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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

DATE: May 29, 2008

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China

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Background

On November 13, 2007, the Department of Commerce ("the Department") published the preliminary determination of this investigation. See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 FR 63875 ("Preliminary Determination"). The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. 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 we have described in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: The Department's Authority to Apply the Countervailing Duty Law to China
Comment 2: Subsidies Prior to China's Accession to the World Trade Organization
Comment 3: Adverse Facts Available ("AFA")
Comment 4: Attribution of Subsidies Received by Affiliates of Zhejiang Kingland Pipeline and Technologies Co., Ltd.
Comment 5: Scope of the Investigation

Comment 6: Sales Denominator for Weifang East Steel Pipe Company Ltd.
Comment 7: Provision of Hot-rolled Steel for Less Than Adequate Remuneration
Comment 8: Government Policy Lending
Comment 9: Provision of Electricity for Less Than Adequate Remuneration
Comment 10: Critical Circumstances on an Importer Specific Basis
Comment 11: Base and Comparison Period for Critical Circumstances
Comment 12: Kingland Export Subsidy and Finding of Critical Circumstances
Comment 13: East Pipe Debt Forgiveness
Comment 14: Discount Rate
Comment 15: Programs Included in AFA Rate for Tianjin Shuangjie Steel Pipe Co., Ltd.
Comment 16: Double Remedy

Use of Adverse Facts Available

For reasons explained in the Federal Register notice, we continue to base the net countervailable subsidy rate for Tianjin Shuangjie Steel Pipe Group Co., Ltd. ("Shuangjie") on AFA for this final determination. Consistent with our approach in the Preliminary Determination,[1] for programs based on the provision of goods at less than adequate remuneration ("LTAR"), we continue to use the rate applied to Zhejiang Kingland Pipeline and Technologies Co., Ltd. ("Kingland Pipeline"), and affiliated companies (collectively, "Kingland," or "Kingland Companies") for the provision of hot-rolled steel ("HRS") for LTAR. For value added tax ("VAT") programs, we are still unable to utilize company-specific rates from this proceeding because neither respondent received any countervailable subsidies from these subsidy programs. Therefore, for VAT programs, we continue to apply the highest subsidy rate for any program otherwise listed, which in this instance is Kingland's rate for the provision of HRS for LTAR.

Similarly, we are not relying on the highest calculated final subsidy rate for grant programs because it is de minimis. Instead, we continue to apply the highest calculated final subsidy rate, which in this instance is Kingland's rate for the provision of HRS for LTAR. Finally, for the six alleged income tax programs pertaining to either the reduction of the income tax rates or the reduction or exemption from income tax, we continue to apply an adverse inference that Shuangjie paid no income tax during the period of investigation (i.e., calendar year 2006). The standard income tax rate for corporations in the PRC is 30 percent, plus a 3 percent provincial income tax rate. Therefore, the highest possible benefit for these six income tax rate programs is 33 percent. We are applying the 33 percent AFA rate on a combined basis (i.e., the six programs combined provided a 33 percent benefit). This 33 percent AFA rate does not apply to income tax deduction or credit programs. For income tax deduction or credit programs, we continue to apply the highest subsidy rate for any program otherwise listed, which in this instance is Kingland's rate for the provision of hot-rolled-steel at LTAR.

An interested party has argued that the Department should change its approach for calculating Shuangjie's AFA rate. We have addressed this argument as well as additional adjustments to this

[1] See Preliminary Determination, 72 FR at 63878-79.

AFA rate in Comment 15 of this memorandum. After examining the party's arguments, we are: (1) excluding provincial–specific programs where record evidence indicates that Shuangjie did not operate within those provinces; and (2) excluding any company-specific subsidy programs that do not involve Shuangjie. On this basis, we determine that Shuangjie's net countervailable subsidy rate is 615.92 percent.[2] We do not need to corroborate the calculated subsidy rates we are using as AFA because they are not considered secondary information as they are based on information obtained in the course of this investigation. See Section 776(c) of the Tariff Act of 1930, as amended ("the Act"); see also the SAA at 870.[3]

Also, for reasons explained in the Federal Register, we have applied AFA with respect to the GOC's failure to provide information in connection with the Provision of HRS for LTAR and the Policy Lending Under the Shandong Provincial Plan. This is discussed further in the Analysis of Programs section, below.

Subsidies Valuation Information

Allocation Period

Pursuant to 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. Section 351.524(d)(2) of the Department's regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System ("the IRS Tables"). The AUL period in this proceeding is 15 years according to the IRS Tables. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulation at 19 CFR 351.525(b)(6)(i) states 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 those 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

[2] See Comment 15 and Memorandum to the File entitled "Selection of the Adverse Facts Available Rate for Tianjin Shuangjie Steel Pipe Co., Ltd. for the Final Determination" (May 29, 2008). This memorandum is available in the Department's Central Records Unit ("CRU").

[3] See Uruguay Round Agreement Act Statement of Administrative Action, attached to H.R. Rep. No. 103-316 Vol I at 870 (1994), reprinted in 1994 U.S.C.C.A.N 3773, 4163 ("SAA").

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 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. (See Countervailing Duties; Final Rule, 63 FR 65348, 65401 (November 25, 1998) ("Preamble")). 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.[4]

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 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 v. United States, 166 F. Supp 2d, 593, 603 (CIT 2001) ("Fabrique").

East Pipe:

In its response, East Pipe reported that it is affiliated with East Pipe Transportation Facility Co., Ltd. ("East Highway"). East Pipe state that East Highway's primary business is to install highway guardrails in the PRC and that East Highway did not produce subject merchandise during the POI. East Pipe further contends that East Highway cannot be considered the holding company of East Pipe because its ownership interest in East Pipe is nominal (the details of the relationship between these two companies area proprietary).

In the Preliminary Determination, we agreed with East Pipe that any subsidies to East Highway should not be attributed to East Pipe under 19 CFR 351.525(b)(6)(iii).[5] East Pipe now argues that any subsidies it receives should be attributed to the combined sales of East Pipe and East Highway under 19 CFR 351.525(b)(6)(iii). We have not done this for the final determination because the record evidence does not support making this change.[6]

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[4] See Preamble at 65401.
[5] See Preliminary Determination, 72 FR at 63881.
[6] See Comment 6 for a further discussion of this issue.

East Pipe acknowledges a second company with which it is legally affiliated by virtue of a long-term investment, but which East Pipe views as commercially independent (the details of the relationship between these two companies are proprietary). We confirmed at verification[7] that this company does not produce the subject merchandise and does not provide inputs to East Pipe. Therefore, we do not need to reach the issue of whether this company and East Pipe are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi), and we are not attributing any subsidies received by this company to East Pipe.

Kingland:

Kingland Pipeline responded to the Department's original and supplemental questionnaires on behalf of itself; its parent company, Kingland Group Co., Ltd. ("Kingland Group"); Beijing Kingland Century Technologies Co. ("Kingland Century"); Zhejiang Kingland Pipeline Industry Co., Ltd. ("Kingland Industry"); and Shanxi Kingland Pipeline Co., Ltd. ("Shanxi Kingland"). According to Kingland, Kingland Group and Kingland Century do not produce the subject merchandise. However, because Kingland Group is the parent company of Kingland, we attributed subsidies received by Kingland Group to Kingland, in accordance with 19 CFR 351.525(b)(6)(iii), for the Preliminary Determination. No interested party objected to this attribution in its briefs; therefore, we are continuing to attribute subsidies received by Kingland Group to Kingland for this final determination.

With respect to Kingland Century, this company is a domestic trading company and does not produce any merchandise. Instead, it purchased and provided inputs to Kingland during the period of investigation ("POI"). Because it is not an input producer, we did not treat Kingland Century as an input supplier as described in 19 CFR 351.525(b)(6)(iv) (which refers to subsidies received by the input producer) for the Preliminary Determination. Consistent with the Preliminary Determination,[8] we are continuing to treat these inputs as being provided directly to Kingland. See Kingland Preliminary Calculation Memorandum.

Kingland Industry and Shanxi Kingland produced and sold subject merchandise domestically during the POI. Consistent with the Preliminary Determination, in accordance with 19 CFR 351.525(b)(6)(ii), we are including Kingland Industry and Shanxi Kingland in the subsidy calculation for this final determination.[9]

Kingland's organization chart submitted in its September 17, 2007, questionnaire response at Exhibit 1 shows several additional companies that appear to be service companies with no relationship to the subject merchandise or companies in which Kingland held a very limited share of ownership during the POI. We discussed these companies in a proprietary memorandum entitled "Zhejiang Kingland Pipeline Co., Ltd.: Cross-owned Companies" (November 5, 2007) (on file in the Department's CRU). We excluded these companies from the subsidy calculation

[7] See East Pipe Verification Report at page 5.
[8] See Preliminary Determination, 72 FR at 63881-82.
[9] See Preliminary Determination, 72 FR at 63881-82.

for the Preliminary Determination.[10] Interested parties did not comment on this methodology in their case and rebuttal briefs. Therefore, we have continued to exclude these companies from the subsidy calculation for this final determination.

Finally, for another company identified in Kingland's organization chart, CNOOC Kingland Pipeline Co., Ltd. ("CNOOC Kingland"), we reviewed additional information at verification and received affirmative and rebuttal comments from parties in their case briefs. We have addressed these comments in detail in Comment 4 of this memorandum.

Benchmarks for Short-Term 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)(2)(i). However, the Department does not treat loans from government banks as commercial if they were provided pursuant to a government program. See 19 CFR 351.505(a)(2)(ii). Because we are finding that the loans provided to East Pipe were made under the Shandong Provincial Steel Plan, as explained below, these loans are the very loans for which we require a suitable benchmark. Additionally, if East Pipe received any loans from private Chinese or foreign-owned banks, these would be unsuitable for use as benchmarks because, as explained in detail in CFS from the PRC,[11] the GOC's intervention in the banking sector creates significant distortions, restricting and influencing even foreign banks within the PRC.[12]

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 explained further, below, the Chinese national interest rates are not reliable as benchmarks for these loans because of the pervasiveness of the GOC's intervention in the banking sector. Loans provided by Chinese banks reflect significant government intervention and do not reflect the rates that would be found in a functioning market.[13]

The statute directs that the benefit is normally measured by comparison to a "loan that the recipient could actually obtain on the market." See section 771(5)(E)(ii) of the Act. Thus, the benchmark should be a market-based rate; however, there is not a functioning market for loans within the PRC. Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting a market-based benchmark interest rate based on the inflation-adjusted interest rates of countries with similar per capita gross income ("GNI")

[10] See Preliminary Determination, 72 FR at 63881-82.
[11] See Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 17484, 17486 (April 9, 2007) ("CFS from the PRC"),
[12] See CFS from the PRC at Comments 8 and 10.
[13] See CFS from the PRC at Comment 10.

to the PRC, using the same regression-based methodology that we employed in CFS from the PRC.[14]

The use of an external benchmark is consistent with the Department's practice. For example, in Softwood Lumber, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada.[15] In the current proceeding, the Department finds 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. Therefore, as in Softwood Lumber, where domestic prices are not reliable, we have resorted to prices (i.e., benchmarks) outside the PRC.

Discussion: In our analysis of the PRC as a non-market economy in the antidumping duty investigation of CLPP from the PRC,[16] the Department found that the PRC's banking sector does not operate on a commercial basis and is subject to significant distortions, primarily arising out of the continued dominant role of the government in the sector.[17] In CFS from the PRC, the Department found that the GOC still dominates the domestic Chinese banking sector and prevents banks from operating on a fully commercial basis.

We continue to find that these distortions are present in the PRC banking sector and, therefore, determine that the interest rates of the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to East Pipe in this proceeding.

Moreover, while foreign-owned banks do operate in the PRC, they are subject to the same restrictions as the SOCBs. Further, their share of assets and lending is negligible compared with the state-owned commercial banks ("SOCBs"). Therefore, as discussed in greater detail in CFS from the PRC, because of the market-distorting effects of the GOC in the PRC banking sector, foreign bank lending does not provide a suitable benchmark.[18]

We now turn to the issue of choosing an external benchmark. Selecting an appropriate external interest rate benchmark is particularly important in this case because, unlike prices for certain commodities and traded goods, lending rates vary significantly across the world. Nevertheless, as discussed in CFS from the PRC, there is a broad inverse relationship between income levels

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[14] See CFS from the PRC at Comment 10.

[15] See Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002), and accompanying Issues and Decision Memorandum at Comment 34 ("Softwood Lumber").

[16] 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) ("CLPP from the PRC").

[17] See "The People's Republic of China ("PRC") Status as a Non-Market Economy," May 15, 2006 ("May 15 Memorandum"); and "China's Status as a Non-Market Economy," August 30, 2006 ("August 30 Memorandum"), both of which are referenced in 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). See also CFS from the PRC at Comment 10.

[18] See CFS from the PRC at Comment 10.

and lending rates. In other words, countries with lower per capita GNI tend to have higher interest rates than countries with higher per capita GNI, a fact demonstrated by the lending rates across countries.[19] The Department has, therefore, determined that it is appropriate to compute a benchmark interest rate based on the inflation-adjusted interest rates of countries with similar per capita GNIs to the PRC, using the same regression-based methodology that we employed in CFS from the PRC. As explained in CFS from the PRC at Comment 10, this pool of countries captures the broad inverse relationship between income and interest rates. We 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 as of July 2007.[20]

Many of these countries reported short-term lending and inflation rates to the International Financial Statistics ("IFS"). With the exceptions noted below, we used this data set to develop an inflation-adjusted market benchmark lending rate for short-term RMB loans.[21] We did not include those economies that the Department considered to be non-market economies for AD purposes for any part of 2006: the PRC, Armenia, Azerbaijan, Belarus, Georgia, Moldova, Turkmenistan, and Ukraine. The benchmark necessarily also excludes any economy that did not report lending and inflation rates to IFS for 2005 or 2006. Finally, the Department also excluded two aberrational countries, Angola, with an inflation-adjusted 2005 rate of 8.66 and Brazil with an inflation-adjusted 2005 rate of 55.38. No countries were excluded as aberrational within the inflation-adjusted 2006 interest rates. For the reasons explained in CFS from the PRC and in response to Comment 8, below, this regression provides the most suitable market-based benchmark to measure the benefit from the Policy Lending Program, because it takes into account a key factor involved in interest rate formation, that of the quality of a country's institutions, that is not directly tied to state-imposed significant distortions in the banking sector discussed above.[22]

Consistent with the regression model employed in CFS from the PRC, the Department calculated inflation-adjusted benchmark lending rates of: 7.67 percent for 2006 and 8.58 percent for 2005. Because these are inflation-adjusted benchmarks, it is also necessary to adjust the interest paid by East Pipe on these RMB loans for inflation. This was done using the PRC inflation figure as reported to IFS.[23]

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[19] See Memorandum from Salim Bhabhrawala to Susan Kuhbach Re: Calculation for the Final Determination: Weifang East Steel Pipe Co., Ltd. (May 29, 2008) ("East Pipe Final Calculation Memorandum"). See http://www.imfstatistics.org at attachment 2B of the East Pipe Final Calculation Memorandum.

[20] See http://web.worldbank.org, search engine term: "lower middle income," at attachment 2A of the East Pipe Final Calculation Memorandum.

[21] See Attachments 3A and 3B of the East Pipe Final Calculation Memorandum.

[22] See www.worldbank.org/wbi/governance, placed on the record in this Investigation in the Memorandum from Damian Felton to Susan Kuhbach Re: Calculations for the Post-Preliminary Analysis of Debt Forgiveness: Weifang East Steel Pipe Co., Ltd ("Post-Prelim Calculation Memorandum") at Attachment 4 (April 9, 2008).

[23] See Attachment 3A and 3B of the East Pipe Final Calculation Memorandum.

Benchmarks for Short-Term Foreign Currency-Denominated Loans

For foreign currency-denominated loans, the Department was unable to locate sufficient data on short-term lending rates for the countries in the basket of "lower middle-income countries" used for its benchmark for RMB loans. Therefore, the Department has used as a benchmark the one-year dollar interest rates for the London Interbank Offering Rate ("LIBOR"), plus the average spread between LIBOR and the one-year corporate bond rates for companies with a BB rating. Bloomberg provides data on average corporate bond rates for companies with a range from A-rated to B-rated.[24] We have determined that BB-rated bonds, which are the highest non-investment-grade and near the middle of the overall range, are the most appropriate basis for calculating the spread over LIBOR. Several of the countries in the basket report bond rates, but not all of these countries report corporate bond rates and none report corporate bond rates for firms in the industrial sector. The Department, therefore, relied on corporate bond rates for the industrial sector in the United States and the eurozone, because the market for dollars and euros is international in scope.

Discount Rates

The lending rates reported in IFS represent short-term lending, and there is not sufficient publicly available long-term interest rate data upon which to base a robust benchmark for long- term loans. To address this problem, the Department has developed an adjustment to the short-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB-rated bond rates. We have used this constructed long-term interest rate for the year in which the government agreed to provide the benefit as our discount rate.[25] This issue is discussed further in Comment 14, below.

Analysis of Programs

I. Programs Determined to Be Countervailable

A. Hot-rolled Steel for Less Than Adequate Remuneration

In the Preliminary Determination, the Department determined that the GOC's provision of HRS through its state-owned producers is a financial contribution within the meaning of section 771(5)(D)(iii) of the Act, and that it confers a benefit on CWP producers because the good is sold for LTAR as described in section 771(5)(E)(iv) of the Act.[26]

The Department continues to find that GOC's provision of HRS through its state-owned steel producers is countervailable. Specifically, we determine that the GOC is providing a good, HRS, for LTAR, and that this good is being provided to a limited number of industries. See Comment

[24] See Bloomberg data, placed on the record of this investigation in the East Pipe Final Calculation Memorandum at Exhibit 2E.
[25] See East Pipe Final Calculation Memorandum at Exhibit 2E for a further discussion of this issue.
[26] See Preliminary Determination, 72 FR at 63882-83.

7 regarding our determination of whether these suppliers are "authorities," within the meaning of section 771(5)(B) of the Act.[27] In a change from the Preliminary Determination, we are also finding countervailable purchases of HRS from privately-owned trading companies that purchase HRS from state-owned producers/suppliers. For these transactions, the GOC's financial contribution (provision of a good) is made to the trading company suppliers that purchase the HRS, while all or some portion of the benefit is conferred on the CWP producers who purchase the HRS from the trading company suppliers.[28] Because the price paid by CWP producers is less than the benchmark price, the CWP producers receive a benefit when they purchase these government-provided goods and, accordingly, receive these inputs for less than adequate remuneration.

During the course of the investigation, we did not seek information from the respondents regarding the amount of HRS purchased through trading company suppliers that was produced by SOEs. Now, in light of our determination that such purchases provide a countervailable subsidy, we have carefully reviewed the record to determine what information is available to calculate this amount. The GOC reported that SOE members of the China Iron and Steel Association ("CISA")[29] accounted for approximately 71 percent of HRS production in China in 2006.[30] In making this claim, the GOC specifically reported that CISA determined whether the HRS producers that comprise the aforementioned percentage were considered to be state-owned or private.[31] However, at verification, when the Department asked how CISA determined whether a HRS producer was private or state-owned, a representative from CISA explained that CISA does not classify member companies according to ownership structure. Instead, we learned that the reported ownership structure of CISA members was developed by the GOC's legal counsel through public sources. Specifically, the GOC's legal counsel explained that factual information on individual or corporate shareholders of CISA members was usually based on self-assessed titles on a company's website.[32] Thus, the GOC misrepresented the source of the information on whether HRS were privately or state-owned, and the reported data reflected the company's own assessments of their ownership category.

Section 776(a)(2)(D) of the Act states that the Department shall use the facts otherwise available in reaching a determination if an interested party provides information that cannot be verified as provided by section 782(i) of the Act. In addition, Section 776(a)(2)(A) of the Act states that the

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[27] See Comment 7 for a further discussion of specificity.

[28] See Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company – Specific Reviews: Certain Softwood Lumber from Canada, 69 FR 75917 (Dec. 20, 2004) and accompanying Issues and Decision Memorandum at Comment 47 (Other Non-Stumpage Programs, #3); Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India, 71 FR 7534 (Feb. 13, 2006) and accompanying Issues and Decision Memorandum at Comment 8.

[29] The GOC explains that CISA members represent the largest share of steel production in China. See the GOC's Response to the Third Supplemental Questionnaire (December 18, 2007) ("GOC 3rd SQR") at page 34.

[30] See The GOC's 3rd Supplemental Response at page 35. The GOC explains that CISA members represent the largest share of steel production in China.

[31] See The GOC's 3rd Supplemental Response at page 35.

[32] See the Memorandum to Susan Kuhbach, Office Director, Re: Government of the People's Republic of China National Verification Report at page 20 (March 5, 2008) ("GOC Verification Report") at page 8.

Department shall use facts available when a party withholds information that has been requested by the Department. Further, section 776(b) of the Act states that if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.[33] As noted above, the ownership of HRS producers was not verified because CISA does not record data by type of ownership. Moreover, we find that the GOC did not act to the best of its ability by failing to properly disclose how the reported ownership structures of CISA members were obtained. In misrepresenting how the information was obtained, the GOC did not provide the Department with "full and complete answers."[34] Instead, the GOC purposefully made a decision to conceal how the information on ownership structure was derived. Accordingly, in selecting from among the facts available, we are drawing an adverse inference with respect to the ownership of HRS producers in the PRC.

Therefore, to determine the percentage of HRS production accounted for by SOEs, we used the list of producers prepared by CISA.[35] However, we did not accept the GOC's characterization of these companies' ownership. Instead, where either record evidence indicates that a HRS producer is state-owned, or the GOC failed to provide factual evidence supporting its classification of the company, we have categorized those producers as state-owned. Based on this analysis, we find that 96.1 percent of HRS production by CISA members is accounted for by SOEs. By extension, we conclude that on the basis of available record evidence 96.1 percent of HRS production in the PRC is by SOEs.[36] Thus, we determine that 96.1 percent of the HRS purchased from trading company suppliers was government-provided steel.

For HRS purchased directly from producer suppliers, we have reviewed the information submitted by the GOC regarding the companies' ownership. Where the GOC provided the requested information and it showed that a producer supplier is private, we have not countervailed the HRS purchased from that supplier. Where the GOC did not provide the requested information, we have made the adverse assumption that the producer supplier was an SOE.[37]

Parties commented extensively on what constitutes adequate remuneration. We have addressed these arguments in Comment 7 of this memorandum. After examining the parties' arguments and all the information on the record, the Department continues to use prices from SteelBenchmarker to determine whether HRS provided by government entities was sold for LTAR. However, we have modified our analysis of the SteelBenchmarker prices, in particular,

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[33] See e.g. Notice of Final Determination of Sales of Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (Aug. 30, 2002).

[34] See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

[35] Our decision to use the HRS producers identified as CISA members to derive the ownership percentage of the HRS industry in no way diminishes or minimizes our finding that the GOC did not provide the Department with "full and complete answers." We continue to find that the GOC misrepresented how the information was obtained, and have drawn adverse inferences accordingly.

[36] See the Department's Memorandum to the File, entitled "Hot-rolled Steel Ownership Ratio" (May 29, 2008), for further detail on how the ownership ratio was calculated.

[37] See Comment 7 for a further discussion.

under which tier of the Department's adequate remuneration hierarchy these prices should be considered. Specifically, in a change from the Preliminary Determination, we now consider the SteelBenchmarker prices to be appropriately considered as equivalent to tier 1, in-country import price into China under 19 CFR 351.511(a)(2) instead of a world market price (i.e., tier two benchmark under 19 CFR 351.511(a)(2)(ii)).[38] In connection with this change, we have also relied on record evidence regarding actual import prices, for a respondent in this proceeding.[39] Finally, consistent with 19 CFR 351.511(a)(2)(iv), we are adjusting the SteelBenchmarker prices to include delivery charges and import duties.[40]

As a result of the change in our treatment of purchases through trading companies, we have made one additional change to the calculations for the Preliminary Determination with respect to Kingland. For the Preliminary Determination, we countervailed all purchases of HRS by Kingland Group.[41] Kingland Group, however, does not produce subject merchandise. Kingland Group acts as a trading company that sells HRS and other products.[42] Therefore, consistent with our determination that producers of CWP received the benefit from a government-provided financial contribution for the provision of HRS to trading companies, we have removed Kingland Group's purchases of HRS from our analysis. We have explained this change in additional detail in the Kingland Final Calculation Memorandum.[43]

On this basis, we determine the countervailable subsidy rate to be 27.35 percent ad valorem for East Pipe and 44.84 percent ad valorem for Kingland.

B. Other Subsidies Received by Kingland

1. Grants Expensed in the Year of Receipt

Kingland Pipeline, Kingland Group, and Kingland Industry reported that they received different city, district, and provincial grants related to export assistance, research and development, and other business activities in 2004, 2005, and 2006. Kingland only identified two of these programs, the "Electromechanical Products Technologies Renovation Project Fund" and "Superstar Enterprise" award, as public information. Kingland designated information about the

[38] See For a full discussion of the Department's rationale regarding this change, see the Departments position in Comment 7 of this memorandum.
[39] See Comment 7 (for further discussion).
[40] See Comment 7 (for further discussion).
[41] See Memorandum to Susan Kuhbach, Office Director, Re: Preliminary Affirmative Countervailing Duty Determination: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; Calculations for the Preliminary Determination for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd., and Beijing Kingland Century Technologies Co. (November 5, 2007) ("Kingland Preliminary Calculation Memorandum") at page 3.
[42] See letter from Kingland Group to the Department, Re: Response to Countervailing Duty Questionnaire at pages 4 and 5 (September 17, 2007).
[43] See Memorandum to Susan Kuhbach, Office Director, Re: Final Affirmative Countervailing Duty Determination: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; Calculations for the Final Determination for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd., and Beijing Kingland Century Technologies Co. (May 29, 2008) ("Kingland Final Calculation Memorandum").

other programs as business proprietary. We addressed these programs in detail in the Kingland Preliminary Calculation Memorandum. Information on the record does not indicate that these grants are tied to any of the programs addressed in this Final Determination.

Consistent with the Preliminary Determination, we determine that all the grants received in 2004 and 2005 should be expensed in those years (i.e., prior to the POI) because even if they were treated as non-recurring, the total amount received was less than 0.5 percent of the relevant sales in those years (see 19 CFR 351.524(b)(2)). Hence, they would confer no benefit in the POI.

2. Export Assistance Grants[44]

For export assistance grants received in 2006, certain of them pertained to markets other than the United States. Pursuant to 19 CFR 351.525(b)(4), we have not included these in our analysis. For the remaining export assistance grants, we determine that these grants are countervailable subsidies within the meaning of section 771(5) of the Act. They are financial contributions under section 771(5)(D)(i), and they provide a benefit in the amount of the grants (see 19 CFR 351.504(a)). Finally, because they are contingent upon export performance, they are specific under section 771(5A)(B).

To calculate the benefit, we divided the amount of each subsidy received by Kingland's export sales in 2006. On this basis, we determine that a countervailable subsidy of less than .005 percent ad valorem exists for Kingland for each subsidy. Where the countervailable subsidy rate for a program is less than .005 percent, the program is not included in the total countervailing duty rate.[45]

See Comment 12 for a further discussion of export subsidies.

3. *Super Star Enterprise*

Kingland Group reported that it received a "Super Star Enterprise" grant award from Huzhou City. Kingland Group explained that Huzhou City granted this award based on the total value of its sales. The company met the relevant sales threshold for 2005 and received this award in 2006.

We determine that Kingland received a countervailable subsidy under the Super Star Enterprise award program. We find that this grant is 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. See 19 CFR 351.504(a). We further determine that the grant provided under this program is limited as a matter of law to

[44] The names of these grants are proprietary. We have addressed them in the Kingland Final Calculation Memorandum.

[45] See e.g. Final Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 70 FR 39998 (July 12, 2005), and accompanying Issues and Decision Memorandum at "Purchases at Prices that Constitute 'More than Adequate Remuneration" (citing Final Results of Administrative Review: Certain Softwood Lumber Products from Canada, 69 FR 75917 (December 20, 2004) "Softwood Lumber from Canada 2004")).

certain enterprises; i.e., enterprises that exceed certain sales values during a year. Hence, we find that the subsidy is specific under section 771(5A)(D)(i) of the Act.

To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants. See 19 CFR 351.524(b). Because the award was not tied to any specific product, we attributed the subsidy to the consolidated sales of the Kingland Group. Also, because the benefit was less than 0.5 percent, the entire amount was attributed to the POI. On this basis, we determine the countervailable subsidy to be 0.02 percent ad valorem for Kingland.

C. Policy Lending Under the Shandong Provincial Steel Plan

In the Preliminary Determination, we found the Government Policy Lending Program not to be countervailable. However, we stated that we would continue to investigate whether the GOC's Iron and Steel Policy or other plans apply to the CWP industry.[46]

At verification we learned that Shandong Province and Weifang City both maintain five-year plans for steel. Neither of these plans had been submitted in response to the Department's specific requests in its questionnaires for information from local governments about their steel plans.[47] In fact, the GOC stated in its questionnaire response:

> GOC has confirmed with the localities in which respondents are located and they confirm that no law, regulation, decree or policy statements were implemented to fulfill the goals of the Eleventh Five-Year Plan, the Steel Policy, and the Industry Adjustment Rules during the POI.[48]

Section 776(a)(2)(A) of the Act states that the Department shall use facts otherwise available if, inter alia, an interested party withholds information that has been requested by the Department or provides information that the Department cannot verify. Further, section 776(b) states that if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interest of that party in selecting from the facts otherwise available. The GOC's failure to submit the requested information and its statement that such plans did not exists, which failed verification, warrant the application of AFA.

We adversely infer that the Shandong Province and Weifang Five-Year Plans for Steel provides for policy lending to CWP producers in Shandong Province. Consequently, in a change from the Preliminary Determination, we find that loans provided by policy banks and state-owned commercial banks in the Shandong Province constitute government-provided loans pursuant to section 771(5)(D)(i) of the Act. We further determine that this loan program is specific in law

[46] See Preliminary Determination, 72 FR at 63883.
[47] See e.g. Countervailing Duty Questionnaire dated July 27, 2007 at Questions 13 and 14, and Department's Supplemental Questionnaire dated October 9, 2007 at Questions 8 and 11.
[48] See letter from the GOC to the Department, Re: GOC Questionnaire Response (September 17, 2007) ("GOC Questionnaire Response") at page 25.

because the government of Shandong Province has a policy in place to encourage and support the growth and development of the CWP industry.[49] Finally, the Department finds that this program provides a benefit to the recipients, equal to the difference between what the recipient paid on the loan and the amount the recipient would have paid on a comparable commercial loan.[50]

On this basis, we determine that East Pipe received a countervailable subsidy of 1.14 percent ad valorem under this program.

