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DATE: May 29, 2008

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

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

REGARDING: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China

SUBJECT: Issues and Decision Memorandum for the Final Determination of Sales at Less than Fair Value

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SUMMARY

We have analyzed the comments of the interested parties in the antidumping ("AD") duty investigation of circular welded carbon quality steel pipe ("CWP") from the People's Republic of China ("PRC"). For the final determination, we have made no changes to the findings made by the Department of Commerce (the "Department") in its amended preliminary determination. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On January 15, 2008, the Department published in the Federal Register its preliminary determination that CWP from the PRC is being, or is likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 733 of the Tariff Act of 1930, as amended ("the Act"). See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 2445, 2451 (January 15, 2008) ("Preliminary Determination"). On March 12, 2008, Petitioners,[1] Jiangsu Yulong Steel Pipe Co., Ltd. ("Yulong"), separate rate

[1] Petitioners in this investigation are Allied Tube & Conduit, Sharon Tube Company, IPSCO Tubulars, Inc., Western

applicants Weifang East Steel Pipe Co., Ltd., Tianjin Baloai International Trade Co., Ltd., Shijiazhuang Zhongqing Import and Export Co., Ltd., and Shandong Fubo Group Co. (collectively, "Weifang East Pipe"), and two U.S. importers of subject merchandise, SeAH Steel America, Ltd. ("SeAH") and Western International Forest Products, LLC ("Western"), filed case briefs.[2] On March 19, 2008, Petitioners, Yulong, and one U.S. importer, MAN Ferrostaal Inc., Commercial Metals Company, and QT Trading LP (collectively, "MAN Ferrostaal"), filed rebuttal briefs.[3] On April 24, 2008, the Department published the amended preliminary determination of sales at less than fair value of CWP from the PRC. See Amended Preliminary Determination of Sales at Less Than Fair Value: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 73 FR 22130 (April 24, 2008) ("Amended Preliminary Determination"). On April 28, 2008, Weifang East Pipe submitted a case brief.[4] On April 30, 2008, Petitioners submitted a rebuttal brief in response to the Weifang East Pipe case brief.[5]

CERTAIN YULONG ISSUES NOT ADDRESSED DUE TO WITHDRAWAL

In the Preliminary Determination, the Department granted Yulong a separate rate and calculated for it a rate of zero percent. Subsequently, Yulong withdrew from this investigation. See Letter to the Hon. Carlos M. Gutierrez, Secretary of Commerce, from Jiangsu Yulong Steel Pipe Co., Ltd., dated April 7, 2008. As a consequence, in the Amended Preliminary Determination, as adverse facts available ("AFA"), the Department found that Yulong is not entitled to a separate rate and treated it as part of the PRC-wide entity. In the Amended Preliminary Determination, the Department did not calculate a separate dumping margin for Yulong, and assigned to it the PRC-wide entity rate of 85.55 percent. Following the Amended Preliminary Determination, no interested party commented on the Department's decision not to calculate a separate dumping margin for Yulong, and the Department has continued to not calculate a separate dumping margin for Yulong in this final determination. Accordingly, issues identified by interested parties related to the calculation of Yulong's dumping margin submitted to the Department in case briefs and rebuttal briefs following the Preliminary Determination are no longer pertinent to the final determination. The issues presented in the Yulong March Case Brief, Petitioners' March Case Brief, Yulong's March Rebuttal Brief, and Petitioners' March

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Tube & Conduit Corporation, Northwest Pipe Company, Wheatland Tube Co., i.e., the Ad Hoc Coalition For Fair Pipe Imports From China, and the United Steelworkers.

[2] Petitioners March 12, 2008, case brief is hereinafter referred to as the "Petitioners' March Case Brief." The Yulong March 12, 2008, case brief is hereinafter referred to as the "Yulong March Case Brief." The Weifang East Pipe March 12, 2008, case brief is hereinafter referred to as the "Weifang East Pipe March Case Brief." The SeAH March 12, 2008, case brief is hereinafter referred to as the "SeAH March Case Brief." The Western March 12, 2008, case brief is hereinafter referred to as the "Western March Case Brief."

[3] Petitioners' March 20, 2008, rebuttal brief is hereinafter referred to as the "Petitioners' March Rebuttal Brief." The Yulong March 20, 2008, rebuttal brief is hereinafter referred to as the "Yulong March Rebuttal Brief." The MAN Ferrostaal March 20, 2008, rebuttal brief is hereinafter referred to as the "MAN Ferrostaal March Rebuttal Brief."

[4] The Weifang East Pipe April 28, 2008, case brief is hereinafter referred to as the "Weifang East Pipe April Case Brief."

[5] Petitioners' April 30, 2008, rebuttal brief is hereinafter referred to as the "Petitioners' April Rebuttal Brief."

Rebuttal Brief that relate to Yulong's calculations and which the Department need not address in this final determination are: (1) whether the Department should reject Yulong's reported market economy ("ME") purchase price for hot-rolled steel ("HRS"); (2) whether to value Yulong's HRS using official import statistics from India; (3) whether to value Yulong's HRS using Indian imports including HTS subheadings 7211.14 and 7211.19; (4) whether the Department should recalculate the surrogate financial ratios based upon the 2007 financial statements submitted by Petitioners; (5) whether the Department should calculate Yulong's dumping margin without applying offsets for non-dumped sales; (6) whether the Department should use the 2006-2007 financial statements of Indian producers of identical merchandise submitted by Yulong to calculate the surrogate financial ratios; (7) whether the Department should use only one of two surrogate values applied in the Preliminary Determination to value Yulong's sales of recovered steel scrap; (8) whether the Department should change the surrogate value for international freight expenses used in the Preliminary Determination; (9) whether the Department should utilize Yulong's actual HRS costs in applying its non-market economy ("NME") methodology; and (10) whether the Department should assign Weifang East Pipe Yulong's AD rate or calculate a separate AD rate for Weifang East Pipe if Yulong receives a *de minimis* margin in the final determination.

LIST OF THE ISSUES

Below is a complete list of the issues that the Department is addressing for this final determination:

Comment 1: Whether the Scope Language Should Include End-Use Definition and Reference to End-Use Applications

Comment 2: Whether the Department Should Graduate the People's Republic of China to Market Economy Status

Comment 3: Whether the Department Should Calculate a Company-Specific Separate Rate for Weifang East Pipe

Comment 4: Whether the Department Should Find Weifang East Pipe to be a Market-Oriented Enterprise

Comment 5: Whether the Department Should Utilize Weifang East Pipe's Actual Hot-Rolled Costs When Calculating an AD Margin Due to the Existence of the Companion Countervailing Duty Investigation

Comment 6: Whether a Double-Remedy Results from the Simultaneous Application of Non-Market Economy AD and Countervailing Duty Methodologies

Comment 7: Whether the Department's Amended Preliminary Determination Violated Legal Principles

Comment 8: Whether the Department Should Employ Weifang East Pipe's Suggested Analytical Approach For Calculating Its Company-Specific Margin

Comment 9: Whether the Department Should Assign Weifang East Pipe's Company-Specific AD Rate to All Cooperative Separate Rate Respondents

Comment 10: Whether the Department Should Make an Adjustment for Countervailable Export Subsidies

Comment 11: Whether the Department Should Use the Highest Petition Margin as the Adverse Facts Available Rate

Comment 12: Whether the Department Should Find That Critical Circumstances Do Not Exist for Yulong

Comment 13: Whether the Department Should Analyze Critical Circumstances on an Importer-Specific Basis in its Critical Circumstances Analysis

Comment 14: Whether the Department Should Include June 2007 in the Base Period Rather than the Comparison Period in its Critical Circumstances Analysis

ADMINISTRATIVE DETERMINATIONS AND COURT CASES

1. Notice of Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China, 67 FR 36570, 36571 (May 24, 2002) ("CWP from the PRC").

2. Memorandum from Abdelali Elouaradia, Office Director, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Scope of the Antidumping and Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China," (November 5, 2007) ("Scope Memorandum").

3. Mitsubishi Elec. Corp. v. United States, 898 F.2d 1577, 1582-1583 (Fed. Cir. 1990) ("Mitsubishi Elec. Corp.").

4. Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China: Whether the Analytical Elements of the Georgetown Steel Holding are Applicable to the PRC's Present-Day Economy," (March 29, 2007) ("Georgetown Memorandum").[6]

[6] This document is available online at: http://ia.ita.doc.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf

5. Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "China's Status as a Non-Market Economy," (August 30, 2006) ("August 30th Memorandum").
6. Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 60632 (October 25, 2007) ("Coated Free Sheet from the PRC").

7. Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 FR 42386 (August 2, 2007) ("Brake Rotors from the PRC").

8. Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From India, 70 FR 13451 (March 21, 2005) ("Bottle-Grade Resin from India").

9. Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China, 73 FR 6479 (February 4, 2008) ("Sodium Hexametaphosphate from the PRC").

10. Yantai Oriental Juice Co. v. United States, 27 CIT 1709 (Ct. Int'l Trade Nov. 20, 2003) ("Yantai Juice").

11. Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Moldova, 67 FR 55790 (August 30, 2002) ("Alloy Steel Wire Rod from Moldova").

