

March 28, 2011

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

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in
the Countervailing Duty Investigation of Aluminum Extrusions
from the People's Republic of China (PRC)

I. Summary

On August 30, 2010, the Department of Commerce (the Department) issued the Preliminary Determination in the above-mentioned countervailing duty (CVD) investigation. See Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 75 FR 54302 (September 7, 2010) (Preliminary Determination). On October 29, 2010, the Department issued a post-preliminary determination decision memorandum concerning new subsidy allegations alleged by Petitioners on July 13 and July 28, 2010.¹ See Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Post-Preliminary Determination Decision Memorandum," (October 2, 2010) (Post-Prelim Memorandum).²

We conducted verification of the questionnaire responses submitted by Zhaoqing New Zhongya Aluminum Co., Ltd. (New Zhongya), Zhongya Shaped Aluminum HK Holding Ltd. (Zhongya HK), and Karlton Aluminum Company Ltd. (Karlton) (collectively the Zhongya Companies) from December 3 through December 7, 2010. See Memorandum to Eric B. Greynolds, Program Manager, Office 3, Operations, "Verification of the Questionnaire Responses Submitted by the Zhaoqing New Zhongya Aluminum Co., Ltd. (New Zhongya) and its Hong Kong affiliate Zhongya Shaped Aluminum (HK) Holding, Ltd. (Zhongya HK) (collectively the Zhongya Companies)" (January 28, 2011) (Zhongya Companies Verification Report). We conducted verification of the questionnaire responses submitted by the Government

¹ Petitioners are Aluminum Extrusion Fair Trade Committee: Aerolite Extrusion Company; Alexandria Extrusions Company; Beneda Aluminum of Florida, Inc.; William L. Bonnell Company, Inc.; Frontier Aluminum Corporation; Futura Industries Corporation; Hydro Aluminum North American Inc.; Kaiser Aluminum Corporation; Profile Extrusion Company; Sapa Extrusions, Inc.; Western Extrusions Corporation; and the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

² Public and public versions of proprietary Departmental memoranda referenced in this document are on file in the Central Records Unit (CRU), Room 7046 in the main building of the Commerce Department.

of the PRC (GOC) from December 9 through December 10, 2010. See Memorandum to Eric B. Greynolds, Program Manager, Office 3, Operations, “Verification of Information Submitted by the Government of the People’s Republic of China” (January 20, 2011) (GOC Verification Report). We conducted verification of the questionnaire responses submitted by Guang Ya Aluminum Industries Co., Ltd. (Guang Ya), Foshan Guangcheng Aluminum Co., Ltd. (Guangcheng), Guang Ya Aluminum Industries Hong Kong (Guang Ya HK), Kong Ah International Company Limited (Kong Ah), and Yongji Guanghai Aluminum Industry Co., Ltd. (Guanghai) (collectively the Guang Ya Companies) from December 14 through December 17, 2010. See Memorandum to Eric B. Greynolds, Program Manager, Office 3, Operations, “Verification of Guang Ya Aluminum Industries Co., Ltd., Foshan Guangcheng Aluminum Co., Ltd., Guang Ya Aluminum Industries Hong Kong, Kong Ah International Company Limited, and Yongji Guanghai Aluminum Industry Co., Ltd. (collectively the Guang Ya Companies)” (January 25, 2011) (Guang Ya Companies Verification Report).

The “Analysis of Programs” and “Subsidies Valuation Information” sections below describe the subsidy programs and the methodologies used to calculate benefits for the programs under examination. Additionally, we have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the “Analysis of Comments” section below, which contains the Department’s response to the issues raised in the briefs. Based on the comments received and our verification findings, we have made certain modifications to the Preliminary Determination. We recommend that you approve the positions described in this memorandum.

Below is a complete list of the issues in this investigation for which we received case briefs and rebuttal comments from interested parties:

- Comment 1:** Application of CVD Law to the PRC
- Comment 2:** Whether Application of the CVD Law to Imports from the PRC Violates the Administrative Procedure Act (APA)
- Comment 3:** Double Counting
- Comment 4:** Cutoff Date for Identifying Subsidies
- Comment 5:** Whether the Guang Ya Companies Inaccurately Reported Their Affiliates Thereby Warranting the Application of Adverse Facts Available (AFA)
- Comment 6:** Whether the Zhongya Companies Failed to Report Their Affiliates Thereby Warranting the Application of AFA
- Comment 7:** Whether the AFA Calculation is Accurate and Reasonable
- Comment 8:** Whether to Include Newly Alleged and Self-Reported Programs in the AFA Calculation
- Comment 9:** Whether the All Others Rate Should Equal the Total AFA Rate
- Comment 10:** Whether the Department Should Have Collected Information from Firms Subject to the All Others Rate
- Comment 11:** Whether the Department Should Have Selected Additional Mandatory Respondents
- Comment 12:** Whether the Department Should Retroactively Revise the All Others Rate from the Preliminary Determination
- Comment 13:** Whether the Sales of Aluminum Extrusions for More Than Adequate Remuneration (MTAR) Program Was Used by the Voluntary Respondents
- Comment 14:** Whether the Sales of Aluminum Extrusions for MTAR Program Is Specific

- Comment 15:** Whether the Sales of Aluminum Extrusions for MTAR Program Confers a Benefit
- Comment 16:** Whether the Department Improperly Rejected Data From The Zhongya Companies Pertaining to the Sale of Aluminum Extrusions For MTAR Program
- Comment 17:** Whether the Ownership Information of Respondents' Customers Was Complete and Fully Verified
- Comment 18:** Whether a Financial Contribution Exists Under the Provision of Primary Aluminum for Less Than Adequate Remuneration (LTAR) Program
- Comment 19:** Whether the Provision of Primary Aluminum for LTAR Program is Specific
- Comment 20:** Whether the Benchmark Used for the Provision of Primary Aluminum for LTAR Program Should Include Import Duties
- Comment 21:** Whether the Department Should Use In-Country Benchmarks Under the Provision of Primary Aluminum for LTAR Program
- Comment 22:** Whether the Guang Ya Companies Properly Reported Their Purchases of Primary Aluminum and Whether the Application of AFA is Warranted
- Comment 23:** Whether the Land for LTAR Program Constitutes a Financial Contribution, Provides a Benefit, and is Specific
- Comment 24:** Whether the Department Should Revise the Benchmark Used Under the Land for LTAR Program
- Comment 25:** Whether the Department Erred in Rejecting Factual Information Concerning the Benchmark Used Under the Land for LTAR Program
- Comment 26:** Whether the Guang Ya Companies Received an Additional Subsidy in Connection With the GOC's Purchase of Land-Use Rights and Buildings
- Comment 27:** Whether PRC Commercial Banks Are GOC Authorities That Provide a Financial Contribution
- Comment 28:** Whether there is a Link Between the Alleged Policy Lending Program and Actual Loans Received by Respondents
- Comment 29:** Whether the Derivation of the Short-Term Benchmark Interest Rate is Arbitrary
- Comment 30:** Whether the Derivation of the Long-Term Benchmark Interest Rate is Arbitrary
- Comment 31:** Whether the Department Committed Ministerial Errors Concerning the Famous Brands Program
- Comment 32:** Whether the Department Should Provide an Entered Value Adjustment to the Zhongya Companies to Account for Price Mark-Ups Made by Their Hong-Kong Affiliate
- Comment 33:** Whether the Department Improperly Declined to Initiate an Investigation of the GOC's Alleged Currency Undervaluation

II. Period of Investigation

The period of investigation (POI) for which we are measuring subsidies is January 1, 2009, through December 31, 2009, which corresponds to the PRC's and the respondents' most recently completed fiscal year at the time we initiated this investigation. See 19 CFR 351.204(b)(2).

III. Attribution of Subsidies

The Department's regulations at 19 CFR 351.525(b)(6)(i) state that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii) - (v) provides that the Department will attribute subsidies received by certain other companies to the combined sales of those companies when: (1) two or more corporations with cross-ownership produce the subject merchandise; (2) a firm that received a subsidy is a holding or parent company of the subject company; (3) a firm that produces an input that is primarily dedicated to the production of the downstream product; or (4) a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership with the subject company.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The Court of International Trade (CIT) has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. See Fabrique de Fer de Charleroi, SA v. United States, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

The Guang Ya Companies

As discussed above, the Guang Ya Companies are Guang Ya, Guangcheng, Guanghai, Guang Ya HK, and Kong Ah. Guang Ya and Guangcheng are the producers of subject merchandise. Guanghai produces aluminum billet that it supplies to Guangcheng. Guang Ya HK and Kong Ah are Hong Kong-based trading companies that export merchandise produced by Guang Ya and Guangcheng. According to the Guang Ya Companies, only Guang Ya HK exported subject merchandise to the United States that was produced by the Guang Ya Companies. We find that the Guang Ya Companies are cross-owned with each other via common ownership within the meaning of 19 CFR 351.525(b)(6)(vi). See the Guang Ya Companies July 8, 2010, questionnaire response at Exhibit 1.

Guang Ya and Guangcheng are the members of the Guang Ya Companies that produce subject merchandise. Therefore, in accordance with 19 CFR 351.525(b)(6)(ii), we have attributed subsidies received by Guang Ya and Guangcheng to the products produced by the two firms. Guanghai is an input supplier to Guangcheng. Therefore, in accordance with 19 CFR 351.525(b)(6)(iv), we would attribute subsidies received by Guanghai to the combined sales of the input made by Guanghai and downstream products produced by Guang Ya and Guangcheng, excluding the sales between corporations.

During the POI, Guang Ya HK exported to the United States aluminum extrusions produced by Guang Ya and Guangcheng. As explained in the Preliminary Determination, the Guang Ya Companies submitted sales information to the Department in order to demonstrate that an Entered Value (EV) adjustment is warranted to ensure that the calculation of the subsidy rate would be reflective of the EV of the subject merchandise. The Department has developed six criteria it uses to determine whether an EV adjustment is warranted. See, e.g., Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative

Countervailing Duty Determination, 74 FR 4936 (January 28, 2009) (CWASPP from the PRC), and accompanying Issues and Decision Memorandum (CWASPP from the PRC Decision Memorandum) at “Adjustment to Net Subsidy Rate Calculation,” in which the Department describes the six criteria utilized by the Department, and Certain Coated Paper Suitable for High-Quality Print Graphic Using Sheet-Fed Presses From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 59212 (September 27, 2010) (Coated Paper from the PRC Final), and accompanying Issues and Decision Memorandum (Coated Paper from the PRC Decision Memorandum) at “Entered Value (‘EV’) Adjustment” and Comment 32, which was published after the Preliminary Determination, and provided elaboration on the Department’s policy with respect to the EV adjustment.

We analyzed the sales information supplied by the Guang Ya Companies. Based on our review, we preliminarily determined that the Guang Ya Companies failed to meet all the criteria to warrant an EV adjustment. See Preliminary Determination, 75 FR at 54308. We continue to find that an EV adjustment to the net subsidy rate, as described in CWASPP from the PRC, is not warranted for the same reasons as discussed in the Preliminary Determination. Id.

The Zhongya Companies

As discussed above, the Zhongya Companies are New Zhongya, Zhongya HK, and Karlton. New Zhongya is the producer of subject merchandise. Zhongya HK and Karlton are Hong Kong based firms that are cross-owned with New Zhongya, within the meaning of 19 CFR 351.525(b)(6)(vi). During the POI, Zhongya HK exported products, including subject merchandise, produced by New Zhongya. During the POI, New Zhongya did not export aluminum extrusions to the United States through Karlton. In the Preliminary Determination, in accordance with 19 CFR 351.525(b)(6)(ii), we attributed subsidies received by New Zhongya to products produced by New Zhongya. We have continued this approach in the final determination.

As explained in the Preliminary Determination, the Zhongya Companies also submitted sales information to the Department in order to demonstrate that an EV adjustment is warranted. Based upon our analysis of the information submitted, we preliminarily determined the Zhongya Companies failed to meet all the criteria to warrant an EV adjustment. We continue to find that an EV adjustment to the net subsidy rate, as described in CWASPP from the PRC, is not warranted. See Comment 32, below.

Mutual Affiliation and Cross-Ownership Between Guang Ya Companies, Zhongya Companies, and Other Aluminum Extrusions Producers

In comments filed with the Department prior to the Preliminary Determination, Petitioners contend that the Guang Ya Companies and the Zhongya Companies are affiliated and cross-owned with one another by virtue of familial relations that exist between the firms. They further contend that the Guang Ya Companies and the Zhongya Companies are affiliated and cross-owned with Asia Aluminum Ltd. (Asia Aluminum), another aluminum extrusion producer as a result of familial relations. See, e.g., Petitioners’ August 18, 2010, submission at 2.

Petitioners are correct in noting that familial relations exist between the Guang Ya Companies, the Zhongya Companies, and Asia Aluminum. For this reason, we find that under section 771(33)(A) of the Tariff Act of 1930, as amended (the Act), affiliation exists between

these three firms. However, as indicated by the CVD regulations, mere affiliation is not a sufficient basis to find that firms are cross-owned. The Preamble states that affiliation “clearly differs” from the cross-ownership standard. See Countervailing Duty Regulations, 63 FR 65347, 65401 (November 25, 1998) (Preamble). The Preamble further states that:

. . . we simply do not find the affiliation standard to be a helpful basis for attributing subsidies. Nowhere in the Statement of Administrative Action (SAA) is there any indication that the affiliated party definition was intended to be used for subsidy attribution purposes. Rather, it identifies the broadest category of relationships which might be relevant to either an antidumping or a countervailing duty analysis . . . we do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as a transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.

Id. Rather, to determine whether firms are cross-owned, we turn to the definition of cross-ownership as provided under 19 CFR 351.525(b)(6)(vi). The regulation states that cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. Based on the information on the record of the investigation, we determine that there is no evidence indicating that the three firms, the Guang Ya Companies, the Zhongya Companies, and Asia Aluminum, have the ability to direct the individual assets of one another as if they were their own. Therefore, we determine that the threshold for finding cross-ownership among these firms, as described under 19 CFR 351.525(b)(6)(vi), does not exist.

Further, for the reasons discussed below in Comments 5 and 6, we determine that the two firms have fully cooperated with regard to the Department’s questions concerning affiliation and cross-ownership and, therefore, the application of total AFA, as argued by Petitioners, is not warranted.

IV. Allocation Period

Under 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (AUL) of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2), there is a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service’s 1977 Class Life Asset Depreciation Range System (IRS Tables), as updated by the U.S. Department of the Treasury. For the subject merchandise, the IRS Tables prescribe an AUL of 12 years. No interested party has claimed that the AUL of 12 years is unreasonable.

Further, for non-recurring subsidies, we have applied the “0.5 percent expense test” described in 19 CFR 351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to sales (total sales or total export sales, as appropriate) for the same year. If the amount of subsidies is less than 0.5 percent of the relevant sales, then the benefits are allocated to the year of receipt rather than allocated over the AUL period.

V. Subsidies Valuation Information

Benchmarks and Discount Rates

The Department is investigating loans received by the Guang Ya Companies from Chinese policy banks and state-owned commercial banks (SOCBs), which were granted on a preferential, non-commercial basis.³ Therefore, the derivation of the Department's benchmark and discount rates for use in computing benefits provided under countervailable programs is discussed below.

Benchmark for Short-Term Renminbi (RMB) Denominated Loans: Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." Normally, the Department uses comparable commercial loans reported by the company for benchmarking purposes. See 19 CFR 351.505(a)(3)(i). If the firm did not have any comparable commercial loans during the period, the Department's regulations provide that we "may use a national interest rate for comparable commercial loans." See 19 CFR 351.505(a)(3)(ii).

As noted above, section 771(5)(E)(ii) of the Act indicates that the benchmark should be a market-based rate. However, for the reasons explained in CFS from the PRC, loans provided by Chinese banks reflect significant government intervention in the banking sector and do not reflect rates that would be found in a functioning market. See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) (CFS from the PRC), and accompanying Issues and Decision Memorandum (CFS from the PRC Decision Memorandum) at Comment 10. Because of this, any loans received by the respondents from private Chinese or foreign-owned banks would be unsuitable for use as benchmarks under 19 CFR 351.505(a)(2)(i). Similarly, because Chinese banks reflect significant government intervention in the banking sector, we cannot use a national interest rate for commercial loans as envisaged by 19 CFR 351.505(a)(3)(ii). Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting an external market-based benchmark interest rate. The use of an external benchmark is consistent with the Department's practice. For example, in Softwood Lumber from Canada, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada. See 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) (Softwood Lumber from Canada), and accompanying Issues and Decision Memorandum (Softwood Lumber from Canada Decision Memorandum) at "Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit."

We are calculating the external benchmark using the regression-based methodology first developed in CFS from the PRC and more recently updated in LWTP from the PRC. See CFS from the PRC Decision Memorandum at Comment 10; see also Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008) (LWTP from the PRC), and accompanying Issues and Decision Memorandum (LWTP from the PRC Decision Memorandum) at "Benchmarks and Discount Rates." This benchmark interest rate is based on the inflation-adjusted interest rates of countries with per capita gross national incomes (GNIs) similar to the PRC. The benchmark interest rate

³ The Zhongya Companies had no loans outstanding during the POI.

takes into account a key factor involved in interest rate formation (i.e., the quality of a country's institutions), which is not directly tied to the state-imposed distortions in the banking sector discussed above.

This methodology relies on data published by the World Bank and the International Monetary Fund (IMF). At the time of the Preliminary Determination, the World Bank had not yet published all the necessary data relied on by the Department to compute a 2009 short-term benchmark interest rate for the PRC. Specifically, the following data were not available: World Governance Indicators and World Bank classifications of lower-middle income countries based on GNI per capita in U.S. dollars. Therefore, for the Preliminary Determination, where the use of a 2009 short-term benchmark rate was required, we applied the 2008 short-term benchmark rate for the PRC, as calculated by the Department. See 75 FR at 54309. We further noted in the Preliminary Determination that the current 2008 loan benchmark may be updated, by the final determination, pending the release of all the necessary 2009 data. Id.

Since the Preliminary Determination, the World Bank has published the World Governance Indicators and World Bank classifications of lower-middle income countries based on GNI per capita in U.S. dollars. We, therefore, have placed these data on the record of the instant investigation and used these data to compute a 2009 short-term benchmark interest rate for the PRC for use in this final determination, where the application of a 2009 short-term benchmark rate is required. See Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations, "Placement of Data Used to Derive 2009 Short-Term Benchmark Interest Rate on Record of Investigation," (January 11, 2011) (2009 Benchmark Interest Rate Memorandum).

The 2009 short-term interest rate benchmark, like the 2008 benchmark rate, was computed following the methodology developed in CFS from the PRC. Specifically, we first determined which countries are similar to the PRC in terms of GNI, based on the World Bank's classification of countries as low income, lower-middle income, upper-middle income, and high income. The PRC falls in the lower-middle income category, a group that includes 55 countries.⁴ As explained in CFS from the PRC, this pool of countries captures the broad inverse relationship between income and interest rates.

Many of these countries reported lending and inflation rates to the International Monetary Fund and are included in that agency's international financial statistics (IFS). With the exceptions noted below, we have used the interest and inflation rates reported in the IFS for the countries identified as "low middle income" by the World Bank. First, we did not include those economies that the Department considers to be non-market economies (NMEs) for antidumping (AD) purposes for any part of the years in question, for example: Armenia, Georgia, Moldova, and Turkmenistan. Second, the pool necessarily excludes any country that did not report both lending and inflation rates to IFS for those years. Third, we removed any country that reported a rate that was not a lending rate or that based its lending rate on foreign-currency denominated instruments. For example, Jordan reported a deposit rate, not a lending rate, and the rates reported by Ecuador and Timor L'Este are dollar-denominated rates; therefore, the rates for these three countries were excluded. Finally, for the calculation of the inflation-adjusted short-term benchmark rate, we also excluded any countries with aberrational or negative real interest rates for the year in question. Because these are inflation-adjusted benchmarks, it is necessary to adjust the respondents' interest payments for inflation. This was done using the PRC inflation rate as reported in the IFS.

⁴ See World Bank Country Classification at <http://econ.worldbank.org/>.

Benchmark for Long-Term RMB Denominated Loans: The lending rates reported in the IFS represent short- and medium-term lending, and there are no sufficient publicly available long-term interest rate data upon which to base a robust long-term benchmark. To address this problem, the Department has developed an adjustment to the short- and medium-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB-rated bond rates. See Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination, 73 FR 35642 (June 24, 2008), and accompanying Issues and Decision Memorandum (LWRP from the PRC Decision Memorandum) at "Discount Rates." In Citric Acid from the PRC, this methodology was revised by switching from a long-term mark-up based on the ratio of the rates of BB-rated bonds to applying a spread which is calculated as the difference between the two-year BB bond rate and the n-year BB bond rate, where n equals or approximates the number of years of the term of the loan in question. See Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 16836 (April 13, 2009) (Citric Acid from the PRC), and accompanying Issues and Decision Memorandum (Citric Acid from the PRC Decision Memorandum) at Comment 14.

Discount Rates: Consistent with 19 CFR 351.524(d)(3)(i)(A), we have used, as our discount rate, the long-term interest rate calculated according to the methodology described above for the year in which the government provided the subsidy.

VI. Use of Facts Otherwise Available and 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 if 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.

Application of Adverse Inferences: Non-Cooperative Companies

The Department initially selected Dragonlux Limited (Dragonlux), Miland Luck Limited (Miland), and Co. Ltd./Liaoning Zhongwang Group (collectively the Zhongwang Group) as mandatory respondents. See Memorandum to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Respondent Selection," (May 18, 2010) (Respondent Selection Memorandum). Accordingly, the Department sent the initial questionnaire to the three companies on May 18, 2010. The Department confirmed that the three firms received copies of the initial questionnaire. See Memorandum to the File from Eric B. Greynolds, Program Manager, Operations, Office 3, "Confirmation of Delivery of Initial Questionnaire to Firms Selected As Mandatory Respondents," (June 4, 2010). Dragonlux, Miland, and the Zhongwang Group failed to respond the Department's initial questionnaire. As a result of the failure of Dragonlux, Miland, and the Zhongwang Group to

submit responses to the Department's initial questionnaire, we found the firms to be non-cooperative, mandatory respondents. See Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Acceptance of Requests for Treatment As Voluntary Respondents" (July 21, 2010) (Voluntary Respondent Selection Memorandum).

We find that, by not responding to the Department's initial questionnaire, Dragonlux, Miland, and the Zhongwang Group withheld requested information and significantly impeded this proceeding. Thus, pursuant to sections 776(a)(2)(A) and (C) of the Act, we have based the CVD rate for Dragonlux, Miland, and the Zhongwang Group on facts otherwise available.

We further determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. By failing to submit responses to the Department's initial questionnaire, Dragonlux, Miland, and the Zhongwang Group failed to cooperate by not acting to the best of their ability in this investigation. Accordingly, we find that an adverse inference is warranted to ensure that the three respondents will not obtain a more favorable result than had they fully complied with our request for information. Our decision to use an adverse inference in applying the facts otherwise available is unchanged from the Preliminary Determination. See 75 FR at 54304.

In deciding which facts to use as adverse facts available (AFA), section 776(b) of the Act and 19 CFR 351.308(c)(1) and (2) 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 other 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." See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). 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." See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.

It is the Department's practice in CVD proceedings to select, as AFA, the highest calculated rate in any segment of the proceeding. See, e.g., 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) (LWS from the PRC), and accompanying Issues and Decision Memorandum (LWS from the PRC Decision Memorandum) at "Selection of the Adverse Facts Available." 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 another PRC CVD proceeding. Id.; see also Certain Tow-Behind Lawn Groomers and Certain Parts Thereof 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 70971, 70975 (November 24, 2008) (unchanged in the Certain 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 Issues and Decision Memorandum at "Application of Facts Available, Including the Application of Adverse Inferences").

Thus, under this practice, for investigations involving the PRC, the Department computes the total AFA rate for non-cooperating companies generally using program-specific rates

calculated for the cooperating respondents in the instant investigation or calculated in prior PRC CVD cases. Specifically, for programs other than those involving income tax exemptions and reductions, the Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program within the investigation, the Department uses the highest non-de minimis rate calculated for the same or similar program (based on treatment of the benefit) in another PRC CVD proceeding. Absent an above-de minimis subsidy rate calculated for the same or similar program, the Department applies the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies. See, e.g., LWTP from the PRC Decision Memorandum at “Selection of the Adverse Facts Available Rate.”

However, in the instant investigation the cooperating firms, the Guang Ya Companies and the Zhongya Companies, are voluntary respondents. Under 19 CFR 351.204(d)(3), in calculating an all-others rate under section 705(c)(5) of the Act, the Department will exclude net subsidy rates calculated for voluntary respondents. Thus, as discussed in further detail below in Comment 9, in accordance with section 705(c)(5)(A)(ii) of the Act and 19 CFR 351.204(d)(3), we have equated the all-others rate with the AFA rates calculated for the non-cooperative companies. We have adopted this approach because the inclusion of self-selected respondents in the derivation of the all-others rate could result in the distortion or manipulation of the all-others rate. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27310 (May 19, 1997) (Preamble to Procedural Regulations). Furthermore, in light of this concern, we determine that it is not appropriate to compute total AFA rates for non-cooperative companies using company-specific rates calculated for participating respondents, because to do so would require the use of program rates calculated for voluntary respondents. In addition, our reasoning not to base the AFA rate on program rates calculated for voluntary respondents extends to our use of program rates from other CVD proceedings involving the PRC. Thus, in deriving the AFA rate for the three non-cooperating mandatory respondents in the instant investigation, we have not utilized company-specific program rates that were calculated for voluntary respondents. Our approach in this regard is unchanged from the Preliminary Determination. See 75 FR at 54305.

Therefore, for purposes of deriving the AFA rate for the three non-cooperating mandatory respondents, we are using the highest non-de minimis rate calculated for the same or similar program (based on treatment of the benefit) 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 the non-cooperating companies. See, e.g., LWTP from the PRC Decision Memorandum at “Selection of the Adverse Facts Available Rate.”

Further, where the GOC can demonstrate through complete, verifiable, positive evidence that Dragonlux, Miland, and the Zhongwang Group (including all 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 those companies. See, e.g., Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 37012 (July 27, 2009) (Racks from the PRC), and accompanying Issues and Decision Memorandum (Racks Decision from the PRC Decision Memorandum) at “Use of Facts Otherwise Available and Adverse Facts Available.” In this investigation, the GOC has not provided any such information. Therefore, we are making the adverse inference that the three

non-cooperative companies, Dragonlux, Miland, and the Zhongwang Group, had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs on which the Department initiated.

For the seven income tax rate reduction or exemption programs at issue in the instant investigation, we are applying an adverse inference that Dragonlux, Miland, and the Zhongwang Group paid no income taxes during the POI. The seven programs are: (1) Tax Reductions for High or New Technology Enterprises (HNTEs) Involved in Designated Projects; (2) Two Free, Three Half Tax Exemptions for Productive Foreign Invested Enterprises (FIEs); (3) Local Income Tax Exemption and Reduction Programs for “Productive” FIEs; (4) Income Tax Benefits for FIEs in Designated Geographic Location; (5) Income Tax Benefits for Technology- or Knowledge-Intensive FIEs; (6) Income Tax Benefits for FIEs That Are Also HNTEs; and (7) Income Tax Reductions For Export-Oriented FIEs.

The standard income tax rate for corporations in the PRC filing income tax returns during the POI was 25 percent. See, e.g., “Notification of the State Council on Carrying out the Transition Preferential Policies Concerning Enterprise Income Tax,” Guo Fa 2007, No. 39 as included in the March 31, 2010, petition at Exhibit III-65. Further, the three percent provincial income tax was no longer in effect during the POI. See the GOC’s August 4, 2010, supplemental questionnaire response at 4. Therefore, the highest possible benefit for all income tax reduction or exemption programs combined is 25 percent. Therefore, we are applying a CVD rate of 25 percent on an overall basis for these seven income tax programs (i.e., these seven income tax programs combined provide a countervailable benefit of 25 percent). This 25 percent AFA rate does not apply to tax credit or tax refund programs. This approach is consistent with the Department’s past practice. See, e.g., 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) (CWP from the PRC), and accompanying Issues and Decision Memorandum (CWP from the PRC Decision Memorandum) at 2, and LWTP from the PRC Decision Memorandum at “Selection of the Adverse Facts Available Rate.”

The 25 percent AFA rate does not apply to the following income tax credit and rebate or accelerated depreciation programs found countervailable because such programs may not affect the tax rate and, hence, the subsidy conferred, in the current year: (1) Value Added Tax (VAT) and Tariff Exemptions on Imported Equipment to FIEs and Certain Domestic Enterprises; (2) VAT Rebates on FIEs Purchases of Chinese-Made Equipment; (3) City Tax and Surcharge Exemptions for FIEs; (4) Tax Offsets for Research and Development (R&D); (5) Income Tax Credits for Domestically-Owned Companies Purchasing Chinese-Made Equipment; (6) Tax Reductions for FIEs Purchasing Chinese-Made Equipment; (7) Tax Refunds for Reinvesting of FIE Profits in Export-Oriented Enterprises; (8) Accelerated Depreciation for Enterprises Located in Northeast Region; and (9) Forgiveness of Tax Arrears for Enterprises in the “Old Industrial Bases” of Northeast China. Based on the methodology discussed above, we determine to use the highest non-de minimis rate for any non-income exemption/reduction tax program from a PRC CVD investigation. That rate is 1.51 percent, calculated for the “Value-Added Tax and Tariff Exemptions on Imported Equipment” program in CFS from the PRC. See CFS from the PRC Decision Memorandum at “VAT and Tariff Exemptions on Imported Equipment”.

Regarding the Preferential Loans as Part of the Northeast Revitalization Program and the Policy Loans for Aluminum Extrusion Producers program, 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 10.54 percent calculated for the “Preferential Lending for the Coated Paper Industry,” from the Coated Graphic Paper from the PRC Order. See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 75 FR 70201, 70202 (November 17, 2010) (Coated Graphic Paper from the PRC Order).

We are investigating a number of grant programs including: (1) State Key Technology Renovation Fund; (2) GOC and Sub-Central Government Grants, Loans, and Other Incentives for Development of Famous Brands and China World Top Brands; (3) Grants to Cover Legal Fees in Trade Remedy Cases in Shenzhen; (4) Special Fund for Energy Saving Technology Reform: Guangdong Province; (5) The Clean Production Technology Fund; (6) Grants for Listing Shares: Liaoyang City (Guangdong Province), Wenzhou Municipality (Zhejiang Province), and Quanzhou Municipality (Fujian Province); (7) Northeast Region Foreign Trade Development Fund; and (8) Northeast Region Technology Reform Fund. The Department has not calculated above de minimis rate 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, 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 the non-cooperative companies. We determine that this rate is 10.54 percent from the “Preferential Lending for the Coated Paper Industry” program from the Coated Graphic Paper from the PRC Order.

The Department is also investigating several provision of a good or service for LTAR programs: (1) Provision of Land-Use Rights for LTAR in Liaoyang High-Tech Industry Development Zone; (2) Provision of Land-Use Rights for LTAR to State-Owned Enterprises (SOEs); and (3) Provision of Primary Aluminum for LTAR. For two of these LTAR programs, we are applying the highest non-de minimis subsidy rate for any provision of land-use rights for LTAR program in a prior PRC CVD investigation. The highest non-de minimis subsidy rate is 2.55 percent calculated for the “Subsidies Provided in the TBNA and the Tianjin Economic and Technological Development Area” from OCTG from the PRC. See Certain 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) (OCTG from the PRC), and accompanying Issues and Decision Memorandum (OCTG from the PRC Decision Memorandum) at “Subsidies Provided in the TBNA and the Tianjin Economic and Technological Development Area.” Concerning the provision of Primary Aluminum for LTAR, the Department has not previously investigated allegations concerning this input product. Therefore, for this program, we are applying the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies. We determine that this similar program rate is the above 2.55 percent rate from OCTG from the PRC. Id.

In addition, the Department is investigating government purchases of aluminum extrusions for MTAR. The Department has not previously investigated allegations concerning this program. Therefore, for this program, we are applying the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies. We determine that this rate is 10.54 percent for the “Preferential Lending for the Coated Paper Industry” program from the Coated Graphic Paper from the PRC Order.

On July 8 and July 28, 2010, Petitioners submitted new subsidy allegations. On August 11, 2010, the Department initiated investigations of all the allegations included in Petitioners' July 8 and July 28, 2010, submissions. See Memorandum to Melissa G. Skinner, Director, "New Subsidy Allegations for the Guang Ya and Zhongya Companies," (August 11, 2010). On August 11, 2010, the Department also sent a new subsidy questionnaire to the GOC as well as to the Zhongya Companies and the Guang Ya Companies regarding these new subsidy allegations. The due date of the questionnaires fell after the due date of the Preliminary Determination. Therefore, we did not address the new subsidy programs in the Preliminary Determination and did not include these additional subsidy programs under investigation in this proceeding in the total AFA rates calculated for Dragonlux, Miland, and the Zhongwang Group. See 75 FR at 54306 – 54307. However, in the Preliminary Determination, we invited interested parties to comment on whether the Department should include the additional alleged programs and the various programs self-reported by the Guang Ya Companies and the Zhongya Companies into the AFA rate calculated for the non-cooperating, mandatory respondents. Id. Upon examination of the comments received we have determined to add the newly alleged and self-reported subsidy programs to the AFA rate established for the non-mandatory respondents. See Comment 8, below.

Therefore, we have included the new subsidy allegations in the total AFA rate. In accordance with the reasons described above, we have assigned the following rates to these programs. For the following LTAR programs, we used the rate of 2.55 percent from OCTG from the PRC: (1) Provision of Land-Use Rights and Fee Exemptions To Enterprises Located in the Zhaoqing High-Tech Industry Development Zone (ZHITDZ) for LTAR; (2) Provision of Land-Use Rights to Enterprises Located in the South Sanshui Science & Technology Industrial Park for LTAR; (3) Provision of Electricity for LTAR to FIEs Located in the Nanhai District of Foshan City; and (4) Government Provision of Land-Use Rights for LTAR for Enterprises Located in the Yongji Circular Economic Park. For the Tax Refunds for Enterprises Located in the ZHITDZ program, we used the rate of 1.51 percent from CFS from the PRC. For the following grant programs, we used the rate of 10.54 percent from the Coated Graphic Paper from the PRC Order: (1) Provincial Government of Guangdong (PGOG) and Foshan City Government Patent and Honor Award Grants; (2) Foshan City Government Technology Renovation & Technology Innovation Special Fund Grants; (3) Nanhai District Grants to State and Provincial Enterprise Technology Centers and Engineering Technology Research and Development Centers; and (4) Nanhai District Grants to High and New Technology Enterprises.

We have also included the following grant programs self-reported by the voluntary respondents in the total AFA rate: (1) Special Fund for Significant Science and Technology in Guangdong Province; (2) Fund for Economic, Scientific, and Technology Development; (3) Provincial Fund for Fiscal and Technological Innovation; (4) Provincial Loan Discount Special Fund for Small and Medium Sized Enterprises (SMEs); (5) Export Rebate for Mechanic, Electronic and High-Tech Products; (6) PGOG Special Fund for Energy Saving Technology Reform; (7) PGOG Science and Technology Bureau Project Fund (Also Referred to as Guangdong Industry, Research, University Cooperating Fund); (8) "Large and Excellent" Enterprises Grant; (9) Advanced Science/Technology Enterprise Grant; (10) Award for Self-Innovation Brand/Grant for Self-Innovation Brand and Enterprise Listing; (11) Tiaofeng Electric Power Subscription Subsidy Funds; (12) Award for Excellent Enterprise; (13) Grant for Labor and Social Security in Sanshui District; (14) Development Assistance Grants from the ZHITDZ

Local Authority; and (15) International Market Exploration Fund for SMEs. For these grant programs we used the rate of 10.54 percent from the Coated Graphic Paper from the PRC Order.

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.” See also SAA at 870, 1994 U.S.C.C.A.N. at 4199. 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 that the Department need not prove that the information selected as facts available are the best alternative information. SAA at 869.

Regarding the reliability of corroboration of the rates selected, we note that the rates selected were calculated in recent final CVD determinations, as outlined above. Further, the calculated rates were based upon verified information about the same or similar programs. No information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. See Comment 7, below, for additional explanation regarding rates for certain programs. 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 are typically no independent sources for data on company-specific programs resulting from countervailable subsidy programs.

Regarding the relevance of the corroboration of the rates selected, the Department considers information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that information is not appropriate for use as AFA, the Department will not use it. See, e.g., Wire Decking from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 32902 (June 10, 2010) (Wire Decking from the PRC), and accompanying Issues and Decision Memorandum (Wire Decking from the PRC Decision Memorandum) at “Application of Adverse Inferences: Non-Cooperative Companies.”

As discussed above, we do not have any evidence concerning these programs due to the decision of the mandatory respondents not to participate in the investigation. Therefore, we have reviewed the information concerning the PRC subsidy programs in other cases. Where we have 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 the non-cooperative mandatory respondents could receive a benefit, to use as AFA. The relevance of these rates is that it is an actual calculated CVD rate for a PRC program from which the non-cooperative mandatory respondents could actually receive a benefit. Further, these rates were calculated for periods close to the POI in this case. In addition, the failure of the mandatory respondents to respond to the Department’s requests for information has “resulted in an egregious lack of evidence on the record to suggest an alternative rate.” Shanghai Taoen Int’l Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (Shanghai Taoen). Due to the lack of participation by the mandatory respondents and the resulting lack of record information concerning their 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 the non-cooperative respondents (Dragonlux, Miland, and the Zhongwang Group) to be 374.15 percent ad valorem. See the memorandum to the file titled “Derivation of Adverse Facts Available (AFA) Net Subsidy Rate Applied in Final Determination” (March 28, 2011).

Various Grant Programs Self-Reported by the Guang Ya Companies

The Guang Ya Companies self-reported receiving various lump sum cash grants from the GOC. As a result, the Department sent questionnaires to the GOC regarding these programs. See the July 21, 2010, first supplemental questionnaire sent to the GOC. In its supplemental questionnaire responses, the GOC provided information concerning the nature of the programs and indicated that the programs were not contingent upon exports, and thus are not specific under section 771(5A)(B) of the Act. However, the GOC failed to respond to the Department’s questions concerning the distribution of benefits, which is information that the Department uses to determine whether alleged subsidy programs are de facto specific under section 771(5A)(D)(iii) of the Act. See the GOC’s August 9, 2010, supplemental questionnaire response. Further, the GOC failed to supply the requested benefit distribution data in its second supplemental questionnaire response, despite the Department’s request that it do so. See the GOC’s August 19, 2010, second supplemental questionnaire response.

Because the GOC failed to provide the requested benefit distribution data, we find, pursuant to section 776(a) of the Act, that the necessary information is not on the record. We further find that the GOC failed to cooperate by not acting to the best of its ability. Therefore, for those programs for which we lack the necessary information and for which the GOC failed to cooperate, in accordance with section 776(b) of the Act, we are assuming as an adverse inference that the programs are de facto specific as domestic subsidies within the meaning of section 771(5A)(D)(iii) of the Act. Our approach in this regard is unchanged from the Preliminary Determination. See 75 FR at 54307.

The Guang Ya Companies’ Failure to Report in a Timely Manner All of its Purchases of Primary Aluminum Under the Provision of Primary Aluminum for LTAR Program

In response to the Department’s initial questionnaire, the Guang Ya Companies provided its purchases of primary aluminum during the POI. See the Guang Ya Companies’ July 8, 2010, questionnaire response at Exhibit 20, in which they indicated that Guang Ya made all of the purchases of the Guang Ya Companies during the POI. The Department used the data in Exhibit 20 to perform the subsidy calculations for the Preliminary Determination. On December 6, 2010, three days after commencement of verification, the Guang Ya Companies submitted data regarding previously unreported purchases of primary aluminum made by Guangcheng during the POI. See the Guang Ya Companies’ December 6, 2010, submission at Exhibit 103. The Guang Ya Companies claimed that the data in Exhibit 103 constituted a “slight” revision of the data originally submitted in Exhibit 20. Id. In response, the Department explained that the data in Exhibit 103 did not constitute a minor correction, as referenced in the Department’s November 24, 2010, verification outline issued to the Guang Ya Companies. See the Department’s December 15, 2010, letter to the Guang Ya Companies, “Rejection of the December 6, 2010, Submission by the Guang Ya Companies.” In the letter, the Department further explained that the Guang Ya Companies’ December 6, 2010, submission was untimely

under 19 CFR 351.302(d)(1)(i). As a result, the Department returned the submission to the Guang Ya Companies. At verification, the Department confirmed, in the aggregate, the magnitude of the previously unreported volume of primary aluminum purchased by Guangcheng. See Guang Ya Companies Verification Report, Exhibit 14 at 16 – 17.

Because the Guang Ya Companies failed to provide all of its purchases of primary aluminum in a timely manner, we find, pursuant to section 776(a) of the Act, that the necessary information is not on the record. We further find that the Guang Ya Companies have failed to cooperate by not acting to the best of their ability. Therefore, in accordance with section 776(b) of the Act, we are applying partial AFA with regard to the primary aluminum purchased domestically by Guangcheng. Specifically, as partial AFA, we have multiplied the single highest unit benefit calculated on Guang Ya's purchases of primary aluminum under this program by the total volume of primary aluminum purchased by the Guang Ya Companies. See "Provision of Primary Aluminum for LTAR" section below.

