C-570-942
Administrative Review
POR: 1/1/2010 – 12/31/2010
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April 5, 2013

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

FROM: Gary Taverman GT
Senior Advisor
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China

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I. Summary

On September 14, 2009, the Department of Commerce ("Department") published a countervailing duty ("CVD") order on certain kitchen appliance shelving and racks ("kitchen racks" or "subject merchandise") from the People's Republic of China ("PRC").[1] The Department published the *Preliminary Results* of this administrative review on October 9, 2012.[2]

The Department extended the deadline for these final results until April 9, 2013.[3] On October 11 and November 19, 2012, we issued supplemental questionnaires to respondent New King Shan (Zhu Hai) Co., Ltd. ("NKS"). NKS submitted timely responses to each on October 23, 2012 ("NSQR4"), and November 28, 2012 (NSQR5"), respectively.

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[1] *See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Countervailing Duty Order*, 74 FR 46973 (September 14, 2009).
[2] *See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Countervailing Duty Administrative Review; 2010*, 77 FR 61396 (October 9, 2012) ("*Preliminary Results*"), as corrected by *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Countervailing Duty Administrative Review; 2010; Correction,* 77 FR 72324 (December 5, 2012).
[3] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Susan H. Kuhbach, Office Director, Antidumping and Countervailing Duty Operations, Office 1, regarding "Certain Kitchen Appliance Shelving and Oven Racks from the People's Republic of China: Extension of Time Limit for Final Results of Countervailing Duty Administrative Review," (January 11, 2013); *see also* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Susan H. Kuhbach, Office Director, Antidumping and Countervailing Duty Operations, Office 1, regarding "Certain Kitchen Appliance Shelving and Oven Racks from the People's Republic of China: Extension of Time Limit for Final Results of Countervailing Duty Administrative Review," (March 13, 2013).

NKS filed a timely case brief.[4] SSW Holding Company, Inc. and Nashville Wire Products, Inc., (collectively, "Petitioners") filed a timely rebuttal case brief.[5]

On February 4, 2013, the Department placed on the record commodity prices for the period of review ("POR") from the World Bank Commodity Price Data (Pink Sheet) ("World Bank"), including prices for wire rod, and hot- and cold- rolled steel coil.[6] NKS submitted timely comments regarding this information on February 19, 2013.[7] We have addressed these comments in the "Analysis of Comments" section below. On March 8, 2013, the Department placed on the record the "Regulations of the People's Republic of China on Import and Export Duties" obtained from the website of the Ministry of Commerce of the PRC.[8] No party in this proceeding commented on this information.

The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate benefits from the programs under review. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section, below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions in this memorandum.

Below is a complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties.

General Issues

Comment 1: Application of CVD Law to the PRC

Benchmark Calculations

Comment 2: Benchmark Calculation for the Wire Rod for Less Than Adequate Remuneration ("LTAR") Program
Comment 3: Inclusion of Ocean Freight in the Benchmark Calculations
Comment 4: NKS' February 19, 2013 Comments Regarding the Department's Placement of Information on the Record

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[4] *See* NKS' submission regarding, "Case Brief."(December 10, 2012)("NKS case brief").
[5] *See* Petitioners' submission regarding, "Petitioners' Rebuttal Brief in Response to New King Shan (Zhu Hai) Co., Ltd.
[6] *See* Memorandum to the File from Jennifer Meek regarding, "Countervailing Duty Administrative Review: Certain Kitchen Appliance Shelving and Oven Racks from the People's Republic of China: Benchmark Information Currently On the Record," (February 4, 2013) ("Benchmark Information Memo").
[7] *See* NKS' submission regarding "Comments on New Factual Information," (February 19, 2013) ("NKS NFI Comments").
[8] *See* Memorandum to the File from Jennifer Meek regarding, "Countervailing Duty Administrative Review: Certain Kitchen Appliance Shelving and Oven Racks from the People's Republic of China: Chinese Customs Regulations for Imports," (March 8, 2013) ("Chinese Customs Memo").

II. Scope of the Order

The scope of the order consists of shelving and racks for refrigerators, freezers, combined refrigerator-freezers, other refrigerating or freezing equipment, cooking stoves, ranges, and ovens. Certain kitchen appliance shelving and racks are defined as shelving, baskets, racks (with or without extension slides, which are carbon or stainless steel hardware devices that are connected to shelving, baskets, or racks to enable sliding), side racks (which are welded wire support structures for oven racks that attach to the interior walls of an oven cavity that does not include support ribs as a design feature), and sub-frames (which are welded wire support structures that interface with formed support ribs inside an oven cavity to support oven rack assemblies utilizing extension slides) with the following dimensions:

- Shelving and racks with dimensions ranging from 3 inches by 5 inches by 0.10 inch to 28 inches by 34 inches by 6 inches; or
- Baskets with dimensions ranging from 2 inches by 4 inches by 3 inches to 28 inches by 34 inches by 16 inches; or
- Side racks from 6 inches by 8 inches by 0.10 inch to 16 inches by 30 inches by 4 inches; or
- Sub-frames from 6 inches by 10 inches by 0.10 inch to 28 inches by 34 inches by 6 inches.

The subject merchandise is comprised of carbon or stainless steel wire ranging in thickness from 0.050 inch to 0.500 inch and may include sheet metal of either carbon or stainless steel ranging in thickness from 0.020 inch to 0.20 inch. The subject merchandise may be coated or uncoated and may be formed and/or welded. Excluded from the scope of the order is shelving in which the support surface is glass.

The merchandise subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTSUS") statistical reporting numbers 8418.99.80.50, 7321.90.50.00, 7321.90.60.40, 7321.90.60.90, 8418.99.80.60, 8419.90.95.20, 8516.90.80.00, and 8516.90.80.10. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

III. Subsidies Valuation Information

A. Period of Review

The POR is January 1, 2010, through December 31, 2010.

B. Allocation of Subsidies

The average useful life period in this proceeding, as described in 19 CFR 351.524(d)(2), is 12 years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System, as revised.[9] No party in this proceeding has disputed this allocation period.

[9] *See* U.S. Internal Revenue Service Publication 946 (2008), *How to Depreciate Property*, at Table B-2: Table of Class Lives and Recovery Periods

C. *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) directs that the Department will attribute subsidies received by certain other companies to the combined sales of the recipient and other companies if: (1) cross-ownership exists between the companies; and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the downstream product, or transfer a subsidy to a cross-owned 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 section of the Department's regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The Preamble to the Department's regulations further clarifies the Department's cross-ownership standard. According to the Preamble, relationships captured by the cross-ownership definition include those where:

> the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) . . . Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a "golden share" may also result in cross-ownership.[10]

Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

The U.S. 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.[11]

NKS stated that it is wholly owned by entities located outside of the PRC.[12] NKS identified several affiliated companies and reported that none of them is located in the PRC.[13] Therefore, we are limiting our analysis to NKS.

