration of the Department's authority to apply the CVD law to countries it has designated as NMEs for AD purposes."[31]

In Georgetown Steel, the CAFC examined "the purpose of the countervailing duty law, the nature of non-market economies and the actions Congress has taken in other statutes that specifically address the question of exports from those economies,"[32] elements the GOC contends are fundamental tools of statutory construction used to determine Congressional intent and to analyze the reasonableness of an agency's interpretation of a statute under a traditional Chevron analysis.[33] The GOC notes that under that analysis, the CAFC concluded that:

> Congress ... has decided that the proper method for protecting the American market against selling by non-market economies at unreasonably low prices is through the antidumping law... . If that remedy is inadequate to protect American industry from such foreign competition – a question we could not possibly answer – it is up to Congress to provide any additional remedies it deems appropriate.[34]

The GOC states the tools of statutory construction applied in Georgetown Steel, and the resultant findings, are no less relevant or instructive today because the substantive issue in this case is the

[31] GOC Case Brief at 4.
[32] Georgetown Steel at 1314.
[33] See Chevron at 842.
[34] Georgetown Steel at 1318 (emphasis added).

same issue considered in Georgetown Steel, namely whether the CVD provisions under Title VII of the Tariff Act of 1930, as amended (the Act), can apply to alleged subsidies granted by governments of NME countries.[35] Moreover, the GOC notes the specific statutory provision examined to discern Congressional intent in Georgetown Steel, i.e. Section 303 of the Act, has also not changed.[36] Accordingly, the GOC argues, Georgetown Steel remains good law and stands for the proposition that the Department lacks statutory authority to apply the CVD law to countries it has designated as NMEs.

In Georgetown Steel, the CAFC noted that Section 303 of the Act had not changed in relevant terms from the first CVD statute Congress enacted in 1897, at a time when no NMEs existed, and accordingly refused to accept the "broadest possible" interpretation of the statute to find an intent by Congress to "cover as many beneficial acts {for the exporter} as possible."[37] Rather, the GOC states, the CAFC found that in enacting the CVD law Congress' intent was limited to addressing "unfair competition" driven by subversion of the market process and the misallocation of resources in a market economy setting.[38] The CAFC also highlighted the fact that Section 303 had been reenacted by Congress on six separate occasions, but was never changed to move beyond the basic foundation of the provision as crafted in 1897. Thus, the CAFC could not discern any Congressional intent in the legislative history to alter the long-standing, but still limited, statutory purpose of Section 303, i.e. dealing with market economy distortions,[39] a finding the CAFC confirmed by noting that "Congress on several occasions in other statutes specifically dealt with exports from nonmarket economies."[40] Since Georgetown Steel, the GOC states Congress has taken no action to alter the fundamental state of the statute, which therefore continues to deny the Department the authority to apply the CVD law to NMEs.

The GOC further argues an unambiguous statutory scheme prohibits the application of the CVD law against NMEs, which is confirmed by Congressional acquiescence since Georgetown Steel. First, the GOC contends the AD and CVD provisions address different issues but stem from, and operate under, a single statutory scheme. Noting the different criteria under Section 701 of the Act (imposition of CVD)[41] and Section 731 of the Act (imposition of AD),[42] the GOC points out that both Section 701 and Section 731 are part of the same subtitle of the Act, namely, "Subtitle IV – Antidumping and Countervailing Duties,"[43] which reflects the fact that Congress has always considered the AD and CVD laws to operate in tandem.[44] The GOC notes that statutory coordination of the AD and CVD provisions became closer with the TAA of 1979, which aligned the procedural requirements for AD and CVD investigations. As a result of the TAA of 1979, the same single statutory provision of the Act governs the mechanism for determining the actual

[35] See id. at 1309.
[36] See GPX Int'l Tire Corp. v. United States, 587 F. Supp. 2d 1278, 1290 (CIT 2008)("The law concerning CVD measures, 19 U.S.C. §§ 1671, 1677(5), has not changed since Georgetown Steel in any way relevant to this issue ... .").
[37] Georgetown Steel at 1314.
[38] Id. at 1315.
[39] Id. at 1314.
[40] Id.
[41] 19 U.S.C. § 1671.
[42] 19 U.S.C. § 1673.
[43] See 19 U.S.C. § 1671.
[44] See, e.g., Trade Act of 1974 (placing both the AD and CVD provisions under the same title designed to provide "Relief from Unfair Trade Practices")

assessment of AD and CVD,[45] which the GOC states is "the very heart of the relief to be imposed."[46] Likewise, the current structure of the Act establishes that the AD and CVD provisions are governed by the same definitions, which the GOC argues demonstrates that Congress found the AD and CVD measures to be so interrelated that it provided only a single definition section applicable to both.[47] For instance, the GOC points out the term "nonmarket economy" is defined in this section and accordingly applies to both the CVD and AD laws.[48] The GOC concludes that judicial interpretation of trade remedy law also reflects the understanding that the AD and CVD provisions comprise a single, integrated statutory scheme from which petitioners make their choice of remedies.[49]

Next, the GOC contends Congressional action subsequent to the CAFC's opinion in Georgetown Steel confirms the conclusion that a statutory scheme precludes the application of the CVD law to NMEs, particularly in light of traditional tools of statutory construction. The GOC notes it is well recognized that when clarifying the meaning of a provision, courts will consider not only the particular statute in question, but also the entire legislative scheme of which it is a part.[50] Moreover, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" or where it incorporates sections of a prior law into new law.[51] The GOC further notes that when considering Congressional failure to act in such situations, courts have also found that Congress acquiesced to judicial or administrative interpretation of a law, particularly when the issue involved is significant or controversial.[52] Finally, the GOC points out that courts have found "the normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific,"[53] especially when the proposed change involves altering the fundamental details of a regulatory scheme.[54]

Noting that Congress has undertaken two comprehensive overhauls of the U.S. AD and CVD statutes since Georgetown Steel,[55] and that during this period the Department consistently maintained its interpretation that it lacked the authority to apply the CVD law to NMEs, the GOC contends Congress' response was to leave intact the basic CVD statute as it was originally

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[45] See 19 U.S.C. § 1675.
[46] GOC Case Brief at 7.
[47] See 19 U.S.C. § 1677.
[48] 19 U.S.C. § 1677(18).
[49] See Allegheny Ludlum at 1368 ("{u}nder the statutory scheme established by the Tariff Act of 1930 ... American industries may petition for relief from imports that are sold in the United States for less than fair value ('dumped'), or which benefit from subsidies provided by foreign governments.")(emphasis added); see also Committee on Ways and Means, U.S. House of Representatives, "Overview and Compilation of U.S. Trade Statutes (WMCP 109-4) at 96 ("Two important trade remedy laws are the antidumping (AD) and countervailing duty (CVD) laws. Although these laws are aimed at different forms of unfair trade, they have many procedural and substantive similarities.") (emphasis added).
[50] 2A Norman J. Singer, Sutherland, Statutes and Statutory Construction § 46:5, at 190-201 and 202-205 (7th ed.). See also Cleveland Indians Baseball at 217.
[51] Merrill Lynch at 383 n.66 (quoting Lorillard at 580).
[52] See Brown & Williamson at 132-33, and Bob Jones Univ. at 601.
[53] Midatlantic Nat'l Bank at 501 (citing Edmonds at 266-267).
[54] See Gonzalez at 921 (citing Whitman at 468, and Brown & Williamson at 160).
[55] I.e. the OTCA of 1988 (the GOC particularly points to Title I, Subtitle C, Part 2, covering sections 1311 to 1337 and entitled "Improvement in the Enforcement of the Antidumping and Countervailing Duty Laws"); and the URAA.

conceived in 1897. Specifically, with respect to the OTCA of 1988, the GOC contends Congress was "presumptively and actually aware of the great significance attributed by Commerce and the Federal Circuit to the fact that Congress had not changed the CVD law since its inception in 1897" in leaving section 303 of the Act undisturbed.[56] Furthermore, although the URAA subsequently repealed section 303 of the Act, the GOC states that Congress did not materially alter the specific statutory provision governing the application of CVDs. Thus, for purposes of continuing the Georgetown Steel analysis, the GOC argues there was no change in the scope of the specific statutory provision, which continues to make no reference to NMEs.[57]

The GOC states the legislative history of the OTCA of 1988 confirms that "Congress understood the then-prevailing agency interpretation of the statute – that the CVD law does not apply to NMEs – to reflect the unambiguous terms of the statute, consistent with Georgetown Steel."[58] In particular, the GOC points to the House Ways and Means Committee marked-up H.R. 3,[59] section 157 of which would have amended sections 303 and 701 of the Act to:

> provide for the application of the countervailing duty law to nonmarket economy countries to the extent that a subsidy can reasonably be identified and measured by the administering authority. The provision is intended to allow the administering authority discretion in determining, on a case-by-case basis, whether a particular subsidy can, as a practical matter, be identified and measured in a particular non-market economy country.[60]

The GOC argues the Committee's understanding of Georgetown Steel as interpreting the unambiguous terms of the statute is explicitly expressed in its discussion of this amendment:

> In a recent court case ... the U.S. Court of Appeals for the Federal Circuit upheld the Department of Commerce's refusal to apply the countervailing duty law in two investigations of carbon steel wire rod imports from Poland and Czechoslovakia, by holding that the countervailing duty law does not apply to nonmarket economy countries.[61]

The measure, including section 157, was adopted by the full House and then considered by House and Senate lawmakers in conference. The resulting conference committee report indicated not only the conferees' understanding of the state of the law ("the Federal Circuit held that the countervailing duty law does not apply to nonmarket economy countries"),[62] but also that Congress decided to eliminate section 157. The GOC thus contends "{t}hat the Committee with principal jurisdiction over U.S. trade remedy legislation, the full House, and a conference committee of House and Senate lawmakers would all agree that the Georgetown Steel opinion reflected a correct interpretation of the statutory scheme, and then reject an explicit provision

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[56] GOC Case Brief at 10.
[57] See 19 U.S.C. §§ 1671 and 1677(5).
[58] GOC Case Brief at 11.
[59] The GOC notes H.R. 3 was the predecessor to H.R. 4848, which ultimately became law on August 23, 1988 under the short title "Omnibus Trade and Competitiveness Act of 1988."
[60] OTCA – House Report at 138 (emphasis added).
[61] Id. (citing Georgetown Steel) (emphasis added).
[62] See OTCA – House and Senate Conference Report at 628.

granting Commerce discretion to apply the CVD law to NME countries, provides important guidance on Congressional understanding and intent in the aftermath of the Georgetown Steel opinion."[63] Furthermore, the GOC states, Congress' expression of its understanding of agency and judicial interpretation with respect to the CVD law continued with the URAA insofar as the SAA adopted by Congress, in discussing the definition of a subsidy, commented that Georgetown Steel stood for the "reasonable proposition that the CVD law cannot be applied to imports from nonmarket economies."[64]

Among the amendments made to the AD law after Georgetown Steel, the GOC contends the most important for discerning Congressional intent was the introduction of a statutory definition for "nonmarket economy country,"[65] through which Congress codified the same understanding of NMEs as articulated by the Department under its then-prevailing interpretation that the CVD law does not, and cannot, apply to NMEs. Specifically, the GOC contends, the Department's historical definition of an NME was as follows:

> {T}he economy of a country is an NME whenever it operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country or to countries other than the United States do not reflect the market value of the merchandise.[66]

The GOC argues the Department's definition above is effectively indistinguishable from the statutory definition promulgated by the OTCA of 1988:

> The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.[67]

Referring once more to the legislative history of the OTCA of 1988, the GOC notes the House-passed bill contained a provision granting the Department explicit discretion to apply the CVD law to NME countries, whereas the corresponding Senate proposal contained no such provision.[68] On the other hand, the Senate proposal contained a provision defining "nonmarket economy country," whereas the House-passed legislation contained no such provision.[69] The GOC stresses that the House ultimately receded on both counts, dropping its provision granting discretion to the Department to apply the CVD law to NMEs and adopting the Senate provision codifying the definition of "nonmarket economy country."[70] The GOC contends this debate and its resolution thus reflect a continuing Congressional intent to address imports from NMEs under the NME provisions of the AD law, not the CVD law.

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[63] GOC Case Brief at 12-13.
[64] SAA at 926 (emphasis added).
[65] See 19 U.S.C. § 1677(18), which was added as part of the OTCA of 1988, at § 1316(b).
[66] Wire Rod from Czechoslovakia at 19374.
[67] 19 U.S.C. § 1677(18).
[68] See OTCA – House and Senate Conference Report at 628.
[69] Id. at 591.
[70] Id. at 591 and 628.

Noting the similarity between the Department's own definition (as advanced in a CVD context) and the new statutory definition of "nonmarket economy country," the GOC contends "there can be little doubt that Congress fully understood (when it adopted this definition) the Department's then-conclusion that the CVD law could not be applied to NME countries" and that "any other reading would ignore the substantial history associated with the term 'nonmarket economy' both at the agency level and before the Federal Circuit."[71] The GOC states the plain meaning of the new statutory definition also supports this conclusion, as there is no way to construe the term "nonmarket economy country" except with reference to a country that, for practical purposes, has no markets. Essentially, the GOC states, "if there are no markets, there can be no market distortions to measure under the CVD law,"[72] or, as explained by the Department, "{s}ubsidies in market economy systems are exceptional events. They can be discerned from the background provided by the market system. No such background exists in an NME."[73]

Subsequent to Georgetown Steel, the GOC states that Congress continued to enhance and refine the NME AD methodology, thereby continuing Congressional action which the CAFC found compelling - that only in the NME antidumping provisions did Congress address imports from NMEs in express terms.[74] The GOC contends one of the more important refinements was Congress' instruction to the Department concerning the adoption of appropriate surrogate values for determining dumping by an NME exporter, namely, when valuing factors of production under NME AD methodology, to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized,"[75] which made clear Congress' intent that the NME AD provisions constituted a hybrid remedy addressing both aspects of dumping and distortions.

The GOC states the CIT reached a similar conclusion, in a case addressing this very instruction, in affirming the Department's decision to reject market purchases by an NME respondent from a country determined to have subsidized the merchandise in question:

> {G}iven that the overarching purpose of the antidumping and countervailing duty law is to counteract dumping and subsidies, the court cannot conclude that Congress would condone the use of any value where there is "reason to believe or suspect" that it reflects dumping or subsidies.[76]

The GOC contends this language makes clear that the CIT associated the purpose of the NME AD provisions with the counteraction of both dumping and subsidies, which mirrors Congress' intent that the NME AD provisions constitute a comprehensive remedy, separate and mutually exclusive with the "market economy" trade remedies of the CVD law and normal AD rules. The GOC concludes "{a}ny other reading would make little sense given that the market economy

[71] GOC Case Brief at 15.
[72] Id.
[73] Wire Rod from Czechoslovakia at 19371.
[74] See Georgetown Steel at 1316-17.
[75] OTCA – House and Senate Conference Report at 590.
[76] China Nat'l Mach. v. United States at 1238.

AD provisions of the statute provide no similar adjustment for subsidized inputs, and the CVD law prohibits countervailing foreign inputs."[77]

In addition, the GOC notes the fact that courts cautiously apply Congressional acquiescence as a tool of statutory construction,[78] does not mean courts will never find such acquiescence to be significant and binding upon agencies.[79] Indeed, the GOC contends, there is clear precedent that Congressional acquiescence can and will be interpreted as clear Congressional intent under certain circumstances, including such as whether the CVD law applies to NME countries. Noting that "{f}ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language,"[80] the GOC argues that Congressional acquiescence to an agency's interpretation by expressly rejecting a discrete issue is binding upon that agency. As "{i}t cannot be presumed later that Congress, after discarding language that would have granted the Department the power to apply CVD provisions to NMEs, somehow in its later silence actually intended to enact it,"[81] the GOC states the Department's decision to now apply the CVD law to NME countries impermissibly defies Congressional interpretation of the statute.

For Congressional acquiescence to be elevated to binding status, the GOC point out three factors must usually be present: (i) Congress must have considered and rejected the "precise issue" presented before the Court;[82] (ii) Congress must have been aware of "what was going on," i.e. must understand the current interpretation at issue;[83] and (iii) Congress should "affirmatively manifest{} its acquiescence" through subsequent legislative action confirming the meaning of the acquiescence.[84] When all three factors are present, the GOC contends Congressional acquiescence is the equivalent of speaking directly to an issue and thus binding upon an agency under Chevron.[85] The GOC argues all three factors are clearly present in this case. First, Congress expressly considered and rejected a proposal to grant the Department the power to apply CVD provisions to NME countries.[86] Second, Congress was aware of "what was going on" while considering and rejecting this proposal, as the congressional committee report cited to Georgetown Steel as affirming the Department's interpretation that the CVD law does not apply to NMEs.[87] Finally, the GOC contends Congress "affirmatively manifested its acquiescence"

[77] GOC Case Brief at 16-17. See 19 U.S.C. §1677-1 (upstream subsidies must be bestowed by an authority on an input product used in the same country as the authority) and 19 CFR § 351.527 (subsidy does not exist where the funding is from a government other than the government under investigation).
[78] See, e.g., Bob Jones Univ. at 600 ("Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation").
[79] See, e.g., Rapanos at 750 ("To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court") (emphasis in original)(citing Bob Jones Univ. at 600).
[80] Cardoza-Fonseca at 442-443 (quoting Pension Benefit Guaranty Corporation at 392-393).
[81] GOC Case Brief at 17-18.
[82] See Bob Jones Univ. at 600, and Rapanos at 750.
[83] See Bob Jones Univ. at 600-601.
[84] See id. at 601.
[85] The GOC notes lower courts have followed the Supreme Court's lead on this issue and have stated that "congressional endorsement" exists when "the issue plainly has been the subject of congressional attention." Butterbaugh at 1342 (citing Solid Waste Agency at 169-170).
[86] OTCA – House Report at 138.
[87] Id.

through subsequent legislative actions such as the SAA, a new statutory definition of NME, and new surrogate value instructions.[88]

The GOC further contends that the instant case presents a "textbook case of Congressional acquiescence" because all three factors are present, as distinguished from other cases where Congressional acquiescence was claimed but not actually present.[89] For example, the GOC notes in Solid Waste Agency, the Supreme Court found that the respondent's claim of Congressional acquiescence could not stand because Congress' alleged legislative rejection occurred nine years prior to the agency interpretation at issue.[90] By contrast, the GOC argues, Congressional rejection of an amendment to grant the Department the power to apply the CVD law to NMEs properly occurred after the Department's and the CAFC's interpretation that Commerce lacked such power.