12. 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) ("Butt-Weld Pipe from PRC").

13. Notice of 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").

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

15. 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 (April 16, 2004) ("CTVs for PRC").

16. 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) ("Fish Fillets from Vietnam").

DISCUSSION OF ISSUES

Comment 1: Whether the Scope Language Should Include End-Use Definition and Reference to End-Use Applications

Petitioners argue that the Department's preliminary rejection of their request to define the scope of this antidumping investigation, and the companion countervailing duty investigation, by end-use application has allowed U.S. importers to circumvent[7] these investigations by substituting single-stenciled American Petroleum Institute ("API") line pipe for ASTM International ("ASTM") standard or structural pipe. Petitioners argue that the Department has the statutory authority and the responsibility to prevent circumvention, which they assert can be accomplished by defining the scope according to end-use application. In addition, Petitioners contend that defining the scope by end-use application, regardless of stenciled specification, is consistent with past practice in investigations involving imports of CWP. See Petitioners' March Case Brief at 4, citing CWP from the PRC. Petitioners contend that reliance on physical dimensions and characteristics alone to define subject merchandise limits the ability of the Department to distinguish between subject and non-subject merchandise.

Petitioners note that the Department explained its reasoning for changing from end-use application to physical characteristics in the Scope Memorandum. Petitioners assert that part of the Department's reasoning was a belief that defining the scope by end-use application would lead to the need for U.S. Customs and Border Protection ("CBP") to implement an end-use certification program. Although Petitioners acknowledge that the Department has abolished end-use certification programs in past cases, e.g., OCTG from Canada, they claim that OCTG from Canada is a case that actually supports their stance on the inclusion of end-use definitions and application references in the scope language. Specifically, in OCTG from Canada, although the Department replaced the end-use certification program implemented by CBP with the requirement that non-subject pipe must be stenciled with a statement that the pipe is intended for non-OCTG applications, Petitioners contend that the Department continued to define the scope of OCTG from Canada by end-use application.

Petitioners also argue that the four physical characteristics currently employed to identify subject pipe that is stenciled to an ASTM standard or structural specification, and any other specification, such as API line pipe, should be applied to single-stenciled API line pipe to prevent circumvention. According to Petitioners, single-stenciled API line pipe meeting one or more of these four physical characteristics represents a negligible portion of the U.S. line pipe market. Therefore, Petitioners argue that the Department should retain these four physical characteristics in the scope definition for subject multiple stenciled pipe, and make these criteria equally applicable to single-stenciled API line pipe for the final determination. Finally, Petitioners request that the Department clarify that the scope's exclusion for line pipe does not

[7] Petitioners provided affidavits documenting alleged circumvention via single-stenciled API 5L line pipe in their December 18, 2007; February 11, 2008; and February 19, 2008, submissions. See Petitioners' case brief at 6-7.

extend to pipe single-stenciled to an API specification if such pipe is intended for, or used in, a subject CWP application.

MAN Ferrostaal disagrees with Petitioners and argues that adopting end-use language in the scope of these investigations would create an unnecessary burden on CBP, and U.S. importers and distributors. MAN Ferrostaal contends that the inclusion of end-use language in the scope may lead to an end-use certification program. According to MAN Ferrostaal, obtaining such certifications from U.S. importers would be difficult because standard pipe is generally sold to distributors who, in turn, sell to other distributors prior to being sold to end-users. Since importers are likely to be once or twice removed from the end-user, MAN Ferrostaal asserts that a scope based upon actual end-use, and the certification requirements most likely needed to enforce such a scope, would create inventory maintenance and control problems for importers/distributors. Since distributors are competitors, MAN Ferrostaal believes that second and third tier distributors will be reluctant to share customer information with first level distributors, thereby hindering importers' abilities to collect information about the ultimate end-use of the imported merchandise.

MAN Ferrostaal also notes that the International Trade Commission's preliminary injury determination was based upon a domestic like product that did not include single-stenciled API line pipe. Therefore, MAN Ferrostaal contends that extending the scope to include single-stenciled API line pipe, as requested by Petitioners, would extend relief to a domestic industry that has not been found to be injured.

Finally, regarding the four physical characteristics used to identify multiple-stenciled pipe subject to this investigation, MAN Ferrostaal argues that, contrary to Petitioners' previous claims, line pipe can be produced meeting these characteristics. Specifically, MAN Ferrostaal claims that API specifications provide for line pipe that (1) has a nominal length of 20 feet (single random length) for both plain-end and threaded-and-coupled line pipe, i.e., less than 32 feet; (2) can be threaded and coupled, also noting that petitioning company Wheatland Tube offers API 5L line pipe that is threaded-and-coupled; and (3) has an outside diameter of less than 2 inches, also noting that petitioning company Wheatland Tube offers API 5L line pipe with outside diameters less than 2 inches. Regarding the fourth characteristic, galvanized, MAN Ferrostaal notes that contrary to Petitioners' claims, API 5L specifications do not prohibit line pipe from being galvanized. Rather, MAN Ferrostaal notes that line pipe that is galvanized can be used in the same applications as line pipe that is not galvanized. Regarding the term "painted," MAN Ferrostaal notes that API specifications similarly do not prohibit line pipe from being painted. Further, MAN Ferrostaal states that the term "painted" should be defined to exclude coatings such as lacquer, varnish, epoxy and similar rust preventatives because virtually all line pipe imported into the United States contains some form of protective coating.

Department's Position: Sections 701 and 731 of the Act require the Department to define the scope of merchandise subject to investigation in each countervailing duty ("CVD") and AD investigation. In deciding whether to initiate an investigation and whether an AD duty order should be imposed, the statute requires the Department to make determinations with respect to a class or kind of foreign merchandise. See section 731 of the Act. If the Department initiates an investigation based upon a petition, it will continue to review the scope of the merchandise

described in the petition by the parties claiming injury by alleged dumping or countervailable subsidies to determine the scope of the final AD order. See 19 C.F.R. § 351.202(b)(5). The Department's legal authority to determine the scope of its orders is well-established. See, e.g., Mitsubishi Elec. Corp.

In this case, after the Preliminary Determination, the Department solicited comments from interested parties on the scope of the investigations. See the Department's January 30, 2008, letter to all interested parties. We received scope comments on February 11, 2008, from Petitioners, MAN Ferrostaal, and a submission filed by six PRC producers of subject merchandise. On February 15 and February 20, 2008, we received rebuttal scope comments from MAN Ferrostaal and Petitioners, respectively. In addition, Petitioners included argument concerning the scope language in Petitioners' March Case Brief, while MAN Ferrostaal rebutted these comments in the MAN Ferrostaal March Rebuttal Brief.

As noted in the AD Initiation Notice, the Department prefers to define product coverage by the physical characteristics of the merchandise subject to investigation. In the Scope Memorandum, we stated the Department prefers to define the scope with physical characteristics because reliance on end-use application often results in ambiguity with respect to product coverage at the time merchandise enters the country, which is when CBP must determine whether the importer has properly classified the merchandise as subject or non-subject merchandise. Specifically, because the importers generally do not know the end-use of the imported merchandise, it would be difficult for CBP to administer any AD or CVD orders on CWP. See Scope Memorandum at 3-4. In this case, as MAN Ferrostaal notes, CWP imports are sold first to one or more distributors, who then sell out of inventory to the ultimate end-user. Given this market structure, MAN Ferrostaal asserts that it is often impossible for the distributor to know how its customer, or its customer's customer, intends to use, or actually did use, the product. We agree with MAN Ferrostaal, and find that this description of the structure of the CWP market is consistent with the Department's experience in past cases involving pipe products. See Scope Memorandum at 4.

Although Petitioners claim that they are not requesting a certification program be implemented with CBP, the Department must consider how CBP would enforce a scope that is defined by end-use application. In a limited number of cases, the Department has instituted an end-use certification program to determine the end-use of imported merchandise, where end-use was a defining characteristic of a class or kind of merchandise subject to an investigation or order. However, as stated in the Scope Memorandum, the Department's experience with end-use certification programs has demonstrated that such programs are not an effective enforcement tool because of the difficulty of verifying the accuracy of such certifications. It is difficult to establish the integrity of the certifications, particularly where the first customer in the United States is a distributor who inventories the merchandise, often for a significant period of time, before reselling to an end-user or another reseller. See Scope Memorandum at 4.

Although the Department has implemented such certification programs in the past, we generally disfavor these programs. For example, the Department eventually ended the certification program in OCTG from Canada, noting that it was "burdensome" and "difficult to administer." See Scope Memorandum at 4 and Attachment 1 (citing Memorandum from Joseph

A. Spetrini, Deputy Assistant Secretary for Compliance, to Eric I. Garfinkel, Assistant Secretary for Import Administration, "Final Determination - Abolishment of the End Use Certification Procedure," dated September 4, 1990). Petitioners are correct that, even though the Department ended the certification program in OCTG from Canada, the Department replaced the certification program with a stenciling requirement. However, even if the Department were to grant Petitioners' request to follow the stenciling example of OCTG from Canada,[8] and require PRC exporters to stencil on the pipe whether it is "Not for ASTM Use," it would still be difficult to determine the accuracy of such statements at the time of entry as the importer is rarely the end-user. Given the possibility of importers submitting inaccurate certifications in a certification program, and the difficulty of determining the accuracy of exporters stenciling statements about end-use directly on the pipe, we find that the threat of circumvention of any future orders is lessened by not including the intended or actual end-use of the product as a means of determining scope coverage. See Scope Memorandum at 4.