ANALYSIS OF PROGRAMS

VII. Programs Determined To Be Countervailable

A. Exemption from City Construction Tax and Education Tax for FIEs

Pursuant to the Circular Concerning Temporary Exemption from Urban Maintenance and Construction Tax and Additional Education Fees for Foreign-Funded and Foreign Enterprises (GUOSHUIFA {1994} No. 38), the local tax authorities exempt all FIEs and foreign enterprises from the city maintenance and construction tax and education fee surcharge. The construction tax is based on the amount of product tax, VAT, and/or business tax actually paid by the taxpayer. For taxpayers located in urban areas, the rate is seven percent; for taxpayers located in counties or townships, the rate is five percent; and for taxpayers located in areas other than urban areas, counties, and townships, the rate is one percent. Regarding the education fee surcharge, FIEs pay only one percent of the actual amount of the product tax, VAT, and business tax paid, whereas other entities pay four percent of that amount. Guangcheng and New Zhongya are FIEs and, therefore, received exemptions under this program.

Consistent with our finding in Racks from the PRC, we determine that the exemptions from the city construction tax and education surcharge under this program confer a countervailable subsidy. See Racks from the PRC Decision Memorandum at "Exemption from City Construction Tax and Education Tax for FIEs in Guangdong Province." The exemptions are financial contributions in the form of revenue forgone by the government and provide a benefit to the recipient in the amount of the savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also determine that the exemptions afforded by this program are limited as a matter of law to certain enterprises, *i.e.*, FIEs, and, hence, specific under section 771(5A)(D)(i) of the Act. Our findings in this regard are unchanged from the Preliminary Determination. See 75 FR at 54310.

To calculate the benefit, we treated the tax savings and exemptions received by Guangcheng and New Zhongya as recurring benefits, consistent with 19 CFR 351.524(c)(1). Guangcheng and New Zhongya both reported that they are exempted from the city construction tax and education fee surcharge. To compute the amount of city construction tax savings, we first determined the rate the companies would have paid in the absence of the program. Both

Guangcheng and New Zhongya reported that a seven percent construction tax would have been applied to them absent the program. They further reported that they paid a one percent education tax instead of a four percent education tax that would have been applicable absent the program. Thus, we compared the rates the companies would have paid during the POI in the absence of the program (seven percent for the construction tax and four percent on the education tax) with the rate the companies paid (zero percent construction tax and one percent education tax), because they are FIEs. To calculate the total benefit under the program, we summed the savings from the construction tax exemption and education fee exemption.

To calculate the program rate, we divided the companies' tax savings received during the POI by their total consolidated sales, net of intra-company sales. Specifically, for New Zhongya, we divided the benefit by its total sales for the POI. For Guangcheng, we divided the benefit by the combined total sales of Guangcheng and Guang Ya.

On this basis, we determine the countervailable subsidy to be 0.01 percent ad valorem for the Guang Ya Companies and 0.07 percent ad valorem for the Zhongya Companies.

B. GOC and Sub-Central Government Grants, Loans, and Other Incentives for Development of Famous Brands and China World Top Brands

The Famous Brand program is administered at the central, provincial, and municipal government level. During the POI, New Zhongya and Guang Ya reported receiving grants under the Famous Brand program from their respective local governments.

Though operated at the local level, the GOC issued "Measures for the Administration of Chinese Top-Brand Products," which state that the requirements for application require that firms provide information concerning their export ratio as well as the extent to which their product quality meets international standards. See the Guang Ya Companies July 8, 2010, questionnaire response at Exhibit 24 (Chapter 3 of the "Measures for the Administration of Chinese Top-Brand Products").

We determine that the grants that the Zhongya Companies and the Guang Ya Companies received under the famous brand program constitute a financial contribution and a benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. Regarding specificity, section 771(5A)(B) of the Act states that an export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. We determine that grants provided to the Zhongya Companies and the Guang Ya Companies under the famous brands program are contingent on export activity. Therefore, we find that the program is specific under section 771(5A)(A) and (B) of the Act. Our approach in this regard is unchanged from the Preliminary Determination and consistent with the Department's findings in prior CVD proceedings involving the PRC. See 75 FR at 54310; see also 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 Issues and Decision Memorandum (PC Strand from the PRC Decision Memorandum) at "Subsidies for Development of Famous Export Brands and China World Top Brands at Central and Sub-Central Level."

The grants that New Zhongya and Guang Ya received during the POI were less than 0.5 percent of their respective total export sales denominators in the year of approval/receipt. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the year of receipt. Guang Ya also received a grant prior to the POI that was greater than 0.5 percent of its total export sales denominator in the year of approval/receipt. Therefore, we allocated the

benefit over time using the methodology provided under 19 CFR 351.524(d)(2).

On this basis, we calculated a total net subsidy rate of 0.36 percent ad valorem for the Guang Ya Companies and a total net subsidy rate of 0.09 percent ad valorem for the Zhongya Companies.

C. Two Free, Three Half Income Tax Exemptions for FIEs

The Foreign Invested Enterprise and Foreign Enterprise Income Tax Law (FIE Tax Law), enacted in 1991, established the tax guidelines and regulations for FIEs in the PRC. The intent of this law is to attract foreign businesses to the PRC. According to Article 8 of the FIE Tax Law, FIEs that are “productive” and scheduled to operate not less than 10 years are exempt from income tax in their first two profitable years and pay half of their applicable tax rate for the following three years. FIEs are deemed “productive” if they qualify under Article 72 of the Detailed Implementation Rules of the Income Tax Law of the People’s Republic of China of Foreign Investment Enterprises and Foreign Enterprises. New Zhongya reported receiving benefits under this program that are attributable to the POI.

We determine that the exemption or reduction in the income tax paid by “productive” FIEs under this program confers a countervailable subsidy. The exemption/reduction is a financial contribution in the form of revenue forgone by the GOC and it provides a benefit to the recipients in the amount of the tax savings. See sections 771(5)(D)(ii) and 771(5)(E) of the Act and 19 CFR 351.509(a)(1). We further determine 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. Our approach in this regard is unchanged from the Preliminary Determination and consistent with the Department’s practice. See 75 FR at 54310, see also CFS from the PRC Decision Memorandum at “Two Free/Three Half Program.”

To calculate the benefit from this program, we treated the income tax exemption claimed as a recurring benefit, consistent with 19 CFR 351.524(c)(1). We then compared the tax rate paid to the rate that otherwise would have been paid by New Zhongya and multiplied the difference by the company’s taxable income. We divided the benefit by the total sales of New Zhongya during the POI.

On this basis, we determine a countervailable subsidy of 0.53 percent ad valorem for the Zhongya Companies.

D. Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries

Enacted in 1997, the Circular of the State Council on Adjusting Tax Policies on Imported Equipment (Guofa No. 37) (Circular 37) exempts both FIEs and certain domestic enterprises from the VAT and tariffs on imported equipment used in their production so long as the equipment does not fall into prescribed lists of non-eligible items. The National Development and Reform Commission (NDRC) and the General Administration of Customs are the government agencies responsible for administering this program. Qualified enterprises receive a certificate either from the NDRC or one of its provincial branches. To receive the exemptions, a qualified enterprise only has to present the certificate to the customs officials upon importation of the equipment. The objective of the program is to encourage foreign investment and to introduce foreign advanced technology equipment and industry technology upgrades. The

Department has previously found this program to be countervailable. See, e.g., Citric Acid from the PRC Decision Memorandum at “VAT Rebate on Purchases by FIEs of Domestically Produced Equipment.”

New Zhongya, an FIE, reported receiving VAT and tariff exemptions under this program for imported equipment prior to and during the POI. Guangcheng, also an FIE, reported receiving VAT and tariff exemptions under this program for imported equipment prior to the POI.

We determine that the VAT and tariff exemptions on imported equipment confer a countervailable subsidy. The exemptions are a financial contribution in the form of revenue forgone by the GOC and the exemptions provide a benefit to the recipients in the amount of the VAT and tariff savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). As described above, only FIEs and certain domestic enterprises are eligible to receive VAT and tariff exemptions under this program; therefore, we further determine that the VAT and tariff exemptions under this program are specific under section 771(5A)(D)(iii)(I) of the Act because the program is limited to certain enterprises. See, e.g., CFS from the PRC Decision Memorandum at Comment 16, and Certain 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) (Tires from the PRC), and accompanying Issues and Decision Memorandum (Tires from the PRC Decision Memorandum) at “VAT and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment on Encouraged Industries.” Our findings are unchanged from the Preliminary Determination. See 75 FR at 54311.

Normally, we treat exemptions from indirect taxes and import charges, such as the VAT and tariff exemptions, as recurring benefits, consistent with 19 CFR 351.524(c)(1) and allocate these benefits only in the year that they were received. However, when an indirect tax or import charge exemption is provided for, or tied to, the capital structure or capital assets of a firm, the Department may treat it as a non-recurring benefit and allocate the benefit to the firm over the AUL. See 19 CFR 351.524(c)(2)(iii) and 19 CFR 351.524(d)(1). Therefore, because these exemptions are for capital equipment, we have examined the VAT and tariff exemptions that New Zhongya and Guangcheng received under the program during the POI and prior years.

To calculate the amount of import duties exempted under the program, we multiplied the value of the imported equipment by the import duty rate that would have been levied absent the program. To calculate the amount of VAT exempted under the program, we multiplied the value of the imported equipment (inclusive of import duties) by the VAT rate that would have been levied absent the program. Our derivation of VAT in this calculation is consistent with the Department’s approach in prior cases. See, e.g., 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 Issues and Decision Memorandum (Line Pipe from the PRC Decision Memorandum) at Comment 8 (“. . . we agree with Petitioners that VAT is levied on the value of the product inclusive of delivery charges and import duties”). Next, we summed the amount of duty and VAT exemptions received in each year. For each company, we divided the total amount of annual VAT and tariff exemptions by the corresponding total sales for year in which the exemptions were received. Those exemptions that were less than 0.5 percent of total sales were expensed to the year of receipt. Those exemptions that were greater than 0.5 percent of total sales were allocated over the AUL using the methodology described under 19 CFR 351.524(d)(2).

On this basis, we determine the countervailable subsidy to be 0.53 percent ad valorem for the Zhongya Companies and less than 0.005 percent ad valorem for the Guang Ya Companies.⁵

E. International Market Exploration Fund (SME Fund)

The SME Fund, established under CQ (2000) No. 467, encourages the development of SMEs by reducing the risk of operation for these enterprises in the international market. To qualify for the program, a company needs to satisfy the criteria in CQ (2000), which provides that the SME should have export and import rights, exports of less than \$15,000,000, an accounting system, personnel with foreign trade skills, and a plan for exploring the international market. Guang Ya reported receiving funds under this program in 2008 and 2009 from the Shishan Town Economic Development Office.

We determine that the grants provided under the SME Fund constitute a financial contribution and benefit under sections 771(5)(D)(i) and 771(5)(E) of the Act, respectively. We also determine that this program is an export subsidy and thus, specific, under section 771(5A)(A) and (B) of the Act, because the program supports the international market activities of SMEs and is contingent upon export performance. Our findings in this regard are unchanged from the Preliminary Determination and consistent with the Department's practice. See 75 FR at 54311 - 12, see also Wire Decking from the PRC Decision Memorandum at "International Market Exploration Fund (SME Fund)." Information on the record indicates that the SME Fund provides one-time assistance. Therefore, consistent with 19 CFR 351.524(c)(1), we are treating the grants received under this program as "non-recurring." To measure the benefits of each grant that are allocable to the POI, we first conducted the "0.5 percent test" for the grant. See 19 CFR 351.524(b)(2). We divided the total amount approved in 2008 and 2009 by the total export sales of Guang Ya and Guangcheng in 2008 and 2009. As a result, we found that the grants received by Guang Ya are less than 0.5 percent and fully expensed to the year of receipt.

Therefore, for the POI, we calculated a total net subsidy rate of 0.01 percent ad valorem for the Guang Ya Companies.

F. Preferential Tax Program for FIEs Recognized as HNTes

According to the "Circular of the State Council Concerning the Approval of the National Development Zones for New and High Technology Industries and the Relevant Policies and Provisions" at Article 2 and 4 of Appendix III, "Regulations on the Tax Policy for the National New and High Technology Industries Parks", FIEs designated as HNTes in high and new technology parks pay a reduced income tax rate of 15 percent.

We determine that the reduction in the income tax paid by FIEs designated as HNTes under this program confers a countervailable subsidy. The reduction is a financial contribution in the form of revenue forgone by the government and it provides a benefit to the recipient in the amount of the tax savings. See sections 771(5)(D)(ii) and 771(5)(E) of the Act, respectively, and 19 CFR 351.509(a)(1). We also determine that the reduction afforded by this program is limited as a matter of law to certain enterprises, i.e., FIEs designated as HNTes, and, hence, is specific

⁵ Consistent with our past practice, we did not include this program in the Guang Ya Companies' total net subsidy rate because it is numerically insignificant. See, e.g., CFS from the PRC Decision Memorandum at "Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE."

under section 771(5A)(D)(i) of the Act. The program is also specific pursuant to section 771(5A)(D)(iv) of the Act, as only ratified new and high technology enterprises located in new and high technology parks approved by the State Council are eligible for the reduced tax rate. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54312. Guang Ya and Guangcheng reported receiving tax benefits attributable to the POI under this program.

We treated the income tax savings enjoyed by the companies as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the rate Guang Ya and Guangcheng would have paid in the absence of the program (25 percent) with the rate the company paid (15 percent), and divided the tax savings received during the POI by the combined total sales of Guang Ya and Guangcheng.

On this basis, we determine the countervailable subsidy attributable to the Guang Ya Companies to be 0.15 percent ad valorem under this program.

G. Policy Loans to Chinese Aluminum Extrusion Producers

The Department examined whether aluminum extrusion producers receive preferential lending through SOCBs or policy banks. According to the allegation, preferential lending to the aluminum extrusion industry is supported by the GOC through the issuance of national and provincial five-year plans, industrial plans for the aluminum and nonferrous metal sector, catalogues of encouraged industries, and other government laws and regulations. Based on our review of the responses and documents provided by the GOC, we determine that loans received by the aluminum extrusion industry from SOCBs and policy banks were made pursuant to government directives.

Record evidence demonstrates that the GOC, through its directives, has highlighted and advocated the development of the aluminum extrusion industry. At the national level, the GOC has placed an emphasis on the development of high-end, value-added aluminum products through foreign investment as well as through technological research, development, and innovation. In laying out this strategy, the GOC has identified specific products selected for development. For example, the “Catalogue of Major Industries, Products, and Technologies Encouraged for Development in China” (Encouraged Industries Catalogue), issued by the GOC in 2000, identifies 526 products, technologies, and infrastructure facilities for business promotion. See the GOC’s August 4, 2010, questionnaire response at Exhibit 3. The Encouraged Industries Catalogue specifically mentions aluminum extrusion products under the non-ferrous metals heading. *Id.*

Similarly, there is the Decision of the State Council on Promulgating the “Interim Provisions on Promoting Industrial Structure Adjustment” for Implementation (No. 40 (2005)) (Decision 40). The GOC implemented Decision 40 in order to achieve the objectives of the Eleventh Five-Year Plan. See the GOC’s August 4, 2010, questionnaire response at Exhibit 6. Decision 40 references the Directory Catalogue on Readjustment of Industrial Structure (Industrial Catalogue), which outlines the projects which the GOC deems “encouraged,” “restricted,” and “eliminated,” and describes how these projects will be considered under government policies. *Id.* Aluminum is mentioned as an industry in the Industrial Catalogue as an “encouraged project.” *Id.* For the “encouraged” projects, Decision 40 outlines several support options available from the government, including financing. *Id.*

In addition, the “Guidelines on Acceleration of the Adjustment of the Aluminum Industry Structure” (Aluminum Industry Guidelines), issued by the GOC in 2006, discusses support that

is to be provided to producers of aluminum extrusions. See the GOC's August 4, 2010, questionnaire response at Exhibit 9. For instance, under the heading "Increase Industry Concentration, Encourage Comprehensive Usage and Conservation of Resources," the Aluminum Industry Guidelines state:

Create favorable conditions for enterprises M&A and restructuring, and accelerate enterprises' merger and restructuring via economic means. Support aluminum, electrolytic aluminum, and aluminum processing enterprises to undertake merger and restructuring, establish internationally competitive enterprise group, realize advantage complementation, and increase industry concentration. Encourage private capital and foreign capital to participate in the reform, restructuring and transformation of state-owned enterprises. Encourage backbone enterprises to keep raising technology and management levels, accelerate medium and small-sized aluminum processing enterprises' technology transformation, and improve resource utilization.

Id. The Aluminum Industry Guidelines also make reference to lending activities. Under the heading, "Strengthen the Coordination and Cooperation of Credit Policy and Industrial Policy and Establish Withdrawal Mechanism Under the Policies," the Aluminum Industry Guidelines state:

It is required to strictly abide by the rule that the minimum self-owned capital requirement for electrolytic aluminum projects shall be no less than 35 percent of the total investment. Financial institutions shall rationally allocate the lending credits taking into account the national macroeconomic adjustments, industrial policies, and ordinary lending principles. Financial institutions may continue to provide credits to oxide aluminum or electrolytic aluminum enterprises that are in compliance with national industrial policies and the market entrance threshold, provided such lending is in accordance with the ordinary lending principles. No credit shall be provided to those enterprises that do not conform to national industrial policies, do not satisfy the market entrance threshold, have obsolete manufacturing processes, have been classified as prohibited, or have been ordered to cease operation. In the event that credits are mistakenly provided to such enterprises, the financial institutions shall take appropriate measures to reclaim the credits and avoid financial risk.

Id. (emphasis added). Additionally, under the heading "Enhance the Implementation of Environmental Protection Regulations, Eliminate Capacities," the Aluminum Industry Guidelines state that different "financing means" shall be used "to support enterprises' environmental protection and energy savings." Id.

Support, in the form of financing, is also discussed in the "Nonferrous Metal Industry Adjustment and Revitalization Plan" (Nonferrous Metal Plan) that was issued by the GOC in 2009. See the GOC's August 4, 2010, questionnaire response at Exhibit 10. Under the heading "Increase Dedication to Technology Improvement and Technology Reform," the Nonferrous Metal Plan states:

Set aside some funds from new central investment. Use loan interest subsidies to support R&D and technology reform in the nonferrous metals industry. Increase the level of financial support directed toward reform of energy conservation technologies.

The Nonferrous Metal Plan further references financing to the aluminum extrusions industry under the heading, “Continue to Implement the Financing Policy of ‘Encouragement and Discouragement’”:

Increase financing support to backbone enterprises in the nonferrous metals industry. Provide support to certain enterprises in issuing stock, enterprise bonds, and corporate bonds. Enterprises eligible to receive such support are those which are engaged in projects which, in addition to adhering to investment management prescriptions, are in compliance with industry policy as well as relevant environmental and land regulations; and implement acquisitions, restructuring, "Going Abroad" and technological reformation.

Id. (emphasis added).

As noted in Citric Acid from the PRC, in general, the Department looks to whether government plans or other policy directives lay out objectives or goals for developing the industry and call for lending to support those objectives or goals. See Citric Acid from the PRC Decision Memorandum at Comment 5. Where such plans or policy directives exist, then it is the Department’s practice to determine that a policy lending program exists that is specific to the named industry (or producers that fall under that industry). See CFS from the PRC Decision Memorandum at Comment 8, and LWTP from the PRC Decision Memorandum at “Government Policy Lending Program.” Once that finding is made, the Department relies upon the analysis undertaken in CFS from the PRC to further conclude that national and local government control over the SOCBs result in the loans being a financial contribution by the GOC. See CFS from the PRC Decision Memorandum at Comment 8.⁶ Therefore, on the basis of the record information described above, we determine that the GOC has a policy in place to encourage the development of the production of aluminum extrusions through policy lending.

The GOC and the Guang Ya Companies provided source documents concerning the largest loans the Guang Ya Companies had outstanding during the POI.⁷ Information in these business proprietary documents further supports our determination that the GOC has a policy in place to encourage the development of the production of aluminum extrusions through policy lending. See Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations, “Excerpts of Internal Loan Documents of the Guang Ya Companies,” (August 30, 2010) (Internal Loan Document Memorandum).

The GOC has argued in its August 4, 2010, questionnaire response that the People’s Bank of China revoked the PRC’s policy lending programs in 1999 pursuant to the “Circular on Improving Administration of Special Loans” (YINFA (1999) No. 228 (Special Loans Circular). See the GOC’s August 4, 2010, questionnaire response at Exhibit 18. We preliminarily determined that there is no basis to conclude that the GOC’s policy lending activities ceased with

⁶ For the Department’s analysis concerning how loans by SOCBs constitute a financial contribution by GOC authorities, see Preliminary Determination, 75 FR at 54313, further discussion below, and Comment 27 below.

⁷ The Zhongya Companies did not have any loans outstanding during the POI.

the issuance of the Special Loans Circular. See Preliminary Determination, 75 FR at 54313. We have reached the same conclusion in the final determination. The Special Loans Circular states that, while banks shall make lending decisions on their own, “authorities” may continue to “give advice on the choice of project.” Further, the Special Loans Circular states that firms may continue to receive formerly designated “special loans”:

For those (former special) loans which do not meet the commercial lending conditions, if the authorities can provide loan interest grant or other subsidies so that the commercial lending conditions are fulfilled, the banks may continue to provide the loans.

Id. The Special Loans Circular goes on to state that:

Wholly State-owned banks shall make efforts to implement the requirements above, and shall actively communicate with the authorities in charge of relevant industries, with a view to gaining their understanding and support.

Id. Thus, despite the GOC’s claims, the Special Loans Circular provides a means by which what it refers to as “special loans” may continue to be provided to firms in the PRC. In addition, the Special Loans Circular states government authorities will continue to “advise” and monitor the actions of the PRC state-owned lending institutions. Furthermore, the Aluminum Industries Guidelines and the Nonferrous Metal Plan, both of which mention directing credit to members of the aluminum extrusions industry, as well as the loans discussed in the Internal Loan Document Memorandum, were issued after the GOC released the Special Loans Circular.

The Guang Ya Companies reported that they had outstanding loans from PRC-based banks during the POI. Consistent with our determinations in prior proceedings, we find these PRC-based banks to be SOCBs. See, e.g., OCTG from the PRC Decision Memorandum at Comment 20.

We determine that the loans to aluminum extrusion producers from SOCBs in the PRC constitute a direct financial contribution from the government, pursuant to section 771(5)(D)(i) of the Act, and they provide a benefit equal to the difference between what the recipients paid on their loans and the amount they would have paid on comparable commercial loans (see section 771(5)(E)(ii) of the Act). We further preliminarily determine that the loans are de jure specific within the meaning of section 771(5A)(D)(i) of the Act because of the GOC’s policy, as illustrated in the government plans and directives, to encourage and support the growth and development of the aluminum extrusions industry. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54313 – 54314.

To determine whether a benefit is conferred under section 771(5)(E)(ii) of the Act, we compared the amount of interest the Guang Ya Companies paid on their outstanding loans to the amount they would have paid on comparable commercial loans. See 19 CFR 351.505(a). In conducting this comparison, we used the interest rates described in the “Benchmarks and Discount Rates” section above. We have attributed benefits under this program to the combined total sales of Guang Ya and Guangcheng.

On this basis, we determine a countervailable subsidy of 1.14 percent ad valorem for the Guang Ya Companies.

H. Fund for SME Bank-Enterprise Cooperation Projects

According to the GOC, 1000 eligible SMEs along with several financial institutions were selected to participate in this program. Under the program, financial institutions in the PRC decide whether to extend credit to certain eligible SMEs. If they decide to do so, the PGOG provides loan interest assistance to the SME that received the financing from the financial institution. The program is administered by the PGOG's Department of Finance and the Bureau of SMEs pursuant to the Circular on Printing and Distributing of the Measures on Implementing the 2009 Government-Bank-Enterprise Cooperation Special Fund Program (YUECAI GONG (2009) No. 54) (Bank Enterprise Cooperation Measures). See the GOC's August 9, 2010, supplemental questionnaire response at Supp-1. The Guang Ya Companies reported that Guang Ya received a grant under this program during the POI.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act, in the form of a direct transfer of funds, and a benefit under section 771(5)(E) of the Act.

According to the Bank Enterprise Cooperation Measures, the 500 SMEs deemed as having the "greatest potential" as well as enterprises that manufacture key equipment, or pursue creative technologies, or engage in advanced manufacturing activities backed by both the PGOG and the corresponding city will receive preferential treatment under the program. In light of the selection process described in the Bank Enterprise Cooperation Measures, we determine that this program is de jure specific under section 771(5A)(D)(i) of the Act because the measures expressly limit access to certain enterprises. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54314.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng. The grant was less than 0.5 percent of the export sales of Guang Ya and Guangcheng in the year of approval/receipt. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.05 percent ad valorem for the Guang Ya Companies.

I. Special Fund for Significant Science and Technology in Guangdong Province

Under this program, the PGOG seeks to support major, generic, and key technology R&D of Guangdong industries and promote technology achievements and diffusion of technological knowledge. The program is administered by the Guangdong Science and Technology Department pursuant to the Provisional Measures on Administration of Guangdong Important Science-Technology Project Special Fund (YEUCAIGONG (2009) No. 166). The Guang Ya Companies reported that Guang Ya received a grant under this program during the POI.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act, in the form of a direct transfer of funds, and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide benefit distribution data for this program. As a result, the Department is applying AFA and assuming that the program is specific under section 771(5A)(D) of the Act. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54314.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.12 percent ad valorem for the Guang Ya Companies.

J. Fund for Economic, Scientific, and Technology Development

Under this program, the Government of Foshan City distributes grants to firms with the aim of fostering technological and economic development. The program is administered by the Science and Technology Bureau of Foshan Municipality and the Finance Bureau of Foshan Municipality pursuant to the Circular on Printing and Distributing of the Measures on Administration of Foshan Sci-Tech Development Special Fund (FOFUBAN (2008) No. 402). See the GOC's August 9, 2010, supplemental questionnaire response at Supp-4. The Guang Ya Companies, which are located in Foshan City, reported that Guang Ya received a grant under this program during the POI.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide benefit distribution data for this program. As a result, the Department is applying AFA and assuming that the program is specific under section 771(5A)(D) of the Act. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54314.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.01 percent ad valorem for the Guang Ya Companies.

K. Provincial Fund for Fiscal and Technological Innovation

Under this program, the PGOG provides grants to firms for the purpose of promoting technological and fiscal innovation. The program is administered by the Provincial Department of Finance and Economic and Trade Commission of Guangdong Province pursuant to the Provisional Measures on Administration of Exploration and Renovation Provincial Level Fund (YUECAIQI (2003) No. 140). See the GOC's August 9, 2010, supplemental questionnaire response at Supp-1. The Guang Ya Companies reported that Guangcheng received a grant under this program during the POI.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide benefit distribution data for this program. As a result, the Department is applying AFA and assuming that the program is specific under section

771(5A)(D) of the Act. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54315.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.04 percent ad valorem for the Guang Ya Companies.

L. Provincial Loan Discount Special Fund for SMEs

Under this program, the PGOG provides interest subsidy grants in order to promote and support SMEs. The program is administered by the Provincial Department of Finance and the Guangdong Provincial SME Bureau pursuant to the Measures on Administration of SME Loan Interest Assistance Special Fund (YUECAIGONG (2009) No. 124). See the GOC's August 9, 2010, supplemental questionnaire at Supp-9. The Guang Ya Companies reported that Guangcheng received a grant under this program during the POI.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide benefit distribution data for this program. As a result, the Department is applying AFA and assuming that the program is specific under section 771(5A)(D) of the Act. Our findings are unchanged from the Preliminary Determination. See 75 FR at 54315.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng in the year of approval/receipt. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.04 percent ad valorem for the Guang Ya Companies.

M. Export Rebate for Mechanic, Electronic, and High-Tech Products

The Guang Ya Companies reported that Guangcheng received a grant under this program during the POI. See the Guang Ya Companies' July 8, 2010, initial questionnaire response at 60. The Department sent two questionnaires to the GOC concerning this program. In its responses, the GOC indicated that it could not find any "meaningful information" concerning the program. See, e.g., the GOC's August 18, 2010, second supplemental questionnaire response at 1.

We determine that the grants issued by the GOC under this program constitute a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. Concerning specificity, we are resorting to the use of facts available (FA) within the meaning of section 776(a)(1) of the Act because the necessary information concerning the manner in which this program is administered is not on the record. Based on the information contained in the July 8, 2010, questionnaire response of the Guang Ya Companies indicating that they received the grant in the form of an "export rebate," we are relying upon FA and determine that the program is contingent upon exports and therefore specific under section 771(5A)(A) and

(B) of the Act. Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54315.

To calculate the benefit, we divided the amount of the grant by the total export sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total export sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.02 percent ad valorem for the Guang Ya Companies.

N. PGOG Special Fund for Energy Saving Technology Reform

Under this program, the PGOG provides grants in the amount of RMB 200 for every one metric ton (MT) of standard coal saved through increased energy efficiency during a given year. Firms must demonstrate annual energy savings equivalent to 2,000 MT of standard coal in order to be eligible to apply for grants under the program. The program is administered by the PGOG's Department of Finance and the Economic Trade Commission of Guangdong pursuant to the "Provisional Measures on Administration of Guangdong Energy-Saving Special Fund (YUECAIGONG) (2008) No. 126). See the GOC's August 4, 2010, initial questionnaire response at Exhibit 46. The Guang Ya Companies reported that Guangcheng received a grant under this program during the POI.

We determine that the grant issued by the GOC under this program constitutes a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide adequate benefit distribution data for this program. In its initial questionnaire, the GOC provided the amount of grants received by all firms (including Guangcheng) during the POI. It also provided for the POI the amount of grants received by aluminum extrusions producers as well as the total amount of grants issued under the program. However, the GOC did not provide, as requested by the Department, the amounts disbursed to other industries during the POI. In addition, the GOC did not provide, as requested by the Department, information concerning the distribution of benefits provided to firms and industry groups in the three years preceding the POI. See the GOC's August 4, 2010, initial questionnaire response at 104 – 111 and Exhibit 46. Further, the GOC did not provide the requested information concerning the distribution of benefits in its second supplemental questionnaire response. See the GOC's August 19, 2010, second supplemental questionnaire response at 1. As a result, the Department is applying AFA and assuming that the program is specific under section 771(5A)(D) of the Act. Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54315.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.06 percent ad valorem for the Guang Ya Companies.

O. PGOG Science and Technology Bureau Project Fund (Also Referred to as Guangdong Industry, Research, University Cooperating Fund)

Under this program, the PGOG distributes grants to universities and firms to support, among other things, industrial development and innovation in the province. The program is administered by the PGOG's Department of Finance and Department of Science and Technology. See the GOC's August 9, 2010, first supplemental questionnaire response at 41 – 50 and Exhibit Supp-5. The Guang Ya Companies reported that Guang Ya received a grant under this program during the POI.

We determine that the grant issued by the GOC under this program constitutes a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. As explained in the "Various Grant Programs Self-Reported by the Guang Ya Companies" section, the GOC failed to provide benefit distribution data for this program. As a result, the Department is applying AFA and assuming that the program is specific under section 771(5A)(D) of the Act. Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54316.

To calculate the benefit, we divided the amount of the grant by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.03 percent ad valorem for the Guang Ya Companies.

P. PGOG Tax Offset for R&D

Under this program, for R&D expenses incurred for developing new products and technologies that cannot be treated as intangible assets, 50 percent of the R&D expense shall be deducted as a tax offset. For R&D expenses considered intangible assets, the tax offset shall be amortized based on 150 percent of the R&D expenses. The program is administered by the PGOG's Science and Technology Department and the Economic Trade Commission pursuant to the "Trial Administrative Measures for the Pre-Tax Deduction of Enterprises R&D Expenses" (R&D Measures). See the Guang Ya Companies' July 8, 2010, questionnaire response at Exhibit 23. Article 5 of the R&D Measures states that eligible R&D projects:

... shall be in line with national and Guangdong provincial technological policies and industrial policies. Any projects belonging to producer projects, technological projects, or process projects eliminated or restricted by the central or Guangdong provincial government shall not enjoy the policy of additional calculation of R&D expenses.

Id. The Guang Ya Companies reported that Guangcheng received a tax offset under this program during the POI.

We determine that the offset issued by the GOC under this program constitutes a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. Concerning specificity, as noted above in the "Policy Loans to Chinese Aluminum Extrusion Producers" section, we have determined that the GOC and the PGOG have targeted the aluminum extrusions industry for development and assistance in a manner that is specific

under section 771(5A)(D)(i) of the Act, as illustrated in the government plans and directives, to encourage and support the growth and development of the aluminum extrusions industry. Given this finding and in light of the language in Article 5 of the R&D Measures, we determine that the tax offsets provided under this program are de jure specific within the meaning of section 771(5A)(D)(i) of the Act. Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54316.

To calculate the benefit, we divided the amount of the tax offset by the total sales of Guang Ya and Guangcheng in the year of approval/receipt. The grant was less than 0.5 percent of the total sales of Guang Ya and Guangcheng. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.04 percent ad valorem for the Guang Ya Companies.

Q. Refund of Land-Use Tax for Firms Located in the Zhaoqing New and High-Tech Industrial Development Zone (ZHTDZ)

The Zhongya Companies reported that New Zhongya received a one-time refund during the POI of land-use taxes paid to the ZHTDZ local authority in 2007. According to the Zhongya Companies, the ZHTDZ local authority reduced its land-use tax rate from five RMB per square meter to two RMB per square meter. The Zhongya Companies state that receipt of the land-use tax refund was contingent upon New Zhongya's location in the ZHTDZ. See the Zhongya Companies August 6, 2010, supplemental questionnaire response at 27. The Zhongya Companies reported that New Zhongya recorded the tax refund in its "subsidy income" ledger. Id.

We determine that the land-use tax refund received by the Zhongya Companies constitutes a financial contribution, in the form of revenue foregone, and a benefit, equal to the amount of the refund, as described under sections 771(5)(D)(ii) and 771(5)(E) of the Act. Because the tax refund is limited to firms located in the ZHTDZ, we determine that the program is regionally-specific under section 771(5A)(D)(iv) of the Act. Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54316.

To calculate the benefit, we divided the amount of the land-use tax received during the POI by the Zhongya Companies' total sales. On this basis, we calculated a total net subsidy rate of 0.13 percent ad valorem for the Zhongya Companies.

R. Development Assistance Grants from the ZHTDZ Local Authority

The Zhongya Companies reported that New Zhongya received a one-time development assistance grant from the ZHTDZ local authority during the POI. According to the Zhongya Companies, in determining eligibility, the ZHTDZ local authority examines firms' output, tax payments, the level of foreign investment, and whether the firms have received famous brand designation. See the Zhongya Companies' August 6, 2010, supplemental questionnaire response at 17.

We determine that the grant issued by the GOC under this program constitutes a financial contribution under section 771(5)(D)(i) of the Act and a benefit under section 771(5)(E) of the Act. Concerning specificity, as explained above in the "GOC and Sub-Central Government Grants, Loans, and Other Incentives for Development of Famous Brands and China World Top

Brands” section, we have determined that the Famous Brand program is contingent upon export activity and, thus, is specific under section 771(5A)(A) and (B) of the Act. The Zhongya Companies indicate that famous brand designation is among the factors considered when determining eligibility under this program. Section 771(5A)(B) of the Act states that a program shall be deemed an export subsidy if receipt of the subsidy is contingent upon export performance, alone or as one of two or more conditions. Accordingly, because famous brand designation is among the factors the ZHTDZ local authority considers when determining eligibility and because the famous brand designation is contingent upon export activity, we determine that the program is specific under section 771(5A)(A) and (B) of the Act. Our interpretation of section 771(5A)(A) and (B) of the Act in this regard is consistent with the Department’s practice. See, e.g., PC Strand from the PRC Decision Memorandum at “Subsidies for Development of Famous Export Brands and China World Top Brands at Central and Sub-Central Level.” Our findings remain unchanged from the Preliminary Determination. See 75 FR at 54316.

To calculate the benefit, we divided the amount of the grant by the total export sales of the Zhongya Companies in the year of approval/receipt. The grant was less than 0.5 percent of the export sales of the Zhongya Companies. Therefore, pursuant to 19 CFR 351.524(b)(2), we expensed the grant amount to the POI (year of receipt).

On this basis, we calculated a total net subsidy rate of 0.08 percent ad valorem for the Zhongya Companies.

S. Provision of Primary Aluminum for LTAR

In the Preliminary Determination the Department found that producers and suppliers, acting as Chinese government authorities, sold primary aluminum to the Guang Ya Companies and the Zhongya Companies for LTAR. The Guang Ya Companies and the Zhongya Companies reported obtaining primary aluminum during the POI from trading companies as well as directly from primary aluminum producers. In the case of the Zhongya Companies, they were able to identify all of the firms that produced the primary aluminum, even the aluminum purchased from trading companies and the Zhongya Companies identified all of these producers as state-owned. Concerning the Guang Ya Companies, in some instances they were not able to identify the producers of some primary aluminum purchased from trading companies. However, all the producers that the Guang Ya Companies could identify were classified as state-owned by the respondent.

In Tires from the PRC, the Department determined that majority government ownership of an input producer is sufficient to qualify it as an “authority.” See Tires from the PRC Decision Memorandum at “Government Provision of Rubber for Less than Adequate Remuneration.” Because all of the producers identified by the Guang Ya Companies and the Zhongya Companies were state-owned, we determine that these primary aluminum producers are majority-owned and are “authorities” under section 771(5) of the Act. As a result, we determine that primary aluminum supplied by companies deemed to be government authorities constitute a financial contribution in the form of a governmental provision of a good and that the respondents received a benefit to the extent that the price they paid for primary aluminum produced by these suppliers was for LTAR. See sections 771(5)(D)(iv) and 771(5)(E)(iv) of the Act.

In prior CVD proceedings involving the PRC, the Department has determined that when a respondent purchases an input from a trading company or non-producing supplier, a subsidy is

conferred if the producer of the input is an “authority” within the meaning of section 771(5)(B) of the Act and that the price paid by the respondent for the input was sold for LTAR. See, e.g., CWP from the PRC Decision Memorandum at “Hot-Rolled Steel for Less Than Adequate Remuneration;” Racks from the PRC Decision Memorandum at “Provision of Wire Rod for Less than Adequate Remuneration;” and CWASPP from the PRC Decision Memorandum at Comment 5.

As noted above, the Zhongya Companies were able to identify all of the entities that produced the primary aluminum that they acquired through trading companies during the POI. However, for the Guang Ya Companies, their accounting and purchase records and invoices did not allow them to identify all the producers that supplied the trading companies during the POI. See, e.g., Guang Ya Companies Verification Report at 6 – 8.

Because the Guang Ya Companies have not been able to supply the requested information, we find that the necessary information is not on the record and, as a result, we are resorting to the use of FA pursuant to section 776(a)(1) of the Act. In its response, the GOC provided information on the amount of primary aluminum produced by SOEs and private producers in the PRC. Using these data, we derived the ratio of primary aluminum produced by SOEs during the POI. Thus, pursuant to section 776(a)(1) of the Act, we have resorted to the use of FA with regard to the primary aluminum sold to the Guang Ya Companies by certain domestic trading companies. Specifically, we assumed that the percentage of primary aluminum supplied by these domestic trading companies that is produced by government authorities is equal to the ratio of primary aluminum produced by SOEs during the POI.⁸ Regarding this ratio, we note that the GOC classified the CHALCO Aluminum Corporation of China (CHALCO) as a privately-owned primary aluminum producer. However, based on publicly available information, we are treating CHALCO as a GOC authority. See Memorandum to the File, “Factual Information Placed On Record Regarding the Ownership of a Primary Aluminum Producer,” (August 16, 2010) (CHALCO Memorandum). Our use of FA in this regard is consistent with the Department’s practice. See, e.g., CWP from the PRC Decision Memorandum at “Hot-Rolled Steel for Less Than Adequate Remuneration;” see also LWRP from the PRC Decision Memorandum at “Hot-Rolled Steel for Less Than Adequate Remuneration.”

Having addressed the issue of financial contribution, we must next analyze whether the sale of primary aluminum to the mandatory respondents by suppliers designated as government authorities conferred a benefit within the meaning of section 771(5)(E)(iv) of the Act. 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 or services. 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). As we explained in Softwood Lumber from Canada, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation because such prices generally would be expected to reflect most closely the

⁸ In other words, in instances where we are applying FA, we are assuming that the percentage of primary aluminum purchased by domestic trading companies during the POI was equal to the ratio of primary aluminum produced by SOEs during the POI, as indicated by the aggregate data supplied in the questionnaire responses of the GOC.

prevailing market conditions of the purchaser under investigation. See Softwood Lumber from Canada Decision Memorandum at “Market-Based Benchmark” section.

Beginning with tier-one, we must determine whether the prices from actual sales transactions involving Chinese buyers and sellers are significantly distorted. As explained in the Preamble:

Where it is reasonable 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 {tier two} in the hierarchy.

See 63 FR at 65377. The Preamble further recognizes that distortion can occur when the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Id.

In the instant investigation, the GOC reported the total primary aluminum production by SOEs during the POI. The share of production number of these SOEs, after adjustment by the Department, accounted for more than 50 percent of the PRC’s production. See Memorandum to the File from Eric B. Greynolds, Program Manager, “Share of Primary Aluminum Production During Period of Investigation,” (August 30, 2010). We find this majority share by SOEs makes it reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market. See Preamble, 63 FR at 65377. Our finding in this regard is in accord with the Department’s practice. See, e.g., Wire Decking from the PRC Decision Memorandum at “Provision of HRS for LTAR.” In addition, as further evidence of the government’s predominant role in the market, we note that the GOC has imposed export tariffs on two of the three harmonized tariff schedule (HTS) categories that cover primary aluminum. Such export restraints can discourage exports and increase the supply of primary aluminum in the domestic market, with the result that domestic prices are lower than they would be otherwise. See, e.g., Racks from the PRC Decision Memorandum at “Provision of Wire Rod for Less Than Adequate Remuneration.” For these reasons, we determine that domestic prices charged by privately-owned primary aluminum producers based in the PRC may not serve as viable, tier-one benchmark prices. For more discussion of this issue, see Comment 21, below.