[10] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65401 (November 25, 1998).
[11] *See Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).
[12] *See* NKS' Initial Questionnaire Response (March 22, 2012) ("NQR") at 1-2.
[13] *Id.*

IV. Use of Facts Otherwise Available and Adverse Inferences

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended ("the Act"), provide that the Department shall apply "facts otherwise available," subject to section 782(d) of the Act, if 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. Section 776(b) of the Act also authorizes the Department to use as adverse facts available ("AFA"), information derived from the petition, the final determination, a previous administrative review, or 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 result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[14] 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."[15]

Government of the People's Republic of China ("GOC")

Although we confirmed that the GOC received our questionnaire,[16] it did not submit a response. Accordingly, we determine that the GOC has withheld information and significantly impeded this proceeding.[17] We further determine an adverse inference is warranted, pursuant to section 776(b) of the Act. By not responding to requests for information, the GOC did not cooperate to the best of its ability in this review and impeded the Department's ability to make findings with respect to aspects of programs that rely on government-provided information. Specifically, the Department solicited information from the GOC to determine: 1) whether suppliers of steel strip and wire rod are authorities under the Wire Rod and Steel Strip for LTAR programs; and 2) the specificity of various grants listed in NKS' financial statements.[18]

[14] *See 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).
[15] *See* Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong. 2d Session, at 870 (1994).
[16] *See* Memorandum to The File from Jennifer Meek, regarding "Telephone Conversation with Chinese Embassy Official Confirming Receipt of Initial Countervailing Duty Questionnaire for the Countervailing Duty Administrative Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China" (August 14, 2012).
[17] *See* sections 776(a)(2)(A) and (a)(2)(C) of the Act.
[18] For the other programs countervailed in the investigation and/or the previous review, the countervailability of each program will remain the same, as no new information has been presented to prompt a review of the previous finding. *See, e.g., Live Swine from Canada; Final Results of Countervailing Duty Administrative Reviews*, 61 FR 52408, 52420 (October 7, 1996) ("*Live Swine from Canada*") ("{I}t is the Department's policy not to reexamine the

1. Steel Strip and Wire Rod for LTAR

The Department sought information from the GOC about the producers of the steel strip and wire rod purchased by NKS. In particular, for the steel strip and wire rod producers that supplied NKS that are not majority-owned by the GOC, the GOC was asked, *inter alia*, to trace back the ownership to the ultimate individual or state owners.[19]

Given the GOC's lack of a response, we have no information concerning government ownership or control of any of the companies that supplied steel strip or wire rod to NKS. Thus, we are making the adverse inference that all of NKS's suppliers of steel strip and wire rod are "authorities" within the meaning of section 771(5)(B) of the Act. For details on the calculation of the subsidy rates for NKS, *see* the "Analysis of Programs" section below.

2. Various Grants

Based on our review of the financial statements submitted by NKS in this review, we sought information about various "subsidies" and other income shown for the POR. We would normally rely on information from the government to determine whether the programs under which these grants were given are specific within the meaning of section 771(5A) of the Act.[20] Because the GOC did not cooperate in this review, however, we were unable to seek this specificity information from the GOC. Due to the GOC's failure to respond to our inquiry in this review and provide this necessary information, we are finding as AFA that benefits from these subsidies are specific.[21] These subsidies are addressed under the "Tax Rebates for Electromechanical High-Tech Products" and "Clean Production Promotion Program" programs in the "Analysis of Programs" section below.[22]

Further, because information concerning the year in which certain disbursements under various grant programs were approved is not available on the record as a result of the GOC's failure to cooperate, we are finding as facts available that the year of approval is the same as the year of receipt for certain subsidies.[23] These subsidies are addressed under the "Guangdong Supporting Fund," "Zhuhai Export Trade Grant," "Tax Rebates for Electromechanical High-Tech Products," and "Clean Production Promotion Program" programs in the "Analysis of Programs" section below.

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

issue of that program's countervailability in subsequent reviews unless new information or evidence of changed circumstances is submitted which warrants reconsideration.").

[19] *See* the Department's February 3, 2012 questionnaire at Section II.

[20] *See, e.g., Certain Magnesia Carbon Bricks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 45472 (August 2, 2010), and accompanying Issues and Decision Memorandum at Comment 6.

[21] *See* sections 771(5A), 776(a)(1) and (2)(A), and (B) of the Act.

[22] At the *Preliminary Results*, the "Clean Production Promotion Program" was referred to as the "Green Manufacturer/Product Program."

[23] *See* section 776(a)(1) of the Act.

its disposal. Secondary information is defined as "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 of the Act concerning the subject merchandise."[24]

The facts available decisions described above do not rely on secondary information. Our determinations that the producers supplying steel strip and wire rod to NKS are authorities and that the programs under which NKS received the subsidies shown in its financial statements are specific are based on the unwillingness of the GOC to provide necessary information and constitute an adverse inference pursuant to section 776(b) of the Act. The corroboration requirement of section 776(c) of the Act is, therefore, not applicable to the use of facts available in this review.

V. Changes Since the Preliminary Results

In the *Preliminary Results,* certain grants NKS reported receiving were grouped under the program title "Green Manufacturer/Product Program." Additional information regarding these grants has since been reported.[25] Based on this additional information, we have changed the program title related to these grants to the "Clean Production Promotion Program."

VI. Analysis of Programs

A. Programs Determined To Be Countervailable

1. Two Free, Three Half Program

Under Article 8 of the "Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises" ("FIE Tax Law"), a foreign invested enterprise ("FIE") that is "productive" and scheduled to operate more than ten years is exempt from income tax in the first two years of profitability and pays income taxes at half the standard rate for the next three years.[26]

In the first administrative review, the Department determined that this program conferred a countervailable subsidy.[27] No interested party provided new evidence that would lead us to reconsider our earlier finding. As stated in *Live Swine from Canada,* "it is the Department's policy not to reexamine the issue of {a} program's countervailability in subsequent reviews unless new information or evidence of changed circumstances is submitted which warrants reconsideration."[28] Therefore, we continue to find that these tax benefits confer a countervailable subsidy.

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[24] *See* SAA at 870.
[25] *See* NSQR4 and NSQR5.
[26] *See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results of the Countervailing Duty Administrative Review,* 77 FR 21744 (April 11, 2012), and accompanying Issues and Decision Memorandum ("Kitchen Racks 2009 Administrative Review Decision Memorandum") at 10.
[27] *Id.*
[28] *See Live Swine from Canada,* 61 FR at 52420.

NKS reported paying a reduced tax rate during the POR under this program.[29] To calculate the benefit, we treated the income tax savings received by NKS as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the income tax that NKS would have paid in the absence of the program with the income tax that NKS actually paid during 2010. We divided the benefit received by NKS in 2010 by its 2010 total sales, in accordance with 19 CFR 351.525(b)(6)(i). On this basis, we determine that NKS received a countervailable subsidy of 1.15 percent *ad valorem* under this program.[30]

2. Income Tax Reduction for FIEs Based on Geographic Location

To promote economic development and attract foreign investment, "productive" FIEs located in coastal economic zones, special economic zones, or economic and technical development zones in the PRC were subject to preferential tax rates of 15 percent or 24 percent, depending on the zone.[31] This program was created on June 15, 1988, pursuant to the Provisional Rules on Exemption and Reduction of Corporate Income Tax and Business Tax of FIEs in Coastal Economic Development Zone issued by the Ministry of Finance, and continued under Article 7 of the FIE Tax Law on July 1, 1991.[32]

As a result of the transition provisions of the new Enterprise Income Tax Law, which came into force on January 1, 2008, enterprises that were eligible for the reduced rates of 15 percent or 24 percent are to be gradually transitioned to the uniform rate of 25 percent over a five-year period.[33]

In the underlying investigation, we determined that this program conferred a countervailable subsidy.[34] No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these tax benefits confer a countervailable subsidy.