A scope based upon end-use application also raises administrative problems for the Department. In conducting an investigation (or subsequent administrative reviews, if an order is issued), the Department would be unable to identify the correct universe of sales to use in its calculations in situations where the actual end-use of merchandise is unknown to the producers or exporters investigated by the Department. Any certifications or assertions made by the exporter/producer about the end-use of particular sales would be difficult, if not impossible, to verify. As a result, the Department's analysis would depend on a generally un-verifiable supposition about the end-use of individual sales, and would be subject to manipulation.

We have reviewed the comments and rebuttal comments submitted by the parties throughout the course of this investigation and continue to find that a scope definition which does not include the intended or actual end-use of the product as a means of determining scope coverage will provide greater certainty, and enable any potential future orders to be effectively administered by the Department and enforced by CBP. Further, we find that the scope language, as defined by physical characteristics, adequately addresses the intention of the petition. Based on the above, the Department finds that physical characteristics, rather than end-use application, better accomplish the Department's goals of crafting an effective, enforceable, and administrable scope.

Regarding Petitioners' request that the scope should include single-stenciled line pipe meeting the four physical characteristics (used to identify multiple-stenciled pipe subject to the scope) as a way to prevent circumvention, Petitioners' affidavits do not demonstrate that single-stenciled line pipe matching the four characteristics are never or practically never used in legitimate line pipe applications. Instead, they indicate that the demand for line pipe with the four characteristics is small in comparison to the overall line pipe market. According to Petitioners, these affidavits indicate that single-stenciled line pipe is substituting for covered standard/structural pipe based on instances where that has been observed or suspected. However, Petitioners do not demonstrate that the expansion of the scope would not bring into the scope single-stenciled line pipe legitimately used in line pipe applications. Nor do Petitioners discuss how expanding the scope to include such single-stenciled line pipe would affect the

[8] See Petitioners' February 20, 2008, submission at 10.

Department's industry support analysis conducted at the beginning of the investigation. Further, we note that the Department recently initiated an investigation of line pipe from the PRC. See Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea and the People's Republic of China: Initiation of Antidumping Duty Investigations, 73 FR 23188 (April 29, 2008). The scope of the line pipe investigation clearly covers single-stenciled line pipe. The fact that the Department is currently investigating line pipe in the context of its own investigation lessens the possibility that the instant investigations on standard and structural pipe can be circumvented via single-stenciled line pipe. Since the instant investigations are on standard and structural pipe, and there is a concurrent investigation on line pipe, the Department will not include in the scope of the instant investigations single-stenciled line pipe meeting any of the four physical characteristics used to identify subject multiple-stenciled pipe in the scope of investigation. For the same reasons, the Department will not change the exclusion on line pipe as currently stated in the scope.

Lastly, regarding the issue of how to define the term "painted" in the scope, we note that MAN Ferrostaal argued that this term should not include coatings used to inhibit rust in transit, such as varnish. See MAN Ferrostaal's March Case Brief at 17, and Letter to the Secretary from MAN Ferrostaal, dated February 11, 2008, at 7-8. Petitioners, in their February 19, 2008, rebuttal submission, agreed with MAN Ferrostaal that "painted" should exclude coatings used to inhibit rust in transit, but should include coatings such as polyester.[9] See Petitioners' February 20, 2008, submission at 8. The Department notes that the API 5L specification states that line pipe may have a "temporary external coating to minimize rusting in transit." See MAN Ferrostaal's February 11, 2008, submission at Attachment 1, page 27 of API specification. Based on the parties' comments and the API specification, the Department finds that the term "painted" in the scope should be understood to exclude coatings to inhibit rust in transit, such as varnish, but include coatings such as polyester, and we have added this language to the scope of these investigations. See the scope section in the Federal Register notice for this determination.

Comment 2: Whether the Department Should Graduate the People's Republic of China to Market Economy Status

Weifang East Pipe argues that the Department's factual findings underlying its justification for applying market-oriented CVD law to the PRC require the Department to graduate the PRC to ME status for purposes of calculating AD rates. In particular, Weifang East Pipe points to the Department's memorandum explaining its decision to apply CVD law to the PRC, where the Department notes that "market forces now determine the prices of more than 90 percent of products in China" and that the present day Chinese economy "presents a significantly different picture than the traditional communist economic system of the early 1980's, i.e., so-called 'Soviet style economies.'" See Weifang East Pipe's March Case Brief at 6, citing the Georgetown Memorandum. In addition, as further support for its argument, Weifang East Pipe asserts that the PRC has established a bona fide ME system through significant economic reforms. Therefore, Weifang East Pipe argues that the Department should graduate the PRC to ME status.

[9] Polyester is a widely recognized type of paint.

Petitioners disagree with Weifang East Pipe and argue that there is no basis under the statutory criteria of section 771(18)(B) of the Act for the Department to graduate the PRC to ME status. In addition, Petitioners assert that Weifang East Pipe has provided no factual information in support of its claim that the PRC has established a bona fide ME.

Department's Position: As an initial matter, the Department notes that Weifang East Pipe's request that the PRC be graduated to ME status has not been endorsed by the Government of China ("GOC"). The GOC has not submitted any document to the record of this investigation in which it requests or endorses graduation to ME status. The Department does not consider requests to graduate a country from NME to ME status unless such a request is endorsed by that country's government. See Alloy Steel Wire Rod from Moldova and Issues and Decision Memorandum at Comment 3. Specifically, in Alloy Steel Wire Rod from Moldova, a respondent requested that the Department revoke Moldova's NME status. Id. However, because the government of Moldova did not support the request, the Department declined to perform the analysis. Id.

The Department agrees with Weifang East Pipe that the PRC's economy no longer resembles a Soviet-style command economy and that this evolution permits the application of the CVD law to the PRC, but disagrees that this evolution necessitates granting the PRC ME status. The Department finds that Weifang East Pipe has misconstrued the Department's recent analysis of the PRC's economy in the Georgetown Memorandum. Weifang East Pipe quotes extensively from the Georgetown Memorandum but ignores its conclusion: that despite ongoing economic reforms, the government's intervention in the PRC is too significant to warrant ME status.

In making an NME country determination under section 771(18)(A) of the Act, section 771(18)(B) of the Act requires that the Department examine an economy as a whole, as opposed to individual industries or companies, and take into account:

1. the extent to which the currency of the foreign country is convertible into the currency of other countries;
2. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
3. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. the extent of government ownership or control of the means of production;
5. the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
6. such other factors as the administering authority considers appropriate.

In conducting its 2006 review of the PRC's status as an NME for purposes of the U.S. AD law, the Department considered the totality of China's economic reforms, both as executed through changes in law and policy and as evidenced by the behavior of commercial, financial, and political actors. See August 30th Memorandum. The Department concluded that, while the PRC has enacted significant and sustained economic reforms, the PRC government has preserved a

significant role for the state in the economy. Id. Indeed, the limits the PRC government has placed on the role of market forces are sufficient to preclude the PRC's designation as a ME under the U.S. AD law.

For example, the PRC government continues to insulate the currency from market forces, and there are still important restrictions on workers' freedom of movement, as well as on bargaining between labor and management. See August 30th Memorandum. The PRC has attracted an enormous amount of foreign direct investment, but extensively guides and constrains this investment in line with governmental policy objectives. State-owned enterprises ("SOEs") are still a crucial part of the economy and remain many of the largest enterprises in the country. The government's stated policy is to maintain a leading role for SOEs in many important sectors of the economy. The August 30th Memorandum further found that the government no longer sustains such SOEs through the traditional means of direct resource allocations or price controls, but instead through a complex web of regulatory restrictions, control over the allocation of land-use rights, and the continued dominance of state-owned banks in the financial sector. Despite ongoing reforms, there is no compelling evidence that the PRC's banks act as genuine commercial entities. After amassing huge volumes of non-performing loans to SOEs, the PRC's banks have been repeatedly bailed out by the government and shielded from both foreign and domestic competition. The August 30th Memorandum found that despite official pronouncements to the contrary, credit in the PRC still flows primarily to state-owned firms, large enterprises, and enterprises favored by the state for development. Moreover, the central government still imposes administrative measures to control the lending growth that had been spurred, in part, by local governments. Finally, the lack of a reliable set of laws and procedures for redress serves in part to preserve the role of the state in the economy, rather than simply being a feature of a period of transition.

Although the Act enumerates the six factors that the Department must consider in determining a country's ME status for purposes of the U.S. AD law, the statute provides no direction or guidance with respect to the relative weight that should be placed on each factor in assessing the overall state of the economy. In the case of the PRC, the Department found in the August 30th Memorandum that despite the significant progress that the PRC has made in transition away from a traditional command economy, the extent of government control and direction over the country's economy warrants the continued designation of the PRC as an NME.