D. East Pipe Debt Forgiveness

In late 2000, Maite Pipe became insolvent. Its workers were not being paid and its chief creditor, Industrial and Commercial Bank of China ("ICBC"), filed a claim to take over the assets Maite Pipe had pledged as collateral. [51] In December of that year, certain managers of Maite Pipe made a proposal to the Weifang People's Government to take over the failing firm and it became East Pipe. [52]

In April 2002, the final approval was given on the reform of Maite Pipe. This document establishes the post-buy-out balance sheets of East Pipe and Maite Pipe. According to East Pipe officials, the assets retained by Maite Pipe were accounts receivable that were not likely to be collected, while the liabilities were debt in the form of accounts payable for remote, hard-to-locate suppliers. Maite Pipe had no operations after the management buyout, but retained a few employees to try and collect the receivables. [53]

The Department has previously examined situations in which the government restructures a state-owned company and sells it off. In these cases, we found that liabilities left behind in a shell corporation should have been assigned to the various operating companies that were formed and sold. Consequently, we apportioned the liabilities among the operating companies and treated the unassumed debt as debt forgiveness to the operating companies.[54]

Applying that practice in this investigation leads us to determine that the liabilities left in Maite Pipe constitute debt forgiveness to East Pipe. Specifically, we determine that the GOC has provided a financial contribution to East Pipe in the form of a direct transfer of funds and that East Pipe received a benefit in the amount of the debt forgiven.[55] Additionally, we determine that this subsidy is de facto specific because it is limited to East Pipe.[56] See, Comment 13 for further discussion on this issue.

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[49] See Section 771(5A)(D)(i) of the Act.
[50] See Section 771(5)(E)(ii) of the Act.
[51] See East Pipe Verification Report at page 4.
[52] See East Pipe SQR Oct 18, 07 at ex 8.
[53] See East Pipe Verification Report at page 5.
[54] See e.g. Final Affirmative Countervailing Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508, 15512 (March 31, 1999).
[55] See Section 771(5)(D)(i) of the Act and 19 CFR 351.508(a).
[56] See Section 771(5A)(D)(iii)(I) of the Act.

We are treating this debt forgiveness as a non-recurring subsidy in accordance with 19 CFR 351.524(c)(1) and allocating the forgiven amount over the AUL using the discount rate described under "Subsidies Valuation Information" above. The benefit allocated to the POI was attributed to East Pipe's total sales (see Comment 6 regarding Sales Denominator for East Pipe). On this basis, we determine the countervailable subsidy to be 1.08 ad valorem for East Pipe.

II. Programs Determined to Be Not Countervailable

A. Government Policy Lending Program

Except as detailed above for policy lending pursuant to the Shandong Provincial Steel Plan, we continue to find that based on the totality of the record evidence, CWP producers did not receive policy loans pursuant to the national level plans for iron and steel, industrial structure adjustment, or technology development. See Comment 8 for a further discussion of Policy Lending.

B. Provision of Inputs for Less than Adequate Remuneration

1. Electricity: We continue to determine that the provision of electricity to CWP producers in the PRC is neither de jure nor de facto specific. Although producers in a few particular industries are eligible for discounts under the law, all other large-scale enterprises within a locality pay the same rate for their electricity, including the CWP producers we examined. On this basis, we determine that the GOC's provision of electricity does not confer a countervailable subsidy on the producers/exporters of the subject merchandise during the POI. See Comment 9 for a further discussion of electricity.

2. Water: We continue to determine that the provision of water in to CWP producers in the PRC is neither de jure nor de facto specific or, in the case of Weifang East Pipe, that water is not provided by an authority within the meaning of section 771(5)(b) of the Act. On this basis, we determine that the GOC's provision of water does not confer a countervailable subsidy on the producers/exporters of the subject merchandise during the POI.[57]

C. VAT Rebates (originally referred to as "Export Incentive Payments Characterized as "VAT Rebates")

We determine that the VAT refund received upon the export of CWP does not confer a countervailable benefit because the VAT rate levied on CWP in the domestic market (17 percent) exceeded the amount of VAT exempted upon the export of CWP (13 percent). See Preliminary Determination, 72 FR 63875, 63884.

[57] See Preliminary Determination, 72 FR at 63884.

III. Post-POI Programs

Government Restraints on Exports: Hot-rolled Steel and Zinc

Petitioners alleged that the GOC restrains exports of HRS and zinc by means of export taxes, which artificially suppress the price a producer in the PRC can charge for these inputs into CWP. The export restraints allegedly giving rise to a subsidy were announced on May 30, 2007, i.e., after the POI. Although the export duties were implemented retroactively, there is no basis to conclude that the export duties affected the prices paid by the respondents for HRS and zinc prior to May 30, 2007, because those purchases had already been made. Therefore, any subsidy conferred by the export duties on HRS and zinc would properly be addressed under our Program-wide Change regulation, 19 CFR 351.526(a). That regulation states that the Department may take a program-wide change into account in establishing the estimated countervailing duty cash deposit rate if: (1) the Department determines that subsequent to the period of investigation or review, but before a preliminary determination in an investigation, a program-wide change has occurred; and (2) the Department is able to measure the change in the amount of countervailable subsidies provided under the program in question.

In this investigation, East Pipe and Kingland submitted their monthly purchase prices for HRS and zinc for periods prior to and following the May 30, 2007, announcement. We analyzed this information for the Preliminary Determination. The data showed fluctuations in the prices of these inputs both before and after the announcement of the export duties. Moreover, the data available for the months after the announcement were limited. No interested party commented on this issue between the Preliminary Determination and this Final Determination. Therefore, consistent with the Preliminary Determination, we are not including these alleged subsidy programs in our cash-deposit rates. [58]

IV. Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI

A. Loans and Interest Subsidies Provided Pursuant to the Northeast Revitalization Program
B. The "Two Free, Three Half" Program
C. Reduced Income Tax Rates for Foreign Invested Enterprises ("FIEs") Based on Location
D. Local Income Tax Exemption and Reduction Program for "Productive" FIEs
E. Income Tax Exemption Program for Export-oriented FIEs
F. Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export-oriented Enterprises
G. Reduced Income Tax Rate for Technology and Knowledge Intensive FIEs
H. Reduced Income Tax Rate for High or New Technology FIEs
I. Preferential Tax Policies for Research and Development at FIEs
J. Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically Owned Companies

[58] Preliminary Determination, 72 FR at 36884-85.

K. Income Tax Credits on Purchases of Domestically Produced Equipment by FIEs
L. Program to Rebate Antidumping Legal Fees in Shenzen and Zhejiang Provinces
M. Funds for "Outward Expansion" of Industries in Guangdong Province
N. Export Interest Subsidy Funds for Enterprises Located in Shenzhen and Zhejiang Provinces
O. Loans Pursuant to Liaoning Province's Five-year Framework
P. VAT and Tariff Exemptions on Imported Equipment
Q. VAT Rebates on Domestically Produced Equipment
R. The State Key Technologies Renovation Project Fund
S. Grants to Loss-making State-owned Enterprises
T. Provision of Inputs for Less Than Adequate Remuneration: Natural Gas
U. Provision of Inputs for Less Than Adequate Remuneration: Land
V. Foreign Currency Retention Program
W. Rebates of Antidumping Legal Fees on Shandong Province
X. Refunds of Provincial Income Taxes for High and new Technology Enterprises in Zhejiang Province

V. Programs Determined To Be Terminated

A. Exemption from Payment of Staff and Worker Benefits for Export-oriented Enterprises

The Department has determined that this program was terminated on January 1, 2002, with no residual benefits. See CFS from the PRC Issues and Decision Memorandum at "Programs Determined to be Terminated."

Analysis of Comments

Comment 1: The Department's Authority to Apply the Countervailing Duty Law to China

Petitioners' Affirmative Comments:

Petitioners argue that the Department properly exercised its authority to apply the CVD law to China. Petitioners note that this decision was made after providing opportunities to comment to both interested parties in the CFS from the PRC investigation and the general public through a Federal Register notice.[59] In addition, Petitioners believe that Georgetown Steel[60] is not an impediment to the Department's application of the CVD law to China, and must be read to allow the Department ongoing discretion to apply the CVD law to China. In support of their argument, Petitioners provide three points to underline their position. First, Petitioners contend that there is no statutory bar to applying the CVD law to China, particularly in light of China's WTO accession. Petitioners assert that in CFS from the PRC, the Department correctly found that

[59] See Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment, 71 Fed. Reg. 75507 (December 15, 2006) ("CVD PRC Comment Request").
[60] See Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) ("Georgetown Steel").

sections 701 and 771(5) and (5A) of the Act do not limit the Department's authority to apply CVD law to only market economies. Rather, according to Petitioners, section 701(a)(1) of the Act broadly requires the Department to impose a CVD if the "government of country or any public entity within the territory of a country is providing" a countervailable subsidy with respect to merchandise imported into the United States. Petitioners contend that the statute broadly defines "country" in such a way that it makes no distinction between countries based on economic or political systems. In addition, Petitioners note that a "Subsidy Agreement country" includes WTO member countries, which China became a member of in 2001. Finally, Petitioners assert that the Act's definition of a "countervailable subsidy" does not state that an "authority" (i.e., a government providing the financial contribution) is limited to market-economies.

Second, Petitioners contend that in the Georgetown Steel Applicability Memorandum,[61] issued in CFS from the PRC, the Department correctly distinguished Soviet-style economies at issue in Georgetown Steel[62] from China's economy and, therefore, correctly applied the CVD law to China. Petitioners note that the Georgetown Steel Applicability Memorandum chronicled numerous differences between China's economy and the Soviet-style economies. Therefore, according to Petitioners, the Department can in fact measure subsidies in China.

Third, Petitioners assert that China's WTO accession supports the application of CVD law to China. Petitioners contend that because the U.S. CVD law was drafted, in part, to conform to the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement")[63] and because China clearly subjected itself to the SCM Agreement when acceding to the WTO under the Accession Protocol,[64] the Department clearly has the authority to apply the CVD law to imports from China as it does to imports from any other country. Additionally, Petitioners point out that under Articles 10.2 and 25 of the Accession Protocol, China agreed that certain subsidies provided to state-owned enterprises ("SOEs") would be viewed as actionable and that China would notify the WTO of all its subsidies. Petitioners also note that, under Article 10.3 of the Accession Protocol, China agreed, inter alia, to eliminate immediately all export subsidies and subsides conditioned on the use of domestic goods.

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[61] See Petitioners' case brief at page 7 (April 17, 2008) ("Petitioners' CB"), citing the Department's Memorandum, Re: "Countervailing Duty Investigation of Coated Free Sheet Paper From the People's Republic of China – Whether The Analytic Elements Of The Georgetown Steel Opinion Are Applicable To China's Present-Day Economy" at page 10 (March 29, 2007) ("Georgetown Steel Applicability Memorandum") (Georgetown Steel Applicability Memorandum is available at http://ia.ita.doc.gov/download/cfsp/china-cfs-georgetown-applicability.pdf).

[62] See Georgetown Steel, 801 F.2d at 1308.

[63] See Petitioners' CB at page 8, citing Agreement on Subsidies and Countervailing Measures (April 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 264 (1994) ("SCM Agreement"); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("URAA"), H.R. Doc. No. 103-316 (1994) at page 923 (Amendments to the CVD law in the URAA were "either required or appropriate to implement the Subsidies Agreement").

[64] See Petitioners' CB at pages 8-9, citing WTO Protocol on the Accession of the People's Republic of China, WT/L/432, Article 15b (November 23, 2001) ("Accession Protocol").

Petitioners assert that Congress requested that China be subjected to the CVD law in the Permanent Normal Trade Relations ("PNTR") for China legislation. Petitioners contend that nothing in U.S. law prohibits applying the CVD law to China. They also state that the CIT has declared that Georgetown Steel does not preclude the Department from investigating Chinese subsidy practices. Furthermore, Petitioners indicate that China has always been subject to subsidy laws and was responsible for complying with the provisions under the SCM Agreement once it joined the WTO. For example, Petitioners note that in April 2006 China issued a notification of 78 different subsides pursuant to its obligation under Article 25 of the SCM Agreement.

GOC's Affirmative Comments:

The GOC argues that the Department has no legal authority to apply the CVD law to China as long as it continues to designate China as a non-market economy ("NME") for antidumping duty ("AD") purposes. In support of its argument, the GOC provides four points to underline its position. First, the GOC contends that the court in Georgetown Steel definitively ruled that the U.S. statutory scheme does not permit the application of CVD law to non-market economy countries.[65] The GOC asserts that the Department's current interpretation of the Georgetown Steel decision, that the Department has the discretion to decide whether to apply CVD law to NME countries, is contradicted by the very language in the Georgetown Steel decision. The GOC notes that in Georgetown Steel the court upheld the Department's own legal conclusion that the CVD law does not apply to NMEs not because the court found the Department's interpretation to be the only permissible interpretation of the statutory scheme. The GOC also notes that the Georgetown Steel decision has been effectively affirmed by Congress because Congress refused to reverse or modify the Georgetown Steel decision in the 1988 Omnibus Trade and Competitiveness Act[66] and the Uruguay Round Agreements Act,[67] but instead strengthened the AD Law.

Second, the GOC asserts that even if the Department has the legal authority to apply the CVD law to China, the Department's imposition of CVD duties against China constitutes a retroactive amendment to a binding rule, in violation of the Administrative Procedures Act ("APA").[68] The GOC states that the APA requires formal rulemaking to amend binding rules. The GOC contends that because the Department has explicitly codified its refusal to initiate CVD cases against NME countries, such refusal constitutes a binding rule as defined in the APA. The GOC contends that a binding rule emerged under the APA when either: 1) in 1984, the Department adopted its position not to apply the CVD law to NME countries after a specific notice and comment period; 2) in 1993, the Department issued the "General Issues Appendix," which was a

[65] See Georgetown Steel, 801 F.2d at 1314.
[66] See Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) ("1988 Omnibus Trade and Competitiveness Act").
[67] See Uruguay Round Agreements Act, Pub L. No. 103-465, 108 Stat. 4813 (1994) ("Uruguay Round Agreements Act").
[68] See 5 USC section 500 et seq. ("Administrative Procedures Act," or "APA").

written statement that resolved various issues related to the CVD law;[69] or 3) the Department codified its position when it specifically limited the scope of its authority in new CVD regulations to exclude NMEs.[70] The GOC notes that application of CVD law to NME countries may not be changed without following formal rulemaking procedures, which is something that the Department has not yet done with respect to the application of the CVD law to China. The GOC argues that, contrary to the Department's characterization in CFS from the PRC of its treatment of China under the CVD law as a "practice," calling a "rule" a "practice" does not immunize the Department's action from APA requirements because it is the nature and effect of the action, not the labels, that govern.

Third, the GOC contends that the Department's stated rationale[71] that China's present day economy is different from the traditional Soviet-style economies is legally flawed. The GOC notes that the Department does not cite any sources providing evidence that U.S. law recognizes different types of NME countries and should apply different rules to different types of NMEs. In addition, the GOC notes that section 771(18) of the Act makes clear that there is only one definition of a NME and, thus, U.S. law does not recognize "hybrid" NMEs. In contrast, the GOC notes that there is Department precedent for refusing to apply the CVD law to NME countries until after the country is designated by the Department to have a market economy. The GOC cites to Sulfanilic Acid from Hungary,[72] where the Department refused to apply the CVD law to Hungary in the year immediately prior to Hungary's graduation to market economy status. The GOC argues that the Department must provide a proper legal analysis that explains how China's NME of today is so different from Hungary's NME in 1997, the year before Hungary graduated to market-economy status. In this regard, the GOC argues that in CFS from the PRC the Department recognized inconsistency with Sulfanilic Acid from Hungary by invoking discretion to make case-by-case determinations and this abrupt reversal without explanation underscores the weak legal foundation of the Department's rationale.

Fourth, the GOC believes that the principal subsidy program at issue in this investigation, the provision of HRS for LTAR, demonstrates that the CVD law should not be applied to NME countries. The GOC notes that Petitioners contend that prices in China cannot be used as a benchmark because they are distorted by pervasive government intervention. The GOC notes that this is the very explanation that the Department gave in Georgetown Steel as to why the CVD law could not be applied to NMEs. The GOC argues that the Department cannot find that prices in China are sufficiently market-based such that it can measure subsidies, while at the same time finding that it cannot use prices in China to measure subsidies because of pervasive government influence. In particular, the GOC notes that the Department's purported analysis of the Chinese economy in comparison to the Soviet-style economy in the Georgetown Steel

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[69] See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217 (July 9, 1993).

[70] See the GOC's case brief (April 17, 2008) ("GOC's CB") at page 9.

[71] See Georgetown Steel Applicability Memorandum at page 4.

[72] See Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002), and accompanying Issues and Decision Memorandum at pages 15 and 17 ("Sulfanilic Acid from Hungary").

Applicability Memorandum fails to analyze any of the specific programs at issue in this investigation. Thus, according to the GOC, the Department's analysis in the Georgetown Steel Applicability Memorandum has nothing to do with this investigation and is irrelevant to the question of whether alleged subsidies can be measured in China's current economy.

Petitioners' Rebuttal Comments:

Petitioners contest the GOC's assertions that the Department does not have the authority to impose the CVD law against China. In support, Petitioners provide six arguments to underline their position. First, Petitioners argue that the CVD statute authorizes the application of the CVD law to China. Petitioners note that the broad definitions of the CVD law's coverage mean that it applies to imports from all nations, including China, and that nothing in the statute qualifies or limits this broad country coverage.[73] Petitioners assert that had Congress intended to exclude NME countries from the statute, it surely would have made this intent explicit, most notably, in amending the law since 1979, which includes two major revisions (i.e., the 1988 Omnibus Trade and Competitiveness Act and the 1994 URAA). Further, Petitioners state that contrary to the GOC's arguments, nothing in the legislative history of the statute contradicts its plain meaning or suggests that Congress opposed allowing the Department to initiate or conduct CVD investigations of imports from NME countries. In fact, Petitioners highlight that in legislation enacted in 2000 to authorize permanent normal trade relations with China upon its accession to the WTO, Congress expressly recognized the availability of CVD remedies against imports from China.[74] Consequently, Petitioners contend that the GOC improperly argues that the Department should supply an exception from the detailed regulatory scheme of the CVD statute that the statute itself does not provide.

Second, Petitioners disagree with the GOC's position that Georgetown Steel prohibits the Department from applying the CVD law to China. Petitioners believe that the GOC's position is based on a misreading of the statute and the Court of Appeals for the Federal Circuit's ("CAFC") ruling in Georgetown Steel. Petitioners contend that the GOC's arguments ignore the fact that the current CVD law was not at issue in Georgetown Steel. Rather, Petitioners state, the GOC focuses selectively on certain parts of the court's discussion in Georgetown Steel. Petitioners assert that the primary issue before the court in Georgetown Steel was whether: (1) the Department had discretion not to apply the now repealed section 303 of the Act to merchandise imported from an NME country; (2) the statute required the Department to conduct CVD investigations regarding such merchandise; and (3) the court should defer to the Department's discretion in construing the statue in the absence of clear Congressional discretion. Petitioners note that the court relied on Chevron and held that the statute allowed the Department the discretion not to apply CVD remedies to NMEs and deferred to the Department's decision not to do so.[75] In addition, Petitioners assert that in Government of China v. United States,[76] the CIT

[73] See Petitioners' rebuttal brief at page 6 (April 22, 2008) ("Petitioners' RB"), citing sections 702(1) and (2) of the Act.

[74] See Petitioners' RB at page 9, citing 22 USC section 6941(4); see also H.R. Rep. No. 106-632, at 12 (2000).

[75] See Petitioners' RB at page 12. Petitioners note that the Department, in CVD PRC Comment Request, noted that the CAFC in Georgetown Steel affirmed that the Commerce "has the discretion not to apply the countervailing duty

denied the GOC's motion for a preliminary injunction of the CFS from the PRC investigation and concluded that Georgetown Steel is no impediment to the application of the CVD law to China. Therefore, Petitioners believe that the GOC's reliance on Georgetown Steel is misplaced.

Third, Petitioners contest the GOC's argument that the Georgetown Steel decision has been effectively affirmed by Congress in a manner that purportedly bars the application of the CVD law to NMEs. Petitioners contend that the GOC's argument disregards the facts that (1) Georgetown Steel involved a different, and now-repealed, CVD statute and (2) the current statute has been significantly amended since Georgetown Steel to contain key provisions that are fundamentally different from those in former section 303. To the latter point, Petitioners note that the current statute does not use the ambiguous "bounty or grant" language of Section 303 and, instead, uses language that broadly defines a subsidy in terms of financial contributions and benefits that can be provided by a government in either a market economy or an NME. Petitioners also assert that the amended language clarifies that, in determining whether a subsidy exists, the Department should not consider: (1) whether the recipient of the subsidy is publicly or privately owned; or (2) the effect of the subsidy.[77] Petitioners believe that this language plainly alters the factors considered in Georgetown Steel with respect to the impracticability of determining subsidization in an NME.

Petitioners also contend that the GOC's arguments regarding alleged Congressional acquiescence in the holding in Georgetown Steel are mistaken for other reasons as well. Petitioners note that the GOC relies on Congress' failure to reverse the CAFC's holding in Georgetown Steel in the Omnibus Trade and Competitiveness Act of 1988 as a basis for claiming Congressional affirmation of the non-application of the CVD law to NMEs. Petitioners contend, however, that there is no specific evidence regarding why Congress did not make such a change to the statute. Petitioners state that what can be deduced from Congress' inaction on this issue in the 1988 Omnibus Trade and Competitiveness Act is that Congress chose to acquiesce in the Department's continuation of its practice, which the CAFC never held it could not alter with a reasoned explanation.

Finally, Petitioners contest the GOC's assertion that the URAA did not reverse or modify the Georgetown Steel holding, but instead strengthened the provisions of the AD Law as applied to NMEs. Petitioners believe, to the contrary, that the URAA repealed Section 303, and extensively revised the current CVD law, including the adoption of broad new definitions of "subsidy" and "countervailable subsidy." In addition, Petitioners note that Congress' most recent actions in adopting permanent normal trade relations with China authorized appropriations to the Department for the purpose of defending US CVD measures with respect to products from China. Consequently, Petitioners contend that this evidences Congress' view that the Department has the legal authority to conduct CVD proceedings on imports from China.

(CVD) law to non-market economy (NME) countries."

[76] See Government of China v. United States, Slip Op. 07-50 (CIT March 29, 2007) at 15-16.

[77] See Petitioners' RB at page 17, citing section 771(5)(C) of the Act.

Fourth, Petitioners contest the GOC's argument that the Department's imposition of CVD duties against China violates the APA. Petitioners argue that the three actions cited by the GOC as evidence of the Department's institution of a "binding rule" are merely clarifications of the Department's interpretation of the statute. Petitioners continue that even if they do technically constitute a "rule" rather than simply an agency practice, they would qualify as an interpretive rule, and would, therefore, be exempt from the APA's formal rulemaking requirements.[78] Petitioners note that the Department extensively addressed these same GOC arguments in CFS from the PRC.[79] Further, Petitioners believe that the courts have confirmed that a change in an agency's interpretation of its governing statutes does not constitute a binding rule under the APA and is, therefore, not subject to the formal rulemaking procedures required by the APA. Therefore, Petitioners argue that the Department should reject the GOC's renewed attempts to characterize the Department's prior actions as anything more than statements of the agency's interpretation of a statute that were never "codified" or made part of any regulation.[80]

Fifth, Petitioners contest the GOC's argument that the Department's rationale for applying the CVD law in China is legally flawed. Petitioners contend that legally the Department has the authority to apply the CVD law to all countries, and also has the legal authority to make any factual determination as long as it is supported by substantial record evidence. Petitioners argue that although the GOC may not agree with the factual determination that the Department made in CFS from the PRC (i.e., that it could measure subsidies in China), the Department's determination was correctly based on substantial record evidence.[81]

Petitioners also assert that the GOC's contention that the Department has created "categories of NME countries" in contravention of the statutory definition of "nonmarket economy countries" is similarly without merit. First, Petitioners note that the statutory definition at section 771(18) of the Act does not operate as a limitation to the Department's authority to measure subsidies in any country. Rather, this section of the Act merely supplies a broad definition of NMEs. As a result, Petitioners state that the Department's decision that it now can measure subsidies in China does not create a "hybrid" NME; rather, it merely recognizes the fact that China's present-day economy is one in which subsidies can be measured.[82]

Petitioners argue that the GOC's continued reliance on Sulfanilic Acid from Hungary again fails to recognize the difference between legal and factual distinctions. Petitioners point to certain facts from Sulfanilic Acid from Hungary that differ significantly from the facts in this case and CFS from the PRC.[83] Petitioners note that the factual foundation on which the Department

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[78] See Petitioners' RB at page 19, citing 5 USC 553(b)(3)(A).

[79] See CFS from the PRC Issues and Decision Memorandum at page 27.

[80] Petitioners note that the GOC's argument found on page 9 of its Case Brief, i.e., the Department codified its position when it specifically limited the scope of its new CVD regulations to exclude NMEs, was made without citation to any legal provision.

[81] See Petitioners' RB at pages 21-22, citing the Georgetown Steel Applicability Memo at page 10 and the CFS from the PRC Issues and Decision Memorandum at Comments 3 and 6.

[82] See Petitioners' RB at page 22, citing the CFS from the PRC Issues and Decision Memorandum at Comment 3 (stating "the Department has not established types of NMEs").

[83] See Petitioners' RB at pages 22-23, citing Panel Report, United States – Anti-Dumping Measures on Stainless

rested its decision in Sulfanilic Acid from Hungary does not apply in this case. Petitioners highlight that the Department, unlike its approach to Soviet-style economies, has determined that it can quantify subsidies in China. Petitioners also claim that China's status as a non-Soviet NME factually distinguishes it from Hungary.[84] Additionally, Petitioners contend that China specifically obligated itself to the application of CVD measures by WTO members while agreeing to be treated as an NME under the Antidumping Agreement. Petitioners contend that China's Accession Protocol clearly recognizes the difficulties of measuring subsides in China, but does not contemplate that WTO members must turn a blind eye to those subsidies simply because measurement is difficult.[85] Petitioners note that Hungary, as an original WTO member, undertook no such obligations.[86] Therefore, Petitioners argue that the Department's factual basis and rationale for applying the CVD law to China are based on substantial record evidence and are legally correct.

Sixth, Petitioners disagree with the GOC's argument that the principal subsidy program at issue in this investigation demonstrates that the CVD law should not be applied to NME countries. Petitioners contend that the Department can measure the benefit from subsidy programs in this investigation by using market benchmarks that reflect conditions in China. For example, Petitioners note that they proposed measuring benefits from the provision of electricity for less than adequate remuneration by using prices in Shanghai and Jiangsu Provinces. Furthermore, Petitioners highlight that the Department's regulations specifically allow for the use of second-tier and third-tier benchmarks rather than forcing the Department to rely solely on prices "stemming from actual transactions between private parties" in the country under investigation.[87] Petitioners note that the Department has used its second- or third-tier benchmark methodologies in a variety of instances and in a variety of countries, including investigations of subsidies in Canada and Indonesia.[88] Consequently, Petitioners conclude that the Department is merely treating China as it does any other country where markets for certain products are distorted by government action.

GOC's Rebuttal Comments:

In its rebuttal brief, the GOC argues that Petitioners' agreement with the Department's decision to apply the CVD law to China is nothing more than a repetition of the rationale the Department

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Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R at para. 6.51 (December 22, 2000) (discussing that in WTO jurisprudence the principle of uniform administration of laws has been developed so that identical treatment under the law is not required where facts differ).

[84] See Petitioners' RB at page 23, citing Sulfanilic Acid from Hungary Issues and Decision Memorandum at Comment 1.

[85] See Petitioners' RB at pages 23-24, citing the Accession Protocol at Part I, para. 15.

[86] See Petitioners' RB at page 24, citing Sulfanilic Acid from Hungary, 67 FR at 60288 (referring to Hungary as a "Subsidies Agreement Country").

[87] See Petitioners' RB at pages 24-25, citing 19 CFR 351.511(a)(2)(i).

[88] See Petitioners' RB at page 25, citing Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia, 72 FR 60636, 60642 (October 25, 2007) ("CFS from Indonesia"); and Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia, 71 FR 47174 (August 16, 2006).

has already set forth. The GOC argues that it has already provided to the Department detailed legal arguments as to why the Department's position on this issue is wrong as a matter of law and policy and, thus, should be changed. The GOC again, asks that the Department reconsider its position.

Department Position:

A. The Department Has Legal Authority to Apply the CVD Law to China

Congress granted the Department the general authority to conduct CVD investigations. See, e.g., Sections 701 and 771(5) and (5A) of the Tariff Act of 1930, as amended ("the Act"). In none of these provisions is the granting of this authority limited only to market economies. For example, the Department was given the authority to determine whether a "government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy . . . ." See Section 701(a) of the Act. Similarly, the term "country," defined in section 771(3) of the Act, is not limited only to market economies, but is defined broadly to apply to a foreign country, among other entities. See also 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); Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984)("Czech Wire Rod"). The Department reached this conclusion, in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. Id. The Department explained that "{t}his is the background that does not allow us to identify specific NME government actions as bounties or grants." Id. 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 China, the PRC Government has eliminated price controls on most products . . . ." See Georgetown Steel Applicability Memorandum. Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in these Wire Rod cases is not a significant factor with respect to China's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from China.

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, 801 F.2d at 1318. In doing so, the CAFC recognized that the statute does not speak to this precise issue and deferred to the Department's decision. The Georgetown Steel court did not find that the CVD law prohibited the application of the CVD law to NMEs, 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. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

See Georgetown Steel, 801 F.2d at 1318 (emphasis added).

The GOC argues that the Georgetown Steel court found that the CVD law cannot apply to NMEs. In making this argument, the GOC cites to select portions of the opinion and ignores the ultimate holding of the case and the court's reliance on Chevron to find the Department had reasonably interpreted the law. Id. 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.

Recently, the Court of International Trade 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 Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318). Therefore, the court declined to find that the Department's investigation of subsidies in China was ultra vires.