NKS reported paying a reduced income tax rate during the POR under the program.[35] To calculate the benefit, we treated the income tax savings received by NKS as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the income tax NKS would have paid in the absence of the program (*i.e.*, at the 25 percent rate) with the reduced rate applicable to NKS for taxes it paid in 2010. We divided the benefit received by NKS in 2010 by its 2010 total sales, in accordance with 19 CFR 351.525(b)(6)(i). On this basis, we determine that NKS received a countervailable subsidy of 0.58 percent *ad*

[29] *See* NKS' Second Supplemental Questionnaire Response, Part 1 (September 7, 2012) ("NSQR2-A") at 2-3.
[30] *See* Memorandum to the File from Jennifer Meek, regarding "Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Results, Calculation Memorandum for New King Shan," dated concurrently with the memorandum ("NKS Final Calc Memo") at 1 and Attachment 4.
[31] *See* NQR at 9; NKS' First Supplemental Questionnaire Response (July 20, 2012) ("NSQR1") Exhibit 2; and NSQR2-A at 2-3
[32] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 10
[33] *Id. See also* NQR at Exhibits 9 and 10.
[34] *See Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009), and accompanying Issues and Decision Memorandum ("Kitchen Racks Investigation Decision Memorandum") at 11-12.
[35] *See* NQR at 9 and Exhibits 8 and 9; NSQR1 at Exhibit 2; and NSQR2-A at 2-3.

valorem under this program.[36]

3. *Exemption from City Maintenance and Construction Taxes and Education Fee Surcharges for FIEs in Guangdong Province*

Pursuant to the *Circular on Temporarily Not Collecting City Maintenance and Construction Tax and Education Fee Surcharge for FIEs 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 the education fee surcharge.[37]

In the underlying investigation, we determined that this program conferred a countervailable subsidy.[38] No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these tax exemptions confer a countervailable subsidy.

NKS reported that it was exempted from these taxes and fees from January through November 2010 but that, due to a change in the law, it began paying them in December 2010.[39]

To calculate the benefit, we treated NKS' tax savings as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the company's savings received during 2010 by the company's total 2010 sales. To compute the amount of the city maintenance and construction tax savings, we compared what NKS would have paid in the absence of the program (seven percent of the total of value-added tax ("VAT"), business tax, and consumption tax paid during January through November 2010) with what it actually paid (zero). To calculate the amount of the savings from the educational fee surcharge exemption, we compared what NKS would have paid in the absence of the program (three percent of total of VAT, business tax, and consumption tax paid during January through November 2010) with what it actually paid (zero).[40]

We divided the benefits received by NKS in 2010 by its 2010 total sales, in accordance with 19 CFR 351.525(b)(6)(i). On this basis, we determine that NKS received a countervailable subsidy of 0.44 percent *ad valorem* under this program.[41]

4. *Provision of Wire Rod for LTAR*

NKS reported purchasing wire rod during the POR and provided information regarding its purchases.[42] In the underlying investigation, we determined that this program conferred a

[36] *See* NKS Final Calc Memo at 1 and Attachment 4.
[37] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 11 and 32. *See also* Kitchen Racks Investigation Decision Memorandum at 7.
[38] *See* Kitchen Racks Investigation Decision Memorandum at 13.
[39] *See* NQR at 9-10 and Exhibit 11; NSQR1 at 4; NSQR2-A at 3; and NKS' Second Supplemental Questionnaire Response, Part 2 (September 18, 2012) ("NSQR2-B") at 3-5 and Exhibits 4 and 5.
[40] *Id.*
[41] *See* NKS Final Calc Memo at 1 and Attachment 4.
[42] *See* NQR at 10-12 and Exhibits 12 and 13; NSQR1 at 4-5 and Exhibit 8(a), 8(b) and 8(c); NSQR2-A at 6 and Exhibit 1; and NSQR2-B at 6.

countervailable subsidy.[43] No interested party provided new evidence that would lead us to reconsider our earlier findings that the GOC's predominant role in the PRC's wire rod market renders domestic prices unusable as benchmarks or that the subsidy conferred is specific.[44] Moreover, as discussed in the "Use of Facts Otherwise Available and Adverse Inferences" section, above, we find, on the basis of AFA, that the wire rod producers reported by NKS are authorities. Consequently, we determine that the GOC is providing a good and, hence, a financial contribution under section 771(5)(D)(iii) of the Act.

To determine whether this financial contribution results in a subsidy to NKS, we followed 19 CFR 351.511(a)(2) for identifying an appropriate market-based benchmark for measuring the adequacy of the remuneration for the wire rod. As in the underlying investigation, we have relied upon "tier two" benchmarks, *i.e.*, world market prices available to purchasers in the PRC, to determine the existence and extent of the benefit to NKS.[45]

NKS submitted Steel Business Briefing export prices for wire rod from Turkey, the Black Sea region, and Latin America. Petitioners submitted wire rod export prices from Japan, sourced from the World Bank. Subsequently, as noted above, the Department placed supplemental information regarding the Japanese prices on the record.[46]

As discussed in Comment 4, below, the Department continues to consider the World Bank to be a usable source for the calculation of the final results. The pricing information submitted by NKS in its February 19, 2013 comments was not analyzed by the Department as a potential benchmark to be used for the final results due to its very late submission and because usable benchmarks were already on the record and were relied upon by the Department in the *Preliminary Results*. Therefore, for these final results we have continued to rely upon the Steel Business Briefing and the World Bank benchmark prices used in the *Preliminary Results*. This benchmark is discussed further in response to Comment 2 below.

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. Regarding delivery charges, we have included the freight charges that would be incurred to deliver wire rod to NKS' plant.[47] We have also added import duties, as reported by the GOC in similar cases, and VAT applicable to imports of wire rod into the PRC.[48] *See* Comment 3, below, for further discussion of our calculation of the import duties included in the benchmark.

[43] *See* Kitchen Racks Investigation Decision Memorandum at 14-16.
[44] *Id.* at 15-16.
[45] *See* Kitchen Racks Investigation Decision Memorandum at 8.
[46] *See* Benchmark Information Memo.
[47] *See* Memorandum to The File from Jennifer Meek regarding Preliminary Results of Countervailing Duty Administrative Review: Kitchen Appliance Shelving and Racks from the People's Republic of China: Benchmark Memorandum (October 1, 2012) ("Prelim Benchmark Memo") at 1 – 4 and Attachments 1, 2, and 3.
[48] Due to the non- response of GOC to our initial questionnaire, we have used tariff and VAT rates from the Memorandum to The File from David Lindgren regarding, "Preliminary Affirmative Countervailing Duty Determination: Galvanized Steel Wire from the People's Republic of China, Benchmark Memorandum,"(August 29, 2011) ("2011 Benchmark Memo"), which is included as Attachment 1 of the Memorandum to the File from Jennifer Meek, regarding "Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: PRC Import Duty and VAT Rates for 2010," (October 1, 2012).