Notwithstanding this central conclusion that prices and costs within the PRC are still too affected by government intervention (including the 90% of prices not directly set by the government) to permit their use in the calculation of normal value, the August 30th Memorandum described many positive reforms that set the PRC apart from traditional Soviet-style command economies. The Georgetown Memorandum compared these command economies with China's economy on how wages and prices were generated, on their treatment of private enterprise, the conduct of foreign trade, and the allocation of resources. In conducting this comparison, the Department found that while the PRC's economy still features extensive state intervention and control, it is nevertheless more flexible than traditional command economies. For example, whereas the government directly sets nearly all prices and wages in Soviet-style economies, the government in the PRC neither directly sets prices nor wages. However, there are important institutional constraints on the impact that market forces can exert on wages and prices, given the

fact that prices are formed in an economy where the state has not ceded fundamental control. Regarding currency, while the renminbi remains somewhat insulated from market forces, it is nevertheless convertible to a much greater extent than in traditional command economies, where access to foreign exchange was extremely limited. Whereas entrepreneurship was essentially banned in Soviet-style economies, private enterprise in the PRC is encouraged in some areas of the economy and limited in others. The result is an economy that features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance. On foreign trade, state trading enterprises controlled exports in the Soviet-style economies, whereas in the PRC individual firms now have significant discretion in these business decisions, even if they operate in an environment of onerous administrative burdens. Regarding the allocation of resources, the governments of Soviet-style economies generally allocated resources directly, often through the central bank. In the PRC, the banking sector is much more developed and nominally operates independently of the government, even if it remains overwhelmingly state-owned. Despite their nominal independence from the government, however, the government still maintains levers of control over the banks to guide the allocation of credit, which still flows disproportionately to the state sector.

In sum, the Georgetown Memorandum found that the PRC government has resisted a definitive break with its command-economy past, opting instead to shrink the role of the state in some areas while preserving it in others, but never ceding fundamental control over the economy to market forces. Nevertheless, the PRC's economy, though distorted, is observably more flexible than the Soviet-style economies. While traditional command economies were most notably characterized by the absence of market forces, the PRC's economy is best characterized as one in which constrained market mechanisms operate alongside of (and sometimes, in spite of) government plans. The limits the PRC government has placed on the role of market forces are not consistent with recognition of the PRC as a ME under the U.S. AD law. However, the Georgetown Memorandum concluded that, given the substantial difference between the Soviet-style economies and the PRC's economy in 2005, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as bar to proceeding with a CVD investigation involving products from China.

Thus, while the August 30th Memorandum makes clear that market signals in the PRC have not evolved sufficiently to justify granting the PRC ME status, the Georgetown Memorandum documents market forces operating in the PRC (unlike in Soviet-style economies), albeit constrained by government interference. Because market forces are present in the PRC to a limited extent and because firms have some autonomy from the government in their reactions to them, firms in the PRC (unlike in traditional command economies) are able to respond to the incentives that subsidies provide. However, while the presence of limited market forces supports the application of the CVD law, this does not necessarily warrant ME status in AD proceedings if these forces are significantly distorted by government intervention, as they are in the PRC.

The fact the government may provide subsidies that further distort prices that are already distorted by the broader non-market environment also explains why the Department can use these prices in a CVD proceeding (together with a third-country or internal PRC benchmark) to measure the benefit of an alleged subsidy while rejecting their use in the calculation of normal value in an AD proceeding. Since a firm in the PRC may have the discretion to change its export

and/or production decisions in response to the incentive provided by, for example, a subsidized input price, it is possible to measure the benefit provided by this subsidy. If the price is set in an environment distorted by significant government interference, however, this price cannot form the basis of normal value in an AD proceeding.

This conclusion that the PRC's economy has evolved sufficiently from its command economy past to justify the application of the CVD law but not enough to warrant ME status is also consistent with the presumption that firms in the PRC operate under state control. PRC exporters may well operate independently of the government in their export activities and these firms have a full opportunity to demonstrate this independence via the Department's separate rates test. Regarding firms' domestic operations, it would not be appropriate to presume that firms' business decisions and domestic prices and costs are not distorted by government interference, given the Department's extensive recent documentation of this interference in the August 30th Memorandum. We note that this decision is consistent with the Department's recent decision in Coated Free Sheet from the PRC. See Coated Free Sheet from the PRC and Issues and Decision Memorandum at Comment 1.

Comment 3: Whether the Department Should Calculate a Company-Specific Separate Rate for Weifang East Pipe

Weifang East Pipe argues that the Department should make it a mandatory respondent and calculate a company-specific AD margin. Weifang East Pipe bases this argument on the following: a) no data from the mandatory respondents can be used; b) Weifang East Pipe provided sales and factors of production ("FOP") data on the record; c) much of the sales and FOP data it submitted in the AD proceeding have likely been verified by the Department in the companion CVD investigation; and d) the petition data are inferior to Weifang East Pipe's company-specific data for purposes of calculating an accurate AD margin because the petition data do not accurately approximate the sales and production experience of Weifang East Pipe or the separate rate respondents. In addition, Weifang East Pipe argues that it was unfair for the Department to select fewer than three mandatory respondents at the outset of this investigation. Moreover, Weifang East Pipe notes that because it is a respondent in the companion CVD investigation, it is unfair for the Department not to have selected it as a mandatory respondent in the AD investigation. According to Weifang East Pipe, the decision not to select Weifang East Pipe limits the Department's ability to address the unique issues associated with the combined application of CVD and AD law to the PRC, e.g., market oriented enterprises ("MOE"), double-remedy of subsidy margins and dumping margins, etc.

Petitioners disagree with Weifang East Pipe. First, Petitioners note that there is no statutory authority to calculate an individual margin and cash deposit rate for a company that was not selected as a mandatory or voluntary respondent. Petitioners note that while Weifang East Pipe has stated that it submitted a complete questionnaire response, that response was not reviewed by the Department. Second, Petitioners argue that the Department did not verify Weifang East Pipe's AD questionnaire response and the statute does not permit the Department to rely upon unverified information for a final determination. Third, Petitioners contend that although Weifang East Pipe states that much of its AD questionnaire response was likely verified in the companion CVD investigation, there is nothing that can be inferred from the CVD

investigation regarding the completeness and accuracy of Weifang East Pipe's AD responses. Petitioners note that AD and CVD proceedings examine different phenomena and time periods. Petitioners argue that these differences result in little, if any, overlap between the AD and CVD cases. Fourth, Petitioners state that Weifang East Pipe cited no authority to demonstrate that the Department's decision to limit this case to two mandatory respondents was an abuse of discretion or otherwise not in accordance with law. Petitioners note that the statute provides the Department with broad discretion to determine the number of mandatory respondents and voluntary respondents that it can reasonably individually investigate.

Department's Position: We agree with Petitioners and we have not calculated a separate rate for Weifang East Pipe for this final determination. As noted by Petitioners, section 777A(c)(2) of the Act gives the Department discretion to limit the number of exporters or producers investigated in an AD proceeding. The Department's selection of two mandatory respondents in this investigation was statutorily permissible. Throughout this investigation, the Department considered whether it could select Weifang East Pipe as either a mandatory or voluntary respondent given the ratio of our available resources to our workload. On three separate occasions, the Department formally informed Weifang East Pipe that it was not able to individually investigate it and that the Department was, therefore, limiting its investigation pursuant to its statutory authority under section 777A(c)(2) of the Act. See Memorandum from Abdelali Elouaradia, Director, Office 4, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Selection of Respondents for the Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China ("Respondent Selection Memorandum")," dated August 2, 2007; Letter from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to William H. Barringer, Esq., regarding "Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; Respondent Selection," dated August 24, 2007; and Memorandum from Maisha Cryor, Senior International Trade Compliance Analyst, Office 4, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Selection of Voluntary Respondents for the Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China," dated November 14, 2007. The reasons articulated in the aforementioned letter and memoranda for not selecting Weifang East Pipe as either a voluntary or mandatory respondent have not changed. Specifically, our available resources and workload do not permit us to select Weifang East Pipe as respondent in this investigation. Following the issuance of the Preliminary Determination on January 15, 2008, submission of case briefs and rebuttal briefs by interested parties on March 12, 2008, and March 19, 2008, respectively, and the hearing on March 24, 2008, Yulong withdrew from this investigation. Consequently, the Department issued an Amended Preliminary Determination on April 24, 2008, and received additional briefs and rebuttal briefs on April 28, 2008 and April 30, 2008, respectively. Given the abridged time line before the final determination, we find that it would have been unduly burdensome and not practicable to complete this investigation in a timely manner if we had selected Weifang East Pipe as an additional respondent, upon Yulong's withdrawal.