The Department has on the record primary aluminum prices, as published by the London Metals Exchange (LME). We find that these prices may serve as a tier-two benchmark, as described under 19 CFR 351.511(a)(2)(ii), when determining whether the Guang Ya Companies and the Zhongya Companies received a benefit on their purchases of primary aluminum from government authorities. Concerning the LME prices, we note that the Department has relied on pricing data from industry publications in prior CVD proceedings involving the PRC. See, e.g., CWP from the PRC Decision Memorandum at “Hot-Rolled Steel for Less Than Adequate Remuneration” section; see also LWRP from the PRC Decision Memorandum at “Hot-Rolled Steel for Less Than Adequate Remuneration” section. As in the Preliminary Determination, we continue to find prices from the LME to be sufficiently reliable and representative for use in the benchmark calculation.

The Zhongya Companies and the Guang Ya Companies reported that they imported primary aluminum. In past cases, the Department has incorporated prices on company-specific imports into the LTAR benchmark, provided that the Department’s analysis indicates that the company-specific import prices are not distorted by the dominance of government production in

the PRC. See, e.g., CWASPP from the PRC Decision Memorandum at “Provision of SSC for LTAR;” see also CWP from the PRC Decision Memorandum at Comment 7.

However, upon further examination, we determine that when the Department has determined that it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, it is not appropriate to utilize company-specific prices as a tier-one benchmark. See Preamble, 63 FR at 65377. We determine that it is reasonable to conclude that the prices of goods that are imported into the domestic market are also significantly distorted as a result of the government’s involvement in the market. Our conclusion in this regard is unchanged from the Preliminary Determination. See 75 FR at 54318.

To determine whether primary aluminum suppliers, acting as government authorities, sold primary aluminum to respondents for LTAR, we compared the prices the respondents paid to the suppliers to our primary aluminum benchmark price. We conducted our comparison on a monthly basis. When conducting the price comparison, we converted the benchmark to the same currency and unit of measure as reported by the voluntary respondents for their purchases of primary aluminum.

Under 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under tier one or tier two, the Department will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Accordingly, in deriving the benchmark prices, we ensured that ocean freight and inland freight were included. Specifically, we included ocean freight pricing data from the Maersk shipping company pertaining to shipments of aluminum, articles of aluminum, and metal products from the port of Busan, South Korea, to Hong Kong. See Petitioners’ August 20, 2010, submission at Exhibit 4. We used this information because it was the only information on the record for ocean freight. Concerning inland freight, we calculated company-specific inland freight rates using cost data supplied by the Guang Ya Companies and the Zhongya Companies. Further, we added to the benchmark the appropriate import duties and the VAT applicable to imports of primary aluminum into the PRC as reported by the GOC. In deriving the benchmark we did not include marine insurance. In prior CVD investigations involving the PRC, the Department has found that while the PRC customs authorities impute an insurance cost on certain imports for purposes of levying duties and compiling statistical data, there is no evidence to suggest that PRC customs authorities require importers to pay insurance charges. See, e.g., PC Strand from the PRC Decision Memorandum at Comment 13. Further, we have not added separate brokerage, handling, and documentation fees to the benchmark because we find that such costs are already reflected in the ocean freight cost from Maersk that is being used in this determination. See Petitioners’ August 20, 2010, submission at Exhibit 4.

Regarding the primary aluminum prices that the respondents paid to government authorities, both the Zhongya Companies and the Guang Ya Companies reported their prices to the Department inclusive of inland freight and indicated the domestic VAT applied to their purchases. Accordingly, when performing our comparison, we included the domestic VAT paid on purchases from government authorities. In this manner, we find the Department has conducted the comparison on an apples-to-apples basis.

Comparing the benchmark unit prices to the unit prices paid by the respondents for primary aluminum, we determine that primary aluminum was provided for LTAR and that a benefit exists in the amount of the difference between the benchmark and what the respondent paid. See section 771(5)(E)(iv) of the Act and 19 CFR 351.511(a).

As noted above in the “Use of Facts Otherwise Available and Adverse Inferences” section, the Guang Ya Companies failed to report in a timely manner a certain volume of primary aluminum that Guangcheng purchased during the POI. As a result of this failure to report the requested information in a timely manner, the Department has determined to apply partial AFA with regard to the primary aluminum purchased by Guangcheng. Specifically, as partial AFA, we have multiplied the single highest unit benefit calculated on Guang Ya’s purchases of primary aluminum under this program by the total volume of primary aluminum purchased by Guangcheng. We then added the benefit on Guangcheng’s purchases to the benefit calculated on the purchases made by Guang Ya. In this manner, we calculated the total benefit for the Guang Ya Companies under this program.

Finally, with respect to specificity, the GOC has provided information on end uses for primary aluminum. The GOC stated that the end uses of primary aluminum relate to the type of industry involved as a direct purchaser of the input. The GOC further stated that the consumption of primary aluminum occurs across a broad range of industries. While numerous companies may comprise the listed industries, section 771(5A)(D)(iii)(I) of the Act clearly directs the Department to conduct its analysis on an industry or enterprise basis. Based on our review of the data and consistent with our past practice, we determine that the industries named by the GOC are limited in number and, hence, the subsidy is specific. See section 771(5A)(D)(iii)(I) of the Act. See LWRP from the PRC Decision Memorandum at Comment 7; see also Racks from the PRC Decision Memorandum at “Provision of Wire Rod for Less Than Adequate Remuneration.”

Our decision to find this program countervailable is unchanged from the Preliminary Determination. See 75 FR at 54317 – 54319.

We find that the GOC’s provision of primary aluminum for LTAR to be a domestic subsidy as described under 19 CFR 351.525(b)(3). Therefore, to calculate the net subsidy rate, we divided the benefit by a denominator comprised of total sales. Regarding the Zhongya Companies, we divided the benefit by the companies’ total sales during the POI. Regarding the Guang Ya Companies, we divided the benefit by combined total sales of Guang Ya and Guangcheng.

On this basis, we calculated a total net subsidy rate of 1.62 percent ad valorem for the Zhongya Companies and 6.06 percent ad valorem for the Guang Ya Companies.

T. Provision of Land-Use Rights and Fee Exemptions To Enterprises Located in the ZHITDZ for LTAR

Petitioners alleged that the PGOG established the ZHITDZ to attract industries encouraged by the GOC, including aluminum extrusion producers. Petitioners allege the PGOG offers to qualifying firms such incentives as reduced requisition compensation costs (i.e., reduced payments to local residents/business displaced by the ZHITDZ’s development), the provision of land for LTAR (in which land-use rights are provided on a sliding scale depending on the size of the development, the firm’s technological development, and the firm’s domestic/international prominence), and discounts on construction application fees, exemptions from administrative fees, and reductions in operational charges.

We initiated an investigation of this program with regard to the Zhongya Companies. In questionnaire responses, the Zhongya Companies reported that New Zhongya signed Land Supply Agreements with the Dawang Sub-Bureau of the Zhaoqing Municipal Bureau of Land

and Resources in 2006. The Zhongya Companies also reported that New Zhongya did not receive any discounts on construction application fees, exemptions from administrative fees, and/or reductions in operational charges during 2009, which is the POI.

In the Post-Prelim Memorandum, we determined that the provision of land-use rights constituted financial contributions in the form of a provision of a good within the meaning of section 771(5)(D)(iii) of the Act.⁹ See Post-Prelim Memorandum at 3. We further found that the provision of land-use rights constitutes a benefit within the meaning of section 771(5)(E)(iv) of the Act to the extent the PGOG provides them for LTAR. Id. Regarding specificity, in the Post-Prelim Memorandum we noted that the PGOG brochure describing the ZHITDZ states that there are preferential policies for land use within the industrial zone. First, the land within the ZHITDZ is state-owned so there is no requisition compensation costs included. Furthermore, we noted that land prices can be lowered according to such factors as industry type, investment volume, and output volume. Id.; see also Petitioners' June 13, 2010, submission at Exhibit 1. In addition, we noted that the PGOG brochure further states that, with regard to land prices, "world top 500 enterprises, internationally or domestically renowned enterprises, high-tech projects as well as other influential projects can be treated individually" and that "land prices can be further lowered upon negotiations between the investor and the management committee." See Post-Prelim Memorandum at 3.

In the Post-Prelim Memorandum, we further explained that New Zhongya received a one-time development assistance grant from the ZHITDZ local authority during the POI and that information from the Zhongya Companies indicates that, in determining New Zhongya's eligibility for the grant, the ZHTDZ local authority examined the firm's output, tax payments, the level of foreign investment, and whether the firms have received famous brand designation. Id.; see also the Zhongya Companies' August 6, 2010, supplemental questionnaire response at 17. Therefore, in the Post-Prelim Memorandum, we concluded that the Land Supply Agreements contract New Zhongya signed with the Dawang Sub-Bureau of the Zhaoqing Municipal Bureau of Land and Resources in 2006 for land located in the ZHITDZ constitute negotiations between New Zhongya and the government authorities managing the ZHITDZ, as described in the PGOG brochure. See Post-Prelim Memorandum at 3. We further concluded that information in the Land Use Contracts confirms a negotiated price different from the published price for land use rights. Therefore, in the Post-Prelim Memorandum, we determined that, the fact that the ZHITDZ local authority provided grants to New Zhongya based on such factors as output and its famous brand designation, New Zhongya also would have met the criteria for receiving preferential land prices as described in the PGOG brochure. Id. On this basis, we determined that the benefits provided under this program are limited to eligible firms located in the ZHITDZ and, thus, are specific under section 771(5A)(D)(iv) of the Act. Id. We have reached the same conclusions in the final determination.

Regarding the various reductions/exemptions of fees allegedly provided under the program, we verified that that New Zhongya did not use these aspects of the program.

To determine whether New Zhongya received a benefit, we have analyzed potential benchmarks in accordance with 19 CFR 351.511(a). First, we look to whether there are market-determined prices (referred to as tier-one prices in the LTAR regulation) within the country. See 19 CFR 351.511(a)(2)(i). In LWS from the PRC, the Department determined that "Chinese land

⁹ The Department determined in LWS from the PRC that the provision of land-use rights constitutes the provision of a good within the meaning of section 771(5)(D)(iii) of the Act. See LWS from the PRC Decision Memorandum at Comment 8.

prices are distorted by the significant government role in the market” and, hence, that tier-one benchmarks do not exist. See, e.g., LWS from the PRC Decision Memorandum at Comment 10. The Department also found that tier-two benchmarks, world market land prices that would be available to purchasers in the PRC, are not appropriate because “they cannot be simultaneously ‘available to an in-country purchaser’ while located and sold out-of-country on the world market.” Id. at “Analysis of Programs – Government Provision of Land for Less Than Adequate Remuneration”; see also 19 CFR 351.511(a)(2)(ii). Because benchmarks were unavailable under the first and second tiers, in LWS from the PRC the Department determined the adequacy of remuneration by reference to tier-three. Id. In LWS from the PRC the Department found, however, that the sale of land-use rights in the PRC was not consistent with market principles because of the overwhelming presence of the government in the land-use rights market and the widespread and documented deviation from the authorized methods of pricing and allocating land. See LWS from the PRC Decision Memorandum at Comment 10; see also 19 CFR 351.511(a)(2)(iii). We determine that, in this investigation, the GOC has submitted no information that questions this analysis.

For these reasons, we are not able to use Chinese or world market prices as a benchmark. Therefore, we are comparing the price that New Zhongya paid for its land-use rights with comparable market-based prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to, but outside of, the PRC. Specifically, we are comparing the price New Zhongya paid in 2006 to the price of certain industrial land in industrial estates, parks, and zones in Thailand in 2006. See LWS from the PRC Decision Memorandum at “Analysis of Programs – Government Provision of Land for Less Than Adequate Remuneration.” In deriving the benchmark, we used, where appropriate updated Thai land price data supplied by the Zhongya Companies. See Comment 24, below.

To calculate the benefit, we computed the amount that New Zhongya would have paid for its land-use rights and subtracted the amount it actually paid for its 2006 purchases under the land-use rights contract. Our comparison indicates that the price New Zhongya paid to the government authority in 2006 was less than our land benchmark price and, thus, that New Zhongya received a benefit under section 771(5)(E)(iv) of the Act. Next, in accordance with 19 CFR 351.524(b)(2), we examined whether the subsidy amount exceeded 0.5 percent of the Zhongya Companies’ total consolidated sales in the year of purchase. Our analysis indicates that the subsidy amount exceeded the 0.5 percent threshold. Therefore, we used the discount rate described under the “Benchmarks and Discount Rates” section to allocate the benefit over the life of the land-use rights contract, which is 50 years.

To calculate the net subsidy rate, we divided the benefit by the Zhongya Companies’ total consolidated sales for the POI, as discussed in the “Attribution of Subsidies” section. On this basis, we calculated a net subsidy rate of 4.97 percent ad valorem for the Zhongya Companies.

U. Provision of Land-Use Rights To Enterprises Located in the South Sanshui Science and Technology Industrial Park for LTAR

Petitioners alleged that the Sanshui District Government (located in Foshan City) provides land to enterprises located in the South Sanshui Science and Technology Industrial Park with preferential prices for land-use rights. The Guang Ya Companies reported that Guangcheng purchased land-use rights in the South Sanshui Science and Technology Industrial Park in 2007.

In the Post-Prelim Memorandum, we determined that the provision of land-use rights for

LTAR under this program constitutes a financial contribution within the meaning of section 771(5)(D)(iii) of the Act and that the provision of land-use rights constitutes a benefit under section 771(5)(E)(iv) of the Act to the extent Foshan City provides them for LTAR. See Post-Prelim Memorandum at 5. Regarding specificity, we noted that documents from the Sanshui District Government (located in Foshan City) indicate that industrial land within the South Sanshui Science and Technology Industrial Park will be offered at preferential prices. See Post-Prelim Memorandum at 5; see also Petitioners' July 28, 2010, submission at Exhibits 6 and 7. Thus, we determined that the benefits provided under this program are limited to firms located in the South Sanshui Science and Technology Industrial Park and, thus, are specific under section 771(5A)(D)(iv) of the Act. See Post-Prelim Memorandum at 5. We have reached the same conclusions in the final determination.

As explained above, we are not able to use Chinese or world market prices as a benchmark. Therefore, we are comparing the price that the Guancheng paid for its land-use rights with comparable market-based prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to, but outside of, the PRC. Specifically, we are comparing the price Guancheng paid in 2007 to the price of certain industrial land in industrial estates, parks, and zones in Thailand in 2007. See LWS from the PRC Decision Memorandum at "Analysis of Programs – Government Provision of Land for Less Than Adequate Remuneration." In deriving the benchmark, we used, where appropriate updated Thai land price data supplied by the Zhongya Companies. See Comment 24, below.

To calculate the benefit, we computed the amount that Guancheng would have paid for its land-use rights and subtracted the amount it actually paid for its 2007 purchases under the program. Our comparison indicates that the price Guancheng paid to the government authority in 2007 was less than our land benchmark price and, thus, that the Guang Ya Companies received a benefit under section 771(5)(E)(iv) of the Act. Next, in accordance with 19 CFR 351.524(b)(2), we examined whether the subsidy amount exceeded 0.5 percent of the Guang Ya companies' total consolidated sales in the year of purchase. Our analysis indicates that the subsidy amount exceeded the 0.5 percent threshold. Therefore, we used the discount rate described under the "Benchmarks and Discount Rates" section to allocate the benefit over the life of the land-use rights contract, which is 50 years.

To calculate the net subsidy rate, we divided the benefit by the Guang Ya Companies' consolidated sales for the POI. On this basis, we calculated a net subsidy rate of 1.80 percent ad valorem for the Guang Ya Companies.

VIII. Program Determined Not to Exist

A. Provision of Electricity for LTAR to Firms Located in the ZHITDZ

Petitioners alleged that the PGOG provides electricity to firms located in the ZHITDZ for LTAR. We initiated an investigation of this program with regard to the Zhongya Companies only. The Zhongya Companies reported that only New Zhongya is located in ZHITDZ and that New Zhongya purchased electricity during the POI. The Guang Ya Companies are not located in the ZHITDZ.

In the Post-Prelim Memorandum, we determined that the program, as alleged, does not exist. See Post-Prelim Memorandum at 6. The allegation in this case is that the PGOG provides electricity at reduced rates inside the zone. However, we verified that firms located in the

ZHITDZ are subject to rates applicable to the East/West Wing Regions of the Guangdong Province, which include the municipalities of Shantaou, Chaozhou, Jieyang, Shanwei, Yangjiang, Zhanjiang, Maoming, Zhaoqing (which includes the ZHITDZ), Yunfu, and Enping of the Jiangmen Municipality. Id. Therefore, we determine that companies in the zone pay the same rate as other companies in the East/West Wing Regions of Guangdong Province. Id. As a result, in the Post-Prelim Memorandum, we determined that there is no program under which electricity is provided for LTAR within the zone. Id. Our finding in this regard remains unchanged from the Post-Prelim Memorandum.

IX. Programs Determined Not to Confer a Benefit During the POI

Regarding programs listed below, benefits from these programs result in net subsidy rates that are less than 0.005 percent ad valorem or constitute benefits that were fully expensed prior to the POI. Consistent with our past practice, we therefore have not included these programs in our net CVD rate calculations. See, e.g., CFS from the PRC Decision Memorandum at “Analysis of Programs, Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE.”

- A. Labor and Social Security Allowance Grants in Sanshui District of Guangdong Province
- B. "Large and Excellent" Enterprises Grant
- C. Advanced Science/Technology Enterprise Grant
- D. Advanced Science/Technology Enterprise Grant
- E. Award for Self-Innovation Brand/Grant for Self-Innovation Brand and Enterprise Listing
- F. Tiaofeng Electric Power Subscription Subsidy Funds
- G. Award for Excellent Enterprise
- H. Export Incentive Payments Characterized as VAT Rebates
- I. PGOG and Foshan City Government Patent and Honor Award Grants
- J. Foshan City Government Technology Renovation and Technology Innovation Special Fund Grants
- K. Nanhai District Grants to State and Provincial Enterprise Technology Centers and Engineering Technology R&D Centers

X. Programs Determined Not to be Used¹⁰

- A. Loans and Interest Subsidies Provided Pursuant to the Northeast Revitalization Program
- B. Provincial Tax Exemptions and Reductions for “Productive” FIEs
- C. Tax Reductions for FIEs Purchasing Chinese-Made Equipment
- D. Tax Reductions for FIEs in Designated Geographic Locations
- E. Tax Reductions for Technology- or Knowledge-Intensive FIEs
- F. Tax Credits for Domestically-Owned Companies Purchasing Chinese-Made Equipment
- G. Tax Reductions for Export-Oriented FIEs
- H. Tax Refunds for Reinvesting of FIE Profits in Export-Oriented Enterprises
- I. Accelerated Depreciation for Enterprises Located in the Northeast Region
- J. Forgiveness of Tax Arrears for Enterprises in the Old Industrial Bases of Northeast China
- K. VAT Rebates on FIE Purchases of Chinese-Made Equipment

¹⁰ In this section we refer to programs determined to be not used by the two voluntary respondent companies.

- L. Exemptions from Administrative Charges for Companies in the ZHTIDZ
- M. The State Key Technology Renovation Project Fund
- N. Grants to Cover Legal Fees in Trade Remedy Cases in Zhenzhen
- O. The Clean Production Technology Fund
- P. Grants for Listing Shares: Liaoyang City (Guangzhou Province), Wenzhou Municipality (Zhejiang Province), and Quanzhou Municipality (Fujian Province)
- Q. The Northeast Region Foreign Trade Development Fund
- R. The Northeast Region Technology Reform Fund
- S. Land Use Rights in the Liaoyang High-Tech Industry Development Zone
- T. Allocated Land Use Rights for SOEs
- U. Tax Refunds for Enterprises Located in the ZHITDZ
- V. Provision of Electricity for LTAR to FIEs Located in the Nanhai District of Foshan City
- W. Nanhai District Grants to High and New Technology Enterprises
- X. Government Provision of Land-Use Rights to Enterprises Located in the Yongji Circular Economic Park for LTAR
- Y. Purchase of Aluminum Extrusions for MTAR

We initiated on a program that alleged that the GOC, by means of the Government Procurement Law and the Indigenous Innovation program, purchases aluminum extrusions for MTAR. In the Preliminary Determination, the GOC, the Guang Ya Companies, and the Zhongya Companies stated that neither the two companies nor their products are listed in government indigenous innovation catalogues. Therefore, we preliminarily determined that the companies did not use the Indigenous Innovation program. See 75 FR at 54319. Based on verified information we continue to find that the Guang Ya Companies and the Zhongya Companies did not use the Indigenous Innovation program. See GOC Verification Report at 12.

In the Preliminary Determination, the Department found that information provided in the questionnaire responses of the Guang Ya Companies and the Zhongya Companies indicated that they may have benefited from the government's purchase of aluminum extrusions under the Procurement Law. See 75 FR at 54319. Thus, in the Preliminary Determination, the Department countervailed the companies' sales of aluminum extrusions that the Department determined were to GOC authorities. Id. Since the Preliminary Determination, the Department has collected additional information from the GOC and the respondent firms regarding the extent to which they sold aluminum extrusions under the Procurement Law during the POI. In light of this additional information, we have revised our findings from the Preliminary Determination.

We verified that the Guang Ya and Zhongya Companies did not sell aluminum extrusions under the Procurement Law during the POI. Therefore, we find this program not used by the Guang Ya and Zhongya Companies. For additional information, see Comment 13, below.

XI. Analysis of Comments

Comment 1: Application of CVD Law to the PRC

Certain importers¹¹ argue that by initiating both an AD and CVD investigation on imports

¹¹ In addition to the GOC, the Guang Ya Companies, and the Zhongya Companies, several additional interested parties submitted case and rebuttal briefs. These parties are: Evergreen Solar, Inc. (Evergreen), the Shower Door,

of aluminum extrusions from the PRC, while continuing to treat the PRC as an NME for purposes of the AD law, the Department disregarded the Court of Appeals for the Federal Circuit's decision in Georgetown Steel and the GPX decisions by the CAFC and CIT, respectively. See Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel); see also GPX International Tire Corp. v. United States, 645 F. Supp. 2d 1231 (CIT 2009) (GPX II), and GPX International Tire Corp. v. United States, 715 F. Supp. 2d 1337 (2010) (GPX III) (collectively, GPX decisions).

Certain importers add that in GPX II, the CIT found that, while the Department may have the authority to apply CVD law to products from NME countries, the Department cannot concurrently apply the AD NME methodology. As such, absent new legislation, the importers argue that the Department may not initiate this or any other CVD investigation against the PRC. Therefore, the Department must terminate this CVD investigation or calculate the AD duties according to market economy methodologies. Certain importers further argue that applying the CVD law to the PRC violates the statutory intent of the Act and the CAFC's decision in Georgetown Steel and the CIT's decision in GPX II. See Georgetown Steel, 801 F.2d at 1308.

Certain importers assert that the Act precludes the Department from concurrently applying the CVD law and AD NME methodology. Specifically, they claim that the exclusion of the term "non-market economy" from sections 701 and 771(5) and (5A) of the Act, combined with the use of that term in other sections, demonstrates that Congress intended to preclude the Department from applying the CVD law concurrently with the AD NME methodology. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (Chevron), and Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997). They state that the absence of the NME term in section 701 of the Act is insufficient to endow the Department with discretion and, because section 771 of the Act sets forth rules and definitions that are applicable to the conduct of both CVD and AD proceedings, it too must be considered.

Certain importers argue that the most significant CVD-specific subsections, 771(5) and (5A) of the Act, contain no reference to NMEs. They state that NMEs are referenced in section 773 of the Act, where there is instruction on the calculation of normal value for AD investigations; however, NMEs are not referenced anywhere in the instructions on the calculation of subsidies for CVD investigations.

They further argue that prior to the shift in practice to applying the CVD law and AD NME methodology concurrently, for two decades following Georgetown Steel, the Department dismissed CVD petitions involving NMEs based on the Federal Circuit's statutory analysis. They cite to the Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 10459 (March 26, 1992); Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China, 57 FR 24018 (June 5, 1992); Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, 58 FR 37217 (July 9, 1993) and the General Issues Appendix attached thereto; and Countervailing Duty,

Tub, and Enclosure Manufacturers Alliance, Eagle Metals Distributors, Inc. (Eagle Metals), Ningbo Yile Import & Export Co., Ltd., Asia Aluminum, MacLean-Fogg Company, Fiskars Brands, Inc., Construction Specialists, North China Aluminum Co., Ltd., RC Respondents (Jiangyin Trust International Inc., COSCO (J.M.) Aluminum Developments Co., Ltd., USA Worldwide Door Components (Pinghu) Co., Ltd., Zhejiang Yongkang Listar Aluminum Industry Co., Ltd., and Floturn Inc. The additional interested parties that submitted case and rebuttal briefs are collectively referred to as the importers.

63 FR at 65377. During this period, they state the Department reasoned that Congress could not have intended for it to apply the CVD law to NMEs. They claim that the Department's express declaration that it was unable to apply the CVD law to NMEs should have evoked some contrary response from Congress if Congress had intended the CVD law to be applicable concurrently with the AD NME methodology. However, they state that Congress adopted the Department's long-standing interpretation of Congressional intent. They note that when Congress enacted the Omnibus Trade and Competitiveness Act of 1988, it was Congress' first opportunity to alter the finding in Georgetown Steel, but that Congress rejected a specific amendment to the law that would have done so. See section 157 of H.R. 3; and H.R. Rep. No. 100-40, pt. 1 at 138 (1987). They add that Congress also chose not to change the law in 1994, when it enacted the URAA. Certain importers assert that by rejecting a change in law, Congress clarified its intent that the Department does not have discretion to apply the CVD law and AD NME methodology concurrently. The Guang Ya Companies assert that this express rejection of an attempt to amend the CVD law does not represent mere Congressional inaction as the Department has previously claimed. See CFS from the PRC Decision Memorandum at Comment 1.

Further, certain importers claim that the Department's previous interpretation of the current CVD law in Sulfanilic Acid from Hungary confirms this interpretation, because the determination was issued after enactment of the new CVD law. See Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002) (Sulfanilic Acid from Hungary), and accompanying Issues and Decision Memorandum (Sulfanilic Acid Decision Memorandum). In that investigation, the Department stated that it could not apply CVD law to an NME country. See Sulfanilic Acid Decision Memorandum at Comment 1. Additionally, the importers assert that the Department's current application of the CVD law to the PRC is also contradicted by the Department's continued failure to accord a PRC industry involved in an AD investigation market-oriented industry status, or to accord a PRC respondent market economy status.

The Guang Ya Companies state court decisions do not support the Department's application of the CVD law to the PRC. The Guang Ya Companies argue that the CIT in GPX II and GPX III squarely ruled against the Department. They add that in GOC v. United States, the CIT did not affirm the Department's proposed application of the CVD law to NME countries nor did it agree with the Department's reasoning in CFS from the PRC, where the Department determined that the Act provides discretion to apply the CVD law when also applying the NME AD methodology in the same country. See Government of the People's Republic of China v. United States, 483 F. Supp. 2d 1274, 1275 (CIT 2007) (GOC v. United States). In that case, the Guang Ya Companies argue the CIT ruled solely that it did not have the jurisdiction to decide the merits of the case. As such, the Guang Ya Companies argue that GOC v. United States is persuasive authority only as it relates to the jurisdictional questions.

The Guang Ya Companies further argue that the CAFC's statutory interpretation in Georgetown Steel confirms that the CVD law cannot be applied concurrently with the AD NME methodology. In Georgetown Steel, they assert the CAFC concluded that under the statutory scheme Congress intended that the AD NME methodology would remedy all unfair trade (CVD and AD) from NME countries, where the court stated:

Congress, however, has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law. Congress intended that any selling by nonmarket economies at

unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply.

Id. at 1316 - 1318.

The Guang Ya Companies additionally argue that, contrary to the Department's claim of discretion under Georgetown Steel, the only discretion the CAFC acknowledged was the "broad discretion to determine the existence of a 'bounty' or 'grant' under the {CVD} law." Id. at 1318. According to the Guang Ya Companies, contrary to the Department's rationale, the discretion to determine the existence of a subsidy is merely discretion exercised in the calculation of subsidies; it is not the discretion to determine whether the CVD law can be applied concurrently with the AD NME methodology.

The GOC argues that in this investigation the Department preliminarily found that there is no way to measure the alleged subsidies to the Chinese aluminum extrusions industry with reference to a market benchmark reflecting actual supply and demand conditions within the PRC and, thus, there is no way of measuring the deviation or misallocation caused by the alleged government intervention. The GOC adds that this contradiction, inherent in the Department's simultaneous conclusion in the AD context that the PRC remains an NME, is why the Federal Circuit held that the AD remedy is the proper method for remedying unfair pricing on goods originating in NMEs.

Petitioners state that the Department acted lawfully in applying the CVD law to the PRC while also applying the AD NME methodology. They argue that the Act requires that the CVD law be applied to all countries, and does not limit application to non-NME countries. Petitioners cite Ad Hoc. Comm. Of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d. 398 (Fed. Cir. 1994) in support of the proposition that, because the AD and CVD law are unambiguous, the Department must give them full effect.

Petitioners argue that, even if the CVD law were ambiguous, Georgetown Steel does not prohibit the application of the CVD law to the PRC. Petitioners claim that the GOC, the Guang Ya Companies, and certain importers misread the meaning of Georgetown Steel, which merely affirmed the Department's decision not to apply the CVD law to certain Soviet-era economies, and did not prohibit the Department from applying the CVD law to all NMEs. They add that Georgetown Steel also interpreted a statute that has since been repealed (*i.e.*, section 303 of the Act, which referenced bounties or grants). They state that the replacement of the term "bounty or grant" with a specific, three-part definition (*i.e.*, financial contribution, benefit, and specificity) provides the Department with new criteria to assess government actions in an NME. Petitioners further argue that the Georgetown Steel Memorandum chronicles the changes in the PRC in the last 20 years that distinguish the PRC from the Soviet-era economies at issue in Georgetown Steel and that Congressional action, which has occurred since Georgetown Steel, highlights Congressional intent to apply the CVD law to the PRC.¹² Specifically, Petitioners argue that the 1994 Uruguay Round Agreements Act (URAA) made clear that the CVD law

¹² See Memorandum from Shana Lee-Alaia and Lawrence Norton to David M. Spooner, Assistant Secretary of Commerce, regarding "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) (Georgetown Steel Memorandum), a public document available at <http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf> and the Department's Central Records Unit at room 7046 of the main Commerce building.

should apply to the PRC; the 2000 Permanent Normal Trade Relations (PNTR) legislation demonstrates Congressional intent to apply the CVD law to the PRC; and the 1988 Trade Act did not indicate Congressional intent to forbid the application of the CVD law to the PRC.

Petitioners argue that the CIT's decisions in GPX II and GPX III were wrongly decided, and that these decisions do not prohibit the simultaneous application of the CVD law to the PRC. Petitioners also note that these decisions are not final.

Department's Position: We disagree with arguments raised by certain importers, the GOC, and the Guang Ya Companies regarding the Department's lack of authority to apply the CVD law to the PRC. The Department's positions on the issues raised are fully explained in multiple cases. See, most recently, Drill Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 76 FR 1971 (January 11, 2011), and accompanying Issues and Decision Memorandum (Drill Pipe from the PRC Decision Memorandum) at Comment 1; see also Coated Paper from the PRC Decision Memorandum at Comment 1; Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 75 FR 57444 (September 21, 2010) (Seamless Pipe from the PRC), and accompanying Issues and Decision Memorandum (Seamless Pipe from the PRC Decision Memorandum) at Comment 1; OCTG from the PRC Decision Memorandum at Comment 1; CFS from the PRC Decision Memorandum at Comment 1; CWP from the PRC Decision Memorandum at Comment 1; LWRP from the PRC Decision Memorandum at Comment 1; OTR from the PRC Decision Memorandum at Comment A.1; LWTP from the PRC Decision Memorandum at Comment 1; and Line Pipe from the PRC Decision Memorandum at Comment 16.

Congress granted the Department the general authority to conduct CVD investigations. See, e.g., sections 701, 771(5), and 771(5A) of the Act. In none of these provisions is the granting of this authority limited only to market economies. For example, the Department is 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." See Carbon Steel Wire Rod from Poland: Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984) (Wire Rod from Poland) and Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) (Wire Rod from Czechoslovakia). 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." See, e.g., Wire Rod from Czechoslovakia, 49 FR at 19373. 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 has eliminated

price controls on most products” See Georgetown Steel Memorandum. 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.

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 prices in the PRC. *Id.* at 4-5. 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. *Id.* at 5. 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. *Id.*

As the Department further 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. *Id.* 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. See Georgetown Steel, 801 F.2d at 1318. 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 those exports, because it could not determine whether that government had bestowed a subsidy (then called a “bounty or grant”) upon them. See, *e.g.*, Wire Rod from Czechoslovakia, 49 FR at 19373. 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.” See Georgetown Steel, 801 F.2d at 1316. 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. *Id.* at 1318. 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.

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, 801 F.2d 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." See GOC v. U.S., 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318). Therefore, contrary to the Guang Ya Companies' argument, the Court declined to find that the Department's investigation of subsidies in the PRC was ultra vires.¹³

The parties' arguments that the intent of Congress is 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 World Trade Organization (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."¹⁴ 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."¹⁵ Congress then expressed its intent that the "United States Government must effectively monitor and

¹³ Id.

¹⁴ See 22 U.S.C. § 6943(a)(1) (emphasis added).

¹⁵ See 22 U.S.C. § 6901(8).

enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO.”¹⁶ In these statutory provisions, Congress is referring, in part, to the PRC's commitment to be bound by the Agreement on Subsidies and Countervailing Measures (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.¹⁷ 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.¹⁸ 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 Application of the CVD Law to Imports from the PRC Violates the APA

The Guang Ya Companies and Evergreen argue that the Department's imposition of CVDs on Chinese imports violates the requirements of the APA, which sets procedures that must be followed when agencies formulate, amend, or repeal a rule.¹⁹ They assert that the Department's change of methodology to apply the CVD law to the PRC falls within the rule-making rubric. Specifically, they state that the Department's previously long-held position that the CVD law does not apply to NMEs meets the APA's definition of a rule as “the whole or part of an agency statement of general or particular applicability and future effects designed to implement, interpret, or prescribe law or policy.”²⁰ In support of their argument that the Department's practice rose to the level of “rule,” they discuss the Department's statements of

¹⁶ See 22 U.S.C. § 6841(5).

¹⁷ See CFS from the PRC Decision Memorandum at Comment 1.

¹⁸ See 22 U.S.C. § 6941(5).

¹⁹ Parties cite to 5 U.S.C. § 553(c) (opportunity to participate in the process) and 5 U.S.C. § 551(5) (providing that rulemaking includes information, amendment, or repeal of a rule).

²⁰ See 5 U.S.C. § 551(4).

legal interpretation regarding the application of CVD law concurrent with the application of the AD NME methodology. They state that on three past occasions the Department issued statements on the imposition of CVD duties against imports from NMEs, following a notice and comment period, and each time found that CVDs could not be imposed against NMEs. Those occasions were: (1) in 1984, the Department adopted its position not to apply the CVD law to NMEs; (2) in the 1993 General Issues Appendix, the Department affirmed its 1984 decision not to apply the CVD law to NMEs; and (3) in 1998, the Department promulgated its CVD regulations confirming that it did not intend to impose CVD duties against NMEs. The Guang Ya Companies note that in the final CVD regulations, the Department decided to codify a final rule on the concept of benefit and, in its definitive interpretation of that term, the Department explained that:

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 (CAFC 1986). We intend to continue to follow this practice.²¹

These parties assert that the Department's treatment of NMEs in the CVD context was a definitive interpretation. As such, they argue that it is not permissible for the Department to apply the CVD law to Chinese imports prior to the final amendment of the applicable rules promulgated through established rulemaking procedures. The Guang Ya Companies and Evergreen add that, although the Department issued a notice to the public on December 15, 2006, regarding the application of the CVD law to imports from the PRC, it never addressed the comments made by the parties as required by the APA.²² Therefore, they assert, because the Department failed to follow the required procedures, the initiation of this investigation was unlawful and should be rescinded.

Petitioners state that importers have failed to establish that the APA applies to CVD proceedings, which are largely investigatory and quasi-adjudicatory in nature. Petitioners discuss that the respondents' arguments are premised on the erroneous conclusion that the Department's prior position regarding the applicability of the CVD law to the PRC constituted a rule that required use of the APA's notice-and-comment procedures. However, as the Department stated in CFS from the PRC, Petitioners note that "the Department's previous policy of non-application of the CVD law to NMEs is not a rule under the APA, but a practice."²³ Petitioners assert that the Department's position was confirmed by the CIT, when it stated:

While Commerce acknowledges that it has a policy or practice of not applying {CVD} law to NMEs ... Commerce has not promulgated a regulation confirming that it will not apply {CVD} 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."²⁴

Petitioners argue that the Department is entitled to change its practice provided that it

²¹ See Preamble, 63 FR at 65360.

²² See Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment, 71 FR 75507 (December 15, 2006).

²³ See CFS from the PRC Decision Memorandum at Comment 2.

²⁴ See GOC v. United States, 483 F. Supp. 2d at 1282 (internal citation omitted).

explains the basis for its change, citing Nat'l Cable & Telecommunications Ass'n v. Brand X, 545 U.S. 967, 981 (2005). Petitioners argue that the Department explained its basis for the change in CFS from the PRC and in the Georgetown Steel Memorandum.

Department's Position: We disagree with arguments that the Department failed to follow the APA procedures. The Department's decision to apply the CVD law to NMEs is not subject to the APA's notice-and-rulemaking procedures because those procedures do not apply to "interpretative rules, general statements of policy or procedure, or practice."²⁵ The Department's position on this issue was fully explained in CFS from the PRC and the respondents have raised no new arguments here. Therefore, we are adopting our analysis in CFS from the PRC for this proceeding, incorporated herein by reference.²⁶

Comment 3: Double Counting

The GOC, the Guang Ya Companies, and certain importers argue that the Department cannot apply the CVD law and the AD NME methodology concurrently because such action results in the unlawful imposition of double remedies on Chinese imports. They argue that the CIT held in GPX II that the Department's current interpretation of the NME AD statute in relation to the CVD statute is unreasonable and the Department must not impose the CVD law on imports from an NME country because its methodologies can result in the imposition of a double remedy. Specifically, the CIT stated:

the Department has a choice. The unfair trade statutes ... give the Department the discretion not to impose CVDs as long as it is using the NME AD methodology. Thus, the Department 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 the Department now seeks to impose CVD remedies on the products of NME countries as well, the Department must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur.²⁷

They state that, on remand in that case, the Department attempted to impose CVD remedies and to offset those CVDs against the respondents' calculated AD cash deposit rate.²⁸ The court, however, held that this approach was unreasonable and noted that with this offset, the combination of the CVD margin and NME AD cash deposit rate will always equal the unaltered NME AD margin and that this renders concurrent CVD and AD investigations unnecessary. The court also held that such an offset does not comply with the statute (section 772 of the Act), which list the specific offsets to export price and constructed export price that are permissible. They note that the Court held that the Department:

must forego the imposition of the countervailing duty law on the nonmarket economy products before the court because its actions on remand clearly demonstrate its inability,

²⁵ See CFS from the PRC Decision Memorandum at Comment 2 (citing 5 U.S.C. § 553(b)(3)(A)).

²⁶ Id.

²⁷ See GPX II, 645 F. Supp. 2d at 1243.

²⁸ See GPX III, 715 F. Supp. 2d at 1343.

at this time, to use improved methodologies to determine whether and to what degree double counting occurs when NME antidumping remedies are imposed on the same good, or to otherwise comply with the unfair trade statutes in this regard.²⁹

Agreeing with the court, the GOC, the Guang Ya Companies, and certain importers assert that the current AD/CVD methodologies as applied to Chinese imports of aluminum extrusions are unfair and effectively punish Chinese companies twice for the same act. They assert that this unfairness comes when the Department offsets an alleged subsidy first by imposing a CVD and then measures dumping by constructing normal value for comparison to U.S. prices by using surrogate values and not actual foreign-market prices. They state that AD NME methodology uses surrogate values to establish a subsidy-free, surrogate normal value and compares this to a subsidized U.S. price. They insist that Department's use of third-country, unsubsidized market surrogate values to measure the respondents' normal value in the parallel AD investigation in this proceeding results in a remedy that fully captures and accounts for any additional domestic subsidy margin found for the respondents in the CVD investigation.

They add that double counting is acute in the aluminum extrusions investigation because the Department is investigating the provision of inputs for LTAR. They discuss that the Department preliminarily calculated CVD margins of 2.36 percent for the Zhongya Companies and 3.07 percent for the Guang Ya Companies for the provision of primary aluminum at LTAR. In the AD investigation, the Department uses a surrogate value for primary aluminum that, by definition, does not include the 2.36 percent or 3.07 percent subsidies. They state that under the Department's current practice, however, the effect of the 2.36 percent or 3.07 percent subsidies is included in the U.S. sales used to calculate the dumping margin. Thus, in the calculation of the AD margin using the NME methodology, the Department captures the effect of the lower price due to subsidized primary aluminum purchases and provides an AD duty to remedy the effect. The result, they assert, is a double remedy for a single, alleged trade-distorting act.