We have compared these benchmark prices to NKS' actual purchase prices, including any taxes and delivery charges incurred to deliver the product to its plants.[49]

Comparing the adjusted benchmark prices to the prices paid by NKS for the wire rod it purchased, we determine that the GOC provided wire rod for LTAR and that a benefit exists in the amount of the difference between the benchmark and what NKS paid.[50] We divided the difference between the amounts actually paid by NKS for wire rod and what it would have paid under the benchmark in 2010, by the company's total sales in 2010. On this basis, we determine that NKS received a countervailable subsidy of 8.38 percent *ad valorem* under this program.[51]

5. *Provision of Steel Strip for LTAR*

NKS reported purchasing steel strip during the POR and provided information regarding its purchases.[52] In the first administrative review of the order, we determined that this program conferred a countervailable subsidy.[53] No interested party provided new evidence that would lead us to reconsider our earlier findings that the GOC's predominant role in the PRC's steel strip market renders domestic prices unusable as benchmarks or that the subsidy conferred is specific.[54] Moreover, as discussed in the "Use of Facts Otherwise Available and Adverse Inferences" section, above, we determine that the steel strip producers reported by NKS are authorities. Consequently, we find, on the basis of AFA, that the GOC is providing a good and, hence, a financial contribution under section 771(5)(D)(iii) of the Act.

To determine whether this financial contribution results in a subsidy to NKS, we followed 19 CFR 351.511(a)(2) for identifying an appropriate market-based benchmark for measuring the adequacy of the remuneration for the steel strip. As in the first administrative review, we have relied upon tier two benchmarks, *i.e.*, world market prices available to purchasers in the PRC, to determine the existence and extent of the benefit to NKS.[55]

Petitioners submitted Japanese export prices of hot- and cold-rolled steel coil sheets sourced from the World Bank.[56] NKS did not submit any benchmark prices for steel strip. Subsequently, as noted above, the Department placed supplemental information regarding the Japanese prices on the record.[57] As discussed in Comment 4, below, NKS challenged the Department's action. NKS did not, however, submit steel strip prices as part of its challenge.

For the reasons explained in Comment 4, we disagree that the Department acted improperly when it placed on the record the supplemental information regarding Japanese steel coil prices sourced from the World Bank. Therefore, we have continued to rely upon the World Bank

[49] *See* NKS Final Calc Memo at 1-2 and Attachment 7.
[50] *See* 19 CFR 351.511(a).
[51] *See* NKS Final Calc Memo at 1-2 and Attachment 7.
[52] *See* NQR at 10-12 and Exhibits 12 and 13; NSQR1 at 4-5 and Exhibits 8(a), 8(b) and 8(c); NSQR2-A at 6 and Exhibit 1; and NSQR2-B at 6 and Exhibit 7.
[53] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 6-7, 8, 18-20, 25-28, 30-31.
[54] *Id.*
[55] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 18-20.
[56] *See* Petitioners' August 2012 Comments.
[57] *See* Section VI(A)(4) above.

benchmark prices used in the *Preliminary Results.*

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. Regarding delivery charges, we have included the freight charges that would be incurred to deliver steel strip to NKS' plant.[58] We have also added import duties, as reported by the GOC in similar cases, and VAT applicable to imports of steel strip into the PRC.[59] *See* Comment 3, below, for further discussion of our calculation of the import duties included in the benchmark. We have compared these benchmark prices to NKS' actual purchase prices, including any taxes and delivery charges incurred to deliver the product to its plants.[60]

Comparing the adjusted benchmark prices to the prices paid by NKS for the steel strip it purchased, we determine that the GOC provided steel strip for LTAR and that a benefit exists in the amount of the difference between the benchmark and what NKS paid.[61] We divided the difference between the amounts actually paid by NKS for steel strip and what it would have paid under the benchmark in 2010, by the company's total sales in 2010. On this basis, we determine that NKS received a countervailable subsidy of 0.05 percent *ad valorem* under this program.[62]

6. Provision of Electricity for LTAR

NKS purchased electricity and provided monthly usage and payment data.[63] In the underlying investigation, we determined that this program conferred a countervailable subsidy.[64] No interested party provided new evidence that would lead us to reconsider our earlier finding that there is a financial contribution that is specific.

To determine whether the GOC's provision of electricity confers a benefit we relied on information developed in *Wind Towers from the PRC.*[65] There, the Department found that the provincial electricity rates schedules did not change between November 2009 and December 2011.[66] Thus, we are using the electricity rates put in place in November 2009, and which continued through our POR, to derive the benchmark.[67]

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[58] *See* Prelim Benchmark Memo at 1 – 4 and Attachments 1, 2, and 3.
[59] Due to the non- response of GOC to our initial questionnaire, we have used tariff and VAT rates from the 2011 Benchmark Memo.
[60] *See* NKS Final Calc Memo at 1-2 and Attachment 7.
[61] *See* 19 CFR 351.511(a).
[62] *See* NKS Final Calc Memo at 1-2 and Attachment 6.
[63] *See* NQR at 12-13 and Exhibits 15(a) and 15(b); and NSQR1 at 6-9 and Exhibits 11(a) and 11(b).
[64] *See* Kitchen Racks Investigation Decision Memorandum at 5-6 and 13.
[65] *See Utility Scale Wind Towers From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 FR 33422, 33435-36 (June 6, 2012) ("*Wind Towers from the PRC*"), unchanged in *Utility Scale Wind Towers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012).
[66] *See* Memorandum to the File from Jennifer Meek, regarding "Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: PRC Electricity Benchmark Rates for 2010," (October 1, 2012) ("PRC Electricity 2010 Benchmark Rates Memo").
[67] *Id.*

Consistent with our approach in *Drill Pipe from the PRC,* we first calculated NKS' variable electricity costs by multiplying the monthly kilowatt hours ("KWH") consumed at each price category (peak, normal, and valley) by the corresponding electricity rates the company paid.[68] Next, we calculated the benchmark variable electricity cost by multiplying the monthly KWH consumed at each price category (peak, normal, and valley) by the highest electricity rate charged for each price category.[69] To calculate the benefit for each month, we subtracted the variable electricity charge paid by NKS during the POR from the monthly benchmark variable electricity cost.