Further, although Weifang East Pipe states that much of its unsolicited responses to the Department's AD questionnaire were likely verified by the Department in the companion CVD investigation, we note that the Department did not review or verify these unsolicited responses in

the course of AD investigation. Consequently, the Department has no knowledge of how the unsolicited responses compare to responses submitted by Weifang East Pipe in the companion CVD investigation; an entirely different and independent proceeding. We also note that since the Department neither reviewed nor verified Weifang East Pipe's data, we do not know whether the submitted data are accurate or complete. In Brake Rotors from the PRC, the Department found this fact to be compelling in its decision not to calculate individual dumping margins for companies who voluntarily submitted unsolicited questionnaire responses on the record of a proceeding. See Brake Rotors from the PRC and Issues and Decision Memorandum at Comment 6. Moreover, we note that section 782(i) of the Act requires the Department to verify all information relied upon in making a final determination. Therefore, Weifang East Pipe's argument concerning the inferiority of the petition data compared to its own data is irrelevant because the Department is not permitted to rely on unverified data for purposes of the final determination in an investigation. Further, the Department has found that there is no statutory authority for establishing an individual cash deposit rate for a non-investigated company. See Bottle-Grade Resin from India and Issues and Decision Memorandum at Comment 6.

Finally, regarding Weifang East Pipe's argument that it should have been selected as a respondent in the AD investigation because it is a respondent in the companion CVD investigation, we note that neither the statute nor the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") contemplates the symmetrical coverage of respondents between different proceedings when the Department limits its examination of exporters and/or producers. The AD and CVD investigations on CWP are distinct administrative proceedings with distinct statutorily imposed deadlines. As such, the Department's respondent selection in the AD investigation is distinct and separate from its selection in the CVD investigation. Moreover, the periods of investigation differ between the AD and CVD investigations. In the AD investigation, the Department selected the exporters and/or producers accounting for the largest volume of imports during the AD period of investigation pursuant to section 777A(c)(2)(B) of the Act. Given that the Department determined that it could only select two respondents in this investigation (see Respondent Selection Memorandum), it was not possible to select Weifang Eat Pipe solely on the basis that it had been selected as a mandatory respondent in the CVD investigation.

For the reasons articulated above, we have not calculated an individual company-specific dumping margin for Weifang East Pipe for the final determination.

Comment 4: Whether the Department Should Find Weifang East Pipe to be a Market-Oriented Enterprise

Weifang East Pipe argues that the factual findings underlying the Department's decision to apply the CVD law to the PRC require the Department to reverse the current presumption that PRC exporters are controlled by the state. Weifang East Pipe contends that the presumption should now be that PRC exporters are market-oriented, unless the record evidence demonstrates otherwise. Weifang East Pipe states that if PRC prices measure value such that they permit the Department to measure benefits within the context of a CVD case, then it follows that these very same prices must also be reliable enough to use in the calculation of normal value in an AD case. Moreover, citing the Georgetown Memorandum, Weifang East Pipe argues that this reversal of

presumption is consistent with the Department's recent determination that significant market forces exist within the PRC.

Citing facts from its August 7, 2007, separate rates application ("SRA"), Weifang East Pipe argues that, even if the Department does not agree to reverse the current presumption that PRC exporters are controlled by the state, the record evidence demonstrates that Weifang East Pipe is a bona fide MOE. Therefore, Weifang East Pipe argues that because it submitted home market and U.S. sales databases in accordance with the Department's ME AD questionnaire, the evidentiary record before the Department contains sufficient data for the Department to calculate an AD rate for Weifang East Pipe by applying the Department's ME AD methodology.

Petitioners disagree with Weifang East Pipe. First, Petitioners contend that Weifang East Pipe's arguments regarding its status as a MOE are moot because Weifang East Pipe was not selected by the Department to be a mandatory or voluntary respondent in the AD investigation. Therefore, Petitioners state that because the Department did not select Weifang East Pipe as a respondent in this investigation, the Department cannot calculate an individual rate for it for the final determination. Moreover, Petitioners note that the Department did not verify any information provided by Weifang East Pipe and, therefore, cannot simply accept Weifang East Pipe's assertions regarding its status. Petitioners contend that even assuming that the Department could grant Weifang East Pipe MOE status, it does not have time in this investigation to gather and verify all of the information that would be required to make such a determination.

Second, Petitioners argue that there is no legal basis to support the Department granting market-oriented status to an individual enterprise. Petitioners assert that such a designation is contrary to the statutory scheme enacted by Congress regarding NMEs. Citing section 773(c)(1) of the Act, Petitioners contend that the Congressional intent is clear that when the exporting country is designated an NME country, the Department must use NME methodology. In addition, citing 19 C.F.R. § 351.408, Petitioners note that the Department's regulations do not contemplate the designation of a MOE. Further, Petitioners state that the creation of a wholesale exception to the application of the NME methodology for an individual enterprise would undermine the agreement negotiated at the World Trade Organization ("WTO") with respect to the PRC's accession to account for the NME forces prevalent in China.

Third, Petitioners state that Weifang East Pipe's reliance on the application of the CVD law to the PRC as justification for the establishment of a MOE is misplaced. Petitioners assert that the Department rejected this same argument in Coated Free Sheet from the PRC. Moreover, citing the Georgetown Memorandum, Petitioners contend that although there may be limited market forces operating in the PRC, this fact serves as insufficient support for a conclusion that the PRC economy as a whole is a ME for purposes of dumping law. Further, Petitioners note that the Department's current NME practice is to presume that all entities in an NME are controlled by the government, unless they demonstrate by record evidence that they are entitled to a separate rate. Petitioners state the Department has not changed this NME practice and has not adopted any practice or policy regarding the establishment of a MOE. Petitioners note that although the Department has employed a test for the past 15 years to determine if an industry,

rather than an enterprise, operating within an NME may permit the application of the ME methodology, the Department has never found that an industry is market-oriented.

Fourth, Petitioners note that Weifang East Pipe relied upon information in its SRA to justify its designation as a MOE. However, Petitioners contend that such information is insufficient to support a wholesale exception for the entity with respect to the application of the NME methodology. Citing the Georgetown Memorandum, Petitioners argue that in order for Weifang East Pipe to demonstrate that it operates as a MOE, it would, at a minimum, have to demonstrate that it sources its inputs outside of the industry's supply chain and that it does not use any inputs that are tied to the general economy, such as land, labor, and energy, because the Department has determined that these inputs are still affected by government interventions in the economy. Petitioners state that Weifang East Pipe has not provided any such information. Rather, Petitioners contend that Weifang East Pipe simply cited to information in its Section A response, which does not address any of its FOPs. Accordingly, Petitioners argue that the record evidence cited by Weifang East Pipe does not support the granting of MOE status.

Department's Position: We agree with Petitioners and find that the Department's practice of applying NME AD methodology to NME companies should be followed in this investigation. Under our current practice, there is no category of NME companies defined as MOEs and there are no criteria that qualify a company as an MOE such that we would use the ME methodology for a NME company. Instead, under the NME methodology, companies are presumed to be part of the PRC-wide entity unless it is established that they are entitled to a separate rate by demonstrating a lack of state control. We note that Weifang East Pipe argues that the Department's application of CVD law to the PRC should lead the Department to reverse this presumption. However, we find that while the PRC's economy has evolved sufficiently from its command economy past to justify the application of the CVD law, it has not evolved enough to warrant reversing the presumption that firms in the PRC operate under state control. See Coated Free Sheet and Issues and Decision Memorandum at Comment 1. PRC exporters may well operate independently of the government in their export activities and these firms have a full opportunity to demonstrate this independence via the Department's separate rates test. Id. However, regarding firms' domestic operations, it would not be appropriate to presume that firms' business decisions and domestic prices and costs are not distorted by government interference, given the Department's extensive recent documentation of this interference in the August 30th Memorandum. Id.

Further, we also disagree with granting MOE treatment to PRC firms involved in AD investigations because the Department has not yet determined whether it is appropriate to introduce a MOE process, nor have we determined what elements should be considered in any such test. On May 25, 2007, the Department published a notice in the Federal Register requesting comments on whether it should consider granting ME treatment to individual respondents in AD proceedings involving the PRC, the conditions under which individual firms should be granted ME treatment, and how such treatment might affect our AD calculation for such qualifying respondents. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 2930 (May 25, 2007). In addition, on October 25, 2007, the Department published in the Federal Register another request for comment on these issues. See Antidumping Methodologies in Proceedings Involving Certain

Non-Market Economies: Market-Oriented Enterprise; Request for Comment, 72 FR 60649 (October 25, 2007). We will address ME treatment of individual respondents after fully considering the comments submitted within the process started by these two notices. Therefore, given that the Department does not officially recognize the existence of MOEs, we will neither reverse the presumption of state control nor analyze the information contained in Weifang East Pipe's SRA for the purpose of determining whether the ME methodology should be applied to Weifang East Pipe.

Comment 5: Whether the Department Should Utilize Weifang East Pipe's Actual Hot-Rolled Steel Costs When Calculating an AD Margin Due to the Existence of the Companion CVD Investigation

Weifang East Pipe argues that the Department should utilize its actual hot-rolled costs when calculating its AD margin due to the Department's preliminary decision in the companion CVD investigation to apply a CVD to offset subsidies provided to producers of hot-rolled steel.