These parties further argue that, as the CIT held in GPX II, due to the potential double counting and the inability of the Department to determine whether and to what degree this double counting is occurring, the Department should not apply the CVD law while also applying an AD NME methodology in the parallel AD case.³⁰ They also argue that the Department, and not the respondents, bears the burden of demonstrating that no double remedy arises through simultaneous application of the CVD law and the AD NME methodology. The GOC and the Guang Ya Companies note that the CIT in GPX II asserted that the Department cannot avoid the double counting issue by placing the burden on the respondents, because there is no way for any respondent to accurately prove what may be occurring.³¹ The GOC adds that the Department's position that there is a burden on the respondents to demonstrate the existence of double counting creates an evidentiary presumption that lacks a lawful or factual basis. The GOC argues that not only has the Department failed to provide the parties in this investigation the required notice of such a presumption and an opportunity to present rebuttal evidence, the presumption itself lacks an economic or legal foundation. The GOC adds that economic principles as well as the Act demonstrate that the application of the Department's NME third-country surrogate value methodology to determine the AD normal value benchmark will always result in a dumping margin calculation that provides a full remedy for any domestic subsidies

²⁹ Id. at 1341 - 1342.

³⁰ See GPX II, 645 F. Supp. 2d at 1243.

³¹ Id.

provided in the exporting country. Therefore, until the Department develops methodologies to address this problem and can demonstrate that no double remedy exists, these parties argue that the Department must terminate this CVD investigation.

Petitioners rebut by stating that the AD and CVD laws address different unfair trade practices and, therefore, their simultaneous application does not result in any double remedy for the same practice. Petitioners argue that AD duties, including those calculated using the NME methodology, are not intended to address subsidies. The purpose of the CVD law is to offset any unfair advantage that foreign governments confer on their producers or exporters. Petitioners contend that Congress did not intend CVDs to reflect the price effects of subsidies on subject merchandise. They state that this fact is evident from the manner in which CVDs are calculated in terms of benefit to the recipient and the Act's instruction that the effects of subsidies are irrelevant to the Department's analysis.³² Petitioners explain that export subsidies constitute the only recognized instance in which one unfair trade process can lead to the imposition of both AD and CVDs. They add, however, that Congress provided Section 772(c)(1)(C) of the Act to address this situation by requiring an upward adjustment to export price or constructed export price in the amount of the export subsidies received. Petitioners contend that in all other instances the company or government practices underlying AD and CVDs are distinct, as are the remedies.

Petitioners also discuss that as a precondition to joining the WTO, the PRC agreed to be subject to both AD and CVDs. Specifically, they note that the PRC agreed, in the Accession Protocol, to be subject to (1) AD methodologies not based on a strict comparison with domestic prices or costs in the PRC, and (2) CVD methodologies with the possibility that prevailing terms and conditions in the PRC may not always be available as appropriate benchmarks.

Petitioners argue that the parties are mistaken when they argue that double remedy must be presumed and that the parties have failed to make any such showing in this investigation. Petitioners state that the parties' arguments are predicated on two assumptions: (1) the PRC domestic subsidies always result in lower export prices and (2) Chinese domestic subsidies never lower normal value. Petitioners respond that the record lacks any evidentiary support for either assumption, and neither is supported by economic theory. Petitioners state that domestic subsidies can be used for any number of purposes and thus do not necessarily have any impact on pricing. Petitioners also state that certain types of subsidies would lower dumping margins for companies located in an NME country, such as a subsidy used to improve production processes that would reduce a company's consumption factors of production per unit of production output. Petitioners explain that a subsidy used for such a purpose would reduce labor hours, electricity usage, and raw material usage. Further, Petitioners state that, to the extent that domestic subsidies do lower export prices, they do so for all markets, not just the United States. Therefore, a reduction in the world price for aluminum extrusions would lower profit ratios for surrogate producers in India. Petitioners add that lower prices in India would depress prices paid for inputs which would, in turn, lower surrogate values for inputs.

Department's Position: We disagree with the GOC, the Guang Ya Companies, and certain importers that the Department cannot apply the CVD law and the AD NME methodology concurrently because such action might result in the unlawful imposition of double remedies. First, the parties' reliance on the GPX decisions is misplaced because those decisions are not

³² See Section 771(5)(C) and (E) of the Act; and Kiswok Industries Pvt. Ltd. v. United States, 28 CIT 774, 783 (2004) (holding that the secondary tax consequences of a subsidy are irrelevant).

final and conclusive as a final order has not been issued and all appellate rights have not been exhausted. Second, the parties have not cited to any statutory authority for not imposing CVDs so as to avoid the alleged double remedies or for making 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 the AD investigation. We note that this position is consistent with the Department's decisions in recent PRC CVD cases.³³

Comment 4: Cutoff Date for Identifying Subsidies

The GOC and the Guang Ya Companies argue that the Department's use of December 11, 2001, as the cutoff date for measuring countervailable subsidies is incorrect. They assert that the cutoff date should be January 1, 2005, the beginning of the POI in CFS from the PRC. They state that the preliminary determination in CFS from the PRC was the first occasion on which the Department claimed that the CVD law was applicable to the PRC. Therefore, they argue that any date prior to January 1, 2005 would subject Chinese exports to the CVD law before the PRC had a reasonable expectation that the CVD law applied.

They further state that the Department's use of December 11, 2001, conflicts with its past practice of applying the CVD law only after finding that a country is no longer an NME. They note that when Sulfanilic Acid from Hungary was published, the Department's determination that Hungary was no longer an NME coincided with the determination that Hungary was subject to the CVD law, thereby setting a clear cutoff date for the application of the CVD law. See Sulfanilic Acid Decision Memorandum at Comment 1. The GOC adds that in the Preamble to the final CVD regulations, the Department states that 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." See Preamble, 63 FR at 65360.

The GOC further states that the CIT has found that the Department's adoption of a December 11, 2001, cutoff date was arbitrary and unsupported by substantial evidence.³⁴ In GPX II, the GOC notes that the CIT suggested that no uniform cutoff date is appropriate in PRC CVD cases.³⁵ Therefore, the GOC argues that the cutoff date must be consistent with the Department's practice and policy of not countervailing subsidies until the country has graduated to market economy status. The GOC asserts that that Department graduated the PRC to market economy status when it made its decision to apply the CVD law to the PRC in CFS from the PRC, which had a POI beginning January 1, 2005.

Petitioners argue that the Department should apply its standard allocation methodology and identify and measure all subsidies bestowed on subject merchandise using the 12-year AUL. Petitioners assert that this approach is consistent with the CIT's decision in GPX II, where the court stated:

Commerce's use of a cut-off date was unsupported by substantial evidence, and the court remands to Commerce to determine the existence of countervailable subsidies based on

³³ See, e.g., Drill Pipe from the PRC Decision Memorandum at Comment 4; Coated Graphic Paper from the PRC Decision Memorandum at Comment 3; Seamless Pipe from the PRC Decision Memorandum at Comment 3; and OCTG from the PRC Decision Memorandum at Comment 2.

³⁴ See GPX II, 645 F. Supp. 2d at 1246.

³⁵ Id.

the specific facts for each subsidy, rather than by examining those subsidies found after an arbitrary cut-off date.³⁶

In rebuttal, Evergreen argues that both the Department's cutoff date of December 11, 2001, and Petitioners' proposed cutoff date of 12 years prior to the investigation are unlawful. Evergreen states that using the December 11, 2001 cutoff dates ignores the fundamental requirement of due process and fairness. Evergreen asserts that the Department acknowledged those requirements in Sulfanilic Acid from Hungary, where the Department stated:

In Georgetown Steel, the CAFC held that the CVD provisions of the Act do not apply to subsidies granted by NME countries. Such dramatic changes in well-settled expectations should apply only prospectively, and should not go back in time.³⁷

Evergreen also states that the Georgetown Steel Memorandum, issued in connection with the preliminary determination in CFS from the PRC, is limited to analysis of economic and market conditions in "present-day" PRC, or, at most, for the POI in that case, which began on January 1, 2005. Evergreen contends that the memorandum contains no analysis of the PRC's market economy conditions for any prior period, nor is there any record evidence that supports the Department's determination to use a cutoff date of December 11, 2001. Evergreen further argues that a cutoff date prior to 2005 is incompatible with the Department's assessment that the PRC was far from completing its transition to market economy by 2005, as demonstrated in the Lined Paper NME Memorandum,³⁸ issued in Certain Lined Paper Products from the PRC.³⁹ As such, Evergreen asserts that, based on the analysis in the Lined Paper NME Memorandum, the Department should use a cutoff date no earlier than January 1, 2005.

Department's Position: Consistent with recent PRC CVD determinations,⁴⁰ we continue to find that it is appropriate and desirable to identify a uniform date from which the Department will identify and measure subsidies in the PRC for purposes of the CVD law, and have adopted December 11, 2001, the date on which the PRC became a member of the WTO, as that date.

We have selected December 11, 2001, because of the reforms in the PRC's economy in the years leading up to that country's WTO accession and the linkage between those reforms and the PRC's WTO membership.⁴¹ The changes in the PRC's economy that were brought about by those reforms permit the Department to determine whether countervailable subsidies were being bestowed on Chinese producers. For example, the GOC eliminated price controls on most products; since the 1990s, the GOC has allowed the development of a private industrial sector; and in 1997, the GOC abolished the mandatory credit plan. Additionally, the PRC's Accession

³⁶ See GPX II, 645 F. Supp. 2d at 1250.

³⁷ See Sulfanilic Acid from Hungary Decision Memorandum at 8, 14.

³⁸ See Memorandum from Shana Lee-Alaia, Lawrence Norton, and Anthony Hill to David M. Spooner, Assistant Secretary, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China – China's Status as a Non-Market Economy, August 30, 2006 (Lined Paper from the PRC NME Memorandum).

³⁹ See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006).

⁴⁰ See, e.g., Drill Pipe from the PRC Decision Memorandum at Comment 4; Coated Paper from the PRC Decision Memorandum at Comment 4; Seamless Pipe from the PRC Decision Memorandum at Comment 4; and OCTG from the PRC Decision Memorandum at Comment 3.

⁴¹ See Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (October 1, 2001).

Protocol contemplates application of the CVD law. While the Accession Protocol, in itself, would not preclude application of the CVD law prior to the date of accession, the Protocol's language in Article 15(b) regarding benchmarks for measuring subsidies and the PRC's assumption of obligations with respect to subsidies provide support for the notion that the PRC economy had reached the stage where subsidies and disciplines on subsidies (e.g., CVDs) were meaningful.

We disagree that adoption of the December 11, 2001, date is unfair because parties did not have adequate notice that the CVD law would be applied to the PRC prior to January 1, 2005 (the start of the POI in the investigation of CFS from the PRC). Initiation of CVD investigations against imports from the PRC and possible imposition of duties was not a settled matter even before the December 11, 2001, date. For example, in 1992, the Department initiated a CVD investigation on lug nuts from the PRC. See 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). In 2000, Congress passed PNTR Legislation (as discussed in Comment 1) which 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."⁴² Thus, the GOC and importers, such as Evergreen, were on notice that CVDs were possible well before January 1, 2005.

We further disagree that Sulfanilic Acid from Hungary is controlling in this case. The Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will reexamine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that country.

Additionally, with regard to Petitioners' argument that subsidies granted prior to the cut-off date should be included in this investigation, we first do not find Petitioners' reliance on GPX II to be persuasive because the decision is not final and conclusive. We also reiterate that economic changes that occurred leading up to and at the time of WTO accession allow us to identify or measure countervailable subsidies bestowed upon Chinese producers. In this regard, the Department is not providing the PRC with preferential treatment. The Department is simply acknowledging its ability to identify and measure subsidies as of December 11, 2001, based on economic conditions in the PRC. Therefore, the Department is fully within its authority in not applying the CVD law to the PRC prior to December 11, 2001.⁴³

As such, for the above reasons and consistent with CWP from the PRC, as well as other recent PRC CVD cases, the Department finds that it can determine whether the GOC has bestowed countervailable subsidies on Chinese producers from the date of the PRC's WTO accession.⁴⁴

Comment 5: Whether the Guang Ya Companies Inaccurately Reported Their Affiliates Thereby Warranting the Application of AFA

Petitioners contend that the Guang Ya Companies failed to provide necessary information in their initial questionnaire response concerning their affiliated producers and exporters of

⁴² See 22 U.S.C. § 6943(a)(1) (emphasis added).

⁴³ See Georgetown Steel, 801 F.2d at 1318.

⁴⁴ See, e.g., CWP from the PRC Decision Memorandum at Comment 2.

subject merchandise. Petitioners assert that the Guang Ya Companies' failure to report affiliated entities is problematic, particularly because they refused to provide a questionnaire response from a certain affiliated company that, according to Petitioners, specialized in the fabrication of aluminum parts.⁴⁵ See Guang Ya Companies Verification Report at 4. Petitioners argue that the record contains evidence including a publicly available internet profile that confirms their assertions. See Petitioners' August 18, 2010, submission at Exhibit 4.

Petitioners argue that this entity should have provided the Department with a full questionnaire response, allowing the possibility for follow-up questions through supplemental questionnaires. Petitioners conclude that given these facts, the Department should reject the incomplete voluntary questionnaire response of the Guang Ya Companies and apply total AFA. Petitioners cite to other determinations in which the Department applied AFA where respondent companies provided incomplete information about affiliates, such as Coated Paper from the PRC Decision Memorandum at Comment 31 and Seamless Pipe from the PRC Decision Memorandum at Comment 22.

The Guang Ya Companies argue that the Department should not collapse the Guang Ya Companies with various other companies due to the fact that their shareholders have family members that hold shares in other aluminum extrusion producers. The Guang Ya Companies claim that the record of this case demonstrates that there is no common ownership among any of the sibling-related companies. Neither the majority shareholder of the Guang Ya Companies, nor his/her spouse or child has any ownership interest in any of the other companies in which his siblings are alleged to have an interest, nor do the siblings have any ownership interest in any of the Guang Ya Companies. See the Guang Ya Companies' August 9, 2010, First Supplemental questionnaire response at 1-6; see also Guang Ya Companies Verification Report at 4-5.

Second, according to the Guang Ya Companies, the record demonstrates that there are no managerial employees or board members of any of the sibling-related companies working as managers or sitting on the board of directors of another of the sibling-related companies. Furthermore, the Guang Ya Companies assert that there were no intertwined operations among the sibling-related companies, no sharing of sales information, no involvement in production and pricing decisions, and no sharing of facilities or employees among the sibling-related companies. The Guang Ya Companies argue that there is no record of any significant transactions among the sibling-related companies. See Guang Ya Companies Verification Report at 4-5.

The Guang Ya Companies argue that the record and the Department's verification findings demonstrate that the companies are operated completely independently and that the Department should continue to find that the sibling-related firms should not be collapsed into a single entity for purposes of the Department's analysis. Accordingly, the Guang Ya Companies argue that the existence of the sibling relationships among the shareholders of other aluminum extrusion producers or exporters should not impinge on the Guang Ya Companies' participation in the Department's investigation or its analysis of the exporters in the Guang Ya Companies.

The Guang Ya Companies disagree with Petitioners' assertion that the Department should use "total AFA" because of Guang Ya's previous relationship with a smaller former affiliate. The Guang Ya Companies state that, in 2008, the Guang Ya Companies formed a company to perform downstream value-added processing using Guang Ya's products. The business did not go well because the new company could not provide the needed quality at an acceptable price. See The Guang Ya Companies October 28, 2010, Fifth Supplemental Response at 3. Late in 2008, after just a few months, the Guang Ya Companies ceased doing

⁴⁵ The name of the affiliated company is proprietary.

business with it and decided to sell. In November 2009, they sold to two individuals who are unrelated to any Guang Ya Companies group owner or manager. See the Guang Ya Companies' October 15, 2010, questionnaire response at 6-7 and Exhibit. 96. Thus, according to the Guang Ya Companies, this company has not had any active role in the Guang Ya Companies' business since 2008, and was completely removed from the Guang Ya Companies by November 2009. See the Guang Ya Companies' October 28, 2010 Supplemental questionnaire response at 3-4.

The Guang Ya Companies dispute Petitioners' assertion that they "refused to provide a questionnaire response" from the company in question. The Guang Ya Companies state that at the time of the filing of the petition, and at all times since, the Guang Ya Companies have had no relationship with the company: no common ownership, no operations or commercial transactions, and no familial ties.

Additionally, the Guang Ya Companies argue that they have formally requested the company to respond to the Department's CVD questionnaire, and provided a translated copy of the questionnaire. They offered to send their own lawyers to assist it in responding, at the Guang Ya Companies' expense. The company refused to provide any cooperation. See the Guang Ya Companies' October 28, 2010 Supplemental questionnaire response at Exhibit 101. Therefore the Guang Ya Companies believe that Petitioners' claim that the Guang Ya Companies refused to cooperate or otherwise impeded the investigation by refusing to provide a questionnaire response is false.

The Guang Ya Companies also dispute Petitioners' reliance on a website that, according to the Guang Ya Companies, has long been out of date and is no longer being updated. Furthermore, the Guang Ya Companies have requested that the company no longer represent itself publicly as affiliated with the Guang Ya Companies. See the Guang Ya Companies' October 15, 2010, questionnaire response at 7 and Exhibit 100.

Thus, the Guang Ya Companies contend the refusal of its former affiliate to cooperate was entirely outside their control. Since the Guang Ya Companies and the company in question are no longer affiliated, and have not been affiliated at any time since before the filing of the petition, the Guang Ya Companies argue that the Department could not possibly apply any adverse inferences, much less total AFA, because of the former affiliate's non-participation. The Guang Ya Companies assert that this is true even if it is recognized as an interested party to the investigation who had an independent obligation to cooperation. The Guang Ya Companies cite to the CIT's decision in SKF USA Inc. v. United States, 675 F. Supp. 2d 1264, 1276 (CIT 2009) (SKF), in which the CIT held that:

Allowing an interested party's failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding, about whom Commerce did not make a finding of non-cooperation, violates the Department's obligation to treat fairly every participant in an administrative proceeding. As is any government agency, Commerce is under a duty to accord fairness to the parties that appear before it. Although 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon another interested party's failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness.

Thus the Guang Ya Companies argue there is no justification for Petitioners' suggestion that the absence of a former affiliated company from this investigation requires that the Department

should “reject” the Guang Ya Companies’ entire response, and “apply total AFA.”

Department’s Position: As explained above in the “Mutual Affiliation and Cross-Ownership Between Guang Ya Companies, Zhongya Companies, and Other Aluminum Extrusions Producers” section, we determine that cross-ownership, as defined under 19 CFR 351.525(b)(6)(vi), does not exist amongst the Guang Ya Companies, the Zhongya Companies, or Asia Aluminum.

We also disagree with Petitioners’ argument that the Department should apply AFA to the Guang Ya Companies due to their failure to provide a questionnaire response from a certain affiliate that specialized in the fabrication of aluminum parts. As indicated in the initial questionnaire, the Department requires respondents to provide complete questionnaire responses for affiliates where cross-ownership exists and:

1. the affiliate produces the subject merchandise; or
2. the affiliate is a holding company or a parent company (with its own operations) of your company; or
3. the affiliate supplies an input product to you that is primarily dedicated to the production of the subject merchandise.

See the Department’s May 18, 2010, Initial Questionnaire at III-1 and III-2. While there was ownership of the affiliate during the POI, the Department confirmed at verification that the affiliate in question did not meet any of the additional three criteria specified above that would have required the affiliate to submit a response to the initial questionnaire. See Guang Ya Companies Verification Report at 4. In particular, the Department confirmed that the affiliate in question did not produce subject merchandise or supply an input to the Guang Ya Companies that was dedicated to the production of subject merchandise during the POI. Id. at 4. Furthermore, we find that the Guang Ya Companies provided complete information regarding cross-ownership and corporate structure of the Guang Ya Companies and the affiliated company, and therefore cooperated fully in this regard. Therefore, we find that the application of AFA to the Guang Ya Companies is not warranted. Further, we find that this case is distinguishable from those cited by Petitioners. For instance, in Seamless Pipe from the PRC the respondent did not provide information concerning the cross-owned holding companies, failed to provide necessary information concerning the relationship between the respondents and holding companies by the applicable deadline, and the Department was unable to verify this information. See Seamless Pipe from the PRC Decision Memorandum at Comment 22.

Comment 6: Whether the Zhongya Companies Failed to Report Their Affiliates Thereby Warranting the Application of AFA

Petitioners argue that, despite the Department’s standard instructions in the original questionnaire to disclose all affiliated companies, the Zhongya Companies have failed to provide complete information about affiliated companies, both manufacturers of aluminum extrusion and cross-owned input suppliers. They offer as an example the absence of a questionnaire response from Foshan Nanhai Dali Zhongya Aluminum Co., Ltd. (Foshan Nanhai), although the Zhongya Companies eventually identified this company as the owner’s, Mr. Kwong, previous factory.

They argue that Foshan Nanhai produced subject merchandise during the allocation period and should be considered cross-owned with the Zhongya Companies. They also argue that Foshan Nanhai produced all of the subject merchandise that the Zhongya Companies exported in 2007 and that assets moved between the two companies. They argue that the Zhongya Companies' website even refers to its previous factory. Petitioners further argue that the owners do not treat the firms as separate entities, noting that a GOC official attested at verification that New Zhongya moved its productive assets from its former location in the Nanhai District of Foshan.

Petitioners contend that, in the absence of complete information from this entity, the Department cannot calculate an accurate subsidy rate for the Zhongya Companies. Petitioners argue that, in other determinations, the Department has applied AFA when a respondent has not provided information on affiliates, including affiliates that hold ownership in the respondent companies, since December 2001. See, e.g., Seamless Pipe from the PRC Decision Memorandum at Comment 22. Petitioners argue that the Department is confronted with a similar set of facts here and should apply AFA.

The Zhongya Companies argue that Petitioners fail to demonstrate that Foshan Nanhai should have provided a response to the Department's questionnaire per the standard for cross-owned companies. With regard to the statement made by a government official at the verification of the GOC's responses that "New Zhongya moved its productive assets from its former location in the Nanhai District of Foshan," they argue that New Zhongya purchased water supply systems and air conditioners from Foshan Nanhai, but did not purchase production equipment. See GOC Verification Report at 15. They contend that the verification report does not indicate any follow-up with regard to the government official's statement, nor was there a reason for follow-up, because this statement does not indicate that production equipment was purchased from Foshan Nanhai.

Department's Position: We disagree with Petitioners that the Department should apply facts available and adverse inferences with regard to the Zhongya Companies due to a failure to provide questionnaire responses from affiliated companies. We determine that there is no evidence on the record of this investigation that warrants a determination that any of the Zhongya Companies are cross-owned with certain other companies or with Foshan Nanhai specifically. We therefore determine the Zhongya Companies did not neglect to provide required questionnaire responses for any other companies and that the use of facts available or adverse inferences with regard to Petitioners' argument to the contrary is not warranted. As indicated above, the initial questionnaire instructs respondents to provide complete questionnaire responses for affiliates only where cross-ownership exists and where one of three certain conditions apply. See the Department's May 18, 2010, Initial Questionnaire at III-1 and III-2.

The Zhongya Companies reported that New Zhongya has three cross-owned companies, Zhongya HK, Karlton, and Alumizonia Inc., but did not provide any additional responses to our May 18, 2010, Initial Questionnaire regarding these firms. See the Zhongya Companies July 9, 2010, initial questionnaire response at III-1 through III-2 and Exhibit 1. They reported that each is incorporated and registered outside of the PRC and therefore, is not eligible for any subsidies from the PRC. Id. We accept this explanation, because, consistent with practice, the Department will not attribute subsidies to a company that is incorporated and registered outside the PRC, and so could not receive subsidies from the PRC. See, e.g., CWASPP from the PRC Decision Memorandum at "Cross-Ownership and Subsidy Attribution" section.

At verification, we reviewed the relationships between the Zhongya Companies and other companies. See Zhongya Companies Verification Report at 2 and 3. As explained above in the “Mutual Affiliation and Cross-Ownership Between Guang Ya Companies, Zhongya Companies, and Other Aluminum Extrusions Producers” section, we determine that cross-ownership, as defined under 19 CFR 351.525(b)(6)(vi), does not exist amongst the Guang Ya Companies, Zhongya Companies, or Asia Aluminum.

We also determine that the Zhongya Companies are not cross-owned with other companies. First, the Zhongya Companies did not identify Da Yang Aluminum Co. Ltd. and Xinyu Aluminum & Stainless Steel Product Co., Ltd. as cross-owned companies and did not provide questionnaire responses for these two companies. However, in response to the Department’s request, the Zhongya Companies reported the names of owners of these two companies, identifying them as brothers and sisters of a shareholder of Zhongya HK. See the Zhongya Companies’ July 9, 2010, initial questionnaire response at III-1 and the Zhongya Companies’ August 6, 2010, supplemental questionnaire response at 3-5. At verification, we reviewed the relationships between the owners and directors the Zhongya Companies and several other companies, including these two companies. See Zhongya Companies Verification Report at 3. As discussed above, while these companies are affiliated under Section 771(33) of the Act, we do not find that the standard for cross-ownership exists under 19 CFR 351.525(b)(6)(vi). Based upon the results of verification and the information on the record, we determine that there nothing on the record to warrant a determination of cross-ownership between either of these two companies and any of the Zhongya Companies.

In addition, the Zhongya Companies did not identify Foshan Nanhai as a cross-owned company. In response to a request by the Department, the Zhongya Companies provided ownership information for this company. This information indicates that the company is not owned by any of the owners of the Zhongya Companies. See the Zhongya Companies’ August 6, 2010, supplemental questionnaire response at 8. In addition, in response to questions by the Department, the Zhongya Companies described the business dealings between the Zhongya Companies and Foshan Nanhai. Id. 6, 8 – 9; see also the Zhongya Companies’ October 13, 2010, supplemental questionnaire response at 6 – 7. Upon review of this information (which is business proprietary), we did not find any evidence that a transfer of subsidies occurred between the companies or any evidence that the Zhongya Companies had the ability to direct the assets of Foshan Nanhai or vice versa. Id.; see also Zhongya Companies Verification Report at 3 in which no reference is made to Foshan Nanhai. Based on the information reported by the Zhongya Companies, we determine that there is no information on the record to warrant a determination of “cross-ownership” between Foshan Nanhai and any of the Zhongya Companies.

We disagree that Seamless Pipe from the PRC provides a relevant precedent for applying AFA to the Zhongya Companies. In Seamless Pipe from the PRC, the Department applied AFA to a respondent because it refused to provide a questionnaire response for a cross-owned company that was also its parent company. Seamless Pipe from the PRC Decision Memorandum at Comment 22. Thus, in Seamless Pipe from the PRC, the Department was dealing with a scenario in which the respondent and its parent company met the conditions requiring the submission of a response to the initial questionnaire. As stated above, we find that the facts concerning the Zhongya Companies and Foshan Nanhai did not meet such conditions.

Comment 7: Whether the AFA Calculation is Accurate and Reasonable

Certain importers argue that the AFA rate calculation from the Preliminary Determination was improperly calculated. They argue that the Department did not follow its practice of selecting, as AFA, the highest calculated rate in any segment of the proceeding because there are subsidy rates attributed to the AFA rate for programs that neither of the voluntary respondents used. They also argue that the rate selected as AFA is much higher than the rate established for either of the two voluntary respondents. Certain importers further argue that the Department has improperly found a benefit for programs which could not co-exist for the same producer or exporter. As an example, they point to the VAT Rebates on FIEs' Purchases of Chinese-Made Equipment and Income Tax Credits for Domestically-Owned Companies Purchasing Chinese-Made Equipment programs. The importers argue the inclusion of both of these programs in the AFA/all others rate constitutes a ministerial error because the two programs could never coexist at the same time for the same entity. They contend an entity is either a domestically-owned entity or an FIE, not both. In addition, the importers argue that the Department erred in the Preliminary Determination when it countervailed multiple grant programs in multiple geographic locations, notwithstanding the fact that there is no evidence of any kind that the non-cooperative respondents that are located in the regions in which the grants are disbursed.

Lastly, certain importers argue that the AFA rate from the Preliminary Determination is unreasonably distortive, detached from commercial reality, and cannot be corroborated. Certain importers contend that, if the Department uses the mandatory respondents' AFA rate in the calculation of the all others rate, it must calculate a reasonably accurate AFA rate. The importers argue that in Gallant Ocean the CAFC determined that an AFA rate must be a "reasonable estimate of respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance" and that the Department "may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." See Gallant Ocean (Thailand) Co., Ltd. v. United States, 602 F.3d 1319, 1321 (CAFC 2010) (Gallant Ocean). Certain importers argue that, in that case, the CAFC found that a rate which was over five times the highest rate was excessive, and that the AFA rate/all others rate in this case is 13 times that of the highest calculated rate.

Petitioners contest the importers' claims that the Department erred in the Preliminary Determination when it included both the VAT Rebates on FIEs' Purchases of Chinese-Made Equipment and Income Tax Credits for Domestically-Owned Companies Purchasing Chinese-Made Equipment programs in the AFA/all others rate calculation. Petitioners note that FIEs need only 25 percent foreign ownership and, thus, a wholly-owned PRC-based company can own a controlling share of an FIE subsidiary and still be eligible for programs targeting both PRC-based companies and FIEs. Petitioners also challenge the importers' claim that the Department improperly assumed that firms in the PRC could have operations in multiple jurisdictions and, therefore, benefit from subsidy programs available in more than one location. They argue that, absent verified information that a company was not eligible for a program the Department should continue to include all of the subsidy programs alleged in the petition in its AFA/all other rate calculation.

Petitioners argue that the Department must update the AFA rate with regard to the Policy Loans for Aluminum Extrusion Producers program. They explain that in the Preliminary Determination, the Department assigned as AFA a net subsidy rate of 8.31 percent ad valorem

for the policy lending program (calculated in LWTP from the PRC) which the Department stated was the highest non-de minimis subsidy rate calculated for any loan program in a prior CVD proceeding involving the PRC. See Preliminary Determination, 75 FR at 54306. However, Petitioners note that the Department has since calculated a net subsidy rate for policy lending that exceeds the 8.31 percent ad valorem AFA rate assigned in the Preliminary Determination. See Coated Graphic Paper from the PRC Order, in which the Department calculated a net subsidy rate of 10.54 percent ad valorem for a policy lending program.

Petitioners further argue that the Department used the 8.31 percent ad valorem subsidy rate for policy loans from LWTP from the PRC as a plug for certain grant programs for which it lacked a calculated rate from a matching grant program. They argue that for such grant programs, the Department should instead use the 10.54 percent ad valorem net subsidy rate calculated for policy loans in Coated Graphic Paper from the PRC Order.

Petitioners also take issue with the AFA rate assigned to the provision of primary aluminum for LTAR program. In the Preliminary Determination, the Department assigned an AFA rate of 2.55 percent ad valorem. See 75 FR at 54306, referencing OCTG from the PRC Decision Memorandum at “Subsidies Provided in the TBNA and Tianjin Economic and Technical Development Area.” Petitioners argue that for the provision of primary aluminum for LTAR program, the Department should have instead assigned as AFA a net subsidy rate of 44.91 percent ad valorem calculated for the provision of Hot-Rolled Steel for LTAR program in Amended CWP from the PRC. See 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, 42546 (July 22, 2008) (CWP from the PRC Order). Petitioners note that the Department applied the 44.91 percent ad valorem rate from CWP from the PRC Order when assigning an AFA rate for the provision of zinc for LTAR program in Wire Decking from the PRC. See Wire Decking from the PRC Decision Memorandum at “Use of Facts Otherwise Available and Adverse Inferences.” Petitioners add that the 44.91 percent ad valorem rate is appropriate for use as an AFA plug for the provision of primary aluminum for LTAR program because it represents the highest calculated subsidy rate for any program otherwise listed, which could have been used by the non-cooperative companies. See Preliminary Determination, 75 FR at 53406.

Regarding the purchase of aluminum extrusions for MTAR program, Petitioners argue that the Department erred when it assigned to the program an AFA rate of 8.31 percent ad valorem from LWTP from the PRC. They argue the Department should have instead assigned an AFA rate of 44.91 percent ad valorem from CWP from the PRC Order because it represents the highest calculated subsidy rate for any program otherwise listed, which could have been used by the non-cooperative companies. See Preliminary Determination, 75 FR at 53406. In the event the Department forgoes the use of the 44.91 percent rate, Petitioners argue the Department should assign as AFA an ad valorem rate of 10.54 percent from Coated Graphic Paper from the PRC Order for the program.

Certain importers rebut Petitioners’ proposed revisions concerning the AFA rates established for the provision of primary aluminum for LTAR and sale of aluminum extrusions for MTAR programs. Certain importers argue that the 44.91 percent rate from CWP from the PRC Order stems from a provision of hot-rolled steel for LTAR program. Certain importers argue that, in the Preliminary Determination, for programs for which there was no matching program the Department sought “the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating respondents.” See 75 FR at 54305.

Certain importers argue that the Department correctly refrained from using the 44.91 percent rate from CWP from the PRC Order because a provision of hot-rolled steel for LTAR program is not a program that aluminum extrusion producers could conceivably use. They further argue that the 44.91 percent rate, calculated in a hot-rolled steel for LTAR program, is not appropriate for as an AFA rate for the MTAR program because it is not a similar program and that producers of aluminum extrusions do not produce hot-rolled steel.

Department's Position: We disagree with the importers that the Department incorrectly calculated the AFA rate by using the highest calculated rate from other PRC investigations which the voluntary respondents did not use. As discussed in the "Application of Adverse Inferences: Non-Cooperative Companies" section above, it is the Department's practice to select, as AFA, the highest calculated rate for the same or similar program in other CVD proceedings. See LWS from the PRC Decision Memorandum at "Selection of the Adverse Facts Available." Moreover, the Department's regulations provide that the Department "will exclude weighted-average dumping margins or countervailable subsidy rates calculated for voluntary respondents." See 19 CFR 351.204(d)(3). Therefore, we disagree with the arguments of certain importers that it was improper to include in the calculation of the AFA/all others rate rates for programs which were not used by the voluntary respondents. In addition, we disagree with the argument that the Department erred when it included both the VAT Rebates on FIEs' Purchases of Chinese-Made Equipment and Income Tax Credits for Domestically-Owned Companies Purchasing Chinese-Made Equipment programs in the AFA rate. Petitioners are correct in noting that FIEs need only 25 percent foreign ownership and, thus, a wholly-owned PRC-based company can own a controlling share of an FIE subsidiary and still be eligible for programs targeting both PRC-based companies and FIEs.

We further disagree with the arguments of certain importers that the Department erred when it included multiple grant programs administered in several geographic locations in the AFA established for the non-cooperative mandatory respondents. As explained in the "Application of Adverse Inferences: Non-Cooperative Companies" section, where the GOC can demonstrate through complete, verifiable, positive evidence that mandatory respondents (including all 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 those companies. See, e.g., Racks from the PRC Decision Memorandum at "Use of Facts Otherwise Available and Adverse Facts Available." We reiterate that in this investigation, the GOC has not provided any such information. Therefore, we are making the adverse inference that the three non-cooperative companies had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs on which the Department initiated.

We also disagree that the AFA rate applied in the Preliminary Determination is unreasonably distortive, punitive, detached from commercial reality, and cannot be corroborated. None of the mandatory respondents cooperated and acted to the best of their ability in the instant investigation and, thus, the Department was precluded from obtaining the necessary information to determine those respondents' actual net subsidy rates for the POI. When faced with a situation requiring total AFA, the Department determines the net subsidy rate on a program-by-program basis and then calculates the total net subsidy rate by summing each of the program rates. See, e.g., Wire Decking from the PRC Decision Memorandum at "Application of Adverse Inferences Non-Cooperative Companies." The Department determined the net subsidy rate for

each program using the AFA methodology described above. See “Application of Adverse Inferences: Non-Cooperative Companies” section.

The Department based its AFA methodology in the instant investigation on net subsidy rates for identical or similar programs that it calculated in CVD proceedings involving the PRC and these rates have been corroborated. The rates are found to be reliable because they are based upon verified information for the same or similar programs. The rates are relevant because the Department must consider information reasonably at its disposal; because the mandatory respondents chose not to participate, the Department reviewed information concerning PRC subsidy programs in other cases to find actual calculated CVD rates for a PRC program which the mandatory respondents could have actually used. Further, as indicated above, the Department has limited its selection of AFA rates to those programs that could conceivably be used by the non-cooperating companies subject to this investigation. See “Application of Adverse Inferences: Non-Cooperative Companies” section above; see also LWTP from the PRC Decision Memorandum at “Selection of the Adverse Facts Available Rate.” These calculated rates reflect the actual subsidy practices of the PRC’s central, provincial, and municipal governments. Moreover, the Federal Circuit has found that in cases where the respondents have failed to cooperate to the best of their ability. . . “Commerce need not select as the AFA rate, a rate that represents the typical dumping margin for the industry in question.” KYD, Inc. v. United States, 607 F.3d 760 (CAFC 2010) (KYD). Furthermore, in KYD, the Federal Circuit upheld the Department’s practice of assigning uncooperative respondents the highest rate previously calculated by the Department. See KYD, 607 F.3d at 766, citing to F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1029, 1033-34 (CAFC 2000) (De Cecco) (an uncooperative party may be assigned the “highest verified margin” of the cooperating companies, even though it was “highly likely that the real dumping margin for (that company) would be well under” the AFA rate). Therefore, we find that the AFA methodology applied has been corroborated.

We disagree that the Department exceeded its discretionary limits and applied a total net subsidy rate to non-cooperative mandatory respondents that was unreasonable and unrelated to commercial reality. The mandatory respondents refused to fully participate in the review. For this reason, we lack information concerning the extent to which those respondents used the alleged subsidy programs. Further, the GOC did not provide any information that could definitively prove the non-use of the alleged subsidy programs by the mandatory respondents. Thus, it is due to the respondents’ refusal to fully cooperate in the review that the Department has had to resort to the use of AFA. The Department is in the position of having to determine subsidy rates for numerous subsidy programs based on a substantial lack of record evidence, which is the direct result of the decision of the mandatory respondents not to cooperate to the best of their ability. The application of AFA could have been avoided if the mandatory respondents had chosen to fully cooperate in the investigation.

Despite missing evidence, the Department finds that it was able to calculate a total net subsidy rate which does have a relationship to the GOC’s industrial policies vis-à-vis the metals industry and thus reflects commercial reality. As explained in the Preliminary Determination, when assigning a net subsidy to each of the programs at issue, we followed the Department’s approach in recent CVD investigations. See 75 FR at 54305; see also LWS from the PRC Decision Memorandum at “Selection of Adverse Facts Available” and “Application of Adverse Inferences: Non-Cooperative Companies” sections. Under this approach, the Department computes the total AFA rate for non-cooperating companies generally using program-specific

rates calculated for the cooperating respondents in the instant investigation or calculated in prior PRC CVD cases. Specifically, for programs other than those involving income tax exemptions and reductions, the Department applies the highest calculated rate for the identical program in the 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, the Department uses the highest non-de minimis rate calculated for the same or similar program (based on treatment of the benefit) in another PRC CVD proceeding. Absent an above-de minimis subsidy rate calculated for the same or similar program, the Department applies the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies. See Preliminary Determination, 75 FR at 54305. Thus, the Department utilized calculated rates for the same or similar programs from prior CVD proceedings involving the PRC as the basis for its AFA calculation and thereby derived AFA rates that have a direct relationship to the GOC's subsidy practices and the experience of steel and metals industry in the PRC.

We further disagree with the claim that the AFA rate applied in the Preliminary Determination is unreasonable because it did not reflect the mandatory respondents' actual subsidy rate. On this point, we reiterate that the decision of the mandatory respondents not to fully cooperate to the best of their ability in the investigation precluded the Department from obtaining the necessary information that would have permitted the Department to calculate a net subsidy rate based on reported data supplied by the mandatory respondents. The CIT has upheld AFA margins in AD proceedings even though only a very small percentage of the respondent's total sales were above the selected rate. See KYD, 607 F.3d at 766, citing Shanghai Taoen, 360 F. Supp. 2d at 1345-48 (upholding a 223.01 percent AFA dumping margin, the "highest rate determined in the current or any previous segment of the proceeding," because "the rate reflects recent commercial activity" by a different exporter of the same goods from the same country, and because there was no prior dumping margin for that company on which Commerce could rely).

In keeping with the Department's underlying determinations in KYD, De Cecco, and Shanghai Taoen, in this case the Department assigned an AFA rate to an uncooperative respondent that consisted of the highest net subsidy rates the Department had previously calculated for each of the subsidy programs at issue.⁴⁶ In instances in which the Department had not previously calculated a net subsidy rate for the identical program at issue, the Department used the highest net subsidy rate calculated for a similar program type. Thus, the Department's AFA hierarchy is in accordance with the principal discussed by the Federal Circuit in KYD, namely that of basing the AFA rate on the highest net subsidy rates previously calculated by the Department.