The GOC's argument that Congress' failure to amend the law subsequent to Georgetown Steel amounts to a Congressional action of non-application of the CVD law to NMEs is also legally flawed. The fact that Congress has not enacted any NME-specific provisions to the CVD law does not mean the Department does not have the legal authority to apply the law to NMEs. The Department's general grant of authority to conduct CVD investigations is sufficient. See, e.g., Section 771(5) and (5A) of the Act. Given this existing authority, no further statutory authorization is necessary. Furthermore, since the holding in Georgetown Steel, Congress has expressed its understanding that the Department already possesses the legal authority to apply the CVD law to NMEs on several occasions. For example, on October 10, 2000, Congress passed the PNTR Legislation. In section 413 of that law, which is now codified in 22 U.S.C. § 6943(a)(1), Congress authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the WTO, assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China." 22 U.S.C. § 6943(a)(1) (emphasis added). China was designated as an NME as of the passage of

this bill, as it is today. Thus, Congress not only contemplated that the Department possesses the authority to apply the CVD law to China, 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 China 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." 22 U.S.C. § 6901(8).

Congress then expressed its intent that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO." 22 U.S.C. § 6941(5). In these statutory provisions, Congress is referring, in part, to China's commitment to be bound by the SCM Agreement as well as the specific concessions China agreed to in its Accession Protocol.

The Accession Protocol allows for the application of the CVD law to China, even while it remains an NME. 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 China. 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. Id. at 9. Paragraph (d) of that same Article provides for the continuing treatment of China as an NME. Id. 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 Protocol contemplates the application of CVD measures to China 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 possible application of the CVD law to China. See 22 U.S.C. § 6941(5).

The GOC fails to discuss these statutory provisions and instead, cites to the fact that Congress has enacted revisions to the AD Law to deal with NME methodologies, including in the 1988 Omnibus Trade and Competitiveness Act, but not to the CVD law. The fact that Congress enacted specific provisions for the application of the AD law, but not the CVD law, to NMEs simply reflects that the Department was applying the AD law to NMEs at the time rather than the CVD law. As the CVD law was not being applied to NMEs at that time, there was no reason to amend the CVD law to address concerns unique to NMEs. In sum, while Congress (like the CAFC) deferred to the Department's practice, as was discussed in Georgetown Steel, of not applying the CVD law to the NMEs at issue, it did not conclude that the Department was unable to do so. To the contrary, Congress did not ratify any rule that the CVD law does not apply to NMEs because the Department never made such a rule.

B. Application of the CVD Law to China Is Consistent with the APA

As an initial matter, the Department notes that the GOC, as well as all other parties in this investigation, have been provided due process through the substantial process that is mandated under the CVD law and the Department's Regulations (e.g., a hearing, submission of written argument, and submission of rebuttal argument). Nevertheless, the GOC incorrectly claims that the Department has retroactively[89] changed an allegedly binding rule regarding the application of the CVD law to NMEs without employing adequate process under the APA. The Department has never promulgated a rule pursuant to the APA regarding the application of the CVD law to NMEs.

The APA's notice-and-comment requirements do not apply "to interpretative rules, general statements of policy or procedure, or practice." 5 U.S.C. § 553(b)(3)(A). As explained in more detail below, the decision as to whether to apply the CVD law to NMEs involves the Department's practice or policy, not a promulgated rule, and is, therefore, not subject to the APA. An agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or a practice. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (Chenery Corp.) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). Here, the decision of whether a subsidy can be calculated in an NME hinges on the facts of the case, and should be made exercising the Department's "informed discretion." See Chenery Corp., 332 U.S. at 203. The Court of International Trade recently agreed, stating that:

> While Commerce acknowledges that it has a policy or practice of not applying countervailing duty law to NMEs, see, e.g., Request for Comment, Commerce has not promulgated a regulation confirming that it will not apply countervailing duty law to NMEs. In the absence of a rule, Commerce need not follow the notice-and comment obligations found in the APA, 5 U.S.C. § 553, and instead may change its policy by "ad hoc litigation." Chenery Corp., 332 U.S. at 203.

See Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d at 1282.

The Court of International Trade has repeatedly recognized the Department's discretion to modify its practice and has upheld decisions by the Department to change its policies on a case-by-case basis rather than by rulemaking when it has provided a reasonable explanation for any change in policy. See, e.g., Budd Co., Wheel & Brake Div. v. United States, 746 F. Supp. 1093 (CIT 1990) (holding that the Department did not engage in rulemaking when it modified its hyperinflation methodology: "because it fully explained its decision on the record of the case it did not deprive plaintiff of procedural fairness under the APA or otherwise"); Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 966 (CIT 1988) (formal rulemaking procedures were not

[89] The Department notes that it is unclear why the GOC characterizes the DOC's application of the CVD law to China as "retroactive" in violation of the APA because the GOC did not provide an argumentation on this point.

required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price). This is because it is necessary for the Department to have the flexibility to observe the actual operation of its policy through the administrative process and as opposed to formalized rulemaking. See Ceramica Regiomontana, S.A. v. United States, 10 C.I.T. 399, 404-05, aff'd, 810 F.2d 1137 (Fed. Cir. 1987). The Department provided a fully reasoned analysis for its change of practice in this case. See Georgetown Steel Applicability Memorandum.

The Department's decision to apply the CVD law in this investigation is also not subject to the notice-and-comment rulemaking of the APA because of the nature of the proceedings before the agency. The "APA does not apply to antidumping administrative proceedings" because of the investigatory and not adjudicatory nature of the proceedings, a principle equally applicable to CVD proceedings. See GSA, S.R.L. v. United States, 77 F. Supp. 2d 1349, 1359 (citing SAA at 892) ("Antidumping and countervailing proceedings . . . are investigatory in nature.")).

As these cases evidence, the GOC is incorrect when it characterizes the Department's explanation in CFS from the PRC as side-stepping the GOC's APA arguments "by simply calling a 'rule' a "practice.'" In contrast to the GOC's APA arguments which fail to cite any case law, the Department's explanation in CFS from the PRC (which is reiterated above) evidences that that the courts have consistently held that the Department does not create binding rules under the APA when it develops its practice on a case-by-case basis in antidumping and CVD proceedings.

The GOC cites to various determinations where it claims the Department established a rule under the APA that it would not apply the CVD law to China. As discussed above, the GOC's argument premised on these determinations is incorrect because the Department does not create binding rules under the APA through its administrative determinations. Instead, in these determinations the Department expounds on its practice in light of the facts before the Department in each proceeding. Furthermore, in the determinations to which the GOC cites, the Department never found that the Congress exempted China from the CVD law.

For example, the GOC cites to Wire Rod from Poland arguing that, through that case, the Department created a binding rule that the CVD law cannot apply to NMEs such as China. In that case (as well as the other Wire Rod case) which provided the Department's analysis on the Soviet bloc economies and examined whether the CVD law could be applied, the Department articulated its decisions based on the status of those economies at the time. For example, after analyzing the operation of the market (or lack thereof) in Poland, the Department explained that:

> These are the essential characteristics of nonmarket economic systems. It is these features that make NME's irrational by market standards. This is the background that does not allow us to identify specific NME government actions as bounties or grants. [90]

[90] See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 19 84).

The Department concluded that Congress had never clearly spoken to this issue. Id. 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."[91] The Department based its decision upon the economic realities of these Soviet bloc economies. It did not create a sweeping rule against ever applying the CVD law to NMEs. Indeed, the Department's subsequent actions demonstrate that it did not create a rule against the application of CVD law to NMEs. For example, in 1992, the Department initiated a CVD investigation against China, notwithstanding its status as an NME, after determining that certain industry sectors were sufficiently outside of government control.[92]

The GOC references a statement in the General Issues Appendix to the 1993 steel cases, again claiming that a reference to the Department's practice elevated that practice to the level of a rule. However, the statement is simply an explanation that the CVD law is not concerned with the subsequent use or effect of a subsidy and that "Georgetown Steel cannot be read to mean that countervailing duties may be imposed only after the Department has made a determination of the subsequent effect of a subsidy upon the recipient's production." General Issues Appendix, 58 FR at 37261. This reference to Georgetown Steel does not set forth a broad rule, but merely acknowledged the Department's practice regarding non-application of the CVD law to NMEs.

The Department has appropriately, and consistently, determined that formal rulemaking was not appropriate for this type of decision. Contrary to the GOC's claims, instead of promulgating a rule when it drafted other CVD rules,[93] the Department reiterated its position that the decision to not apply the CVD law in prior investigations involving NMEs was a practice:

> In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).[94]

See CVD Preamble, 63 FR at 65360 (emphasis added). In a subsequent determination, the Department continued to explain that it has a practice of not applying the CVD law to NMEs, and did not refer to this practice as a rule. "The Preamble to the Department's regulations states that . . . it is important to note here our practice of not applying the CVD law to non-market economies. . . . We intend to continue to follow this practice." Sulfanilic Acid from Hungary at

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[91] Id.; see also Czech Wire Rod.

[92] See Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (Jan. 9, 1992) (Lug Nuts from the PRC). The Department ultimately rescinded the CVD investigation on the bases of the AD investigation, the litigation, and a subsequent remand determination, concluding that it was not a market-oriented industry. See 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 (Mar. 26, 1992).

[93] The Department notes that the GOC argues the Department "codified its position when it specifically limited the scope of its authority in the new CVD regulations to excluded non-market economies." GOC Case Brief at 9. The Department is unable to directly respond to the GOC's argument because without citation or quoted text it is unclear to which portion of the Department's CVD regulations the GOC refers.

[94] See also GIA at 37261. We intend to continue to follow this practice.

Issues and Decision Memo, Comment 1 (emphasis added). The claim that the Department has somehow created a rule, when it has neither referred to its practice as such nor adopted notice-and-comment rulemaking for this practice, is erroneous.

C. Sulfanilic Acid from Hungary Does Not Preclude the Department's Determination in this Case

The GOC argues that the Department cannot make a determination in this case that is different from Sulfanilic Acid from Hungary without explaining how "China's non-market economy of today is so different from Hungary's non-market economy in 1997." As an initial matter, the Department has fully explained these differences.[95] Furthermore, there is no requirement that the Department address each instance where a prior practice was applied when changing that practice. The Department is only required to provide a "reasoned analysis" for its change.[96] As explained by the Supreme Court:

> An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.

Id., 500 U.S. at 186-87 (citations and internal quotations omitted).

The GOC additionally argues that the Department cannot make a determination in this case that is different from Sulfanilic Acid from Hungary because the AD law only contains one definition of NMEs. Contrary to the GOC's claims, the Department has not established types of NMEs. After its initial analysis of the Soviet-styled economies in the Wire Rod investigations, the Department began a practice of not looking behind the designation of a country as an NME when determining whether to apply the CVD law to imports from that country (assuming no claim for a market oriented industry was made).[97] Now, the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that economy, much as it did in the original Wire Rod investigations.[98] However, the determination of whether the CVD law can be applied does not necessarily create different types of NMEs. It is simply recognizing the inherent differences between NMEs.

The GOC also argues that in CFS from the PRC the Department was unwilling to explain its "abrupt reversal" from Sulfanilic Acid from Hungary and, instead, invoked its discretion to make case-by-case determinations. Contrary to the GOC's arguments, the Department provided a detailed explanation of its change in practice in CFS from the PRC.[99] Furthermore, as described

[95] See generally Georgetown Steel Applicability Memorandum.
[96] See e.g. Rust v. Sullivan, 500 U.S. 173, 187.
[97] See e.g. Sulfanilic Acid from Hungary, 67 FR 60223.
[98] See e.g. Georgetown Steel Applicability Memorandum.
[99] See e.g. CFS from the PRC at Issues and Decision Memo, Comments 3 & 6.

above, the Department's ability to develop its practice on a case-by-case basis is well-grounded in administrative law and has been fully recognized by the courts.

D. The Department' Less Than Adequate Remuneration Analyses Fully Support Application of the CVD Law to China

The GOC argues that the Department's failure to use prices inside China to measure subsidies arising from the GOC's provision of hot rolled steel for less than adequate remuneration evidences that the CVD law cannot be applied to China. In this Final Determination, the Department has employed Tier 1 (i.e., in-country) prices to determine whether hot rolled steel was sold for less than adequate remuneration and, as such, this GOC argument is no longer relevant.[100]

Additionally, the Department's regulations do not limit the Department to actual in-country prices for a less than adequate remuneration analysis. Our regulations explicitly provide for the use of world market prices for these analyses.[101] In fact, the Department has applied this regulatory provision in prior CVD proceedings.[102] Thus, the use of this alternative, i.e., world market price, is fully in accordance with the Department's regulations and the Department's past practice, and in no manner evidences that the CVD law should not be applied to China.

Comment 2: Subsidies Prior to China's Accession to the World Trade Organization

Petitioners' Affirmative Comments:

In their case brief, Petitioners argue that the Department should not adopt the December 11, 2001, cut-off date for determining whether to countervail potential subsidies in China for the final determination. Petitioners argue that the CVD law does not bestow preferential treatment on China simply because it became a member of the WTO in 2001. First, Petitioners contend that the statute does not differentiate between subsidies provided by WTO members and those provided by non-WTO members. Petitioners assert that section 701(a)(1) of the Act is unambiguous in that it applies to all countries, without regard to WTO membership, economic systems, or political consideration. Therefore, Petitioners contend that the December 11, 2001, cut-off date prevents the imposition of a countervailing duty that otherwise would be imposed, and directly conflicts with the Department's statutory mandate. Petitioners state that China's accession to the WTO on December 11, 2001, is only relevant under U.S. law in that China's status as a "Subsidies Agreement country" under the statute requires that the ITC conduct an injury determination.

[100] See Department's Response to Comment 7, below.
[101] See 19 CFR 351.511(a)(2)(ii).
[102] See e.g. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28665 and accompanying Issues and Decision Memo at "Sale of High-Grade Iron Ore for Less than Adequate Remuneration" (May 17, 2006).

Second, Petitioners contend that the Department's AUL regulations support full recognition of countervailable subsidies.[103] Petitioners note that in Pure Magnesium from Israel, [104] the Department investigated non-recurring subsides prior to the date of Israel's membership in the WTO. Petitioners assert that by departing from its normal methodology, the Department implicitly negates the core concept that non-recurring subsidies continue to provide benefits past the date of bestowal in industries with high capital costs. Citing Carbon Steel Products from France, Petitioners note that the Department has established that changing the AUL once it has been established or using an inappropriate AUL violates its statutory obligations.[105] Petitioners contend that in this investigation, the Department essentially departed from the presumptive AUL by establishing the December 11, 2001 cut-off date, which does not allow for an AUL to exist prior to 2001.

Petitioners conclude by arguing that relevant WTO agreements do not exempt China from recognition of existing subsidy benefits. In particular, Petitioners note that nothing in the Accession Protocol states or implies that an exception or special treatment will be granted to China for previously granted subsidies provided prior to China's accession that continue to provide benefits to Chinese producers post-accession. Petitioners also assert that the GOC specifically obligated itself to adhere to the requirements of the SCM Agreement knowing that WTO members could apply countervailing measures.[106]

GOC's Affirmative Comments:

The GOC believes that the Department's adopted cut-off date for determining when to countervail potential subsidies in China, December 11, 2001, is too early in time. In support, the GOC provides three principal arguments to underline its position. First, the GOC argues that using December 11, 2001, subjects prior periods of time to the discipline of the CVD law when parties would have had no reasonable expectation that the CVD law would apply. The GOC asserts that this is fundamentally unfair to the GOC and Chinese exporters. The GOC contends that such an early cut-off date fails to give parties adequate notice of the change in practice of applying the CVD law to China.

Second, the GOC argues that a later cut-off date is consistent with prior Department practice on this issue. The GOC notes that, in the past, the Department has refused to examine or value subsidy benefits prior to the time that the Department determines that it is appropriate to apply the CVD law to a particular country. In particular, the GOC cites to Sulfanilic Acid from Hungary, [107] where the Department declined to countervail potential non-recurring subsidies that

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[103] See Petitioners' CB at page 12, citing 19 CFR 351.524(d).

[104] See Final Affirmative Countervailing Duty Determination: Pure Magnesium from Israel, 66 FR 49351 (September 27, 2001) ("Pure Magnesium from Israel") (The Department investigated non-recurring subsides as far back as 1993, which was prior to the date of Israel's membership in the WTO.).

[105] See Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products From France, 67 FR 62111 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 3 ("Carbon Steel Products from France").

[106] See Petitioners' CB at page 16, citing Part I, paragraph 15 of the Accession Protocol.

[107] See Sulfanilic Acid from Hungary at pages 8 and 14.

occurred the year before the Department found Hungary to have transitioned to a market economy. The GOC notes the Preamble 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.[108]

The GOC contends that leaving aside whether the legal conclusion as to the applicability of the CVD law to NMEs is correct, there is no basis to abandon the fundamental principle applied in Sulfanilic Acid from Hungary: the CVD law cannot apply to events or transactions that pre-date the time for which the Department concluded that the NME country became sufficiently market-based to apply the CVD law. The GOC contends that the Department must address the Sulfanilic Acid from Hungary precedent in deciding what cut-off date should apply to this case. The GOC notes that a formal graduation date from NME to market economy is not present in this case. Furthermore, the GOC argues that the most analogous date would be April 9, 2007, the publication date of the preliminary determination in CFS from the PRC and the date that the Georgetown Steel Applicability Memorandum entered the public domain.

Third, the GOC argues that establishing a later cut-off date would be consistent with the Department's logic for continuing to apply NME status in the AD cases against China. The GOC contends that the WTO documents upon which the Department relies in the Lined Paper Memorandum[109] to continue applying its NME methodology in AD cases do not support a finding that market reforms took effect in China until 2005. In support of their argument, the GOC highlights five sub-points to illustrate how the Lined Paper Memorandum presents the Department's case that China is not yet a market economy. First, the GOC notes that the Lined Paper Memorandum highlights the slow process of liberalizing the remnimbi. According to the GOC, this implies that the Department believed that the market prior to 2006 was not sufficiently deregulated to allow development of a real foreign exchange market. Second, the GOC notes that the Lined Paper Memorandum discusses restrictions on foreign investment that continue on an ad hoc basis even after the WTO accession. Third, the GOC contends that the Department has explicitly and extensively relied on the WTO China Trade Policy Review[110] to justify continued application of NME status to China, which covers a period of time through the end of 2005. Fourth, the GOC states that the Lined Paper Memorandum cites to IMF studies from 2005 about the limited extent to which the state-owned commercial banks were operating on market principles. Finally, the GOC asserts that the Lined Paper Memorandum discusses limitations on private ownership and the changes that took place in 2006. Therefore, the GOC argues that Lined Paper Memorandum supports using a cut-off date, at a minimum, of January 1, 2005. In

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[108] See Preamble, 63 FR at 65360.

[109] See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, Re: Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China – China's Status as a Non-Market Economy ("NME") (August 30, 2006) ("Lined Paper Memorandum").

[110] See Trade Policy Review, People's Republic of China, WT/TPR/S/161 (February 28, 2006) ("WTO China Trade Policy Review").

addition, the GOC notes that in the CFS from the PRC case, the Department considered China to be sufficiently market oriented to justify the application of CVD law for the period of 2005.

United States Steel Corporation ("U.S. Steel") Affirmative Comments:

U.S. Steel argues that the Department should not use the date of China's accession to the WTO as the "uniform date" from which it will identify and measure subsidies in China for purposes of the CVD law because (1) China is not entitled to such "special treatment" and (2) to do so would be inconsistent with the logic of the Department's decision in CFS from the PRC to apply CVD law to China.

U.S. Steel argues that neither Congress nor the WTO requires the Department to limit the subsidies it will identify and measure to those granted after China's accession to the WTO on December 11, 2001. U.S. Steel cites Section 701 of the Act to support its position that the Department is statutorily obligated to apply CVD laws to *any* country that provides subsidies that benefit imports into the United States, whether or not such country is a member of the WTO or has signed the SCM Agreement. U.S. Steel argues that neither the SCM Agreement nor China's Accession Protocol provides that countervailing duties be applied only to subsidies conferred after accession to the WTO. To the contrary, U.S. Steel argues that the SCM Agreement explicitly states that in calculating the total ad valorem subsidization, the effective date of the WTO Agreement shall not cut off relief against prior subsidies which benefit future production.[111] Further, U.S. Steel contends that the Accession Protocol did not provide China with an exemption for subsidies which predate China's accession. U.S. Steel argues that one of the purposes of China's disclosure of subsidies via the Accession Protocol was to put WTO members on notice of prior subsidies and provide them the ability to address prior subsidies.[112]

U.S. Steel argues that the Department has afforded no "special treatment" in the past and notes that the Department countervailed nonrecurring subsidies provided by the Government of Iran, a non-WTO member and a government not subject to the requirements of the SCM Agreement.[113] U.S. Steel points to the Department's in-depth examination of China's economy in CFS from the PRC and highlights the many bases for the Department's conclusion that China had reformed and abandoned a Soviet-style economy sufficiently to be subject to CVD laws. U.S. Steel notes that most of the major reforms cited by the Department, including flourishing entrepreneurship[114] and abolition of central planning for labor, [115] occurred well in advance of, and were unrelated to, China's accession to the WTO.

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[111] See e.g. SCM Agreement at Annex IV, paragraph 7.
[112] See Accession Protocol at Annex 5A.
[113] See Certain In-Shell Pistachios (C-507-501) and Certain Roasted In-Shell Pistachios (C-507-601) from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews, 68 FR 4997 (Jan. 31, 2003), and accompanying Issues and Decision Memorandum at Comment 7.
[114] See Georgetown Steel Applicability Memorandum at page 10.
[115] Id. at pages 6 and 6n.

In the alternative, U.S. Steel suggests that should the Department limit the subsidies that it will identify and measure, the Department should use the effective date of the Uruguay Round Agreements Act ("URAA"), i.e., January 1, 1995, since the SCM Agreement established a new and expansive definition of what constitutes a subsidy.[116] At a minimum, U.S. Steel argues that the Department should countervail all subsidies that fall within that definition and that were provided after that definition became part of United States law.

Specialty Steel Industry of North America Affirmative Comments:

Specialty Steel Industry of North America and domestic stainless steel producers (collectively, "DSSP"), challenge the Department's preliminary determination that land-use rights provided by the Chinese government in 1998 and 2000 did not constitute countervailable subsidies because they were provided prior to December 11, 2001. DSSP argues that that the statute defines a countervailable subsidy according to three criteria (namely, financial contribution, benefit, and specificity), none of which are time restricted.[117] Therefore, DSSP urges the Department to amend the Preliminary Determination by investigating whether the provision of land use rights is a countervailable subsidy under the three criteria, since the Department is statutorily authorized to do so.

Further, DSSP argues that the Department's inclusion of a cut-off date as a factor in its analysis goes beyond the unambiguous plain language allowed by the CVD statute. DSSP states that an analysis, if made in accordance with the statute, as to whether a countervailable subsidy exists is made independent of the type of economy (market v. non-market). DSSP points out that the CAFC in Eurodif rejected a previous analysis by the Department that used factors beyond the criteria enumerated in the CVD statute. [118]

Therefore, DSSP argues that since Petitioners have submitted sufficient record evidence that the Chinese government's provision of land satisfies each of the criteria of a countervailable subsidy, the Department should calculate a benefit using the methodology used in LWS from the PRC.[119] Specifically, DSSP argues that the Department should find de facto specificity because only six projects were eligible to receive land grants, and because the government exercised discretion by granting land to "key" or "backbone" enterprises. In the alternative, DSSP argues that if the Department determines that it must examine whether changes in the Chinese economy allow for the identification and measurement of subsidies before it applies the CVD law to China in accordance with Georgetown Steel, then the Department must perform such examination of China's economy in 1998 and, if necessary, in 2000.

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[116] See SCM Agreement at Art. 1.1.
[117] See Section 771(5) of the Act.
[118] See Eurodif S.A. v. United States, 411 F.3d 1355, 1365 (Fed. Cir. 2005) ("Eurodif") (stating that "the purpose of the subsidy statute cannot exceed the metes and bounds of the subsidy statute as established by its text").
[119] See Laminated Woven Sacks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 72 FR 67893 (Dec. 3, 2007) ("LWS from the PRC").

Finally, DSSP urges the Department to invite public comment on the cut-off date issue because it is a difficult issue and a matter of importance beyond the current proceeding.

Petitioners' Rebuttal Comments:

Petitioners disagree with the GOC's argument that the Department's adopted "cut-off date," December 11, 2001, is too early in time. Petitioners argue that the Department provided legally adequate notice that the CVD law can apply to imports from China. Petitioners also claim that the GOC ignores multiple instances where the Department provided such notice. Petitioners assert that the law does not require notice as envisioned by the GOC because the Department's application of the CVD law to China is a change in practice, not a "dramatic shift" in "black letter" law, as the GOC argues.[120] Petitioners highlight that: (1) the Department's non-application of CVD law to NMEs was a practice; (2) no notice and comment rulemaking procedures were employed in adopting this practice; (3) the practice had not been codified in the Department's regulations; and (4) no rulemaking procedures were necessary to modify it. Petitioners contend that even if the Department's practice of not applying the CVD law to NMEs was more than a practice, it would be at most a non-binding interpretive rule. Thus, Petitioners argue, the Department retains the discretion and authority to change its position.[121]

Further, Petitioners contend that the Department has consistently made clear that it was not promulgating a binding legislative rule with respect to its practice or policy of not applying the CVD law to NMEs. In support of their contention, Petitioners highlight language from the Preamble, where the Department referred to its "practice of not applying the CVD law to non-market economies," and added, "{t}he CAFC upheld this practice in Georgetown Steel Corp. v. United States."[122] In addition, Petitioners note that in the Department's recent notice soliciting comments on whether the CVD law should be applied to China, the Department referred to its "long-standing policy of not applying CVD law to NMEs, such as the PRC."[123] Consequently, Petitioners believe that the Department has supported its departure from its prior practice as required by Allegheny Ludlum Corp. v. United States.[124] Petitioners assert that the GOC's argument that April 9, 2007 is the earliest date the Department can measure subsidies ignores the multiple points in time where the Department provided notice to the GOC or the GOC consented to subsidy disciplines. Petitioners cite to the follo0wing dates on which GOC must have known it was subject to CVD law: 1) in 1986, when China sought resumption of it GATT contracting party status; 2) in 1995, when China requested its GATT application be converted to a request for WTO accession; 3) in 2000, when Congress recognized availability of CVD remedies again imports from China;[125] 4) on November 20, 2006, when the Department initiated the CFS from

[120] See Petitioners' RB at page 27, citing quotations from the GOC's case brief (April 17, 2008) at page 14.
[121] See Petitioners' RB at page 28, citing Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) (definition of interpretive rule).
[122] See Preamble, 63 FR at 65347 and 65360.
[123] See Petitioners' RB, at page 29, citing CVD PRC Comment Request.
[124] See Allegheny Ludlum Corp. v. United States, 24 CIT 452, 458, 122 F. Supp. 2d 1141 (2000).
[125] See 22 U.S.C. § 6941(4) and 22 U.S.C. § 6943.

the PRC investigation; and 5) on December 15, 2006, when the Department published its request for comment on the "Application of the Countervailing Duty Law to Imports From the People's Republic of China.[126]

Petitioners also contest the GOC's argument that the Department cannot apply CVD law to events that predate when the Department concluded that the NME country became sufficiently market-based to apply the CVD law. Petitioners believe that when the GOC states in its case brief that Sulfanilic Acid from Hungary is a precedent that the Department must address, the GOC tries to impose requirements that are not found in the law. Petitioners contend that contrary to the GOC's suppositions, the Department does not have an obligation to cite each and every case in which the former practice had been implemented. Instead, Petitioners argue the Department's legal obligation is to explain changes to its practice, which that Department has done in CFS from the PRC.[127]

Finally, Petitioners disagree with the GOC's argument that establishing a later cut-off date would be consistent with the Department's logic for continuing to apply NME status in the AD cases against China. Petitioners argue that the GOC incorrectly focuses on the wrong comparison, which is the determination that China remains an NME in the AD context compared to the status of the economy for purposes of the CVD law. Petitioners contend that the correct comparison at issue, however, is between the status of China's economy at the time of the Georgetown Steel opinion and the current status of the economy.[128] Petitioners believe that using the correct, later comparison leads to an analysis that reveals that China's NME has undergone sufficient changes since the opinion in Georgetown Steel such that the application of the CVD law is now possible, even if China is still considered an NME for AD purposes.[129] Further, Petitioners point out that the Department has created a practice of providing individual margins based on a company's own sales prices to the United States or based on an average pricing behavior of a set of producers who are representative of the industry to companies that demonstrate freedom from *de facto* or *de jure* government control.[130] Therefore, Petitioners conclude that the Department should measure the subsidies according it its normal AUL methodology in CVD cases, and not according to dates that the GOC divines from AD analysis.

GOC's Rebuttal Comments:

The GOC argues that contrary to Petitioners' claims, China is not receiving preferential treatment by application of a cut-off date. The GOC notes that China is the only WTO Member country against which the Department is imposing both CVD duties and AD duties based on the NME methodology at the same time. Therefore, the GOC believes that is unreasonable for Petitioners to assert that China is receiving preferential treatment in the U.S. enforcement of its CVD and AD laws.

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[126] See CVD PRC Comment Request.
[127] See Petitioners' RB at page 31, citing Georgetown Steel Applicability Memorandum at page 10.
[128] See Petitioners' RB at page 32, citing Georgetown Steel Applicability Memorandum at page 2.
[129] See Petitioners' RB at page 33, citing Georgetown Steel Applicability Memorandum at page 9.
[130] See Petitioners' RB at page 33-34, citing Georgetown Steel Applicability Memorandum at page 10.