Petitioners argue that this point is moot because the Department did not calculate a company-specific margin for Weifang East Pipe. However, in any event, Petitioners argue that such a move would violate the statue.

Department's Position: We agree with Petitioners. As explained in Comment 3 above, we have determined not to select Weifang East Pipe as a respondent, and therefore, not to calculate an individual dumping margin for Weifang East Pipe based on its own data. We also determined that we would not examine, review, or utilize Weifang East Pipe's data in any capacity for the final determination. See Comment 3, above. Therefore, it is not necessary to address whether to use actual costs or surrogate costs in such a calculation.

Comment 6: Whether a Double-Remedy Results from the Simultaneous Application of Non-Market Economy AD and CVD Methodologies

Weifang East Pipe argues that, if the Department continues to apply the NME methodology to determine the AD margin, then the Department must adopt measures to avoid imposing two sets of duties to compensate for the same alleged unfair trade practice. Weifang East Pipe notes that the Department addressed the double-remedy issue in Coated Free Sheet from the PRC, where it found that there was no evidence that a double remedy resulted from the combined application of CVD duties and AD duties based on NME methodology. However, Weifang East Pipe argues that in Coated Free Sheet from the PRC, the Department's conclusion was based on the economically and legally questionable theory that export subsidies always affect export price whereas domestic subsidies rarely influence export price. Weifang East Pipe contends that there is no economic justification for the Department to conclude that a producer will always choose to increase profitability if the benefit is conveyed via a domestic subsidy, but will choose to lower prices if the benefit is conveyed via an export subsidy. In addition, Weifang East Pipe states that the Department's distinction between the economic effects of export subsidies and domestic subsidies is legally irrelevant because the statute requires the Department to assess a CVD equal to the full amount of the subsidy, thereby assuming a complete "pass through" to sales prices.

Weifang East Pipe contends that the statute recognizes the issue of a double-remedy of CVD and AD duties, most clearly demonstrated by section 772(c)(1)(C) of the Act, which requires U.S. price be adjusted for the amount of any CVDs imposed on the subject merchandise to offset export subsidies. Weifang East Pipe states that when making this adjustment, the Department assumes that the full amount of the export subsidy is used by the exporter to lower its price to the U.S. market. Similarly, Weifang East Pipe argues that the statute also assumes complete "pass through" for domestic subsidies in concomitant ME AD and CVD cases. In such instances, the statute calls for no adjustment for domestic subsidies because the Department allocates domestic subsidies across all home market and export market sales. Thus, the domestic subsidies are captured in both the U.S. price and normal value calculations in the AD case, thereby offsetting each other and requiring no additional adjustment. Weifang East Pipe asserts that, given that these assumptions about "pass through" are built into the law, the Department must take that action into account when making decisions in the parallel NME AD and CVD cases. Weifang East Pipe emphasizes that its argument on double-remedy is not based on economic theory. Rather, it is based on the statute's built-in assumptions of complete "pass through" for both export and domestic subsidies, and the statutory requirement to take action to avoid a double-remedy, as illustrated by section 772(c)(1)(C) of the Act.

Weifang East Pipe also argues that the Department's conclusion in Coated Free Sheet from the PRC, that a double-remedy would not occur in cases in which both CVD and AD duties based on NME methodology are applied, is contrary to findings by the United States Government Accounting Office ("GAO"). Specifically, Weifang East Pipe contends that the GAO found that "there is substantial potential for a double-remedy of domestic subsidies if Commerce applied CVDs to China while continuing to use its current NME methodology to determine AD duties." See Weifang East Pipe's March Case Brief at 31.

To demonstrate the alleged double-remedy, Weifang East Pipe discusses the facts of the AD and CVD investigations. Specifically, Weifang East Pipe notes that in the CVD investigation, the Department imposed a domestic CVD duty that equaled the difference between the actual purchase price reported by Zhejiang Kingland Pipeline and Technologies Co., Ltd. ("Kingland"), a Chinese pipe producer, and a world market price for hot-rolled steel. Weifang East Pipe maintains that the "unfair advantage" Kingland obtained through the low-cost purchase of hot-rolled steel would be fully offset by the CVD that would be imposed by the Department. Weifang East Pipe asserts that applying the Department's NME methodology in this companion AD investigation will result in the Department ignoring Kingland's actual hot-rolled cost to derive normal value. Weifang East Pipe notes that the Department will substitute a surrogate value for Kingland's hot-rolled cost in the AD investigation. Weifang East Pipe states that to the extent this surrogate value is higher than Kingland's actual cost of hot-rolled steel, the AD duties will offset the same alleged unfair advantage of low cost hot-rolled steel. Because both the domestic CVD and AD address the same unfair advantage, Weifang East Pipe argues that there is a double-remedy. Specifically, Weifang East Pipe states that a CVD offsets the alleged unfairness associated with a domestic subsidy used to lower the cost of obtaining material inputs.

Finally, Weifang East Pipe argues that the Department has the legal authority to avoid the double application of remedies despite the statutory silence on the matter of adjusting for

domestic subsidies. In addition, Weifang East Pipe contends that a double-remedy of AD and CVD duties violates U.S. law and U.S. WTO obligations.

Petitioners disagree with Weifang East Pipe. First, Petitioners argue that Weifang East Pipe's entire argument is moot because Weifang East Pipe received a zero subsidy rate in the CVD investigation. Thus, Petitioners maintain that there can be no double-remedy for Weifang East Pipe, even if the Department had calculated an individual dumping rate for this company. In addition, Petitioners note that Weifang East Pipe raises the issue of double-remedy with respect to Kingland, a Chinese respondent in the CVD investigation. However, Petitioners explain that not only is Kingland's AD margin based upon total AFA, i.e., the PRC-wide entity margin, Kingland did not file a case brief in this case. Thus, Petitioners assert that Weifang East Pipe has no standing to assert arguments on Kingland's behalf. In addition, Petitioners contend that the methodology for valuing hot-rolled steel in the dumping calculations is irrelevant with respect to Kingland because of its AFA status. Therefore, Petitioners assert that Weifang East Pipe cannot demonstrate a double-remedy with respect to Kingland.

Petitioners also argue that the Department has no statutory authority to adjust the NME AD methodology to address alleged double-remedy in relation to domestic subsidies. Petitioners argue that Congress expressly addressed whether dumping calculations must be adjusted when there are concurrent AD and CVD investigations in section 772(c)(1)(C) of the Act by requiring the Department only to adjust the dumping margin to account for export subsidies. Petitioners note that the statute does not provide for any adjustment with respect to domestic subsidies and argue that had Congress intended the Department to adjust the dumping margin to prevent an alleged double-remedy with respect to domestic subsidies, it would have made that intent clear. Petitioners note that the Department reaffirmed this conclusion in Coated Free Sheet from the PRC. Further, Petitioners fault Weifang East Pipe's argument that the value of domestic subsidies is necessarily passed through - in its entirety - to customers. Petitioners assert that this argument was rejected by the Department in Coated Free Sheet from the PRC. Further, Petitioners assert that Weifang East Pipe cannot demonstrate that a double-remedy occurred in this case. Rather, Petitioners assert that Weifang East Pipe's allegation of a double-remedy is based upon conjecture because Kingland, who received a CVD subsidy rate, did not provide an AD questionnaire response. Petitioners state that the surrogate value could, in fact, be lower than Kingland's actual cost for hot-rolled steel. Petitioners state that there is just no way to know because Kingland was not a respondent in the AD investigation.

Finally, Petitioners state that this issue should be addressed only in the context of an administrative review because the statute requires adjustments to EP or CEP only for CVDs that have already been imposed. Petitioners note that in an investigation where the AD and CVD cases are aligned (as here), the CVD order will not be published until after the final AD determination. Therefore, Petitioners assert that no adjustment for export subsidies needs to be made.

Department's Position: We agree with Petitioners and have made no adjustment for the alleged double-remedy in this instance. First, as explained in Comment 3 above, no individual company-specific margin was calculated for Weifang East Pipe in this antidumping duty proceeding because it was not selected as a mandatory or voluntary respondent. Second,

Weifang East Pipe's arguments regarding Kingland are speculative. Kingland has made no demonstration or even assertion, in this investigation, that the AD duty that would be imposed would constitute a double remedy for practices already addressed by the CVD investigation. Third, considering section 772(c)(1)(C) of the Act, we find that Congress provided no AD adjustment for CVDs imposed to offset subsidies that are not export subsidies. For these reasons, we have not made an adjustment to account for the alleged double-remedy resulting from the interaction of domestic subsidies and the NME factor methodology in this instance. We note that this decision is consistent with the Department's recent decision in Coated Free Sheet from the PRC. See Coated Free Sheet from the PRC and Issues and Decision Memorandum at Comment 2.