Finally, although the Department has previously suggested that legislation extending PNTR to the PRC and the PRC's WTO Accession Protocol demonstrated Congress' understanding that "the Department already possesses the legal authority to apply the CVD law to NME's…,"[91] the GOC counters there is nothing in the PNTR legislation expressly recognizing the Department's authority to apply U.S. CVD law to NMEs, nor in the legislative history accompanying the PNTR legislation, which references subsidies only in terms of the PRC's broader WTO subsidy commitments.[92] Rather, the only reference to the U.S. CVD laws in the text of the PNTR legislation is the provision authorizing additional appropriations to the Department for the purpose of, inter alia, "defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China,"[93] which the GOC argues merely acknowledges the Department's then-existing practice of applying CVD law to the PRC and other NMEs where the industry under investigation has been found to be operating as an MOI.[94] The GOC contends this was Congress' and the Department's understanding of the U.S. CVD law in NME cases at the time the PNTR legislation was passed, and thus is the only reasonable interpretation of Congressional action here.[95] Moreover, the GOC notes the Department continued to rule that the CVD law should not be applied to NME countries even after the PNTR legislation.[96] Thus, given that the Department itself believed that the statutory framework prohibited application of CVD duties to NME countries at the time of the PRC's WTO accession (December 2001), the GOC concludes "it is fantastic to conclude that Congress believed that the PNTR legislation authorized the imposition of CVD duties against NME countries."[97]

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[88] See SAA at 926; 19 U.S.C. § 1677(18); and OTCA – House and Senate Conference Report at 590.
[89] GOC Case Brief at 19.
[90] Solid Waste Agency at 159, 169-170.
[91] Kitchen Shelving and Racks from the PRC IDM at 27.
[92] See Permanent Normal Trade Relations with the People's Republic of China, H.R. Rep. 106-632 (May 22, 2000).
[93] Pub. L. No. 106-286 (October 10, 2000) at § 413(a)(1), codified at 22 U.S.C. § 6943(a)(1).
[94] See, e.g., Fans from the PRC at 10012 ("the Department is free to apply the CVD law to an MOI located within an NME").
[95] See, e.g., RL30175: China's Accession to the World Trade Organization: Legal Issues, Jeanne J. Grimmett, Legislative Attorney, American Law Division, Congressional Research Service (June 2, 2002) at n.48 ("The Department of Commerce will nonetheless apply CVD law to imports from NME countries if the goods under investigation are produced by an MOI").
[96] See Sulfanilic Acid From Hungary.
[97] GOC Case Brief at 21.

In support of its argument that application of the CVD law to imports also subject to AD NME methodology is impermissible, RHI likewise looks to the statute and its legislative history. Prior to 2007, RHI notes it was the Department's long-standing practice not to apply the CVD law to NME countries because it found that the centrally controlled economies in such countries made it difficult to "disaggregate government actions in such a way as to identify the exceptional action that is a subsidy."[98] This practice was affirmed in Georgetown Steel, which recognized that Congress had addressed "the problem of exports by {NMEs} through other statutory provisions" so that "any selling by {NME countries} at unreasonably low prices should be dealt with under the antidumping law."[99] RHI contends this reasoning is still applicable today, namely that government actions in an NME cannot be distinguished from particular countervailable subsidies and therefore pricing distortions in NMEs are best addressed under the AD law. RHI further contends the legislative history since Georgetown Steel reflects that Congress reaffirmed this reasoning and intended to leave intact the statutory scheme under which the Department addressed NME trade practices through the AD, rather than CVD, law. In fact, RHI states, Congress passed up several opportunities to amend the statutory scheme to expressly authorize the application of the CVD law to NME countries, choosing instead to leave this to the NME methodology under the AD law.[100]

Noting the Department addressed the issue of whether it has statutory authority to apply CVDs to countries it determines are non-market economies (NMEs) in the Preliminary Determination as well as in past CVD investigations,[101] Petitioner contends the GOC and RHI have failed to identify any statutory language that prohibits the Department from applying the CVD law to the PRC. To the contrary, Petitioner counters, the Department's authority to apply the CVD law to the PRC is supported by the statute and the WTO Agreements. Additionally, Petitioner contends the Department's exercise of discretion is consistent with Georgetown Steel.

Petitioner argues the Department's decision to apply the CVD law to the PRC is within the scope of the authority vested in the Department by Congress because: (i) no statutory provision prohibits the application of CVD laws to NMEs; (ii) the PRC's WTO accession in 2001, and the United States' ratification of that accession through domestic legislation, clearly anticipates the Department's application of CVD law to the PRC; and (iii) Congress ratified the Department's decision to apply the CVD law to the PRC in subsequent statutory enactments, including via the authorization of appropriations to the Department to apply the CVD law to the PRC.

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[98] Wire Rod from Czechoslovakia at 19372. See also CVD Preamble at 65360 (where "{the Department} determines that a change in status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.").

[99] Georgetown Steel at 1316. See also SAA at 926 ("the reasonable proposition that the CVD law cannot be applied to imports from non-market economies.")

[100] See, e.g., the OTCA of 1988 (changing the NME AD law but ultimately not adopting proposed language that would have granted the Department the authority to apply CVD law to NME countries on a case-by-case basis)(see OTCA – House and Senate Conference Report at 628); and the URAA (CVD law amended but no authorization of application to NME countries); see also GPX at 1238-39 ("Congressional silence regarding the application of the CVD law to NME countries may indicate that Congress never anticipated that the CVD law would be applied while a country remained designated as an NME country.").

[101] Preliminary Determination at 68242; CFS from the PRC IDM at Comment 1; CWP from the PRC IDM at Comment 1; LWS from the PRC IDM at Comment 1; LWRP from the PRC IDM at Comment 1; Raw Flexible Magnets from the PRC IDM at Comment 1; OTR Tires from the PRC IDM at Comment A.1; LWTP from the PRC IDM at Comment 1; CWLP from the PRC IDM at Comment 16; Stainless Pipe from the PRC IDM at Comment 4.

Citing the statutory language of 19 U.S.C. §§ 1671(a)(l) and 1677(3), Petitioner notes that neither provision's reference to "country" restricts its definition to market economy countries, logic which the Department adopted in its determinations applying the CVD law to the PRC.[102] Moreover, Petitioner argues, the term "countervailable subsidy," defined in congressional amendments to the statute, falls within the meaning of Article XVI of the GATT 1994 and thus is not limited only to market economy countries because Article XVI applies to all WTO members, including the PRC. Petitioner points out that the PRC's WTO Accession Protocol expressly provides "the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO member," and that the PRC specifically committed to the disciplines established in the SCM Agreement, including allowing other WTO members to use methodologies for identifying and measuring the subsidy benefit, which take into account the possibility that prevailing terms and conditions in the PRC may not always be available as appropriate benchmarks.[103] Petitioner further states that congressional silence regarding the treatment of NMEs under the CVD law stands in "stark contrast to the clear guidance provided for the treatment of NMEs under the general provisions of the AD/CVD laws,"[104] and thus argues Congress never intended to limit the application of the CVD law to market economies as it would have manifested such intent in the statute.[105]

In addition to noting that, as a matter of statutory interpretation, courts routinely reject inferences based on congressional non-action, Petitioner states that RHI has provided no evidence to support its inference that Congress' failure to act implies that Congress must not have intended to provide the Department with the authority to apply the CVD law to the PRC. Rather, Petitioner submits the opposite inference, i.e. that Congress has not acted because it understands that it already properly vested the Department with the requisite authority, is at least as valid. In fact, Petitioner argues that subsequent congressional action demonstrates that Congress believes that the Department already possesses the authority to apply the CVD law to the PRC.[106] Petitioner concludes the GOC and RHI have "failed to unearth any statutory basis, or even evidence of congressional intent, to support their assertion that the Department lacks the authority to apply to the CVD law to China."[107]

Petitioner also contends the GOC's interpretation of Georgetown Steel as holding that the Department lacks the statutory authority to apply the CVD law to countries it designates as NMEs is at odds with the plain meaning of the decision and has been rejected by both the CIT

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[102] See, e.g., Stainless Pipe from the PRC IDM at Comment 4.
[103] See Accession Protocol at Article 15. See also CFS from the PRC IDM at Comment 10.
[104] Petitioner Rebuttal Brief at 6. See, e.g., 19 U.S.C. § 1677b(c) (providing for calculation of NV from NMEs).
[105] See, e.g., Gray Portland Cement at 401 ("Absent strong evidence to the contrary, 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'")(quoting Connecticut Nat'l Bank v. Germain).
[106] For instance, Petitioner points out that Congress authorized the appropriation of funds to the Department to use in "defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China." 22 U.S.C. § 6943(a)(1) (emphasis added). Likewise, Petitioner notes that when Congress ratified the United States' agreement regarding the PRCs WTO accession, it appropriated funds to the Department with the explicit purpose of "monitoring compliance by the {PRC} with its commitments under the WTO ... and defending the United States antidumping and countervailing duty measures with respect to the products of the {PRC}," as well as "enforcement of United States trade laws with respect to the {PRC}." Id. at § 6943(a)(1) (emphasis added) and § 6943(a)(2).
[107] Petitioner Rebuttal Brief at 7.

and the Department. First, Petitioner argues the GOC's selected excerpts from Georgetown Steel leave the mistaken impression that the CAFC intended to make a pronouncement about congressional intent, particularly the portion of the opinion stating that "{i}f that remedy {under the AD law} is inadequate to protect American industry from such foreign competition – a question we could not possibly answer - it is up to Congress to provide any additional remedies it deems appropriate."[108] However, Petitioner submits it is the final paragraph of the analysis, and penultimate paragraph of the decision, that is controlling:

> the Court of Customs and Patent Appeals, whose decisions we follow, recognized that the agency administering the countervailing duty law has broad discretion in determining the existence of a "bounty" or "grant" under that law. We cannot say that the Administration's 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.[109]

Thus, Petitioner states, the court based its decision on the discretion afforded to the Department and the Department's exercise thereof, rather than on any compulsory interpretation of the statutory language.

Furthermore, Petitioner argues, the Georgetown Steel decision does not contain any finding that the Department's interpretation is the only permissible interpretation of the statute. Noting the specific issue before the CAFC was an interpretation of the terms "bounty or grant" in the then-existing text of the CVD statute, Petitioner points out that, based on a plain reading of the statute, the CAFC found it was unable to determine "whether that section applies to non-market economies by reference to {its} language."[110] Accordingly, without clear congressional intent, the court deferred to the Department's interpretation, which Petitioner contends hinged on the "economic realities of Soviet bloc-economies."[111] Thus, Petitioner argues, it is entirely appropriate for the Department upon reconsideration of the issue to determine that, given the dissimilarities between the Soviet-bloc economies in the mid-l 980s and the PRC's economy as it stands today, it is appropriate to apply the CVD law to the PRC.

Petitioner also notes that although the CAFC has not had an opportunity to revisit these questions, the CIT affirmed the Department's interpretation of the statute to authorize the application of the CVD law to NMEs (in a proceeding in which the GOC sought a preliminary injunction to prevent the Department from applying the CVD law to the PRC): "the Georgetown Steel court only affirmed the Department's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs."[112]

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[108] GOC Case Brief at 4 (quoting Georgetown Steel at 1318).
[109] Georgetown Steel at 1318 (emphasis added; citations omitted). Petitioner notes Section 303 of the Act, 19 U.S.C. §1303 (repealed), was the predecessor CVD provision to 19 U.S.C. §1671, and it continued to apply to certain exporting countries that were not entitled to an injury determination until Congress, in the URAA, expanded the scope of section 1671 to apply to all exporting countries.
[110] Georgetown Steel at 1314.
[111] CFS from the PRC IDM at Comment 1.
[112] GOC v. U.S. at 1282 (citing Georgetown Steel at 1318) (emphasis added).

Finally, Petitioner notes that since finding "{t}he Department has legal authority to apply the CVD law to China" in CFS from the PRC,[113] the Department consistently continues to do so in every subsequent investigation. Because the GOC presents no new arguments as to why the Department is compelled as a matter of law to reverse its practice of applying the CVD law to the PRC, Petitioner submits that the Department should continue to do so in its final determination in this case.

**Department Position**

We disagree with the GOC and RHI regarding the Department's authority to apply the CVD law to the PRC. The Department's positions on the issues raised are fully explained in multiple cases. See, e.g., OCTG from the PRC IDM at Comment 1. Congress granted the Department the general authority to conduct CVD investigations. See, e.g., sections 701, 771(5), and (5A) of the Act. In none of these provisions is the granting of this authority limited only to market economies. For example, the Department was given the authority to determine whether a "government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy . . . ." See section 701(a) of the Act. Similarly, the term "country," defined in section 771(3) of the Act, is not limited only to market economies, but is defined broadly to apply to a foreign country, among other entities. See section 701(b) of the Act (providing the definition of "Subsidies Agreement country").

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME."[114] The Department reached this conclusion, in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. The Department explained that "{t}his is the background that does not allow us to identify specific NME government actions as bounties or grants."[115] Thus, the Department based its decision upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, "although price controls and guidance remain on certain 'essential' goods and services in the PRC, the PRC Government have eliminated price controls on most products . . . ."[116] Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in the Wire Rod from Poland and Wire Rod from Czechoslovakia cases is not a significant factor with respect to the PRC's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from the PRC.[117]

The Georgetown Steel Memorandum details the Department's reasons for applying the CVD law to the PRC and the legal authority to do so. As explained in the Georgetown Steel Memorandum, Georgetown Steel does not rest on the absence of market-determined prices, and the decision to apply the CVD law to the PRC does not rest on a finding of market-determined

[113] CFS from the PRC IDM at Comment 1.
[114] See Wire Rod From Poland and Wire Rod from Czechoslovakia.
[115] See, e.g., Wire Rod from Czechoslovakia at 19373.
[116] See Georgetown Steel Memorandum), discussed in CFS from the PRC.
[117] See, e.g., Wire Decking from the PRC.

prices in the PRC.[118] In the case of the PRC's economy today, as the Georgetown Steel Memorandum makes clear, the PRC no longer has a centrally-planned economy and, as a result, the PRC no longer administratively sets most prices.[119] As the Georgetown Steel Memorandum also makes clear, it is the absence of central planning, not market-determined prices, that makes subsidies identifiable and the CVD law applicable to the PRC.[120]

As the Department explains in the Georgetown Steel Memorandum, extensive PRC government controls and interventions in the economy, particularly with respect to the allocation of land, labor and capital, undermine and distort the price formation process in the PRC and, therefore, make the measurement of subsidy benefits potentially problematic.[121] The problem is such that there is no basis for either outright rejection or acceptance of all the PRC's prices or costs as CVD benchmarks because the nature, scope and extent of government controls and interventions in relevant markets can vary tremendously from market-to-market. Some of the PRC prices or costs will be useful for benchmarking purposes, i.e., are market-determined, and some will not, and the Department will make that determination on a case-by-case basis, based on the facts and evidence on the record. Thus, because of the mixed, transitional nature of the PRC's economy today, there is no longer any basis to conclude, from the existence of some "non-market-determined prices," that the CVD law cannot be applied to the PRC.

The CAFC recognized the Department's broad discretion in determining whether it can apply the CVD law to imports from an NME in Georgetown Steel.[122] The issue in Georgetown Steel was whether the Department could apply CVD laws (irrespective of whether any AD duties were also imposed) to potash from the USSR and the German Democratic Republic and carbon steel wire rod from Czechoslovakia and Poland. The Department determined that those economies, which operated under the same, highly rigid Soviet system, were so monolithic as to render nonsensical the very concept of a government transferring a benefit to an independent producer or exporter. The Department therefore concluded that it could not apply the U.S. CVD law to these exports, because it could not determine whether that government had bestowed a subsidy (then called a "bounty or grant") upon them.[123] While the Department did not explicitly limit its decision to the specific facts of the Soviet Bloc in the mid-1980s, its conclusion was based on those facts. The CAFC accepted the Department's logic, agreeing that, "Even if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves."[124] Noting the "broad discretion" due the Department in determining what constituted a subsidy, the Court then deferred to the Department's judgment on the question.[125] Thus, Georgetown Steel did not hold that the Department could choose not to apply the CVD law to exports from NME countries, where it was possible to do so. Instead, the CAFC simply deferred to the Department's determination that it was unable to apply the CVD law to exports from Soviet Bloc countries in the mid-1980s.

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[118] See Georgetown Steel Memorandum at 4-5.
[119] See id. at 5.
[120] See id.
[121] See id.; see also Lined Paper Memorandum at 22.
[122] See Georgetown Steel at 1308.
[123] See, e.g., Wire Rod from Czechoslovakia at 19373.
[124] See Georgetown Steel at 1316.
[125] Id. at 1318.

The Georgetown Steel Court did not find that the CVD law prohibited the application of the CVD law to all NMEs for all time, but only that the Department's decision not to apply the law was reasonable based upon the language of the statute and the facts of the case. Specifically, the CAFC recognized that:

> {T}he agency administering the countervailing duty law has broad discretion in determining the existence of a "bounty" or "grant" under that law. We cannot say that the Administration's 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. Chevron at 842-845.

Georgetown Steel at 1318 (emphasis added).

The Georgetown Steel Court did not hold that the statute prohibited application of the CVD law to NMEs, nor did it hold that Congress spoke to the precise question at issue. Instead, as explained above, the Court held that the question was within the discretion of the Department.

The CIT concurred, explaining that "the Georgetown Steel court only affirmed {the Department}'s decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs."[126] Therefore, the Court declined to find that the Department's investigation of subsidies in the PRC was ultra vires.[127]

The respondents' argument that the intent of Congress was that the CVD law does not apply to NMEs is also flawed. Since the holding in Georgetown Steel, Congress has expressed its understanding that the Department already possesses the legal authority to apply the CVD law to NMEs on several occasions. For example, on October 10, 2000, Congress passed the PNTR Legislation. In section 413 of that law, which is now codified in 22 U.S.C. § 6943(a)(1), Congress authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the WTO, assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China."[128] The PRC was designated as an NME at the time this bill was passed, as it is today. Thus, Congress not only contemplated that the Department possesses the authority to apply the CVD law to the PRC, but authorized funds to defend any CVD measures the Department might apply.

This statutory provision is not the only instance where Congress has expressed its understanding that the CVD law may be applied to NMEs in general and the PRC in particular. In that same trade law, Congress explained that "{o}n November 15, 1999, the United States and the People's Republic of China concluded a bilateral agreement concerning the terms of the People's Republic of China's eventual accession to the World Trade Organization."[129] Congress then

[126] See GOC v. U.S. at 1282 (citing Georgetown Steel at 1318).
[127] Id.
[128] See 22 U.S.C. § 6943(a)(1) (emphasis added).
[129] See 22 U.S.C. § 6901(8).

expressed its intent that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO."[130] In these statutory provisions, Congress is referring, in part, to the PRC's commitment to be bound by the SCM Agreement as well as the specific concessions the PRC agreed to in its Accession Protocol.