The GOC also notes that with respect to the Department's regulations regarding non-recurring subsidies, no party has adopted the position that the Department's AUL methodology for calculating the POI benefit of non-recurring subsides should not be used. As a result, the GOC contends, the technical application of the Department's AUL methodology is not an issue. However, the issue according to the GOC is how the Department should address the fact that, in some cases, the applicable AUL will include a period of time for which the Department has determined that China's economy was so controlled by the government that it should be impossible to apply the CVD law. The GOC notes that Petitioners' arguments do not address this core issue primarily because the Department has repeatedly ruled that is impossible to calculate countervailable subsides for NME countries.[131]

U.S. Steel's Rebuttal Comments:

In its rebuttal brief, U.S. Steel argues that there is no basis for the GOC's claim that in order for the Department to observe the fundamental requirements of due process and fairness, the earliest the Department can identify and measure subsidies in China is the date of the CFS from the PRC preliminary determination. U.S. Steel points out that the Department rejected similar arguments in Certain Steel Products from Belgium.[132] Certain Steel Products from Belgium, U.S. Steel contends, stands for the principle that the Department may apply changes in its prior practices for identifying and measuring subsidies to programs which predate the changes by many years. U.S. Steel also claims that the Department recognized in Certain Steel Products from Belgium that respondent governments do not rely on the Department's practice when establishing or administering subsidy programs.[133] Furthermore, U.S. Steel argues that China's Accession Protocol affirms the GOC's recognition that it was subject to the CVD laws and, therefore, had sufficient notice that subsidies granted prior to the date of entry into force of the WTO Agreement would be included in the overall rate of subsidization.[134] U.S. Steel contends that the Department would act inconsistent with its regulations and prior practice if it did not find that subsidies provided by the GOC were countervailable regardless of whether they were granted prior to China's accession to the WTO as it has done in the past.[135]

U.S. Steel dismisses the GOC's argument that the Department's determination to countervail subsidies prior to CFS from the PRC is inconsistent with Sulfanilic Acid from Hungary and the Lined Paper Memorandum. U.S. Steel argues that the Department's discretionary decision to not apply CVD laws to Soviet-style NMEs was upheld by the CAFC in Georgetown Steel. Furthermore, U.S. Steel contends that the Department's conclusions in the Lined Paper

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[131] See the GOC's rebuttal brief (April 22, 2008) at pages 5-6, citing the Georgetown Steel Reply Brief for the United States of America (The Commerce Department), dated February 11, 1986, submitted to the CAFC, Case No. 85-2805 at page 11.

[132] See Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium, 47 FR 39304 (Sept. 7, 1982) at Appendix 4 – General and GATT-Related Issues, Comment 3 ("Certain Steel Products from Belgium").

[133] Id.

[134] See Accession Protocol at 7.

[135] See U.S. Steel's rebuttal brief (April 17, 2008) at page 5.

Memorandum underscore the fact that China's economy had long before reached a point where it was possible to identify and measure subsides.

Department's Position

After careful consideration of the parties' comments, we continue to find that it is appropriate and administratively 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.

Our decision to adopt this date is not based on whether the CVD law can or cannot be applied to non-WTO members. We fully agree with the Petitioners that the statute does not differentiate between countries that have acceded to the WTO and those that have not. As such, parties' reliance on CVD investigations in which the Department investigates non-recurring subsidies that predate membership in the WTO is incorrect. Instead, we have selected this date because of the reforms in the PRC's economy in the years leading up to its WTO accession and the linkage between those reforms and the PRC's WTO membership. See Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (October 1, 2001). 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. See Georgetown Steel Applicability Memorandum. Additionally, as noted in the Preliminary Determination, the PRC's Accession 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., countervailing duties) were meaningful.

Petitioners, U.S. Steel, and DSSP contend that the statute, by its plain language, does not permit a fixed date from which the Department will find countervailable subsidies because 701(a) is aimed at any country. This argument focuses on the geographic reach of the law, but ignores that the imposition of CVDs requires the Department to be able to identify and to measure subsidies. The Department addressed the virtually identical concern in Czech Wire Rod.[136] Specifically, we examined whether "any political entity is exempted *per se* from the countervailing duty law" and found that none were, but then went on to address the additional question of whether the law could be applied to nonmarket economy countries like Czechoslovakia. We concluded that state intervention in that economy, such as government control of prices, did "not allow us to identify specific NME government actions as bounties or grants."

[136] See Czech Wire Rod at 19371.

The Department's analytical approach in Czech Wire Rod was upheld by the CAFC in Georgetown Steel.[137] As discussed in response to Comment 1, the Court found that the Department had the discretion not to apply the CVD law where subsidies could not meaningfully be identified or measured. In the instant investigation, our analysis has led us to conclude that, the economic changes that occurred leading up to and at the time of WTO accession allowed us to identify or measure countervailable subsidies bestowed upon Chinese producers. In this regard, the Department is not providing China with special/preferential treatment nor is the Department expanding the criteria for a subsidy beyond those found in the statute. Rather, the Department is simply acknowledging its ability to identify and measure subsidies as of December 11, 2001, based on the economic conditions in China. Therefore, the Department is fully within its authority in not applying the countervailing duty law to the PRC prior to December 11, 2001.[138]

We acknowledge that there was not a single moment or single reform law that suddenly permitted us to find subsidies in the PRC. As U.S. Steel has noted, many reforms were put in place before the PRC acceded to the WTO. On the other hand, the GOC has pointed to areas identified by the Department where the PRC economy continues to exhibit nonmarket characteristics. These examples only serve to demonstrate that economic reform is a process that occurs over time. This process can also be uneven: reforms may take hold in some sectors of the economy or areas of the country before others. This possibility underpins DSSP's comment that we are required to make specific findings with respect to whether the government's provision of land in 1998 and again in 2000 confers countervailable subsidies.

We have rejected the approach of making specific findings for specific programs, opting instead for a uniform date of application based on the economic changes that have occurred across the entire Chinese economy. First, the cumulative effects of the many reforms implemented prior to the PRC's WTO accession give us confidence that by the end of 2001, subsidies in the PRC could be identified and measured. Second, the program-by-program, company-by-company approach advanced by DSSP is not administratively feasible. Using the instant proceeding as an example, we are investigating two pipe companies located in different provinces and nearly 30 alleged subsidies. While certain programs such as reduced income tax rates can be relatively easy to investigate, alleged subsidies such as the provision of land for less than adequate remuneration and policy lending are not. They require analysis of several levels of government and banks because practices can vary from jurisdiction-to-jurisdiction and between different bank branch offices. If the Department were first required to determine whether subsidies could be identified and measured on a land plot-by-land plot or loan-by-loan basis and then investigate the subsidy, the Department could not complete CVD investigations on Chinese products within the statutorily mandated deadlines. These significant administrative concerns support a bright-line cutoff that allows the Department to focus its analysis on investigating the alleged countervailable subsidies. Furthermore, this bright line provides certainty to the parties concerned.

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[137] See Georgetown Steel, 801 F.2d at 1318.
[138] See Georgetown Steel, 801 F.2d at 1318.

Petitioners and U.S. Steel have further argued that our AUL regulations require that we investigate subsidies given during the AUL period. For the reasons explained above, if subsidies cannot be meaningfully identified and measured before December 11, 2001, then these regulations are inapplicable. Regarding Petitioners' citation to the Department's position in Carbon Steel Products from France regarding a change in the AUL, the Department explained in that case that it could not change the AUL of a previously allocated subsidy from one segment of a proceeding to the next because that would result in countervailing an amount greater than the net subsidy. That issue is not relevant here as we are not changing the AUL within a CVD proceeding but rather, fully countervailing subsidies found after December 11, 2001.

U.S. Steel has argued in the alternative that the Department should use January 1, 1995, the effective date of the URAA, as the cut-off date because of the new, expanded definition of subsidy implemented then. We disagree that January 1, 1995, is an appropriate date because reforms in the PRC had not progressed to a point where subsidies could be identified and measured. Moreover, we disagree that the URAA materially changed the definition of subsidy. (See SAA at p.255, "In general, the Administration intends that the definition of "subsidy" will have the same general meaning that administrative practice and courts have ascribed to the term "bounty or grant" and "subsidy" under prior versions of the statute …").

Regarding DSSP's contention that we should invite public comment on the cut-off date, we note that the Department is considering this issue simultaneously in six countervailing duty investigations covering imports of circular welded pipe, light-walled rectangular pipe, laminated woven sacks, flexible magnets, sodium nitrate, and off-the-road tires. Thus, numerous parties have had the opportunity to comment and our consideration of this issue has benefitted from their submissions. Furthermore, as discussed in detail in Comment 1, the Department regularly develops its practice on matters such as this within the context of AD/CVD proceedings. Consistent with general principles of administrative law, the courts have affirmed the Department's ability to do so.[139]

Turning to the arguments made by the GOC, 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 April 9, 2007 (the date of the CFS from the PRC preliminary determination). We agree with Petitioners that there is no evidence on the record of this investigation that the GOC provided subsidies to CWP producers based on the inapplicability of U.S. CVD law to China. Moreover, 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.[140] In 2000, Congress passed PNTR Legislation (as cited 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

[139] See Comment 1.
[140] See Lug Nuts from the PRC at 877.

in the WTO, and defending United States antidumping and *countervailing duty measures with respect to products of the People's Republic of China*." 22 U.S.C. §6943(a)(1) (emphasis added). Thus, the GOC and PRC exporters were on notice that CVDs were possible well before the preliminary determination in CFS from the PRC.

We further disagree that Sulfanilic Acid from Hungary is controlling here. As noted in response to Comment 1, 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.

Finally, the GOC points to several nonmarket characteristics of its economy the Department identified in its Lined Paper Memorandum to support the agency's continued treatment of the PRC as an NME for AD purposes. According to the GOC, these characteristics existed in 2005 and 2006, and support the adoption of a later cut-off date. We disagree. As we acknowledged above, economic reform is a process that occurs over time, and it may progress faster in some sectors of the economy or areas of the country than in others. Unquestionably, there continue to be nonmarket aspects of the Chinese economy even today. Nevertheless, we have concluded that the cumulative effects of the many reforms implemented prior to the PRC's WTO accession lead to economic changes allowing us to identify and to measure subsidies bestowed upon producers/exporters in the PRC after December 11, 2001.

Comment 3: Adverse Facts Available

GOC

Petitioners' Affirmative Comments:

Petitioners argue that the Department should apply facts available ("FA") and AFA, where appropriate, in the final determination. Citing specific examples from verification and other parts of the investigation, Petitioners claim that the GOC withheld information, failed to provide information in the form or manner requested, and impeded the investigation, as specified by section 776(a)(2) of the Act. Petitioners request that the Department apply AFA to the GOC in general circumstances because the GOC did not do "the maximum it (was) able to do," as the CAFC stated in Nippon Steel.[141]

GOC's Rebuttal Comments:

The GOC responds that it sought to cooperate in all respects in responding to the enormous volume of documentation and translations required by the Department. Regarding Petitioners' allegations related to the GOC verification, the GOC responds that it provided the information it

[141] See Nippon Steel Corporation v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Nippon Steel").

was able to provide under the circumstances and explained fully why it was not able to provide certain information. Therefore, the GOC argues that there is no justification to apply AFA.

East Pipe

Petitioners' Affirmative Comments:

Petitioners argue that East Pipe has repeatedly been unable to provide information requested by the Department, and has refused to cooperate fully within this proceeding. Therefore, the petitioners argue that this pattern of non-cooperation should result in the Department applying AFA for the final determination. Citing East Pipe's initial response, Petitioners argue that East Pipe withheld the identity of its steel suppliers. Due to the fact that this information was received very late in this investigation, Petitioners assert that the Department was unable to accurately verify the information. Petitioners also contend that East Pipe failed to provide clear and proper translations of all of the documents requested by the Department, and requested confidential treatment of information when confidentiality was not necessary. For the above-stated reasons, the petitioners conclude that East Pipe's violations should result in the Department applying AFA in its final determination.

Petitioners also argue that East Pipe's failure to disclose other suppliers of HRS should result in a facts available finding that these suppliers are SOEs. Petitioners state that, initially, East Pipe was unable to provide information regarding the companies from which it purchased HRS. Petitioners contend that East Pipe did not provide the Department with the information of seventeen of the companies it purchased HRS from until one week prior to the beginning of its verification. In addition, Petitioners assert that East Pipe only provided ownership information for some of these HRS suppliers. As a result of East Pipe's untimely and incomplete information on its suppliers, Petitioners argue, the Department should apply AFA with respect to the purchases from these suppliers.

East Pipe's Rebuttal Comments:

East Pipe argues that the Department should reject Petitioners' request for the use of AFA because there is no basis to conclude that East Pipe sought to impede the Department's investigation and no evidence that East Pipe failed to cooperate to the best of its ability. East Pipe argues that all aspects of its questionnaire responses and the corrections it has submitted to those responses were verified by the Department. Therefore, East Pipe argues, the use of AFA would be inappropriate.

Kingland

Petitioners' Affirmative Comments:

Petitioners allege that Kingland has evaded the Department's requests for information, leaving the Department with little reliable information on which it can calculate an accurate subsidy rate.

Petitioners claim, for example, that Kingland's initial questionnaire response failed to address its cross-ownership with CNOOC Kingland. Petitioners also claim Kingland failed to report that a share transfer involving CNOOC Kingland occurred during the POI. Furthermore, Petitioners allege that Kingland also failed to submit initial questionnaire responses for Kingland Industry and Shanxi Kingland, two affiliates that produced subject merchandise during the POI. Petitioners claim these examples demonstrate that Kingland failed to cooperate or act to the best of its ability. Petitioners argue, therefore, that the Department must apply total AFA with respect to Kingland.

Kingland's Rebuttal Comments:

In its rebuttal brief, Kingland argues that it fully disclosed its affiliated companies in its original questionnaire response and identified all companies that were cross-owned with Kingland. Therefore, Kingland argues that there is no foundation to Petitioners' claim that Kingland failed to cooperate in the investigation.

Shuangjie

Petitioners' Affirmative Comments:

Petitioners argue that the Department should continue to apply AFA to Shuangjie. Petitioners note that Shuangjie withdrew all of its proprietary information from the record, thereby impeding the Department's investigation. Because Shuangjie failed to cooperate, Petitioners argue, the Department must apply total AFA.

Department's Position: Section 776(a) of the Act states that the Department will apply FA in reaching a determination if:

> (1) necessary information is not available on the record, or
> (2) an interested party or any other person
>
> (A) withholds information that has been requested by the administering authority or the Commission under this title,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
> (C) significantly impedes a proceeding under this title, or
> (D) provides such information but the information cannot be verified as provided in section 782(i).

Section 776(b) of the Act provides that the Department may use an adverse inference (i.e., AFA) in selecting from the facts otherwise available if it finds that an interested party has failed to cooperate to the best of its ability.

We address the Petitioners' allegations with respect to each respondent below.

GOC

We agree with Petitioners that it is appropriate to apply FA or AFA to specific instances in which the GOC failed to cooperate with our requests for information and have done so in this investigation. As explained in the Analysis of Programs Section I.A above (Programs Determined to Be Countervailable: Hot-rolled Steel for Less Than Adequate Remuneration), we have applied an adverse inference in determining the level of state ownership in the production of HRS. Also, as noted in Section I.C above (Programs Determined to Be Countervailable: Policy Lending Under the Shandong Provincial Plan), where the GOC did not provide provincial plans, we have assumed adversely that that those plans resulted in policy lending to the CWP producer in that province. We do not find, however, that the GOC's overall level of responsiveness warrants the application of total AFA. Although we have identified specific instances in which the GOC failed to provide requested information and provided unverifiable information, we have taken into consideration the scope of this investigation, the time constraints, and the GOC's general responsiveness to our requests. Therefore, although the application of FA or AFA is appropriate in specific instances, we do not find that the application of total AFA to the GOC is warranted.

East Pipe

We disagree with petitioners that total AFA is warranted for East Pipe. The major omission identified by petitioners was the new factual information regarding additional suppliers that was submitted by East Pipe shortly before the beginning of verification. East Pipe reported these data to address accounting errors it discovered. Specifically, at verification the company explained that it originally reported only its purchases from its hot-rolled strip supplier, and inadvertently omitted its coil, galvanized strip, and wide strip purchases during the POI.[142] We are satisfied that East Pipe did not intentionally withhold this information from the Department, and we were able to verify the reported amounts. Moreover, we note that East Pipe's earlier responses regarding its suppliers covered the overwhelming majority of HRS steel it purchased during the POI.[143]

More generally, we note that East Pipe submitted responses to five questionnaires and participated fully in the verification of its submitted information. Therefore, we find no basis to apply total AFA to this company.

Kingland

We do not find a basis to apply total AFA to Kingland. In Exhibit 1 of its original questionnaire response dated September 17, 2007, Kingland included CNOOC Kingland in its affiliated

[142] See East Pipe Verification Report at page 15.
[143] See East Pipe's October 19, 2007, response at Exhibit 12 versus East Pipe Verification Report and Verification Exhibit 13.

company chart. The question on affiliated companies in the original questionnaire asked Kingland to "identify all companies with which your company is affiliated…"[144] The original questionnaire did not require Kingland to limit its answer to the POI or to explain in detail any changes in affiliation that occurred during the POI. The original questionnaire also stated that Kingland had to provide a complete questionnaire response for cross-owned affiliates that produce the subject merchandise, are holding companies or parent companies, supply inputs to subject merchandise, or transferred subsidies to Kingland.[145]

In order to analyze Kingland's relationship with CNOOC Kingland, we requested additional information in supplemental questionnaires dated October 4, 2007,[146] and December 14, 2007.[147] In responses dated October 19, 2007,[148] and December 27, 2007,[149] Kingland provided responses to our questions. In addition, we examined Kingland's affiliation with CNOOC Kingland at verification.[150] We did not request that Kingland submit a full questionnaire response for CNOOC Kingland. Furthermore, although Kingland did not provide extensive unsolicited details on the transfer of its shares in Huzhou Gas to CNOOC during the POI, Kingland fully explained the share transfer in response to our question in the December 14 supplemental questionnaire. We received this response prior to the verification, which allowed us to verify Kingland's response with respect to Huzhou Gas and the share transfer. Therefore, because Kingland responded fully to our questions, we have no basis to conclude that Kingland withheld requested information, failed to provide requested information by applicable deadlines, significantly impeded the proceeding, or provided unverifiable information.

Petitioners also argue that Kingland did not provide original questionnaire responses for Kingland Industry and Shanxi Kingland. On pages 5 and 7 of its October 18, 2007, supplemental questionnaire response, however, Kingland explained that it understood that the products produced by Kingland Industry and Shanxi Kingland were within the scope of the investigation. Therefore, Kingland submitted complete questionnaire responses on behalf of both companies. We asked additional questions about these companies in the next two supplemental questionnaires and verified information on both companies. For all these reason, then, there is no basis to apply AFA to Kingland's responses under the standards of sections 776(a) and 776(b) of the Act.

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[144] See letter from the Department to Kingland, Re: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China (July 27, 2007) at Section III, page 2.
[145] Id. at pages 2-3.
[146] See letter from the Department to Kingland, Re: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China (October 4, 2007) at page 1.
[147] See letter from the Department to Kingland, Re: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China (December 14, 2007) at pages 1 and 2.
[148] See letter from Kingland to the Department, Re: Response to 1st Supplemental CVD Questionnaire (October 19, 2007) at pages 1-3.
[149] See letter from Kingland to the Department, Re: Response to Third Supplemental CVD Questionnaire (December 27, 2007) at pages 1-2.
[150] See Memorandum to Susan Kuhbach, Office Director, Re: Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd.; Beijing Kingland Century Technologies Co., Ltd.; Zhejiang Kingland Pipeline Industry Co., Ltd.; and Shanxi Kingland Pipeline Co., Ltd. Verification Report (March 5, 2008) at pages 5-7 ("Kingland Verification Report").

We note that Petitioners are requesting that the Department apply total AFA to East Pipe and Kingland, while at the same time acknowledging that East Pipe and Kingland cooperated in this investigation in connection with Petitioners arguments about the application of AFA to Shuangjie. The difference between the levels of cooperation of Shuangjie, a respondent that withdrew from the investigation, and East Pipe and Kingland, companies that answered our questionnaires and permitted verification, supports our decision not to apply total AFA to East Pipe and Kingland.

Shuangjie

We agree with Petitioners that, as described in the Preliminary Determination, Shuangjie failed to act to the best of its ability and, therefore, failed to cooperate with the Department's investigation.[151] Consequently, we continue to apply a total AFA rate to Shuangjie. See Comment 15 for a discussion of the AFA rate applied to Shuangjie.

Comment 4: Attribution of Subsidies Received by Affiliates of Kingland

Petitioners' Affirmative Comments:

Petitioners argue that the Department should attribute subsidies received by certain Kingland affiliates to Kingland. First, Petitioners contest the Department's preliminary determination that cross-ownership did not exist between CNOOC Kingland and Kingland Pipeline during the POI. According to Petitioners, record evidence suggests that CNOOC Kingland was capable of producing subject merchandise and had exports of subject merchandise to the United States during the POI. As a result, Petitioners argue that the Department should use FA to calculate subsidies received by CNOOC Kingland and should attribute those subsidies to the combined sales of both Kingland and CNOOC Kingland.

First, Petitioners contend that Kingland and CNOOC Kingland are cross-owned under 19 CFR 351.525(b)(6)(vi) because of Kingland Group's ownership of Huzhou Oil and Natural Gas Pipeline Co., Ltd. ("Huzhou Gas") through part of the POI and Kingland Group's connections with CNOOC Kingland after that date. Petitioners note that on page 2 of Kingland's questionnaire response dated December 27, 2007, Kingland disclosed its ownership interest in Huzhou Gas during the POI. This information and information collected at verification, according to Petitioners, confirms that Kingland Group owned and controlled Huzhou Gas during part of the POI.

Petitioners also contend that Kingland Group retained sufficient control over the operations of CNOOC Kingland after Kingland Group's transfer of shares to China National Offshore Oil Corporation (CNOOC) to qualify CNOOC Kingland as cross-owned with Kingland. Citing 19

[151] See Preliminary Determination, 72 FR at 63878-79.

CFR 351.525(b)(6)(vi), Fabrique,[152] and HRS from South Africa,[153] Petitioners argue that the Department has the 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. Petitioners argue that Kingland Group's relationship with CNOOC Kingland meets this standard. They contend that proprietary information obtained at verification confirms that Kingland exercised management control over CNOOC Kingland, and that Kingland Group, Kingland Pipeline and CNOOC Kingland are connected by at least one shareholder. This evidence, according to Petitioners, demonstrates cross-ownership after Kingland's transfer of shares to CNOOC.

With regard to merchandise, Petitioners note that Kingland acknowledged that CNOOC Kingland is capable of producing subject merchandise. Petitioners contend that the standard for attributing subsidies from one cross-owned company to another is that the company is capable of producing subject merchandise, as stated in CTL Plate from Belgium[154] and CFS from the PRC.[155] Thus, according to Petitioners, CNOOC Kingland meets the standard for the Department to attribute subsidies from CNOOC Kingland to Kingland.

Petitioners argue that even if the Department finds that CNOOC Kingland must have actually produced subject merchandise, record evidence indicates that CNOOC Kingland did produce and export subject merchandise to the United States during the POI. First, Petitioners note that information in mill certificates and invoices reviewed at verification, as well as information submitted by Petitioners on January 3, 2008,[156] contradicts Kingland's contention that CNOOC Kingland did not produce or export subject merchandise during the POI. Petitioners state that the Department should further investigate imports of CNOOC Kingland-produced pipe if it believes that more evidence is necessary to establish definitively that CNOOC Kingland produced and exported subject merchandise during the POI.

Finally, Petitioners argue that the Department must continue to find that subsidies received by three Kingland affiliates – Kingland Group, Shanxi Kingland, and Kingland Industry – are attributable to Kingland because the companies shared cross-ownership with Kingland. Petitioners note that Shanxi Kingland and Kingland Industry are cross-owned companies that produced the subject merchandise during the POI, and that Kingland Group is the parent company of Kingland. Therefore, Petitioners argue that these companies meet the standards for cross-ownership established by 19 CFR 351.525.

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[152] See Fabrique at 603.

[153] See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from South Africa, 66 FR 50412 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 6 ("HRS from South Africa").

[154] See Cut-to-Length Carbon Steel Plate From Belgium; Final Results of Countervailing Duty Administrative Review, 64 FR 12982, 12990 (March 16, 1999) ("CTL Plate from Belgium").

[155] See Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 17484, 17486 (April 9, 2007) (unchanged in CFS from the PRC final determination).

[156] See, generally letter from Petitioners to Department, "New Factual Information on Kingland" (January 3, 2008).

Kingland's Rebuttal Comments:
In response, Kingland claims that it did not list CNOOC Kingland as a cross-owned company in its original response because CNOOC Kingland does not produce subject merchandise, is not a holding company or parent company of Kingland, does not supply Kingland with any input product primarily dedicated to production of subject merchandise, and has not received any subsidy which was transferred to Kingland. Kingland claims that the Department accepted these claims for the Preliminary Determination[157] and confirmed these facts during verification.
In response to Petitioners' claim that Kingland continued to exercise control over CNOOC Kingland's management after the transfer of shares to CNOOC, Kingland notes that the Department confirmed at verification that CNOOC Kingland's board of directors, which was composed of four CNOOC representatives and three Kingland representatives during the POI, made final decisions on appointing managers. Kingland also rejects Petitioners' allegation that Kingland Group and CNOOC Kingland share officers or managers. Finally, Kingland argues that the Department at verification confirmed that merchandise shipped by CNOOC Kingland and Huzhou Gas during the POI was not subject merchandise.

Department's Position:

We first address the issue of CNOOC Kingland. The Department's standard for finding cross-ownership under 19 CFR 351.525(b)(6)(vi) is whether one corporation can use or direct the assets of another corporation in essentially the same ways it can use its own assets. Information submitted by Kingland and verified by the Department shows that Kingland could not have used or directed the assets of CNOOC Kingland in the same way it could have used its own assets. Specifically, documentation reviewed at verification confirmed information in Kingland's October 19, 2007, response on CNOOC Kingland's shareholders, board of directors, and voting rights.[158] The documentation confirmed that Kingland held a minority of CNOOC Kingland's shares after the share transfer.[159] The documentation also confirmed that CNOOC appointees held four of the seven positions on CNOOC Kingland's board of directors, and that the board's chairman was a CNOOC nominee. Finally, the documentation confirmed that the board members held voting rights. This information shows that CNOOC, not Kingland, could use or direct the assets of CNOOC Kingland in the same way it could use or direct its own assets.

The record also disputes Petitioners' claim that Kingland is likely to have maintained control of CNOOC Kingland's management after the share transfer. First, the record shows that the board of directors is the ultimate decision-making authority for CNOOC Kingland. As we noted on page 5 of the Kingland Verification Report, CNOOC Kingland's Articles of Association state that Kingland will make nominations for CNOOC Kingland's positions of general manager and vice general manager. The Articles also state, however, that the final decisions on whether to approve nominees rest with the board of directors. Therefore, Kingland cannot use or direct the

[157] See Preliminary Determination, 73 FR at 63882.
[158] See letter from Kingland to the Department, Re: First Supplemental Questionnaire Response at pages 1-3 (October 17, 2007). See also Kingland Verification Report at page 5.
[159] See Memorandum to Susan Kuhbach, Office Director, Re: Business Proprietary Information Memorandum for the Final Determination at Comment A (May 29, 2008) ("BPI Memorandum").

assets of CNOOC Kingland in the same way it can use its own assets because CNOOC controls the board of directors, which is the ultimate decision-making authority for CNOOC Kingland. Finally, Petitioners note that a shareholder in Kingland Pipeline is also the general manager of CNOOC Kingland. This individual, however, is an operations manager of CNOOC Kingland and, under the Articles of Association, does not control the company.[160] Therefore, this does not change our finding that the CNOOC-controlled board of directors is the ultimate decision-making authority for CNOOC Kingland. As a result, we find that, irrespective of the existence of this shareholder/manager, Kingland could not have used or directed the assets of CNOOC Kingland in the same way it could have used or directed its own assets, and we have made no changes to the Preliminary Determination with respect to CNOOC Kingland.

With regard to Huzhou Gas (i.e., the entity prior to the share transfer agreement between Kingland and CNOOC), Petitioners have claimed that there was evidence that Huzhou Gas produced subject merchandise during the POI, and that subsidies received by Huzhou Gas should, therefore, be attributed to Kingland in accordance with the regulations. The documentation we reviewed at verification, however, did not show definitively that the merchandise in question was subject merchandise. As we stated on page 6 of the Kingland Verification Report, the merchandise listed on the documentation either had a diameter of 24 inches or was only stenciled to an American Petroleum Institute (API) specification, which are both characteristics of non-subject merchandise. Further, at verification, we reviewed every Huzhou Gas shipment listed in Petitioners' January 3, 2008, submission. As we noted in the verification report, the dates on the invoices for these shipments were in June and July 2006, which is well after the share transfer between CNOOC and Kingland took place and Huzhou Gas ceased to exist. As such, despite appearing on Huzhou Gas invoices, these sales were made by CNOOC Kingland. In fact, at verification, a Kingland official noted that CNOOC Kingland may have employed Huzhou Gas invoices for some time after the share transfer.[161] Therefore, we cannot conclude, based on documents we reviewed on the record, that Huzhou Gas definitively could be considered a producer of subject merchandise during the POI.

Petitioners have also argued that Kingland sought to hide information on its ownership of Huzhou Gas during the POI. In Exhibit 1 of its September 17, 2007, questionnaire response, Kingland identified its affiliation with CNOOC Kingland, Huzhou Gas's successor. We note that the original questionnaire did not specify a time period on which Kingland was to report its affiliations.[162] Furthermore, when we asked additional questions on Huzhou Gas in the December 13, 2007, supplemental questionnaire to understand fully the history of CNOOC Kingland, Kingland responded to our questions and provided the share transfer agreement between CNOOC and Kingland.[163] Finally, during verification, Kingland provided all

[160] See BPI Memorandum at Comment B.
[161] See Kingland Verification Report at page 6.
[162] See letter from the Department to Kingland, Re: Countervailing Duty Investigation at Section 3 page 2 (July 27, 2007).
[163] See letter from Kingland to the Department, Re: Response to Third Supplemental CVD Questionnaire at page 2 and Exhibit 3rd Supp-2 (December 27, 2007).

documents we requested for Huzhou Gas.[164] Therefore, we have no basis to conclude that Kingland did not cooperate with our requests for information with respect to Huzhou Gas and we are not applying AFA to Kingland.

In addition, we note that Petitioners argue that Huzhou Gas's ability to produce subject merchandise during the POI is a sufficient basis on which to attribute subsidies under 19 CFR 351.525(b)(6)(ii) between Huzhou Gas and Kingland. As noted above, the record information we reviewed regarding the issue of whether Huzhou Gas could be considered a producer of the subject merchandise during the POI is not definitive. Moreover, notwithstanding Kingland's full cooperation, the Department does not have any information regarding subsidies received by Huzhou Gas. If this investigation results in a CVD order, the Department will examine Kingland's affiliations and possible attributions of subsidies in more detail.