Comment 7: Whether the Department's Amended Preliminary Determination Violated Legal Principles

Weifang East Pipe argues that the Department's Amended Preliminary Determination violated the following three legal principles: (1) the Amended Preliminary Determination was not based on substantial evidence on the record because the Department did not use Weifang East Pipe's submitted data in the AD margin calculation for Weifang East Pipe; (2) the Department failed to use "the best information available" to calculate the AD margins for Weifang East Pipe because the Department used data from the petition to calculate the margin for separate rate respondents rather than using Weifang East Pipe's submitted data; and (3) the Department effectively applied AFA to cooperative separate rate respondents by using the simple average of the petition rates to calculate the AD separate rate margin.

First, regarding its argument that the Department's Amended Preliminary Determination was not based on substantial evidence, Weifang East Pipe states that the Department is required to utilize the entire evidentiary record when making a determination. By not utilizing Weifang East Pipe's submitted data in its AD margin calculations, Weifang East Pipe maintains that the Department violated this legal principle. Second, regarding its argument that the Department failed to use "the best information available," Weifang East Pipe states that section 773(c)(1) of the Act makes clear that the values or prices of input consumption in a FOP methodology "shall be based on the best available information regarding the values of such factors in a market economy country." See Weifang East Pipe's April Case Brief at 5. Weifang East Pipe asserts that using the petition data, as was done in the Amended Preliminary Determination, does not generate the most accurate AD margins possible. Rather, Weifang East Pipe contends that using its own data would generate much more accurate dumping margins. However, by refusing to do so, Weifang East Pipe argues that the Department has acted contrary to the legal principle of using the best information available. Third, regarding its allegation of the application of adverse inferences, Weifang East Pipe argues that using the simple average of the petition rates to estimate the rate of dumping for the separate rate respondents was an application of adverse inferences because a better alternative was on the record of the proceeding, i.e., Weifang East Pipe's submitted data. Weifang East Pipe contends that by ignoring its submitted data in favor of the petition data, the Department failed to recognize full cooperation of the separate rate respondents. Weifang East Pipe states that the Court of International Trade ("CIT") addressed a similar situation in Yantai Juice, where it asserts that, pursuant to a remand redetermination, the Department's decision to rely on both petition data and data from non-investigated interested

parties to calculate the all-others rate was upheld. However, Weifang East Pipe maintains that the Department only used the petition data to fill in gaps in the respondents data. Weifang East Pipe notes that the calculation resulted in the all-others rate being lowered more than twenty-five percentage points. However, unlike in Yantai Juice, Weifang East Pipe maintains that it has provided the Department with complete questionnaire responses. Thus, Weifang East Pipe maintains that there is no reason for the Department to rely on data contained in the petition to calculate AD margins for the separate rate respondents.

Petitioners disagree with Weifang East Pipe. Citing section 735(c)(5)(B) of the Act, Petitioners note that when the margins for all individually investigated respondents are based on total facts available, the statute gives the Department the authority to calculate the all-others rate for non-investigated exporters and producers by averaging the estimated weighted-average dumping margins of the individually investigated companies. Petitioners further note that the SAA directs the Department to use other reasonable means to determine the dumping margins for non-investigated exporters and producers if the method of averaging the margins of the individually investigated exporters and producers results in an average that "would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers." See Petitioners April Rebuttal Brief at 2. Petitioners note that both the statute and the SAA specifically envision cases where total AFA will be used to determine the all-others rate applicable to separate rate respondents. However, rather than following this "expected method," Petitioners note that the Department selected the simple average of the petition margins. Petitioners state that although this method resulted in a lower all-others rate than the method envisioned by the statute, it is reasonable and consistent with the Department's past practice.

Petitioners note that Weifang East Pipe argues that the method of averaging the petition margins is tantamount to assigning an AFA rate to cooperative separate rate respondents. However, Petitioners contend that Weifang East Pipe has not explained why the simple average (rather than the highest) petition rate can be considered an adverse rate. Moreover, Petitioners state that Weifang East Pipe has not attempted to distinguish this scenario from many other cases where the Department has used the simple average of the petition rates in identical situations. Further, Petitioners assert that Weifang East Pipe cannot explain how the Department's methodology is adverse when it results in a lower margin than would be assigned under the method envisioned by the statute and the SAA. In addition, Petitioners disagree with Weifang East Pipe's interpretation of Yantai Juice. Petitioners state that Yantai Juice focused on a situation where the Department assigned a margin of 28.33 percent to separate rate respondents, despite the fact that each of the individually investigated respondents received a zero margin. Petitioners state that the CIT criticized the Department for calculating a separate rate margin that was so much higher than would have been determined under the statutory "expected method," i.e., averaging the zero margins assigned to the mandatory respondents, without explaining why it was reasonable to do so. Petitioners note that, in this case, Weifang East Pipe is not arguing – as the respondents did in Yantai Juice – that the Department should have applied the "expected method" set forth in the statute and the SAA. Petitioners note again that, in this case, the "expected method" would result in the application of a margin based entirely on total AFA. Here, unlike in Yantai Juice, Petitioners note that the Department departed from the "expected method" in such a way that resulted in a lower all-others rate, not a higher all-others rate.

Department's Position: We agree with Petitioners and find that our Amended Preliminary Determination did not violate legal principles. Normally, the separate rate margin is determined based on the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding *de minimis* margins or margins based entirely on AFA. See section 735(c)(5)(A) of the Act. If, however, the estimated weighted-average margins for all individually investigated respondents are *de minimis* or based entirely on AFA, the Department may use any reasonable method. See section 735(c)(5)(B) of the Act. In this proceeding, because the rate for all individually investigated respondents is based on AFA, we employed the reasonable method of relying on information from the petition to determine a cooperative rate to be applied to the respondents that have demonstrated entitlement to a separate rate. This action is consistent with our past practice. For example, in Sodium Hexametaphosphate from the PRC, the Department assigned an average of the margins calculated for purposes of initiation as the separate rate for the final determination. See Sodium Hexametaphosphate from the PRC, 73 FR at 6480-6481. Therefore, given that the Department did not calculate the AD dumping margin for separate rate respondents based solely on an AFA rate, and given the fact that Weifang East Pipe's submitted data are not usable in this AD proceeding (as explained above in Comment 3), we find that our Amended Preliminary Determination margin calculation: 1) was based on substantial evidence on the record; 2) used the best information; and 3) was not tantamount to assigning AFA to separate rate respondents. Moreover, we find that our margin calculation was legally permissible and consistent with our past practice. Therefore, we will continue to calculate the dumping margin for the separate rate respondents in the same manner for the final determination as was done in the Amended Preliminary Determination.

Comment 8: Whether the Department Should Employ Weifang East Pipe's Suggested Analytical Approach For Calculating Its Company-Specific Margin

Weifang East Pipe provided an analytical summary of the techniques the Department should apply to calculate its company-specific AD margin.

Petitioners contend that this argument is moot because Weifang East Pipe is not entitled to an individually calculated margin.

Department's Position: We agree with Petitioners. As explained in Comment 3 above, we did not select Weifang East Pipe as a mandatory or voluntary respondent, and therefore, did not calculate an individual dumping margin for Weifang East Pipe based on its own voluntarily submitted data. In addition, we also determined that we would not examine, review, or utilize Weifang East Pipe's unverified data in any capacity for the final determination. See Comment 3, above. Therefore, it is not necessary to address how the Department would perform such a calculation.

Comment 9: Whether the Department Should Assign Weifang East Pipe's Company-Specific AD Rate to All Cooperative Separate Rate Respondents

Weifang East Pipe argues that the Department should rely on Weifang East Pipe's information to calculate the margins applied to the all other cooperative separate rate respondents in this proceeding.

Petitioners had no comment.

Department's Position: As explained above with respect to Comment 3 above, we are not relying on Weifang East Pipe's voluntarily submitted (and unverified) data in any capacity for the final determination. Therefore, we have not relied on these data to calculate margins to be applied to the other separate rate respondents.

Comment 10: Whether the Department Should Make an Adjustment for Countervailable Export Subsidies

Yulong notes that, in the companion CVD investigation, it is part of the "all others" category. Yulong argues that the Department should adjust its antidumping duty cash deposit rate to reflect the impact of any CVD deposits imposed on Yulong to offset any export subsidies that the Department may find to be included in the "all others" category. In addition, Yulong claims that, to the degree that the Department finds that the mandatory respondents in the parallel CVD investigation are not benefitting from countervailable export subsidies, the Department should nonetheless adjust its dumping cash deposit margin downwards by the presumptive share of the "all others" CVD rate that represents the proportion of countervailable export subsidies to total countervailable subsidies alleged by Petitioners in the CVD petition. For example, Yulong asserts that if export subsidies represent 50 percent of all countervailable subsidies alleged in the CVD petition, the Department should adjust Yulong's dumping margin downwards by half of the CVD rate assigned to the "all others" category. Yulong maintains that this presumption is appropriate in an investigation, because the exact amount of AD duties owed on specific entries is not fixed. Rather, the AD investigation is conducted for the sole purpose of establishing cash deposits, which are estimates of AD duty rates. Yulong urges the Department not to let the difficulty of this task prevent it from making this legally required adjustment to its dumping margin.