The Accession Protocol allows for the application of the CVD law to the PRC, even while the PRC remains classified as an NME by the Department.[131] In fact, in addition to agreeing to the terms of the SCM Agreement, specific provisions were included in the Accession Protocol that involve the application of the CVD law to the PRC. For example, Article 15(b) of the Accession Protocol provides for special rules in determining benchmarks that are used to measure whether the subsidy bestowed a benefit on the company. Paragraph (d) of that same Article provides for the continuing treatment of the PRC as an NME. There is no limitation on the application of Article 15(b) with respect to Article 15(d), thus indicating it became applicable at the time the Accession Protocol entered into effect. Although WTO agreements such as the Accession Protocol do not grant direct rights under U.S. law, the Accession Protocol contemplates the application of CVD measures to the PRC as one of the possible existing trade remedies available under U.S. law. Therefore, Congress' directive that the "United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People's Republic of China to the WTO," contemplates the application of the CVD law to the PRC.[132] Neither the SCM Agreement nor the PRC's Accession Protocol is part of U.S. domestic law. However, the Accession Protocol, to which the PRC agreed, is relevant to the PRC's and our international rights and obligations. Further, Congress thought the provisions of the Accession Protocol important enough to direct that they be monitored and enforced, a direction codified in U.S. law.

In sum, the Department has authority to apply the CVD law to NMEs under U.S. law. Further, the Department's decision to apply the CVD law to the PRC, as explained in the Georgetown Steel Memorandum, is within the Department's discretion and in accordance with law. Accordingly, the Department's application of the CVD law in this proceeding is appropriate.

**Comment 2: Whether the Simultaneous Application of the CVD Law and the Antidumping Non-Market Economy Methodology in This Case Would Lead to Impermissible Double Remedies**

Even assuming the Department has the authority to apply the CVD law against the PRC while designating the PRC as an NME, the GOC contends the Department must modify its CVD and/or NME AD methodologies to account for a likely double remedy and thereby avoid an unreasonable result, per the CIT's ruling in GPX.[133] In GPX, the CIT noted "the AD and CVD law when applied to NME countries both work to correct government distortion of market prices,"[134] and thus, the GOC argues, applying both CVDs and NME ADs leaves the Department in an untenable position of remedying the same distortion twice. To this end, the GOC notes the

[130] See 22 U.S.C. § 6941(5).
[131] See Petition, Vol. II-A at Exhibit 20.
[132] See 22 U.S.C. § 6941(5).
[133] GPX at 1243.
[134] Id. at 1241.

GPX court ultimately gave the Department a choice of either devising new methodologies or refraining from imposing CVDs on NME imports.[135]

The GOC states the Department in this case has offered no notice of any new policy or methodology intended to avoid the double remedy the CIT has found is likely when CVDs and NME ADs are applied. Further, should the Department adopt new methodologies, the GOC contends the respondents in this investigation have had no opportunity to assess what those methodologies might be and thus have had no ability to defend their interests. As such, the GOC argues that its interests and those of RHI have been unfairly prejudiced from the beginning of this investigation and that adopting new methodologies after the fact, short of finding de minimis subsidies, would be "demonstrably unfair and deny respondents adequate due process."[136] As such, even if the authority exists for the Department to apply the CVD law to NMEs, the GOC argues the Department should nonetheless terminate this investigation.

Likewise, RHI argues the simultaneous application of the CVD law in this investigation and the NME methodology in the companion AD investigation is "inherently unfair, unlawful and unquestionably imposes impermissible 'double remedies' of the same alleged unfair trade practices."[137] RHI notes the NME methodology is applied to NME country producers in AD proceedings based on the premise that pervasive government interference in NMEs distorts the pricing mechanism, making local prices unreliable measures of value. Accordingly, RHI states, the NME methodology's calculation of antidumping margins based on surrogate factor-of-production values from a presumably undistorted market economy is intended to address all forms of price distortions in the NME, including both dumping and unfair subsidization. In particular, although the two alleged subsidy programs found countervailable in the Post-Preliminary Determination, i.e. export restraints on magnesia and the provision of electricity for less than adequate remuneration, are alleged to benefit RHI by reducing its costs of production, RHI argues the effects of any reductions in such costs are remedied entirely by the AD NME methodology in determining normal value based upon surrogate values and surrogate financial ratios rather than actual home market prices. As any alleged unfair subsidization of a producer located in an NME is fully addressed by the AD NME methodology, RHI contends, application of both CVD law and NME methodology under AD law results in the imposition of double "remedies" to the same price distortions. Accordingly, RHI argues the Department must terminate this CVD investigation of programs relating to RHI's costs, or at the very least sufficiently modify the NME methodology applied in the companion AD investigation to account for this overlap and avoid imposing double remedies.

RHI further notes that in GPX, the CIT recognized that the simultaneous application of CVD and AD law to NME producers is "unreasonable" in the absence of procedures to safeguard against double remedies:

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[135] See id. at 1243 ("Commerce reasonably can do all of its remedying through the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable. If Commerce now seeks to impost CVD remedies on the products of NME countries as well, Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that make it unlikely that double counting will occur.")(emphasis added). The CIT added that the Department "should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools." Id.

[136] GOC Case Brief at 22.

[137] RHI Case Brief at 36.

> Commerce's interpretation of the NME AD statute in relation to the current CVD statute here was unreasonable. If Commerce is to apply CVD remedies where it also utilizes the {non-market economy} AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products of an NME country and avoid to the extent possible double counting of duties.[138]

Because the Department has applied its NME methodology without modification to RHI's MCBs from the PRC in its preliminary determination in the companion AD investigation,[139] while simultaneously applying the CVD law in this investigation, RHI thus contends the Department's determinations in the two investigations account twice for any alleged price distortions and therefore constitute the very practice held to be unreasonable and unlawful by the court in GPX.

Petitioner first notes that when the GOC raised the issue of double counting in past CVD investigations, the Department rejected the GOC's arguments in every instance. Petitioner then contends there are two problems with the GOC's and RHI's argument that application of both AD and CVD remedies result in double counting: (i) the GOC's argument that the Department is required by statute to offset the CVD margins is inconsistent with the plain language of the statute; and (ii) neither the GOC nor RHI have provided any record evidence to demonstrate that double counting actually occurred in this investigation, as the Department has specifically sought in previous investigations involving the GOC.

In response to the argument that the Department should adjust the AD margin in the parallel AD investigation for the amount of the domestic subsidies determined in this CVD investigation in order to prevent any double counting, Petitioner argues the effect of this adjustment would be that the Department is compelled to reduce the AD margin by whatever CVD rate is determined in the CVD case. Essentially, Petitioner contends, the GOC is arguing that the Department should not bother with a CVD investigation because the Department adequately deals with subsidies by using nonsubsidized surrogate factor values to value the factors of production in the parallel AD investigation. Petitioner states that such an adjustment to the AD margins is not supported by the statute, as evidenced by the fact that the GOC fails to cite any statutory support.

Moreover, Petitioner notes that although the Department's consistent practice, since this issue was first raised in CFS from the PRC, has been to require the GOC or the foreign producers/exporters to provide record evidence indicating that such double counting exists,[140] the GOC and RHI have failed to provide such evidence. Without any evidence of actual double counting, Petitioner states the Department is unable to make the necessary adjustment to correct for any such double counting that may have occurred and, as a result, the Department is simply continuing a practice that existed since the very first CVD investigation involving the PRC. Accordingly, Petitioner contends RHI's argument that application of both CVD law and AD law NME methodology results in the imposition of double "remedies" to the same price distortions is both "factually incorrect and legally unsound."[141]

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[138] GPX at 1234-35.
[139] See AD Preliminary Determination.
[140] See CFS from the PRC—Preliminary at 17489, affirmed in CFS from the PRC IDM at Comment 2.
[141] Petitioner Rebuttal Brief at 11.

## Department Position

Regarding the issue of double counting, we disagree with the comments of the GOC and RHI. The respondents have not cited to any statutory authority that would allow us to terminate this CVD investigation to avoid the alleged double remedies or to make an adjustment to the CVD calculations to prevent an incidence of alleged double remedies. If any adjustment to avoid a double remedy is possible, it would only be in the context of an AD investigation. We note that this position is consistent with the Department's decisions in recent PRC cases.[142]

In addition, the respondents' reliance on GPX is misplaced. This decision is not final, as a final order has not been issued by the CIT, nor have all appellate rights been exhausted. Even if reliance on GPX were not misplaced, GPX does not support the positions attributed to it by the GOC. Contrary to the respondents' claim that GPX absolutely precludes the Department from simultaneously applying the CVD law and the NME methodology under the AD law, the Court in GPX clearly stated that "Commerce may have the authority to apply the CVD law to products of an NME-designated country."[143] Moreover, GPX did not find that a double remedy necessarily occurs through concurrent application of the CVD statute and NME provision of the AD statute, only that the "potential" for such double counting may exist.[144]

**Comment 3: Whether the Department's Application of Countervailing Duties to a Non-Market Economy Country Violates The Administrative Procedures Act**

RHI argues that, even assuming the Department has the statutory authority to apply the CVD law to an NME country, the Department's abrupt change to its long-standing practice of not so applying the CVD law violates the rulemaking procedures of the APA, which establishes that an agency must allow parties an opportunity to participate in the rulemaking process of formulating, amending, or repealing a rule.[145] In particular, RHI argues the Department created a binding rule of not applying CVD law to NME countries in 1984 when, following a notice and comment period, the Department established its policy in several different cases,[146] and then reaffirmed its policy nine years later.[147] Furthermore, RHI argues, the Department codified this rule in its CVD

[142] See, e.g., Wire Decking from the PRC IDM at Comment 1, OCTG from the PRC IDM at Comment 2, Citric Acid from the PRC IDM at Comment 2, and Kitchen Shelving and Racks from the PRC IDM at Comment 2.
[143] See GPX at 1240.
[144] Id.
[145] See 5 U.S.C. §§ 553(c) and 551(5). The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 V.S.C. § 551(4).92. See also Alaska Professional Hunters at 1034 (finding that the agency that revised an interpretation of a regulation contrary to a long-standing interpretation is equivalent to an amended rule).
[146] See Textiles from the PRC at 46601 (stating that "in view of the novelty of issues raised by the petition, we invite written comments and participation in a conference in which all persons interested in the issues are invited."). Although the Textiles from the PRC petition was withdrawn, RHI notes the Department considered the comments in the subsequent final determination with raising the novel issue. See Wire Rod from Poland at 19376 (finding "the notion of a subsidy is, by definition, a market phenomenon, {and} it does not apply in the market setting."). See also Potassium Chloride from the Soviet Union – Rescission (finding, "as a matter of law, {subsidies} cannot be found in NMEs").
[147] See Steel Products from Austria at 37261 (finding that the "CVD law is not applicable to non-market economies because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy... in a non-market economy, it is impossible to say that a producer has received a subsidy in the first place.").

regulations in 1998,[148] the Preamble for which (section 351.505) makes clear that CVD law does not apply to NMEs. Thus, RHI argues, the repeated affirmations and eventual codification of its interpretation over a 20-year period established a binding rule for purposes of the APA, i.e., the Department as a matter of policy did not apply CVD law to NMEs.

Accordingly, RHI states this rule cannot be amended without engaging in the rulemaking procedures required by the APA, i.e. any time the Department creates a new CVD rule or amends an existing rule it must provide public notice and opportunity to comment.[149] In this case, however, RHI contends the Department failed to comply with the APA's notice-and-comment procedures in reversing its long-standing policy of not applying CVD law to NME countries. Specifically, RHI notes that although the Department issued a public notice of its contemplated change on December 15, 2006 (nearly a month after the first CVD petition covering imports from the PRC was filed on November 20, 2006),[150] the Department never addressed the parties' comments before making its preliminary and final decisions and thus failed to provide a meaningful "opportunity to participate" in its decisions. RHI concludes that because the Department never engaged in the requisite notice-and-comment procedures for "such a significant departure from an established and binding rule," the Department's actions in initiating this CVD investigation on imports from the PRC, an NME, are contrary to law.

**Department Position**

We disagree with RHI's contention that the application of the CVD law to the PRC constitutes a retroactive amendment to a binding rule that requires a formal rulemaking. An agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or a practice.[151] Here, the decision of whether a subsidy can be calculated in an NME hinges on the facts of the case, and should be made exercising the Department's "informed discretion."[152] The CIT has agreed, stating that:

> While Commerce acknowledges that it has a policy or practice of not applying countervailing duty law to NMEs, see, e.g., Request for Comment, Commerce has not promulgated a regulation confirming that it will not apply countervailing duty law to NMEs. In the absence of a rule, Commerce need not follow the notice-and-comment obligations found in the APA, 5 U.S.C. § 553, and instead may change its policy by "ad hoc litigation." See Chenery Corp. at 203.

GOC v. U.S. at 1282.

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[148] CVD Preamble at 65360 (defining "benefit" after considering comments received, and explaining that "it is important to note here our practice of not applying CVD law to non-market economies. The CAFC upheld this practice in Georgetown Steel. We intend to continue to follow this practice.").
[149] See Shinyei at 1309 (finding that the APA generally applies to CVD and AD proceedings); see also Impact Steel at 1305 (requiring the Department to provide a notice-and-comment period, including at least, "final clarification with detailed responses to all comments received"). See also Mercy Medical (finding an agency violated the APA after changing its 20-year long practice without a notice and comment period).
[150] See Application of CVD to PRC – Comment Request.
[151] See, e.g., Chenery Corp. at 202-03 ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").
[152] See id. at 203.

The CIT has repeatedly recognized the Department's discretion to modify its practice through case-by-case basis and has upheld decisions by the Department to change its policies in this manner rather than by rulemaking when it has provided a reasonable explanation for any change in policy.[153] This is because it is necessary for the Department to have the flexibility to observe the actual operation of its policy through the administrative process as opposed to formalized rulemaking.[154] The Department has provided a fully reasoned analysis for its change of practice.[155]

The Department's decision to apply the CVD law in this investigation is also not subject to the notice-and-comment rulemaking of the APA because of the nature of the proceedings before the agency. The "APA does not apply to antidumping administrative proceedings" because of the investigatory, as opposed to adjudicatory, nature of the proceedings, a principle equally applicable to CVD proceedings.[156]

RHI cites to determinations where it claims the Department established a rule under the APA that it would not apply the CVD law to the PRC. The argument premised on these determinations is incorrect because the Department does not create binding rules under the APA through its administrative determinations. Instead, in these determinations the Department expounds on its practice in light of the facts in each proceeding. Furthermore, in the determinations to which RHI cites, the Department never found that the Congress exempted the PRC from the CVD law. In Wire Rod from Poland, which provided the Department's analysis on the Soviet bloc economies and examined whether the CVD law could be applied, the Department articulated its decisions based on the status of those economies at the time. For example, after analyzing the operation of the market (or lack thereof) in Poland, the Department explained that:

> These are the essential characteristics of nonmarket economic systems. It is these features that make NME's irrational by market standards. This is the background that does not allow us to identify specific NME government actions as bounties or grants.

Wire Rod from Poland at 19374.

The Department concluded that Congress had never clearly spoken to this issue.[157] In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME."[158] The Department based its decision upon the economic realities of these Soviet-bloc economies. It did not create a sweeping rule prohibiting the application of the CVD

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[153] See, e.g., Budd Co. (holding that the Department did not engage in rulemaking when it modified its hyperinflation methodology: "because it fully explained its decision on the record of the case it did not deprive plaintiff of procedural fairness under the APA or otherwise"); Sonco Steel at 966 (formal rulemaking procedures were not required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price).
[154] See Ceramica Regiomontana at 404-05.
[155] See LWTP from the PRC IDM at Comment 1; see also Georgetown Steel Memorandum.
[156] See GSA at 1359 (citing SAA at 892) ("Antidumping and countervailing proceedings . . . are investigatory in nature.").
[157] Id.
[158] Id.

law to NMEs. Indeed, the Department's subsequent actions demonstrate that it did not create a rule against the application of CVD law to NMEs. For example, in 1992, the Department initiated a CVD investigation against the PRC, notwithstanding its status as an NME, after determining that certain industry sectors were sufficiently outside of government control.[159] The Department ultimately rescinded the CVD investigation on the basis of the AD investigation, the litigation, and a subsequent remand determination, concluding that it was not a market-oriented industry.

RHI references Steel Products from Austria, claiming that a reference to the Department's practice elevated that practice to the level of a rule. However, the statement is simply an explanation that the CVD law is not concerned with the subsequent use or effect of a subsidy and that "Georgetown Steel cannot be read to mean that countervailing duties may be imposed only after the Department has made a determination of the subsequent effect of a subsidy upon the recipient's production."[160] This reference to Georgetown Steel does not set forth a broad rule, but merely acknowledged the Department's practice regarding non-application of the CVD law to NMEs.

The Department has appropriately, and consistently, determined that formal rulemaking was not appropriate for this type of decision. Instead of promulgating a rule when it drafted other CVD rules, the Department reiterated its position that the decision to not apply the CVD law in prior investigations involving NMEs was a practice:

> In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

CVD Preamble at 65360.[161]

In a subsequent determination, the Department continued to explain that it has a practice of not applying the CVD law to NMEs, and did not refer to this practice as a rule. "The Preamble to the Department's regulations states that . . . it is important to note here our practice of not applying the CVD law to non-market economies. . . . We intend to continue to follow this practice."[162] The claim that the Department has somehow created a rule, when it has neither referred to its practice as such nor adopted notice-and-comment rulemaking for this practice, is erroneous. And as such, the Department was free to amend its practice on a case-by-case basis as opposed to a formal rulemaking procedure.

[159] See Lug Nuts and Wheel Locks from the PRC – Initiation.
[160] See Steel Products from Austria at 37261.
[161] See also Steel Products from Austria at 37261.
[162] Sulfanilic Acid from Hungary at Comment 1.

**Comment 4 – Whether the Department's Decision to Initiate an Investigation of Export Restraints at Issue Was Contrary to Law and Unsupported by Fact**

The GOC and RHI maintain that the Department effectively ignored the statute and its own standards for when it should initiate an investigation of an alleged subsidy. Citing to Section 702(b)(1) of the Act and Article 11.2 of the SCM Agreement, the GOC and RHI hold that the Department can only initiate an investigation of a subsidy allegation if information in the allegation adequately establishes the potential existence of all three elements of a subsidy: 1) financial contribution; 2) benefit; and 3) specificity. The GOC and RHI maintain that the underlying allegation regarding the export restraints at issue did not meet the statutory requirements for initiating an investigation of a subsidy since the allegation did not adequately establish the existence of three elements of a subsidy (i.e., financial contribution, benefit and specificity).[163] Moreover, in the context of allegations concerning export restraints, the GOC contends that the Department has "articulated a standard for initiation that defines the parameters of such a measure. This includes an emphasis on severity of the export restraints and the need for independent studies of price effects or long-term pricing data within the market under investigation as an important basis for alleging the legal element of financial contribution."[164] Absent a showing of severe export restraints, further supported by pricing data and independent studies of price effects, the GOC contends that an investigation of export restraints should not be initiated. In light of the Department's disregard of both the statutory requirements and its own standards for initiation with respect to the export restraints at issue, both parties argue that the Department should terminate the investigation for the program at issue.