To measure whether NKS received a benefit with regard to its base rate (*i.e.*, either maximum demand or transformer capacity charge), we first divided the monthly transmitter capacity charged to NKS by the corresponding consumption quantity to determine the monthly base rate. Next, we calculated the benchmark transmitter capacity cost by multiplying NKS's consumption quantities by the highest transmitter capacity rate reflected in the electricity rate benchmark chart. To calculate the benefit, we subtracted the maximum demand or transformer capacity costs paid by NKS during the POR from the benchmark costs.[70]

We then calculated the total benefit received during the POR under this program by summing the benefits stemming from NKS' variable electricity payments and transmitter capacity payments. We divided the benefit by the NKS' total sales in POR. On this basis, we determine that NKS received a countervailable subsidy of 1.01 percent *ad valorem* under this program.[71]

7. Guangdong Supporting Fund

NKS reported receiving assistance under Yuelaoshefa (2009) No. 6.[72] In the first administrative review, the Department found that grants under this program conferred a countervailable subsidy.[73] No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these grants confer a countervailable subsidy.

To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants.[74] As the approval date is unknown, we are treating the year of receipt, 2010, as the year of approval as facts available under section 776(a)(1) of the Act. We applied the "0.5 percent test," pursuant to 19 CFR 351.524(b)(2). The grant amount was less than 0.5 percent of NKS' 2010 total sales. Thus, in accordance with 19 CFR 351.524(b)(2), we expensed the entire amount of the grant to 2010 and attributed the benefit to NKS' 2010 total sales. On this basis, we determine that NKS received a countervailable subsidy of 0.27 percent *ad valorem* under this program.[75]

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[68] *See 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) ("*Drill Pipe from the PRC*"), and accompanying Issues and Decision Memorandum at "Provision of Electricity for LTAR" section.
[69] For specific electricity benchmark rate details, *see* PRC Electricity 2010 Benchmark Rates Memo.
[70] *See* NKS Final Calc Memo at 1 and Attachment 5.
[71] *See* NKS Final Calc Memo at 1 and Attachment 5.
[72] *See* NSQR2-B at Exhibit 6(a)(1), 6(a)(2), and 6(a)(3); and NSQR3 at 1.
[73] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 14-15
[74] *See* 19 CFR 351.524(b).
[75] *See* NKS Final Calc Memo at 1 and Attachment 4.

8. Zhuhai Export Trade Grant

NKS reported receiving assistance under ZWJM (2009) No. 28.[76] In the first administrative review, the Department found that grants under this program conferred a countervailable subsidy.[77] No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these grants confer a countervailable subsidy.

To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants.[78] As the approval date is unknown, we are treating the year of receipt, 2010, as the year of approval as facts available under section 776(a)(1) of the Act. We applied the "0.5 percent test," pursuant to 19 CFR 351.524(b)(2). The grant amount was less than 0.5 percent of NKS' 2010 export sales. Thus, in accordance with 19 CFR 351.524(b)(2), we expensed the entire amount of the grant to 2010 and attributed the benefit to NKS' 2010 export sales. On this basis, we determine that NKS received a countervailable subsidy of 0.01 percent *ad valorem* under this program.[79]

9. Tax Rebates for Electromechanical High-Tech Products

NKS reported receiving a tax rebate based on its exports of electromechanical high-tech products.[80] NKS also states that the local government administered the tax rebate.[81]

We find that the tax rebate received by NKS under this program conferred a countervailable subsidy. The tax rebate is revenue forgone by the GOC and, consequently, a financial contribution that provides a benefit in the amount of the tax savings to NKS.[82] Further, as explained above under "Use of Facts Otherwise Available and Adverse Inferences," we find this program specific. This finding of specificity is supported by NKS's characterization of the tax rebate as being related to its exports.[83]

To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants.[84] As the approval date is unknown, we are treating the year of receipt, 2010, as the year of approval as facts available under section 776(a)(1) of the Act. We applied the "0.5 percent test," pursuant to 19 CFR 351.524(b)(2). The grant amount was less than 0.5 percent of NKS' 2010 export sales. Thus, in accordance with 19 CFR 351.524(b)(2), we expensed the entire amount of the grant to 2010 and attributed the benefit to NKS' 2010 export sales. On this basis, we determine that NKS received a countervailable subsidy of 0.08 percent *ad valorem* under this program.[85]

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[76] *See* NSQR2-B at Exhibit 6(B)(1); and NSQR3 at 1.
[77] *See* Kitchen Racks 2009 Administrative Review Decision Memorandum at 14.
[78] *See* 19 CFR 351.524(b).
[79] *See* NKS Final Calc Memo at 1 and Attachment 4.
[80] *See* NSQR1 at 3 and Exhibit 6; NSQR2-B at Exhibit 6(c)(1) and 6(c)(2); and NSQR3 at 1.
[81] *Id.*
[82] *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a) (direct taxes) and 19 CFR 351.510(a) (indirect taxes).
[83] *See* NSQR1 at 3 and Exhibit 6; NSQR2-B at Exhibit 6(c)(1) and 6(c)(2); and NSQR3 at 1.
[84] *See* 19 CFR 351.524(b).
[85] *See* NKS Final Calc Memo at 1 and Attachment 4.

10. Clean Production Promotion Program

NKS reported receiving grants to support green production/products.[86] NKS also states that the local government administered one of the grants.[87] After the *Preliminary Results*, NKS provided the "Circular on Distributing Work Scheme for Clean Production of Key Enterprises in Zhuhai City" (ZYJB (2010) No.10) that included "Working Scheme for Clean Production of Key Enterprises in Zhuhai City" as an attachment, and the "Circular on Promulgating The Ninth List of Clean Production Enterprises in Guangdong."[88] These documents describe grants awarded to enterprises selected from the "Key Enterprise Clean Production Industry Classification Management List" that voluntarily implement certain clean production policies and measures. As noted above, we have changed the name used in the *Preliminary Results* for this program from the "Green Manufacturer/Product Program" to its current name as the result of this additional information.

We find that the grants received by NKS under this program conferred a countervailable subsidy. The grants are a direct transfer of funds within the meaning of section 771(5)(D)(i) of the Act, providing a benefit in the amount of the grant.[89] Further, as explained above under "Use of Facts Otherwise Available and Adverse Inferences," we find this program specific.

To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants.[90] As the approval date is unknown, we are treating the year of receipt, 2010, as the year of approval as facts available under section 776(a)(1) of the Act. We applied the "0.5 percent test," pursuant to 19 CFR 351.524(b)(2). The aggregated grants were less than 0.5 percent of NKS' 2010 total sales.[91] Thus, in accordance with 19 CFR 351.524(b)(2), we expensed the entire amount received in 2010 and attributed the benefit to NKS' 2010 sales. On this basis, we determine that NKS received a countervailable subsidy of 0.09 percent *ad valorem* under this program.[92]

B. Programs Found to Be Not Used or that Provided No Benefit During the POR

We examined the following programs and determine that the producers and/or exporters of the subject merchandise under review did not apply for or receive benefits under these programs during the POR:

1. Provision of Nickel for LTAR by the GOC

[86] *See* NSQR1 at 3 and Exhibit 6; NSQR2-B at 2 and 7, and Exhibits 3, 6(d)(1), and 6(d(2); and NSQR3 at 1.
[87] *See* NSQR2-B at 7 and Exhibits 6(d)(1), and 6(d(2).
[88] *See* NSQR5 at Exhibits 1 and 2.
[89] *See* 19 CFR 351.504(a).
[90] *See* 19 CFR 351.524(b).
[91] Our choice of the denominator (total sales versus export sales) relies on proprietary information. *See* Memorandum to The File from Jennifer Meek regarding Preliminary Results of Countervailing Duty Administrative Review: Kitchen Appliance Shelving and Racks from the People's Republic of China: Calculations for the Preliminary Results for NKS, (October 1, 2012
[92] *See* NKS Final Calc Memo at 1-2 and Attachment 4.