In addition, we disagree with the notion that total AFA rate assigned in the Preliminary Determination is punitive. In KYD the Federal Circuit held that the Department is ". . . permitted to use a 'common sense inference that the highest prior margin is the most probative evidence of current margins . . .'" See KYD, 607 F.3d at 767, citing to Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990). In addition, in KYD the Federal Circuit further upheld the Department's practice of presuming that ". . . the highest prior margin reflects the current margins . . ." in cases in which the respondent fails to cooperate to the best of its ability. See KYD, 607 F.3d at 767, quoting Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (Fed. Cir. 2002). In the instant investigation, the Department followed the

⁴⁶ We use the term "calculated" in this context to mean CVD rates derived from information supplied by fully cooperating respondents.

practice upheld by the Court in KYD, in that the Department derived AFA rates for subsidy programs using the highest previously calculated net subsidy rate for the identical or similar program. Thus, we find that the resulting total net subsidy rate is not punitive.

We agree with Petitioners that the AFA rate with regard to the loan programs (i.e., “Policy Loans for Aluminum Extrusion Producers” and “Preferential Loans as Part of the Northeast Revitalization Program”) for this final determination should be the net subsidy rate of 10.54 percent, which is the highest non-de minimis subsidy rate calculated for a loan program (i.e., “Preferential Lending to the Coated Paper Industry”) in a CVD proceeding involving the PRC. See Coated Graphic Paper from the PRC Order, 75 FR at 70202. Also, because the net subsidy rate of 10.54 percent is the highest calculated subsidy rate for any program otherwise listed, which could have been used by the non-cooperative companies, we have applied the 10.54 percent as the AFA rate for the grant programs and “Government Purchase of Aluminum Extrusions for MTAR” program, in this final determination.

We disagree with Petitioners that the Department should use the net subsidy rate of 44.91 percent, which was calculated for the provision of hot-rolled steel for LTAR in CWP from the PRC Order, for the provision of primary aluminum for LTAR program. We determine that the 44.91 percent rate is not an appropriate AFA plug for any program being examined in this investigation, because the non-cooperating respondents cannot conceivably use hot-rolled steel in their production of subject merchandise. Therefore, for the provision of primary aluminum for LTAR program, we continue to apply the AFA rate of 2.55 percent, which was calculated for a provision of a good for LTAR program under “Subsidies Provided in the TBNA and the Tianjin Economic and Technological Development Area” in OCTG from the PRC. See OCTG from the PRC Decision Memorandum at “Subsidies Provided in the TBNA and the Tianjin Economic and Technological Development Area.”

Comment 8: Whether to Include Newly Alleged and Self-Reported Programs in the AFA Calculation

Petitioners argue that the Department should include newly alleged subsidy programs and programs self-reported by the voluntary respondents in the total AFA rate assigned to the non-cooperative mandatory respondents.⁴⁷ Petitioners argue that section 775(1) of the Act instructs the Department to “include the . . . subsidy program” in the proceeding if the Department finds the program to be countervailable. They add that this is also reflected in the Department’s regulations. See 19 CFR 351.311(b). Petitioners argue that there have been no time constraints in the instant investigation that would prevent the Department from modifying the AFA rate pursuant to their proposal.

Petitioners argue that including the additional programs in the AFA rate for the final determination conforms with the Department’s precedent. Petitioners cite to Retail Bags from Vietnam in which Petitioners claim that the Department included subsidy programs discovered during the course of the investigation in the total AFA rate calculated for a non-cooperative mandatory respondent, save those programs that were found to be terminated or not applicable to producers of subject merchandise. See, e.g., Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 75 FR 16428 (April 1, 2010) (Retail Bags from Vietnam), and accompanying Issues and Decision

⁴⁷ Petitioners further argue that in the final determination the all others rate should also reflect the inclusion of the newly alleged and self-reported subsidy programs.

Memorandum (Retail Bags from Vietnam Decision Memorandum) at “Application of Facts Otherwise Available and AFA for API and Fotai.”

Petitioners acknowledge that, as it relates to provincial or local programs alleged after respondent selection, the Department has previously only assigned adverse rates to those mandatory respondents that Petitioners alleged were located in the respective province or locality. See Racks from the PRC Decision Memorandum at “Use of Facts Otherwise Available and Adverse Facts Available.” Petitioners argue that the standard set forth in Racks from the PRC places an unfair burden on the petitioners to make a city-by-city allegation for multiple programs. They argue that the Department should instead acknowledge fact that subsidy programs in the PRC are manifestations of the central government that are merely implemented at the provincial and municipal level. They argue that the Department should therefore be able to assume that the same types of subsidy programs exist across most provinces and municipalities. Therefore, in terms of AFA, they argue the burden should be on the GOC or other interested parties to demonstrate that a particular entity is not in a particular jurisdiction. On this basis, Petitioners argue that the Department should depart from the approach adopted in Racks from the PRC.

No other party commented on this issue.

Department’s Position: We have applied the following standard as it applies to the subsidy programs at issue that were not included in the investigation at the time of the initiation of the investigation. Specifically, we have included newly initiated and self-reported programs in the AFA rate calculations for the non-cooperative mandatory respondents, except for those programs that would not have been available to the non-cooperative respondents or those programs found not to exist. This is consistent with our determination in Retail Bags from Vietnam, where we included in the total AFA rate for a non-cooperating mandatory respondent a program that was discovered during verification, after the respondent had stopped cooperating. See Retail Bags from Vietnam Decision Memorandum at “Application of Facts Otherwise Available and AFA for API and Fotai.” Further, for all of the self-reported and newly initiated programs, there was nothing on the record to support a conclusion that these subsidy programs were not available to the non-cooperative respondents. Therefore, all of these programs were included in the AFA calculation. We find this approach prevents non-cooperative respondents that no longer participate from successfully avoiding being associated with newly alleged subsidy programs and subsidies discovered during the course of the investigation. Therefore, as discussed above in the “Application of Adverse Inferences: Non-Cooperative Companies,” section, we have modified the total AFA calculations to reflect this standard.

We find that our approach in the instant investigation to include the newly alleged programs and self-reported programs, as opposed to the approach from Racks from the PRC, most closely adheres to the Department’s existing AFA methodology, namely that the Department will include regional subsidy programs in the AFA rate in the absence of evidence from the GOC that mandatory respondents’ facilities and cross-owned affiliates are not located in particular provinces whose subsidies are being investigated.

Comment 9: Whether the All Others Rate Should Equal the Total AFA Rate

The GOC and numerous importers object to the Department’s decision in the Preliminary Determination to set the all others rate equal to the AFA rate assigned to the three non-cooperative mandatory respondents. They argue that the Department’s approach contradicts its

practice, violates its statutory and regulatory obligations, and is not supported by record evidence.

The GOC argues there is no basis to conclude that the circumstances surrounding the selection of the initial mandatory respondents and subsequent voluntary respondents somehow created a situation in which “the potential for voluntary respondents’ net subsidy rates to distort or manipulate the all others rate is too great.” See Preliminary Determination, 75 FR at 54321. The GOC points out that two of the mandatory respondents, Dragonlux and Miland, are non-PRC mainland trading companies, and argues that little is known of their operations. The GOC argues it was for this reason that Petitioners urged the Department to avoid selecting Dragonlux and Miland. See Respondent Selection Memorandum at 4, discussing Petitioners’ arguments that selecting the two companies “would be unlikely to yield any useful information about the degree of government subsidization in the PRC.” Thus, the GOC argues it should be of no surprise that the two companies chose not to respond to the questionnaire. The GOC further argues that it is likely that the two firms do not exist and are not involved in trading aluminum extrusions. In light of this information, the GOC argues that the Department had no basis to preliminarily determine that the use of the voluntary respondents’ net subsidy rates to derive the all others rate could lead to distortive or manipulated results.

The GOC further argues that the Department is statutorily obligated to determine the individual weighted average rate for each known exporter and producer of the merchandise. See section 751(a)(2) of the Act. The GOC argues that the Department has often determined not to review all of the individual producers and exporters when doing so would not be practicable, pursuant to section 777(c)(2) of the Act. But, the GOC argues that the Congressional intent behind this exception is that it be read narrowly in order to preserve the notion that the Department should base rates on each party’s individual circumstance. See Carpenter Technology Corp. v. United States, 662 F. Supp. 2d 1337 (CIT 2009) (Carpenter Technology). The GOC argues that as of result of Carpenter Technology, the courts have directed the Department to individually investigate a greater number of respondents in a given segment of a proceeding.

The GOC further argues that section 705(c)(5)(A)(i) of the Act requires that the Department calculate weighted average countervailable subsidy rates for exporters and producers individually investigated, excluding any zero and de minimis rates as well as any margins determined entirely under AFA. The GOC contends that the Department individually investigated a total of five firms in the instant investigation: the three non-cooperative mandatory respondents and the two voluntary respondents. The GOC argues that pursuant to section 705(c)(5)(A)(i) of the Act, the all others rate cannot include the AFA rates of the three non-cooperative mandatory respondents but rather should include the rates of the two voluntary respondents who were individually investigated.

The GOC argues that section 705(c)(5)(A)(ii) of the Act allows the Department to utilize a “reasonable method” (a.k.a. an exception provision) to establish the all others rate if the subsidy rates established for all exporters and producers are zero, de minimis, or determined entirely under AFA. However, argues the GOC, this exception does not apply in this case, because two of the individually investigated respondents received rates which were above de minimis and not based entirely on AFA. In the alternative, the GOC argues that even if the Department concludes that this exception applies, the Department’s method of basing the all others rate entirely on a total AFA rate is not a “reasonable method” as described under section 705(c)(5)(A)(ii) of the Act. The GOC asserts that the CIT recently held that it is unreasonable to

calculate an all others rate based entirely on AFA:

Commerce explained that it determined both that the China-wide entity's rate was not reasonably reflective of Jiuli's dumping rates and that it was inappropriate to assign a cooperative respondent . . . an antidumping margin based entirely on adverse facts available due to another respondent's failure to cooperate . . . These are reasonable conclusions.

See Bristol Metals L.P. v. United States, 703 F. Supp. 2d 1370, 1378 (CIT 2010) (Bristol Metals).

The GOC argues that in LWS from the PRC, the Department found that issues relating to the calculation of the all others rate are the same in both the AD and CVD context. See LWS from the PRC Decision Memorandum at Comment 21. Therefore, the GOC argues that statutory requirement to avoid basing the all others rate on AFA applies with equal force in CVD investigations and, thus, the Department should revise its approach from the Preliminary Determination.

In order to correct the allegedly unreasonable and unsupported approach from the Preliminary Determination, the GOC argues the Department should calculate the all others rate based on the final net subsidy rates calculated for the two voluntary respondents. At a minimum, adds the GOC, any "reasonable method" for calculating the all others rate must include the net subsidy rates of the voluntary respondents in a simple average.

Evergreen argues that section 705(c)(5)(A)(i) of the Act provides that the all others rate must be an amount equal to the rates established for exporters and producers individually examined, unless these rates are zero, de minimis, or based entirely on AFA. Evergreen argues that the Department individually investigated two respondents, and calculated a rate for the respondents which was above de minimis and not based entirely on AFA. Evergreen concludes that the Department is required to calculate the all others rate using a weighted average of the mandatory respondents' rates.

Evergreen argues that the "reasonable method" exception discussed in section 705(c)(5)(A)(ii) of the Act may be employed when the net subsidy rates for all individually investigated exporters and producers are zero, de minimis, or determined entirely under AFA. In the Preliminary Determination, the Department stated that, "because it lacks subsidy rates for exporters and producers individually investigated, it must resort to 'any reasonable method' to derive the all others rate." However, Evergreen notes that the Department in fact selected two firms, the Guang Ya Companies and the Zhongya Companies, for individual investigation. The preliminary rates for the Guang Ya Companies and the Zhongya Companies were not zero, de minimis, or based entirely on AFA. Yet, the Department incorrectly excluded the companies' rates from the all others rate.

Evergreen argues that the Act is unambiguous, and thus Chevron does not allow the Department to fill gaps in the statute where there is no ambiguity, or take authority upon itself where no such authority has been explicitly or implicitly granted. See Marine Harvest (Chile) S.A. v. United States, 244 F. Supp. 2d 1364, 1374 (CIT 2002) quoting Chevron, 467 U.S. at 842-43; see also United States v. Menasche, 348 U.S. 528, 528-539 (1955), and Siderca, S.A.I.C. v. United States, 350 F. Supp. 2d 1223, 1227 (CIT 2004). Nowhere in section 705(c)(5)(A)(ii) of the Act does it imply that voluntary rates may be excluded from the all others rate calculation.

Evergreen points out that the Department acknowledged that the "principal of excluding

voluntary rates from the all others rate is not directly addressed in the statute. See Preliminary Determination, 75 FR at 54321. Evergreen asserts that, pursuant to Chevron, such an observation by the Department should serve as the end of the inquiry, not the beginning. Evergreen further notes that in FAG Italia the court found it “well established that the absence of a statutory prohibition cannot be the source of agency authority.” See FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Federal Circuit 2002) (FAG Italia). Thus, the Department cannot attempt to stretch the fact that Congress did not explicitly preclude the exclusion of voluntary rates into an ambiguity that permits the Department’s approach in the Preliminary Determination concerning the derivation of the all others rate.

Evergreen contends that the statute makes clear that, for purposes of calculating the all others rate, there are only two groups of exporters and producers: those that are individually investigated and receive company-specific rates and those that are not individually investigated and receive the all others rate. Evergreen asserts that in the Preliminary Determination, the Department created a distinction not found in the statute between mandatory respondents and voluntary respondents, when the Department stated that “the companies under individual investigation that participated in the investigation are voluntary respondents.” See 75 FR at 54321. Then, despite the fact that the Department individually investigated the voluntary respondents and assigned them company-specific rates, the Department nonetheless preliminarily determined not to treat the voluntary respondents as “individually investigated” firms when calculating the all others rate, based not on the Act, but on the Preamble to Procedural Regulations, which states that the term “investigated” is not defined by statute and does not address the question of how voluntary respondents should be treated. Evergreen asserts that the plain language of statute regards the voluntary respondents as “individually investigated exporters and producers” and, as such, their net subsidy rates must be used as the basis for deriving the all others rate.

Evergreen takes issue with the Department’s claim that Article 9.4 of the Antidumping Agreement implies that the all others rate cannot be a function of subsidy rates calculated for voluntary respondents. See Preliminary Determination, 75 FR at 54321, citing Preamble to Procedural Regulations, 62 FR at 27310. On the contrary, Evergreen claims that Article 6.10.2 of the Antidumping Agreement clearly implies that voluntary respondents are in fact “selected” for examination: “In cases where the authorities have limited their examination . . . they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information . . .” Evergreen argues that the phrase “initially selected” implies that voluntary respondents are entities that are subsequently “selected.” Evergreen contends that, when read in tandem with Article 6.10.2 of the Antidumping Agreement, Article 9.4 actually supports the notion of including voluntary respondents rates in the all others rate calculation. Evergreen further notes that the Department stated that it “selected” the Guang Ya Companies and the Zhongya Companies during its respondent selection process. See Post-Prelim Memorandum at 1.

Evergreen further argues that even if it were possible to exclude the rates of voluntary respondents from the all others rate calculation, the Department may not set the all others rate equal to a total AFA rate. Evergreen argues that AFA rates may only be assigned to non-cooperative respondents. Evergreen notes that in SKF the Court held that the Department “violates” its obligation to fairness when it allows “an interested party’s failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding about whom the Department did not make a finding of non-cooperation.” See SKF, 675 F. Supp.

2d at 1264, 1276; see also De Cecco, 216 F.3d at 1030. Evergreen adds that in SKF, the court further stated that while section 776(b) of the Act does not expressly prohibit the Department from applying AFA to a party based upon another party's failure to cooperate, "a construction permitting such an absurd result makes a mockery of any notion of fairness." Id. Evergreen notes that in the Preliminary Determination the Department did not, and could not, find that companies subject to the all others rate were non-cooperative under section 776(b) of the Act. Thus, the Department's preliminary decision to equate the all others rate with the AFA rate violates the clear mandate of section 776(b) of the Act.

Evergreen further argues that the Department's approach in the Preliminary Determination cannot be considered "reasonable" as described under section 705(c)(5)(A)(ii) of the Act. Evergreen argues that the Department acknowledged this fact in LWS from the PRC in which the Department did not to equate the all others rate with the AFA rate and instead incorporated the rates of the voluntary respondents into the all others rate calculation. The Department determined that Petitioners' argument that the all others rate should be based on the mandatory respondents' rates, where the mandatory respondents received AFA, was not a "more reasonable approach" than weight averaging the mandatory respondents and voluntary respondents' rates to calculate the all others rate. See LWS from the PRC Decision Memorandum at Comment 21.

Evergreen adds that there is no evidentiary support for the Department's concern that the use of voluntary respondent rates to derive the all others rate will result in "manipulation." It further argues that, in terms of the all others rate calculation, the Department cites no distinguishing characteristic of the instant investigation that would warrant even harsher treatment than it imposed in LWS from the PRC. Evergreen asserts that the Department has failed to explain why voluntary rates calculated from record evidence are distortive, but a total AFA rate comprised from myriad unrelated investigations is not. Evergreen argues that if the Department refuses to calculate the all others rate based solely on the voluntary rates, then it should at least resort to a simple average calculation consisting of the voluntary respondent rates and a reasonable AFA rate.

Several importers of aluminum extrusions submitted case briefs that echo the arguments of the GOC and Evergreen. Additionally, they argue that in Amanda, the CIT found that there is no basis in the statute for penalizing cooperative, uninvestigated respondents due solely to the presence of non-cooperating uninvestigated respondents who received a margin based on AFA. See Amanda Foods (Vietnam) Ltd. v. United States, 647 F. Supp. 2d 1368 (Amanda); see also Bristol Metals. Eagle Metals argues that the Department's determination to base the all others rate on the AFA rate is an ultra vires act, because the Department is acting without express or implied statutory authority, citing Pac Fung Feather Co., Ltd. v United States, 911 F. Supp. 529, 534 (CIT 1995).

Concerning the exception provision under section 705(c)(5)(A)(ii) of the Act, these importers argue that the provision applies to firms not "individually investigated." If voluntary respondents are not "individually investigated," then section 705(c)(5)(A)(ii) of the Act would preclude them from receiving a rate based on their own data, which would render the voluntary respondent provision under section 782(a) of the Act a nullity. The fact that the Department's approach in the Preliminary Determination leads to such an illogical outcome demonstrates that its interpretation of section 705(c)(5)(A)(ii) of the Act was in error. They further argue that the SAA indicates that the Department "shall endeavor to investigate all firms that voluntarily provide timely responses . . ." See SAA at 942. Thus, the Department cannot credibly claim that

the statute does not define the term “investigate” and does not directly address whether voluntary respondents are considered part of the investigation. The importers further note that the Department stated in a prior CVD proceeding involving the PRC that the all others rate may not include rates based solely on AFA rates. See Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 75 FR 38977 (July 7, 2010).

The importers argue that if the Department nonetheless decides to base the all others rate, in whole or in part, on AFA, then the program rates that comprise the AFA and all others rate calculations should be capped based on the highest calculated program rate determined for either of the two voluntary respondents. According to the importers, this approach reflects the Department’s standard AFA methodology for CVD proceedings. According to the importers, utilizing this approach in the Preliminary Determination would have resulted in an AFA rate of 31.01 percent ad valorem. They add that simple averaging the AFA rate with the individual rates calculated for the voluntary respondents would have resulted in a preliminary all others rate of 21.92 percent ad valorem.

Petitioners state that none of the mandatory respondents chose to participate in the investigation. Petitioners argue that this decision followed comments by the Zhongwang Group in the press that it was “closely cooperating” with agencies of the GOC to defend its interest. See Petitioners’ June 24, 2010, submission to the Department. Petitioners further note that, at the same time that the Department learned of the firms’ decision not to participate, the GOC informed the Department that the GOC would participate if and when the Department selected voluntary respondents to replace the mandatory respondents. Petitioners claim that the mandatory respondents’ unified decision not to participate coupled with the dictates of the GOC “set a troubling tone from the outset of the investigation.” See Petitioners’ case brief at 21.

Petitioners argue that 19 CFR 351.204(d)(3) expressly states that the Department will exclude weighted-average rates of voluntary respondents from the all others rate calculation. They state that in the instant investigation the Department opted to exclude the rates of voluntary respondents from the all others rate calculation in full consideration of record evidence and the behavior of Chinese respondents. They add that the Department’s approach was consistent with its recent practice. See Certain Potassium Phosphate Salts From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Termination of Critical Circumstances Inquiry, 75 FR 30375, 30376 (June 1, 2010) (Phosphate Salts from the PRC), where the all others rate was equal to the AFA rate assigned to all mandatory respondents. Petitioners contend that this determination is consistent to the Preamble to Procedural Regulations, where the Department stated that it would exclude voluntary respondents from the all others rate to “prevent{ } distortion or outright manipulation of the all-others rate.” Preamble to Procedural Regulations, 62 FR at 27310.

The GOC disputes the relevance of Phosphate Salts from the PRC. It notes that in Phosphate Salts from the PRC there were no individually investigated respondents, whether mandatory or voluntary, and, thus, no individually calculated net subsidy rate on which to base an all others rate calculation. The GOC also argues that the plain language of the statute provides an exception to the normal calculation of the all others rate only when the net subsidy rates calculated for all exporters and producers individually investigated are zero, de minimis, or based entirely on AFA, conditions that do not apply to the facts of the instant investigation. See section 705(c)(5)(A)(ii) of the Act.

The GOC further contends that the SAA supports this plain reading of the statute.

According to the GOC, the SAA specifically provides that the new law overruled the Department's prior practice by removing the Department's authority to include AFA rates in the all others rate. See SAA at 873. Echoing comments made by the importers, the GOC adds that the SAA highlights the statute's new treatment of voluntary respondents and the calculation of rates for such respondents. The GOC argues that Petitioners' interpretation of the exception provision under section 705(c)(5)(A)(ii) of the Act renders the entire new section 782(a) of the Act, concerning voluntary respondents, a nullity. Under such an interpretation, the Guang Ya Companies and the Zhongya Companies would not be considered "individually investigated" and, thus, the Department would be directed to assign those firms the all others rate rather than the calculated rates derived from their respective, actual circumstances. The GOC contends, that on the contrary, section 704(c)(1)(B)(i)(I) of the Act contemplates only two categories of respondents for which the Department will determine a subsidy rate, those individually investigated and those that are assigned the all others rate. According to the GOC, those that the Department individually investigates receive rates based on their individual circumstances, while the remaining firms receive the all others rate as described under section 705(c)(5)(A)(i) of the Act. The GOC asserts that the Department clearly investigated the Guang Ya Companies and the Zhongya Companies on an individual basis.

Evergreen reiterates that in SKF the Court prohibited the Department from applying AFA to one group of respondents for the unrelated misdeeds of another. See SKF, 675 F. Supp. 2d at 1276. They further argue that this aspect of SKF was recently upheld in Tianjin, where the Court rejected the Department's application of AFA to a respondent based entirely on an unaffiliated suppliers' failure to cooperate. See Tianjin Magnesium International Co., Ltd. v. United States, Ct. No. 09-00535, Slip Op. 11-17 at 6 (CIT February 11, 2011) (Tianjin). The importers also restate their position that section 705(c)(5)(A)(i) of the Act does not exclude voluntary rates from the all others rate calculation, but rather only excludes zero/de minimis rates and rates based entirely on AFA. They contend that the exception provision, as described under section 705(c)(5)(A)(ii) of the Act, applies only in such narrow categories.

Certain importers further contend that Petitioners' reliance upon 19 CFR 351.204(d)(3) is misplaced. They argue that it is well-established that a regulation is unlawful to the extent that it is inconsistent on its face. See Chevron, 467 U.S. at 842 – 843; see also Allied Pacific Food (Dalian) Co. Ltd. v. United States, 587 F. Supp. 2d 1330, 1352 (CIT 2008), in which the court found that the Department's regulation dealing with the calculation of surrogate values contrary to the statute and, therefore, "invalid."

Certain importers take issue with Petitioners' claim that the use of the voluntary respondents' subsidy rates to calculate the all others rate poses a risk of manipulation or distortion. They contend that Petitioners' single citation to a newspaper article does not support the notion that the Chinese producers and exporters of subject merchandise were colluding to achieve a particular result. They argue that the "cooperation" mentioned in the article between one of the mandatory respondents and the GOC is to be expected in a CVD investigation where the Department requires the GOC to work closely with the selected respondents. Certain importers contend that the record does not support Petitioners' allegation of manipulation.

Petitioners argue that it is not appropriate to use the voluntary respondents' rates as the basis for the all others rate. They note that the voluntary respondents initially were not selected as mandatory respondents because of the relative size of their sales volumes and, thus, their situations are not necessarily reflective of the degree of subsidization in the industry as a whole. Petitioners add that, contrary to the respondents' claims, the possibility of manipulating the all

others rate is a real concern and that this concern warrants excluding rates of voluntary respondents from the all others rate calculation.

If, however, the Department departs from its approach in the Preliminary Determination, Petitioners urge the Department to utilize the approach from LWS from the PRC, in which the Department calculated the all others rate based on the average rates for both the non-cooperative mandatory respondents and voluntary respondents.

Department's Position: We disagree with the arguments of the GOC and the importers and have continued to calculate the all others rate as in the Preliminary Determination. In reaching its decision on this issue in the Preliminary Determination, the Department relied upon language in 19 CFR 351.204(d)(3) and the Preamble to Procedural Regulations. The Department's regulations at 19 CFR 351.204(d)(3) state that in calculating an all others rate under section 705(c)(5) or 735(c)(5) of the Act:

... the Secretary will exclude weighted-average dumping margins or countervailable subsidy rates calculated for voluntary respondents.

Thus, with reference to the Act, the regulation clearly states that the subsidy rates of voluntary respondents shall not be included in the all others rate calculation. Further, with regard to this regulation as well as others, the Department makes clear at the outset that it finds them to be in "conformity" with the Act and an "elaboration through regulation" of statements in the SAA. See Preamble to Procedural Regulations, 62 FR at 27296. Furthermore, in the Preamble to Procedural Regulations the Department directly addresses the claim that 19 CFR 351.204(d)(3) is inconsistent with the statute:

One commenter argued that this provision is inconsistent with the statute and should be deleted. We do not agree with this comment. . . The statute does not define the term "investigated" and does not directly address the question of whether voluntary respondents should be considered to be part of the investigation. Because the statute does not resolve the issue we look to the AD Agreement for guidance as to the best interpretation of the Act, in keeping with the requirement that, to the extent possible, a statute be interpreted in a manner consistent with the international obligations of the United States.

Article 9.4 of the AD Agreement provides that the duties applied to "exporters or producers not included in the examination" (i.e., "all others") may not exceed the weighted-average margin for the "selected exporters or producers." This implies that those exporters or producers not "selected" are not considered to be included in the "examination." Therefore, the better interpretation of section 705(c)(5) or 735(c)(5) of the Act is that producers who are not "selected" by the Department (i.e., voluntary respondents) are not considered to have been "examined" (i.e., investigated), so that their margins should not contribute to the "all others" rate. In effect the Department conducts parallel proceedings for voluntary respondents.

See 62 FR at 27310. Thus, the parties' claims that the decision in the Preliminary Determination to exclude the subsidy rates of the voluntary respondents from the all others rate calculation

violated the statute are not new and, as indicated above, have already been addressed and rejected by the Department. Moreover, as stated in the Preamble to Procedural Regulations, we find that the Act does not directly address the treatment of voluntary respondents regarding the all others rate, and thus the Department has the discretion to determine how to calculate the all others rate with respect to voluntary respondents. As the Department's regulations make clear, the Department has determined not to include the rates of the voluntary respondents in the calculation of the all others rate. We further disagree with the parties' argument that the Department's regulation is inconsistent with the Act because the Act did not address the inclusion of the voluntary respondents' rates in the calculation of the all others rate.

Concerning the issue of whether the subsidy rates of voluntary respondents should have been included in the all others rate calculation, we acknowledge that the Preliminary Determination utilized an approach that differed from the method employed LWS from the PRC. See LWS from the PRC Decision Memorandum at Comment 21, in which the Department calculated the all others rate by simple-averaging the AFA rates of the non-cooperating mandatory respondents with the rate calculated for a voluntary respondent. For the reasons explained in the Preliminary Determination, the Department has re-evaluated its approach from LWS from the PRC and determined that it is not appropriate to include the rates of voluntary respondents in the all others rate:

However, upon further examination, we now determine that the potential for voluntary respondents' net subsidy rates to distort or manipulate the all-others rate is too great and, thus, we find that reliance on the approach from LWS from the PRC is no longer appropriate.

See 75 FR at 54321. Given that we determine that the rates for voluntary respondents should not be utilized in establishing the all others rate, we have not implemented the importers' proposal of simple averaging the AFA with the individual rates calculated for the voluntary respondents.

We disagree with the notion that the Department must somehow first affirmatively prove that the voluntary respondents or the foreign government are attempting to distort the all others rate before the subsidy rates of the voluntary respondents may be excluded from the all others rate calculation under 19 CFR 351.204(d)(3). Again, the Preamble to Procedural Regulations addresses this very point:

. . . the purpose of this provision was to prevent manipulation and to maintain the integrity of the all others rate. . . exclusion of the voluntary respondents from the determination of the all others rate serves the obvious purpose of preventing distortion or outright manipulation of the all others rate. The producers or exporters most likely to submit voluntary responses are those with reason to believe that they will obtain a lower margin by volunteering than they would obtain by being subject to the all others rate. Inclusion of rates determined for voluntary respondents thus would be expected to distort the weighted-average for the respondents selected by the Department on a neutral basis.

See 62 FR 27310. As the Preamble to Procedural Regulations makes clear, the Department requires no affirmative finding in order to exclude voluntary respondents from the all others rate. Rather, the Department has reasonably concluded that voluntary respondents are "expected" to be those firms with the lowest levels of subsidization and, thus, their inclusion will lead to the distortion of the all others rate calculation.

We further disagree with the argument that the Department's method for deriving the all others rate in the Preliminary Determination was improper because it constitutes the unfair application of AFA to "cooperative" parties (i.e., parties subject to the all others rate for which the Department made no finding of non-cooperation under section 776 of the Act). As explained above, the Department does not consider voluntary respondents to be part of the investigation but rather treats them as participants in a parallel proceeding. See Preamble to Procedural Regulations, 62 FR at 27310. As a result, the three firms initially selected as mandatory respondents are the only firms the Department considers as being "individually investigated" respondents in the investigation. We find that the GOC's and importers' argument that the Department admitted that it was "investigating" or "selecting" the voluntary respondents is irrelevant, because the term "individually investigated" as it is used in 9.4 of the AD Agreement and the Preamble to Procedural Regulations does not consider voluntary respondents to be individually investigated. We disagree with Evergreen's assertion that Article 6.10.2 of the Antidumping Agreement demonstrates that voluntary respondents are "selected" and thus should be considered "individually investigated" because, as stated above, the Department considers voluntary respondents to be part of a parallel investigation and not "selected" as part of the investigation that will be used for purposes of the all others rate calculation.

As explained above, the three mandatory respondents chose not to participate and, thus, the Department designated them as non-cooperative respondents. Given that the Department does not consider voluntary respondents to be part of the investigation and given the fact that the mandatory respondents chose not to cooperate, the facts of the instant investigation resemble those of prior investigations in which the Department lacked participation from respondents that were considered part of the investigation. Thus, we find that, contrary to the arguments of certain importers, the facts of the instant investigation do, in fact, resemble those of Phosphate Salts from the PRC. See 75 FR at 30376; see also Raw Flexible Magnets from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 39667, 39668 (July 10, 2008) (Flexible Magnets from the PRC). In these investigations, the Department, in accordance with its practice, set the all others rate equal to the AFA rate assigned to the non-cooperative mandatory respondents:

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we have assigned a subsidy rate to each of the three producers/exporters of the subject merchandise that were selected as mandatory company respondents in this CVD investigation. With respect to the all-others rate, section 705(c)(5)(A)(ii) of the Act provides that if the countervailable subsidy rates established for all exporters and producers individually investigated are determined entirely in accordance with section 776 of the Act, the Department may use any reasonable method to establish an all-others rate for exporters and producers not individually investigated. In this case, the rate calculated for the three investigated companies is based entirely on facts available under section 776 of the Act. There is no other information on the record upon which to determine an all-others rate. As a result, we have used the AFA rate assigned to the three mandatory respondents as the all-others rate.

See Phosphate Salts from the PRC, 75 FR at 30376. As indicated above, in Phosphate Salts from the PRC and Flexible Magnets from the PRC, the Department invoked the exception provision under section 705(c)(5)(A)(ii) of the Act and set the all others rate equal to the AFA rate.

We also disagree that the various court cases cited by the GOC and certain importers hold that the Department erred when it set the all others rate equal the AFA rate. Regarding Bristol Metals and Amanda, the issue in both cases revolved around the rate assigned to firms that applied for treatment as separate rate entities under the Department's AD NME methodology, thereby making those the facts of those cases distinct from those of the instant investigation. Though not as fully examined as a selected respondent, separate rate entities in AD NME proceedings are considered part of the proceeding, they participate in the proceeding, and may receive a rate that differs from the all others rate. In contrast, in CVD proceedings, the Department does not examine additional respondents in the form of separate rate entities. Rather, in CVD proceedings, the respondents are limited to the foreign government, the mandatory respondents, and voluntary respondents, as applicable. Thus, in the instant investigation, the pool of cooperative and uncooperative parties was limited to these five entities. Therefore, we find it is incorrect to characterize interested parties subject to the all others rate as "cooperating" parties when the parties submitted no factual information on the record of the investigation, Department sent no questionnaires to such parties, and the Department's CVD methodology has no equivalent allowance for separate rate entities as it does under its AD NME methodology.

For similar reasons, we find that parties' citation to SKF and Tianjin are distinct from the facts of the instant investigation. These cases involved instances in which the Department applied AFA to mandatory respondents because unaffiliated parties failed to provide information that mandatory respondents needed in order to respond to the Department's questionnaires. In the instant investigation, parties cite to SKF and Tianjin in reference to parties subject to the all others rate and not with regard to selected respondents. As such, we find the facts of SKF and Tianjin are distinct from the instant investigation.

Because there were no calculated rates for individually investigated mandatory respondents on this record, it was reasonable for the Department to resort to section 705(c)(5)(A)(ii) of the Act and use "any reasonable method" to determine the all others rate. We have continued to set the all others rate equal to the rate assigned to the non-cooperative mandatory respondents.

Comment 10: Whether the Department Should Have Collected Information from Firms Subject to the All Others Rate

Certain importers argue that the Department improperly failed to request further information from non-selected, active participants in the investigation. Certain importers note that on September 20, 2010, certain interested parties filed a procedural comment requesting that the Department seek limited additional information from all cooperative interested parties with respect to key facts, such as the nature of the ownership of each cooperative firm, the geographic location of the firm's factory and office, as well as other basic information that could have easily been collected by the Department.

The importers argue that the Department failed to respond to their September 20, 2010, request and failed to collect any information from any cooperative interested party that was not selected for individual examination. They further argue that the Department improperly applied a punitive net subsidy rate to such cooperative firms based on a purported lack of information available to the Department regarding whether such firms had any possibility of benefitting from the alleged subsidy programs. The importers assert that the Department cannot, due to lack of

information, impose AFA on such cooperative firms when the Department knows that it may need such information, but nevertheless refuses to solicit the necessary facts from the cooperative firms. The importers add that the court has found that the Department “must insure that any methodology it employs . . . is based on the best information available.” See Yantai Oriental Juice Co., et al. v. United States, Slip Op 03-150 at 2 (CIT 2003). On this basis, the importers argue that the all others assigned to such cooperative firms was punitive and improper.

Petitioners argue that the parties in question are not “cooperative” because they have not filed any information about any of the subsidy programs at issue. Rather, argue Petitioners, the parties in question have done nothing more than suggest that the Department create a new separate rates practice in the context of CVD proceedings, where entities not selected for mandatory investigation are able to make claims concerning the subsidies they have received. Petitioners claim that such an approach is not only unprecedented in the CVD context but also untenable due to the GOC’s failure to properly respond to the Department’s questions and because the PRC’s subsidy programs often go by different names and operate slightly differently depending on the location of the administering authority that operates the program. Petitioners argue that, should the Department accept certain importers’ suggestion, the Department should allow Petitioners to submit subsidy allegations for each entity.

Department’s Position: We disagree with the importers’ claims that the Department improperly failed to solicit information from non-selected firms that would have enabled the Department to determine whether those firms received subsidies from the GOC. We agree with Petitioners that these importers are requesting that the Department establish a separate rates practice in CVD proceedings. In AD proceedings involving NME countries, the Department holds a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single AD duty rate. It is the Department’s policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From the People’s Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 FR 9753, 9754 (February 22, 2011); see also Final Determination of Sales at Less Than Fair Value: Sparklers From the People’s Republic of China, 56 FR 20588 (May 6, 1991), as further developed in Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People’s Republic of China, 59 FR 22585 (May 2, 1994). In conducting its separate rates analysis for AD proceedings involving NME countries, the Department’s analysis is limited to the issue of government control. Moreover, the analysis does not address the actions of the firms requesting separate rates treatment (*i.e.*, the Department does not examine the extent to which such firms engaged in dumping).

In contrast, in the instant investigation, the importers appear to demand that the Department not only create a separate rates practice for CVD proceedings, but that the Department take the significant, extra step of evaluating the extent to which the GOC subsidized each firm requesting separate rate treatment so that each firm may receive a company-specific rate that differs from the all others rate. The practice urged by the importers arguably would exceed the level of inquiry utilized for separate rate requests in AD proceedings, because rather than parties submitting information concerning government control only, the Department would be required to conduct individual examinations of numerous firms in the PRC. Adopting such an approach would not only be unprecedented in the context of CVD proceedings, it would, for

purposes of the instant investigation, also be untenable in light of the Department's available resources and the regulatory and statutory deadlines in CVD investigations. For further discussion of the Department's decision not to select additional mandatory respondents, see Comment 11 below.

In addition, in this case, the Department limited its examination to three companies, determining that it was not practicable to examine the 114 individual exporters and/or producers of which Petitioners requested an investigation. See Respondent Selection Memorandum at 4. This determination was pursuant to the Department's discretion as set forth in section 777A(e)(2) of the Act, which allows the Department to limit its examination to a reasonable number of companies where it determines that it is not practicable to examine all companies. The importers' argument amounts to a request that we conduct an examination of all companies, even though these companies did not request examination, and despite the fact that the Department reasonably limited its examination to a reasonable number of companies.

Comment 11: Whether the Department Should Have Selected Additional Mandatory Respondents

Certain importers argue that, when it became apparent the mandatory respondents would not participate in the investigation, the Department could have selected additional firms as mandatory respondents. Certain importers argue that the Department had ample time to make such a selection, as evidenced by the fact that the Department accepted questionnaire responses from the voluntary respondents on July 8, 2010, and formally accepted them as voluntary respondents on July 21, 2010. Certain importers further note that the Department postponed the due date of the GOC's initial questionnaire response until August 9, 2010. Thus, argue certain importers, the Department accepted initial responses more than 45 days after the date on which it became aware that the mandatory respondents would not participate.

Certain importers further argue that the Department had adequate resources to review one or more additional mandatory respondents. They argue that the Department initially selected three mandatory respondents for review, only to ultimately investigate two voluntary respondents. Thus, the Department should have had the resources available to select additional mandatory respondents.

The importers assert that the Department's failure to select additional mandatory respondents or convert one or more of the voluntary respondent into mandatory respondents constitutes an abuse of its discretion. They argue that to remedy its oversight, the Department should retroactively designate one or both of the voluntary respondents as mandatory respondents and use their data as the basis of the all others rate.

Department's Position: We disagree with the importers. The Department received two requests from firms for voluntary treatment: a May 6, 2010, request from the Zhongya Companies and a May 26, 2010, request from the Guang Ya Companies. We disagree that the Department improperly failed to select an additional mandatory respondent. In CVD investigations, the Department faces tight statutory deadlines. See, e.g., section 703(b)(1) of the Act, providing that the Department shall make a preliminary determination within 65 days after the date on which the Department initiates an investigation, and section 703(c)(1)(A) of the Act, providing that the Department may postpone the preliminary determination not later than the 130th day after the date of initiation, if the petitioners request an extension. The three mandatory

respondents initially selected for investigation did not directly inform the Department of their intention not to participate in the proceeding. Rather, they simply failed to respond to the Department's initial questionnaire, and so, the Department was not able to formally designate the three firms as non-cooperative until after the expiration of the June 24, 2010, due date of the initial questionnaire, which was 65 days after the initiation of the investigation and only 67 days prior to the fully extended due date of the Preliminary Determination. For the Department to have selected additional mandatory respondent(s) after June 24, 2010, would not have been tenable given the Department's statutory and regulatory deadlines.

In fact, it was the Department's concern about its statutory deadlines that lead it to require that the two firms requesting voluntary treatment submit their initial questionnaire responses to the Department by July 8, 2010, the date that the initially selected mandatory respondents would have submitted their initial questionnaire responses had the Department granted a two-week extension to the initial questionnaire. See Voluntary Respondent Selection Memorandum at 2; see also, e.g., the Department's June 21, 2010, letter to the Zhongya Companies in which it extended the companies' deadline for responding to the initial questionnaire until July 8, 2010.

We acknowledge that the Department extended the due date of the GOC's response to the initial questionnaire until August 9, 2010. However, the Department explained that its decision to do so was partly based on the fact that the voluntary respondents were not formally selected until July 21, 2010, and that portions of the GOC's response would require specific information for particularly identified companies. See the Department's July 21, 2010, letter to the GOC. Furthermore, for the reasons explained above, we disagree that the decision to extend the deadline for the submission of the GOC's questionnaire response is somehow indicative of the Department's ability to accept additional mandatory respondents. It would not have been tenable for the Department to simultaneously receive and review initial questionnaire responses from the GOC and respondent firms so close to the fully extended due date of the Preliminary Determination.