Finally, explained in the *Attribution* section above, we have continued to find that Kingland Group, Kingland Industry, and Shanxi Kingland are cross-owned companies under the standards for cross-ownership established by 19 CFR 351.525.

Comment 5: Scope of the Investigation

Petitioners, MAN Ferrostaal Inc. ("MAN"), Commercial Metals Company ("CMC"), and QT Trading LP ("QT") raised scope comments in their briefs. The summary of these comments and the Department's reply are detailed in the concurrent Final Determination in the Antidumping Duty Investigation of CWP from the PRC which is hereby incorporated by reference.

Comment 6: Sales Denominator for Weifang East Steel Pipe Company Ltd.

Petitioners' Affirmative Comments:

Petitioners argue that the Department should reduce East Pipe's denominator to reflect the fact that East pipe purchased and resold subject merchandise. Under Department practice,[165] according to Petitioners, the resale of subject merchandise produced by a non-responding company should not be included in the respondent's sales values. Petitioners further contend that the Department should exclude resales of those pipes for which East Pipe's claims of further manufacturing could not be substantiated. In support, Petitioners argue that: (1) the record in this case shows that East Pipe has no way of tracking the pipe purchased from the unaffiliated pipe

[164] See Kingland Verification Report at page 5.

[165] See Final Results, Reinstatement, Partial Rescission of Countervailing Duty Expedited Reviews, and Company Exclusions: Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 10982 (March 9, 2004) and accompanying Issues and Decision Memorandum ("we are not including in our subsidy rate calculations logs which the companies demonstrate that they acquired and resold without any processing.") ("Softwood Lumber"); and Certain Pasta From Italy: Amended Final Results of the Fourth Countervailing Duty Administrative Review, 67 Fed. Reg. 59 (January 2, 2002) Decision Memorandum ("With respect to the Department's treatment of purchased pasta, we stated in the Preliminary Results, "{W}hen respondents purchased pasta from other producers and we were able to identify resales of this merchandise to the United States, we excluded these sales of the purchased pasta from the margin calculation for that respondent...'").

producer in question; (2) the subsidies received by East Pipe in no way benefit the value of the pipe purchased from the unaffiliated pipe producer; and (3) the underlying data is unreliable and is based on a series of inaccurate, imprecise and incomplete disclosures.

Finally, Petitioners submit that the Department found that East Pipe benefited from countervailable debt forgiveness in the Post-Preliminary Analysis; [166] however, the Department incorrectly used East Pipe's total sales figure as the denominator instead of the figure that reflects the deduction of the unaffiliated pipe producers' subject merchandise. Petitioners argue that this erroneous calculation lowered the rate of the debt forgiveness subsidy from 1.06 percent to 1.30 percent.

East Pipe's Affirmative Comments:

East Pipe argues that in the Post-Preliminary Analysis, the Department erroneously concluded that no cross-ownership exists between East Pipe and its subsidiary, East Highway. East Pipe argues that the Department verified that East Pipe and East Highway are cross-owned. East Pipe argues that under the Department's attribution rules, "if a firm that received a subsidy is a holding company, including a parent company with its own operations, the Department will attribute a subsidy to the consolidated sales of the holding company and its subsidiaries.[167]" East Pipe contends that if the Department continues to find that East Pipe is the recipient of countervailable debt forgiveness in 2002, the Department should add East Highway's sales to the denominator in its margin calculation.[168]

Petitioners' Rebuttal Comments:

Petitioners argue that even if East Highway were a cross-owned affiliate of East Pipe, East Highway does not produce subject merchandise, nor does it provide any input into the production of subject merchandise. Therefore, under 19 CFR 351.525(b)(6)(ii), Petitioners contend that East Pipe's arguments have no merit. Furthermore, Petitioners argue that even if the Department were to accept East Pipe's contention that subsidies should be spread over the sales of both East Pipe and East Highway, the Department does not have the information on the record to avoid double counting in the denominator, because no information on the record exists regarding sales between the two affiliates.

East Pipe's Rebuttal Comments:

East Pipe argues that the Department should continue to include within its sales denominator the resale of purchased pipe from the unaffiliated pipe producer in question, whether the pipes were further manufactured or not. Given the fungible nature of a domestic subsidy, East Pipe asserts, it should be assumed that any domestic subsidies allegedly received by East Pipe infect all

[166] See Post-Preliminary Findings for the Provision of Land for Less Than Remuneration and New Subsidy Allegations, dated April 9, 2008 ("Post-Preliminary Analysis").
[167] See East Pipe's Case Brief at pages 9-10; see also C.F.R. 351.552(b)(6)(iii).
[168] See East Pipe's Case Brief at pages 9-10.

aspects of its operations, including resales.[169] Finally, East Pipe asserts that the Department verified and reconciled the data related to the unaffiliated pipe producer in question, and that nothing in the Department's verification report indicated that this data is unreliable.

Department's Position

With regard to resold merchandise, we agree with the Petitioners that merchandise not further processed by East Pipe should not be included in the respondent's denominator. This is consistent with our past practice.[170] Furthermore, East Pipe has provided no basis for its claim that the subsidies it received should have equal application to resales. Although East Pipe argues that any domestic subsidy it received infects all aspects of its operations, there is no evidence on the record indicating that business aspects of East Pipe's operations (such as further processing, repacking, etc) were involved in the simple resale of these pipes. Therefore, we cannot include these sales in East Pipe's denominator.

However, we disagree with Petitioners that there is no evidentiary basis to exclude the pipe that was further processed by East Pipe. At verification, Department officials toured East Pipe's facilities, saw where the black pipe it purchased was stored, and discussed East Pipe's processes for painting or galvanizing this pipe before shipping it to final customers. The Department then verified East Pipe's data regarding how much of its purchased pipe was further processed or resold as-is.[171] Thus, contrary to the Petitioners' statements, there is nothing in the verification report demonstrating that East Pipe's data pertaining to further processed merchandise are unreliable, inaccurate or imprecise.

Therefore, we are adjusting East Pipe's total sales to remove only that portion which relates to resold merchandise not undergoing further processing.

With regard to inclusion of East Highway's sales, we agree with the Petitioners that even if we were to find East Pipe and East Highway holding/parent companies under 351.525(b)(6)(iii), we would not be able to include East Highway's sales in the denominator. This is because there is no information on the record that would allow us to eliminate sales between the two companies, with the result that we could not avoid over-countervailing the benefit in the denominator.

Comment 7: Provision of Hot-rolled Steel for Less Than Adequate Remuneration

Petitioners' Affirmative Comments:

Petitioners argue that the Department should continue to find that the GOC's provision of HRS for LTAR is a countervailable subsidy. First, Petitioners contend that the record demonstrates

[169] See East Pipe's rebuttal brief (April 22, 2008) at page 3, citing Certain Pneumatic Off-The-Road Tires from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 9278 (February 20, 2008).
[170] See Softwood Lumber.
[171] See Weifang East Steel Pipe Company, Ltd. Verification Report at page 11 (March 5, 2007).

that the provision of HRS by GOC-controlled HRS suppliers provides a financial contribution. Citing HRS from South Africa,[172] Flowers from the Netherlands,[173] and SSSS from Korea 1999,[174] Petitioners contend that the Department's analysis of whether a company is a public entity is guided by the following factors: (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. Based upon these factors, Petitioners assert that the Department should find that the vast majority of HRS purchased by the respondents was from government-controlled steel suppliers. Petitioners cite proprietary information on specific HRS suppliers to demonstrate that the companies are state-owned. Petitioners also assert that the Department was unable to verify claims of private ownership for certain Kingland HRS suppliers and, therefore, should classify these suppliers as state-owned.

Regarding price benchmarks, Petitioners argue that prices in China are unsuitable for measuring a benefit because the HRS industry in China is composed primarily of state-owned producers. Petitioners assert that the GOC continued to limit its responses after the Preliminary Determination to the hot-rolled narrow strip industry, which Petitioners note, did not comply with the Department's request for information on the entire HRS industry. Furthermore, Petitioners assert that the information provided by the GOC only supports Petitioners' contention that the HRS sector in China is so dominated by the government that prices in China cannot be used to determine whether, or to what extent, the provision of HRS from SOEs provides a benefit to CWP producers.

First, Petitioners argue that the record demonstrates that Chinese producers of narrow HRS do not constitute a separate industry. Petitioners also note that pricing data submitted by the GOC indicates that narrow strip steel and wide strip steel are produced to the same Chinese hot-rolled steel commodity grades. Furthermore, Petitioners argue that the ownership percentages for both narrow strip HRS producers and wide strip HRS producers submitted by the GOC are unverified and unreliable. As a result, Petitioners argue that no Chinese prices can serve as the benchmark to measure the adequacy of remuneration under 19 CFR 351.511(a)(2)(i). Petitioners also claim that Chinese prices cannot serve as a benchmark because of the high level of government ownership of the HRS industry in China and resulting market power held by the GOC, record evidence that the GOC successfully carries out policies to suppress domestic HRS prices in China, and the existence of industrial policies aimed at enhancing the output of downstream steel-using industries.

Petitioners contend that the SteelBenchmarker World Export Price data used by the Department as a benchmark for the Preliminary Determination provides a world market price available to

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[172] See HRS from South Africa, 66 FR at 50412, citing Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 30954 (July 13, 1992).

[173] See Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from the Netherlands, 52 FR 3301, 3302, 3310 (February 3, 1987) ("Flowers from the Netherlands").

[174] See 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) ("SSSS from Korea 1999").

purchasers in China, consistent with 19 CFR 351.511(a)(2)(ii). For example, Petitioners note that SteelBenchmarker's World Export Market prices represent prices available in the "Atlantic and Pacific Basin."[175] Petitioners also cite additional evidence, such as extensive audit procedures, to demonstrate the accuracy of the price information in SteelBenchmarker. Furthermore, Petitioners cite comparisons of the SteelBenchmarker price information to proprietary information from verification to demonstrate the appropriateness of the SteelBenchmarker information as a benchmark. Finally, Petitioners assert that the SteelBenchmarker information is a conservative benchmark because it represents a price for HRS before any rolling or slitting occurs.

Petitioners also address two specific aspects of the selection of benchmarks for the final determination. First, Petitioners argue that the Department should use a separate benchmark for East Pipe's reported purchases of a certain type of HRS because the SteelBenchmarker data do not include prices for this type of steel.[176] Second, Petitioners contend that the Department should use Chinese import statistics if it decides to use another benchmark to measure the world market price of HRS under 19 CFR 351.511(a)(2)(ii).

Finally, Petitioners contend that U.S. law allows for world benchmarks, including SteelBenchmarker and Chinese import prices, from outside the investigated country. Citing the Preamble,[177] Petitioners note that the Department has used second- or third-tier benchmarks instead of prices resulting from actual transactions in the country in question (an "in-country" or "first-tier" benchmark, as provided in 19 CFR 351.511(a)(2)(i)), if the price of the good or service is distorted because of government involvement in the market. Petitioners argue that use of a second-tier benchmark in this case is required because the GOC's dominance of the HRS market has significantly distorted any actual transaction prices. Petitioners cite Softwood Lumber from Canada 2002[178] and HRS from Thailand[179] as cases in which the Department used second- and third-tier benchmarks because of government domination of the markets in question, even though there were private producers in both markets.

GOC's Affirmative Comments:

The GOC contests the Department's finding that the provision of HRS in China confers a countervailable subsidy. First, the GOC claims that the Department failed to address how government-owned HRS producers in China are "authorities" within the meaning of section 771(5)(B)(i) of the Act or whether the government entrusted or directed the producers to provide

[175] See letter from Petitioners to Secretary of Commerce, "Submission of Factual Information" at Exhibit 46 (January 7, 2008).
[176] The type of steel is proprietary information. See Weifang Calculation Memorandum.
[177] See Preamble, 63 FR at 65377.
[178] 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), and accompanying Issues and Decision Memorandum at "Provincial Stumpage Programs Determined to Confer Subsidies" ("Softwood Lumber from Canada 2002").
[179] See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 50410 (October 3, 2001) ("HRS from Thailand").

a financial contribution under section 771(5)(B)(iii) of the Act. Citing the Department's analysis in DRAMS from Korea,[180] the GOC contends that the Department examines many factors to determine whether an entity is a government authority. The GOC also cites the DRAMS AB Report[181] to argue that the activities of corporate entities owned by the government are not attributable to the government unless the entities exercise elements of government authority. The GOC contends that the Department has only established that some HRS producers in China have government ownership, but has not established that these producers are government authorities.

Second, the GOC argues that the Department has not established that government-owned HRS producers were entrusted or directed by the government. Citing Hynix,[182] the GOC claims that the courts have not extended a blank check to the Department to find entrustment or direction when it pleases. The GOC also cites the SCM Agreement[183] and U.S. – Export Restraints[184] to argue that the focus of an entrustment or direction inquiry must be on the nature of the government's action, not on the effects. The GOC contends that the Department's preliminary finding that welded pipe is not part of the 2005 Steel Policy, coupled with the absence of any other evidence linking GOC actions to the pricing practices of HRS producers, establishes that the GOC did not entrust or direct HRS producers in China to provide steel for LTAR.

Third, the GOC contends that if the Department does find a financial contribution with respect to the provision of HRS, ample HRS price benchmarks exist that will demonstrate the absence of any benefit to Chinese CWP producers. The GOC claims that the hot-rolled narrow strip industry, which the GOC argues is the relevant HRS input for the production of CWP in China, is dominated by private producers. Furthermore, the GOC argues that certain aspects of the HRS market in China demonstrate that government involvement does not distort market prices. In the Chinese HRS market, according to the GOC, there is no single government-set price. The GOC also claims that the Chinese HRS market is highly fragmented, includes state-owned mills that are structured as publicly-listed corporations, is profitable, has increasing levels of private investment and has significant private producers. The GOC also claims that available HRS pricing data in China indicates a functioning market. This evidence, the GOC argues, demonstrates that that prices charged by private HRS producers in China are not distorted and can be used as a benchmark. With regard to an appropriate benchmark, the GOC contends that record evidence provides a clear definition of narrow strip steel (i.e., steel at or below 600 millimeters in width). Referring to pricing data on the record, the GOC argues that the Department also has ample price benchmarks to use for narrow strip HRS and wide strip HRS.

The GOC contends that the alternative to measuring benefit by using private transaction prices is to assess whether the prices charged for HRS by SOEs in China are consistent with "market

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[180] See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003), and accompanying Issues and Decision Memorandum at Comment 1 ("DRAMS from Korea").
[181] See DRAMS AB Report at para. 112 n.179.
[182] See Hynix Semiconductor Inc. v. United States, 391 F. Supp. 2d 1337, 1343, 1347 (CIT 2005) ("Hynix").
[183] See the SCM Agreement at Article 1.1(a)(1).
[184] See United States – Measures Treating Export Restraints as Subsidies, WT/DS194/R (June 29, 2001).

principles," as outlined in 19 CFR 351.511(a)(2)(iii). The GOC contends that world market prices, such as the SteelBenchmarker prices that the Department used for the Preliminary Determination, are not comparable to prices for Chinese narrow strip used in the production of CWP. Record evidence of the Chinese steel industry's profitability and the absence of any price discrimination in the Chinese HRS market, the GOC argues, should compel the Department to find that prices for HRS charged by SOEs are consistent with market principles.

Kingland's Affirmative Comments:

Kingland contends that the Department erred in determining that users of hot-rolled steel are limited in number and, hence, the provision of this good is specific. Kingland points out that the list of industries using hot-rolled steel provided by the GOC, "construction, automobile, electronic appliance, machineries, chemical industries, and long-transmission pipelines, etc.," was a representative list and that these sectors account for hundreds of thousands of companies.

Kingland further argues that the Department should consider purchases of HRS from privately-owned Chinese companies as the appropriate basis for comparison to determine whether Kingland received HRS at LTAR from SOEs. Citing 19 CFR 351.511(a)(2)(i), Kingland contends that the regulations instruct the Department to compare a government price to a market-determined price resulting from actual transactions in the country in question. Further, citing the Preliminary Determination, Kingland notes that the Department found no countervailable benefit with respect to East Pipe's purchases from privately-owned HRS suppliers. Kingland argues, therefore, that the Department should use Kingland's purchases of HRS from private suppliers in its analysis of whether Kingland received HRS from SOEs at LTAR. Citing the Kingland Verification Report,[185] Kingland notes that the prices paid by the Kingland companies to SOEs for HRS were either close to or substantially higher than the average prices paid to privately-owned suppliers. Finally, Kingland claims that the Department should reject the prices from SteelBenchmarker, which the Department used for the Preliminary Determination,[186] because these prices are based on "price opinions,"[187] not on actual prices as required by 19 CFR 351.511(a)(2).

Petitioners' Rebuttal Comments:

In their rebuttal brief, Petitioners contest the GOC's assertion that the Department must determine whether state-owned HRS producers are authorities within the meaning of section 771(5)(B) of the Act and perform an entrustment or direction analysis. Citing section 771(5)(B) of the Act, Petitioners contend that governments and public entities are both authorities under the Act. Countering the GOC's reference to Hynix,[188] Petitioners argue that Hynix is inapposite to CWP because Hynix deals with entrustment or direction by a government authority to a private

[185] See Kingland Verification Report at Exhibits 1a and 9.
[186] See Preliminary Determination, 63 FR at 63882.
[187] See letter from Kingland to Secretary of Commerce, "Factual Information" at Attachment 2 (December 28, 2007) ("Kingland FIS").
[188] See Hynix, 425 F. Supp. 2d 1287, 1294.

body, not with direct actions by a government or public entity. Petitioners argue that the DRAMS AB Report[189] makes clear that this analysis is only warranted in the context of indirect subsidies requiring entrustment or direction. Petitioners argue that this practice is consistent with China's obligations under its WTO accession[190] and with other cases, such as Stainless Steel from Korea,[191] in which the Department has treated government-owned providers of steel inputs as public entities. Finally, Petitioners note that a WTO panel in Korea – Commercial Vessels[192] addressed similar arguments, but found a clear distinction between a "public body" and a "private body."

In response to the GOC's argument concerning the distinction between narrow strip steel and wide strip steel, Petitioners contend that the Department is not required to make a separate finding of financial contribution for each variety of a good provided for LTAR. Petitioners cite CFS from Indonesia[193] and Softwood Lumber from Canada 2004[194] as cases in which the Department has made a single finding of financial contribution for government provision of a good.

Petitioners contest specific arguments in the GOC's case brief. First, Petitioners claim that the GOC presented erroneous information on respondents' purchases of "wide" HRS. Further, referring to record information on the characteristics of wide strip and narrow strip steel, Petitioners claim that the record does not support a finding that the HRS industry should be split into two separate industries. To support this assertion, Petitioners cite record information to demonstrate that a portion of the 'narrow' HRS purchases reported by East Pipe was produced from 'wide' HRS that was slit and/or rolled to smaller widths.

Petitioners also contend that substantial record evidence indicates that Chinese HRS prices are distorted because state-owned producers have significant market power. Petitioners claim that verified information can support private ownership of only 2.5 percent of the Chinese HRS industry, meaning the state can act as a monopolist. Further, Petitioners contend that documentation from the National Development and Reform Commission (NDRC) and State-owned Asset Supervision and Administration Commission (SASAC) indicates that the state controls sectors it deems important to national economic performance, including the steel industry. Finally, citing record evidence for specific companies, Petitioners argue that the Chinese government also has significant influence over the operations of private HRS producers.

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[189] See DRAMS AB Report at paragraph 112.

[190] See Report Of The Working Party On The Accession Of China, WT/MIN(01)/3 at paragraph 172 (November 10, 2001), provided in the letter from Petitioners to the Department, Re: Petition for the Imposition of Antidumping and Countervailing Duties Against Circular Welded Carbon Quality Steel Pipe from the People's Republic of China at page 136 (June 7, 2007) ("Petition").

[191] See, e.g., Final Results and Partial Rescission of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip From the Republic of Korea, 68 FR 13267 (March 19, 2003) ("SSSS from Korea 2003").

[192] See Panel Report, Korea – Measures Affecting Trade in Commercial Vessels, WT/DS273/R (April 11, 2005) at paragraph 7.28 ("Korea – Commercial Vessels").

[193] See CFS from Indonesia Issues and Decision Memorandum at Comment 13.

[194] See Softwood Lumber from Canada 2004, 69 FR at 75917.

Countering the argument of the GOC, Petitioners contend that the profitability of Chinese HRS producers is not relevant to the determination of whether HRS was sold for LTAR. Petitioners argue that HRS producers can provide a given volume of steel at a lower price than would be the case absent the subsidies, meaning that HRS users produce at higher output levels, and at lower costs, than would be the case without subsidies. Furthermore, rejecting the GOC's assertion that the HRS market in China is fully-functioning, Petitioners argue that the GOC failed to explain why there is a substantial price difference between HRS sold in China and that sold in the world export market. Petitioners also reject Kingland's argument that the SteelBenchmarker data do not represent market-determined prices and argue that the data are based on actual observations of market pricing. Finally, in response to Kingland's claim that the Department considered East Pipe's prices for HRS to be free from government influence, Petitioners counter that the Department found no countervailable subsidy because East Pipe's HRS provider was a private entity. Therefore, the Petitioners contend, the Department found that no countervailable subsidy existed because there was no financial contribution from the government.

GOC's Rebuttal Comments: Referring to arguments in its case brief, the GOC rejects Petitioners' contentions and claims the Department failed to establish the presence of a financial contribution, ignored valid benchmarks in China, and applied an inappropriate benchmark from SteelBenchmarker. The GOC concludes that the Department should determine that the provision of HRS to CWP producers does not confer a subsidy.

Department's Position

We have addressed comments by parties separately.

Relevant Input for the Production of CWP (GOC)

The GOC argues that the Department risks distorting its analysis of government ownership of a particular industry if it too broadly defines a market and the industries present in that market. However, we find that limiting our analysis to narrow strip as the relevant HRS input in this investigation, distorts our analysis in the opposite way – it defines the relevant market and industry too narrowly.

The scope of this investigation includes all merchandise with an outside diameter up to 16 inches. CWP is produced by forming flat-rolled steel into a tubular configuration and welding it along the joint.[195] Production of CWP with an outside diameter of 16 inches requires steel sheet with a width of over 1200 mm.[196] Therefore, the GOC's position that HRS under 600 mm is the relevant input in this case does not comport with the definition of the merchandise under investigation. By accepting the GOC's argument that narrow strip is the relevant input into the production of CWP, we would exclude an analysis of HRS products that are clearly inputs to the merchandise under investigation.

[195] See page 4 of the Petition.
[196] The circumference of a circle with a diameter of 16 inches (406.4 mm) is 1276.74 mm.

Respondents' purchase information further demonstrates that we should analyze the HRS industry as a whole. Respondents purchase strip wider than 600 mm and strip narrower than 600 mm. (Because information on specific respondents is business proprietary, we have addressed this information in Comment C of the BPI Memorandum.)

Finally, we do not find that there are any relevant distinctions between strip under 600 mm and strip 600 mm or over to conclude that producers in each category constitute separate industries. As Petitioners note, the GOC's submitted price information evidences that strip 600 mm or wider is sold in the same steel grades as strip less than 600 mm in width.[197] This fact, along with other proprietary information from respondents,[198] indicates that the two products are substitutable.

Taken as a whole, this record evidence indicates that it is inappropriate to find that producers of strip below 600 mm in width constitute a separate industry as it is relevant to this investigation. The GOC points to the distinction between the two categories in the Harmonized System ("HS") as a demarcation between the two products. We do not find this difference in the HS categories to be an important distinction and, for the reason stated above, have continued to base our analysis on HRS.

Specificity of Industries Using HRS (Kingland)

We have continued to find that uses of HRS are limited and, consequently, that the provision of HRS is de facto specific under section 771(5A)(D)(iii)(I). We acknowledge that by including "etc." the GOC's list was representative, but because the GOC did not elaborate, we do not know what those additional industries would be. Furthermore, while hundreds of thousands of companies may comprise the listed industries, section 771(5A)(D)(iii)(I) clearly directs the Department to conduct its analysis on an industry or enterprise basis. Consistent with our past practice, the industries named by the GOC (construction, automobile, electronic appliance, machineries, chemical industries, and long-transmission pipelines) are limited in number. For example, in *Belgian Steel*,[199] we concluded that eight industries (steel, food processing, paper, chemicals and fertilizer, mining, electromechanical, firearms, and cement and ceramics) were "too few" users, and as a result, found the subsidy to be de facto specific.

Whether Certain Entities are Authorities

The GOC has argued that the Department must make a determination of whether government-owned HRS suppliers are "authorities" within the meaning of section 771(5)(B)(i) by performing the five-factor test on each supplier. While we agree that the Department has used such a test,[200]

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[197] See Petitioners' CB at page 95, citing the letter from the GOC to the Department, Re: Countervailing Duty Questionnaire Response, at Exhibit 106 (September 17, 2007).
[198] See Comment D of the BPI Memorandum.
[199] Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 FR 37273, 37276 (July 9, 1993) (*Belgian Steel*)
[200] See e.g. Final Affirmative Countervailing Duty Determination Dynamic Random Access Memory

there is insufficient evidence on the record of this investigation to do so. Beyond the levels of government ownership for some companies, the GOC has not provided the information that is needed to conduct the analysis. Therefore, for purposes of this Final Determination, we have applied a rule of majority ownership to determine whether a government-owned HRS supplier is an "authority" within the meaning of section 771(5)(B)(i). Specifically, where an HRS producer-supplier is majority-owned by a government entity, we are treating that supplier as an "authority."[201] We will reconsider the feasibility of applying the five-factor test during an administrative review, should this investigation result in a countervailing duty order.

Because we are finding that these producer-suppliers are "authorities," we do not reach the issue of whether they are private entities entrusted or directed by the GOC to provide a financial contribution to the respondents.

Petitioners contend that specific suppliers of the responding companies are SOEs, based on the level of government ownership or claiming that the owners should be viewed as government entities. Because the identities of these suppliers are proprietary, we have addressed these comments in Comment F of the BPI Memorandum.

The GOC did not provide requested information regarding the ownership of certain producer-suppliers. Because of the GOC's failure to provide this information, we are treating these companies as "authorities." See sections 776(a) and (b) of the Act.

Benchmark

The Department's regulation 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 have explained in Canadian Lumber, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation.[202] This is because such prices generally would be expected to reflect most closely the prevailing market

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Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003), Issues and Decision Memorandum at pages 16-17, and Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 30954 (July 13, 1992).

[201] We are only examining producer-suppliers in this context because under the methodology being followed in this investigation, the ownership of the trading company suppliers is irrelevant.

[202] See Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002) ("Canadian Lumber"), and accompanying Issues and Decision Memorandum at page 36.

conditions of the purchaser under investigation. In the Preliminary Determination, we did not rely on market-determined prices from actual transactions within China (i.e., tier one) for determining what constitutes adequate remuneration from government-provided HRS, because of the GOC's failure to provide information on the HRS industry as a whole.[203] Instead, relying on AFA, we used as a world market prices (i.e., tier two benchmark)from SteelBenchmarker for hot-rolled band (i.e., HRS that is 5 mm thick x 1200-1500mm wide) that would be available to purchasers in China.

Subsequent to the Preliminary Determination and in response to requests by the Department, the GOC provided some information on the ownership structure of the HRS industry in China.[204] Consequently, for the final determination we are not simply rejecting tier one benchmarks as we did in the Preliminary Determination but, instead, we are examining record information regarding all potential benchmark prices in order to determine the appropriate benchmark under the adequate remuneration hierarchy.

Based on the hierarchy established above, we must first determine whether there are market prices from actual sales transactions involving Chinese buyers and sellers that can be used to determine whether the government-provided HRS was sold for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government provides the majority, or a substantial portion of the market for a good or service, prices for such goods and services in the country will be considered significantly distorted and will not be an appropriate basis of comparison for determining whether there is a benefit.[205]

As explained above in the "Analysis of Programs" section for Hot-rolled Steel for Less Than Adequate Remuneration, in this proceeding we are finding 96.1 percent of HRS production in the PRC is from SOEs.[206] Consequently, because of the government's overwhelming involvement in the PRC HRS market, the use of private producer prices in China would be akin to comparing the benchmark to itself, (i.e., such a benchmark would reflect the distortions of the government presence).[207] As we explained in Canadian Lumber:

> Where the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. It is impossible to test the government price using another price that is entirely, or almost entirely, dependent upon it. The analysis would become circular because the benchmark price would reflect the very market

[203] See Preliminary Determination, 72 FR at 63882.
[204] See GOC Third SQR at page 35; see also, the Department's National Government Verification Report at Verification Exhibit A-2.
[205] See Preamble 63 FR at 65377.
[206] Even if arguendo we were to rely on the GOC's 71 percent production figure, we would still find that government production accounts for a significant portion of the HRS industry, so that it is reasonable to conclude that private prices in China are significantly distorted, and therefore unusable as benchmarks.
[207] See Canadian Lumber Issues and Decision Memorandum at 34.

distortion which the comparison is designed to detect.[208]

For these reasons, prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's actions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration.

We disagree with the GOC's underlying assertions in support of its arguments that the Department must look beyond the degree of state-ownership of the HRS industry in China and consider the actual nature and structure of the industry. First, the GOC's assertions that: (1) there is no single or uniform government-set price; (2) the HRS industry is highly fragmented; (3) state-owned producers purportedly operate the same as private companies; (4) private investment in the HRS industry is growing; and, finally, (5) a functioning market exists because prices fluctuate from day-to-day and vary across regions in China, do not mitigate the fact that the government accounts for a significant portion of production (i.e., 96.1 percent of Chinese HRS production is from SOEs). In such instances, it is reasonable to conclude that domestic prices for comparable goods provided from private sources are effectively determined by the government provided prices. Second, we agree with Petitioners' rebuttal argument that the profitability of Chinese HRS producers is not relevant to the determination of whether HRS was sold for LTAR.

We also disagree with Kingland's argument that because the Department found no countervailable subsidy with respect to East Pipe's purchases from privately-owned HRS suppliers we should use Kingland's purchases of HRS from private suppliers as its benchmark. The reason we found no countervailable subsidy for East Pipe's purchases is that they were provided by private HRS producers. As such, these sales do not give rise to a financial contribution, and we therefore never reached the issue of benefit for those transactions. For the same reasons described above, we find that the government's significant involvement in the HRS market invalidates the use of Kingland's actual HRS purchases from private sources, because the use of such a benchmark would reflect the significant distortions caused by the government presence in the HRS market in China.