NKS reported non-use of this program.[93] After analyzing the information on the record, we determine that no nickel was provided to NKS by GOC authorities during the POR.[94]

2. Income Tax Refund for Reinvestment of Profits in Export-Oriented Enterprises
3. Income Tax Reduction for Export-Oriented FIEs
4. Local Income Tax Exemption or Reduction Program for "Productive" FIEs
5. Preferential Tax Subsidies for Research and Development by FIEs
6. Income Tax Credits on Purchases of Domestically-Produced Equipment by FIEs
7. Income Tax Credits for Purchases of Domestically-Produced Equipment by Domestically-Owned Companies
8. Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax
9. VAT Rebates for FIEs Purchasing Domestically-Produced Equipment
10. Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
11. Import Tariff Exemptions for the "Encouragement of Investment by Taiwanese Compatriots"
12. Government Provision of Water at LTAR to Companies Located in Development Zones in Guangdong Province
13. Exemption from Land Development Fees for Enterprises Located in Industrial Cluster Zones
14. Reduction in Farmland Development Fees for Enterprises Located in Industrial Zones
15. Special Subsidy from the Technology Development Fund to Encourage Technology Development
16. Exemption from District and Township Level Highway Construction Fees for Enterprises Located in Industrial Cluster Zones
17. Exemptions from or Reductions in Educational Supplementary Fees and Embankment Defense Fees for Enterprises Located in Industrial Cluster Zones
18. Exemption from Real Estate Tax and Dyke Maintaining Fee for FIEs in Guangdong Province
19. Import Tariff Refunds and Exemptions for FIEs in Guangdong Province
20. Preferential Loans and Interest Rate Subsidies in Guangdong Province
21. Direct Grants in Guangdong Province
22. Funds for "Outward Expansion" of Industries in Guangdong Province
23. Land-related Subsidies to Companies Located in Specific Regions of Guangdong Province
24. Import Tariff and VAT Refunds and Exemptions for FIEs in Zhejiang
25. Grants to Promote Exports from Zhejiang Province
26. Land-related Subsidies to Companies Located in Specific Regions of Zhejiang
27. Special Subsidy from the Technology Development Fund to Encourage Technology Innovation
28. Subsidies to Encourage Enterprises in Industrial Cluster Zones to Hire Post-Doctoral Workers
29. Land Purchase Grant Subsidy to Enterprises Located in Industrial Cluster Zones and Encouraged Enterprises

[93] *See* NSQR1 at 10; NSQR2-A at 7 and Exhibit 2; and NSQR2-B at 6-7 and Exhibit 8.
[94] *See* NKS Final Calc Memo at 1.

30. Exemption from Accommodating Facilities Fees for High-Tech and Large-Scale FIEs
31. Income Tax Deduction for Technology Development Expenses of FIEs
32. Preferential Land-Use Charges for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones
33. Reduction of Land Price at the Township Level for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones
34. Reduction in Urban Infrastructure Fee for Industrial Enterprises in Industrial Zones
35. Income Tax Rebate for "Superior Industrial Enterprises" in Zhongshan
36. Accelerated Depreciation for New Technological Transformation Projects "Superior Industrial Enterprises" in Zhongshan
37. Exemption from the Tax on Investments in Fixed Assets for "Superior Industrial Enterprises" in Zhongshan
38. Shunde Famous Brands Program
39. International Market Exploration Fund Program also known as: "International Market Development Fund Grants for Small and Medium Sized Enterprises" program, "SME Fund", "Medium & Small Size Enterprise International Market Expansion Assistance" program or "International Exhibition Show Assistance" program
40. Foshan Shunde Export Rebate
41. Zhuhai Farmer Training Subsidy

VI. Analysis of Comments

<u>General Issues</u>

Comment 1: Application of CVD Law to the PRC

<u>NKS' Arguments</u>

Referencing the decision made in *GPX Int'l Tire Corp. v. United States*,[95] NKS argues that Congress' passage of legislation applying the CVD law to non-market economy ("NME") countries subsequent to the issuance of the underlying order in this case, and prior to the completion of this administrative review, demonstrates that it was not previously legal to apply the CVD law to NME countries. NKS argues application of this legislation in this case was *ultra vires*. As part of this argument, NKS claims that the CVD law violates the *Ex Post Facto* Clause of the Constitution because the CVD law contains provisions that are penal in nature. Specifically, NKS draws upon Eighth Amendment jurisprudence to argue that the use of fines in a civil sanction does not solely have a remedial purpose, because if the purpose is deterrence, then the fine is punishment.[96] NKS further argues that the application of adverse facts to uncooperative parties under the CVD law, which is intended to deter non-cooperation,[97] is a fine amounting to punishment as the action directly impacts the amount of duty to be paid, making the CVD law more than a mere remedial statute. NKS concludes by stating that the CVD law is more than a mere tax and would appear to be the kind of law that falls within the constitutional restrictions on *Ex Post Facto* laws.

[95] *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011)("*GPX*").
[96] *Austin v. United States*, 509 U.S. 602 (1993) ("*Austin*"); *United States v. Bajakajian*, 524 U.S. 321 (1998).
[97] 19 U.S.C. 1677e.

Petitioners' Rebuttal Arguments

Petitioners argue that application of the CVD law to NMEs was not *ultra vires* because the CVD law does not exclude NMEs from its application, nor did it exclude them at the time the Department issued the underlying order for this administrative review. Petitioners further note that Congress' passage of Public Law 112-99 acknowledged the Department had, and continues to have, authority to apply the CVD law to imports from NME countries. Petitioners claim NKS' reliance on the *GPX* decision to contend that the Department lacks such authority is misplaced because that decision never became final and was vacated by a subsequent decision of the Federal Circuit.[98]

Petitioners also argue that only penal laws implicate the *Ex Post Facto* Clause of the Constitution.[99] Petitioners draw upon numerous court cases in concluding the CVD law is well-established as remedial and not punitive,[100] and therefore the *Ex Post Facto* Clause is not implicated. In addition, Petitioners dispute the applicability of the Excessive Fines Clause of the Eighth Amendment to this case, as the purpose of that clause is to "limit the government's power to punish."[101] Relying on several cases, Petitioners argue that the purpose of the CVD law is not to punish or to fine, but is instead to remediate and to construct a fair valuation of imports.[102] Petitioners also claim that the courts have not construed CVDs as fines.[103] Petitioners also distinguish the *Austin* case, arguing that the Court there explained that a remedial law may be considered punishment if it also serves either "retributive or deterrent purposes,"[104] which is not the case with the CVD law.