The GOC and RHI contend that the information submitted in the Petition and Petition Supplement was not sufficient for initiating the export restraint allegation. Specifically, none of the documents used to support the underlying investigation addressed magnesia prices in the PRC. The GOC maintains that Petitioner did not provide any pricing data nor explain why they did not provide POI pricing data when it could have done so based on the sources in the Petition supplement at Exhibit S-5. The GOC also notes that since Petitioner is in the business of purchasing magnesia, it should have been able to obtain magnesia pricing data. Moreover, the GOC maintains that Petitioner did not provide any independent studies showing the effect of export restraints on pricing of magnesia in the Chinese market. The GOC concludes that the Department should have demanded more pricing data from Petitioner before initiating on the export restraint allegation and that such pricing information is a necessary basis for any alleged financial contribution.

With respect to the Department's supposed articulated standard for initiation, the GOC and RHI each cite to the CFS from Indonesia to support its contention that, when considering whether to initiate an investigation of an export restraints program, the Department, has drawn distinctions among export restraints, emphasizing, inter alia the severity (e.g., ban vs. tax) of the export

[163] RHI also argues that the Department's initiation of the export restraint allegation in the instant case was contrary to the WTO's ruling that export restraints are not considered financial contributions under the SCM Agreement. RHI cites United States – Measures Treating Export Restraints as Subsidies at para. 8.75, to support its contention that the WTO has ruled that export restraints do not constitute government entrusted or government directed provision of goods. RHI further contends that as Section 771 of the Act is intended to be consistent with the SCM Agreement per URAA, the statute precludes the Department from initiating an investigation of export restraints.

[164] GOC Case Brief at 25.

restraint. In particular, the GOC argues that Petitioner's export restraint allegation does not meet the Department's standard of "severity" as articulated by the GOC. The GOC proposes that the document from Exhibit S-5 of the Petitioner's August 10, 2009 Petition Supplement shows the amount of magnesia exports undermines the Petitioner's argument for initiating an export restraint allegation and does not meet the Department's initiation standards. Specifically, the GOC contends that this document shows that the PRC exported approximately two-thirds of its magnesia production and therefore, do not meet the Department's "standard of severity" as applied to other cases in which the Department initiated or countervailed export restraint programs. The GOC concludes that export figure cited above demonstrates that the export restraints at issue do not constitute an export ban similar to the bans in CVD cases where the Department initiated and/or countervailed export restraint programs (e.g., Leather from Argentina and CFS from Indonesia).

Likewise, the GOC and RHI cite to the Seamless Pipe NSA Memorandum in which the Department declined to initiate an investigation of export restraints on steel rounds because the petitioners did not adequately support its allegation of a government financial contribution with sufficient information relating to, inter alia, the pricing of steel rounds. In addition, the parties rely on OCTG from the PRC to document that the Department's standard for initiation emphasizes the importance of including an "historical price trend comparison that would allow a review as to whether pricing differences during the POI are due to export restraints in the petition."[165]

According to the GOC and RHI, the Petitioner in this case did not submit any long-term pricing data or any independent studies on the price effects of the alleged export restraints which, GOC and RHI claim, normally are required by the Department in order to initiate an investigation of an export restraint program. To support its argument, the GOC contrasts this to the Department's treatment of export restraint programs in Seamless Pipe from the PRC—Preliminary and OCTG from the PRC. The GOC notes that in the OCTG and Seamless Pipe cases the Department rejected Petitioners' export restraint allegations even though they submitted pricing data and pricing effects information on the record. The GOC points out that the pricing study placed on the record of the instant investigation by Petitioner only shows pricing effects in the United States and not in the PRC.[166] The GOC further notes that the study used by Petitioner does not mention any government measures or any export bans. Thus, the GOC maintains that the pricing study submitted by Petitioner did not account for any government measures in the regression analysis of effects on the U.S. price of magnesia imports from the PRC. Rather, the GOC claims that the same report states that any price effects are the result of the actions of private actors, and not the government of the PRC. Thus, the GOC

[165] GOC Case Brief at 29.

[166] The GOC explains that it agrees with one aspect of the report which states that the reasons for the high prices of magnesia in the U.S. are due to inflationary pressure in the Chinese economy because of strong demand, higher ocean and inland freight costs, and tax incentives introduced by the PRC government. The GOC also points out that the tax incentive claim in the study is not supported by any footnotes or source documents. The GOC maintains that Petitioner did not provide any pricing data nor explain why they did not provide POI pricing data when it could have done so based on the sources in the Petition Supplement at Exhibit S-5. The GOC also notes that since Petitioner is in the business of purchasing magnesia, it should have been able to obtain such magnesia pricing data. The GOC concludes that the Department should have demanded more pricing data from Petitioner before initiating on the export restraint allegation.

maintains that the report submitted by the Petitioner undermines the financial contribution alleged in the petition.

Finally, RHI also argues that the Department should not have initiated the export restraint allegation since this type of subsidy is not specific. RHI maintains that information submitted by Petitioner in its Petition shows that any subsidy arising from the export restraints at issue could not be specific since Petitioner listed other industries, besides MCBs, that make magnesia based bricks (such as fired magnesite, magnesite dolomite, and magnesia aluminum carbon bricks) and that use magnesia inputs for production purposes. RHI concludes that each of these industries, plus other non-brick manufacturers that use magnesia, could be presumed recipients of any benefits from an export restraint program; and thus making this program not specific. According to RHI, the Department has not followed precedent by assuming, at the time it initiated its investigation of the export restraints at issue, that those export restraints were specific.

**Department Position**

As an initial matter, the Department notes that its decision on whether to initiate an investigation of any alleged subsidy is made based on its analysis of information on the record. With respect to initiation, section 702(b)(1) of the Act states that petitioners must allege the elements necessary for the imposition of the duty imposed by section 701(a) of the Act (i.e., financial contribution, specificity, and benefit). The allegation must be accompanied by information reasonably available to petitioners supporting those allegations. In our initiation analysis for the export restraints at issue, the Department found that the Petitioner had properly alleged the three elements necessary for the imposition of CVD duties under section 701(a) of the Act and that these elements were supported by information reasonably available to the Petitioner with regard to export restraints, thus making investigation of export restraints proper under section 702(b)(1) of the Act. See Initiation Notice, 74 FR 42858 and the Initiation Checklist at p. 10.[167] We find that there is no basis to reconsider our decision to initiate an investigation of the export restraints at issue.

The GOC's and RHI's comparison of the bases for the Department's decision to initiate investigations of export restraint programs in Leather from Argentina and CFS Paper from Indonesia and not initiate investigations of certain export restraint programs in Seamless Pipe from the PRC and OCTG from the PRC is misplaced. As an initial matter, the Department's decisions on whether to initiate an investigation of the types of export restraints alleged in these other cases were based solely on the Department's analysis of information on the record. This is particularly relevant given that "export restraints" can come in many forms, as each of these cases demonstrates. Moreover, the Department disagrees with the parties' contention that the Department's separate decisions on whether to initiate an investigation of alleged export

[167] The support included: Minutes of the 2002 Coordination Meeting of Ling-Burn and Dead-Burnt Magnesia Successful Bidders, China Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters (January 21, 2002) (see CVD PRC Petition Volume I, at Exhibit 29) Additional Excerpts from Industry Study 2309: Refractories (February 2008) (see Supplement to the CVD PRC Petition, dated August 10, 2009, at Exhibit S-4) and Expert Report of Dr. Russell Lamb (see Supplement to the CVD PRC Petition, dated August 10, 2009, at Exhibit S-5.)

restraints in these other cases constitute a higher standard for initiation with respect to all export restraint programs. While the nature of an export restraint subsidy allegation may require information that may not be required for other subsidy allegations, the Department's decision on initiation in each of the cases cited by the GOC and RHI was based on the application of the initiation standard to the evidence of record.

As noted by the parties, the Department has countervailed export restraint programs in prior cases. For example, in CFS Paper from Indonesia, the Department found that the export restraint at issue provided a countervailable subsidy based, in part, on the type of restraint at issue as well as the long-term historical price comparisons that demonstrated a link between the imposition of the restraint and a divergence between domestic and world prices. It is important to note that, in CFS Paper from Indonesia, the Department did not require that the petitioner demonstrate a clear link between the export restraints and the divergence in prices at the time of initiation. In fact, the Department initiated an investigation of the export restraints in CFS Paper from Indonesia in the absence of any domestic price data. Thus, contrary to the GOC's suggestion, CFS Paper from Indonesia does not support its contention that the Department's standard for initiation for all types of export restraint programs is to always require a link between the imposition of those restraints and the divergence of domestic and world market prices in order to initiate an investigation of the potential subsidy. Additionally, we note that the Department has initiated other investigations of export restraints in which the petitioners were not required to demonstrate the "severity" of the respective restraints at the time of initiation See e.g., "Provision of Low-Cost Coke through the Imposition of Export Restraints" in OCTG from the PRC.

Thus, contrary to the Parties' claims, the nature of the alleged export restraint will determine whether additional information such as long-term price comparisons, is necessary to support a decision to initiate an investigation of that particular export restraint. More generally, what precise information is required to support an allegation of a countervailable export restraint is case-specific and will depend on the particular facts and circumstances of the precise restraint at issue in a given allegation. As we explained in our initiation decision, in this case the Petitioner made a proper allegation, which included the necessary supporting information, including adequate pricing data for this type of export restraint, based on information reasonably available to it. As such, consistent with section 702(b)(1) of the Act, we continue to find that petitioners alleged the elements necessary for the imposition of the duty imposed by section 701(a) of the Act and that their allegation was accompanied by information reasonably available to them supporting those allegations.

**Comment 5 – Whether the Export Restraints at Issue Can be Found to Confer a Financial Contribution to the Industry Producing MCBs**

Both the GOC and RHI take issue with the Department's determination that, as an adverse inference, the GOC's export restraints on magnesia constitute a financial contribution (i.e., provision of goods) to PRC producers of downstream goods which incorporate magnesia within the meaning of sections 771(5)(B) and (D) of the Act.

Generally, the GOC and RHI maintain that the export restraints at issue are not "cognizable as financial contributions"[168] and therefore cannot be found to confer a countervailable subsidy pursuant to section 771 of the Act and Article 1.1(a) of the SCM Agreement. In particular, the GOC argues that its export restraints on magnesia are not the type of governmental measures which constitute an entrustment or direction of private parties to provide magnesia to domestic downstream industries.[169] In the absence of government entrustment or direction of private parties, the GOC and RHI argue that the Department has no basis on which to find that its export restraints on magnesia constitute a financial contribution pursuant to Article 1.1(a) of the SCM Agreement.[170]

Both the GOC and RHI contend that it is well-established at the WTO that not all government actions constitute a financial contribution and that the entrustment and direction cannot be the mere by-product of governmental action. To support this position, the GOC and RHI cite to Softwood Canadian Lumber - WTO where the WTO appellate body stated "not all government measures capable of conferring benefits would necessarily fall within Article 1.1.(a)"; otherwise paragraphs (i) through (iv) of Article 1.1(a) would not be necessary "because all government measures conferring subsidies, per se, would be subsidies."[171] Each party also relies on DRAMS from Korea-WTO to support its position that the GOC's export restraints on magnesia are not the type of governmental measures that constitute an entrustment or direction of private parties. In particular, the GOC maintains that with "respect to the entrustment and direction that presumably underpins the Department's theory of financial contribution in this case, such entrustment or direction does not cover the situation in which the government intervenes in the market some ways, which may or may not have a particular result simply based on the given factual circumstances and exercise of free choice by actors in the market."[172]

**Department Position**

Notwithstanding the GOC's and RHI's arguments regarding the non-countervailability of the export restraints at issue, the Department continues to find, as an adverse inference, that the GOC's export restraints on magnesia constitute a financial contribution (i.e., provision of goods) to PRC producers of downstream goods which incorporate magnesia within the meaning of sections 771(5)(B) and (D) of the Act. As discussed in the Post-Preliminary Determination, the record of this investigation shows that the GOC withheld information necessary to the analysis of the export restraints at issue and ultimately stated that "it will not respond to the questions posed by the Department with respect to export restraints in this investigation."[173] Accordingly, the Department continues to find that, pursuant to section 776(a)(2)(A) of the Act, the use of facts

[168] See GOC QR at 10. Citing the WTO report in United States – Measures Treating Export Restraints as Subsidies, the GOC argues that an export restraint "cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement." GOC QR at 10, quoting United States – Measures Treating Export Restraints as Subsidies at para. 8.75. Thus, the GOC argues that its export restraints on magnesia are not the type of governmental measures which constitute an entrustment or direction of private parties to provide magnesia to domestic downstream industries. See, e.g., GOC SQR2-1 at 5-6.
[169] See, e.g., GOC SQR2-1 at 5-6.
[170] See id.
[171] See GOC Case Brief at 24.
[172] See DRAMS from Korea-WTO at para. 114.
[173] See GOC SQR2-1 at 8 and GOC SQR2-2 at 19.

available is warranted, given that the GOC withheld information necessary for this investigation. Moreover, we continue to determine that an adverse inference is appropriate under section 776(b) of the Act because in deciding not to cooperate, the GOC failed to act to the best of its ability to comply with our repeated requests for information.

As noted in the Post-Preliminary Determination, the larger part of the GOC's limited responses with respect to export restraints has been devoted to its repeated arguments that there is no basis under WTO rules to treat export restraints as a countervailable subsidy. The Department disagrees with the GOC's and RHI's apparent position that since export restraints, both in general and those at issue, cannot constitute a financial contribution pursuant to section 771(5)(D)(iii) of the Act, the GOC was not required to respond to the Department's requests for information on the export restraints at issue. As an initial matter, the Department has found export restraints to confer a financial contribution in past cases.[174] Moreover, similar to its examination of other potential subsidies, the Department based its analysis of export restraints in these past cases on information submitted on the record of those proceedings by the relevant governments and respondent companies. Further, the Department found in its initiation analysis that Petitioner had properly alleged the elements necessary for the imposition of CVD duties under section 701(a) of the Act and that these elements were supported by information reasonably available to the Petitioner with regard to export restraints, thus making investigation of export restraints proper under section 702(b)(1) of the Act.[175] Thus, irrespective of its opinion regarding the potential countervailability of the export restraints at issue, it is the GOC's responsibility to respond to the Department's requests for information on the export restraints at issue.

In addition, information submitted by the GOC, prior to its refusal to answer further questions on export restraints, illustrated GOC control over the export restraints at issue and indicated the need for additional information to determine whether these measures constituted a financial contribution under section 771(5)(D) of the Act. In its initial questionnaire responses, the GOC provided the "Measures on Quota Bidding of Export Commodities" (Measures), which state that ultimate responsibility for the export bid quota system resides with the PRC's MOFCOM, which in turn delegates authority to sub-national government units as well as chambers of commerce. The record of this investigation shows that in our first and second supplemental questionnaires, we asked the GOC to clarify the export bid approval process and hierarchy described in the Measures.[176] However, the GOC did not provide requested information with respect to the government hierarchy responsible for export restraints and the exchange of information within this hierarchy with respect to domestic consumption, production levels, and pricing of magnesia. In addition, the GOC did not provide additional details regarding the export bid approval process

[174] See Leather from Argentina and CFS from Indonesia.
[175] See Initiation Notice at 42858.
[176] See GOC QR at Ex. C-1. The Measures state that MOFCOM supervises the export bid process via the Committee for the Invitation for Bid for Export Commodity Quotas (CIBECQ), whose membership consists of the leaders of MOFCOM. See GOC QR at Ex. C-1. The Measures also state that the MOFCOM is responsible for the routine work of the CIBECQ, which is to set up "offices for the invitation for bid for export commodity quotas" (OIB) within the "relevant chambers of commerce for import and export." See id. The Measures also indicate that relevant chambers of commerce for import and export shall be responsible for the routine work of their OIB. See id. (We note that the CCCMMC is the relevant chamber of commerce for magnesia.) Further, the Measures state that sub-national departments of foreign trade shall be responsible for examining the qualifications of export bid-tendering enterprises from their jurisdiction. See id.

and hierarchy described in the Measures. Finally, the GOC did not provide information necessary to analyze the impact of export restraints on the magnesia industry in the PRC. In particular, the GOC did not identify or submit any reports, statistical data, or compliance data that parties involved in the magnesia export restraint process provide to the GOC with respect to export restraints on magnesia. This missing information is a crucial factor in determining whether the export restraints at issue were structured to provide a financial contribution to domestic downstream industries.

As discussed above, the record of this investigation shows that the GOC withheld information and ultimately stated that it will not respond to the questions posed by the Department regarding the export restraint program. Accordingly, the Department continues to find that, pursuant to section 776(a)(2)(A) of the Act, the use of facts available is warranted. Moreover, we continue to determine that an adverse inference is appropriate under section 776(b) of the Act because in deciding not to cooperate, the GOC failed to act to the best of its ability to comply with our repeated requests for information.

**Comment 6 – Whether the Use of Facts Available with Adverse Inferences Is Warranted For the Export Restraint Subsidy**

The GOC and RHI maintain that the Department's use of adverse inferences with respect to the export restraints at issue was improper and unlawful. As an initial matter, both parties contend that the Department improperly relied on adverse inferences to determine that the export restraints at issue are countervailable (i.e., provide a financial contribution and are specific). Moreover, RHI argues that by finding the export restraints of magnesia to be countervailable, the Department effectively and unfairly applied adverse inferences to RHI even though it responded fully to the Department's various requests for information.

The GOC and RHI argue that the Department's reliance on facts available with an adverse inference to determine that the export restraints at issue are specific and provide a financial contribution are unsupported by law and evidence. Citing the specificity criteria listed in section 771(5A)(D) of the Act, RHI maintains that the information the Department requested and that the GOC did not provide (e.g., how the GOC instituted export restraints against magnesia, how export quotas are determined, as well as various reports and statistical information) could not be used by the Department to determine if the export restraints at issue were specific. In fact, the GOC and RHI contend that the Department never asked for the types of information needed to determine whether export restraints are specific. Specifically, RHI notes that the Department did not ask for information such as the identities of Chinese domestic consumers of magnesia, which the company proposes would be relevant for any analysis as to who is benefitting from the export restraint subsidy.