Lastly, we disagree with importers' argument that the Department should have converted the voluntary respondents to mandatory respondents. As explained above in Comment 9, we find that it is not appropriate to treat voluntary respondents as mandatory respondents.

Comment 12: Whether the Department Should Retroactively Revise the All Others Rate from the Preliminary Determination

Certain importers argue that, as the method the Department used to establish the all others rate from the Preliminary Determination does not accord with the statute, the Department must correct and lower the all others rate. In doing so, argue the importers, the Department should apply the revised all others rate retroactively to entries that were made on or after September 7, 2010, the effective date of the Preliminary Determination. Certain importers argue that the Department has the authority to apply such retroactive revisions to preliminary decisions. See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (Nails from the PRC), and accompanying Issues and Decision Memorandum (Nails from the PRC Decision Memorandum) at Comment 22; see also Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 47587 (August 14, 2008) (Hangers from the PRC), and accompanying

Issues and Decision Memorandum (Hangers from the PRC Decision Memorandum) at Comment 8.H. Certain importers contend that, in Hangers from the PRC, the Department, over the objections of the petitioners, applied the results of an amended preliminary determination retroactively to the start of the suspension of liquidation period, which was the effective date of the initial preliminary decision). See Hangers from the PRC Decision Memorandum at Comment 7.H.

The importers argue that the need to apply a retroactive correction to the all others rate is not hypothetical. They explain that they have had to pay the improper and punitive duties since the September 7, 2010, publication of the Preliminary Determination and to allow the rate to stand uncorrected would impose excessive financial burdens on innocent importers. They add that it would also be unjust to require importers to participate in a first administrative review for the sole purpose of recouping deposits paid pursuant to an unlawful Preliminary Determination.

Department's Position: As explained above in Comment 9, the Department disagrees with the notion that its method for establishing the all others rate in the Preliminary Determination was in violation of the statute or otherwise in error. Because we are not amending our decision on this matter, this issue is moot.

Furthermore, we also disagree that the Department's decision to retroactively amend the cash deposit rates in Nails from the PRC and Hangers from the PRC should lead the Department to take the same approach in the instant investigation. In both cases, the Department states revised the dumping margins retroactively for entries that were made on or after the effective date of the investigations' preliminary determinations because the preliminary margins contained significant ministerial errors that required the issuance of amended determinations:

Furthermore, because these errors pertain to the identification of the proper separate rates recipients for this investigation, the Department is making these corrections effective as of January 23, 2008, the date of the Preliminary Determination.

See Nails from the PRC Decision Memorandum at Comment 22. Similarly, in Hangers from the PRC, the Department stated that, because the preliminary determination was amended to correct ministerial errors for a certain respondent, it agreed with the respondent that it "should retroactively change the effective date of the amendment to the date of publication of the Preliminary Determination." See Hangers from the PRC Decision Memorandum at Comment 8.H. In this case, the Department did not issue an amended preliminary determination to correct ministerial errors, and so Evergreen's reliance on Nails from the PRC and Hangers from the PRC is misplaced. Therefore, we find no basis to retroactively amend the cash deposit rates as requested by the respondents.

Comment 13: Whether the Sales of Aluminum Extrusions for MTAR Program Was Used by the Voluntary Respondents

The GOC contends that the record of the investigation demonstrates that the Guang Ya Companies and the Zhongya Companies did not make any sales under the alleged MTAR program during the POI. The GOC explains that the alleged program operates under the

Procurement Law and that the law applies to purchases involving government funds at the municipal, provincial, and central government level. See GOC Verification Report at 6. The GOC asserts that the Procurement Law does not apply to any corporate entities, whether they are SOEs or privately owned. The GOC argues that verified information proves that the Procurement Law applies to only three types of entities: 1) state departments (or government agencies); 2) government-sponsored institutions; and 3) social organizations. See GOC Verification Report at 5 – 6. The GOC adds the Department further verified that the Procurement Law does not apply to profit-making entities and that different regulations apply to the registration of profit-making entities. Id. at 6 – 7. Further, the GOC states that GOC officials explicitly confirmed to the Department that SOEs are not eligible to purchase items under the Procurement Law. Id. at 6. On this basis, the GOC argues that the record clearly demonstrates that the Procurement Law does not apply to SOEs. Accordingly, there is no basis for the Department to conclude in the final determination that the Guang Ya Companies and the Zhongya Companies “have benefitted from the government’s purchases of aluminum extrusions under the Government Procurement Law” as the Department found in the Preliminary Determination. See 75 FR at 54319.

The GOC further argues that records examined at verification confirm that the Guang Ya Companies and the Zhongya Companies did not supply any goods that were covered under the Procurement Law during the POI. The GOC notes that the Department examined database queries that government officials conducted of all procurement announcements by city and provincial governments during the POI and that no reference to the Guang Ya Companies and the Zhongya Companies was found. See GOC Verification Report at 3 and Exhibit 7 at 90 – 95. The GOC argues that the negative results of the database queries are consistent with the fact that all of the two firms’ customers during the POI consisted of profit-making enterprises that are not subject to the Procurement Law. See, e.g., Zhongya Companies Verification Report at 12, in which the Department did not find any indication that the firm’s ten customers were government-owned or that the firm’s purchase orders indicated participation in a bidding process or procurement order under the Procurement Law.

The GOC further asserts that after an exhaustive review at verification of the government procurement process, the relevant regulations, and procurement catalogues, the Department confirmed that aluminum extrusions are not included in any of the municipal, provincial, or central government catalogues. See GOC Verification Report at 9.

The GOC also argues that none of products of the Guang Ya Companies and the Zhongya Companies fall under the Indigenous Innovation Policy. The GOC states that at verification the Department reviewed the circulars containing products lists that are issued under the Indigenous Innovation Law and confirmed that the lists contained no reference to aluminum extrusions, the Guang Ya Companies, or the Zhongya Companies.

The GOC also contends that the Department confirmed as unfounded Petitioners’ claims that the Guang Ya Companies and the Zhongya Companies used the MTAR program. The GOC cites to Petitioners’ August 19, 2010, submission at Exhibits 7, 8, and 9, which purportedly indicates that the respondents used the program during the POI. The GOC asserts that evidence examined at verification clearly demonstrates that Petitioners’ information relates to projects involving sales transactions that occurred in 2010, which is after the POI. See GOC Verification Report at 11 – 12. Further, concerning the alleged transactions referenced in Petitioners’ August 19, 2010, submission the GOC argues that the Department confirmed that either the respondents did not actually participate in the project or that the information merely referenced the

solicitation of installation services, not the direct supply of aluminum extrusion materials. Thus, argues the GOC, the information submitted by Petitioners cannot serve as a basis for finding that the two respondents used this program.

Concerning the Guang Ya Companies, the GOC notes that they made sales to certain schools located in Fuqing City in Fujian Province. See GOC Verification Report at 9. However, the GOC asserts that the Department cannot find that the Guang Ya Companies made the sales to these schools under the Procurement Law because, as demonstrated at verification, aluminum extrusions are not listed in the procurement catalogues and the values of the sales in question were too small to be covered by the law. See GOC Verification Report at 8 – 10.

Regarding the Zhongya Companies, the GOC asserts that in the Preliminary Determination the Department relied solely on language from the implementing measures of the Procurement Law as the basis for assuming, as AFA, that the companies' unreported domestic sales were made to GOC authorities at a 20 percent price premium. See Preliminary Determination, 75 FR at 54307. The GOC argues that undisputed record evidence demonstrates that the implementing regulations were, and still are, in draft form and were not in effect during the POI, thus there is no basis for the Department to use references to a purported 20 percent price premium in the implementing measures as AFA. See the March 31, 2010, Petition at Exhibit III-155.

The Zhongya Companies also argue that record evidence and the Department's verification findings demonstrate that the Zhongya Companies did not use the MTAR program. The Zhongya Companies explain that at verification the Department found no evidence indicating that the firm participated in bidding projects under the program during the POI. See Zhongya Companies Verification Report at 14. The Zhongya Companies further note that the verification report states that during the POI items in New Zhongya's accounts receivable were limited to private, profit making entities and contained no references to "government ministries," "agencies," "hospitals," or "utilities." Id. The Zhongya Companies add that the Department's review of the firm's customer lists indicated that New Zhongya's sales were limited to private companies and did not involve SOEs or government agencies. Id.

Petitioners argue that the Department properly countervailed the Guang Ya Companies sales of aluminum extrusions to state-owned firms by comparing the prices the Guang Ya Companies charged to state-owned firms, to the prices the Guang Ya Companies charged to privately-owned firms. They also contend that the Department properly assumed, as AFA, that all of the customers comprising the Zhongya Companies' missing domestic sales data were government authorities, the purchases of which were covered by the Procurement Law.

Petitioners add that public information in the Petition indicates that one of the mandatory respondents, the Zhongwang Group, has nearly exclusive procurement arrangements with government-owned companies in the transportation and construction sector that are covered by the Procurement Law. Petitioners argue that the fact that the Zhongwang Group, one of the PRC's largest aluminum extrusions producers, appears to have benefited greatly as a result of the Procurement Law, reinforces the notion that the MTAR program provides significant benefits to members of the PRC's aluminum extrusions industry.

Department's Position: We determine that the two voluntary respondents, the Guang Ya Companies and the Zhongya Companies, did not make any sales of aluminum extrusions under the Procurement Law during the POI; therefore, we find this program not used. During the GOC verification we reviewed various product catalogues at the municipal, provincial, and central

government level that are issued as part of the Procurement Law to determine whether aluminum extrusions are covered under the Procurement Law. Furthermore, we also reviewed the value threshold for procurement of items not listed in the government procurement catalogues. Under the Procurement Law, procurement of items not listed in the government procurement catalogues will fall under the Procurement Law if the purchase is above the value threshold set by the government. See GOC Verification Report at 7 - 9. None of the procurement catalogues reviewed at verification listed aluminum extrusions. Id. In addition, during the GOC verification, we queried databases that track procurement announcements in the city of Guangzhou and the Province of Guangdong (the locations where the two respondent firms are located) and found that the Guang Ya Companies and the Zhongya Companies were not listed. See GOC Verification Report at 3. Therefore, we were able to confirm during the GOC verification that the Guang Ya Companies and the Zhongya Companies did not use this program.⁴⁸ At verification, we also confirmed the types of information and documentation that firms must supply to the GOC for sales of products covered by the Procurement Law. See GOC Verification Report at 3 - 5. We found no such documentation concerning sales of aluminum extrusions by the Guang Ya Companies or the Zhongya Companies during the company verifications. See Guang Ya Companies Verification Report at 12 – 13; see also Zhongya Companies Verification Report at 12 -14.

We disagree with Petitioners' comment that we should apply AFA in this final determination with respect to the Zhongya Companies. While the Zhongya Companies did not provide a complete listing of all of their customers, we were able to verify that the company did not make sales under the Procurement Law through an examination of GOC records. However, because we have found this program not used rather than not countervailable, we have included this program in the AFA calculation for the non-cooperative companies which includes the Zhongwang Group.

Regarding Petitioners' argument that one of the non-cooperating mandatory respondents benefited from the program, and therefore provides evidence that members of the aluminum extrusion industry benefit from the program, we find that the evidence on the record indicates that the voluntary respondents did not use the program, and so the potential use of the program by the mandatory respondents or other members of the industry is irrelevant.

Comment 14: Whether the Sales of Aluminum Extrusions for MTAR Program Is Specific

The GOC argues that there was no basis for the Department to preliminarily conclude that the sales of aluminum extrusions for MTAR program is “. . . specific under section 771(5A)(C) of the Act because the government procurement program is contingent upon the use of domestic goods over imported goods, as evidenced by the price premium set forth in the Implementing Measures of the Procurement Law.” See Preliminary Determination, 75 FR at 54320. The GOC argues that the Implementing Measures referenced by the Department were not in effect and existed only in draft form during the POI. See the March 31, 2010, Petition at Exhibit III-155. The GOC argues that Petitioners have not cited to any evidence indicating that the draft measures have been adopted, and indeed, reiterates the GOC, the measures have not

⁴⁸ Information submitted by the Guang Ya Companies indicates that they made sales of aluminum extrusions to two schools during the POI. Assuming arguendo that these sales were covered by the Procurement Law, they would not give rise to a numerically significant net subsidy rate (e.g., a net subsidy rate that exceeds 0.005 percent ad valorem), even if the entire purchase values were treated as the benefit.

been adopted. Therefore, argues the GOC, the Department has no basis to conclude that the MTAR program is specific under section 771(5A)(C) of the Act.

Petitioners argue that the Department properly determined that MTAR program is specific under section 771(5A)(C) of the Act because the Procurement Law requires the use of domestic goods or services unless they cannot be obtained under reasonable commercial conditions. Petitioners contest the GOC's claims that the Implementing Measures of the Procurement Law were not in effect during the POI. In support of their contention, Petitioners note that the GOC has similarly claimed that a 1999 proclamation from the GOC ended all policy lending in the PRC. Petitioners argue that record evidence clearly demonstrates that SOCBs have not heeded the GOC's proclamation. As a result, the Department should view skeptically the GOC's claims concerning the date on which the Implementing Measures were enacted. Moreover, Petitioners argue that the Implementing Measures simply serve as clarification of requirements under the Procurement Law, which has been in place since 2002.

Department's Position: As noted above, we find that this program was not used by the Guang Ya Companies and the Zhongya Companies. Therefore, there is no need to address the issue of specificity, as it pertains to these two firms. However, because we have found this program not used we have, consistent with Department practice, included it in the AFA calculation for the non-cooperative respondents.

Comment 15: Whether the Sales of Aluminum Extrusions for MTAR Program Confers a Benefit

The GOC argues there is no basis to conclude that a benefit was provided to suppliers of aluminum extrusions under the provisions of the Procurement Law. The GOC argues that the Procurement Law provides explicit provisions for price competition that result in market-driven prices which are competitive and consistent with market principles. The GOC explains that during the verification of the GOC the Department examined in detail the documents related to three examples of procurement by public bidding and confirmed the various steps of the process. See GOC Verification Report at 3-5. The GOC contends that nothing in these documents suggests that suppliers or products procured under the Procurement Law benefit from any price minimums or that there are preferences for domestic products over imported products. In addition, the GOC contends that the bidding process provided explicitly for price competition and that these documents confirm that the Procurement Law applies mechanisms to obtain the most competitive market price available. The GOC argues that this process is consistent with market principles.

The GOC further argues that even if the respondents had provided supplies of aluminum extrusions to domestic customers under the provision of the Procurement Law, there would be no basis to conclude that a benefit was provided. The GOC maintains that, as the Procurement Law embraces mechanisms that obtain competitive market prices, there is no basis to resort to an out-of-country benchmark with regard to such purchases. The GOC argues that, at a minimum, the prices subject to the Procurement Law procedures are consistent with market principles within the meaning of 19 CFR 351.511(a)(2)(iii)(tier three) and that the prices obtained through competitive bidding are explicitly the result of competitively-run government auctions within the meaning of 19 CFR 351.511(a)(2)(i)(tier one).

Department's Position: As noted above, we find that this program was not used by the Guang Ya Companies and the Zhongya Companies. Therefore, the issue of benefit is moot. However, because we have found this program not used we have, consistent with Department practice, included it in the AFA calculation for the non-cooperative respondents.

Comment 16: Whether the Department Improperly Rejected Data From The Zhongya Companies Pertaining to the Sale of Aluminum Extrusions For MTAR Program

The Zhongya Companies argue that Department's use of adverse inferences with regard to this program is unwarranted. They contend that they did as the Department instructed, arguing that the Department's original questionnaire said not to answer program-specific questions for a program that the respondent did not apply for, use, or benefit from. They argue that New Zhongya did not apply for, use, or benefit from the MTAR government purchase program during the POI and that they stated this in their response to the Department's original questionnaire. The Zhongya Companies contend that they did not answer the program-specific questions for this program, including the one which requested that the Zhongya Companies provide home market sales/customer data, because they were following the Department's explicit instructions. Thus, they argue that there was no deficiency in their original questionnaire response.

The Zhongya Companies provide a detailed account of the chain of events, in support of their contention that AFA is unwarranted. They explain that, in their response to the Department's May 18, 2010, initial questionnaire, they answered the Department's questions, stating (a) New Zhongya did not apply for, use, or benefit from the program, and (b) New Zhongya had not operated under any government procurement contract, nor sold aluminum extrusions to SOEs in the transportation and construction sectors during the POI. The Zhongya Companies state that they responded to the program-specific questions for each program that they did not use in the same manner and that the Department did not object to their responses to the other non-used programs, even though the questionnaire format is the same for all programs.

The Zhongya Companies state that, in the Department's July 21, 2010, first supplemental questionnaire, the Department requested that they report home market sales/customers data for the one year POI. On July 28, 2010, the Zhongya Companies requested a one-week extension of the deadline for providing its response to this supplemental questionnaire, explaining that their offices were closed due to a typhoon. They explain that they were granted a partial extension until August 6, 2010, and argue that Department's practice is to grant a one-week extension for extensive questionnaires. They then explain that their response to this supplemental questionnaire was 322 pages, with 29 exhibits and that they only had time to provide the domestic sales/customer data for the Zhongya Companies' top ten customers. They explain that the sales of these ten customers accounted for 70 percent of the Zhongya Companies' home market sales during the POI and that providing data for all 146 customers would have taken a huge amount of time that was not granted by the Department.

The Zhongya Companies explain that, given the Department's preliminary decision to use AFA with regard this program, they included a complete set of the Zhongya Companies' domestic sales/customer data in their October 12, 2010, questionnaire response. On October 26, 2010, the Department rejected this domestic sales/customer data.

The Zhongya Companies take issue with the Department's rationale for rejecting the data

pertaining to their other customers. They argue that the original May 18, 2010, questionnaire instructed the respondent not to answer the program-specific questions as to a particular program if the respondent did not apply for, use or benefit from the program. They explain that, if the Department's use of the term "again" in its October 26, 2010, letter means that New Zhongya should have followed the original May 18, 2010, questionnaire instructions when answering the July 21, 2010, supplemental questionnaire regarding MTAR, then the Zhongya Companies should have just said in answer to the July 21, 2010, supplemental questionnaire that the Zhongya Companies had already fully answered the original May 18, 2010, questionnaire. However, the Zhongya Companies claim they did more than requested in response to the July 21, 2010, supplemental questionnaire by providing program-specific information, i.e., a complete set of domestic sales/customer data. They then point out that the Department's October 26, 2010, letter stated that New Zhongya should have requested an extension to answer the July 21, 2010, supplemental questionnaire, but the Zhongya Companies did request an extension which the Department only partially granted.

The Zhongya Companies then explain that, on November 2, 2010, the Department issued another supplemental questionnaire regarding this program and that, on the November 9, 2010, due date, they again answered that New Zhongya did not use the program and provided the missing sales/customer data. They argued that this was responsive to the Department's explicit request in this particular supplemental questionnaire that the Zhongya Companies discuss and describe any documentation that it reviewed or consulted when providing the response. The Zhongya Companies then explain that, on November 15, 2010, the Department again rejected the missing domestic sales/customer data, stating that this information was requested in the Department's initial May 18, 2010, original questionnaire. They again contend that the Department wrongly ignored its own instructions in the May 18, 2010, questionnaire which indicated that the respondent should answer the program-specific questions (such as providing the domestic sales data) if the particular program was used. They argue that the Department is effectively arguing that a respondent must answer the program specific questions even if the respondent does not use the program. They maintain that this would be contrary to the wording of the May 18, 2010, questionnaire and to Department practice.

They further explain that the Department's November 15, 2010, letter states that its July 21, 2010, supplemental questionnaire just "reiterates" the Department's original May 18, 2010, questionnaire. They argue that is too is wrong and lament that, in reply to the Department's July 21, 2010, supplemental questionnaire, they could have answered that, as they indicated in its original questionnaire response, the Zhongya Companies did not use the program and do not need to answer the program-specific questions. In addition, they disagree that Department gave the Zhongya Companies 78 days to provide the home market sales/customer data because this erroneously assumes that the May 18, 2010, questionnaire asked for this program-specific information even though New Zhongya did not use the program.

The Zhongya Companies also argue that the sales data they submitted on November 9, 2010, was directly responsive to the questions in the Department's November 2, 2010, supplemental questionnaire, contending that those new supplemental questions explicitly requested this information. They further argue that before the start of the verification, they filed an objection to the Department's action, noting all the above and asking to speak with senior Department officials. They disagree with Department's December 8, 2010, letter, arguing that it lacks explanation and repudiates the Department's prior statements, also without explanation.

The Zhongya Companies conclude that, yet again at verification, they offered their full

books and records, including full sales listing to demonstrate that it did not benefit from this program. They maintain that these data, again, were wrongly rejected.

The Zhongya Companies take further issue with the Department application of AFA for this program, arguing that, as a matter of law, adverse inferences are only permissible if there has been a failure to answer a question. They maintain that there was no such failure. In addition, they argue that there was no corroboration of the adverse facts that were used by the Department. They state that section 776(c) of the Act requires the Department to corroborate information from independent sources has not been met and that the Department provided no support for the 20 percent preferential price the Department used for its adverse inference.

Petitioners rebut that the Zhongya Companies had 79 days to provide the Department with the MTAR data that the Department requested in its initial and first supplemental questionnaires. They contend that the Zhongya Companies waited until October 12, 2010, to submit complete data. Noting that this is 147 days after the Department's initial questionnaire, they contend that the Zhongya Companies simply did not take the time to assemble the data. Petitioners argue that it was well within the Department's authority to require the Zhongya Companies to provide data responsive to the Department's clearly-articulated request within the allotted 79 days. Petitioners further argue that allowing the Zhongya Companies to submit the data at such a late date would be an invitation to respondents in future investigations to treat the Department's deadlines as mere suggestions rather than meaningful dates intended to allow the Department to complete investigations in a timely and thorough manner.

Petitioners also rebut the Zhongya Companies' claim that there is "no support" for the AFA rate the Department selected. They argue that the assumptions that New Zhongya's other customers were government authorities, and that the application of a 20 percent sales price premium, were necessary in light of the nature of the allegations and failure to provide the information. They state that, because the GOC's Implementing Regulations require purchase of domestic goods unless they are more than 20 percent more expensive than foreign good, applying this 20 percent rate as AFA was the only way the Department could fulfill its mandate to ensure that the party does not obtain a favorable result by failing to cooperate that if it had cooperated fully. They further argue that the Implementing Regulations are simply clarifications of requirements under the Government Procurement Law of the People's Republic of China and that it has been in place since 2002. Petitioners contend the Federal Circuit has stated that the Department must balance the statutory objectives of finding an accurate dumping margin and inducing compliance when selecting an AFA rate and that this 20 percent rates is the rate that record evidence indicates is the maximum possible amount of benefit from this program.

Department's Position: As explained above, we determine that this program was not used by the Zhongya Companies. Therefore, this issue is moot.

Comment 17: Whether the Ownership Information of Respondents' Customers Was Complete and Fully Verified

The GOC argues that the ownership information it submitted regarding the voluntary respondents' domestic customers was complete, accurate, and fully verified by the Department. It argues that the Department confirmed the accuracy of the ownership information submitted by

the GOC, the Guang Ya Companies, and the Zhongya Companies with reference to the customers' capital verification reports, articles of association, shareholder resolutions, and share transfer agreements. See GOC Verification Report at 10 – 11. Accordingly, argues the GOC, there is no basis for the Department to reject any of the ownership information pertaining to the respondents' domestic customers.

Petitioners did not comment on this issue.

Department's Position: As stated above, we determine that the sale of aluminum extrusions for MTAR program was not used by the Guang Ya Companies and the Zhongya Companies. Therefore, this issue is moot.

Comment 18: Whether a Financial Contribution Exists Under the Provision of Primary Aluminum for LTAR Program

The GOC contends that the record demonstrates that it did not provide the aluminum extrusions industry with financial contributions during the POI in connection with the alleged provision of primary aluminum for LTAR program. The GOC asserts that the Preliminary Determination failed to address how government-owned primary aluminum producers in the PRC constitute authorities within the meaning of section 771(5)(B) of the Act, or whether the government entrusted or directed the producers to provide a financial contribution to the aluminum extrusions industry under section 771(5)(B)(iii) of the Act. The GOC argues that consistent with its decisions in previous CVD investigations, for the final determination the Department must consider the following five factors to determine whether an entity is an authority: 1) government ownership; 2) the government's presence on the entity's board of directors; 3) the government's control over the entity's activities; 4) the entity's pursuit of governmental policies or interests; and 5) whether the entity is created by statute. See, e.g., Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003) (DRAMS from Korea), and accompanying Issues and Decision Memorandum (DRAMS from Korea Decision Memorandum) at "The GOK's Involvement in the ROK Lending Sector from 1999 through June 30, 2002;" Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada, 57 FR 30946, 30954 (July 13, 1992); Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers From the Netherlands, 52 FR 3301, 3310 (February 3, 1987); and Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 FR 30636, 30642-43 (June 8, 1999). The GOC argues that proper application of these factors in this case shows that the primary aluminum producers whom the Department preliminarily considered "authorities" based essentially only on the existence of government ownership do not satisfy the applicable standards.

The GOC argues that primary aluminum producers who are government-owned should not per se be considered "authorities" within the meaning of section 771(5)(B) of the Act. The GOC argues that Government ownership/control does not by itself establish the existence of a government "authority" for purposes of the statute. The GOC argues that in the past, the Department has concluded that entities with even 100 percent majority government ownership should not be considered government authorities. See DRAMS from Korea Decision Memorandum at "The GOK's Involvement in the ROK Lending Sector from 1999 through June

30, 2002.”

Furthermore, the GOC argues, government ownership of enterprises in the PRC is separate and independent of traditional government functions. The GOC argues that previous reforms have established that SOEs do not exercise elements of governmental authority and, therefore, SOEs do not confer financial contributions within the meaning of the statute. SOEs have separate legal status from that of the government and management of the enterprises’ operations has been given to the enterprises’ managers. The GOC points to the 1993 Company Law and the State-Owned Assets Supervision and Administration Commission (SASAC) in support of its argument that SOEs act separately from the state. The GOC also argues that the record establishes that primary aluminum pricing is not regulated or set by the state, but is subject to market forces under the 1998 Price Law. The GOC argues that the government sets prices only for vital or rare commodities, natural monopolies and essential non-profit services set forth in government pricing catalogs, but not for aluminum.

Petitioners argue that the Department appropriately determined that companies that provided aluminum extrusions to the respondents in this investigation which were owned and controlled by the GOC are “government authorities” consistent with section 771(5)(B) of the Act. Petitioners argue that in this investigation, as in other PRC cases, the Department established that companies that are over 50 percent owned by the GOC are authorities for purposes of determining whether there is a financial contribution. See Preliminary Determination, 75 FR at 54317. Petitioners note that the GOC does not take issue with the fact that the entities are majority government-owned but argues that state-ownership is not sufficient to establish government authority.

Petitioners disagree with the GOC argument that the government ownership of enterprises in the PRC is separate and independent from government functions and that that the management of the state-owned enterprises is left to the management of the companies. Petitioners contend that the GOC cites to no authority or precedent to support their contention that government reforms have established that SOEs do not exercise elements of government authority nor does the GOC provide specific information about how its reforms have created greater autonomy among state-owned aluminum companies.

Petitioners cite Coated Paper from the PRC in support because in that case the Department disagreed with the GOC that government ownership is “separate and independent of traditional government functions.” Moreover, Petitioners argue, in that case the Department did not find that the GOC provided evidence that the GOC does not control majority owned companies. See Coated Paper from the PRC Decision Memorandum at Comment 16.

Petitioners argue that the notion that the price for primary aluminum is not regulated or set by the GOC, and prices are subject to “market forces” pursuant to the 1998 Price Law is inaccurate and that evidence on the record indicates that the GOC is heavily involved in manipulating the market for primary aluminum in the PRC.

Petitioners conclude that the GOC’s involvement in the market for primary aluminum through majority ownership of over half the primary aluminum suppliers in the PRC, and through the effect of export restraints which allows the government to affect pricing for primary aluminum in the PRC demonstrates that majority government-owned primary aluminum companies are government authorities in accordance with section 771(5)(B) of the Act.

Department’s Position: In Racks from the PRC, the Department stated its policy with respect to application of the five factors test. See Racks from the PRC Decision Memorandum at

Comment 4; see also OCTG from the PRC Decision Memorandum at Comment 9. In Racks from the PRC, the Department stated that it does not analyze each of the five factors for every firm in every case, and, “in most instances, majority government ownership alone indicates that a firm is an authority.” See Racks from the PRC Decision Memorandum at Comment 4; see also Coated Paper from the PRC Decision Memorandum at Comment 16, stating that there is a rebuttable presumption that majority owned government entities are authorities within section 771(5)(B) of the Act.

In this case, we have analyzed whether the evidence on the record indicates that enterprises which are majority-owned by the government as “authorities” within the meaning of section 771(5)(B) of the Act. The GOC argues that the prices of primary aluminum inputs are not regulated by the state, as evidenced by the 1998 Price Law and, thus, the Department erred in its preliminary finding that majority state-owned firms are GOC authorities capable of providing a financial contribution. The evidence submitted by the GOC to support its claim that the primary aluminum suppliers are not exercising elements of government authority attempts to show that these suppliers act as commercial entities. However, the Department addressed and rejected this same argument in Racks from the PRC:

It has been argued that government-owned firms may act in a commercial manner. We do not dispute this. Indeed, the Department’s own regulations recognize this in the case of government-owned banks by stating that loans from government-owned banks may serve as benchmarks in determining whether loans given under government programs confer a benefit. However, this line of argument conflates the issues of the “financial contribution” being provided by an authority and “benefit.” If firms with majority government ownership provide loans or goods or services at commercial prices, i.e., act in a commercial manner, then the borrower or purchaser of the good or service receives no benefit. Nonetheless, the loan or good or service is still being provided by an authority and, thus, constitutes a financial contribution within the meaning of the Act.

See Racks from the PRC Decision Memorandum at Comment 4. The Department rejected similar claims in Coated Paper from the PRC. See Coated Paper from the PRC Decision Memorandum at Comment 16.

We also disagree that the 1998 Law and the SASAC demonstrate that government ownership is separate and independent of traditional government functions. We note that no pricing information or ownership information was submitted on the record that would support these claims. The laws cited by the GOC suggest that SOEs should be provided some level of autonomy, but we do not find that this is sufficient to demonstrate that the GOC does not control majority owned companies, because, with majority ownership, the government could control the majority of board seats and thus have the power to appoint senior managers.

Thus, following the reasons set forth in Racks from the PRC, we have continued to treat majority state-owned input producers as GOC authorities capable of providing primary aluminum for LTAR.

The GOC cites to DRAMs from Korea to support its statement that the Department considers 100 percent government-owned entities not to be “authorities” under the CVD law. The Department has no policy that would find a wholly-owned company not an ‘authority.’ The cite to DRAMs from Korea is misplaced because, in CORE from Korea, the Department decided to modify our treatment of commercial banks with government ownership with respect to the

finding of a financial contribution under section 771(5)(B)(i) of the Act. As we noted in CORE from Korea:

In both the DRAMs Investigation and the CFS from the PRC Investigation, we accorded different treatment under this section of the Act to government-owned banks that were commercial banks and those government-owned banks that acted as policy or specialized banks. Upon further review, we have determined that, with respect to determining whether a government-owned bank is a public entity or authority under the CVD law, it is more appropriate to focus solely on the issue of government ownership and control. This treatment of government-owned commercial banks is consistent with our treatment of all other government-owned entities, such as government-owned manufacturers, utility companies, and service providers. Furthermore, this treatment of government-owned commercial banks is also more consistent with 19 CFR 351.505(a)(2)(ii) and 351.505(a)(6)(ii). Thus, a government-owned or controlled bank, be it a commercial bank or a policy bank, is considered a public entity or authority under the Act.

See Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 74 FR 2512 (January 15, 2009) (CORE from Korea), and accompanying Issues and Decision Memorandum at “GOK’s Direction of Credit.” Therefore, the Department considers companies (and banks) that are owned or controlled by the government to be public authorities under the CVD law.

Comment 19: Whether the Provision of Primary Aluminum for LTAR Program is Specific

The GOC notes that in the Preliminary Determination, the Department found the “program” to be specific because “the industries named by the GOC are limited in number.” See 75 FR at 54319. The GOC submits that the record evidence of the range of industries utilizing primary aluminum does not meet the statutory requirement of “specificity” under CVD law. The GOC states that record evidence for the end uses of primary aluminum relate to the type of industry involved as a direct purchaser of the input, and the GOC documented that the consumption of primary aluminum occurs across a broad range of industries. The GOC argues that this record evidence demonstrates that primary aluminum sales are not directed to a specific group of industries or enterprises, but that sales are made to a broad variety of industries. Moreover, the GOC argues that the record evidence shows that the GOC does not restrict the prices charged to consumers in the PRC. See the GOC’s August 9, 2010, questionnaire response at 6-10. Thus, in the final determination the GOC argues that the Department must reverse its finding that the provision of primary aluminum is specific to aluminum extrusions producers during the POI.

Petitioners dispute the GOC’s contention that the record demonstrates that primary aluminum sales were not directed to a specific industry or group of industries. Petitioners argue that the GOC did not answer any of the Department’s questions on this issue during the investigation, and only stated that the GOC confirms that primary aluminum could be used in an unlimited number of industries.

Petitioners argue that in the Preliminary Determination, the Department appropriately determined that the number of industries that use primary aluminum is limited. Petitioners argue that primary aluminum is purchased and used by companies that produce downstream aluminum

products. Thus, the benefit from the provision of primary aluminum is limited to the industry producing finished aluminum products. Petitioners contend that this situation does not vary significantly from the provision of standing timber for LTAR in Coated Paper from Indonesia. See Certain Coated Paper Suitable for High-Quality Print Graphics using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination, 75 FR 59209 (September 27, 2010) (Coated Paper from Indonesia), and accompanying Issues and Decision Memorandum at “Provision of Standing Timber for Less Than Adequate Remuneration.” Petitioners argue that in that investigation, the Government of Indonesia provided standing timber to five industries including the paper industry. Therefore, the Department found that the number of industries that benefit from the provision of standing timber was limited to a group of industries and was therefore specific.

Department’s Position: The Department has addressed the GOC’s arguments in this regard in prior CVD investigations involving the PRC. For example, in Racks from the PRC, the Department explained that it examined information supplied by the GOC regarding the end uses for wire rod. The Department concluded that while numerous companies may comprise the listed industries, section 771(5A)(D)(iii)(I) of the Act clearly directs the Department to conduct its analysis on an industry or enterprise basis. See Racks from the PRC Decision Memorandum at “Provision of Wire Rod for LTAR.” In Racks from the PRC, the Department concluded that the industries named by the GOC were limited in number and, hence, the subsidy was specific. Id. We have conducted the same analysis in the instant review based on information supplied by the GOC, and have determined that the industries named by the GOC are limited in number. Therefore, as in Racks from the PRC, we have determined that the provision of primary aluminum for LTAR program is specific under section 771(5A)(D)(iii)(I) of the Act.

Comment 20: Whether the Benchmark Used for the Provision of Primary Aluminum for LTAR Program Should Include Import Duties

The Zhongya Companies argue that the benchmark used to measure the benefit on purchases of primary aluminum should be corrected to eliminate the erroneous inclusion of an import duty. They explain that New Zhongya pays no import duty for its aluminum feedstock because it imports from Hong Kong and that no import duties apply to imports from Hong Kong. They argue that, once the import duty is removed from the benchmark, it is clear that the Zhongya Companies paid more for primary aluminum from the PRC than the benchmark price and therefore there is no benefit.

Petitioners rebut the Zhongya Companies’ position, arguing that, under 19 CFR 351.511(a)(2)(ii) and practice, the Department relies on a benchmark that would apply to all purchasers nationwide in the country under investigation, and is not restricted to the particular circumstances of one respondent. Petitioners argue that the regulations require the inclusion of import duties in the benchmark. 19 CFR 351.511(a)(2)(iv).

Petitioners then argue that the Zhongya Companies’ claim that no import duties apply to their purchases of imported aluminum is too categorical and thus inaccurate, arguing that, during verification, a company official explained that if New Zhongya uses imported aluminum in goods it sells domestically, it must pay the import duties on aluminum ingots supplied by Karlton. They contend that New Zhongya is only exempt from the import duty when it is operating under an inward processing model. They take issue with the reliability of the

information provided by the Zhongya Companies in support of their claim, arguing that all of the primary aluminum that New Zhongya reported as imports from Hong Kong actually originated in another country. They then argue that, given that this third country is not a WTO member and that there is no evidence that value is added to the imported primary aluminum prior to entering the PRC the Department should continue to add duties to the benchmark. Petitioners further argue that the suppliers for most of the import transactions were related companies that should not be included in the establishment of the benchmark. Petitioners conclude that the inclusion of a five percent import duty is well-supported by the record of this investigation. In the alternative, they propose that the Department average the three potentially applicable tariff rates of zero, five, and fourteen percent to get an import duty rate of 6.3 percent and include this in the benchmark.

Department's Position: The Zhongya Companies are essentially arguing that the Department should construct a company-specific, tier-one benchmark to measure the benefit from this program. Because the Department is not constructing a tier-one benchmark, the import duties applicable to the Zhongya Companies' imports from Hong Kong are not relevant to the calculation of a benchmark for this program. As explained above in the "Provision of Primary Aluminum for LTAR" section and in Comment 21, we have determined that, due to distortion in the PRC market, we are unable to use tier-one prices as benchmark prices. Therefore, the actual import prices reported by the Zhongya Companies are not useable as benchmark prices in our examination of whether domestic purchases of primary aluminum from government-owned or controlled producers are made at LTAR. Consequently, we are conducting our analysis by using a tier-two world market price benchmark, pursuant to 19 CFR 351.511(a)(2)(ii). The tier-two benchmark prices are monthly LME prices. Furthermore, as mandated by 19 CFR 351.511(a)(iv), we have adjusted these price to include delivery charges and import duties. We note that the LME prices do not include prices from Hong Kong.

For this final determination, we have adjusted each monthly LME benchmark price to include an average import duty rate of 2.5 percent. To derive this average import duty rate, we first identified the two Chinese tariff numbers under which unwrought non-alloy primary aluminum are categorized, tariff numbers 7601.1010 and 7601.1090. See excerpt from the Chinese tariff schedule titled "Customs Import and Tariff of the People's Republic of China," provided in Petitioners' August 20, 2010, submission at Exhibit 5.⁴⁹ We selected these two categories because, as with our LME benchmark prices, they pertain to non-alloy aluminum. Of the rates listed for these two categories, we used the rates list under the Most Favored Nation (MFN) heading, five percent for tariff number 7601.1010 and zero percent for tariff number 7601.1090, because the MFN rate reflects the general tariff rate applicable to world trade.

Comment 21: Whether the Department Should Use In-Country Benchmarks Under the Provision of Primary Aluminum for LTAR Program

The Zhongya Companies argue that the Department should use their import prices as the benchmark, arguing that their import prices are LME prices plus a premium. They contend that the Department states in the Preliminary Determination that the LME prices are acceptable as a benchmark. They further contend that the Department's preliminary decision that import prices are distorted by the PRC state-owned primary aluminum import supply in the PRC is not

⁴⁹ See also the GOC's August 9, 2010, supplemental questionnaire response at 8 and Zhongya Companies Verification Report at 10 and Exhibit 8, at 24 – 30.

supported because the Zhongya Companies' questionnaire response shows that the import prices are below domestic prices.

The Zhongya Companies further assert that because foreign primary aluminum suppliers to the Zhongya Companies sell on the international market, they are not going to sell to the Zhongya Companies if they can get a better price elsewhere in the world. They maintain that the prices of their foreign suppliers therefore constitute world prices and thus are adequate for use in the benchmark.

Finally, the Zhongya Companies assert that the Department provides no evidence for its finding that the prices in the PRC are distorted. They argue that the Department provides no evidence that the state-owned suppliers are operating on terms inconsistent with commercial considerations.

The GOC asserts that the Department's rejection of a tier-one benchmark (market prices from actual transactions within the PRC) for valuing the adequacy of remuneration is contrary to law, citing the section 771(5)(E)(iv) of the Act, 19 CFR 351.511(a)(2)(i), and the Preamble. The GOC argues that a NAFTA panel the Department's preference for tier-one benchmarks. See In the matter of Certain Softwood Lumber Products from Canada, NAFTA USA-CDA-2002-1904-03 (June 7, 2004). The GOC submits that it is not reasonable to conclude that the prices in the primary aluminum market in the PRC are significantly distorted as a result of the government's involvement in the market and that the record in this investigation does not provide for such a finding.

The GOC asserts that the government does not constitute a substantial part of the primary aluminum market in the PRC. The GOC argues that the Department found that 50 percent of the PRC's primary aluminum production stemmed from state entities based on an unlawfully broad definition of "authorities" and that, if a lawful approach to defining government "authorities" were used, it would be clear that the vast majority of Chinese primary aluminum was manufactured by non-government authorities.

The GOC argues that the Department should consider the actual nature and structure of the market to determine whether the GOC's involvement distorts prices. The GOC contends that the record contains no evidence that the private suppliers' prices are distorted by alleged GOC control of the SOE firms or that any government impact results in a downward distortion of private firm prices. The GOC argues that, to the contrary, the fact that there are numerous private aluminum producers within the PRC supports a conclusion that primary aluminum pricing decisions within the PRC are driven by competitive market principles. The GOC contends that the Department has failed to demonstrate significant distortion and, therefore, is required by law and regulation to rely on in-country prices as the benchmark for determining whether the respondents purchase primary aluminum for LTAR. The GOC argues that the Department must treat the respondents' import prices as a viable tier-one benchmark price because the record demonstrates that the respondents import a significant amount of primary aluminum. See Preliminary Determination, 75 FR at 54318.