Next, turning to tier one benchmark prices stemming from actual import prices, there is record evidence that a respondent purchased HRS from a supplier located outside of China during the POI.[209] This import price is comparable to the prices in the SteelBenchmarker used in the Preliminary Determination. For example, the weighted average actual import price is higher than simple average for SteelBenchmarker price.[210] Part of the difference in these prices reflects that the actual import price is a delivered price, while the SteelBenchmarker prices are not. Although we previously determined that the SteelBenchmarker prices are appropriately considered market-

[208] See Canadian Lumber Issues and Decision Memorandum at pages 38-39.
[209] The specifications of the HRS purchased are business proprietary and are addressed in Comment F of the BPI Memorandum.
[210] The weighted average actual import price is business proprietary and is identified in Comment F of the BPI Memorandum.

determined prices under tier two of the adequate remuneration hierarchy, the fact that these prices are comparable to an actual import transaction by a respondent has led us to now conclude that SteelBenchmarker prices should be treated as surrogate import prices and, thus, a tier one benchmark. Although the regulations refer to "actual imports," we see no meaningful difference in actual and potential market-determined import prices stemming from transactions outside the country.[211] This is particularly the case where, as here, an actual import price is comparable to world market-determined price, such as those contained in the SteelBenchmarker.[212] In effect, because of the close match between the actual import prices and the SteelBenchmarker prices, we consider the latter to be equivalent or surrogates for actual imports. These prices are thus appropriately considered tier one benchmark prices. For these reasons, to measure the adequacy of remuneration from government-provided HRS during the POI, we are relying on the following: (1) the actual import price paid by the respondent for that respondent's purchases in the relevant month(s);[213] and (2) the SteelBenchmarker prices for both respondents where the actual import price noted above is not applicable. Finally, pursuant to 19 CFR 351.511(a)(2)(iv), we are adjusting the SteelBenchmarker prices to include delivery charges and import duties.[214]

With regard to Kingland's argument that the Department should reject the prices from SteelBenchmarker, because these prices are based on "price opinions,"[215] not on actual prices as required by 19 CFR 351.511(a)(2), we disagree. As noted above, the actual import price is comparable to SteelBenchmarker prices and, in fact, the weighted average import price is higher than the average SteelBenchmarker price. Consequently, we find that there is no compelling reason to reject SteelBenchmarker prices.

We also disagree with the GOC's argument that SteelBenchmarker prices are not comparable to prices for Chinese narrow strip used in the production of CWP. First, the GOC failed to provide any factual evidence in support of its claim. Second, we highlight Petitioners' argument that the SteelBenchmarker information is a conservative benchmark because it represents a price for HRS before any rolling or slitting occurs.

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[211] See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Certain Softwood Lumber Products From Canada, 66 FR 43186, 43197 (August 17, 2001) (unchanged in the final determination, see Canadian Lumber Issues and Decision Memorandum at pages 37-38).

[212] We are not relying on import statistics of hot-rolled strip imported into China as a tier one benchmark because these statistics show that import quantities of hot-rolled strip into China are relatively small in comparison to Chinese domestic production of hot-rolled strip and, therefore, do not constitute a sufficient basis to serve as reliable benchmarks.

[213] The identity of the respondent and the purchase month(s) are business proprietary and are addressed in Comment F of the BPI Memorandum.

[214] See Memorandum to the File, re: Final Determination Calculation Memorandum for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd.; Beijing Kingland Century Technologies Co.; Zhejiang Kingland Pipeline Industry Co., Ltd.; and Shanxi Kingland Pipeline Co., Ltd (May 29, 2007); see also, Memorandum to the File, re: Calculations for the Final Determination: Weifang East Steel Pipe Co., Ltd. (May 29, 2008).

[215] See letter from Kingland to Secretary of Commerce, "Factual Information" at Attachment 2 (December 28, 2007) ("Kingland FIS").

Regarding Petitioners' argument that the Department should use a separate benchmark for East Pipe's reported purchases of a certain type of HRS, we agree. This information is business proprietary, so we have addressed it in the East Pipe Final Calculation Memorandum.[216]

Comment 8: Government Policy Lending

Petitioners' Affirmative Comments:

Petitioners argue that the Department should find that the GOC's Policy Lending program provides CWP producers with countervailable subsidies. In addition, Petitioners contend that in the event that the Department continues to find that CWP producers do not benefit from the GOC's Policy Lending program, there is sufficient evidence that the program exists for the steel industry, as detailed below. Therefore, according to Petitioners, the Department should find that the GOC's steel Policy Lending program was "not used," as opposed to found "not to exist."

Petitioners make several arguments regarding the countervailability of policy loans in China, which are addressed below.

The GOC's Policy Lending Program provides a financial contribution: Petitioners assert that national, provincial and municipal government authorities effectuate policies to provide countervailable loans to CWP producers. Petitioners believe that acting pursuant to these official policies, Chinese policy banks and state-owned or state-controlled commercial banks provided loans to CWP producers that constitute a direct transfer of funds by a government authority and, therefore, are clearly financial contributions according to section 771(5)(D)(i) of the Act.[217]

The Preferential Loans Received by the CWP Industry pursuant to the GOC's Policy Lending Program are Specific: Petitioners believe that additional information obtained subsequent to the Preliminary Determination allows the Department to reverse its preliminary finding that the CWP industry did not receive preferential financing pursuant to the GOC's Iron and Steel Policy. In particular, Petitioners argue that the GOC maintains numerous policies and programs that benefit the steel industry, including programs benefiting producers of subject merchandise through both implicit and explicit directions to government-owned banks.

Petitioners argue that the 11th Five-Year Plan's[218] instructions to improve the quality of steel products and create globally competitive steel companies are signals to government-owned banks to undertake and fund projects. Petitioners believe the evidence that demonstrates the GOC's implementation of these policies includes: (1) the remarkable rise of China's steel industry as the world's largest; and (2) admissions that China's purportedly "commercial" banks continue to

[216] See Calculations for the Final Determination for East Pipe (May 29, 2008) ("East Pipe Final Calculation Memorandum").
[217] See Petitioners' CB at page 115, citing CFS from the PRC Issues and Decision Memorandum at pages 9-10.
[218] See Petitioners' CB at page 119, citing National Economic and Social Development 11th Five-Year Plan, provided in the Petition at Exhibit 54 ("11th Five-Year Plan").

lend based on non-commercial considerations such as government preferences for certain industries and social stability.[219]

Next, Petitioners argue that the GOC's statements regarding the scope of its Iron and Steel Policy are inaccurate and assert that there are examples that demonstrate subject merchandise is covered by the policy.[220] First, Petitioners dispute the GOC's contention that the term "metal products" in the Iron and Steel Policy's definition of scope means something other than what it says.[221] Petitioners assert that "metal products" does not mean "steel rod or cable," as the GOC contends. Instead, Petitioners believe that the scope of the Iron and Steel Policy is intentionally broad and includes all aspects of steel production from mining to the manufacture of fabricated steel products.[222] Petitioners contend that if the GOC had intended to limit the application of the policy to the subset of steel products (i.e., "steel rod or cable"), the GOC would have done so in the document itself.

Finally, Petitioners highlight specific language from the preamble and Articles 1 and 2 of the Iron and Steel Policy to demonstrate that subject merchandise is covered by the policy. First, Petitioners note that the preamble of the Iron and Steel Policy speaks to steel in terms of "quantity, quality and varieties." Next, Petitioners point to language contained in Article 1 that refers to raw iron and steel as "iron and steel," while Article 2 discusses "steel products," i.e., products made from steel. Petitioners argue that this distinction demonstrates that the Iron and Steel Policy is not limited in the manner suggested by the GOC. Finally, Petitioners assert that the Catalogue of Major Industries, Products and Technologies Encouraged for Development in China[223] and the NDRC's own Catalogue on Readjustment of Industrial Structure (Version 2005)[224] reference steel pipe and tube with steel writ large.

Petitioners also argue that CWP producers benefit from policy lending programs for encouraged industries, products, and companies. Petitioners point to, in particular, the GOC's list of encouraged products and projects that are eligible for special bank financing. Petitioners note that the Directory Catalogue on Readjustment of Industrial Structure (Version 2005) (the "Directory Catalogue")[225] identifies several different varieties of steel pipe as eligible for government benefits. Petitioners contend that because steel pipes (e.g., steel tube production for oil well pipe in oil extraction, high-pressure boiler tube in plant, long distance transmission of oil

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[219] See Petitioners' CB at page 117, citing the Memorandum to Susan Kuhbach, Office Director, Re: Government of the People's Republic of China, Weifang City and Shandong Province Verification Report, at page 8 (March 7, 2008) ("Weifang/Shandong Verification Report"). Petitioners note that social stability is paramount to both the GOC and the Communist CCP.

[220] See Petitioners' CB at 121, citing the Iron and Steel Policy at note 1. Petitioners also cite the GOC Verification Report at page 20.

[221] See Petitioners' CB at page 121. Petitioners cite the Iron and Steel Policy at note 1 and the National Government Verification Report at page 20.

[222] Id. citing the Iron and Steel Policy at note 1.

[223] See the Petition at Exhibit 65.

[224] See the Petition at Exhibit 66.

[225] Id.

and gas) are designated by the Directory Catalogue as "encouraged," the respondent companies receive a direct benefit.

Further, Petitioners state that producers of subject merchandise also are eligible for subsidies based on special government designations and recognition. In particular, Petitioners note that State Council Circular on Printing and Circulating Certain Supporting Policies for Implementation of the Outline of Medium and Long-Term Plan for National Scientific and Technological Development (2006-2020) ("State Council Circular"): (1) instructs China's nominally commercial banks to lend to high-tech projects "in accordance with national investment policy and credit policy; (2) further encourages the nominally "commercial banks to "prioritize" loans to support the exportation of the products of high technology enterprises; and (3) orders policy banks to issue "soft loans" to high technology enterprises.[226] Petitioners highlight that Kingland has been designated by the GOC as a "National Major Enterprise of High and New Technology" and, as such, the designation makes Kingland eligible for loans from government banks pursuant to this program.[227] Petitioners also contend that Kingland is benefiting from a sub-national subsidy program to channel funds from "various resources" to star, key and backbone enterprises.[228] Next, Petitioners highlight language from the 2007 Shandong Provincial Government Work Report from Shandong Province, where East Pipe is located, to argue that the government "strictly" controlled access to credit.[229] Petitioners believe that this demonstrates the government promoted favored industries over others.

Petitioners also argue that the GOC withheld documents regarding provincial policy lending programs. In particular, Petitioners note that the Department requested on several occasions that the GOC provide relevant sub-national industrial policies and other related documents. The Petitioners highlight that the GOC denied the existence of any central, provincial, or municipal government laws and regulations other than the ones already provided by the GOC in response to the original questionnaire. Contrary to the GOC's assertions, however, the Department's investigation revealed numerous industrial policies not reported by the GOC, note Petitioners. For example, Petitioners point out that the Department discovered the existence of industrial planning documents for both the provincial and municipal levels in the Shandong Province.[230] Petitioners argue that withholding requested documents or falsely certifying that requested documents do not exist demonstrates that the GOC did not do the "maximum" to provide the Department with the information that it requested, as courts have held respondents must do.[231]

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[226] See letter from the GOC to the Department, Re: Government of China's Response to the Department's Third Supplemental Questionnaire at Exhibit 12 (December 18, 2007) ("GOC Third SQR").

[227] See Petitioners' CB at page 126. Petitioners cite the Petition at Exhibit 122 and the State Council Circular, provided in the GOC Third SQR at Exhibit 12.

[228] See Petitioners' CB at page 127. Petitioners cite the Report on the Outline of the 11th Five-Year Plan for National Economic and Social Development of Huzhou City, provided in the GOC Third SQR at Exhibit S-9; and the 2007 Huzhou Municipal Work Report at page 11, provided in the GOC Third SQR at Exhibit S-4.

[229] See page 12 of the Shandong Provincial Government Work Report, provided in the GOC Third SQR at Exhibit S-5.

[230] See Petitioners' CB at page 130, citing the Weifang/Shandong Verification Report at page 4.

[231] See Petitioners' CB at page 118, citing Nippon Steel Corporation v. United States, 337 F.3d 1391, 1382 (Fed. Cir 2003).

Petitioners contend that without the provincial and municipal level industrial planning documents, the Department will not be able to fully analyze the types of support provided by the GOC to producers of subject merchandise.

The GOC has carried out its policy to provide preferential loans to its steel industry: Petitioners note that the GOC has argued in this investigation that its industrial policies are without effect and, therefore, cannot result in the provision of subsidies. Petitioners argue that the GOC's assertions are contradicted by the texts of the industrial planning documents themselves. For example, Petitioners highlight that Article 17 of the Decision of the State Council on Promulgating the "Interim Provisions on Promoting Industrial Structure Adjustment" for Implementation, instructs that "financial institutions shall provide credit supports in compliance with credit principles" designed by the government to carry out its industrial policies.[232] Petitioners contend that this demonstrates the GOC's continued direction of lending to meet its policy goals and that the GOC expected entities to carry out its orders. In addition, Petitioners note that statements made by Huzhou City officials and Weifang City officials at verification and in response to questions posed by the Department relating to the respective cities' industrial planning documents are contrary to what the industrial planning documents themselves say.

Next, Petitioners note that in CFS from the PRC, the Department found that state ownership of the banking sector in China contributed to the ability of the government to control lending decisions, and that those government-owned banks "continued to take industrial policy into account when making lending decisions."[233] Petitioners contend that as a result of government's continued control of Chinese banks, steel projects that are consistent with the industrial objectives expressed in the five-year plans and related policy documents often receive preferential loans. In particular, Petitioners argue that Zhejiang DRC admitted the government does have influence over policy banks and may use that influence for encouraged industry.[234] Petitioners state that the Department confirmed at verification that banks lending to Kingland considered non-commercial lending criteria.[235] Thus, Petitioners contend that Kingland obtained loans from government-owned banks as a result of government policies. For East Pipe, Petitioners note that the Shandong Provincial Government Work Report touts the government control over lending.[236] In addition, Petitioners believe that the analysis of lending decisions for East Pipe reviewed by the Department at verification indicates the receipt of loans as a result of government policies.

The Department should measure the benefit from the GOC Policy Lending Program using a revised benchmark: Petitioners argue that the Department should measure the benefit from the GOC policy lending program using a revised lending benchmark. Petitioners argue that the CFS

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[232] See Petitioners' CB at page 133.
[233] See CFS from the PRC Issues and Decision Memorandum at page 58.
[234] See Petitioners' CB at page 140, citing the Memorandum to Susan Kuhbach, Office Director, Re: Verification Report of the Huzhou Municipal Government and the Zhejiang Provincial Government of the People's Republic of China at page 5 (March 11, 2008) ("Huzhou/Zhejiang Verification Report").
[235] Id. citing the Huzhou/Zhejiang Verification Report at page 8 and the GOC Third SQR at Exhibit 3S-20.
[236] Id. citing the Weifang/Shandong Verification Report at page 6.

from the PRC benchmark methodology must be revised to comport with statutory and regulatory requirements by: (1) calculating the benchmark on a non-inflation adjusted basis; (2) removing any governance adjustments; and (3) not adjusting the respondent's actual interest paid for inflation in China. Petitioners highlight that the Department's regulations do not contemplate or allow inflation adjustments as a proxy for currency conversion or adjustments for governance factors.[237] Instead, the regulations only specifically address inflation where "interest rates fluctuated significantly during the period of investigation or review," which Petitioners contend is not the case in China in 2005 or 2006.[238] In addition, Petitioners cite to the CIT's finding in Hynix that it is unnecessary for the Department to account for governance in its averaging of commercial lending rates.[239]

Petitioners next argue that if the Department continues to use its regression-based inflation-adjusted methodology for determining Chinese lending benchmarks, it must make certain adjustments. First, Petitioners, note that the Department has not shown or explained why the real lending rates of Angola, the Dominican Republic, and Samoa are aberrational and should be excluded. Petitioners contend that the Department must either include all lower-middle income countries in its regression analysis for all years, or explain its methodology for determining whether a country's rate in a particular year is aberrational and, thus, unusable.

Further, Petitioners assert that if the Department excludes Angola, the Dominican Republic, and Samoa, it should only do so in the years these countries' rates are aberrational. Petitioners state that if the Department's desire is to use the same set of countries from year to year for consistency, the Department's logic actually creates major inconsistencies. In order to eliminate inconsistencies and provide the largest, most robust dataset of countries for its regression analyses, Petitioners argue that the Department should only exclude ostensibly aberrational data in the year that it has been determined that such data actually are aberrational.

Finally, Petitioners believe that the Department should not exclude any of the World Bank governance factors in calculating Chinese lending benchmarks. Petitioners note that the Department has calculated an average of five of the six World Bank governance factors and used this average in the regression analysis. Petitioners highlight that the Department has failed to explain why it was appropriate to use certain governance factors (i.e., all but one) from the World Bank data. Petitioners argue that if the Department continues to use its regression-based methodology, it should average the data from all six governance factors, rather than just five.

GOC's Rebuttal Comments: The GOC contends that the Department correctly determined that CWP producers did not benefit from countervailable loans from the government. The GOC notes that a substantial part of Petitioners' case brief is devoted to repeating the allegation set forth in the petition. The GOC believes that the complete evidentiary record demonstrates that CWP producers are not even part of the GOC's Iron and Steel Policy.

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[237] See Petitioners' CB at page 143. Petitioners cite 19 CFR 351.505(a)(2)(i) and the Preamble, 63 FR at 65363.
[238] Id. citing 19 CFR 351.505(a)(2)(iv) and the Preamble, 63 FR at 65364.
[239] See Hynix, 425 F. Supp. 2d at 1308.

The GOC notes that this investigation is not about steel but, instead, is focused strictly on CWP. Thus, the GOC argues that the Department cannot find that loans received by CWP producers from government owned or controlled banks provide a countervailable subsidy unless, inter alia, there is an actual government program to provide preferential financing to CWP producers. The GOC highlights the record evidence in this case that demonstrates: (1) no national level law, regulation or policy paper designates the CWP industry as a "pillar" or "encouraged" industry; (2) no standard or structural pipe (i.e., pipe failing within the scope of the investigation) is designated as an encouraged industry; (3) none of the individual pipe companies investigated were ever designated as "key," "backbone," "famous," "priority" and/or "Province Special Grade Credit Venture" enterprises during the POI; (4) the GOC's Iron and Steel Policy does not mention CWP at all; and (5) Article 25 of the Iron and Steel Policy, which addresses financing and the provision of loans, is explicitly limited to iron smelting, steel smelting and steel rolling, and does not mention the CWP industry.

The GOC also notes that Petitioners' heavy reliance on the Iron and Steel Policy to demonstrate the preferential lending to steel industry is misplaced. The GOC asserts that the policy focuses on restricting growth of the steel industry by reducing existing capacity and limiting new investment in steel production by raising standards for new projects. The GOC argues that this focuses on limiting growth, not on promoting it.

Next, the GOC contends that there is no evidence that the GOC's Iron and Steel Policy has had any influence on loans received by CWP producers. Rather, the GOC argues, record evidence demonstrates that: (1) China has an effective, commercially-oriented lending market; (2) loan pricing is determined by market forces, with banks making lending decisions based upon commercial considerations, including proper risk assessment; and (3) governmental industrial policy has a very limited role in lending decisions, and is but one factor a bank may take into account in examining risk. Therefore, the GOC argues there is no basis for finding that the Chinese commercial banks that provided loans to CWP producers were acting pursuant to government policy rather than commercial considerations.

Kingland's Rebuttal Comments: Kingland contends that Petitioners' claim that Kingland benefited from policy lending has no support in the record and was confirmed by the Department at verification. Kingland notes the Department examined the loans received by Kingland during the POI at verification and found no indication that Kingland received preferential treatment, favorable interest rates, or any other non-commercial consideration from banks. In addition, there was no indication of government involvement in Kingland's loans, according to Kingland.

Department's Position

In the Preliminary Determination, we found the Government Policy Lending Program not to be countervailable. However, we stated that we would continue to investigate whether the GOC's Iron and Steel Policy or other plans apply to the CWP industry.[240] As explained further below

[240] See Preliminary Determination, 72 FR at 63883.

and with one notable exception, we continue to find that based on the totality of the record evidence, CWP producers did not receive policy loans pursuant to the national level plans for iron and steel, industrial structure adjustment, or technology development.[241] However, we find that East Pipe received policy loans pursuant to sub-national development policies.

We address the various policy documents we investigated below.

11th Five-Year Plan

While the 11th Five-Year Plan lists specific policy goals relating to the steel industry, Petitioners are unable to identify provisions explicitly providing for financing and credit.[242] Thus, in and of itself, this Five-Year Plan does not provide a basis for finding that Policy Lending exists for the CWP industry. However, we have also considered it in connection with the other policy documents we examined.

Iron and Steel Policy

We begin with what is meant by "major iron and steel project{s}" as specified in the Iron and Steel Policy. We agree with Petitioners that the scope definition within the Iron and Steel Policy describing the "iron and steel industry" and, to a lesser extent, the Preamble language noted by Petitioners make it difficult to discern whether the CWP industry is covered by the Iron and Steel Policy. At the national government verification, we spent considerable time trying to determine definitively whether the CWP industry is covered by the Iron and Steel Policy. As a general matter, the GOC stated numerous times that CWP is not covered by the Iron and Steel Policy, but the GOC failed to provide any factual evidence in support of its statements. For example, we asked to see a positive list that would state definitively what is included under the policy. We were told that no such list existed, other than the problematic scope definition within the policy itself. The GOC explained that it was uncertain whether even a metallurgical dictionary or encyclopedia would contain a definition of "metal products."[243] The GOC did provide a 2006 metal products industry publication to demonstrate that the term "metal products" relates to "steel wire products" and not steel products writ large.[244] We do not, however, find the metal industry publication provided by the GOC to be a particularly convincing method to discern what is mean by "metal products" as stated in the scope definition in the Iron and Steel Policy.

At the national government verification, we also asked whether the GOC could provide documents that would illustrate the type of iron and steel projects that are subject to the approval and endorsement provisions specified in the Iron and Steel Policy. We explained that if CWP

[241] In addition, Petitioners' cite to a program by the State Administration of Metallurgical Industry that ensures that China's steel industry would be competitive after entry into the WTO. We find that there is no evidence on the record that the loans received by respondents were pursuant to, or pursuant to this program. The respondent's loans examined by the Department during the course of this investigation were granted long after China joined the WTO.
[242] See Petitioners' CB at pages 118-119.
[243] See the Department's National Government Verification Report at pages 21-22.
[244] See the Department's National Government Verification Report at pages 21, citing Verification Exhibit A-1.

projects were not among those subject to the approval and endorsement provisions, they would not appear in such documentation and, thus, would help substantiate the GOC's statements that CWP industry is not covered by the Iron and Steel Policy. The GOC explained that documents identifying such projects are highly sensitive and could not be provided to the Department.[245]

Accordingly, the Department finds that the GOC impeded its investigation by refusing to provide requested information during the investigation. The Department attempted several times to find a reasonable approach to getting the needed information, but the GOC refused to work with the Department in this matter. Because of this refusal, the Department was unable to verify important claims made by the GOC on the record of this case. While, as explained below, the lack of the GOC's cooperation does not affect our analysis, such a lack of cooperation in any future segments of this case could result in the application of adverse inference.

Although the GOC's unwillingness to provide this information precluded us from verifying at the national government whether CWP producers were subject to the approval and endorsement provisions of the Iron and Steel Policy, we received information about and were able to verify the loans received by the respondents. We note that the Iron and Steel Policy includes only one reference to using loans to support particular producers or activities.[246] Specifically, Article 16 states that:

> For a major iron and steel project that is based on home-made equipment as newly developed, that state shall grant policy supports in such aspects as…discounted interest rate{s}…[247]

Other references to financing are negative in the sense that they address loans to iron smelting, steel smelting, and steel rolling, all of which are "discouraged."[248]

Based on our examination of company loans, none of the loans reported by the respondents was for the purpose of financing the purchase of any equipment.[249] Thus, regardless of whether the Iron and Steel Policy covered CWP, we find that there is no evidence indicating that CWP producers received policy loans pursuant to or because of the particular producers or activities supported by the Iron and Steel Policy.

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[245] See the Department's National Government Verification Report at pages 21-22.

[246] Export credits are mentioned in Article 27, but appear to relate to exporting technology. In any case, there is no evidence that respondents received export credits.

[247] See the GOC's Original Questionnaire Response, at Exhibit 96, for the Iron and Steel Policy.

[248] See Articles 10 and 25 of the Iron and Steel Policy; See also, Article 24 of the Iron and Steel Policy for another provision speaking to discouraging financing.

[249] See Kingland's questionnaire responses on September 17, and October 18, 2007, and Exhibit 1-A of the Kingland verification report for the loans reported by Kingland; see also East Pipe's questionnaire response on September 17, 2007, for loans reported by Kingland.

Encouraged Industries, Products and Companies

The only mention of a specific financing tool in the Interim Provision of Promoting Industrial Structure Adjustment ("ISA") is found at Article 17, which states that for encouraged projects, all financial institutions shall provide credit in compliance with credit principles.[250] The Directory Catalogue on Readjustment of Industrial Structure (Version 2005) (the "Directory Catalogue") is the tool used by the ISA to identify encouraged products.[251] Although the respondents advertise making pipe that is considered encouraged by the Directory Catalogue, the ISA does not identify any specific financing tools that are provided to "encouraged" industries/projects. Consequently, we find that the respondents did not receive preferential lending pursuant to, or because of the ISA and the Directory Catalogue.

Technology Development Plan

We agree with Petitioners that the Technology Development Plan[252] does explicitly provide for policy lending to high technology enterprises. In particular, Article 15 states that the China Development Bank and the Export-Import Bank of China may provide soft loans to high and new technology enterprises for taking part in project investment, and provide financial support to export and import key technologies. Also, Article 16 instructs commercial banks to: (1) lend to high-tech projects "in accordance with national investment policy and credit policy;" and (2) further encourages the nominally "commercial banks" to "prioritize" loans to support the exportation of the products of high technology enterprises.[253] However, we found no evidence at verification that loans received by Kingland were bestowed pursuant to, or because of the Technology Development Plan.[254] Further, it is unclear whether Kingland's technology designation, as reported on its web-site, makes it eligible for financing under the Technology Development Plan. Moreover, Kingland did not receive loans from the China Development Bank or the Ex-Im Bank of China, which are the two state-owned banks that are specifically directed to provide policy loans pursuant to the Technology Development Plan.[255] Consequently, we find that Kingland did not use this program. However, we plan to continue to examine the Technology Development Plan and Kingland's designation as "National Major Enterprise of High and New Technology" closely in any subsequent administrative review.

[250] See Petition, Volume III, Part 1 of 4 at Exhibit 67.
[251] See Petitioner, Volume III, Part 1 of 4 at Exhibit 66.
[252] State Council Circular on Printing and Circulating Certain Supporting Polices for Implementation of the Outline of Medium and Long-Term Plan for National Scientific and Technological Development (2006-2020), See Petitioners Brief at page 126.
[253] See the Technology Development Plan, at Articles 15 and 16, provided at the GOC's 3rd Supplemental Response (December 17, 2007) at Exhibit 19.
[254] See Zhejiang Province Verification Report at pages 7-12.
[255] See Kingland's questionnaire responses on September 17, October 18, 2007, and Exhibit 1-A of the Kingland verification report for the loans reported by Kingland.

Sub-National Development Policies

First, with regard to sub-national development policies pertaining to Kingland, we disagree with Petitioners that Kingland benefited from a sub-national policy lending program. The Huzhou City Work report and Huzhou City Development Plan do speak of accelerating, strengthening and fostering star enterprises; increasing investment in key industrial projects; and targeting steel to make it bigger and stronger.[256] Further, Kingland did report that the local government designated Kingland Group as a "Super Star Enterprise."[257] However, at verification, Kingland stated the "Super Star Enterprise" designation afforded the Kingland companies with no preferential treatment.[258] Further, the GOC explained at the provincial verification that the term "Super Star Enterprise" referred to enterprises that already achieved success and was a form of recognition, and that the term had nothing to do with developing industry.[259] While both of the aforementioned statements provided by Kingland and the GOC were not supported with additional evidence, we found no evidence at verification that loans received by Kingland were bestowed pursuant to, or because of any designations or sub-national development policies.[260] Therefore, we find that Kingland did not receive government policy loans relating to any sub-national policies or plans.

Next, with regard to sub-national development policies pertaining to East Pipe, we find, based on AFA, that East Pipe benefited from a sub-national policy lending program. We requested that the GOC provide relevant sub-national (i.e., provincial or municipal level) industrial policies and other related documents.[261] The GOC denied the existence of any provincial or municipal government laws and regulations other than the ones already provided by the GOC in response to the original questionnaire.[262] However, contrary to the GOC's assertions, our verification revealed sub-national steel development policies not reported by the GOC relating to both the provincial and municipal levels in the Shandong Province.[263] Further, the 2007 Shandong Provincial Government Work Report states that the government "strictly" controlled access to credit. Finally, also at the provincial verification, we observed evidence that indicates that East Pipe received a policy loan.[264]

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[256] See the Report on the Outline of the Eleventh Five-Year Plan for National Economic and Social Development of Huzhou City ("Huzhou City Development Plan"); See also, the 2007 Huzhou Municipal Work Report ("Huzhou City Work Report"), both of which were provided in the GOC's 3rd Supplemental Response, at Exhibits S-9 and S-4, respectively.

[257] See the Zhejiang Provincial Verification Report at page 3.

[258] See Kingland's Verification Report at page 9. See letter from Kingland Group to the Department, Re: Response to Countervailing Duty Questionnaire, at page 10 (September 17, 2007).

[259] See the Zheijang Provincial Verification Report, at page 3.

[260] See Zhejiang Province Verification Report, at pages 7-12.

[261] See e.g. the Department's First Supplemental Questionnaire issued to the GOC on October 9, 2007, at question 11.

[262] See the GOC's Response to the First and Second Supplemental Questionnaires at page 8.

[263] See Shandong Province Verification Report at pages 4-5.

[264] See Shandong Province Verification Report at page 8.