Thus, RHI concludes that even though GOC refused to answer certain questions posed by the Department, its refusal did not constitute withholding any information necessary for determining whether the export restraints at issue were specific or that they conferred a financial contribution. RHI maintains that there are no facts on the record of this investigation from which the Department could conclude that the export restraints at issue provide a specific subsidy or that they confer a financial contribution and that the presence of such facts are a "prerequisite to the drawing of an adverse inference to that effect."[177] RHI argues that section 776 of the Act does not permit the Department to "make up a … determination out of the whole cloth, as was done in the Post-Preliminary Determination. It provides only that the Department 'may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'"[178] RHI argues that the Department's decision with respect to the export restraints at issue did not rely on "any facts otherwise available" (i.e. information on the record) "showing that the provision of allegedly low cost magnesia to PRC producers of downstream goods which incorporate magnesia is specific as required by the statute."[179] RHI further argues that the only facts discussed by the Department "relate to information not provided by the Government of China in response to the Department's requests - - in other words, facts not available to the Department."[180]

Moreover, RHI argues that the Department did not identify any data showing that the GOC's export restraints confer a benefit (i.e. the price of magnesia in the Chinese market decreased because of the export restraints). In fact, RHI contends, the Department did not specifically make a finding that the export restraints at issue decreased the price of magnesia in the PRC. According to RHI, the Department just relied on Petitioner's view that export restraints have the effect of decreasing the domestic price of magnesia in the PRC and then compared the company's magnesia purchase prices against an artificially constructed benchmark price without any analysis as to why the benchmark price was higher. As such, RHI concludes that the Department made the adverse inference without relying upon any corroborating information from the record or from independent sources. Citing section 776 of the Act, RHI concludes that the Department did not meet the corroboration requirements for using adverse inferences as defined in the statute. Finally, citing section 776(b) of the Act, RHI contends that the Department can only use adverse inferences against non-cooperating parties when selecting from among the facts otherwise available. RHI states that it would be unfair for the Department to apply adverse inferences to a cooperating respondent due to the non-responsiveness of another party. Moreover, RHI argues that the Department verified its responses, including those regarding its magnesia purchases, and found no significant issues with those responses. Citing JTEKT Corp., RHI contends that the CIT held that the Department cannot invoke its authority under section 776 of the Act to rely on facts otherwise available in place of information that was verified on the ground.

Citing to the legal standards set forth under sections 776(a)(2)(A) and 776(b) of the Act, Petitioner first argues that the Department correctly applied AFA in treating the export restraint program for raw materials in the PRC as a countervailable subsidy, because the GOC withheld information necessary for this investigation and the GOC's decision not to cooperate constituted a failure to act to the best of its ability in complying with the Department's repeated requests for information. In support of its argument, Petitioner refers to the Post-Preliminary Determination to identify certain information requested by the Department but not provided by the GOC, including information necessary to analyze the impact of export restraints on the magnesia

[177] RHI Case Brief at 9.
[178] Id., citing 19 USC § 1677e(b).
[179] RHI Case Brief at 9-10.
[180] Id. at 12.

industry in the PRC and evaluate whether such export restraints are specific and structured to provide a financial contribution to domestic downstream industries in the PRC.

Furthermore, Petitioner contends the Department's determination to use an adverse inference was appropriate in light of the GOC's decision not to cooperate, namely its continued reiteration of its positions regarding the non-countervailability of export restraints and the Department's decision to initiate with respect to export restraints, its objection to the Department's line of questioning regarding export restraints rather than responding to additional questions, and its ultimate statement that it would "not respond to the questions posed by the Department with respect to export restraints in this investigation."[181] Accordingly, Petitioner argues that in drawing an adverse inference, the Department correctly found that the GOC's export restraints on magnesia: (i) constituted a financial contribution (i.e., provision of goods) to Chinese producers of downstream goods that incorporate magnesia, within the meaning of sections 771(5)(B) and (D) of the Act, and (ii) are specific to MCBs in the PRC, within the meaning of section 771(5)(A) of the Act. Petitioner concludes that the Department correctly determined that through these export restraints, the GOC provided inputs to downstream producers of MCBs.

Petitioner counters RHI's argument that AFA is unwarranted by noting that RHI acknowledges the GOC refused to provide information requested by the Department. Citing OCTG from the PRC, Petitioner maintains that the Department requests information from governments in CVD investigations in order to determine the specificity and financial contribution of alleged programs. Since the GOC refused to supply the requested information, Petitioner concludes that the Department properly applied AFA for finding specificity and financial contribution for export restraints.

Petitioner disagrees with RHI's contention that since it cooperated with the Department that the Department should not apply AFA to its company's rate. Petitioner argues that if the Department agrees with RHI, then other governments would be allowed to not cooperate and thus allow government authorities to dictate what information the Department uses in its analysis. Citing Steel Authority of India and Rhone Poulenc I, Petitioner supports its argument that the Department can use AFA against a cooperating company in a CVD case even when the government of the country where the company is located is not cooperating. Countering the GOC's and RHI's argument that the information requested by the Department, and which the GOC refused to provide, does not address specificity or financial contribution, Petitioner states that the courts have given the Department the authority and discretion to determine what information it may need to evaluate the countervailablity of alleged programs. On this basis, Petitioner concludes it is up to the Department and not the GOC or RHI to determine what information is relevant for the instant CVD investigation. Petitioner further disagrees with RHI's argument that there is no evidence on the record to support the Department's determination that the export restraints program meets the qualifications for specificity and financial contribution. Rather, Petitioner counters, the GOC's refusal to cooperate compelled the Department to make the specificity and financial contribution determinations using AFA with adverse inferences.

Finally, Petitioner also argues that the Department correctly determined that the use of AFA was warranted with respect to Mayerton regarding the export restraint program in the PRC and to the

[181] See Petitioner Case Brief at 10, citing the Post-Preliminary Determination at 6.

benefit conferred thereby, pursuant to section 776(a)(2)(D) of the Act. As Mayerton was selected as a mandatory respondent in this investigation, Petitioner states that Mayerton's decision to no longer participate in this investigation significantly impeded this proceeding, and its subsequent failure to provide requested information necessary to determine a CVD rate subjected it to adverse inferences, pursuant to section 776(b) of the Act. Since the Department cannot rely on any information submitted by Mayerton in its analysis, Petitioner contends the Department correctly determined that an adverse inference was appropriate under section 776(b) of the Act because, by withdrawing from the investigation, Mayerton failed to cooperate "to the best of its ability" in this investigation. Petitioner states that, in drawing an adverse inference, the Department correctly found that Mayerton received a countervailable benefit from the GOC's program of export restraints on magnesia, as Mayerton is a producer of downstream goods that incorporate magnesia. Petitioner concludes that, consistent with the Department's recent practices, a total AFA rate should be computed for Mayerton by using the highest non-de minimis rate calculated for the same or similar program in another PRC CVD investigation.[182]

**Department Position**

The Department continues to find that, pursuant to section 776(a)(2)(A) of the Act, the use of facts available is warranted, given that the GOC has withheld information necessary for this investigation. We note that in the GOC SQR and subsequent GOC SQR2-1, the GOC stated that it would not provide certain requested information regarding export restraints because "the information requested was not relevant to the instant investigation."[183] Moreover, in its second supplemental questionnaire responses, the GOC stated it would "not respond to the questions posed by the Department with respect to export restraints in this investigation."[184] As such, we continue to determine that an adverse inference is appropriate under section 776(b) of the Act because in deciding not to cooperate, the GOC has failed to act to the best of its ability to comply with our repeated requests for information. In drawing an adverse inference, we continue to find that the GOC's export restraints on magnesia constitute a financial contribution (i.e., provision of goods) to PRC producers of downstream goods which incorporate magnesia within the meaning of sections 771(5)(B) and (D) of the Act. Moreover, as an adverse inference, we continue to find that GOC's export restraints on magnesia are specific to producers of MCBs in the PRC within the meaning of section 771(5A) of the Act. Accordingly, the Department continues to find that, through these export restraints, the GOC is providing inputs to downstream producers of magnesia carbon bricks.

As discussed above, in our initiation analysis for the export restraints at issue, the Department found that the Petitioner had properly alleged the three elements necessary for the imposition of CVD duties under section 701(a) of the Act and that these elements were supported by information reasonably available to the Petitioner with regard to export restraints at issue, thus making investigation of export restraints proper under section 702(b)(1) of the Act.[185] When investigating the countervailability of a program, the Department has the authority to determine

[182] See Petitioner Case Brief at 12, citing Kitchen Shelving and Racks from the PRC IDM at 4.
[183] See GOC SQR at 21.
[184] See GOC SQR2-1 at 5 and SQR2-2 at 16.
[185] See Initiation Notice at 42858.

the extent of an investigation and the type of information that it needs for its analyses.[186] In this case, because of the GOC's refusal to fully respond to the Department's requests for information, as discussed below, the Department drew an adverse inference when choosing among the incomplete information on the record and determined that the export restraints are specific and provide a financial contribution. The Department's drawing of an adverse inference from among the incomplete facts available on the record is specifically contemplated by section 776(b)(1) of the Act.

Based on the Department's proper initiation, the Department requested information from the GOC to determine whether the export restraints at issue meet the specificity and financial contribution elements of a CVD subsidy. The record of this investigation shows that that the GOC withheld information with respect to the export restraints at issue. The GOC failed to cooperate to the best of its ability in responding to a request for information necessary to determine whether there was a financial contribution and specificity. The GOC is the only party which possessed the requested information that would enable the Department to conduct its full analysis of this allegation and the GOC affirmatively and repeatedly refused to provide that information to the Department. In a CVD investigation, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters of merchandise under investigation. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.[187]

**Comment 7: Whether the Department Should Adjust the Manner It Calculates the Export Restraints Benefit**

RHI maintains that the DBM and FM benchmarks chosen by the Department "misrepresent the appropriate, comparable benchmarks prices" and proposes that, if the Department continues to find export restraints countervailable for the final determination, the Department should revise those DBM and FM benchmarks.[188] Specifically, RHI contends that the DBM and FM benchmarks selected by the Department have three fundamental flaws: "(a) the countries' data selected are not significant magnesia producers; (b) data from certain countries were excluded, while aberrational values were included; and (c) China's supply and price-inflating dominance over worldwide prices was ignored."[189]

RHI takes issue with the countries selected by the Department for world market prices, claiming that they are not significant magnesia producers. RHI further maintains that the Department did

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[186] See LWS from the PRC IDM at Comment 19; see also Nippon Steel (affirming the Department's application of AFA against a party that claimed the requested information was unnecessary for the Department's determination); see also Rhone Poulenc I, affirmed by Rhone Poulenc II (finding that the Department has authority to decide what information is necessary to make a determination).

[187] See, e.g., CTL Plate from Korea AR—Preliminary (unchanged in CTL Plate from Korea AR, in which the Department relied on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively).

[188] RHI Case Brief at 16.

[189] Id.

not adequately explain why it selected certain countries and not others. In particular, RHI cites to the 2008 USGS Minerals Yearbook (see Post-Preliminary Factual Information at Exhibit 7) and notes that Department did not use export data from several countries which: 1) "have significant production of magnesia;"[190] 2) produce fused magnesia;[191] 3) exported magnesia to the United States;[192] or 4) had magnesite compounds production capacity.[193] RHI maintains that the Department's calculations "fail to justify its country selection and exclusion of some of the larger producers of magnesia worldwide."[194] RHI also claims that the Department arbitrarily excluded prices for FM from Turkey, Mexico, and Serbia because the commodity descriptions reported for each country indicated that it included magnesia products other than fused magnesia; however, RHI argues that the Department included the price data for DBM from certain countries that also included materials other than DBM in their commodity descriptions, making the Department's actions inconsistent and arbitrary. RHI argues that, contrary to its practice in AD cases, the Department did not exclude aberrational values based on extremes of AUVs or low quantities when calculating its benchmarks.[195] Finally, RHI concludes that since the benchmark prices should be representative of prices available to Chinese producers, the benchmark prices should exclude North American and European prices. RHI states that any benchmarks should be limited to prices from Asian countries, "because these prices are actually available to purchasers in China based on relative proximity."[196] RHI proposes that the Department rely on the weight-averaged value of magnesia from all export sources, except for the few exceptions noted above and to then adjust those values downward in order to offset the distortive influence of Chinese pricing. To support its argument, RHI cites Petitioner's submission, which RHI included in its Post-Preliminary Factual Information submission, where it states that the PRC's policies and dominance of the magnesia market resulted in increased prices for magnesia worldwide.

Even with these recommended changes, RHI argues that there is a fundamental problem with the Department's use of GTA export price data as a measure of the domestic Chinese magnesia market prices in the absence of the Chinese export measures affecting magnesia. Specifically, RHI maintains that "it does not account for the application to the exports of the same rationale as was used to conclude the export measures increase domestic magnesia supply and decrease magnesia prices points to a conclusion that the export measures decrease the export supply of magnesia and increase Chinese magnesia export prices. That price distortion would be echoed throughout the world export market, because the PRC is the dominant source and supplier of magnesia worldwide."[197] As a result of this domination of the world magnesia market, RHI maintains:

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190 Australia, North Korea, Russia, and South Korea.
191 Australia, Brazil, Israel, Japan, Mexico, the PRC, Russia, South Korea, the United Kingdom, and the United States.
192 Australia, Austria, Brazil, Canada, Greece, Israel, Japan, Mexico, the PRC, Slovakia, and Spain.
193 Australia, Austria, Brazil, Canada, France, Greece, India, Iran, Ireland, Israel, Italy, Japan, North Korea, Mexico, the Netherlands, Norway, the PRC, Poland, Russia, Serbia, Slovakia, South Africa, South Korea, Spain, Turkey, Ukraine, and the United States.
194 RHI Case Brief at 17.
195 Specifically, RHI contends the Department erroneously included aberrationally high AUVs for Brazil, Czech Republic, Slovenia, Sweden, Bulgaria, Bolivia, and Columbia, and low quantities for Argentina and Denmark.
196 RHI Case Brief at 17 n.23.
197 RHI Case Brief at 19.

"all non-Chinese suppliers to the world market are takers of prices set by Chinese exporters. With the prices of Chinese magnesia supplies effectively controlling export prices from other magnesia suppliers, any distortion introduced into the Chinese supply by the GOC export measures (which distortions are presupposed by the Department's assumption regarding the price impact of the export measures)."[198]

RHI argues that these distortions "necessarily also are reflected in export prices worldwide. The worldwide benchmark used by the Department fails to factor this into the calculation of the benchmark for measuring the adequacy of remuneration for the 'government-provided' magnesia used by Chinese MCB producers."[199] RHI also points out that the Petitioner, in separate antitrust proceedings, has claimed that the PRC is the world's leading producer of magnesia and that the PRC effectively determined magnesia prices worldwide.

Additionally, RHI argues that the Dominant Firm Model (DFM) necessitates that the Department adjust the benchmark for export restraints. RHI claims that the Department applied the DFM in this investigation when it found that significant government intervention made PRC bank loans unreliable as benchmarks in the CVD investigation. Such doctrines and the economic principles behind them must be applied consistently by the Department under both the AD and CVD laws. RHI contends that an agency acts impermissibly when it treats similar situations in a manner that is "internally inconsistent,"[200] and fails to "reasonably explain {} the inconsistency,"[201] In its application of economic principles across different types of trade cases, the Department therefore must be consistent as a matter of law. As such, RHI argues that, consistent with the Department's practice, the Department should apply the DFM principle to the observed world prices of magnesia used to create the "tier-two" benchmarks, because DBM and FM prices worldwide parallel and are effectively determined by the prices of magnesia from the PRC. RHI posits that the conditions for application of the DFM principle clearly exist in world magnesia markets outside the PRC:

(a) there is one overwhelmingly dominant market player—the PRC; and

(b) that player sets prices without regard to market forces (under the statute the prices of an NME supplier such as the PRC are disqualified for factor valuation purposes because they are presumptively set without regard to market forces).

Further, RHI maintains that "any worldwide benchmark, dominated by Chinese supply and pricing for magnesia, therefore must be adjusted to offset the effects of the dominant supplier's that is, the PRC's export pricing and thereby use the undistorted value of the magnesia as a benchmark, as directed by the statute."[202]

To correct the fundamental flaw described above, RHI proposes that the Department should use the DFM to address the PRC's dominance in the global magnesia market and the country's effect on world market magnesia prices. RHI states that since the PRC accounts for 90 to 95 percent of

[198] Id. at 19-20.
[199] Id. at 20.
[200] NSK., Ltd. at 1357.
[201] Id. at 1358.
[202] RHI Case Brief at 27.

the world market for fused magnesia (according to the 2008 USGS Minerals Yearbook), the presence of Chinese pricing data would have major distortive implications for any world market prices. RHI goes on to state that under the statute, the Department disqualifies prices of a non-market economy supplier for factor valuation purposes because they are presumptively set without regard to market forces. RHI also maintains that Petitioner has acknowledged the PRC's dominance of the world magnesia market since Petitioner has previously accused the PRC of engaging in a world-wide conspiracy to fix and increase magnesia prices. RHI argues that the only way to provide a benchmark price would be to adjust the benchmark to eliminate the upward export price bias presumed to be a result of the GOC's export restraints.

Citing Softwood Lumber from Canada, RHI argues that the Department has a precedent for using the DFM model to formulate a benchmark for magnesia prices and notes that the Department stated in its decision:

> "where there is one overwhelmingly dominant market player, and that player happens to set prices without regard to market forces, it is impossible to conclude that the mere fact that the few remaining private suppliers in the market are price takers shows that a truly competitive market exists or that prices of those private suppliers are market-based..."[203]

RHI concludes that this language from the Canadian decision means that the remaining private prices of the same commodity cannot be considered to be independent of the dominant market player's price, whether or not that dominant market player is government-controlled. According to RHI, use of the DFM is in accordance with the Department's regulations and WTO rulings. RHI notes, citing the Department's regulations, that the preamble to the regulations stated "where there is a reason to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy."[204] RHI also notes that in Softwood Lumber from Canada - WTO, the WTO upheld the Department's use of DFM methodology. According to RHI, the WTO stated that:

> "whenever the government is the predominant provider of certain goods, even if it's not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods. Inclining the latter to align their prices to the point where there may be little difference, if any between the government price and the private price."

RHI also argues that the Department has previously applied the DFM in the CVD investigation of CFS from the PRC. According to RHI, the Department stated in CFS from the PRC that the intervention by the PRC in the market created distortions that affected even the private sector in the PRC. RHI goes on to quote the Department where it states, in the same case, that the market-based banking system in the PRC has not been fully formed and precludes the Department from using benchmarks from within the PRC, even from foreign banks, to measure loan benefits. Citing the Preliminary Determination, RHI notes that the Department also said that PRC bank loans are unreliable in the instant CVD case. RHI goes on to state that the Department must apply the DFM consistently across both the AD and CVD cases in accordance with the CIT's

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[203] Softwood Lumber from Canada IDM at 47-49.
[204] See CVD Preamble.

ruling in Husteel & SeAH. and NSK Ltd. In both cases, RHI maintains that the court stated that the Department must be consistent in similar situations and in its application of economic principles across different types of trade cases.