Petitioners argue that the Department correctly rejected actual transaction prices from non-SOE suppliers and import prices and used an external benchmark. They contend that the record demonstrates that the GOC is heavily involved in the market for primary aluminum. First, Petitioners argue that the Department calculated that 60 percent of the primary aluminum production in the PRC is accounted for by SOEs and collectively-owned companies and that this is a strong indication that the primary aluminum prices in the PRC are distorted and an additional percentage may also be government-owned. See CHALCO Memorandum. Second, Petitioners

argue that the existence of export tariffs on two of three of the HTS categories that cover primary aluminum is further evidence of the GOC's predominant role in the market for primary aluminum. They contend that these export taxes distort the pricing structure by making the primary aluminum supply in the PRC more abundant than it otherwise would be relative to demand, resulting in a decrease in the prevailing prices. Third, Petitioners argue that import prices cannot be used as the benchmarks. They argue that, given that imports of primary aluminum account for only 11.81 percent of total supply, imports cannot have a meaningful effect on market prices in the PRC and would likely be affected by the preponderance of SOE supply and the export restraints.

Finally, Petitioners argue that the record demonstrates the GOC's heavy involvement in aluminum market, citing the GOC's 11th Five-Year Plan. See Petition at Exhibit III-17. In addition, they maintain that the GOC has called for the development of several large secondary aluminum enterprises and that a plentiful and inexpensive supply of primary aluminum would be critical to the enhancement of the downstream aluminum industry. Petitioners also argue that other planning documents highlight a pervasive policy by the GOC to manage, develop, and enhance the primary aluminum industry. These include the 10th Five-Year Development Guidelines for the Aluminum Industry and the Nonferrous Metal Industry Adjustment and Revitalization Plan. Petitioners conclude that, for these reasons, the Department should continue to use prices published by the LME for benchmark purposes.

Department's Position: As explained above in the "Provision of Primary Aluminum for LTAR" section and Comment 18, we have determined that state-owned domestic producers of aluminum in the PRC are GOC authorities. We also determined that primary aluminum supplied by companies determined to be government authorities constitutes a financial contribution in the form of a governmental provision of a good and that the respondents received a benefit to the extent that the price they paid for primary aluminum produced by these suppliers was for LTAR. See sections 771(5)(D)(iv) and 771(5)(E)(iv) of the Act.

The basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services is set forth under 19 CFR 351.511(a)(2). 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). While we agree with the GOC that the Act directs the Department to determine the adequacy of remuneration in relation to the prevailing market conditions in the country where the good is being provided, in this case we have determined that the market for primary aluminum is significantly distorted by the presence of companies determined to be government authorities and that, therefore, the use of a tier-one benchmark prices, which includes actual imports, is not suitable for our analysis. See "Provision of Primary Aluminum for LTAR" section for further discussion. We agree with Petitioners that the fact that SOEs account for more than 50 percent of the PRC's production of primary aluminum demonstrates that actual transaction prices are significantly distorted. We disagree with the GOC that the fact that there are some private aluminum producers in the PRC demonstrates that the market is not distorted; the majority of primary aluminum producers are SOEs, and so a finding of significant distortion is reasonable. We disagree with the GOC that this decision is inconsistent with the Preamble, because the

Preamble expressly states that, “where it is reasonable 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...” See 63 FR at 65377.

We determine that the London Metal exchange prices for primary aluminum on the record are suitable for use as a tier-two benchmark, pursuant to 19 CFR 351.511(a)(2)(ii). In the Preliminary Determination, we used the LME prices for primary aluminum that were placed on the record by Petitioners. We also collected LME price data for a single month at our verification meeting with the Zhongya Companies. See Zhongya Companies Verification Report, Exhibit 8 at 75. The monthly average price reviewed during the Zhongya Companies verification is the same as the monthly average price provided by Petitioners. Similarly, the Guang Ya Companies provided six months of LME price data. Again, the monthly average prices for these data are the same as that submitted by Petitioners. Therefore, we are continuing to use the monthly average LME price data provided by Petitioners.

Comment 22: Whether the Guang Ya Companies Properly Reported Their Purchases of Primary Aluminum and Whether the Application of AFA is Warranted

Petitioners assert that the Department should apply AFA in light of the Guang Ya Companies’ failure to provide reliable information relating to purchases of primary aluminum for LTAR. Petitioners argue that the Department was not able to verify the Guang Ya Companies’ largest purchase of aluminum during the POI. Petitioners argue that the Department discovered that “the largest purchase that Guang Ya made during the POI was unknown,” and that “the company was not able to identify the supplier in both its 2009 books and in its current accounting system from 2010.” See Guang Ya Companies Verification Report at 7. The Department noted in its verification report that the Guang Ya Companies’ attempt to explain that their employees “may not be aware of who the supplier(s)” are, and that they simply pay suppliers whatever amounts are requested “without corroborating documentation.” Id. at 7-8.

Petitioners argue that the Guang Ya Companies’ failure to keep verifiable records undermines the reliability of all data that they submitted in relation to their purchases of aluminum. Petitioners further argue that it is not clear how the Guang Ya Companies could have prepared the data submitted to the Department if they do not record the supplier of each shipment of and simply pay anyone who puts forward a claim to have supplied aluminum. In these circumstances Petitioners argue that the Department must apply FA because it was “unable to verify submitted information.” See 19 CFR 351.308(a). Petitioners further argue that the Department should also apply an adverse inference as to this information, because the Guang Ya Companies were not acting to the best of their ability when they submitted information that cannot be corroborated. See 19 CFR 351.308(a).

The Guang Ya Companies reject claims by Petitioners that the Department was not able to verify their largest purchase of aluminum during the POI and that there is no basis for resorting to AFA when calculating the Guang Ya Companies’ rate.

The Guang Ya Companies argue that, as reported in the Department’s verification report, Department officials selected the purchase identified by the Guang Ya Companies as the largest reported purchase of primary aluminum and the verifiers were able to trace the purchase through to payment. See Guang Ya Companies Verification Report at 7. The Guang Ya Companies further argue that the verification report makes clear that in reviewing the chart of primary aluminum purchases, the Department found that cumulatively the largest purchase was classified

under the generic category of “supplier.” The Guang Ya Companies argue that this largest recorded purchase was not in fact a single purchase sourced from a single supplier, but rather comprised of several small shipments from multiple suppliers during the course of the POI. The Guang Ya Companies argue that they explained to Department officials at verification, in the normal course of business the company books some purchases under the generic term “supplier,” when at the time of delivery, the warehouse employees inputting the material into inventory do not know the identity of the supplier. As a result, although this may seem to be the largest purchase in Guang Ya’s books and records, it is actually a series of small shipments under the generic entry of supplier. See Guang Ya Companies Verification Report at 7.

Furthermore, according to the Guang Ya Companies, not only was the Department able to verify that the Guang Ya Companies received this merchandise from multiple suppliers but also verified that it was paid in small batches to the several suppliers. See Guang Ya Companies Verification Report at 7. The Guang Ya Companies conclude that because the Department was able to verify their record keeping as to their purchases of primary aluminum, Petitioners’ argument should be rejected and AFA should not be applied.

Department’s Position: We disagree with Petitioners that we should apply AFA to the Guang Ya Companies’ purchases of primary aluminum. Under 19 CFR 351.511(b), the Department will normally consider a benefit as having been received as of the date on which the firm pays or, in the absence of payment, was due to pay for the government provided good or service. Thus, at verification, the Department confirmed the total quantities of primary aluminum purchased by both Guang Ya and Guangcheng during the POI. See Guang Ya Companies Verification Report at 6-8 and Exhibits 9 and 14. Specifically, we reviewed the internal quantity and value ledgers for both imported and domestically sourced primary aluminum for both companies and reconciled the total payments during the POI to their respective financial statements. Id. We also reviewed a variety of pre-selected purchases and did an on-site inspection of the warehouse where the primary aluminum was delivered. See Guang Ya Companies Verification Report at 6-8 and Exhibit 7. Additionally, the Guang Ya Companies were able to trace the purchases reported in their questionnaire responses to the corresponding invoices, including the single largest purchase of aluminum that it made during the POI. See Guang Ya Companies Verification Report at 7 and Exhibit 8 which describe the verification of the Guang Ya Companies’ purchase of primary aluminum during the POI including their largest purchase, which was comprised of several smaller purchases.

At verification, we were unable to match all of the deliveries the Guang Ya Companies received in their warehouse to the corresponding accounting records. See Guang Ya Companies Verification Report at 7. However, as noted above, we were able to identify the date on which all of the purchases were made during the POI, which 19 CFR 351.511(b) states is the information the Department requires in order to quantify the benefit. Moreover, we find there is no evidence on the record indicating that payments for deliveries of primary aluminum made to the Guang Ya Companies were not eventually made. Because we were able to determine the date of the purchases during the POI, we do not find that there is information missing from the record, or that the Guang Ya Companies failed to cooperate by not acting to the best of their ability in this regard. Therefore, we have determined that AFA is not warranted. See Sections 776(a) and (b) of the Act.

Comment 23: Whether the Land for LTAR Program Constitutes a Financial Contribution, Provides a Benefit, and is Specific

The GOC disagrees with the Department's Preliminary Determination that the GOC's provision of land-use rights to the Guang Ya Companies and the Zhongya Companies constitutes the provision of a good within the meaning of section 771(5)(D)(iii) of the Act, is specific within the meaning of section 771(5A) of the Act, and confers a countervailable benefit within the meaning of section 771(5)(E) of the Act. See Post-Preliminary Memorandum at 2 – 6.

The GOC argues that in the Post-Preliminary Memorandum the Department concluded that the negotiated price for land use rights by New Zhongya Companies in the ZHITDZ was preferential, preliminarily finding that the government provided incentives such as reduced requisition compensation costs and the provision of land-use rights on a sliding scale depending on the size of the development, the firm's technological development, and the firm's domestic/international prominence. See Post-Preliminary Memorandum at 2-3.

The GOC argues that at verification it demonstrated that the criteria for negotiating prices for land parcels within the ZHITDZ were no different from the general area of Zhaoqing outside the zone:

The official provided screen shots from a website containing the guidelines for applying for land-use rights that were in effect in 2006. See VE 4 at pages 48-50 The official explained that these guidelines were applicable to parcels located throughout Zhaoqing and that there were not any separate guidelines for land located in the ZHITDZ.

See GOC Verification Report at 15. The GOC further argues that at verification the GOC explained that corporate status of the applicant is not a factor in the approval process, with the exception of farms. The GOC Verification Report states that, “any type of company can apply for land-use rights in the ZHITDZ. The official also stated that whether or not an applicant is an exporter is not a consideration.” See GOC Verification Report at 15.

The GOC contends that at verification the Department further confirmed that the ZHITDZ is not limited to high technology companies and the Department verified that the Zhongya Companies did not receive any refund or exemption on the construction fees levied for the ZHITDZ. Additionally the GOC argues that the Department confirmed that there is no construction fee imposed for construction on parcels outside the ZHITDZ. See GOC Verification Report at 15.

For New Zhongya, the GOC argues that the land in question was farmland/“greenfield” without any supporting infrastructure, and so the company was required, at its own costs, to build whatever was required. See Zhongya Companies Verification Report at 18. The GOC argues that it is clear that the Zhongya Companies negotiated and paid for the land-use rights on an arm's length basis and did not benefit from any government program. Thus the Department should conclude that the provision of such land-use rights was not countervailable or provided at LTAR.

The GOC argues similarly with regard to the Guang Ya Companies and their acquisition of land-use rights in the South Sanshui Science and Technology Industrial Park. The GOC notes that the Department verified that all parcels within the entire Sanshui district are classified

according to grade:

The official then explained that sales of land-use rights for parcels located both inside the industrial park and outside the park are negotiated. The official explained that the Sanshui District Land and Resources Bureau begins the negotiation with an interested party based on the average prices of the parcels with the same grade located throughout the Sanshui District. Then, from that starting point, the price is negotiated based on the characteristics of the parcel itself, such as location, the level of infrastructure on the parcel, and nearness to roads and sewage systems.

See GOC Verification Report at 17-18.

According to the GOC, the Department reviewed detailed lists of all the parcels sold in the Sanshui District in 2006, both within the industrial park and outside the industrial park and confirmed the accuracy of the lists provided by reference to the original source documents. See GOC Verification Report at 18 and Exhibit 5 at pages 66-78. The GOC claims that these verified documents established that the weighted-average price of the parcels sold within the industrial park was greater than the weighted-average price of all parcels sold in the Sanshui District in 2006. See GOC Verification Report at 18. The GOC concludes that there is no evidence that the purchase of land-use rights by Guangcheng in the South Sanshui Science and Technology Industrial Park occurred at preferential prices or in any way conveyed a benefit to Guangcheng or the Guang Ya Companies and, therefore, the Department has no basis to conclude that the provision of such land-use rights was countervailable or provided at LTAR.

The GOC further argues that the Department made an incorrect finding that the government sale of the rights to use land is a provision of a “good” within the meaning of the statute. The GOC states that the sale of land use rights does not fit within any of the definitions of “financial contribution” and thus cannot be held as countervailable under the statute.

The Zhongya Companies argue that in the Post-Preliminary Memorandum the Department failed to demonstrate that their acquisition of land-use rights was specific under section 771(5A) of the Act. The Zhongya Companies assert that the evidence on the record and the Department’s own findings in previous cases demonstrate that the Department cannot satisfy the relevant legal standard in this case and therefore cannot find this program to be countervailable in its final determination.

The Zhongya Companies argue that the Department previously determined:

. . . that, due to the overwhelming presence of government involvement in the land-use rights market, as well as the widespread and documented deviation from the authorized methods of pricing and allocating land, the sale of land-use rights in China is not conducted in accordance with market principles.

See LWS from the PRC Decision Memorandum at “Government Provision of Land for Less Than Adequate Remuneration” (emphasis added). In finding that any land subsidy is “widespread” and generally available in the PRC, the Department effectively has found the subsidy therefore is not “specific” and not a countervailable subsidy. They further argue that, in stating that the subsidy must be measured based on out-of-the PRC benchmarks, the Department further confirms its view that all PRC land prices are subsidized such that the subsidy is generally available (i.e., not “specific”), and the Department has failed to establish otherwise in

this case or elsewhere. In the absence of a reasonable demonstration that it is specific, the Zhongya Companies argue the Department should find the program not countervailable in the final determination.

Petitioners contend the Zhongya Companies' arguments deny the nature of land in the PRC and the industrial zones at issue. Petitioners argue that the GOC owns all of the land in the PRC and certain GOC agencies responsible for distributing land use rights have established special geographical areas within which they provide land use rights under conditions that differ from those elsewhere in the same jurisdictions. Petitioners argue that there would be no point in the GOC setting up such special zones if they served the same purpose elsewhere. Petitioners argue that, although the respondents imply that the land use rights in the zones at issue are provided on essentially the same terms as those outside of the zones the evidence on the record makes it clear that this is not the case.

Petitioners cite a document that they submitted on the record where the Zhaoqing Government touts the "Eight Advantages" of locating in the ZHITDZ, which include "preferential policies for land use." Specifically Petitioners note one of the selling points the Zhaoqing Government advertises is that it gives certain companies a better deal for land-use rights than others:

World top 500 enterprises internationally or domestically renowned enterprises, High-Tech projects at the state level, high taxation project or other influential projects can be treated individual and land prices can be further lowered upon negotiations between the investor and management committee.

See Petitioners' July 13, 2010, First New Subsidy Allegation at Exhibit 1. Petitioners further note that the Zhaoqing Government has specified that the preferred investment for the zone relate to only a handful of projects specifically including enterprises engaged in the processing of aluminum. Id.

Petitioners contest the GOC's claim that even though the local government advertises ZHITDZ to potential investors, the "guidelines" for price negotiations are the same for all firms inside and outside the zone and therefore price negotiations cannot be specific. Petitioners note that section 771(5A)(D)(iv) of the Act states that in the case where a good is sold for LTAR it is specific if the subsidy is limited to an enterprise or industry located within a designated geographical region. Petitioners assert that the information posted by the GOC on the Internet makes clear that it does not negotiate on neutral criteria.

With regard to the land use rights in the South Sanshui Science and Technology Industrial Park, Petitioners argue that the GOC makes a similar claim that land-use rights prices are the same inside and outside of the zone. Petitioners contest as unsubstantiated the GOC's assertion that it uses the same grading system for land in and outside the zone or that this renders the provision of these land use rights not specific because negotiations all begin at the same price. Additionally, Petitioners argue that the GOC's contention that it charged more for land inside the zone did not withstand verification. See GOC Verification Report at 18.

Petitioners disagree with the Zhongya Companies' argument that the Department "has not explained its analysis for finding the alleged program to be specific." Petitioners assert that in the Post-Preliminary Memorandum the Department specifies that land use rights are regionally specific under section 771(5A)(D)(iv) of the Act. See Post-Preliminary Memorandum at 5. Petitioners argue that the evidence on the record indicates that the GOC created the zone and

offers land use rights in this designated geographic area at preferential prices. See Petitioners' July 28, 2010, Second New Subsidy Allegation at Exhibit 6 and 7. In conclusion, Petitioners support the analysis in the Post-Preliminary Memorandum concerning the GOC's provision of land use rights. Petitioners assert that the Department correctly found that these land use rights provided by the GOC are regionally specific.

Department's Position: We disagree with the notion that the GOC's provision of land-use rights does not constitute a financial contribution, confer a benefit, or is not specific. The Department has addressed this argument in past CVD proceedings involving the PRC. As explained in LWTP from the PRC, the Department's practice of treating land as a good or service is fully consistent with the Act. In that investigation, the Department explained that it has consistently taken the position that the provision of land is the provision of a good or service and, consequently, a financial contribution under section 771(5)(D)(iii) of the Act. See LWTP from the PRC Decision Memorandum at Comment 12. The Department further explained in LWTP from the PRC that the statutory definition of a financial contribution is written broadly in recognition that governments have a variety of mechanisms at their disposal to confer a financial advantage on specific domestic enterprises or industries. Id. The SAA confirms that the sweep of the statute is intended to be broad to ensure that such mechanisms are subject to the CVD law:

Section 771(5)(D) of the Act lists the four broad generic categories of government practice that constitute a "financial contribution." The examples of particular types of practices falling under each category are not intended to be exhaustive. The Administration believes that these generic categories are sufficiently broad so as to encompass the types of subsidy programs generally countervailed by Commerce in the past, although determinations with respect to particular programs will have to be made on a case-by-case basis.

See SAA at 927. We agree with the reasoning set forth in LWTP from the PRC, and adopt that reasoning in response to the arguments raised here.

We further disagree with the arguments of the GOC and the respondents concerning whether the land for LTAR programs are regionally specific under section 771(5A)(iv) of the Act. The GOC and the respondent have presented no evidence that overcomes or disproves the factual information from regional and municipal governments in the PRC that the Department used as its basis for finding regional specificity within the two zones. Regarding the ZHITDZ, a brochure issued by the PGOG states that there are preferential policies for land use within the zone, namely that land prices can be lowered according to such factors as industry type, investment volume, and output volume. See Petitioners' June 13, 2010, submission at Exhibit 1. The PGOG brochure further states that with regard to land prices "world top 500 enterprises, internationally or domestically renowned enterprises, high-tech projects" ". . . and other influential projects can be treated individually" and that "land prices can be further lowered upon negotiations between the investor and the management committee." Id. Similarly, regarding the South Sanshui Science and Technology Industrial Park, documents from the Sanshui District Government (located in Foshan City) indicate that industrial land within the South Sanshui Science and Technology Industrial Park will be offered at preferential prices. See Petitioners' July 28, 2010, submission at Exhibits 6 and 7. When asked at verification to discuss the information from the municipal government touting preferential prices for firms that located

within the South Sanshui Science and Technology Industrial Park, the GOC stated that it was unable to comment on this. See GOC Verification Report at 18.

We further disagree with the Zhongya Companies' argument that, by previously finding that deviations from the authorized methods of pricing and allocating land are "widespread" and generally available in the PRC, the Department effectively has found the provision of land-use rights to be not specific. See LWS from the PRC Decision Memorandum at "Government Provision of Land for Less Than Adequate Remuneration." The excerpt from LWS from the PRC to which the Zhongya Companies cite was made in reference to the benchmark that the Department must utilize when determining whether land was sold in the PRC for LTAR. Specifically, the passage in question states that the overwhelming presence of GOC involvement in the land-use rights market makes the use of a tier three benchmark under 19 CFR 351.511(a)(2)(iii) (i.e., whether the GOC's pricing of land-use rights is consistent with market principles) not viable. As such, the Department's statement in LWS from the PRC cannot be interpreted as a finding on by the Department that the GOC's provision of land-use rights cannot be specific under section 771(5A) of the Act.

Comment 24: Whether the Department Should Revise the Benchmark Used Under the Land for LTAR Program

The Zhongya Companies argue that the Thai land benchmarks used by the Department in its post-preliminary determination calculations are inappropriate. They argue that the Department must use alternative land benchmarks placed in the record by New Zhongya that meet the legal requirements relating to comparability and non-subsidization, or it must make adjustments to the Thai land benchmarks.

The Zhongya Companies argue that, while the first quarter 2008 Thai land values used as a benchmark in the post-preliminary calculations also have been used as the land benchmark in previous CVD investigations, the Department has not provided any evidence that the values represent an accurate and legally acceptable benchmark based on the particular circumstances of the Zhongya Companies' land acquisition. They argue that the Department has simply and impermissibly relied on the same land values as those used in LWS from the PRC without any supporting evidence showing how these property values accurately reflect the market value of the specific land acquired by the Zhongya Companies. They argue that this is contrary to the Department's own approach in LWS from the PRC, in which the Department focused on the specific land-use rights at issue in that investigation.

The Zhongya Companies argue that the Department has made no demonstration in this case that the province in which the Zhongya Companies are located is similarly "on par with Thailand," and there is no evidence in the record indicating that it is. The Zhongya Companies maintain that the record of each review/investigation is independent and the decision should be case specific.

The Zhongya Companies argue that the record in this investigation shows the Thai land benchmarks used in the Post-Preliminary Memorandum fail to meet the comparability requirements of section 771(5) of the Act and 19 CFR 351.511(a) because of fundamental differences between the proposed benchmark and New Zhongya's acquisition. First they argue that the Thai benchmarks pertain to properties in developed industrial parks with significant amenities, while the land acquired by the Zhongya Companies was undeveloped. They explain that the Thailand benchmarks used in the Post-Preliminary Memorandum were based on land

values for properties in several Thai industrial parks or estates, as reported in a CBRE Asian Industrial Market Flash for first quarter 2008. The Zhongya Companies add that both the first quarter 2008 and first quarter 2007 versions of the CBRE report show that the Thailand industrial estates and parks for which indicative land values are provided include infrastructure and other amenities unlike the greenfield land acquired by the Zhongya Companies. They further argue that the CBRE “Industrial Property Guide” included as Exhibit B of the November 26, 2010, submission explains that the Thai Industrial Estates and Industrial Parks/Zones are more expensive than greenfield sites, which require additional costs for land preparation, connection to utilities, and other infrastructure and amenities.

The Zhongya Companies argue that at verification they provided 128 photographs showing the development of their factory site from 2005 to March 2010. The Zhongya Companies then argue that the benchmark prices based on the land values for the Thailand properties vastly overstate the value of the New Zhongya properties. As evidence, they refer to page 12 of the CBRE Industrial MarketView report for the Philippines in second quarter 2007 (Exhibit D to the November 26, 2010 submission), which lists average lease rates and capital values at selected industrial parks in the Philippines at the end of second quarter 2007. They state that one property in Subic Bay Technopark listed as having “infrastructure in place” has an indicated land price of US\$4.64 per square foot for a 50-year leasehold. They state that a second property, located in the same region in Subic Bay Industrial Park, is not indicated as having “infrastructure in place” and has an indicated land price of only US\$2.80 per square foot, also for a 50-year leasehold. They argue that these prices indicate that the value of land without infrastructure is worth only approximately 60 percent of the value of similar land available with infrastructure in place.

Second, the Zhongya Companies argue that the Thai benchmarks used are for sales involving permanent transfers of property rights, while the land they acquired was only a 50-year lease for limited land-use rights. They contend that the Thai land values used in the benchmark represent significantly more valuable permanent land transfers as compared with the limited 50-year leases of land-use rights.

Third, they argue that the benchmarks used by the Department are from a time more than two years after New Zhongya’s acquisition and the Department’s adjustments for inflation are insufficient to account for changes in property values during the intervening period. They argue that the Thailand land values used in the Department’s benchmark are taken from a CBRE report on industrial land values in Thailand for the first-quarter of 2008, which is well over a year after the 2006 land acquisitions by the Zhongya Companies to which they are compared. They further argue that the CBRE report from which the land benchmark prices were sourced reflects the volatility of industrial land prices in Thailand, in particular, the impact of the booming automotive sector and related Eco-Car initiative that spurred investment in Thailand’s economic sector in first-quarter 2008. They argue that, as a result of this volatility, prices from first-quarter 2008 do not accurately reflect market prices from mid-2006, even when adjusted for inflation.

Fourth, they argue that the Thai benchmarks used are from a major metropolitan city (Bangkok), while the property acquired by the Zhongya Companies is in a much less developed area. They then explain that the Zhongya Companies’ acquisition was of land that is not near a city of the size and state of development of Bangkok.

Fifth, they argue the CBRE report from which the Department obtained the Thai land values indicates that industrial land values in Thailand that the Department used as the benchmark were artificially inflated by Thai government subsidies to the automotive industry.

They argue that such subsidies led to an automotive industry boom that spurred investment and drove up industrial land values in the particular locale that the Department used for the benchmark land prices. They conclude that the courts routinely have recognized that benchmarks distorted by government intervention cannot be used as benchmarks in CVD proceedings, citing, e.g., Royal Thai Government v. United States, 441 F. Supp. 2d 1350, 1365 (CIT 2006).

The Zhongya Companies argue that a land value for industrial property in the Philippines that they placed on the record satisfies the relevant legal requirements relating to comparability and non-subsidization. Specifically, they contend that the CBRE Industrial MarketView report provided as Exhibit D to their November 26, 2010, submission lists a land price for a 50-year leasehold in the Subic Bay Industrial Park of US\$2.80 per square foot. They argue that, similar to the term of New Zhongya's land acquisition, this land value is for the acquisition of a 50-year lease of an industrial property. They also argue that because the Subic Technopark property listed immediately below it in the CBRE report is indicated as having "infrastructure in place," the lack of such a description for the Subic Bay Industrial Park property indicates that it does not have infrastructure in place and therefore is a greenfield tract comparable to the land acquired by the Zhongya Companies. Third, they argue that the indicative land price reported is for a period (second quarter 2007) relatively close in time to the Zhongya Companies' acquisitions (June and October 2006) and there is no evidence that land prices in the Philippines experienced unusual volatility during the intervening months. Fourth, they argue there is no evidence that land prices in Subic Bay Industrial Park are distorted by subsidies or other government intervention. Fifth, they contend that the Philippines is economically similar to the PRC, as evidenced both by the economic data in the Department's memorandum of January 11, 2011, and by the fact that the Department found the Philippines to be economically comparable to the PRC in the companion AD investigation.

The GOC also argues that, in measuring the benefit, the Department incorrectly uses the price of outright land sales of industrial land in Bangkok, Thailand, as benchmarks for land leases in Zhaoqing and Foshan, the PRC, without any adjustments to account for obvious differences. The GOC argues that the statute requires the Department to seek domestic benchmarks, and that external land price benchmarks are not permissible under the statute because the value of land in another country can be determined only on the basis of the derived demand in that other country, which is necessarily based on the land's productive use in that country. The GOC concludes that, in this investigation, the Department has failed to use Chinese land benchmarks and made no adjustments the many differences in market conditions affecting land values between the urban metropolis of Bangkok, Thailand, and the areas of Zhaoqing and Foshan.

Petitioners rebut by arguing that the GOC created the South Sanshui Science and Technology Industrial Park and offers land-use rights in this designated geographic area at preferential rates, citing to screen shots of government websites. They agree with the approach from the Preliminary Determination, contending that the Thai land prices are appropriate and contemporaneous benchmarks from an authoritative, public source and that appropriate adjustments for inflation were made. They take issue with the Zhongya Companies' assertion that the land-use rights the Zhongya Companies acquired are in a much less developed area than the Thai industrial zones forming the basis of the benchmark prices used by the Department, which wrongly implies that the Thai industrial land is in downtown Bangkok, which Petitioners assert is not the case. They argue that the Department should reject the proposal of using

alternative land prices from the Philippines. They also point out that the proposed benchmark zone in the Philippines is adjacent to a highly developed metropolitan area. They also rebut the Zhongya Companies' position that subsidies in Thailand to the auto industry distorted land values by arguing that the alternative Philippines data reference incentives and tax amnesties for companies located in the economic zones. See Petitioners' February 15, 2011, Rebuttal Brief at 58 – 60.

Petitioners further argue that the Zhongya Companies do not provide adequate support for their assertion that infrastructure should represent more than half of the cost of land use rights. They contend that the comparison of two disparate pieces of land contained in the Philippines land data are neither scientific nor authoritative and thus cannot be accepted as a general rule for the final determination. In conclusion, Petitioners argue that the land values for industrial estates outside Bangkok are appropriate and that the Department adjustments are sufficient to ensure an appropriate comparison under the Act. Id. at 60 – 61.

Department's Position: We disagree with the GOC and the Zhongya Companies that the Department should use as external land benchmarks the prices for land in the Philippines placed on the record by the Zhongya Companies. See the Zhongya Companies November 26, 2010, submission at Exhibit D. Consistent with LWS from the PRC and Citric Acid from the PRC, we continue to determine that that the "indicative land values" for land in Thai industrial estates, parks, and zones, which are published in the "Asian Industrial Property Market Flash" by CBRE, are suitable for comparison with the prices for land-use rights acquired by New Zhongya and the Guang Ya Companies. The 2007 prices for land in Thailand that were provided by Zhongya Companies are from the same source (CBRE), and pertain to the same industrial lands in Thailand, as the 2008 prices that we used in our preliminary calculations. See the Zhongya Companies' November 24, 2010, submission at Exhibit A, page 3.

With regard to the Zhongya Companies' argument that New Zhongya's land in the ZHITDZ is not comparable with the Thai industrial lands referred to in the CBRE report, we do not agree. Information on the record indicates that the levels of infrastructure and the amenities in the ZHTIDZ and the Thai industrial parks referenced, as the CBRE report, are comparable. A website provided by Petitioners that was published in 2004 and entitled "An Introduction to Zhaoqing" contains a detailed description of the ZHTIDZ. Under the heading, "Preferential Policies for Land Use," the website states that the "Zhaoqing High-Tech Zone offers the industrial estate which has been well-equipped with electricity, water, cable, road..." indicating a significant level of infrastructure. See Petitioners July 13, 2010, New Subsidy Allegations at Exhibit 1, page 8.

The website also touts several "advantages" of the industrial park regarding the park's infrastructure, location, and amenities. For example, "Advantage Four: Convenient Multidimensional Transportation Network" is a detailed description of the park's proximity to large cities (i.e., Guangzhou, Hong Kong, Macao), roadways, railways, ports, and the airport. "Advantage Five: High Starting-point Planning, High Standard Construction" states, "the infrastructure facilities are growing better and better" and lists as supporting service facilities a customs house, commodity inspection, a bank, a school, and a hospital. It also states that a golf holiday village, five-star hotel, large shopping mall, and high class business center will be forthcoming. See Petitioners July 13, 2010, New Subsidy Allegations at Exhibit 1, pages 5-8. With regard to the slideshow presentation at verification, we collected pictures of the construction of New Zhongya showing power lines and a canal on or near the site, and do not

agree with the Zhongya Companies that these pictures prove that the land is not comparable to Thai industrial lands. See Zhongya Companies Verification Report at Exhibits 24-26.

The CBRE report lists prices for Thai land in industrial estates, industrial parks and an industrial zone under the heading “Industrial Parks.” The report describes industrial estates in Thailand as having similar levels of infrastructure and amenities as what was advertised for the ZHTIDZ (see above). According to the CBRE report, in Thailand,

an industrial estate resembles an industrial town or industrial city, providing the complete infrastructure necessary for industrial operation, including electricity, water, flood protection, waste water treatment, solid waste disposal, etc. They are accessible to seaports, airports, and other transportation centres.

See the Zhongya Companies’ November 26, 2010, submission at Exhibit A, page 11.

Another CBRE report, titled “Industrial Property Guide,” contains a description of Industrial parks/Zones,” and it states that, “[p]hysically, industrial parks/zones are quite similar to the industrial estates...” See the Zhongya Companies’ November 26, 2010 submission, at Exhibit B (page 5 of the guide). In addition, at our verification meetings with the GOC, an official explained that the ZHITDZ was attractive to because of its location and because it has better infrastructure than other parts of Zhaoqing (i.e., specifically more advanced roads, water and sewer systems, and residential infrastructure). See GOC Verification Report at 16. For these reasons, we do not find the arguments for not using the land prices for industrial land in Thailand or for making an infrastructure comparability adjustment to these Thai industrial land prices to be persuasive. We also disagree with the Zhongya Companies’ assertion that the Department did not make a case-specific finding regarding the comparability of the Thai industrial land to land in the ZHITDZ.

We agree with the Zhongya Companies that we should use the 2007 land prices, as opposed to the 2008 land prices we used in our preliminary calculations. New Zhongya acquired its land-rights in 2006, and the Guang Ya Companies acquired their land-use rights in 2007. As 2007 is more contemporaneous with the times of these purchases, we have used the 2007 prices for Thai industrial land for benchmark purposes. See the Zhongya Companies November 26, 2010, submission at Exhibit A, page 3. These are the same benchmark prices that were used in the LWS from the PRC and Citric Acid from the PRC. In addition, with regard to the Zhongya Companies’ argument that the 2008 Thai land prices are distorted by subsidies that increased the land values in 2008, we do not need to address this point, as we determine to use the 2007 land prices provided by the Zhongya Companies instead of the 2008 prices.

We also disagree with the argument that land price data from the Philippines are best suited for use as a benchmark. As stated above, we find that the land-use rights acquired by the Zhongya Companies and the land that comprises the Thai land benchmark are located in areas with infrastructure development. In contrast, according to the Zhongya Companies, the proposed land prices from the Philippines are not located in an area with infrastructure development. Further, we disagree with the Zhongya Companies’ argument that the Philippines land price data are a better benchmark because, unlike the Thai land price data, they are not distorted by government subsidization. As Petitioners point out, the alternative Philippines data reference incentives and tax amnesties for companies located in the economic zones. See the Zhongya Companies’ November 26, 2010, submission at Exhibit A, page 7. Therefore, we continue to use the land price data from Thailand as the basis for the benchmark under the land for LTAR

programs at issue in this investigation.

Comment 25: Whether the Department Erred in Rejecting Factual Information Concerning the Benchmark Used Under the Land for LTAR Program

The Zhongya Companies argue that the Department improperly rejected the Zhongya Companies' December 22, 2010, submission providing needed information to accurately calculate the true subsidy rate, despite the fact that the Department introduced very little evidence on the record regarding the Thai land benchmark, and despite the Department's statutory obligation to accurately measure the amount of the subsidy. They argue that the Department's initial letter rejecting the Zhongya Companies' requested extension with regard to aluminum benchmark information failed to address the pending request relating to the land benchmark. They explain that, in a letter dated November 24, 2010, they requested an extension until December 22, 2010, to provide further information as to benchmark land values, on the basis that this date was consistent with the deadline for providing final surrogate value information in the companion AD case and would not be information subject to verification during the upcoming verification. They contend that, if the Department had time to consider benchmark information for the companion AD investigation, it would equally have such time in the CVD case. They further explain that the Department issued its October 29, 2010, Post-Preliminary Memorandum well after the deadline for its August 29, 2010, Preliminary Determination, thereby warranting additional time for consideration of appropriate benchmarks. They explain that they followed this request with a separate letter on November 26, 2010, requesting extension of the deadline to submit information relevant to benchmark aluminum input values. They argue that on December 8, 2010, the Department responded by rejecting only the Zhongya Companies' request with regard to the benchmark aluminum input values.

The Zhongya Companies argue that the reasons cited in the Department's letter rejecting an extension for aluminum benchmark information weigh in favor of granting the requested extension with regard to land benchmark information. They argue that the Department's letter notes that the aluminum benchmark was determined in the Preliminary Determination, published on September 7, 2010, and two subsequent invitations were issued to relevant parties to comment further on the benchmark used in the MTAR program. They argue that the land benchmark, however, was not determined at that time and no such explicit invitations to comment were issued by the Department.

They argue that the Department's letter of January 5, 2011, rejecting the December 22, 2010, submission of land benchmark information did so simply by a brief reference to the previously established deadline and without addressing any of the reasons Zhongya Companies provided for needing an extension or otherwise explaining why "good cause" did not exist to grant the extension, as the Department is authorized to do under 19 CFR 351.302(b). They complain that the Department has routinely extended the deadline for submission of new facts in other cases, and contend that its unexplained failure to follow such practice in this case is not in accordance with law.

The Zhongya Companies then argue that the Department itself then added new benchmark data to the record on January 11, 2011 -- nearly three weeks after rejecting New Zhongya's submitted benchmark data as untimely. They contend that Department thereby demonstrated that still had ample time under the statutory deadlines to consider further relevant information in order to determine accurate benchmarks meeting the relevant statutory and

regulatory requirements. They argue that Department's failure to explain why its information was timely and relevant but the Zhongya Companies' information should be rejected out of hand furthermore is not in accordance with law.

The Zhongya Companies conclude that the Department has been inconsistent, and has failed to explain its acceptance/inclusion of certain information versus rejection of other information on the record.

Department's Position: We disagree with the Zhongya Companies. The Department clearly indicated to interested parties that, in accordance with 19 CFR 351.301(b)(1), the deadline for factual information would be due no later than the close of business on November 26, 2010, which corresponded to seven days prior to the start of verification. See Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations (Factual Deadline Memorandum). The Zhongya Companies filed the factual submission in question on December 22, 2010, 12 days after the completion of the GOC verification, 15 days after the completion of the Zhongya Companies' verification, and 26 days after the new factual information deadline. Thus, the Department properly rejected the Zhongya Companies' December 22, 2010, submission as untimely under 19 CFR 351.302(d)(1)(i).

The Zhongya Companies' claims concerning its November 24, 2010, request for an extension to the factual deadline and the Department's purported silence concerning its request to submit additional information concerning the land for LTAR benchmarks constitute nothing more than an attempt to create ambiguity where none exists. Again, the Factual Deadline Memorandum made it abundantly clear that November 26, 2010, was the deadline for additional factual information. The Department's December 8, 2010, letter to the Zhongya Companies rejecting their request for additional time to file factual information only served to reiterate the finality of the November 26, 2010, deadline. See the Department's December 8, 2010, letter, "Response to Request for Extension of Time to File Factual Information Pertaining to the More Than Adequate Remuneration (MTAR) Program," (More importantly, the requested extension date is past the regulatory deadline for the submission of factual information. See 19 CFR 351.301(b)(1)). We also disagree that, because the Department has accepted information filed after the deadline in other cases, it was required to accept the Zhongya Companies' untimely filed data. The Department is not required to extend its deadlines. As the CIT has held, the Department has "broad authority to set, and extend, its deadlines." See SKF, 675 F. Supp. 2d at 1274.

We further disagree with the Zhongya Companies' argument that the Department should have accepted the information contained in their December 22, 2010, submission because it was not information subject to the upcoming verification. It is the role of the Department, and not that of the respondent or petitioning parties, to determine whether information is subject to verification. In fact, as the Preamble to Procedural Regulations points out, the reason why 19 CFR 351.301(b)(1) sets the factual information deadline seven days prior to verification is that, "... a single deadline ensures that Department analysts have time to review submitted information before they depart for verification."

Lastly, we disagree with the Zhongya Companies' argument that the Department's placement of 2009 Benchmark Interest Rate Memorandum on the record after completion of verification undermines its decision to reject the Zhongya Companies' December 22, 2010, submission. In the Preliminary Determination, the Department stated its intention to place updated benchmark data on the record as soon as it became available: "The Department notes

that the current 2008 loan benchmark may be updated, by the final determination, pending the release of all the necessary 2009 data.” See 75 FR at 54309.

Comment 26: Whether the Guang Ya Companies Received an Additional Subsidy in Connection With the GOC’s Purchase of Land-Use Rights and Buildings

Petitioners argue that at verification the Guang Ya Companies and its affiliate Guangcheng revealed that they had received payment from the local government in connection with the acquisition of land and buildings. See Guang Ya Companies Verification Report at 20. Although the Department obtained a copy of a sales agreement between Guangcheng and the Foshan City Nanhai District Sushan Township Guanyao Office, Petitioners argue more information is required for the Department to determine whether this financial payment constitutes a countervailable subsidy. See Guang Ya Companies Verification Report at Exhibit 25.

Petitioners argue that the Department is required to determine whether a benefit was provided by the government to Guangcheng in the form of excessive compensation and more detailed information is also needed relating to the land and buildings that Guangcheng sold in order to assess the appropriate level of compensation. See Guang Ya Companies Verification Report at 20. Petitioners argue that the Department should obtain further information in order to investigate this financial contribution and potential subsidy. If the Department determines that insufficient time remains to investigate this possible subsidy before the final determination, Petitioners argue that it should defer consideration of this newly discovered potential subsidy to the first administrative review pursuant to 19 CFR 351.311(c)(2).