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; and (C) significantly impedes a proceeding. Despite our requests for information on relevant sub-national development policies, the GOC withheld such information during the investigation within the meaning of section 776(a)(2)(A) of the Act. Further, the revelation of the existence of the previously nonexistent sub-national development policies for the Shandong Province and Weifang City, occurred after the deadline for submission of factual information pursuant to 19 CFR 351.301.[265] In addition, the revelation of these additional policies resulted in the GOC's original response pertaining to the nonexistence of subnational policies not verifying within the meaning of section 776(a)(2)(D) of the Act. Finally, we find that the GOC significantly impeded our investigation by withholding requested information, which did not allow the Department the ability to fully analyze the support provided by the sub-national development policies to CWP producers within the meaning of section 776(a)(2)(C) 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.[266] As noted above, by withholding requested information and claiming that such information did not exist, the GOC did not do the "maximum" to provide the Department with the information that we requested and thus failed to act to the best of its abilities.[267] Therefore, we are making an adverse inference that the sub-national development policies in the Shandong province provide policy lending support to CWP producers in the Shandong province. Consequently, we are countervailing loans supplied to East Pipe (the only respondent in the Shandong Province) by banks in the Shandong Province.

Policy Lending Benchmark

We have not adopted the Petitioners' position regarding the inflation adjustments or inclusion of all of the governance factors in the interest rate regression. We continue to determine that data from certain countries and certain years are aberrational and we do not include such aberrational data in the regression analysis; however, we have adjusted the regression so that a country's data are only taken out of the analysis for the year in which the data are considered aberrational. Finally, we have continued to exclude "voice and accountability" from the average of governance indicators in performing the regression analysis for the interest rate benchmark.

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[265] The deadline for submission of factual information was January 7, 2008, (i.e., seven days before the start of verification). See Section 776(a)(2)(B) of the Act.

[266] See, e.g. Notice of Final Determination of Sales of Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (Aug. 30, 2002).

[267] See Petitioners' CB at page 118, citing Nippon Steel Corporation v. United States, 337 F.3d 1391, 1382 (Fed. Cir 2003).

Section 351.504(a)(2)(i) of our regulations states that in identifying a "comparable commercial loan" to use as a benchmark, the Department will consider, inter alia, the currency in which the loan is denominated. In this investigation, our benchmark is not denominated in any single currency, but instead is constructed of interest rates from numerous countries, while each of the government-provided loans is denominated in a single currency. The inflation adjustment allows us to address this. As we explained in CFS from the PRC,[268] when the Department compares prices across countries, it normally converts those prices into a common currency because cross-currency price comparisons make no sense. In the case of interest rates, this involves adjusting for expectations about movements in the exchange rate between the currencies in question. However, such an adjustment is not feasible given the limited availability of relevant forward exchange rate data for the countries in the basket that underlie the benchmark. The Department can, however, adjust nominal interest rates for inflation and use a cross-country comparison of real interest rates for benefit calculation purposes. A cross-country comparison of real rates is a rough proxy for a comparison of exchange rate-adjusted nominal rates because of the general link between inflation and (nominal) exchange rate expectations. The use of real rates also makes sense because the benefit calculation should not reflect inflation expectations that differ across countries. While our regulations do not expressly permit an inflation adjustment, they do emphasize the desirability of using a benchmark denominated in the same currency which supports making this adjustment. Once the benchmark is adjusted for inflation, it is necessary to also adjust the rates on the government-provided loans for inflation so that the comparison is conducted on an inflation-adjusted basis.

Similarly, while the Department's regulations do not explicitly address the use of governance factors for making comparisons, as with the inflation adjustment, they facilitate cross-country comparisons because they incorporate other important factors that can influence interest rate formation. Thus, contrary to Petitioners' claim, the inflation adjustment and inclusion of the governance factors are consistent with the intent of 19 CFR 351.505(a)(2)(i).

Further, we see no inconsistency between this approach and the CIT's ruling in Hynix. Banks and other lenders in each of the countries included in the constructed benchmark will take into account various factors such as the quality of governance in a country, political stability, government involvement, and interference in the respective economies in assessing risk associated with lending to businesses in a country. To the extent that there are differences across countries in these factors (in such areas as political stability, government effectiveness, and rule of law) they will give rise to differences in perceived risk associated with the particular country which will be reflected in a country's overall level of interest rates, i.e. all else equal, a company in a highly unstable country will pay a higher interest rate than a similar company in a relatively stable country. Moreover, in the portion of Hynix to which petitioner cite, the CIT was examining the relevance of government involvement in the restructuring of a corporation and not governance factors, generally.[269] As such, Hynix is inapposite to the Department's adjustment of the policy lending benchmark.

[268] See CFS from the PRC at Comment 10.
[269] See Hynix, 425 F.Supp.2d at 1308.

The Department continues to determine that it is appropriate to exclude the governance indicator "voice and accountability" from the average of governance indicators in performing the regression analysis for the interest rate benchmark. The Department finds that the other governance indicators are more indicative of the factors that contribute to perceived risk in a country and that "voice and accountability" is not a factor that a lender would consider when determining the risk associated with lending to a business in a particular country.

With respect to the aberrational values excluded from the regression, the Department excluded one data point for 2002, Brazil, for being aberrational. The Department determined Brazil's data to be aberrational because the inflation adjusted interest rate for Brazil was almost double that of the next lower rate and there were no other rates nearly as high Brazil's. The analysis for 2005 excluded two data points, those for Angola and Brazil, for the same reason that Brazil was excluded for 2002. Angola and Brazil's inflation adjusted interest rates in 2005 were almost double the rate of the next lower country. In the regression analysis for 2006, no countries were excluded as aberrational.

Comment 9: Provision of Electricity for Less Than Adequate Remuneration

Petitioners' Affirmative Comments:

Petitioners argue that the Department's Preliminary Determination with respect to electricity at LTAR was erroneous because it was not consistent with HRS from Thailand.[270] In the Preliminary Determination, the Department found that the GOC's provision of electricity to CWP producers did not confer a countervailable subsidy because the provision of electricity to large-scale enterprises in the PRC is neither de jure nor de facto specific. Petitioners argue that the Department should revise certain elements of its analysis in the Preliminary Determination, consistent with HRS from Thailand, and find that the provision for electricity by the GOC is a countervailable subsidy.

With respect to specificity, Petitioners argue that the Department should revise its analysis from the Preliminary Determination due to the fact that: 1) electricity in the PRC is produced by numerous power plants; 2) the prices for uploading, transmitting and selling electricity are regulated by the GOC through the National Development and Reform Commission ("NDRC") and provincial governments; 3) two state-owned companies (State Grid Corporation of China and China South Power Grid) are responsible for transmitting electricity; and 4) the NDRC sets the prices for these two companies. The Petitioners also argue that electricity in the PRC is divided into broad consumer categories, and that some industries within the "large-scale industry" receive discounts.

Petitioners state that the Department must conduct its specificity analysis at the appropriate level of aggregation similar to HRS from Thailand , where the Department found the Royal Thai

[270] See HRS from Thailand at 50410.

Government (RTG), through its agencies, determined policies for the setting of electricity prices. In HRS from Thailand , there were two state-owned companies responsible for the transmission of electricity, while all consumers in the same category paid the same rate to either of the two state-owned companies and the RTG controlled the prices based on cost. Petitioners assert that because the GOC, through its agencies, determines policies for setting electricity rates in this case, the Department should find specificity using the same methodology as HRS from Thailand.

Petitioners cite the appeal of HRS from Thailand to the CIT, where the plaintiffs argued that the provision of electricity was not specific because "industrial companies in the same customer categories located anywhere in Thailand {paid} the same electricity rates."[271] The court upheld the Department's determination because electricity in one of the Thai regions was cheaper than the other. Petitioners argue that the fact that companies in the same customer category paid the same rate was insignificant to the court and the Department's analysis, and that the record of this proceeding indicates that the Department should also find the provision of electricity specific according to section 771(5A)(D)(iv) of the Act.

Petitioners also state that at the verification of the NDRC, the Department learned that prices for electricity vary between provinces, and that prices within Shandong province (where East Pipe is located) also vary across cities and counties. Petitioners also argue that in Shandong, "off-grid" power plants exist that set rates higher than the rates set by the NDRC for companies such as East Pipe and Kingland that are on the State Grid Corporation of China. Petitioners argue that the GOC, through either the NDRC or provincial governments, approves prices set by these off-grid companies.

Petitioners state that according to the Department's verification report, 1) companies on the State Grid pay lower electricity rates than companies using off-grid companies; 2) companies within some regions pay lower electricity rates than companies in other regions; and 3) companies in some cities within Shandong Province pay lower rates than companies in other cities.[272] Petitioners add that at the verification of the Weifang Price Department and the Weifang Electricity Bureau, the Department established that six location specific price zones existed within Shandong Province and that Exhibit 116, paragraph V., of the GOC's September 17, 2007, questionnaire response indicates that Shandong Province shifts prices between urban and rural customers. Moreover, Petitioners contend that Article 34, Exhibit 114, Appendix 3 of the same response, further indicates that differential prices exist between urban and rural users. As a result, Petitioners argue, the record evidence strongly supports a finding that the provision of electricity is specific. Petitioners also argue that at the Department's verification of the Huzhou Municipal Government, the facts also established that in addition to the per unit rate charges, companies within the province, including Kingland, paid what appear to be varying rates of surcharges. Petitioners contend that because neither entity explained the basis for these surcharges, the Department should, as facts available, also find that the government's discretionary use of varying surcharges also results in specificity because criteria for applying the

[271] See Royal Thai Government v. United States, 441 F. Supp. 2d 1350, 1357-1358 (Ct. Int'l Trade 2006) ("Royal Thai Government*")*.
[272] See GOC Verification Report at pages 37-39.

surcharge are not clearly set, strictly followed, or automatic. Petitioners also cite Exhibit 118 of the GOC's September 17, 2007, response to argue that prices for electricity vary between limited industries and non-limited industries, with non-limited industries paying lower rates than limited industries. The Petitioners contend that producers of CWP would be included within the non-limited industries category.

With regard to benefit, the Petitioners argue that the Department must conduct its benefit analysis similarly to prior cases involving the provision of electricity where governments were the sole or dominant provider of a service. Petitioners contend that the Department must examine whether the government price was set in accordance with market principles, consistent with 19 CFR 351.511(a)(2)(iii),[273] the practice that was upheld in Royal Thai Government.

Petitioners argue that although multiple recitations by the GOC exist throughout the record of this proceeding that electricity prices are set in order to cover costs, no record evidence exists to indicate that costs are actually covered. Petitioners contend that the Department should conduct its benefit analysis according to 19 CFR 351.511(a)(2)(iii) and examine whether the GOC applied market principles in setting its price.[274] The Petitioners argue that the Department will then find that the provision of electricity for LTAR confers a benefit to CWP producers, consistent with section 776(a)(2)(D) of the Act.

In order to calculate a benefit for this program, the Petitioners argue that the Department should compare the prices in Shandong Province (for East Pipe) and Zhejiang Province (for Kingland), respectively, to the prices for in Shanghai Province and Jiangsu Province – the two coastal provinces located between Shandong and Zhejiang.[275] The respondent's resulting savings per kilowatt hour, Petitioners assert, should then be applied to each respondent's total kilowatt usage for the POI.

GOC's Rebuttal Comments:

The GOC argues that based on the same set of facts presented in the Petitioners' case brief, the Department correctly concluded in its Preliminary Determination that the provision of electricity was not specific to large-scale enterprises in the PRC, since virtually all enterprises pay the same rates within each locality. The GOC also argues that the Department concluded that the provision of electricity in the PRC was based on market principles because there is an absence of price discrimination in the market. The GOC asserts that nothing at verification altered the facts and findings of this proceeding with regard to electricity and that NDRC officials confirmed with the Department that it establishes cost-based pricing guidelines with provincial level governments setting prices according to actual local conditions, which are approved by the NDRC. The GOC argues that there is no uniform pricing across the PRC, and that each region

[273] See e.g. Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 FR 55810 (August 30, 2002); see also HRS from Thailand at 50410.
[274] See Preamble, 63 FR at 65378.
[275] See GOC Questionnaire Response at Exhibit 115.

prices its electricity based on the recovery of cost. Therefore, the GOC asserts that Petitioners' claims are misplaced.

With respect to specificity, the GOC refutes the Petitioners' claim that the Department should have employed a specificity analysis based on region rather than customer classification. The GOC notes that in HRS from Thailand, the RTG set a uniform national tariff policy for all regions, and there was evidence that the RTG was subsidizing the price of electricity to offset the loss of one of the two state-owned electric companies. The GOC argues that in HRS from Thailand, there was evidence to support the position that prices were set at the national level, while in the case at hand, the prices for electricity in the PRC are set by each region according to local conditions, and account for costs and profits. The GOC argues that it would be wrong for the Department to find specificity by distinguishing among the regions which each have pricing authority. The GOC also states that if a subsidy in fact existed, the subsidies granted by a state or province that are not limited to a specific enterprise, industry or group would not be considered specific. In this case, the GOC argues, the Department confirmed that within each locality, prices do not prefer a specific enterprise, industry or group "beyond acceptable commercial practice related to standard customer classification and the amounts of electricity consumed."[276] Additionally, the GOC argues that the only approach to finding specificity with regard to electricity is to determine if similarly situated customers in each region receive the same price. Because the Department confirmed this point at verification, the GOC argues, no specificity exists.

Finally, the GOC argues that the provision of electricity does not confer a benefit because the prices for electricity are set in accordance with market principles. Contrary to Petitioners' argument that nothing on the record demonstrates that the PRC sets electricity prices in accordance with market principles, the GOC states that the Department noted in its Preliminary Determination and confirmed at verification that no price discrimination exists amongst electricity consumers. Second, the GOC argues that the Department verified documents provided by the GOC that indicated established guidelines that electricity prices shall be set based on the principal of cost compensation and profits. Hence, the GOC argues that there is no basis to conclude that the provision of electricity in the PRC confers a benefit.

Department's Position:

We continue to find that the GOC's provision of electricity does not confer a countervailable subsidy on CWP producers, although our analysis has changed since the Preliminary Determination based on information obtained at verification. Specifically, we have determined that record evidence indicates that prices for electricity are set at the provincial (Zhejiang) or sub-provincial level (in Shandong), and that large-scale users within these jurisdictions face the same fee schedules. Moreover, there is no evidence that these large-scale users are limited in number or operate within a limited number of industries. Therefore, we determine that the provision of electricity in these jurisdictions is non-specific within the meaning of section 771(5A) of the Act.

[276] See GOC's Rebuttal Brief at page 17.

While we acknowledge that the record contains some contradictory evidence on this point, on balance, the information on the record of this proceeding supports the conclusion that prices to users are set at the subnational level. At the national government verification, GOC officials explained that lower level governments set prices according to the guidelines established by the NDRC, and that these prices are approved by the NDRC.[277] In Zhejiang Province, provincial officials stated that prices are set by the NDRC, but that the provincial pricing bureau makes recommendations to the national government about adjustments to prices.[278] In Shandong Province, officials stated that the NDRC approves the pricing schedules established by the Shandong Pricing Bureau.[279] In both Zhejiang and Shandong, the electricity rate schedules setting out the prices for the various categories of users are issued by the provincial price bureaus and not by the NDRC.[280] Thus, while the national government clearly plays a role, on balance the evidence on the record of this proceeding indicates that prices are established at the subnational level.[281]

In Zhejiang, the prices set by the provincial price bureau apply uniformly across the province.[282] In Shandong, for historical reasons, different prices are set for different sub-jurisdictions.[283] According to officials from the Shandong Price Bureau, the prices for these sub-jurisdictions are set by the sub-jurisdictions, and are monitored by the Shandong Price Bureau.[284] Prices within each sub-jurisdiction are uniform.[285]

Having found that prices are set uniformly within Zhejiang Province and within the sub-jurisdictions of Shandong Province, we address Petitioners' other arguments regarding specificity. Petitioners have argued that 1) companies on the state grid pay lower prices for electricity than companies using off-grid suppliers; 2) Shandong Province shifts prices between urban and rural customers through use of a surcharge; and, 3) that different prices arise within Zhejiang Province because of various surcharges. Regarding different charges depending on whether the customer purchases on- or off-grid electricity, the GOC identified one such off-grid

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[277] See GOC Verification Report at page 37. See also, Exhibit 114 of GOC Questionnaire Response at Appendix 3 stating that "electricity sales shall be formulated by the government according to unified policy and level-by-level administration".

[278] See Memorandum to Susan Kuhbach, Senior Office Director, Re: Verification Report of the Huzhou Municipal Government and the Zhejiang Provincial Government of the People's Republic of China Verification Report (March 11, 2008) at page 14 – 15 ("Huzhou-Zhejiang Verification Report").

[279] See Memorandum to Susan Kuhbach, Senior Office Director, Re: Government of the People's Republic of China, Weifang City and Shandong Province Verification Report (March 7, 2008) at page 9 ("Shandong Verification Report").

[280] See GOC Questionnaire Response, at Exhibit 116 and 117, and the GOC 3rd SQR at Exhibit S29 and S3.

[281] Prices paid to electricity suppliers appear to be set in a parallel manner, i.e. provinces set the prices and send them to the NDRC for approval. See, GOC Verification Report at page 37.

[282] See GOC Verification Report at page 39, GOC Questionnaire Response at Exhibit 117 and GOC 3rd SQR, at Exhibit S31.

[283] See GOC Verification Report at page 39, GOC Questionnaire Response at Exhibit 116 and GOC 3rd SQR, at Exhibit S31.

[284] See Shandong Verification Report at page 9.

[285] See GOC Questionnaire Response at Exhibit 116 and GOC 3rd SQR at Ex S29.

producer in Weifang. However, there is no evidence on the record that this particular generating plant was state-owned and, hence, whether it is properly considered in determining whether government-provided electricity is specific. Regarding the urban/rural surcharge in Shandong identified by the Petitioners, this provision of the Shandong rate circular applies to other sub-jurisdictions, i.e., not to the sub-jurisdiction that includes Weifang where East Pipe is located.[286] Finally, the surcharges identified in Zhejiang Province apply to all users other than agricultural, drainage and threshing operations.[287] As demonstrated at verification, these surcharges applied equally to Kingland and other, similar-sized industrial users. [288]

Based on our finding in this proceeding that electricity rates are set at the sub-national level, we disagree that the analysis applied in HRS from Thailand is appropriate here. That is, our specificity determination in HRS from Thailand was explicitly premised on a national policy to provide preferential electricity which is not present in China's electricity market.[289]

For all these reasons, the Department finds that the GOC's provision of electricity does not confer a countervailable subsidy to producers of CWP.

Comment 10: Critical Circumstances on an Importer Specific Basis

SEAH Steel of America Affirmative and Western International Forest Products, LLC Comments:

The interested parties SeAH Steel of America ("SSA") and Western International Forest Products, LLC ("Western"), importers of subject merchandise, filed a case brief in both the antidumping duty investigation and the countervailing duty investigation of CWP from the People's Republic of China. The comments that SSA and Western submitted for both proceedings are being summarized and addressed herein.

SSA and Western argue that the Department should reconsider its methodology of determining whether critical circumstances exist within the Preliminary Determination of both the antidumping duty investigation and the countervailing duty investigation of CWP from the People's Republic of China. Specifically, SSA and Western request that the Department use their import-specific data submitted to the Department, as well as related data from the U.S. Customs and Border Protection (CBP), to determine that their imports of subject merchandise were not "massive" over a short duration of time, within the meaning of 19 CFR 351.206.

SSA and Western argue that the Department should analyze critical circumstances on an importer-specific basis because U.S. law provides the Department with the legal authority to perform such an analysis. SSA and Western also contend that Congress' use of the term "imports" in the critical circumstances provision of the antidumping and countervailing duty

[286] See GOC Questionnaire Response at Exhibit 116 para V.
[287] See Huzhou-Zhejiang Verification Report at page 15. See also GOC Questionnaire Response at Exhibit 117.
[288] See Huzhou-Zhejiang Verification Report at pages 14-15.
[289] See HRS from Thailand at Comment 11.

statutes indicated that Congress desired that critical circumstances analysis would focus on the actions of the importer and not the exporter. See 19 U.S.C § 1671b(e)(1) and 19 U.S.C §1671d (a)(2).

SSA argues that had Congress wanted the Department to assess whether critical circumstances exist for each individual foreign producer or exporter under investigation then the statute would have indicated that CBP aggregate the data for each accordingly and not by entries which are defined as imports. SSA asserts that the Department's Antidumping Manual ("Manual") also supports its argument for an importer-specific analysis. SSA observes that the Manual states that the publication of an affirmative preliminary determination is the starting date when an importer is normally subject to potential liability with suspension of liquidation and the posting of cash deposits or bonds and then states that, "{i}n anticipation of high preliminary dumping duties, the importer may deliberately import and stockpile large quantities of a product."[290] Thus, SSA suggests that the Department recognizes that it is the importer rather than the exporter that has a reason to stockpile the subject merchandise to evade the possible countervailing duty liability.

SSA argues that the collection and use of importer-specific data for analyzing whether critical circumstances exist is administratively feasible based on normal Department practices. SSA argues that the fact that the Department routinely obtains importer-specific data from CBP and calculates antidumping duty assessment rates that are applicable to specific importers shows that a similar method in the context of a critical circumstances determination is administratively feasible. Western also argues that an importer-specific critical circumstances analysis is administratively feasible since shipment data disaggregated by importer is readily available to the Department in this proceeding.

SSA and Western both assert that the Department's failure to consider an importer-specific critical circumstances analysis while imposing an AFA rate on exporter Shuangjie unfairly penalizes importers who could not control Shuangjie's decision to withdraw from the proceeding on October 31, 2007. The Department issued its Preliminary Determination on November 5, 2007 and based Shuangjie's rate on AFA.[291] SSA argues that the application of AFA to Shuangjie, based on the exporter's withdrawal just five days prior the Preliminary Determination, imposed an unwarranted liability in the form of the 264.98 AFA deposit rate on SSA and other similarly situated importers, such as Western, who purchased CWP from Shaungjie within the three-months preceding the Preliminary Determination. SSA argues that this AFA critical circumstances decision does not place any consequences on exporters. It asserts that the critical circumstances provision should not punish innocent importers who are subjected to countervailing duty liabilities because an unrelated producer has withdrawn from the investigation. SSA proposes that "rather than making a blanket application of critical circumstances to all affected importers in the case of an affirmative finding of massive imports, the Department should use the affirmative finding as a rebuttable presumption which individual

[290] See United States Department of Commerce: Import Administration's Antidumping Manual, January 22, 1998.
[291] See Memorandum to the File Re: Countervailing Duty Investigation: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China – Selection of Adverse Facts Available Rate for Tianjin Shuangjie Steel Pipe Co., Ltd. (November 5, 2007).

importers can overcome by demonstrating that their own imports of subject merchandise did not surge during the comparison period." Accordingly, SSA proposes that the Department perform a surge analysis on an importer-specific basis, providing individual importers the opportunity to come forward with the relevant and necessary data.

SSA and Western also contend that the Department should revisit the facts in Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China[292] and Ammonium Nitrate from the Russian Federation.[293] In those cases, the Department declined to issue critical circumstances determinations based on an importer-specific analysis. SSA claims that those cases are inapposite since they both deal with an importer who requested that the Department make a producer-specific critical circumstances determination for an uncooperative producer for which the importer provided export data and claimed to be the only importer. SSA argues that in this instant investigation, it does not want the Department to make a company-specific critical circumstances finding with respect to any producer/exporter, but instead wants the Department to make an importer-specific critical circumstances determination based on provided importer data.

SSA and Western also argue that the import data they submitted on December 7, 2007, proves that their imports of subject merchandise did not increase following the filing of the petition on June 7, 2007 and as a result, SSA and Western should be removed from any final critical circumstances determination that the Department may issue. SSA and Western defend their position by stating first that U.S. law provides the Department with the legal authority to analyze critical circumstances on an importer-specific basis. Next, these importers claim that the application of importer-specific findings, where the importer affirmatively demonstrates that it did not substantially increase imports over a relatively short duration of time, are consistent with the policy objective of the critical circumstances provision.

Petitioners' Rebuttal

Petitioners argue that the record evidence present in this case leads to an affirmative critical circumstances determination by following the Department's regulations and statute, which they argue do not allow for an import-specific analysis of critical circumstances. The Department's prior determinations also do not allow for the type of importer-specific analysis requested by SSA and Western. Petitioners point out that the Department previously considered an identical set of facts regarding an importer-specific critical circumstances determination in Ammonium Nitrate from the Russian Federation and declined to issue an importer-specific analysis.

Petitioners question the relevance of SSA's attempts to distinguish the facts of this instant case from those of Ammonium Nitrate from the Russian Federation. Petitioners argue that the contrast that SSA's attempts to between its cooperation in the instant proceeding and the lack of

[292] See Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China; Affirmative Final Determination of Circumvention of Antidumping Duty Order, 59 FR 15155 (March 31, 1994).

[293] See Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, 65 FR 42669 (July 11, 2000) ("Ammonium Nitrate from the Russian Federation").

cooperation on the part of the Ammonium Nitrate from the Russian Federation respondent (Acron) is not a relevant comparison, and assert that the applicable comparison is between Acron and the non-cooperative respondent in this investigation. Petitioners also reject the distinction that SSA makes between its "importer specific" request and what SSA considers to be the Ammonium Nitrate from the Russian Federation importer's "producer specific" request. Petitioners argue that the requests are identical because each deals with relieving an importer from paying duties owed because of a non-cooperative producer in an investigation. Petitioners argue that the Department should recognize the similarities between Ammonium Nitrate from the Russian Federation and this case, and accordingly decline to analyze any importer-specific data in the instant investigation because it is unverified and related to a non-cooperative respondent as was the case with ConAgra in Ammonium Nitrate from the Russian Federation.

Additionally, Petitioners point out that the arguments made by SSA and Western misinterpret and ignore the language of the statue concerning critical circumstances. Petitioners contend that the statute does not contemplate that the Department will consider shipments of scope merchandise on an importer-specific basis. Petitioners assert that the law dictates that the Department will investigate the entire category of merchandise that is within the scope of an investigation. Petitioners reject the importers' position that the words "imports" and "importer" suggest that the Department is required to consider an importer-specific analysis. Petitioners argue that these words are both modified and must be read in conjunction with the term of art, "subject merchandise," See § 705(a)(2) of the Act, (19 U.S.C. § 1671d(a)(2)) and § 771(25) of the Act, (19 U.S.C. § 1677d(25)). Petitioners argue that the importers have ignored the intent of the statute by focusing on the words "imports" and "importer" and relief should be provided to the domestic industry as the critical circumstances provision intends and not the importers.

Finally, Petitioners claim that the importer-specific methodology proposed by SSA and Western is not administrable by the Department. Petitioners assert that as a matter of equity, the Department cannot make importer-specific critical circumstances determinations for SSA and Western without doing the same for all other importers. Petitioners dismiss the importers' arguments that a critical circumstances determination applicable to all importers is "punitive," citing several precedent cases in which respondents' rates were based on AFA and importers were not exempted from the duty liability.[294]

Petitioners dispute SSA's contention that the Department should treat an affirmative finding of critical circumstances as a "rebuttable presumption" that could be overcome by individual importers, arguing that application of such a rebuttable presumption in critical circumstances proceeding conflicts with the Department's prior practice.[295] Petitioners assert that applying a rebuttable presumption would also fail to address the concern that an exporter whose overall shipments have surged, would be partially exempted from a critical circumstance based on data submitted by an importer. Petitioners suggest that the available importer-specific data that SSA and Western propose to use to rebut this presumption would be difficult to verify, in part because

[294] See Petitioners' CB at 86.
[295] Id.

it includes shipments from AFA respondent, Shuangjie. Petitioners also argue that an "equitable" implementation of SSA's proposed methodology would also require the Department to examine a much wider body of shipment data than they believe SSA has suggested, including the importer-specific shipments for exporters whose overall data do not indicate a surge. Petitioners contend that in doing this, the Department would need to reconcile its CBP data with each exporter's shipment data and verify this data, a "Herculean" task in Petitioners' estimation.

Department's Position:

We have continued to make our critical circumstances determination based on producer data and not on an importer-specific basis. This is consistent with the Department's past practice.[296] Furthermore, the critical circumstances provisions are focused on determining whether a surge of sales to the United States occurred in response to the filing of an AD/CVD petition. Analyzing producer data evidences whether that producer increased its sales following the filing of a petition. An importer specific analysis would allow an exporter or producer to mask such a surge by selling to multiple importers. Finally, the Department agrees that the importer-specific methodology proposed by SSA and Western would be unduly burdensome for the Department to administer. As Petitioners have argued, as a matter of equity, the Department cannot make importer-specific critical circumstances determinations for SSA and Western without doing the same for all other importers. We also need to consider individual exporters as well. Much of the specific shipment data used in such an analysis would be difficult, if not impossible, to verify, particularly if shipments originate with producers who have declined to cooperated.

Comment 11: Base and Comparison Period for Critical Circumstances

Western International Forest Products, LLC and SEAH Steel of America Affirmative Comments:

SSA and Western argue that the Department should not include June 2007 as a part of the post-petition comparison period because their imports of subject merchandise from China that arrived in the United States in June 2007 could not have been exported in response to filing of the petition. SSA argues that when the Department has importer-specific data, it is erroneous to treat the month the petition was filed as part of the post-petition comparison period in situations where the petition was filed in the first half of the month, and part of the pre-petition base period when it was filed in the second half of the month. SSA and Western argue that they have placed evidence on the record demonstrating that there is a considerable amount of time between the bill of lading date and the actual entry date of the merchandise in the United States.

SSA argues that it is distortive to incorporate the month of the filing of the petition as part of the post-petition comparison period and cites the decision made by the Department in Uranium from Ukraine and Tajikistan (Uranium) to support this position.[297] SSA asserts that in Uranium, the

[296] See Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, 65 FR 42669 (July 11, 2000) at Comment 3.

[297] See Final Determination of Sales at Less Than Fair Value: Uranium from Ukraine and Tajikistan, 58 FR 36640, 36646 (July 8, 1993).

Department stated that inclusion of the month of the filing of the petition as part of the comparison period was distortive. In Uranium, the antidumping duty petition was filed on November 8, 1991, but the Department determined that it was distortive to include November as part of the comparison period because of shipment lag-times.

SSA asserts that due to shipment lag times, their imports of subject merchandise that entered during June 2007 were ordered and shipped prior to the June 7, 2007 filing of the petition for this case. Therefore, SSA argues that none of the imports that entered could have been shipped in response to the petition filed on June 7, 2007, or in an attempt to stockpile the subject merchandise. SSA claims that this is demonstrated by actual bill of lading dates for shipments that entered in June and contend that SSA's orders of standard pipe from China "virtually stopped" in June. After analyzing the aggregate monthly import data and deducting monthly shipment volumes for East Pipe and Kingland from the total monthly import volumes from China, SSA and Western conclude that imports from other exporters were not significant during the post-petition comparison period.