To support its argument, RHI cites the Department regulations at 19 CFR 351.511(a)(2)(ii), which states that if there is more than one commercially available world market price, the Department will average such purchases to the extent practicable, making allowances for factors affecting comparability to ensure an apples-to-apples comparison of benchmark price to domestic price. RHI maintains that the benchmark used by the Department in the Post-Preliminary Determination should be revised to include data from additional countries and exclude aberrational data from others. Any revised "outside-China" benchmark should be adjusted downward by 75 percent so that it accounts for the PRC's dominance of the world magnesia market in accordance with an economic study on the record.

RHI maintains that adjusting the benchmark should not be problematic since the Department has adjusted benchmarks before in other cases, such as Softwood Lumber from Canada, in order to ensure comparability. RHI further argues that the Department must find a benchmark that is undistorted by PRC export pricing in accordance with the statute.

Petitioner disagrees with RHI's contention that the Department should change or adjust the benchmarks used in the Post-Preliminary Determination. In particular, Petitioner contends that, based on Softwood Lumber from Canada, the Department's reliance on an external benchmark is consistent with its statutory mandate. In the instant investigation, Petitioner maintains that the Department should not rely on Chinese domestic magnesia prices because of the PRC's pervasive and predominant role in the domestic market for magnesia. Petitioner concludes that because of the PRC's dominant role in the magnesia market, all prices stemming from sales of domestically produced magnesia that is sold externally or internally are unusable as a benchmark. Moreover, citing CFS from the PRC, Petitioner notes that the Department should continue to rely on weight-averaged benchmarks since relying on a single country's figure could introduce distortions.

Petitioner further holds that RHI is incorrect in its reliance on 19 CFR 351.5111(a)(2)(ii) to argue that the Department should take into consideration the PRC's dominance in the world magnesia market when constructing export prices for the benchmark. Stating that this approach is inconsistent with the Department's practice in CVD investigations involving the PRC as well as other countries, Petitioner notes the Department regularly uses external benchmarks when government intervention so distorts the domestic market so that it is impracticable to use domestic prices. Petitioner also argues that RHI's reliance on Softwood Lumber from Canada to support its argument for a benchmark adjustment is erroneous since the Canadian case addressed using domestic prices as a benchmark and not external prices. Finally, Petitioner notes that RHI provided no support for the 75 percent reduction it proposed.

**Department Position**

We have not adjusted the GTA-derived DBM and FM benchmarks in the manner suggested by RHI. The Department's regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods.[205] As detailed in the Post-Preliminary Determination, in the instant case, the Department has determined that there are no reliable prices from actual transactions within the PRC to use in the benefit calculation. Therefore, we proceeded to and will continue to use world market prices that were reasonably available to purchasers in the PRC as the benchmarks to which to compare RHI's reported purchase prices for DBM and FM.

With respect to RHI's claims, we note that RHI has not argued that the GTA-derived DBM and FM benchmarks are not world market prices. Rather, it has argued that the countries selected by the Department to calculate world market DBM and FM prices are not significant magnesia producers. As such, RHI appears to have conflated the standard for selecting a tier two benchmark in a CVD case with one of the criteria in selecting a surrogate country in an NME AD case. We note that in measuring the adequacy of remuneration for government-provided goods, 19 CFR 351.511(a)(2)(ii) requires that the Department compare the government price to a world market price, and this provision contains no requirement that the Department calculate world market prices only from significant producers. When selecting a surrogate country in an NME AD case, section 773(c)(4) of the Act states that the Department should utilize, to the extent possible, prices from market economy countries that are (A) at a comparable level of economic development and (B) a significant producer of comparable merchandise.[206]

Moreover, we disagree with RHI's argument that the Department did not explain its country selection methodology. Specifically, as noted in the Post-Preliminary Calculation Memorandum and the Post-Preliminary Determination, the Department used annual world export prices for DBM and FM derived from GTA data. As noted in the Post-Preliminary Calculation Memorandum, the GTA data at the aggregate six-digit HTS level (2519.90), which covers "Magnesia, Fused, Dead-Burned, Etc. & Magnesium Oxide," showed 65 countries which reported export data. As the GTA's aggregate-level data do not differentiate between DBM and FM, we examined the GTA's country-specific data for each of these 65 countries and noted that, for certain countries, the GTA reported export data at the eight-digit HTS level which differentiated between DBM and FM.[207] Using this methodology, we were able to identify separate yearly export quantities and values from 30 countries for DBM and/or for FM. Thus, we calculated separate weighted-average annual world export prices for DBM and FM derived

[205] These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (e.g., actual sales, actual imports, or competitively run government auctions) ("tier one"); (2) world market prices that would be available to purchasers in the country under investigation ("tier two"); or (3) an assessment of whether the government price is consistent with market principles ("tier three").

[206] We note that the statute does not define the terms "comparable level of economic development" and "significant producer of comparable merchandise."

[207] Based on our analysis of the descriptions (where available) used in the eight-digit HTS subcategories covering DBM and FM for those 65 countries, we then eliminated the countries: a) which did not have eight-digit HTS subcategories covering DBM or FM; b) whose eight-digit HTS subcategory descriptions were ambiguous or incomprehensible; or 3) whose eight-digit HTS subcategories were basket categories (i.e. the description aggregated multiple forms of magnesia, such as DBM, FM, or magnesia oxide). In addition, we eliminated the export data from the PRC due to our finding that the GOC's export restraints on magnesia apply to all sales of certain domestically produced magnesia products, including DBM and FM. In all, the Department used export data from 30 countries. Each of these 30 countries did not have usable export data for DBM and FM. Rather, 26 of these 30 countries had DBM data and 26 of the 30 countries had FM data.

from relevant GTA data at the eight-digit HTS level from countries which had eight-digit HTS classifications which clearly differentiated between DBM and FM.

Moreover, RHI's position that the Department "failed to justify the exclusion of some of the larger producers of magnesia worldwide" in its Post-Preliminary Determination lacks support in record evidence. RHI relies primarily on the 2008 USGS Minerals Yearbook (Minerals Yearbook) to identify 28 countries,[208] which RHI refers to as "large producers of magnesia worldwide," that the Department excluded in its Post-Preliminary Determination. As an initial matter, RHI placed the Minerals Yearbook on the record of this investigation after the Post-Preliminary Determination. More importantly, the Minerals Yearbook does not provide DBM-specific export values or FM-specific export values for any country. Rather, the countries named by RHI were identified in the Minerals Yearbook as having: 1) significant production of magnesia; 2) produced fused magnesia; 3) exported magnesia to the United States;[209] or 4) having magnesite compounds production capacity, without reference to the type of magnesia.

Regarding RHI's claim that data from some or all of the 28 countries it identified from the Minerals Yearbook were: 1) improperly excluded by the Department in its Post-Preliminary Determination, and 2) should be included for this final determination, we note that the Department did in fact use GTA-based DBM and/or FM export data from 16 of these countries in its Post-Preliminary Determination,[210] and we will continue to use export data from all but one of these countries for the final determination.[211] In its Post-Preliminary Determination, the Department did not use export data from three countries that did not report exports under the aggregate six-digit HTS category (2519.90).[212] In addition, the Department properly excluded data from six countries because the category description of their six-digit HTS category or eight-digit subcategory indicated that it was a basket category that included FM, DBM, and other magnesium oxide.[213] In addition, the Department properly excluded two countries for whom it was not possible to discern FM or DBM export data based on their HTS subcategory descriptions.[214] Lastly, export data from the PRC was excluded because we found that the GOC's export restraints on magnesia apply to all sales of certain domestically produced magnesia products, including DBM and FM.[215]

[208] See Post-Preliminary Factual Information at Exhibit 7.

[209] The United States does not separately report DBM and FM import data. Rather, the appropriate HTS category is a basket category which covers both DBM and FM. Thus, while it is possible to calculate a value for U.S. imports of magnesia using the Minerals Yearbook, that single value would cover both DBM and FM.

[210] I.e. Austria, Brazil, France, Greece, India, Ireland, Italy, Mexico, the Netherlands, Poland, Russia, Serbia, Slovakia, Spain, Turkey, and the United Kingdom. See Post-Preliminary Calculation Memorandum at 8 and Att. 2.

[211] As Austria did not have any DBM or FM exports in 2008, we are excluding it from the benchmark calculations for this final determination. See Final Calculation Memorandum. We are also excluding Romania and Croatia from the selected group of countries, as they either had no 2008 exports or no information available specific to DBM or FM. See id.

[212] I.e. Iran, North Korea, and Norway.

[213] I.e. Australia, Canada, Israel, Japan, South Korea, and the United States. See Post-Preliminary Determination at 8.

[214] The description of South Africa's only subcategory stated "Commodity: 25199000, Other," while the subcategory for the Ukraine was in a foreign language and thus incomprehensible.

[215] See Post-Preliminary Determination at 8.

We also disagree with RHI's claim that the Department was inconsistent in excluding FM exports from some countries because the HTS description included products other than FM while not excluding DBM exports from countries values because the HTS description included products other than DBM. For instance, we excluded FM data from Turkey, whose HTS description stated "Commodity: 25199090, Fused Magnesia and Other Magnesium Oxide Whether Or Not Pure Nes In 2519," and Serbia, whose HTS description stated "Commodity: 2519909000, Other." The HTS description for each of these countries clearly indicated that the HTS was not exclusive to FM. Conversely, the HTS description for most countries that reported DBM exports stated "Commodity: 25199030, Dead-Burned "Sintered" Magnesia, Whether Or Not Containing Small Quantities Of Other Oxides Added Before Sintering." Thus, the HTS description for each of these countries clearly indicated that the HTS was exclusive to DBM, some of which contain traces of other oxides, rather than a basket category containing products other than DBM, as is the case with the FM HTS descriptions discussed above. For this final determination, we will exclude countries for whom there is no quantity and/or value export data available for 2008 or for whom it is not possible to discern FM or DBM export data based on their HTS subcategory descriptions.[216] Finally, beyond mere assertion, RHI has offered no evidence to establish that there was aberrational data included in the DBM and FM benchmarks. Thus, we will not exclude exports of low volume/high value DBM or FM data for this final determination.

Moreover, we conclude that there is no basis for excluding North American and European DBM and FM prices and limiting the benchmarks to prices from Asian countries, because, as RHI contends, the prices from Asian countries "are actually available to purchasers in China based on relative proximity." In measuring the adequacy of remuneration for government-provided goods, 19 CFR 351.511(a)(2)(ii) requires that the Department compare the government price to a world market price where it is reasonable to conclude such a price would be available to purchasers in the country under investigation. In this case, there is no information on the record of this investigation which indicates that world market prices, including those outside of Asia, would not be available to PRC-purchasers, and RHI's apparent claim that PRC companies may only import magnesia from Asia is likewise unsupported by record evidence.

Finally, the adjustment to the benchmarks to address what RHI refers to as "China's dominance in the global magnesia market and the country's effect on world market magnesia prices" is not supported by record evidence. We note that RHI used the Minerals Yearbook as its main data source to support its argument of the PRC's dominance in the global magnesia market. However, RHI's citations of the data source appear to be incorrect. For example, RHI claimed that page 46.1 of the Minerals Yearbook states that "the PRC accounts for 90 to 95 percent of traded fused magnesia on a global basis." However, such a statement does not exist in the Minerals Yearbook on the record of this investigation. Moreover, the GTA's country-level data on the record of this investigation shows that exports from the PRC account for less than one half of world exports for FM or DBM.[217] Second, it claimed that page 46.1, and Tables 8 and 9 of the Minerals Yearbook indicates the PRC has "the largest industrial base of magnesia processing

[216] These countries include Turkey, Serbia, Finland, and Bolivia for the FM benchmark calculations, and Brazil, Slovenia, Argentina, Lithuania, Denmark, and Colombia for the DBM benchmark calculations. Austria, Romania, and Croatia are being excluded from the calculations of both benchmarks. See Final Calculation Memorandum.
[217] See Post-Preliminary Calculation Memorandum.

facilities with 372,000 metric tons of fused magnesia production capacity, whereas global production in 2008 was only 560,000 metric tons." We first note that there is a difference between production and production capacity. Moreover, page 46.1 of the Minerals Yearbook stated that the production capacity numbers were from a study published in 2006 but did not provide the specific year of the data. As such, the production capacity numbers relied upon by RHI to support its claim regarding world production of FM in 2008 do not appear be from 2008. Finally, we note that the 2008 GTA-derived export data indicates an FM export volume which exceeds the world FM production capacity relied upon by RHI.[218] Accordingly, we have not adjusted the DBM and FM benchmarks in the manner suggested by RHI.

**Comment 8: Whether the Department Correctly Applied AFA and Treated the Provision of Electricity as a Countervailable Subsidy**

Pursuant to 19 U.S.C. § 1677e(a), Petitioner argues that, because the GOC failed to provide information essential to the Department's evaluation of whether the Provision of Electricity for LTAR program is countervailable, the Department correctly applied AFA to the GOC's provision of electricity subsidies to RHI and Mayerton during the POI. Citing to OCTG from the PRC, Petitioner states that in a CVD case, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters, but when the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.[219] However, Petitioner notes that, where possible and to the extent they are useable and verifiable, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit.[220] Petitioner argues the GOC's repeated decision not to provide information necessary to the analysis of electricity prices in the PRC and whether those prices were consistent with market principles, despite the Department's repeated requests for such information, served as an adequate basis for the Department's preliminary determination that it was appropriate to apply facts otherwise available pursuant to section 776(a)(1) and (2) of the Act and, in selecting among the facts available, to draw an adverse inference and preliminarily determine that the GOC's provision of electricity to RHI constituted a financial contribution pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.[221]

Furthermore, Petitioner argues the Department was also correct in determining that the use of facts otherwise available, pursuant to section 776(a)(2)(D) of the Act, is warranted with respect to Mayerton's use of the Provision of Electricity for LTAR program since Mayerton informed the Department that it would no longer participate in this investigation. Thus, as the Department was unable to verify or rely on information submitted by Mayerton, Petitioner contends the Department properly inferred that Mayerton received a countervailable benefit from the GOC's program under section 776(b) of the Act.

[218] I.e., PRC FM exports exceed PRC production capacity and world FM exports exceed world production capacity. See Final Calculation Memorandum.
[219] See OCTG from the PRC IDM at 23.
[220] See id.
[221] See Post-Preliminary Determination at 10 and 12.

The GOC generally objects to Petitioner's arguments on the application of AFA, which the GOC contends have been "fostered by the Department's unreasonable approach to issues such as electricity, where the Department has leaped to absurd conclusions in repeated cases, including this one, on the existence of an alleged subsidy program based solely on the presence of regional variations in electricity pricing."[222] The GOC argues that, "despite regional pricing variations for electricity being a common feature of virtually any modern economy driven by the realities of different cost structures across regions" and "notwithstanding evidence that the PRC's electricity system functions not unlike systems in other countries, including the United States," the Department has "fixated on this issue in the PRC."[223] The GOC continues, "{i}t is remarkable that the Department can reach such sweeping conclusions about China when the United States itself operates large government-owned electricity grids, such as the Tennessee Valley Authority, which incur huge losses and remain the recipient of heavy subsidization."[224] The GOC concludes it will not further elaborate on electricity, "recognizing the futility of making substantive arguments on this issue before the Department in light of the Department's refusal to be objective."[225]

RHI argues that the Department should not have used adverse inferences when calculating the electricity rates for the RHI Companies since it was the GOC, and not RHI, that was non-cooperative. Citing the statute, RHI claims that the Department is only authorized to invoke adverse inferences against the party that has not cooperated. RHI maintains that using adverse inferences against them was unwarranted since they have been fully cooperative with the Department throughout the investigation. Citing Section 776 of the Act to support its position, RHI points out that the statute says the Department can only use "an inference adverse to the interest of that party in selecting from the facts otherwise available." RHI also cites Fujian Machinery, stating that based on the ruling in that case, it is unlawful and unfair to use adverse inferences against them as a fully cooperating party due to the non-cooperation of another party. RHI concludes that the Department should have used the companies' information on the record or at least relied on facts otherwise available when determining its rate. RHI also argues that in accordance with the statute, the Department should rely on facts otherwise available without adverse inferences. Stating that even if the Department were to use adverse inferences, RHI maintains that the Department must use secondary information corroborated from independent sources per 19 USC §1677e. RHI proposes that since its companies are located in Liaoning province, the Department should use the provincial rates provided by the GOC to compare with the prices the RHI companies paid for its electricity purchases that were verified by the Department.

**Department Position**

The Department continues to find that, pursuant to section 776(a)(2)(A) of the Act, the use of facts available is warranted, given that the GOC has withheld information necessary for this investigation. As discussed in the Post-Preliminary Determination, in the second supplemental questionnaire issued February 22, 2010, the Department requested that the GOC provide copies

[222] See GOC Rebuttal Brief at 1.
[223] See id.
[224] See id.; see also GOC SQR2-2 at Ex. 8: "Paper on China's Electricity System filed in Certain Kitchen Appliance Shelving and Racks from the People's Republic of China and Related Exhibits," p. 1.
[225] See GOC Rebuttal Brief at 1.

of the 2006 and 2008 price proposals for Liaoning province. In its response to the second supplemental questionnaire, the GOC stated that it could not provide these documents.[226] In the third supplemental questionnaire issued March 26, 2010, the Department asked the GOC to explain why it could not provide the 2006 and 2008 provincial price proposals for Liaoning. The GOC responded that it:

> "...is able to obtain the proposals as they are part of the price setting process within China for electricity. The GOC, however, chooses not to provide these documents as it believes they are unnecessary to understanding electricity pricing in China, as explained in previous responses based on the GOC's implementation rules and notices on electricity price reforms."[227]

Also in the second supplemental questionnaire issued February 22, 2010, the Department asked the GOC to describe specifically and provide the supporting data demonstrating how the NDRC derived the price adjustments that took place in 2006 and 2008. The GOC response described the procedures that the NDRC should follow for making price adjustments instead of describing the actual procedures the NDRC followed when implementing the 2006 and 2008 price adjustments.[228] In the Department's third supplemental questionnaire issued on March 26, 2010, we again asked the GOC to give specific details and data demonstrating how the NDRC derived the 2006 and 2008 price adjustments for the various provinces. In the GOC SQR3, the GOC again described the processes and data the NDRC should analyze but did not provide the specific data the NDRC used in formulating the 2006 and 2008 price adjustments.[229]

In a CVD investigation, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters of merchandise under investigation. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.[230] However, where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit to the extent that those records are useable and verifiable.

Consistent with this practice, because the GOC failed to provide information essential to our analysis of the Provision of Electricity for LTAR program, as detailed above, we relied on facts otherwise available, and in selecting from among the facts available, we drew an adverse inference with regard to the issues of financial contribution and specificity. The GOC's and RHI's arguments do not persuade us that the use of facts available and adverse inferences is not warranted where the GOC failed to provide the Department with the basic information for which to determine whether a countervailable subsidy was conferred. Therefore, there is no basis to

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[226] See GOC SQR2-2 at 5.
[227] See GOC SQR3 at 1.
[228] See GOC SQR2-2 at 6-9.
[229] See GOC SQR3 at 2-3.
[230] See, e.g., CTL Plate from Korea AR—Preliminary (unchanged in CTL Plate from Korea AR, in which the Department relied on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively).

reconsider our Post-Preliminary Determination with respect to the Provision of Electricity for LTAR program.