Department's Position

Public Law 112-99 clarifies that the Department has the authority to apply the CVD law to imports from NME countries, such as the PRC.[105] NKS' reliance upon the Federal Circuit's decision in *GPX*[106] to contend that the Department lacks such authority is misplaced, because that decision never became final and was in fact vacated by a subsequent decision of the Federal Circuit.[107]

We disagree with NKS' argument that Public Law 112-99 is a prohibited *Ex Post Facto* law. The *Ex Post Facto* Clause of the Constitution "flatly prohibits retroactive application of penal legislation."[108] It is well-established that the CVD law is remedial and not penal in nature[109]

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[98] *See GPX Int'l Tire Corp., v United States*, 678 F.3d 1308 (Fed. Cir. 2012).
[99] *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997).
[100] *Nucor Corp. v. United States*, 414 F.3d 1331 (Fed. Cir. 2005); *Chaparral Steel Co. v. United States*, 901 F.2d 1097 (Fed. Cir. 1990); *Nat'l Ass'n of Mirror Mfrs. v. United States*, 696 F. Supp. 642 (1988).
[101] *Austin*, 509 U.S. at 609.
[102] *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369 (Fed. Cir. 2003); *United States Steel Corp. v. United States*, 2009 Ct. Intl. Trade LEXIS 156 (2009).
[103] *Tung Mung Dev. Co., Ltd. v. United States*, 219 F. Supp. 2d 1333 (2002).
[104] *Austin*, 509 U.S. at 610.
[105] *See Application of Countervailing Duty Provisions to Nonmarket Economy Countries*, 112 Pub. L. No. 99, 126 Stat. 265 (March 13, 2012) (Public Law 112-99).
[106] *GPX Int'l Tire Corp. v. United States*, 666 F.3d 737 (Fed. Cir. 2011).
[107] *See GPX Int'l Tire Corp., v United States*, 678 F.3d 1308.
[108] *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 09-00422, slip op. 13-31 at 10-11 (Ct.

because the purpose of the statute is to 'offset' the harmful effects of foreign subsidies."[110] In addition, recent CIT cases have explicitly held that Public Law 112-99 "does not run afoul of *the Ex Post Fac*to Clause because it is remedial and not penal in nature."[111]

To the extent that NKS argues the AFA provision in the CVD law[112] is equivalent to a punishment and somehow "converts that entire provision into something more than remedial,"[113] we disagree. NKS' argument is directly contradicted by established judicial precedent which holds that the AFA provision is remedial, not punitive.[114]

NKS does not appear to have alleged a violation of the Eighth Amendment in its case brief.[115] However, to the extent that NKS' other arguments rely on Eighth Amendment jurisprudence and might implicate the Excessive Fines Clause, we disagree that CVD law, including the application of adverse facts to uncooperative parties and its consequent effects on the calculation of the duty, constitute penal fines as described and regulated under the Eighth Amendment. The Excessive Fines Clause of the Eighth Amendment applies only in the context of punishment.[116] Again, it is well-established that the CVD law, including the AFA provision, is remedial and not punitive.[117]

Comment 2: Benchmark Calculation for the Wire Rod for Less Than Adequate Remuneration ("LTAR") Program

NKS' Arguments

NKS argues the Japanese pricing data sourced from the World Bank should not be included in

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Int'l Trade March 12, 2013) (quoting *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 266 (1994)); *see also Kansas v. Hendricks*, 521 U.S. 346, 370 (1997).

[109] *See, e.g., Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (quoting S.Rep. No. 1221, 92d Cong., 2d Sess. 8 (1972) ("Countervailing duties are *not*, nor were they ever intended to be, *penal* in nature; they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded to foreign merchandise" (emphasis added by court))); *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 ("the purpose of antidumping and countervailing duty laws is remedial, not punitive or retaliatory").

[110] *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 09-00422, slip op. 13-31 at 12 (*citing* S. Rep. No. 1221, 92d Cong., 2d Sess. 8 (1972)).

[111] *GPX Int'l Tire Corp. v. United States*, No. 08-00285, slip op. 13-2 at 62 (Ct. Int'l Trade Jan. 7, 2013); *see also Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 09-00422, slip op. 13-31 at 14.

[112] *See* section 776(b) of the Act.

[113] NKS case brief at 10.

[114] *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 ("the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins"); *GPX Int'l Tire Corp. v. United States*, No. 08-00285, slip op. 13-2 at 16 ("Certain aspects of the trade remedy laws also permit Commerce to look to surrogate data sources or allow the use of adverse inferences, which may increase the level of the duty assessed. These adjustments, however, do not transform the duty into a punitive measure provided the duty remains reasonably related to the actual harm caused" (citations omitted)).

[115] NKS stated that "[f]or purposes of this section of the administrative brief, the issue as to whether or not the Countervailing Duties to NKS were excessive is not placed in dispute. Rather, the question is whether countervailing duties constitute fines under the 8th Amendment." NKS Case Brief at 8.

[116] *See Austin*, 509 U.S. at 609-10 ("The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense'" (quoting *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 265 (1989) (emphasis added by court))).

[117] *See, e.g., GPX Int'l Tire Corp. v. United States*, No. 08-00285, slip op. 13-2 at 16.

the benchmark calculations for wire rod. First, NKS claims that the Japanese pricing data submitted by Petitioners are in "summary" form without supporting source information. NKS also questions details regarding the source data; including whether the source for this data is as listed – from the Steel products index – World Bank, (Japan) producers' export contracts (3 to 12 month terms), FOB mainly to Asia, the Japan Metal Bulletin World Bank. Next, NKS claims that the other potential benchmark sources describe the steel wire rod as being "mesh quality" whereas the Japanese product is described as steel wire rod. Because kitchen racks are a type of mesh, according to NKS, the proposed Japanese benchmarks are less specific. Finally, NKS claims, the Department's inability to find ocean freight rates from Japan to Zhuhai suggests that wire rod from Japan would not be readily available to a producer in Zhuhai. Also, there is no evidence indicating that the rates used by the Department as a substitute (freight rates from Australia to Zhuhai) are comparable to the rates from Japan to Zhuhai.

Petitioners' Rebuttal Arguments

Petitioners state the Japanese pricing data they submitted are not a summary, but instead are monthly pricing data for the POR. Petitioners claim that NKS has not supported its argument that the Japanese data are less specific to the input used, noting that the Department has used Japanese wire rod export pricing data reported by the World Bank, to calculate the benchmark in the previous review of the order and in other CVD investigations.[118] Finally, Petitioners argue that using ocean freight rates from Australia to Zhuhai in the benchmark rate calculation is in accordance with 19 CFR 351.511(a)(2)(iv), because the distances are similar, and that it would be absurd to conclude that the Department's inability to find freight rates between Japan and Zhuhai means that products were not shipped between those two locations.