Finally, SSA argues that the Department should adopt an element of the critical circumstances methodology of the companion antidumping investigation and use monthly import data on a aggregate basis as AFA to determine whether imports from Shuangjie have surged.[298] In doing this, SSA argues that the Department should use March through June, 2007 as the base period and July through October as the comparison period.

Zhejiang Kingland Pipeline and Technologies, MAN Ferrostaal Inc., Commercial Metals Company, and QT Trading LP Affirmative Comments:

Respondent Kingland, and interested parties MAN, CMC, QT argue that Kingland's shipments during June 2007 should be considered as part of the pre-petition period for the Department's critical circumstances analysis because Kingland has demonstrated that it made these shipments to fulfill contracts made prior to June 2007. Citing the 1979 Trade Agreements Act House Report,[299] Kingland, MAN, CMC, and QT claim that Congress's intent with the critical circumstances provision was to deter exporters from circumventing the law by increasing their exports during the time between the initiation of an investigation and a preliminary determination. Kingland, MAN, CMC, and QT contend that the Kingland FIS,[300] dated December 28, 2007, demonstrates that all of Kingland's sales in June 2007 were made to fulfill contracts prior to June 2007. Therefore, Kingland, MAN, CMC, and QT argue that these shipments involved no attempted circumvention or intention to increase shipments between the

[298] See Memorandum for Stephen J. Claeys from Abdelali Elouaradia, Antdumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, Regarding Preliminary Affirmative Determination of Critical Circumstances (A570-910) (December, 11, 2007) at 5-7 and Attachment 2.

[299] See Report of the Committee on Ways and Means, U.S. House of Representatives, to Accompany H.R. 4537, Trade Agreements Act of 1979, 96th Congress, 1st Session, House Report No. 96-317 at 63 ("1979 Trade Agreements Act House Report").

[300] See letter from Kingland to Secretary of Commerce, "Circular Welded Carbon Quality Steel Pipe from China – Factual Information" (December 28, 2007) ("Kingland FIS").

initiation and preliminary determination. Kingland, MAN, CMC, and QT also argue that the Department should, in the alternative, make a final negative determination of critical circumstances because post-petition shipments were considerably less than pre-petition shipments for comparable periods.

Citing information in the Kingland FIS, Kingland, MAN, CMC, and QT argue that all of Kingland's shipments during June 2007, the month of the filing of the petition, were to fulfill contracts concluded in March, April, and May 2007. They also note that the Department has the discretion to include shipments that were made by a foreign producer/exporter during the month in which a petition was filed as part of the pre-petition period. Kingland argues that Congressional intent in drafting the critical circumstances provision was to deter exporters from increasing their exports to the United States between the initiation of an investigation and a preliminary determination by the Department.[301] Because Kingland's shipments were made to fulfill contracts concluded prior to the month of the petition, Kingland, MAN, CMC and QT argue that the Department must include the June 2007 shipments in the pre-petition period and make a negative final determination of critical circumstances.

Petitioners Rebuttal Comments:

Petitioners argue that the Department should continue to define the base and the comparison period consistent with its normal practices and include June 2007 within the post-petition comparison period in both the antidumping and countervailing investigations of this proceeding. Petitioners state that because there are companion CVD and antidumping investigations on subject merchandise identical in scope, the month of the preliminary determination in the CVD investigation should define the end of the post-petition comparison period, which is November 2007 for both investigations. Furthermore, Petitioners reject the argument made by the importers and respondents that the lag-time for shipments between China and the United States compels the Department to incorporate June in the pre-petition base period and cite to other cases involving imports from China in which the Department defined the base period and comparison period according to its normal standards. Petitioners recommend that the Department continue to follow what they consider to be its normal practice and make a final affirmative critical circumstances determination because imports of subject merchandise have clearly increased by at least 15 percent as required by 19 CFR § 351.206(h)(2). Additionally, Petitioners argue that because more data is now available on the record for the final determination, the Department should expand the comparison and base periods to five months each.

Furthermore, Petitioners argue that even though, the importers and respondents say that the lag-time due to shipment time between China and the United States should convince the Department to incorporate June 2007 in the base period, in other cases involving imports from China, the Department has defined the base period and comparison period according to its normal standards. Petitioners also recommend that the Department continue to follow its normal practices and make a final affirmative critical circumstances determination because record evidence

[301] See 1979 Trade Agreements Act House Report at 63.

demonstrates that imports of subject merchandise have clearly increased by at least 15 percent as required by 19 CFR § 351.206(h)(2). Additionally, Petitioners argue that because more data is now available on the record for the final determination, the Department should expand the comparison and base periods.

Department's Position:

The Department is continuing to define base and comparison periods within the bounds of its normal practice by including June 2007 within the post-petition period, and extending the comparison period up through the month prior to Preliminary Determination, to the extent shipment data are available on the record to do this. We have not included the month of the Preliminary Determination because the Preliminary Determination was published in the first half of the month. The Department's position is supported by both law and prior decisions. See section 705(a)(2) of the Act and 19 CFR 351.206. Pertinent examples of the Department's past practice regarding the application of critical circumstances include Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 and accompanying Issues and Decision Memo at Comment 3 (April 16, 2004) ("CTVs") and Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decision Memo at Comment 7.

In CTVs, the Department adjusted the normal base and comparison periods for "extraordinary circumstances" (e.g., the SARS epidemic) where a respondent's reaction to these extraordinary circumstances were well-documented, but made no adjustment for long-term contracts (items ordered before the petition was filed).[302] In CTVs, the Department stated that although it had acknowledged in prior cases that the purpose of the critical circumstances provision is to prevent attempts to circumvent the imposition of duties, we did not intend that all shipments made pursuant to long-term contracts should be excluded. The Department determined that such a general finding would be inappropriate because under the terms of many long-term contracts, including those examined in CTVs, respondents have the flexibility to increase shipments prior to the suspension of liquidation, thereby circumventing the imposition of duties. In the instant investigation, we note that although SSA and Kingland provide evidence that contracts for orders shipped in June 2007 were completed prior to that month, neither SSA or Kingland claim or provide evidence that these pre-petition sales contracts were binding in a way that ruled out any subsequent amendments. Given this precedent, there is no reason to make an adjustment for orders in this case. Regarding SSA's argument that subject merchandise was most likely shipped prior to the filing of the petition on June 7, 2007, see discussion in the Final Critical Circumstances Memorandum.[303] Therefore, we are not analyzing June 2007 as part of the pre-petition period.

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[302] See CTVs at Comment 3.

[303] See Memorandum to the File Re "Critical Circumstances Analysis for Zhejiang Kingland Pipeline and Technologies Co., Ltd. Import Shipment Analysis for Zhejiang Kingland Pipeline and Technologies Co., Ltd. and "All Others" (May 29, 2008) ("Final Critical Circumstances Memorandum") (this memorandum is on file in the

For the CVD and AD investigations, the Department analyzed critical circumstances based on the broadest comparison period available based on the data. However, a 6-month analysis will not be used because the Preliminary Determination in the CVD investigation was published in the first half of November 2007. As such, including data from that month would be distortive in the AD and CVD critical circumstances analyses because it would reflect the impact of the preliminary duty rate on shipment volumes during the greater part of that month. For the countervailing duty investigation, the Department analyzed Kingland's shipment data using a 4-month base and comparison period of February 2007 through May 2007 and June 2007 through September 2007, respectively. The Department analyzed East Pipe's shipment data using a five-month base and comparison period of January 2007 through May 2007 and June 2007 through October 2007, respectively. Similarly, the Department analyzed the countervailing duty investigation "All Others" shipment data using a 5-month base and comparison period of January 2007 through May 2007 and June 2007 through October 2007, respectively. Finally, the Department will use a 5-month base to determine whether critical circumstances exist within the antidumping duty investigation.

Comment 12: Kingland Export Subsidy and Finding of Critical Circumstances

Kingland's Affirmative Comments:

Kingland notes that the Department stated, "Kingland received countervailable export subsidies during the POI" in the Preliminary Determination.[304] Kingland also notes that the Department found Kingland's use of the export subsidy in question, the "Super Star Enterprise of Huzhou City" award, to be sufficient to make an affirmative determination of critical circumstances under section 703(e)(1)(A) of the Act. Kingland contends that the award is not tied to export performance. Furthermore, Kingland contends that Kingland Group, the recipient of the award, did not export during the POI or any other time. Therefore, Kingland argues that the Department cannot rely on the award to support a finding of critical circumstances.

Petitioners' Rebuttal Comments:

In response, Petitioners argue that the finding of an export subsidy is irrelevant to an affirmative finding of critical circumstances under the Department's current regulations at 19 CFR 351.206. Petitioners contend that the Department must only find "a subsidy inconsistent with the subsidy agreement (and) massive imports of the subject merchandise over a relatively short period."[305] Petitioners point out that Kingland benefited from subsidies beyond the export subsidy identified by the Department. Moreover, Petitioners note that in the Kingland Preliminary Calculation Memorandum,[306] the Department treated the Super Star Enterprise award as a domestic subsidy,

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Department's CRU).

[304] See Preliminary Determination, 72 FR at 63879.

[305] See Section 705(a)(2) of the Act.

[306] See Kingland Preliminary Calculation Memorandum at page 4.

not an export subsidy. Finally, Petitioners note that the Department found other export subsidies to exist for Kingland, albeit at a de minimis level.

Department's Position

We agree with the Petitioners. The Super Star Enterprise award is not the subsidy on which we based our preliminary determination that Kingland received export subsidies during the POI. In the Preliminary Determination, we noted that Kingland received multiple export subsidies during the POI.[307] In addition, we stated our intention to address certain subsidy programs in the Kingland Preliminary Calculation Memorandum because Kingland designated information on these subsidies as business proprietary information. We based our finding that Kingland received export subsidies during the POI on these multiple export subsidies. See Kingland Preliminary Calculation Memorandum at pages 6 and 7. Therefore, we continue to find that Kingland received export subsidies during the POI and have made no changes to the analysis in the Preliminary Determination, See also Kingland Final Calculation Memorandum (for further detail on the export subsidies underlying our critical circumstances determination).

Comment 13: East Pipe Debt Forgiveness

East Pipe's Affirmative Comments:

East Pipe contends that the Department incorrectly assumed that East Pipe's purchase of Maite's assets must also include all liabilities. Although the Department relied on SSPC from Italy[308] to reach its conclusion, the situations in the two cases differ. According to East Pipe, the Italian government shuffled assets and liabilities between two state-owned companies, Finsider and ILVA S.p.A., and the Department found that the liabilities and losses should be assigned to the successor company, ILVA S.p.A. In the instant investigation, East Pipe was the product of private investors, separate and distinct from Maite, and did not purchase Maite but only acquired some of Maite's assets.

According to East Pipe, the Department has no basis to "create" a debt forgiveness by assuming that in purchasing Maite's assets East Pipe should also have taken on Maite's liabilities. Instead, the only liabilities East Pipe should be have been expected to assume were those liabilities that were part of an overall asset package that was properly valued by the parties, in East Pipe's view.

[307] See Preliminary Determination at 63879.

[308] See Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508 (March 31, 1999) ("SSPC from Italy").

There is no evidence on the record of this proceeding, according to East Pipe, that the asset package was not properly valued.

If the Department continues to link the liabilities retained by Maite to East Pipe, East Pipe contends that the Department should examine the asset acquisition in the context of standard bankruptcy proceedings. East Pipe contends that the record shows that Maite was the subject of a creditor-initiated liquidation through the courts and further administered by the Weifang People's Government, and that there is no evidence that the transaction was carried out inconsistent with Chinese law. East Pipe points to Al Tech[309] and several Department determinations,[310] claiming that the Department has a practice of not countervailing debt forgiveness or other restructured obligations when they occur on commercially consistent terms through a bankruptcy proceeding.

Finally, East Pipe argues that the Department has no basis to conclude that assets left with Maite were valueless or that liabilities were forgiven. In addition, the Department focused primarily on the liabilities left with Maite and made no specific investigation as the status of the assets left with Maite. According to East Pipe, the record shows that these assets held some value and, consequently, they should be offset against any liabilities that the Department has considered as debt forgiveness.

Petitioners' Rebuttal:

Petitioners claim that, contrary to East Pipe's view, the facts in this case closely match those in SSPC from Italy. According to Petitioners, a careful reading of that case reveals that the debt forgiveness that was countervailed occurred when the operating companies of ILVA S.p.A. were sold and a portion of the debt was left behind in another ILVA company, ILVA Residua. Thus, Petitioners claim, the distinctions East Pipe attempts to draw are unfounded.

Petitioners further contend that the bankruptcy precedents cited by East Pipe are inapposite because, *inter alia*, in SSSSC from Korea and Wire Rod from Germany, the Department found that the creditors did not treat the debt in question differently than similarly placed debt for other troubled companies. Moreover, in Wire Rod from Italy, the Department was examining the same transactions it subsequently addressed in the SSPC from Italy, i.e., the sale of ILVA's assets, and in both Wire Rod from Italy and SSPC from Italy, the Department found that debt was forgiven in these transactions. According to Petitioners, the Department explicitly distinguished the ILVA

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[309] See Al Tech Specialty Steel Corp. v. United States, 661 F.Supp. 1206, 1213 (Ct. Int'l Trade 1987) ("Al Tech")

[310] See Preliminary Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 68 FR 53116, 53126, (September 9, 2003) (SSSSC from Korea) (citing Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 FR 55808 (August 30, 2002), ("Wire Rod from Germany") Issues and Decision Memo at Comment 6); Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy, 63 FR 40474 (July 29, 1998) ("Wire Rod from Italy") (citing Final Affirmative Countervailing Duty Determinations; Certain Textile Mill Products and Apparel from Colombia, 52 FR 13272, 13277 (April 22, 1987); Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Spain, 47 FR 51438, 51442 (November 15, 1982)).

situation from the prior findings regarding bankruptcy cited by East Pipe in Wire Rod from Italy.[311] Regarding Al Tech, Petitioners claim that there is no information on the record of this case to indicate that East Pipe's insolvency was actually handled through a bankruptcy proceeding. Consequently, in their view, Al Tech is also inapposite.

Finally, Petitioners disagree with East Pipe's claim regarding the value of the assets that were left behind in Maite. In support, Petitioners point to the verification report where an East Pipe official stated that the assets were accounts receivable that were not likely to be collected. Moreover, citing SSPC from Italy, Petitioners argue that the Department's practice in these situations is to offset the liabilities only with liquid assets, and these accounts receivable cannot be considered liquid assets.

DOC Position:

We have continued to treat the debt retained by Maite as debt forgiven to East Pipe. In its attempt to distinguish its situation from that described in SSPC from Italy, East pipe has focused on the restructuring of assets between Finsider and ILVA. However, the relevant transactions are those involving ILVA and the sale of its various operating companies. East Pipe's situation clearly mirrors that of ILVA in SSPC from Italy, where the Italian government-owned ILVA retained a portion of the debt after selling off AST and its other operating companies. [312] Here, the state-owned enterprise, Maite,[313] retained a portion of the debt after selling off its operating assets. The fact that the new owners acquired assets and liabilities of Maite rather than Maite itself does not provide a basis for reaching a different conclusion here. Like the companies that were spun off from ILVA, the company that became East pipe was able to shed debt that was properly attributed to the assets that were sold.[314] Thus, the Department has not 'created' a debt forgiveness.

Regarding East Pipe's claim that the package of assets and liabilities taken over by the company was properly valued, we are not making any finding in this investigation. We note that the Department maintains a rebuttable presumption that subsidies normally confer a benefit on the recipient throughout the AUL.[315] When a change in ownership occurs, that presumption may be rebutted upon presentation of information showing that the transaction occurred at arm's length and for fair market value. In this instance, the presumption has not been rebutted.

We further disagree with East Pipe that its situation should be treated as a standard bankruptcy proceeding and addressed in accordance with SSSSC from Korea and Wire Rod from Germany.

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311 See Wire Rod from Italy at 40498.
312 See SSPC from Italy and accompanying Issues and Decision Memorandum (March 31, 1999).
313 See December 4, 2007 Response of Weifang East Pipe Steel Pipe Co., Ltd. to the New Subsidy Allegation Questionnaire at Exhibit NA 28, "Civil Judgment – The Higher People's Court of Shandong Province," p.4 (of Maite Group's registered capital, the Weifang State-owned Assets Administration Bureau accounted for 68.09 percent).
314 See SSPC from Italy at 15512.
315 See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125, 37127 (June 23, 2003).

In those cases, the Department was examining companies that received debt relief through standard bankruptcy proceedings in their countries and because neither of the companies had received any special or differential treatment in those proceedings, the Department found that the debt forgiveness was not specific. Al Tech also addresses the situation where debt relief occurred through a standard process. Here, there is no information to indicate that East Pipe underwent a standard bankruptcy process.[316] While one creditor had the court freeze Maite's assets, there is no evidence that other creditors participated in a process to settle Maite's liabilities to them.[317] Also, to the extent that Maite did avail itself of a bankruptcy process, we would find that process to be specific.[318] The other precedents raised by East Pipe address the issue of whether prior subsidies "pass through" a debt restructuring or bankruptcy, and not debt relief. Therefore, they are not relevant.

Finally, we have continued to treat the assets that remained with Maite as having no value. As Petitioners pointed out, these were accounts receivable that were not likely to be collected and, hence would not be offset against liabilities under the Department's practice.[319]

Comment 14: Discount Rate

East Pipe's Affirmative Brief

East Pipe argues that the Department should use the company's cost of long-term debt or a country-wide cost of long-term debt in the PRC as the discount rate, instead of using a discount rate derived from interest rates outside of China. Although the Department has found that interest rates in the PRC are distorted, East Pipe claims that 19 CFR 351.524(d)(3)(i)(A) does not specify the presence of a distorted commercial lending market as a basis for disqualifying the cost of long-term fixed rate debt of the firm or in the country for use as a discount rate. Moreover, East Pipe argues that this is the proper approach because the alleged countervailable event at issue is debt forgiveness, not a loan acquisition for which the statute and regulations direct the Department to use comparable commercial loans as benchmarks.

Petitioners' Rebuttal

Petitioners counter that the Department should continue using the regression-based long-term lending benchmark as the discount rate for allocating the benefit of East Pipe's debt forgiveness over time. First, Petitioners claim, none of East Pipe's loans have terms approximating the 15-year AUL being used in this case and, as the Department has recognized, it is important to take into account the length of the 'long-term' period being considered.[320] Second, although the

[316] 661 F.Supp. at 1213.
[317] See East Pipe Verification Report, at pages 4-6.
[318] See BPI Memorandum at Comment H for additional discussion.
[319] See Wire Rod from Italy at 40498.
[320] In support, Petitioners cite to Lightweight Thermal Paper from the People's Republic of China: Preliminary Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 73 FR 13850, 13855 (March 14, 2008) ("LWTP from the PRC").

Department may have determined preliminarily that policy lending is not countervailable to the CWP industry, it did determine that there are no market-based interest rates in the PRC because of the distorting effect of the GOC in the PRC banking sector. Thus, Petitioners claim, the Department was correct in relying on the rate it considered appropriate, in accordance with 19 CFR 351.524(d)(3)(i)(C).

DOC Position:

The selection of a discount rate for purposes of allocating subsidy benefits over time does not in any meaningful way differ from the selection of a commercial benchmark interest rate to calculate the benefit from government-provided long-term loans. Although used for different purposes, in both cases the Department is selecting an appropriate interest rate. For loan purposes, the benchmark must be a comparable commercial loan, i.e., it must be from a commercial lending institution or a commercial loan from a government bank, and it must be similar in structure to the government loan with respect to whether it is fixed or variable, date of maturity, and currency. While not explicitly stated by the regulations, the same guidelines would apply to the selection of a discount rate. The regulations do explicitly state that countervailable loans shall not be used as discount rates, presumable because such loans are not commercial. We recognize that the Department's regulations express a preference for discount rates based on the actual cost of long-term fixed-rate loans taken out by the firm, or an average of such loans in the country. However, where we have determined that interest rates in the country, including long-term fixed-rates, are distorted,[321] such rates are unusable to measure the benefit from long-term government loans. By extension, these same in-country rates are also unusable as discount rates for purposes of allocating non-recurring subsidy benefits over time. Further, the regulations specifically provide the Department with the authority to use a rate considered to be "most appropriate".[322] In this case, because we have found that role of the GOC in the PRC banking sector has distorted all PRC-lending rates, we rejected all internal PRC interest rates as benchmarks.[323] Moreover, as Petitioners note, there are no long-term fixed rates in China that approximate the duration of the 15-year AUL.[324] For all these reasons, we determine that it is appropriate to continue to use the regression-based long-term lending benchmark as the discount rate for allocating the benefit of East Pipe's debt forgiveness over time under 19 CFR 351.524(d)(3)(i)(C).

Comment 15: Programs Included in AFA Rate for Tianjin Shuangjie Steel Pipe Co., Ltd.

Western's Affirmative Comments:

Western requests that the Department exclude three provincial-specific programs from its calculation for Shuangjie because Shuangjie does not operate within the targeted provinces of

[321] See CFS from the PRC at comments 8 and 10.
[322] See 19 CFR 351.524(d)(3)(i)(C).
[323] See Benchmarks and Discount Rates section of this memorandum.
[324] See Petitioner's RB at page 65.

Shenzhen, Zheijang and Guangdong.[325] Western argues that the publicly available information it provided the Department shows that Shuangjie's location was not within the specific provinces and, therefore, that no benefit was conferred upon Shuangjie.[326] Western also requests that the Department exclude the "debt forgiveness program" from Shuangjie's calculation. To support its position, Western points to the Department's Post-Preliminary Analysis, which discussed the "debt forgiveness program" as a specific transaction involving only East Pipe and Maite.[327]

Western argues that the Department's current methodology for selecting AFA 1) is wholly inconsistent with the commercial experience of current and previous Chinese respondents; 2) resulted in an egregiously high margin for Shuangjie; and 3) is aberrational. Western cites De Cecco[328] as a case demonstrating that the basis of the authority to apply AFA is "to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." Further, Western argues that the Department's goal of "striking a balance between providing a respondent with an incentive to respond accurately by imposing a rate that is reasonably related to the respondent's prior commercial activity"[329] is better served if the Department revisits its methodology for selecting Shuangjie's AFA rate. Western proposes that the Department partially adopt the methodology used in Sodium Nitrite from the PRC and Raw Magnets from PRC, where the Department applied the highest countervailable subsidy rate that was calculated in CFS from the PRC for a similar "type" of program.[330] As such, Western suggests that the Department calculate an AFA margin by using the highest margins calculated in CFS from the PRC for certain of the types of programs determined to apply to Shuangjie. Specifically, Western suggests that for the ten income tax programs that apply to Shuangjie, the Department should use the 0.76 percent countervailable subsidy rate calculated in CFS from the PRC in connection with the "Two Free/Three Half" program.[331]

Petitioners' Rebuttal Comments

Petitioners disagree with Western's argument that the Department should exclude certain programs from the AFA rate for Shuangjie. First, Petitioners contest Western's request that the Department should exclude certain subsidy programs from the AFA calculation because: (1) Shuangjie does not have production facilities in certain locations; and (2) Shuangjie could not

[325] Shenzhen, Zhejiang, and Guangdong are the specific provinces referenced. Western states that Shuangjie operates in Tianjin and Beijing only. Western adds that Petitioners have not alleged that Shuangjie operates in Shenzhen, Zhejiang, or Guangdong provinces, or that Shuangjie received a benefit from the provincial-specific programs.

[326] See letter from Western to the Department, "WIFP Import Data" (December 28, 2007).

[327] See Post-Preliminary Analysis at page 9.

[328] See F.lli De Cecco De Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027, 1032 (CAFC 2000) ("De Cecco").

[329] See Preliminary Determination, 72 FR at 63878.

[330] See Sodium Nitrite from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 73 FR 19816 (Apr. 11, 2008) ("Sodium Nitrite from the PRC"); Raw Flexible Magnets 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 9998 (Feb. 25, 2008) ("Raw Magnets from the PRC"); and CFS from the PRC, 72 FR at 60645.

[331] See CFS from the PRC Issues and Decision Memorandum at page 11.

have benefited from the debt forgiveness program. Petitioners argue that the Department properly did not and should not exclude any subsidy programs from its calculations because Shuangjie withdrew all of its information from the record, thereby leaving the Department with no information from which to make a determination about which programs might have applied to Shuangjie. Petitioners contend that Shuangjie was given the opportunity to demonstrate that it did not have production facilities in certain locations and that it did not benefit from debt forgiveness. Instead, Petitioners note that Shuangjie voluntarily withdrew from the investigation and, thereby, accepted the fact that it would receive a total AFA rate.

Next, Petitioners contest Western's argument that the Department should change its methodology for calculating the AFA rate for Shuangjie. Petitioners contend that Western failed to acknowledge that all mandatory respondents in Sodium Nitrite from the PRC and Raw Magnets from the PRC had either failed to answer the Department's questionnaire or had withdrawn from the cases. Therefore, Petitioners argue that there was no other rate in those investigations that the Department could have used to calculate the AFA rate. Petitioners note that the Department used rates from CFS from the PRC in Sodium Nitrite from the PRC and Raw Magnets from the PRC because CFS from the PRC was the only China CVD case that had a final determination. Petitioners note that in the instant investigation, both other mandatory respondents (i.e., East Pipe and Kingland) cooperated in the investigation. Therefore, Petitioners argue that there is no reason for the Department to use rates other than those from respondents within the same proceeding.[332] Finally, Petitioners state that Western fails to acknowledge that in several other recent preliminary determinations of CVD cases the Department has utilized the same methodology to calculate AFA rates where not all mandatory respondents withdrew or failed to cooperate.[333]

Petitioners also contest Western's argument that the Department's AFA calculation for Shuangjie is punitive. Contesting Western's citation to De Cecco, Petitioners state that there is no verified record evidence in this case that has "discredited" the AFA rate applied to Shuangjie. Finally, Petitioners contend that Western's argument that East Pipe and Kingland's lower margins evidence that Shuangjie's AFA rate is too high, is without merit. Petitioners assert that the Department makes its determinations on a company-by-company basis, and that one respondent's rate does not provide any evidence of what another respondent's rate should be. Petitioners contend that the Department should continue to calculate Shuangjie's final AFA rate using the same methodology that is has consistently used in these situations.

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[332] See Petitioners' RB at page 73, citing LWS from the PRC, 72 FR at 67893 and 67895.

[333] See Petitioners' RB at page 73, citing Lightweight Thermal Paper 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 13850, 13853 (March 14, 2008) ("LWTP from the PRC"); LWS from PRC at 67894-67897; Light-walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 FR 67703, 67704-67706 (November 30, 2007) ("LWRP from the PRC").

Department's Position:

We agree with Western that record evidence indicates that Shuangjie did not operate within the target provinces of Shenzhen, Zheijang and Guangdong[334] and, thus, Shuangjie could not have received a countervailable subsidy from the following programs: (1) Program to Rebate Antidumping Legal Fees in Shenzhen and Zhejiang Province; (2) Export Interest Subsidy Funds for Enterprises Located in Shenzhen and Zhejiang Province; and (3) Funds for "Outward Expansion" of Industries in Guangdong Province. Consequently, in a departure from the Preliminary Determination, we are excluding these three provincial programs, as well as other provincial programs where record evidence indicates that Shuangjie did not operate within those provinces, from our calculation for Shuangjie's AFA rate.

With regard to Western's request that we exclude any company specific subsidy programs from Shuangjie's AFA rate where record evidence makes it clear that Shuangjie could not have received a countervailable subsidy, we also agree. In this particular instance, the company-specific program at issue is the debt forgiveness program involving East Pipe. We find that there is no record evidence indicating that Shuangjie was a party to this program.[335] Consequently, we are excluding the debt forgiveness program in Shuangjie's AFA rate.

Although Shuangjie withdrew its information from the record warranting application of AFA, this does not mean that the Department can assume, in the face of evidence to the contrary, that Shuangjie benefited from forgiveness of debt to East Pipe or from programs in provinces where the company is not located.

We disagree with Western's arguments that the methodology used in the Preliminary Determination resulted in an aberrational and punitive rate that requires the Department to use the approach taken by the Department in Sodium Nitrite from the PRC and Raw Magnets from the PRC. It has been the Department's practice to calculate the AFA rate using rates from within the same proceeding, when possible.[336] Reliance on information within the proceeding ensures that the Department's AFA rate is based on information specific to the merchandise/industry under investigation. As Petitioners note, in the Sodium Nitrate from the PRC and Raw Magnets from the PRC investigations, there were no participating respondents and, consequently, no other rates within the proceeding the Department could use to calculate the AFA rate. Therefore, in those investigations, the Department used rates from the only China CVD case that had a final determination (i.e., CFS from the PRC). However, in the instant investigation, we have rates from respondents within the same proceeding. In addition, as Petitioners' highlight, there have been several recent AFA rate calculations where the Department did not leave the proceeding to calculate the rate because there were usable rates within the same proceeding.[337] Therefore, we

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[334] See Western's Import Data submission at Exhibits 2-8 (December 28, 2007).
[335] See Post-Preliminary Analysis at page 9.
[336] See Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006); and CFS from the PRC.
[337] See Petitioners' RB at page 73, citing LWTP from the PRC at 13853; LWS from PRC at 67894-67897; LWRP from the PRC at 67704-67706 (November 30, 2007).

will not use rates calculated from CFS from the PRC for the purposes of calculating Shuangjie's AFA rate.

We do not dispute Western's assertion that the Department's authority to apply AFA is "to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." However, as Petitioners' note, in De Cecco the court found that rate applied by the Department was "discredited by the agency's own investigation" and, therefore, the court found the rate to be inappropriate.[338] In the instant investigation, there is no verified record evidence discrediting the AFA rate calculated for Shuangjie. Therefore, we find that the application AFA to calculate Shuangjie's rate ensures that respondents participate in investigations by successfully creating an incentive to cooperate. Further, we agree with Petitioners' rebuttal argument that subsidy margins calculated for East Pipe and Kingland do not provide any evidence of what another rate should be.

Comment 16: Double Remedy

Petitioners and the GOC raised double remedy of duties comments in their briefs. The summary of these comments and the Department's reply are detailed in the concurrent Final Determination in the Antidumping Duty Investigation of CWP from the PRC which is hereby incorporated by reference.

[338] See De Cecco, 216 F. 3d 1027, 1032 (CAFC 2000).

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE ____ DISAGREE ____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
(Date)