**Comment 9: Whether the Provision of Electricity Is Specific and Provides a Financial Contribution**

RHI contends there is no evidence that the Provision of Electricity for LTAR program is specific and therefore countervailable. Citing the definitions of de facto and de jure specific from sections 1677(5A)(D) (i), (iii), and (iv) of the Act, RHI argues that the Department has not demonstrated how the electricity program fits any of the descriptions listed in the statute. RHI notes that the GOC has told the Department in its questionnaire response that there are no price preferences for the MCB industry and that RHI paid the electricity rates according to its classification as a "large scale industry."[231]

RHI, citing 19 USC §1677(5)(D)(iii) and Article 1.1(a)(1)(iii) of the SCM Agreement, argues that the provision of electricity falls under the general infrastructure exception to the provision of goods and services for financial contribution. RHI notes that the Department's regulations define the "general infrastructure" exception as "infrastructure that is created for the broad societal welfare of a country, region, state, or municipality."[232] RHI also maintains that per the final CVD rules, electricity fits under the general infrastructure definition since it is generated for the broad welfare of society as a whole. RHI concludes that since electricity is under the general infrastructure exception, the Department cannot use adverse inferences to find financial contribution for the electricity for less than adequate remuneration program.

Neither the Petitioner nor the GOC commented on this argument.

**Department Position**

As explained above in the "Application of Facts Available, Including the Application of Adverse Inferences" section, since the GOC failed to provide the requested information regarding the provision of electricity for LTAR, the Department is applying AFA and inferring that the provision of electricity by GOC authorities constitutes a financial contribution and is specific under the Act.[233]

The Department disagrees with RHI's position that electricity is categorized as "general infrastructure." The Department has consistently found the provision of electricity to be the provision of a good, and not to be general infrastructure.[234] The Department also disagrees with

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[231] See GOC QR at 9.
[232] See 19 CFR § 351.511(d).
[233] See OCTG from the PRC IDM at Comment 30, and PC Strand from the PRC IDM at Comment 26.
[234] See, e.g., Hot-Rolled Steel from Thailand IDM at Comment 10. ("Furthermore, the electricity at issue here is not general infrastructure, but a good that is bought and sold in the marketplace. In the Department's view, the term infrastructure refers to the types of goods and services described in the Preamble to the regulations, including schools, interstate highways, health care facilities and police protection. According to our regulations, if we find that these types of infrastructure were provided for the broad societal welfare, they would be considered general infrastructure.")

RHI's interpretation of the final CVD regulations since the regulations explicitly categorize electricity within the provision of goods and services.[235]

**Comment 10: Whether the Department Should Use RHI's Revised 2008 Sales Amount in the Department's Final Calculations**

Petitioner states that RHI originally included inter-company sales in the 2008 sales amount it reported to the Department, but subsequently provided a revised 2008 sales amount that did not include "inter-company sales" in its supplemental questionnaire response. Thus, Petitioner argues, the Department should use RHI's revised 2008 sales amount in its calculations for the Final Determination.

Although the Post-Preliminary Calculation Memorandum indicates the Department used RHI's (i.e., RHIL, RHID and RHIJ) total annual POI (2008) sales as the denominator to calculate the net benefit attributable to export restraints on magnesia and the provision of electricity,[236] RHI first argues the record is unclear as to whether the Department actually excluded RHI's inter-company sales from this calculation. Specifically, RHI states that despite the conclusive statement in the calculation section of the memorandum, a previous section and the supporting Attachment 1 to the Post-Preliminary Calculation Memorandum suggest that RHI's inter-company sales were excluded.[237] Thus, RHI argues, if the Department used RHI's revised data, "the decision was in error for the reasons articulated herein."[238]

Next, RHI contends Petitioner's argument that the Department should use RHI's revised 2008 sales (provided in its supplemental questionnaire response) "lacks any factual or legal basis, and is simply outcome determinative," as it effectively requires the Department to exclude inter-company sales made by RHI's affiliates from the denominator in order to lower the denominator and thus raise the CVD margin.[239] Instead, RHI argues, the Department must follow its regulations, which require all of RHI's sales to be used.[240] In its Post-Preliminary Determination and accompanying calculations, RHI notes the Department used RHIL's and RHIJ's combined CNY-denominated POI sales for export restraints on magnesia, and used RHIL's, RHID's, and RHIJ's POI sales, as appropriate, for electricity.[241] In addition, RHI states that it reported its total 2008 sales in its original questionnaire response and indicated, in its supplemental questionnaire response, that no double counting of inter-company sales was included in the original response because no inter-company sales occurred in 2008. RHI contends Petitioner's argument does not acknowledge this fact in advocating for RHI's purchases of magnesia and

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[235] See CVD Preamble at 65377. ("We also received several comments in response to our stated intention of continuing to employ a preferentiality type analysis where the government is the sole provider of goods or services such as electricity, water, or natural gas.")
[236] See Post-Preliminary Determination at 9 and 12; and Post-Preliminary Calculation Memorandum at 5-6.
[237] See Post-Preliminary Calculation Memorandum at 2 ("using total sales of RHIL, RHID, and RHIJ (less any internal sales) as the denominator in our calculations") and Att. 1 (showing RHIL sales less estimated sales to RHID).
[238] See RHI Rebuttal Brief at 15.
[239] Id.
[240] See 19 CFR § 351.525(b)(3) (requiring the Department to calculate the net subsidy rate attributable to countervailable subsidies by calculating the denominator that incorporates "all products sold by a firm" for domestic subsidies)(emphasis added).
[241] See Post-Preliminary Determination at 9 and 12; and Post-Preliminary Calculation Memorandum at 5-6.

electricity to be divided by a denominator representing only a portion of the POI sales, which would be contrary to the Department's regulations and the facts in this case. Moreover, RHI states the Department's practice indicates that if no double-counting occurred in the data, then a company's consolidated data is used.[242]

Furthermore, RHI contends, Petitioner's argument fails to recognize the cross-ownership and attribution rules established by 19 CFR 351.525(b)(6)(iii) of the Department's regulations ("if the firm that received the subsidy is a holding company ... the {Department}will attribute the subsidy to the consolidated sales of holding company and its subsidiaries."). Because RHI is the parent company of all RHI entities, including RHIL, RHID, and RHIJ, RHI states the regulation requires the Department to attribute any and all subsidies received by the subsidiaries to the parent. Moreover, RHI notes, countervailable subsidies are calculated based on both RHI's prices and sales. Accordingly, as there is no basis under the regulations or otherwise to exclude RHI's inter-company sales, RHI concludes the Department must use all of RHI's 2008 POI sales, as provided in the original questionnaire response.

**Department Position**

While we agree with Petitioner that inter-company sales, as defined by the Department's practice should be excluded from the denominator, the 2008 sales amount reported in RHI's supplemental questionnaire response excluded sales beyond just those sales among the three RHI entities. Therefore, we have relied upon RHI's verified sales data in determining which sales to include in the denominator, and not the RHI Companies' revised 2008 sales information submitted in RHI SQR at exhibits RHIL-1, RHID-1, and RHIJ-1.[243] When selecting an appropriate denominator for use in calculating the ad valorem subsidy rate, the Department considered the basis for respondents' receipt of benefits under each program at issue. As discussed in the Preliminary Determination and the RHI Cross-Ownership Memorandum, RHIL, RHID, and RHIJ are cross-owned. RHIL and RHID are producers of subject merchandise while RHIJ is an input supplier. Pursuant to 19 CFR 351.525(b)(6)(ii), for subsidies received by RHIL and RHID, we have used the total sales of RHIL and RHID as the denominator in our calculations, from which we have deducted sales between these two crosse-owned companies, per our practice.[244] Pursuant to 19 CFR 351.525(b)(6)(iv), for subsidies received by RHIJ, we have used the total sales of RHIL, RHID, and RHIJ as the denominator in our calculations, from which we have deducted sales among these three cross-owned entities.

With respect to the parties' arguments that it is not clear how the Department treated sales among RHIL, RHID, and RHIJ for the Preliminary Determination and Post-Preliminary Determination, the Department notes that in the calculations for both determinations we deducted an estimated figure of inter-company sales (i.e., sales among RHIL, RHID, and RHIJ) per the regulations and our practice cited above, based on the information we had on the record at the time.[245] However, since the issuance of these determinations, we were able to verify the sales data provided by

[242] See, e.g., Seamless Pipe from the PRC at 9169.
[243] See Final Calculation Memorandum.
[244] See e.g., Citric Acid from the PRC—Preliminary, unchanged in Citric Acid from the PRC.
[245] See Preliminary Calculation Memorandum at Attachment 1 and Post-Preliminary Calculation Memorandum at Attachments 1 and 6.

RHI.[246] Thus, for this final determination, we will rely on the verified sales data in deducting certain sales among the cross-owned RHI companies from the denominator.[247]

**Comment 11: Whether the Department Should Examine Income Tax Credits for Purchases of Domestically Produced Equipment in Detail**

Petitioner states that in the Preliminary Determination, although the Department found that RHI benefitted from the Income Tax Credits for FIEs Purchasing Domestically Produced Equipment program, it also found that RHI did not benefit from this program during the POI. Pursuant to Department's regulations providing that direct tax exemptions are normally treated as recurring benefits attributed to the year that the exemption is received, the Department treated the benefit as a recurring subsidy and attributed the benefits to tax returns before the POI.[248] However, Petitioner notes, the Department's regulations also provide that a subsidy provided for, or tied to, the capital structure or assets of a firm may be treated as a non-recurring subsidy and expensed over the relevant average useful life.[249] Petitioner contends that a tax credit linked to the purchase of equipment meets this exception, as supported by the Department's reliance on this provision in finding that the VAT Rebates on Purchases of Domestically Produced Equipment was a non-recurring subsidy for RHI. Accordingly, Petitioner argues the Department should also find that the GOC's granting of income tax credits to RHI is a nonrecurring subsidy that materially benefitted RHI during the POI.

With respect to Mayerton, Petitioner cites to Kitchen Shelving and Racks from the PRC and contends that the Department should apply an adverse inference that non-cooperative companies paid no income taxes during the POI.[250] Since the standard income tax rate for corporations in the PRC is 30 percent, plus a three percent provincial income tax rate, Petitioner argues the Department should apply a CVD rate of 33 percent (the highest possible benefit for all income tax reduction or exception programs combined) on an overall basis for Mayerton.

RHI argues that Petitioner misinterprets the plain meaning of 19 CFR 351.524 and "ignores, or is perhaps unaware of, the now long-settled Department practice of treating Income Tax Credits for FIEs Purchasing Domestically Produced Equipment as a recurring subsidy."[251] In particular, RHI notes that 19 CFR 351.524(a) and (c) require the Department to allocate a recurring benefit to the year in which the benefit is received and provide a non-binding, illustrative list of recurring subsidies, including such "direct tax exemptions and deductions" as the income tax program in question. Moreover, RHI states the Department has no reason in the case at hand to overturn its longstanding and consistent practice of treating the Income Tax Credits for FIEs Purchasing Domestically Produced Equipment program as recurring,[252] since any alleged benefit RHI had received at one time clearly expired long before the POI, as the Department found in the Preliminary Determination.[253] RHI concludes that Petitioner ignores the Department's prior

[246] See RHI Verification Report.
[247] See Final Calculation Memorandum.
[248] See Preliminary Determination, and 19 CFR 351.524(c)(1).
[249] See 19 CFR 351.524(c)(2)(iii).
[250] See Kitchen Shelving and Racks from the PRC IDM at 6.
[251] RHI Rebuttal Brief at 11.
[252] See, e.g., CFS from the PRC IDM; see also Wire Decking from the PRC—Preliminary at 57643.
[253] Preliminary Determination at 68246.

treatment of this program in past CVD cases and thus provides no reason for the Department to reverse itself.

**Department Position**

Consistent with our practice in past CVD investigations, the Department will continue to treat any benefit received under the Income Tax Credits for Purchasing Domestically Produced Equipment program in the PRC as a recurring subsidy for this final determination.[254]

**Comment 12: Whether the Department Should Apply AFA with Respect to VAT Rebates Associated with RHI's Purchases of Domestically Produced Equipment**

Petitioner notes that the Department twice asked the GOC to furnish one complete package of the VAT Rebates on Purchases of Domestically Produced Equipment for one of the RHI companies, but the GOC refused to provide the package both times. If the requested application and approval package was sufficiently sensitive, Petitioner contends the GOC could have requested double-bracket administrative protective order treatment. Petitioner states that the documents provided by RHI may support the rebate amount asserted by RHI, but the Department cannot be certain without the corresponding GOC documents that the GOC refuses to provide. Accordingly, Petitioner argues the Department should apply, as AFA, the highest possible VAT rebate rate to RHI's purchases of domestically produced equipment.

The GOC counters that Petitioner cites no basis to support the application of a total AFA rate to the VAT rebates associated with RHI's purchase of domestically produced equipment, an action the GOC contends is contrary to Department practice. Rather, consistent with Department practice,[255] the GOC states that in situations where the Department has not received information from the responding government, any application of adverse facts has been limited to the questions of financial contribution and specificity, and "the Department has otherwise relied on the utilization information of the respondent to derive any subsidy benefit finding."[256] For these reasons, the GOC argues Petitioner's argument should be rejected.

RHI notes that Petitioner's pre-verification comments requested the Department to verify RHI's use of the VAT Rebates on Purchases of Domestically Produced Equipment program "in detail" to rectify a supposed failure by the GOC to produce VAT rebate documents, but at verification the Department examined RHI's claimed use of the program extensively and noted no discrepancies.[257] "Faced with a thorough, issue-free verification," RHI argues, Petitioner is now "asking the Department to disregard its verification findings and to impose adverse inferences on RHI regardless of a successful verification."[258]

RHI contends Petitioner's argument that the Department cannot be certain of its VAT rebate verification findings without corresponding Chinese government documents is "illogical,

[254] See Final Calculation Memorandum. See Preliminary Determination at 68246. See also, e.g., Citric Acid from the PRC IDM at 17; and CWLP from the PRC IDM at 25-26.
[255] See, e.g., Wire Decking from the PRC—Preliminary at 57641.
[256] GOC Rebuttal Brief at 3.
[257] See Pre-Verification Comments for RHI at 2-3; RHI Verification Report at 17-22.
[258] RHI Rebuttal Brief at 13.

outrageous, and wholly unsupported by the record facts and the law."[259] Specifically, RHI states that at verification RHI produced original VAT rebate applications and approval documentation, with government chops, which the Department was able to examine and tie to purchase orders, invoices, and bank receiving vouchers, thereby tracing RHI's claimed use of the program into its accounting system.[260] RHI argues that Petitioner makes no attempt to explain why the Department "cannot be certain" of its verification findings without additional evidence from the GOC, but rather is reduced to arguing that RHI deserves an AFA rate even though the documents it provided "may support the rebate amount asserted by RHI."[261]

Accordingly, RHI argues, the Department has no basis for penalizing RHI, a company that has cooperated fully with the Department's investigation, with adverse inferences under Section 776 of the Act. In particular, RHI notes that when the Department determines a party has failed to cooperate to the best of its ability, Section 776 authorizes the Department to use "an inference adverse to the interests of that party in selecting from among the facts otherwise available."[262] Thus, RHI argues it is not only unlawful but also "grossly unfair" to apply adverse inferences against a fully cooperating respondent as a result of the non-responsiveness of other parties.

**Department Position**

The Department will not apply AFA with respect to VAT Rebates associated with RHI's Purchases of Domestically Produced Equipment.

In CVD cases, the Department requires information from both the government of the country whose merchandise is under investigation or review and the foreign producers and exporters. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.[263] However, where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit to the extent that those records are useable and verifiable.[264]

As noted in the Preliminary Determination, the Department found this program to provide a financial contribution and to be specific based on information placed on the record by the GOC.[265] As such, it was not necessary to rely on AFA to find this program provided a financial contribution exists and is specific. Moreover, we note that in the present case, the information withheld by the GOC were records which specifically dealt with RHI's use of this program. We note that at verification, the Department extensively reviewed RHI's records regarding the VAT rebates, including those withheld by the GOC.[266] The Department obtained and verified these

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[259] Id.
[260] See RHI Verification Report at 17-22.
[261] See RHI Rebuttal Brief at 13-14, and Petitioner Case Brief at 16.
[262] 19 U.S.C. § 1677e(b) (emphasis added). RHI further cites to Nippon Steel at 1382 ("Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information.")(emphasis added).
[263] See, e.g., Wire Decking from the PRC IDM at 22 (citing to Wire Decking from the PRC—Preliminary at 57641), and Kitchen Shelving and Racks from the PRC IDM at 17.
[264] Id.
[265] See Preliminary Determination at 68245.
[266] See RHI Verification Report at 17-22.

records and will rely on them to determine the amount of the benefit RHI received under this program. See Final Calculation Memorandum.

**Comment 13: Whether the Department Should Apply Total AFA When Assigning Mayerton's Final Countervailing Duty Rate**

Pursuant to 19 U.S.C. § 1677e(a), Petitioner argues that the Department should base Mayerton's final CVD rate on total AFA because Mayerton failed to cooperate to the best of its ability in this investigation. In determining whether an interested party has acted "to the best of its ability," the Department assesses whether the party has put forth "maximum efforts" toward providing the Department full and complete answers to all its inquiries in an investigation and, to that end, Petitioner notes the Department only needs to show that: (i) a "reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations;" and (ii) the respondent's failure to promptly produce the data is due to the respondent's lack of cooperation by either failing to keep and maintain the requisite records, or failing to exert maximum efforts towards investigating and extracting the requisite data from its records.[267]

Petitioner states that the Department has applied this standard in multiple investigations involving the PRC.[268] Citing specifically to Tissue Paper from the PRC—AD,[269] Petitioner adds that the Department determines whether identified "problems are persuasive enough to preclude the Department from using any of {a respondent's} data to calculate an accurate" CVD rate by evaluating the "totality of the circumstances." Petitioner argues that Mayerton's withdrawal of participation constitutes a failure to cooperate "to the best of its ability" in this investigation, and thus, in light of the above standard and considering the "totality of the circumstances" in this investigation, total AFA is warranted for the calculation of Mayerton's CVD rate.