Department's Position

As explained above under "Provision of Wire Rod for LTAR," the record contains supporting information for Japanese wire rod prices sourced from the World Bank. This added information confirmed the source and characteristics of the World Bank pricing data[119] used in the benchmark price calculations in the *Preliminary Results*. NKS did not submit timely comments objecting to the usability of this data when it was originally submitted by Petitioners.[120] Also, NKS did not identify any errors in the Japanese wire rod price data that discredited the data itself, or the World Bank and/or the Japanese Metal Bulletin as reliable sources of pricing data. We agree with Petitioners that NKS has not supported its claim that the subject racks "are a type of mesh" or that mesh quality wire is more specific to the merchandise in question than the wire rod reported in the Japanese statistics.

Regarding NKS' arguments about the use of Australian ocean freight rates to compute a delivered price in Zhuhai for Japanese wire rod, we disagree that this provides a basis for

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[118] Petitioners cite *Galvanized Steel Wire From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 17418 (March 26, 2012) ("*GSW from the PRC*"), and accompanying Issues and Decision Memorandum at 12-13 and Comment 8.

[119] *See* Petitioners' Comments on NKS' Supplemental Questionnaire Response (August 6, 2012) ("Petitioners' August 2012 Comments").

[120] *See* Petitioners' August 2012 Comments. Parties had ten days to comment after the date the information is served on the interested party. *See* 19 CFR §351.301(c)(1).

rejecting the Japanese prices. Our regulations at 19 CFR 351.511(a)(2)(iv) require that we use a delivered price and, lacking freight rates for locations that conform with the pricing data, we have previously used freight rates for a comparable distance.[121] In this regard, we agree with Petitioners that our inability to find publicly available ocean freight rates from Japan to the PRC for the entire POR from Maersk Lines is not evidence that Japanese wire rod would not be readily available to subject merchandise producers in the PRC.

Comment 3: Inclusion of Ocean Freight the Benchmark Calculations

NKS' Arguments

NKS argues the Department should not include ocean freight in the "dutiable value" when calculating the import duties to be incorporated into the wire rod and steel strip benchmarks. In support, NKS cites to U.S. Customs and Border Protection ("CBP") regulations which define dutiable value as exclusive of transportation charges.[122] NKS claims the inclusion of ocean freight creates an inflated benefit rate by overstating the benchmark value. Instead, NKS states that ocean freight should be added after the import duties and VAT have been calculated.

Petitioners' Rebuttal Arguments

Petitioners question NKS' support of its argument, pointing out that CBP law is not relevant here. Petitioners note that in *Line Pipe from the PRC*, the Department agreed with the comment that the dutiable value should include international freight and specifically stated that the "VAT is levied on the value of the product inclusive of delivery charges and import duties."[123]

Department's Position

In accordance with 19 CFR 351.511(a)(2)(iv) and prior cases,[124] when measuring the adequacy of remuneration under tier-one or tier-two benchmarks, 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. Thus, the PRC's practices, and not those of the United States, are relevant to the calculation of wire rod and steel strip benchmark prices in this administrative review. As noted above under "Summary," the Department placed information regarding Chinese customs practices on the record,[125] which confirms that in the PRC, "dutiable value" includes ocean freight. Also, as Petitioners note, the Department has

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[121] *See* 2011 Benchmark Memo, and *GSW from the PRC*, and accompanying Issues and Decision Memorandum at 12-13 and Comment 8.
[122] NKS cites 19 U.S.C §1401a(b)(4).
[123] *See Circular Welded Carbon Quality Steel Lined Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR70961 (November 24, 2008) ("*Line Pipe from the PRC*"), and accompanying Issues and Decision Memorandum at 19-20 and Comments 8.
[124] *See id.*; *see also Utility Scale Wind Towers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012), and accompanying Issues and Decision Memorandum at and Comment 19; *see also Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008), and accompanying Issues and Decision Memorandum at Comment 4 and 5.
[125] *See* Chinese Customs Memo at Attachment 1.

specifically found that in the PRC, the VAT is applied to the import price inclusive of, *inter alia*, delivery charges.[126] Therefore, we are continuing to include ocean freight in the calculation of dutiable value in these final results.

Comment 4: NKS' February 19, 2013 Comments Regarding the Department's Placement of Information on the Record

Commenting on the information the Department placed on the record on February 4, 2013,[127] NKS challenges the Department's action.[128] In particular, NKS claims that the Department abused its discretion by placing the information on the record after the new factual information deadline had passed and that the Department should not remedy a filing by Petitioners that NKS has argued to be deficient.[129] NKS further contends that the Japanese wire rod prices are excessive as evidenced by comparing them to other prices NKS submitted in Exhibit 3 of its February 19, 2013, comments. NKS also requests that those other prices in its Exhibit 3 be included in the wire rod benchmark calculation for the final results.

Department's Position

Regarding NKS' objection to the Department's decision to place new factual information on the record after the deadline had passed, the Department is appropriately cautious in adding information to the record at this state of the proceeding; however, in this instance, the information was pertinent to an issue being decided in the final results, was limited in scope, and came to light in sufficient time to afford procedural protections and allow parties an opportunity to respond as provided for in 19 CFR 351.301(c)(1).[130] It is the statutory responsibility of the Department to conduct the administrative review and place on the record information upon which it will rely in conducting the review.[131]

We also disagree with NKS' argument that the Department added this information to remedy deficiencies in the information provided by Petitioners. The World Bank data provided by Petitioners described the nature of the data and cited the source, and we were easily able to confirm the accuracy of the data.[132] The information placed on the record by the Department was independently sourced and was added to supplement the record with more details for our analysis of whether the World Bank prices would continue to be considered a usable source for the calculation of the final results. This added information confirmed the source and characteristics of the World Bank pricing data[133] used in the benchmark price calculations in the

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[126] *See Line Pipe from the PRC*, and accompanying Issues and Decision Memorandum at Comments 7 and 8.
[127] *See* Benchmark Information Memo.
[128] *See* NKS NFI Comments.
[129] *Id.*
[130] *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 at Comment 7; *Fresh Garlic From the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008-2009 Antidumping Administrative Review*, 76 FR 37321 (June 27, 2011) and accompanying Issues and Decision Memorandum at Comment 2.
[131] *See Stainless Steel Plate in Coils from Taiwan: Final Rescission of Antidumping Duty Administrative Review*, 68 FR 63067 (November 7, 2003), and accompanying Issues and Decision Memorandum at Comment 5.
[132] *See* Petitioners' August 2012 Comments at 2-3 and Attachment 1.
[133] *Id.*

Preliminary Results. There were no comments made objecting to the World Bank information at the time of submission by Petitioners, and the Department considered the information provided sufficient for our calculations in the *Preliminary Results*.

With respect to NKS' claim that the Japanese prices are excessive, we have reviewed the wire rod prices submitted by NKS as Exhibit 3 of its February 19, 2013. While we acknowledge that the Japanese wire rod prices sourced from the World Bank are higher than those provided in NKS' Exhibit 3, that fact in itself does not detract from the reliability of the World Bank data. This is especially true because the information at NKS' Exhibit 3 does not show what country the prices are from or the terms of the sales or offers reflected therein.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review in the Federal Register.

✓

Agree Disagree

Ronald K Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

April 5, 2013
(Date)