According to the GOC, the Guang Ya Companies had no obligation to report on this transaction in their questionnaire response and should not be penalized for that fact that this transaction was discussed for the first time at verification. The GOC argues that Petitioners have provided no evidence that the circumstances surrounding this transaction justify the initiation of an investigation because of the lack of a financial contribution, benefit or specificity.

The Guang Ya Companies argue that Petitioners are factually incorrect regarding the circumstances in which Guangcheng received compensation for the land and buildings, and that the issue was discussed in full at verification. Guangcheng was required by the local government in Foshan City, Nanhai District, to sell to the local government certain land and buildings owned by Guangcheng, through the government’s right of eminent domain. The property was needed in order to build a high speed rail line that crossed a portion of Guangcheng’s premises. See Guang Ya Companies Verification Report at 20. According to the Guang Ya Companies, the transaction is essentially a sale of land use rights, and the compensation was the value of the property taken and does not constitute a “benefit” as Petitioners argue.

The Guang Ya Companies contend that the Act and regulations define “benefit” as instances where goods or services are provided at LTAR. See Section 771(5)(E)(iv) of the Act; see also 19 CFR 351.511(a). The Guang Ya Companies argue that the government’s exercise of its right of eminent domain cannot be regarded as a “benefit” to the company. According to the Guang Ya Companies, the Department verified that Guangcheng received “compensation” in the form of monies from the local government for its land and buildings, and that it booked this receipt of income as it does with other payments under the “special payables account.” See Guang Ya Companies Verification Report at 20. However, the Guang Ya Companies argue that this compensation does not amount to an award or a benefit, and Petitioners’ argument that the

Department attempt to investigate this alleged subsidy should be rejected.

Department's Position: The Department's regulations provide that, if the Department discovers a practice "that appears to provide a countervailable subsidy with respect to the subject merchandise and the practice was not alleged or examined in the proceeding," the Department will examine the practice if it concludes that "sufficient time remains before the scheduled date for the final determination." See 19 CFR 351.311(b). In their case brief, Petitioners allege that information concerning compensation from the GOC for certain land and buildings which was discovered at verification may constitute a subsidy, and that the Department should obtain additional information about it. However, we find that there is insufficient time to examine the allegations contained in Petitioners' case brief. Therefore, should the instant investigation result in the imposition of an order, the Department will examine the circumstances surrounding the acquisition of the land and buildings at issue in a subsequent administrative review involving the Guang Ya Companies, pursuant to 19 CFR 351.311(c)(2) (providing that the Department may defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any).

Comment 27: Whether PRC Commercial Banks Are GOC Authorities That Provide a Financial Contribution

The GOC argues that the Department has previously determined that state ownership alone is not sufficient to establish that PRC commercial banks are authorities for purposes of the CVD law and has found that entities with majority government ownership not to be government authorities for purposes of the CVD law. See CFS from the PRC Decision Memorandum at Comment 8; see also DRAMS from Korea Decision Memorandum. The GOC asserts that the Department must have affirmative evidence that PRC commercial banks are GOC authorities. It further argues that, rather than ownership, the issue should center on whether commercial banks are acting on a commercial basis or fulfilling government policies. In this regard, asserts the GOC, the record evidence demonstrates that the PRC commercial banks involved in this proceeding acted on a commercial basis and that there is no evidence that the GOC directed said banks to provide a financial contribution.

Petitioners argue that the Department has previously found that the GOC maintains majority ownership in nearly all of the country's banks and guides their operations through various means. See CFS from the PRC. They further argue that the record contains ample evidence of affirmative control on the part of the GOC. Thus, Petitioners argue that the Department should continue to find that PRC commercial banks are GOC authorities which are able to provide a financial contribution under the CVD law.

Department's Position: The Department has previously determined that government-owned banks are a public entity or authority under the CVD law. See, e.g., OCTG from the PRC Decision Memorandum at Comment 20. This treatment of government-owned commercial banks as authorities is consistent with our treatment of all other government-owned entities, such as government-owned manufacturers, utility companies, and service providers. In CORE from Korea, the Department decided to modify our treatment of commercial banks with government ownership with respect to the finding of a financial contribution under section 771(5)(B)(i) of the Act. See CORE from Korea Decision Memorandum at "Programs Determined to Confer

Subsidies.” As we found in CORE from Korea, we continue to find that the treatment of government-owned commercial banks as authorities is also consistent with 19 CFR 351.505(a)(2)(ii) and 351.505(a)(6)(ii). Thus, a government owned or controlled bank, be it a commercial bank or a policy bank, is considered a public entity or authority under the Act. Therefore, the Department considers banks that are owned or controlled by the government to be public authorities under the CVD law.

In light of the Department’s findings in CORE from Korea, we do not find the GOC’s arguments concerning CFS from the PRC (e.g., that the Department purportedly found that state ownership alone is not sufficient to establish that PRC commercial banks are authorities and even found entities with majority government ownership not to be government authorities) to be persuasive. Further, as noted above, in OCTG from the PRC, an investigation issued after CFS from the PRC, the Department explicitly rejected the notion that state ownership alone is not sufficient to establish that Chinese commercial banks act as GOC authorities. See OCTG from the PRC Decision Memorandum at Comment 20.

Comment 28: Whether There Is a Link Between the Alleged Policy Lending Program and Actual Loans Received by Respondents

The GOC argues that the record fails to establish any link between an alleged government policy to encourage a specific industry and the bank loans received by the Guang Ya Companies. According to the GOC, in the Preliminary Determination the Department unlawfully concluded that loans received by the Guang Ya Companies from SOCBs and policy banks were made pursuant to government directives. See 75 FR at 54313. According to the GOC, the Department’s standard as applied in this investigation, reaches beyond the lawful limits. U.S. law provides that a subsidy is specific as a matter of law when “the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limit access to the subsidy to an enterprise or industry.” See section 771(5A)(D)(i) of the Act. The GOC submits that the Department may not lawfully rely on isolated references to the “non-ferrous metals industry” and general statements of broad economic goals such as “creating favorable conditions for enterprises’ mergers and acquisitions (M&A) and restructuring, and accelerating enterprises’ merger and restructuring,” citing to certain planning documents, to make this determination. The isolated references to “government support” or “creating favorable conditions” from various plans cited by the Department, that have to be “taken together,” fall short of requiring preferential lending to the aluminum extrusions industry. The Department must examine the broad scope and context of these documents in its final determination. The GOC argues that the documents relied upon by the Department to make its determination do not direct “policy lending” to aluminum extrusions industry. The GOC contends that these documents neither provide nor expressly limit a subsidy to the aluminum extrusions industry.

The GOC argues that Decision 40 does not support the Department’s conclusion that the GOC directs lending to aluminum extrusions producers at preferential rates. See Preliminary Determination, 75 FR at 54312. First, contends the GOC, Decision 40 applies to hundreds of projects and is not limited to a single enterprise or industry as required section 771(5A)(D)(i) of the Act. In addition, Article 17 of Decision 40 specifically provides that “{a}ll financial institutions shall provide credit in accordance with lending principles.” See Decision 40 at 10. Thus, there is no directive in Decision 40 for preferential lending specifically to the aluminum extrusions industry.

Furthermore, the GOC argues, the Department dismisses the GOC's confirmation that the Special Loans Circular revoked the PRC's policy lending programs in 1999. See the GOC's August 4, 2010, questionnaire response at Exhibit 18. The GOC contends that the Department failed to provide substantive references to justify its preliminary decision particularly because the Preliminary Determination acknowledges that the 1999 Circular specifically provides that "banks shall make lending decisions on their own." See 75 FR at 54313.

Petitioners disagree with the GOC's contention that the Department made an error in its decision to countervail policy lending. According to Petitioners, Chinese law requires that the country's banks, state and commercial, lend according to industrial policies. See Petition at Exhibit III-44 at Article 34. Petitioners note that the Department cited to language of many of the relevant policies in the Preliminary Determination. See 75 FR at 54312 - 54313. Petitioners point to the Aluminum Industry Guidelines which call for the development of high value-added processed aluminum products, and further provide that financial institutions shall rationally allocate the lending credits taking into account the national macroeconomic adjustments, industrial policies and ordinary lending principles. See Petition at Exhibit III-21. Petitioners further highlight the Nonferrous Metal Plan which provides that the GOC should:

Increase the support to backbone nonferrous enterprises in financing, and provide support in issuance of stocks, enterprise bonds and corporate bonds, and in bank loans, for project that are in conformity with the industrial policy, environmental protection and land laws and regulations, and investment regulations, and for enterprises that undertake M&A restructuring, 'going abroad,' and technology reform.

See Petition at Exhibit III-25. Petitioners note that, in referencing the Nonferrous Metal Plan in the Preliminary Determination, the Department failed to utilize the translation noted above that contains the term "bank loans." See 75 FR at 54313. Petitioners conclude that the record of this investigation demonstrates that the GOC's pronouncements in various laws and industrial policies indicate that there is a link between policy lending programs and actual loans received by the respondents.

Department's Position: We continue to find that loans received by the aluminum extrusions industry from SOCBs were made pursuant to government directives. We disagree with the GOC's contention that the Department erred in countervailing policy lending in the Preliminary Determination. In general, the Department looks to whether government plans or other policy directives lay out objectives or goals for developing the industry and call for lending to support objectives or goals. See, e.g., Drill Pipe from the PRC Decision Memorandum at Comment 8. We find this standard has been met in the instant investigation.

We disagree with the GOC's claim that the Special Loans Circular effectively revoked the GOC's extension of policy loans to favored industries. As stated above in the "Policy Loans to Chinese Aluminum Producers" section, the Special Loan Circular states that "authorities" (i.e., GOC authorities) may continue to give "advice on the choice of the project." See the GOC's August 4, 2010, questionnaire response at Exhibit 18. The Special Loan Circular further states that firms may continue to receive financing formerly designated as "special loans" provided that the government sufficiently subsidizes the firms such that they will be able to meet "commercial lending conditions." Id. In addition, the Special Loan Circular states that wholly stated owned banks shall "actively communicate with authorities" and "gain their understanding and support."

Id. Thus, we do not find the GOC's comments concerning the Special Loans Circular to be persuasive.

We also disagree with the GOC's claim that the Department's preliminary decision is flawed because it is based on isolated references and general statements of broad economic goals. The Department has previously determined that Article 34 of Law of the People's Republic of China on Commercial Banks (Banking Law) states that banks should carry out their loan business "under the guidance of the state industrial policies." See OCTG Decision Memorandum at Comment 21. The Department therefore found that the Banking Law, in some measure, stipulates that lending procedures be based on the guidance of government industrial policy. Id.

We also disagree with the GOC's claim that Decision 40 fails to support the Department's preliminary decision. In Decision 40, Article 3 states:

Adhering to combining market regulation with government guidance, we shall give full play to the fundamental role of the market in allocating resources, strengthen the reasonable guidance of state industrial policies, and realize optimal resource allocation.

See the GOC's August 4, 2010, questionnaire response, Exhibit 6 at 2. Thus, Decision 40 indicates the GOC's intent to continue to "guide" the market. Id.

Further, in addition to the GOC documents cited above, the Department referenced several other documents in the Preliminary Determination concerning policy lending to the aluminum extrusions industry. For example, the Encouraged Industries Catalogue specifically designates aluminum extrusion products for business promotion and the Industrial Catalogue identifies the aluminum industry as an encourage industry. See the GOC's August 4, 2010, questionnaire response at Exhibit 9. Moreover, as Petitioners note, the Aluminum Industry Guidelines state that financial institutions shall allocate "lending credits taking into account . . . industrial policies," deny credit to enterprises that do not conform to national industrial policies, and use "financing means" to support the aluminum industry environmental protection and energy saving efforts. Id. The Nonferrous Metal Plan makes similar references to financial support. See the GOC's August 4, 2010, questionnaire response at Exhibit 10. Therefore, we disagree with the GOC that these policies are not specific to the aluminum extrusions industry. Furthermore, business proprietary source documents concerning the largest loans the Guang Ya Companies had outstanding during the POI further supports our determination that the GOC has a policy in place to encourage policy lending to the aluminum extrusions industry. See Memorandum to the File, from Eric B. Greynolds, Program Manager, Office 3, Operations, "Excerpts from Internal Loan Documents of the Guang Ya Companies."

Thus, taking into account all of the evidence, we determine that the GOC's industrial plans clearly indicate state support and, specifically, credit or financing support for the producers of aluminum extrusions.

We also disagree with the GOC's argument that SOCBs lend to aluminum extrusion producers according to market principals and, therefore, the Department has no basis to find such loans are specific under section 771(5A) of the Act. As indicated above, the Department has cited numerous GOC documents that instruct SOCBs to take industrial policies into account

when issuing credit to certain industries, including the aluminum extrusions industry. Therefore, we find unpersuasive the GOC's claim that SOCBs adhere to market principals without regard to the GOC's industrial policy.

Comment 29: Whether the Derivation of the Short-Term Benchmark Interest Rate is Arbitrary

The GOC argues that the Department's regression-based methodology to determine the short-term benchmark interest rate that relies on IMF and World Bank data is fundamentally flawed, because the Department relies on a collection of IMF published rates which the GOC contends are not actually short-term rates, and may not reflect business loans. The GOC further argues that the Department arbitrarily excluded negative inflation-adjusted rates from its benchmark calculation. The GOC argues that the Department should use the actual interest rates on comparable bank loans in the PRC, as required by the regulations.

Petitioners disagree with the GOC's assertion that the Department's short-term benchmark interest rate is flawed. They assert that the Department correctly found that lending rates in the PRC are distorted because of the GOC's lending policies and are inappropriate for use as a "market" benchmark. See Preliminary Determination, 75 FR at 54309. Additionally, Petitioners cite the GOC's ownership of most of the banks in the county and its control over interest rates thought its manipulation of benchmark deposit and lending rates. See Petition at 14-18 and Exhibits III-34 through III-44. Petitioners conclude that the Department should continue to compare interest rates from state-owned banks to a market benchmark from outside of the PRC finding that banks owned and controlled by the GOC are government authorities capable of providing a financial contribution within the meaning of the CVD law.

Department's Position: With respect to the suitability of using a regression-based methodology that relies on World Bank governance indicators and lending rates to calculate a short-term benchmark interest rate, we disagree that the Department's methodology was arbitrary. We disagree with the GOC's argument that the assumptions underlying the benchmark calculation are flawed. The benchmark interest rate is based on several variables, the inflation-adjusted interest rates of countries with per capita gross national incomes similar to that of the PRC as well as variables that take into account the quality of a country's institutions (as reflected by World Bank governance indicators). We note that the World Bank governance indicators are factors that are not directly tied to state-imposed distortions in the banking sector. Thus, we have continued to rely on the calculated regression-based benchmark first developed in CFS from the PRC and used in recent CVD investigations involving the PRC, such as OCTG from the PRC. Regarding the GOC's objection to the Department excluding inflation adjusted, negative interest rates from the short-term benchmark, as previously explained, the Department finds that negative-adjusted rates are not common, tend to be anomalous, and, moreover, are not sustainable commercially. See, e.g., OCTG from the PRC Decision Memorandum at Comment 25. Therefore, we have continued to exclude negative real interest rates in calculating our regression-based benchmark rates.

The GOC contends that although the Department has characterized the loans from the IFS as short-term, many of the reported lending rates are not short-term rates. The GOC has raised this point in past cases. See Line Pipe from the PRC Decision Memorandum at Comment 12. We agree that certain of the interest rates used in our regression analysis may reflect

maturities of longer than one-year. Indeed, the notes to the IFS state that these rates apply to loans that meet short- and medium-term financing needs. Therefore, we find that these rates should not be treated as exclusively short-term in nature. See 19 CFR 351.102, where a short-term loan is defined as having repayment terms of one-year or less. To address this concern, we will continue to use the same interest rate data from the IMF and regression-based benchmark rate methodology, but will apply it to loans with terms of two years or less. This approach is consistent with the Department's approach in prior investigations. See LWTP from the PRC Decision Memorandum at "Benchmark and Discount Rates" section; see also Line Pipe from the PRC Decision Memorandum at Comment 12.

We disagree with the GOC's argument that the Department should have used interest rates from PRC-based lending institutions as the basis for the short-term benchmark. In the Preliminary Determination, the Department made the finding that the "GOC's predominant role in the banking sector results in significant distortions that render the lending rates in the PRC unsuitable as market benchmarks." See Preliminary Determination, 75 FR at 54309; see also CFS from the PRC Decision Memorandum at Comment 10, and LWTP from the PRC Decision Memorandum at Comment 20. As a result, the Department preliminarily determined that interest rates in the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to the respondents in this investigation and, thus, determined to use an external benchmark to measure the benefit of countervailable loans. See Preliminary Determination, 75 FR at 54309. The Department finds that no new information has been submitted on the administrative record of this proceeding to give it reason to revisit its preliminary finding regarding the use of an external benchmark to measure the benefit of loans found to be countervailable. In CWP from the PRC, the Department indicated that for loan purposes, benchmarks must be a comparable commercial loan, *i.e.*, they must be from a commercial lending institution, and they must be similar in structure to government loans with respect to whether they are fixed or variable, the date of maturity, and the currency in which they are granted. See CWP from the PRC Decision Memorandum at Comment 14. However, where we have determined that interest rates in the country are distorted, such interest rates are unusable to measure the benefit from government loans. *Id.* Furthermore, in CFS from the PRC, the Department noted that it is not possible to adjust for these market distortions, stating that any such endeavor would be a "highly complex, speculative, and impracticable exercise," and that for these reasons, it is appropriate to resort to an external benchmark with regard to GOC policy lending programs. See CFS from the PRC Decision Memorandum at Comment 10.

Normally, the Department uses comparable commercial loans reported for benchmarking purposes. See 19 CFR 351.505(a)(2)(i) and (ii). However, because we find that the GOC's intervention has created distortions in the PRC's banking sector, we find that there are no actual commercial loans and that there are no national interest rates that would make a suitable benchmark. See 19 CFR 351.505(a)(3). Therefore, the Department finds that it is appropriate to use an external benchmark to calculate the benefits provided under this program. Further, the use of external benchmarks is consistent with the Department's practice in such situations where government intervention into a sector prevents us from applying an internal benchmark. See, e.g., Softwood Lumber from Canada Decision Memorandum at "Provincial Stumpage Programs Determined to Confer Subsidies;" see also CFS from the PRC Decision Memorandum at Comment 10; see also CWP from the PRC Decision Memorandum at "Benchmarks for Short-Term RMB Denominated Loans."

For all these reasons, we determine that is appropriate to use the external benchmark methodology as used in the Preliminary Determination. Since the publication of the Preliminary Determination, the Department has made minor revisions to the external benchmark used to calculate the benefit conferred to recipients of policy loans through this program. See the above section regarding Loan Benchmarks and Discount Rate.

Comment 30: Whether the Derivation of the Long-Term Benchmark Interest Rate is Arbitrary

The GOC argues that in deriving the long-term benchmark interest rate, the Department arbitrarily calculated an adjustment spread, or factor, between short-term and long-term rates using United States dollar “BB” bond rates. It contends this approach is illogical. The GOC notes that the Department uses its improperly derived short-term benchmark as the starting point for its long-term benchmark and then adds a “bump-up” to arrive at the long-term benchmark. The GOC contends that the Department erroneously adds the “bump-up” not only to the short-term interest rate but also to the PRC’s inflation rate. The GOC argues that the Department should use actual interest rates on comparable bank loans in the PRC.

As described above in Comment 29, Petitioners rebut the GOC argument the Department should use actual interest rates of bank loans in the PRC for loan benchmark purposes. However, Petitioners did not provide rebuttal comments to the GOC’s specific arguments regarding the ways in which Department’s calculation of the long-term benchmark interest rate is flawed.

Department’s Position: We disagree with the GOC’s objection to the Department’s derivation of the long-term benchmark, which consists of the short-term benchmark plus a spread that is a function of U.S. dollar “BB” bond rates. The Department has fully addressed the arguments raised by the GOC regarding the use of the U.S. corporate BB bond rate to derive a long-term external benchmark in prior cases. See, e.g., OCTG from the PRC Decision Memorandum at Comment 27. The Department explained that 19 CFR 351.505(a)(3)(iii) requires the Department to use ratings of AAA to BAA and CAA to C- in deriving a probability of default in the stated formula. However, there is no statutory or regulatory language requiring that these rates apply to the calculation of long-term rates under 19 CFR 351.505(a)(3)(i) or (ii). Moreover, the transitional nature of PRC financial accounting standards and practices, as well as the PRC’s underdeveloped credit rating capacity, suggests that a company-specific mark-up (to account for investment risk) should not be the general rule. The Department determined that a uniform rate would be appropriate, which would reflect average investment risk in the PRC associated with companies not found uncreditworthy by the Department. As we have received no other objective basis upon which to determine this average investment risk or a basis to presume it is only for companies with an investment grade rating, we are choosing the highest non-investment rate. See OCTG from the PRC Decision Memorandum at Comment 27.

When the Department began to apply this mark-up using the BB corporate bond rate, we solicited comments from parties and none were filed. See Citric Acid from the PRC Decision Memorandum at Comment 13. In this instant case, we have also not received any suggested alternatives. As no new arguments have been presented, we will continue to use the BB corporate bond rate for the final determination in any long-term loan calculations or discount rate calculations.

Regarding the “bump-up” the Department applied to the long-term benchmark, we find that because the Department has already adopted an additive long-term adjustment, the GOC’s argument regarding applying a “bump-up” to the inflation rate is moot. See Citric Acid from the PRC Decision Memorandum at Comment 15.

Lastly, for the reasons discussed in Comment 29, we find that the use of PRC-based long-term benchmarks is not appropriate.

Comment 31: Whether the Department Committed Ministerial Errors Concerning the Famous Brands Program

Petitioners contend that there was a clerical error in the preliminary calculations concerning benefits that the Zhongya Companies obtained from the Famous Brands program. The Department stated in the Preliminary Determination that the benefit Zhongya received from this program was expensed prior to the POI. See 75 FR at 54310. However, the Zhongya Companies reported that they received “rewards” under this program twice during the POI, once on May 21, 2009 and once on October 28, 2009. Petitioners argue that the Department should incorporate these subsidies into its final calculations and treat these grants as export subsidies.

Petitioners note that during verification the DOC discovered that the Guang Ya Companies received a grant under the Famous Brands program in 2004 that it did not report. See Guang Ya Companies Verification Report at 16. Petitioners argue that the Department must revise its calculations of the benefits the Guang Ya Companies received to reflect this additional benefit.

Department’s Position: We agree with Petitioners and have revised our calculations from the Preliminary Determination with respect to the Zhongya Companies and the Guang Ya Companies to reflect receipt of benefits under the Famous Brands program for both companies during the POI. See “GOC and Sub-Central Government Grants, Loans, and Other Incentives for Development of Famous Brands and China World Top Brands” for additional explanation regarding the Famous Brand program. Regarding the Guang Ya Companies, we agree with Petitioners that benefits received under the Famous Brand program which were discovered during verification should be included for the final determination. See Section 775 of the Act.

Regarding the Zhongya Companies, in the Preliminary Determination, we agree with Petitioners that we inadvertently included one of the Famous Brand grants received by the Zhongya Companies in our preliminary calculations for the Development Assistance Grants from the ZHTDZ Local Authority program, thereby double-counting the value of the grant. We have removed the value of this grant from the calculations for the Development Assistance Grants from the ZHTDZ Local Authority program, because it is included in the calculations for the Famous Brands program. As a result, we determine that the Zhongya Companies received numerically significant benefits during the POI under both of these programs.

Comment 32: Whether the Department Should Provide an Entered Value Adjustment to the Zhongya Companies to Account for Price Mark-Ups Made by Their Hong-Kong Affiliate

The Zhongya Companies explain that Zhongya HK, their Hong-Kong based affiliate, makes the final export sale to foreign customers (including U.S. customers) and that the prices

ultimately charged to foreign customers differ from the prices charged by New Zhongya (located in the PRC mainland) to Zhongya HK. They argue that the Department, as it has done in past CVD proceedings under such circumstances, should calculate the sales denominator over which subsidies are allocated based on Zhongya HK's sales value to foreign customers. They contend Department should not allocate the subsidies only to the sales of New Zhongya (which reflect the prices it charged to Zhongya HK), as was done in the Preliminary Determination.

The Zhongya Companies argue that they have met the Department's six criteria for granting an entered value (EV) adjustment and that these criteria were reviewed at verification. Specifically, the Zhongya Companies list the criteria as follows: 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; 2) the exporter and the party that invoices the customer are affiliated; 3) the U.S. invoice establishes the customs value to which CVD duties are applied; 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; 5) the merchandise is shipped directly to the United States; and 6) the invoices can be tracked as back-to-back invoices that are identical except for price. See, e.g., CWASPP from the PRC Decision Memorandum at "Adjustment to Net Subsidy Rate Calculation."

The Zhongya Companies argue their sales process fulfills the above because each New Zhongya invoice to Zhongya HK can be matched to a Zhongya HK invoice to the unaffiliated foreign customer. They contend that the Department should adjust its net subsidy rate calculations to account for the fact that the "export values" recorded in the books of New Zhongya do not reflect the actual U.S. prices because there is a mark-up on those sales made by Zhongya HK. They argue that, to calculate the adjusted net subsidy rate, the Department should multiply each program rate by a ratio equal to the value of sales to the United States made by New Zhongya to Zhongya HK divided by the value of Zhongya HK's sales to the United States, inclusive of Zhongya HK's mark-up. They conclude that, in this manner, a net subsidy rate is calculated that conforms to Department practice.

Petitioners argue that the Department should continue to deny the Zhongya Companies' claim for an EV adjustment. They argue that the Department's practice is clear – the burden of establishing entitlement for such an adjustment falls squarely on the respondent and when a respondent does not adequately meet its burden, the Department denies the adjustment and attributes the subsidy to the products produced by the corporation that received the subsidy, consistent with 19 CFR 351.525(b)(6)(i). They argue that the information provided by the company after the Preliminary Determination is inadequate to establish an EV adjustment and that the attempts at verification to supplement its submission were both untimely and insufficient.

Petitioners argue that, as described in the verification report, the Zhongya Companies export subject merchandise pursuant to several different arrangements and substantially different relationships between the amounts of revenue that New Zhongya books and the ultimate price of the same merchandise when sold to the final customer. They argue that, for example, under the "inward processing with supplied materials" sales model, the offshore trading company retains title to the input and therefore New Zhongya's revenue represents only the value it adds transforming these inputs and profits. Petitioners compare this model with the "inward processing with imported material" model in which aluminum inputs are purchased by New Zhongya and thus, New Zhongya's sales revenue is included in both the value added to transform the inputs (and its profit) and the value of the inputs. They cite the Coated Graphic Paper from the PRC Prelim, arguing that the Department rejected an analogous claim for an EV

adjustment because the respondent failed to provide adequate support documentation for each of the producer/trading company combinations and were not able to disaggregate their sales. See Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 75 FR 10774 (March 9, 2010) (Coated Graphic Paper from the PRC Prelim). They argue that, as in that case, the Department does not appear to have the required information to ascertain which sales of subject merchandise were made under which type of processing agreement, and to calculate the separate EV adjustments that would pertain to each type of sale.

They further argue that, even if the Department were to reverse its preliminary finding, the Department must revise the manner in which it applied the EV Adjustment in CWASPP from the PRC, CFS from the PRC, and Ball Bearings and Parts Thereof From Thailand; Final Results of Countervailing Duty Administrative Review, 57 FR 26646, 26447 (June 15, 1992) (Bearings from Thailand) to prevent the under-collection of CVDs, as addressed in detail by the Department in the Coated Graphic Paper from the PRC Prelim. They explain that in the Coated Graphic Paper from the PRC Prelim, the Department adjusted the sales denominator by removing the toll processing fees from the reported sale and replaced this value with the off-shore trading company's sales value for the same products.

Petitioners provide four theoretical examples for calculating the final subsidy rate to demonstrate the effect of the off-shore toll processing arrangements on the CVD rate calculations. First, they provide an example of a volume-based methodology. Second, they provide what they claim is an example of the Department's standard value based methodology. Third, they outline how an EV adjustment would be applied for a Chinese manufacturer that produces merchandise through a "toll processing agreement" with an offshore, affiliated (or cross-owned) trading company. Fourth, they explain how the EV Adjustment was applied in CWASPP from the PRC, CFS from the PRC, and Bearings from Thailand. They argue that applying the EV adjustment using the same methodology of the aforementioned cases leads to an under collection of CVD duties.

Finally, Petitioners argue that, if the Department determines that it is appropriate to apply an EV Adjustment in this case, it should either apply the methodology from the Coated Graphic Paper from the PRC Prelim or revise its adjustment formula to eliminate the type of over-collection that exists in under the third scenario and the under collection that exist under the fourth scenario.

Department's Position: In order to qualify for the EV adjustment, a respondent must claim, and demonstrate through documentary evidence, that it qualifies for the EV adjustment. The evidence on the record does not lead us to a conclusion that the adjustment requested by the Zhongya Companies is warranted. In prior proceedings, the Department has used six criteria to determine whether a company merits an EV adjustment and has granted an adjustment if the company met these criteria. See, e.g., CWASPP from the PRC Decision Memorandum at "Adjustment to Net Subsidy Rate Calculation." The Zhongya Companies have not sufficiently demonstrated through their submissions and verification that they have met these criteria. Additionally, the Zhongya Companies sell their products through unrelated domestic trading companies, which then sell the merchandise to trading companies in Hong Kong that are related to New Zhongya, before the merchandise is "marked up" for sale by the Hong Kong trading company to customers in the United States. We find this aspect of the Zhongya Companies'

sales chain does not adhere to the second and sixth criteria of the Department's EV adjustment methodology. See, e.g., CWASPP from the PRC Decision Memorandum at "Adjustment to Net Subsidy Rate Calculation," which states that in order for the Department to make the EV adjustment, the exporter and the party that invoices the customer must be affiliated (the second criteria) and the Department must be able to track the invoices as back-to-back invoices that are identical except for price (the sixth criteria).

In supplemental questionnaire responses, the Zhongya Companies explained that New Zhongya produces aluminum extrusions and that extrusions that are exported to the United States during the POI are sold to Zhongya HK. The Zhongya Companies provided some evidence that Zhongya HK charged higher "marked-up" prices for exports of products made by New Zhongya. In their August 6, 2010, supplemental questionnaire response, they provided a copies of a New Zhongya factory invoice and the invoice Zhongya HK issued to a U.S. customer, indicating a higher price charged by Zhongya HK than New Zhongya's factory invoice price. See the Zhongya Companies' August 6, 2010, supplemental questionnaire response at 12 and Exhibit 9. However, the information submitted by the Zhongya Companies in response to the Department's questionnaires and the information we reviewed at New Zhongya during verification indicates that New Zhongya sells the large majority of its merchandise first through unaffiliated domestic trading companies that, in turn, invoice Zhongya HK. We reviewed an example of a sale New Zhongya made through this "general sales" process. It indicates two markups, one for the sale to the domestic trading company and one by the domestic trading company to New Zhongya.

However, we find that the Zhongya Companies did not provide information regarding the domestic trading companies' markup to Zhongya HK. Further, we lack information concerning which of Zhongya HK's sales are attributable to production by New Zhongya through the general sales model, and how much was made through the inward processing trade model. Also, while they provided a few limited examples, the Zhongya Companies did not provide data for all of sales exported through the Hong Kong trading companies.

On this basis, we continue to refrain from making the EV adjustment as requested by the Zhongya Companies.

Comment 33: Whether the Department Improperly Declined to Initiate an Investigation of the GOC's Alleged Currency Undervaluation

Petitioners urge the Department to reconsider its decision not to initiate on their allegation that the GOC has a program to undervalue its Chinese currency and ask that the Department apply its initiation standards and initiate an investigation of currency undervaluation. Petitioners also argue that the Department calculate a net subsidy rate for the program using facts available. Petitioners argue that Congress intended the threshold for initiation to be low, and that Petitioners met the threshold requirement under section 702(b)(1) of the Act. See United States v. Roses Inc., 706 F.2d 1563, 1572 – 1573 (CAFC 1983) (Roses). They argue that Roses held that the threshold for initiation should be "roughly analogous to the rigor of the requirements necessary to make out a cause of action for purposes of civil litigation." Petitioners add that the Supreme Court found that a civil litigation complaint may proceed even if "it strikes a savvy judge that actual proof the facts is improbable" and "recovery . . . unlikely." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (Bell) (internal quotations omitted). Petitioners contend the Department should apply the initiation threshold standard established in Bell to the currency undervaluation allegation. Petitioners argue that the amount of time the Department took to

consider the allegation is inconsistent with its practice, citing, e.g., Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 74 FR 45811 (September 4, 2009). Petitioners argue that the Department did not provide Petitioners with an opportunity to comment.

Petitioners take issue with the Department's decisions that the currency undervaluation allegation insufficiently supports the claim of a de facto export subsidy because assistance to an industry is not indicative of a subsidy contingent upon exportation or anticipated exportation. See Memorandum to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Subsidy Allegation—Currency," (August 30, 2010) (Currency Memorandum) at 4. Petitioners argue that the law does not require evidence of assistance to an industry for a subsidy to be considered a de facto export subsidy. Rather, Petitioners argue the regulations state an export subsidy exists if the eligibility, approval, or amount of a subsidy is contingent upon export performance. See 19 CFR 351.514. Petitioners argue that 70 percent of the PRC's foreign currency earnings are earned by exporters, exporters (not all enterprises and individuals, as the Department inferred) are the recipients of excess RMB resulting from the GOC's policy of undervaluing its currency. Citing Can-Am Corp. v. United States, 664 F. Supp. 1444, 1450 (CIT 1987) (Can-Am), Petitioners argue that this provides evidence that the GOC anticipates that currency undervaluation will lead to exportation. They further argue that currency undervaluation stimulates export sales over domestic sales, thereby providing another basis for a de facto export subsidy. Additionally, Petitioners argue that the fact that exporters earn the vast majority of the PRC's foreign currency earnings demonstrates that the GOC's undervaluation program is tied to ". . . actual or anticipated export earnings . . . as one of two or more conditions." See 19 CFR 351.514.

Alternatively, Petitioners contend that they adequately alleged that the GOC's currency undervaluation is de facto specific to FIEs under sections 771(5A)(D)(iii)(II) and (III) of the Act. Petitioners cite to evidence they claim demonstrates that 20 percent of the foreign currency receipts earned by FIEs are converted into RMBs. See Petition at Exhibit III-183 (Undervaluation Report). Petitioners argue that a finding of specificity must be determined on a case-by-case basis, and requires gathering of data during the investigation, citing Preamble, 63 FR at 65358. Petitioners argue that the Department should initiate an investigation of this allegation to obtain more information and revise its analysis.

Petitioners note that in the Currency Memorandum, the Department cited to the Wire Rod from Poland Prelim to support its decision not to initiate an investigation of the allegation. See Currency Memorandum at 5, citing Carbon Steel Wire Rod From Poland; Preliminary Negative Countervailing Duty Determination, 49 FR 6768 (February 23, 1984) (Wire Rod from Poland Prelim). Petitioners argue that in the Wire Rod from Poland Prelim, the Department at least made its finding not to apply the CVD law to the PRC after investigating alleged subsidies. They argue the Department should, at the very least, do the same in the instant investigation.

Petitioners contend that the Department's decision in the Wire Rod from Poland Prelim hinged on the fact that Poland was a command-style, non-market economy and that prices were set in that economy without any regard to economic value and, thus, there was no reason to believe that the exchange rate had any effect on the decision to export. See Wire Rod from Poland Prelim, 49 FR at 6768. The Department ultimately determined that the CVD law did not apply to such Soviet-style, non-market economies. See Wire Rod from Poland, 49 FR at 19374. However, Petitioners point out that, in applying the CVD law to the PRC, the Department has

repeatedly distinguished the economy of the PRC from such Soviet-style economies and, thus, the Department's assumptions from Wire Rod from Poland concerning exchange rates case do not carry over to CVD proceedings in the PRC.

Petitioners also object to the Department's assertion that currency subsidies only exist in multiple exchange rate systems. See Currency Memorandum at 5. They argue there is no basis to limit the countervailability of a currency practice to a single kind of government exchange regime. Petitioners also argue that the Department failed to address how the GOC's alleged currency undervaluation program provides a benefit and financial contribution. They argue that declining to initiate solely by reference to specificity is unlawful and unfair. Lastly, Petitioners argue that the Department must provide interested parties an opportunity to comment on the PRC's currency practices. They argue there is still time to allow such a comment period prior due date of the final determination.

The GOC argues that an allegation of currency manipulation is not within the jurisdiction of the Department or the WTO SCM Agreement. However, to the extent that the Department considered Petitioners' allegation, the GOC supports the Department's conclusion not to initiate on this allegation. The GOC argues that Petitioners had ample opportunity to submit their allegation and, in fact, provided the Department with substantial documentation. Therefore, the Department had more than an adequate record on which to evaluate Petitioners' currency allegation. The GOC adds that the Department correctly concluded that the allegation lacked "the elements necessary for the imposition of the duty imposed by section 701(a)" of the Act and was not supported by information reasonably available to Petitioners. See Currency Memorandum at 3 – 6. The GOC further notes that all prior findings related to currency regimes dealt with multiple, not unified, exchange rate regimes and that the Department has properly rejected allegations involving unified regimes because they do not single out any specific user. Id. at 5. Thus, argues the GOC, in the instant investigation the Department reached the correct conclusion that the PRC's exchange rate system was "broadly available across the Chinese economy to all firms that exchange foreign currency and thus does not single out any enterprise, industry, or group thereof." Id. at 6.

Department's Position: We disagree with Petitioners' claims regarding our decision not to investigate their currency subsidy allegations. Petitioners are incorrect that the Department failed to apply the correct initiation standard. In addressing both the initial currency allegation filed with the Petition and the revised currency allegation, the Department identified the correct statutory standard cited by Petitioners. See section 702(b)(1) of the Act. Consistent with that standard, the Department determined that Petitioners' allegation failed to provide the elements necessary for the imposition of CVD duties and was not supported by information reasonably available to Petitioners. See Currency Memorandum at 4. For example, Petitioners' allegation relied on their claim that FIEs are required to surrender the foreign exchange they earn and accept RMB in return, but the Department pointed out that, "Petitioners own information indicates that the surrender requirement was terminated in 2007." Id. In addition, Petitioners overlooked information in the documentation that they provided which indicated that FIEs use the vast majority of their foreign exchange earnings to purchase imported inputs and, thus, do not convert those foreign currency earnings at the allegedly undervalued exchange rate. Id. at 4 – 5. Notwithstanding Petitioners' claims to the contrary, the Department was not required to initiate an investigation of a currency allegation that was not reasonably supported by the facts alleged by Petitioners. Petitioners' allegation was not only unsupported but directly contradicted by the

facts on the record.

We disagree with Petitioners' argument that they were not provided a sufficient comment period. The Currency Memorandum explained in detail why the Department determined that Petitioners' allegation did not meet the standard for initiation. The Department issued the Currency Memorandum concurrently with the Preliminary Determination. Thus, Petitioners could have supplemented their currency allegation with additional information and argument after the issuance Preliminary Determination. However, Petitioners did not do so.

While we did not specifically address in the Currency Memorandum Petitioners' information that exporters account for 70 percent of foreign exchange earned, Petitioners' allegation in this regard does not differ in substance from their original currency allegation, which the Department determined was inadequate. In particular, Petitioners alleged that there is a direct and positive correlation between the export activity/export earnings and the amount of the subsidy received, while the Department found no export contingency because receipt of the excess RMB is independent of the type of transaction or commercial activity for which the dollars are converted or of the particular company or individuals converting the dollars.

We disagree with Petitioners' characterization of the Department's statements regarding unified and multiple exchange rate regimes. In the Currency Memorandum, the Department did not state that the CVD law only applied to countries with multiple exchange rate regimes. The Department merely noted that the select set of cases cited by Petitioners in support of their allegation addressed only multiple exchange rate regimes. See Currency Memorandum at 5 – 6. Any views or findings the Department may have articulated in these decisions – some of which are several decades old – is informative on the exchange-rate-as-a-subsidy issue, but is no longer necessarily dispositive. However, the Department did point out distinguishing factors between Petitioners' allegation regarding the currency practices of the PRC and previous case determinations. First, in previous CVD cases, a government selected certain industries and enterprises, or groups thereof, as the subject of preferential currency exchange rates. This preferential rate was separate and distinct from the exchange rate used by the broader economy. Id. Second, the Department observed that, unlike previous cases, the available evidence indicates that the unified exchange rate of the PRC applies to all enterprises and individuals in the economy. Id. Therefore, the Department concluded that the case precedent cited by Petitioners, as well as all previous determinations regarding exchange rate programs, did not support Petitioners' allegation that the PRC's unified exchange rate regime provides a countervailable subsidy. Id. We also disagree with Petitioners' reading of the Can-Am decision. In our view, that case, which pre-dates the current statutory provisions defining subsidies, merely reinforces that the alleged subsidy must be tied to the exportation of goods.

The Department does not agree with Petitioners' arguments regarding the Wire Rod from Poland Prelim. It is true that in the Wire Rod from Poland Prelim the Department considered the petitioner's exchange rate claim at the same time it also considered whether to apply the CVD law to Poland. But the application question was separate and distinct from the Department's finding on the exchange rate. Moreover, as explained above, the Department's assessment that no subsidy existed in the context of a unified rate is only informative, not dispositive, in the present case.

XII. Recommendation

We recommend that you accept the positions described above.

Agree

Disagree

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date