**Department Position**

For the purposes of this final determination, the Department will apply total AFA to Mayerton. The record of this investigation shows that Mayerton informed the Department of its intent to no longer participate in this investigation. Given Mayerton's complete withdrawal from this proceeding as a mandatory respondent, an action clearly within the scope of section 776(a)(2), we will base Mayerton's CVD rate on facts otherwise available. Moreover, because Mayerton chose not to participate and thus did not cooperate to the best of its ability in this investigation, in selecting from among the facts available, the Department with rely on adverse inferences pursuant to section 776(b) of the Act. Therefore, our final determination for Mayerton is based on total AFA. The rates actually chosen as AFA for each allegation pursuant to this policy are detailed in the "Application of Facts Available, Including the Application of Adverse Inferences" section above.

[267] See Petitioner Case Brief at 5-6, citing Nippon Steel at 1382.
[268] See, e.g., HEDP Acid from the PRC—AD at 10546; STR from the PRC—AD at 8908; Stainless Pipe from the PRC—AD at 4915; Small Graphite Electrodes from the PRC—AD at 2051.
[269] See Tissue Paper from the PRC—AD IDM at 8.

## VII. **Recommendation**

Based on the results of verification and our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish this final determination in the Federal Register.

Agree_____ Disagree_____

_________________________
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_________________________
(Date)

**APPENDIX**

## I. *ACRONYM AND ABBREVIATION TABLE*

| **Acronym/Abbreviation** | **Full Name or Term** |
|---|---|
| AD | Antidumping Duty |
| AFA | Adverse Facts Available |
| AUL | Average useful life |
| BPI | Business proprietary information |
| CAFC | Court of Appeals for the Federal Circuit |
| CFR | Code of Federal Regulations |
| CIT | Court of International Trade |
| CVD | Countervailing Duty |
| DBM | Dead-Burned Magnesia |
| FM | Fused Magnesia |
| Department | Department of Commerce |
| FIE | Foreign Invested Enterprise |
| GOC | Government of The People's Republic of China |
| GTA | Global Trade Atlas |
| IDM | Issues and Decision Memorandum |
| KWH | Kilo Watt Hours |
| LTAR | Less Than Adequate Remuneration |
| Mayerton | Liaoning Mayerton Refractories Co., Ltd. (i.e. LMR) and Dalian Mayerton Refractories Co. Ltd. (i.e. DMR) |
| NDRC | National Development and Reform Commission |
| NME | Non-Market Economy |
| MCB | Magnesia Carbon Bricks |
| ME | Market Economy |
| MOFCOM | Ministry of Commerce of the People's Republic of China |
| MOI | Market-Oriented Industry |
| NV | Normal Value |
| Petitioner | Resco Products, Inc. |
| PNTR | Permanent Normal Trade Relations |
| POI | Period of Investigation |
| PRC | The People's Republic of China |
| RHI | RHI Refractories Liaoning Co., Ltd. (i.e. RHIL), RHI Refractories (Dalian) Co., Ltd. (i.e. RHID) and Liaoning RHI Jinding Magnesia Co., Ltd. (i.e. RHIJ). |
| SOE | State-Owned Enterprise |
| VAT | Value Added Tax |
| WTO | World Trade Organization |

## *II. LITIGATION TABLE*

| Short Cite | Cases |
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| Alaska Professional Hunters | Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) |
| Allegheny Ludlum | Allegheny Ludlum Corp. v. United States, 287 F.3d 1365 (Fed. Cir. 2002) |
| Bethlehem Steel | Bethelem Steel Corp. v. United States, 7 CIT 339, 590 F. Supp. 1237 (1984) |
| Bob Jones Univ. | Bob Jones Univ. v. United States, 461 U.S. 574 (1983) |
| Brown & Williamson | FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) |
| Budd Co. | Budd Co., Wheel & Brake Div. v. United States, 746 F. Supp. 1093 (CIT 1990) |
| Butterbaugh | Butterbaugh v. Dept. of Justice, 336 F.3d 1332 (Fed. Cir. 2003) |
| Cardoza-Fonseca | INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) |
| Ceramica Regiomontana | Ceramica Regiomontana, S.A. v. United States, 10 CIT 399, aff'd, 810 F.2d 1137 (1987) |
| Chenery Corp. | SEC v. Chenery Corp., 332 U.S. 194 (1947) |
| Chevron | Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) |
| China Nat'l Mach. v. United States | China Nat'l Mach. v. United States, 264 F. Supp. 2d. 1229 (CIT 2003) |
| Cleveland Indians Baseball | United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) |
| Connecticut Nat'l Bank | Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) |
| Edmonds | Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) |
| Fujian Machinery | Fujian Machinery and Equipment Import & Export Corp. v. United States, 178 F. Supp. 2d 1305 (CIT 2001) |
| Georgetown Steel | Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) |
| Gonzalez | Gonzalez v. Oregon, 126 U.S. 904 (2006) |
| GOC v. U.S. | Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d 1274 (CIT 2007) |
| GPX | GPX International Tire Corp., 645 F.2d 1231 (CIT 2009) |
| Gray Portland Cement | Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398 (Fed. Cir. 1994) |
| GSA | GSA, S.r.l. v. United States, 77 F. Supp. 2d 1349 (CIT 1999) |
| Husteel & SeAH | Husteel and SeAH Steel Corp. v. United States, Slip Op. 07-74 (CIT 2007) |
| Impact Steel | Impact Steel Canada Corp. v. United States, 533 F. Supp. 2d 1298 (CIT 2007) |
| JTEKT Corp. | JTEKT Corp. v. United States, 31 ITRD 2300 (CIT 2009) |
| Lorillard | Lorillard, A Division of Loew's Theaters, Inc. v. Pons, 434 U.S. 575 (1978) |

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| Mercy Medical | Mercy Medical Skilled Nursing v. Thompson, 2004 WL 3541332 (D.D.C. 2004) |
| Merrill Lynch | Merrill Lynch, Pierce. Fenner & Smith Inc. v. Curran, 456 U.S. 353 (1982) |
| Midatlantic Nat'l Bank | Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986) |
| Nippon Steel | Nippon Steel Corporation v. United States, 337 F.3d 1373 (Fed. Cir. 2003) |
| NSK Ltd. | NSK Ltd. v. U.S., 390 F.3d 1352 (Fed Cir. 2004) |
| Pension Benefit Guaranty Corporation | Nachman Com. v. Pension Benefit Guaranty Corporation, 446 U.S. 359 (1980) |
| PPG Industries | PPG Industries v. United States , 978 F.2d 1232 (Fed. Cir. 1992) |
| Rapanos | Rapanos v. United States, 547 U.S. 715 (2006) |
| Rhone Poulenc I | Rhone Poulenc, Inc. v. United States, 710 F. Supp. 341(CIT 1989) |
| Rhone Poulenc II | Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185 (Fed. Cir. 1990) (affirming Rhone Poulenc I) |
| Shanghai Taoen | Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339 (CIT 2005) |
| Shinyei | Shinyei Corp. of Am. v. United States, 355 F.3d 1297 (Fed. Cir. 2004) |
| Solid Waste Agency | Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001) |
| Sonco Steel | Sonco Steel Tube Div., Ferrum, Inc. v. United States, 694 F. Supp. 959 (CIT 1988) |
| Steel Authority of India | Steel Authority of India v. United States, 149 F. Supp. 2d 921 (CIT 2001) |
| Whitman | Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) |
| Yantai | Yantai Timken Co. v. United States, 521 F. Supp. 2d 1356 (CIT 2007) |

## *III. ADMINISTRATIVE DETERMINATIONS AND NOTICES TABLE*

Note: if "certain" is in the title of the case, it has been excluded from the title listing.

| **Short Cite** | **Administrative Case Determinations** |
|---|---|
| Citric Acid from the PRC—Preliminary | Citric Acid and Citrate Salts From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 73 FR 54367 (September 19, 2008) |
| Citric Acid from the PRC | Citric Acid and Citrate Salts from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 16836 (April 13, 2009) and accompanying IDM |
| CFS from Indonesia | Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (October 25, 2007) and accompanying IDM |
| CFS from the PRC—Preliminary | Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 17484 (April 9, 2007) |
| CFS from the PRC | Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) and accompanying IDM |
| CTL Plate from Korea AR—Preliminary | Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from Korea AR, 71 FR 11397 (March 7, 2009) |
| CTL Plate from Korea AR | Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from Korea, 71 FR 38861 (July 10, 2006) |
| CWLP from the PRC—Preliminary | Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 73 FR 52297 (September 9, 2008) |
| CWLP from the PRC | Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 70961 (November 24, 2008) and accompanying IDM |
| CWP from the PRC | Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) and accompanying IDM |
| CWP from the PRC – CVD Order | Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 FR 42545 (July 22, 2008) |
| Fans from the PRC | Oscillating and Ceiling Fans from China, 57 FR 10011 (June 5, 1992) |
| Flowers from Mexico | Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996) |
| HEDP Acid from the PRC—AD | I-Hydroxyethylidene-l, I-Diphosphonic Acid from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 10545 (March 11, 2009) and accompanying IDM |

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| Hot-Rolled Steel from Romania | Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Administrative Review, 70 FR 34448 (June 14, 2005) and accompanying IDM |
| Hot-Rolled Steel from Thailand | Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 50410 (October 3, 2001) and accompanying IDM |
| Kitchen Shelving and Racks from the PRC | Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 37012 (July 29, 2009) and accompanying IDM |
| LWS from the PRC | Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008) and accompanying IDM |
| Lawn Groomers from the PRC | Tow-Behind Lawn Groomers and Certain Parts Thereof From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 29180 (June 19, 2009) and accompanying IDM |
| Leather from Argentina | Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Leather From Argentina, 55 FR 40212 (October 2, 1990) |
| Lug Nuts and Wheel Locks from the PRC—Initiation | Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (January 9, 1992) |
| LWRP from the PRC | Light-Walled Rectangular Pipe and Tube From People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination, 73 FR 35642 (June 24, 2008) and accompanying IDM |
| LWTP from the PRC | Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008) and accompanying IDM |
| LWTP from the PRC—Amended | Lightweight Thermal Paper From the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 FR 70958 (November 24, 2008) |
| OTR Tires from the PRC | New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) and accompanying IDM |
| OCTG from the PRC | Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 FR 64045 (December 7, 2009) and accompanying IDM |
| PC Strand from the PRC | Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 28557 (May 21, 2010) and accompanying IDM |
| Potassium Chloride from the Soviet Union – Rescission | Potassium Chloride from the Soviet Union: Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984) |
| Raw Flexible Magnets from the PRC | Raw Flexible Magnets from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 39667 (July 10, 2008) and accompanying IDM |

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| Seamless Pipe from the PRC—Preliminary | Seamless Carbon and Alloy Steel Standard. Line and Pressure Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Preliminary Affirmative Critical Circumstances Determination, 75 FR 9163 (March 1, 2010) |
| Semiconductors from Taiwan | Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909 (February 23, 1998) |
| Small Graphite Electrodes from the PRC—AD | Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China, 74 FR 2049 (January 14, 2009) and accompanying IDM |
| Softwood Lumber from Canada | Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada, 67 FR 15545 (April 2, 2002) and accompanying IDM |
| Stainless Pipe from the PRC—AD | Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 4913 (January 28, 2009) and accompanying IDM |
| Stainless Pipe from the PRC | Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 4936 (January 28, 2009) and accompanying IDM |
| Steel Grating from the PRC | Steel Grating from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 32362 (June 8, 2010) and accompanying IDM |
| Steel Products from Austria | Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217 (July 9, 1993) |
| STR from the PRC—AD | Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (Feb. 27, 2009) and accompanying IDM |
| Sulfanilic Acid from Hungary | Final Affirmative Countervailing Duty Determination: Sulfanilic Acid From Hungary, 67 FR 60223 (September 25, 2002) |
| Textiles from the PRC | Textiles, Apparel and Related Products from China, 48 FR 46600 (October 13,1983) |
| Tissue Paper from the PRC—AD | Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China, 70 FR 7475 (February 14, 2005) and accompanying IDM |
| Wire Decking from the PRC—Preliminary | Wire Decking From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 74 FR 57629 (November 9, 2009) |
| Wire Decking from the PRC | Wire Decking from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 32902 (June 10, 2010) and accompanying IDM |
| Wire Rod from Poland | Carbon Steel Wire Rod From Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984) |
| Wire Rod from Czechoslovakia | Carbon Steel Wire Rod from Czechoslovakia, 49 FR 19370 (May 7, 1984) |

## ***NON-IDM MEMORANDA AND OTHER SHORT-CITED EXHIBITS/DOCUMENTS***

| **Short Cite** | **Full Name** |
|---|---|
| Petition | Petitions for the Imposition of Antidumping and Countervailing Duties, Certain Steel Grating from People's Republic of China (May 29, 2009) |
| Initiation Notice | Certain Magnesia Carbon Bricks from the People's Republic of China: Initiation of Countervailing Duty Investigation, 74 FR 42858 (August 25, 2009) and accompanying Initiation Checklist |
| GOC QR | Government of China's CVD Questionnaire Response – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (November 5, 2009) |
| GOC SQR | Government of China's Supplemental CVD Questionnaire Response – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (January 5, 2010) |
| GOC SQR2-1 | Government of China's Second Supplemental CVD Questionnaire Response (part 1) – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (March 15, 2010) |
| GOC SQR2-2 | Government of China's Second Supplemental CVD Questionnaire Response (part 2) – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (March 22, 2010) |
| GOC SQR3 | Government of China's Third Supplemental CVD Questionnaire Response – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (April 2, 2010) |
| RHI QR | RHI's CVD Questionnaire Response – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (November 5, 2009) |
| RHI SQR | RHI's Supplemental CVD Questionnaire Response – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (January 5, 2010) |
| RHI SQR2-1 | RHI's Second Supplemental CVD Questionnaire Response (part 1) – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (March 15, 2010) |
| RHI SQR2-2 | RHI's Second Supplemental CVD Questionnaire Response (part 2) – Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China (March 15, 2010) |
| Preliminary Determination | Certain Magnesia Carbon Bricks From the People's Republic of China: Preliminary Negative Countervailing Duty Determination, 74 FR 68241 (December 23, 2009) |
| Preliminary Calculation Memorandum | Preliminary Determination Calculations for RHI Refractories Liaoning Co., Ltd., RHI Refractories (Dalian) Co., Ltd., and Liaoning RHI Jinding Magnesia Co., Ltd. (December 16, 2009) |
| RHI Cross-Ownership Memorandum | Cross-Ownership of RHI Refractories Liaoning Co., Ltd., RHI Refractories (Dalian) Co., Ltd., and Liaoning RHI Jinding Magnesia Co., Ltd. (December 16, 2009) |
| AD Preliminary Determination | Certain Magnesia Carbon Bricks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 75 FR 11847 (March 12, 2010) |

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| Post-Preliminary Determination | Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China: Post-Preliminary Determination (May 6, 2010) |
| Post-Preliminary Calculation Memorandum | Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China: Post-Preliminary Calculations for Post-Preliminary Determinations (May 6, 2010) |
| Post-Preliminary Factual Information | Certain Magnesia Carbon Bricks from China: Factual Information in Response to Post-Preliminary Determination (May 17, 2010) |
| Pre-Verification Comments for RHI | Countervailing Duty Investigation of Certain Magnesia Carbon Bricks from the People's Republic of China: Pre-Verification Comments for RHI (April 28, 2010) |
| RHI Verification Report | Verification of the Questionnaire Responses Submitted by RHI Refractories Liaoning Co., Ltd., RHI Refractories (Dalian) Co., Ltd., and Liaoning RHI Jinding Magnesia Co., Ltd. (June 1, 2010) |
| Petitioner Case Brief | Certain Magnesia Carbon Bricks from the People's Republic of China – Petitioner Case Brief (June 10, 2010) |
| RHI Case Brief | Certain Magnesia Carbon Bricks from the People's Republic of China – RHI Case Brief (June 10, 2010) |
| GOC Case Brief | Certain Magnesia Carbon Bricks from the People's Republic of China –GOC Case Brief (June 10, 2010) |
| Petitioner Rebuttal Brief | Certain Magnesia Carbon Bricks from the People's Republic of China – Petitioner Rebuttal Brief (June 17, 2010) |
| RHI Rebuttal Brief | Certain Magnesia Carbon Bricks from the People's Republic of China – RHI Rebuttal Brief (June 17, 2010) |
| GOC Rebuttal Brief | Certain Magnesia Carbon Bricks from the People's Republic of China –GOC Rebuttal Brief (June 17, 2010) |
| Final Calculation Memorandum | Final Determination Calculations for RHI Refractories Liaoning Co., Ltd., RHI Refractories (Dalian) Co., Ltd., and Liaoning RHI Jinding Magnesia Co., Ltd. and Final AFA Calculations for Liaoning Mayerton Refractories and Dalian Mayerton Refractories Co. Ltd. (July 26, 2010) |
| Application of CVD to PRC – Comment Request | Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment, 71 FR 75507 (Dec. 15, 2006) |
| Georgetown Steel Memorandum | Memorandum from Shana Lee-Alaia and Lawrence Norton to David M. Spooner, Assistant Secretary of Commerce, Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy (March 29, 2007) |
| Lined Paper Memorandum | Memorandum to David M. Spooner, Assistant Secretary for Import Administration, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ('China') – China's Status as a Non-Market Economy ("NME") (August 30, 2006) |
| Seamless Pipe NSA Memorandum | Memorandum from Yasmin Nair to Susan Kubach, Countervailing Duty Investigation: Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China – New Subsidy Allegations (Feb. 17, 2010) |

## ***MISCELLANEOUS TABLE (REGULATORY, STATUTORY, ARTICLES, ETC.)***

| **Short Cite** | **Full Name** |
|---|---|
| The Act | Tariff Act of 1930, as amended |
| APA | Administrative Procedures Act, 5 USC section 500 et seq. |
| CVD Preamble | Countervailing Duties; Final Rule, 63 FR 65348 (November 25, 1998) |
| Trade Act of 1974 | Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) |
| TAA of 1979 | Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) |
| OTCA – House Report | Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100-40, part 1 (1987) |
| OTCA – House and Senate Conference Report | Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100-576 (1988) |
| OTCA of 1988 | Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) |
| URAA – House Report | Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. I (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199 |
| URAA – Senate Report | Uruguay Round Agreements Act, S. Rep. No. 103-412 (1994) |
| URAA | Uruguay Round Agreements Act, Pub L. No. 103-465, 108 Stat. 4809 (1994) |
| SAA | Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, 103d Cong., 2d Sess. (1994) |
| SCM Agreement | Agreement on Subsidies and Countervailing Measures, April, 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 264 (1994) |
| Accession Protocol | Protocol on the Accession of the People's Republic of China to the World Trade Organization, WT/L/432, art. 15(b) (November 23, 2001) |
| United States – Measures Treating Export Restraints as Subsidies | Panel Report, United States – Measures Treating Export Restraints as Subsidies, WT/DS194/R (June 29, 2001) |
| Softwood Lumber from Canada – WTO | U.S. Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS57/AB/R (February 17, 2004) |
| DRAMS from Korea – WTO | Appellate Body Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) From Korea, WT/DS296/AB/R (June 27, 2005) |