Petitioners disagree with Yulong and note that it is not a respondent in the CVD investigation and was not found to have received export subsidies. Petitioners note that Kingland was the only respondent found to have received export subsidies and those subsidies were found to be *de minimis*. Therefore, Petitioners assert that there is no basis to presume that such subsidies contributed to lower export prices by Yulong that, in turn, increased Yulong's dumping margin. Accordingly, Petitioners argue that no adjustment is required. Petitioners also state that even if Yulong were found to have benefitted from export subsidies, no adjustment to U.S. price would be required because the statute requires adjustments to price only for CVDs that have already been imposed at the time that the final AD determination is issued. Petitioners contend that in cases where AD and CVD cases are aligned, the CVD order will not be published until after the final AD determination. Therefore, no adjustment for export subsidies should be made.

Department's Position: We disagree with Yulong that it is entitled to receive an adjustment to its AD duty cash deposit rate due to export subsidies. Since Yulong was not individually investigated in the companion CVD investigation, it is part of the "all others" category in that case. However, the Department did not attribute any export subsidies to the "all others" category in the CVD preliminary determination or the concurrent CVD final determination. See concurrent final determination in the companion CVD investigation. Since no countervailing duties are being imposed on Yulong's merchandise to offset export subsidies in the CVD investigation, the Department finds that an adjustment is not warranted.

Comment 11: Whether the Department Should Use the Highest Petition Margin as the Adverse Facts Available Rate

Petitioners claim that the Department contravened its normal practice in the Preliminary Determination by selecting the lowest petition margin as the AFA rate, applicable to the PRC-wide entity. Petitioners argue that the Department's rationale, that Yulong's highest transaction-specific margin corroborated the lowest petition margin, is also applicable to the highest petition margin. Petitioners contend that there is no requirement in the statute or in the SAA that a margin taken from the petition, in order to be considered "corroborated," must be similar to a margin calculated from information provided by respondents. Citing Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982 (January 17, 2007) at and the accompanying Issues and Decision Memorandum Comment 11 and Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580 (November 16, 2007) and the accompanying Issues and Decision Memorandum at Comment 2, Petitioners claim that the actual price lists issued by PRC pipe producers and exporters submitted in the petition to corroborate the calculations of export price and normal value in the petition satisfies the corroboration requirement in the statute and in the SAA. Thus, according to Petitioners, the Department corroborated the highest petition margin at the initiation of this investigation.

In addition, Petitioners state that, if the Department: (1) rejects the ME purchase price for HRS reported by Yulong in favor of a surrogate value, and (2) updates the surrogate financial ratios for Yulong based upon the financial statements submitted by Petitioners, that Yulong's highest transaction-specific margin would corroborate the highest petition margin.

No interested party rebutted this argument.

Department's Position: We agree with Petitioners in part. In the Amended Preliminary Determination, the Department selected the highest petition margin as AFA. See Amended Preliminary Determination, 73 FR at 22133. In doing so, we corroborated the highest petition margin by relying upon our pre-initiation analysis. Id. Thus, the Department found that the highest petition rate has probative value for the purpose of being selected as the AFA rate assigned to the PRC-wide entity (including Yulong).

Comment 12: Whether the Department Should Find That Critical Circumstances Do Not Exist for Yulong

Yulong argues that the Department's December 11, 2007, preliminary critical circumstances determination, in which the Department found that Yulong had massive imports during a relatively short period, should be revised in the final determination, based on Yulong's updated sales data. According to Yulong, the four-month base and comparison periods that the Department preliminarily selected are no longer appropriate because: (1) the Department now has available seven months of shipment data from Yulong; (2) the Department's preliminary critical circumstances determination relied upon prior cases that actually used six-month base and comparison periods; and (3) the Department has stated that its normal practice is to use respondents' import data up to the date of the preliminary antidumping determination in its critical circumstances analysis, where such data are available. Yulong claims that, except for the four-month period preliminarily chosen by the Department, during every other possible period for which data now are available and for which comparisons can be made, Yulong did not have increases in exports at all, let alone increases of more than 15 percent.

In rebuttal, Petitioners state that, in the event the Department applies AFA to Yulong, it should reject Yulong's critical circumstances data and make an affirmative finding of critical circumstances for Yulong as part of the PRC-wide entity.

Department's Position: We agree with Petitioners. In the Amended Preliminary Determination, the Department: (1) applied total AFA to Yulong and denied it a separate rate, and (2) rejected Yulong's critical circumstances data and made an affirmative finding of critical circumstances for Yulong as part of the PRC-wide entity. See Amended Preliminary Determination, 73 FR at 22133. For the final determination, the Department has followed its normal practice and revised our analysis to take into account more recent data. Specifically, we have expanded the comparison period to the month prior to the preliminary determination in the companion CVD investigation (since this determination was published in the first half of November 2007). See Memorandum from Abdelali Elouaradia, Office Director, to Stephen J. Claeys, Deputy Assistant Secretary, "Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe ("CWP") from the People's Republic of China ("PRC") - Final Affirmative Determination of Critical Circumstances," dated May 29, 2008. See also Comment 13 below. Based on the analysis contained in this memorandum, the Department finds for the final determination that critical circumstances exist for the PRC-wide entity.

Comment 13: Whether the Department Should Analyze Critical Circumstances on an Importer-Specific Basis in its Critical Circumstances Analysis

SeAH and Western filed a case brief in both the antidumping duty investigation and the countervailing duty investigation of CWP from PRC regarding importer-specific critical circumstances analysis. The comments that SeAH and Western submitted are summarized and addressed herein.

SeAH and Western argue that the Department should reconsider its methodology of determining whether critical circumstances exist for both the AD duty investigation and the CVD investigation of CWP from the People's Republic of China. Specifically, SeAH and Western request that the Department use their import-specific data submitted to the Department, as well

as related data from 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.

SeAH 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. SeAH and Western also contend that Congress' use of the term "imports" in the critical circumstances provision of the antidumping and countervailing duty statutes indicated that Congress desired that critical circumstances analysis would focus on the actions of the importer and not the exporter. See 703(e)(1) and 705 (a)(2) of the Act.

SeAH 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. SeAH asserts that the United States Department of Commerce: Import Administration's Antidumping Manual, January 22, 1998 ("Antidumping Manual") also supports its argument for an importer-specific analysis. SeAH 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."[10] Thus, SeAH 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.

SeAH argues that the collection and use of importer-specific data for analyzing whether critical circumstances exist is administratively feasible based on normal Department practices. SeAH 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.

SeAH 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 in the CVD investigation of CWP on November 5, 2007 and based Shuangjie's rate on AFA. SeAH argues that the application of AFA to Shuangjie, based on the exporter's withdrawal just five days prior the preliminary determination in the CVD investigation of CWP, imposed an unwarranted liability in the form of the 264.98 AFA deposit rate on SeAH and other similarly situated importers, such as Western, who purchased CWP from Shaungjie within the three-months preceding the preliminary determination in the CVD investigation of CWP. SeAH argues that this AFA critical circumstances decision does not place any consequences on

[10] See Antidumping Manual.

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. SeAH 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 importers can overcome by demonstrating that their own imports of subject merchandise did not surge during the comparison period." Accordingly, SeAH 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.

SeAH and Western also contend that the Department should revisit the facts in Butt-Weld Pipe from PRC and Ammonium Nitrate from the Russian Federation. In those cases, the Department declined to issue critical circumstances determinations based on an importer-specific analysis. SeAH 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. SeAH 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.

SeAH 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, SeAH and Western should be removed from any final critical circumstances determination that the Department may issue. SeAH 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 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 SeAH 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 SeAH'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 SeAH's attempts to between its cooperation in the instant proceeding and the lack of 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 SeAH makes between its "importer specific" request and what SeAH 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 SeAH 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 SeAH 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 SeAH 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.[11]

Petitioners dispute SeAH'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 the application of such a rebuttable presumption in critical circumstances proceeding conflicts with the Department's prior practice.[12] 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 SeAH and Western propose to use to rebut this presumption would be difficult to verify, in part because it includes shipments from AFA respondent, Shuangjie. Petitioners also argue that an "equitable" implementation of SeAH's proposed methodology would also require the Department to examine a much wider body of shipment data than they believe SeAH has

[11] See Petitioners' March Rebuttal Brief at 37.

[12] See Petitioners' case brief in the CVD investigation, dated April 17, 2008, at 86.

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.[13] 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 SeAH 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 SeAH 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 14: Whether the Department Should Include June 2007 in the Base Period Rather than the Comparison Period in its Critical Circumstances Analysis

SeAH, Western, MAN Ferrostaal, and Kingland filed case briefs in the antidumping duty investigation and the countervailing duty investigation of CWP from PRC regarding the appropriate comparison period for the critical circumstances analysis. The comments that SeAH, Western, MAN Ferrostaal, and Kingland submitted are summarized and addressed herein.

SeAH 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. SeAH 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. SeAH 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.

SeAH 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

[13] See Ammonium Nitrate from the Russian Federation and Accompanying Issues and Decision Memorandum at Comment 3.

Uranium from Ukraine to support this position.[14] SeAH asserts that in Uranium from Ukraine, the Department stated that inclusion of the month of the filing of the petition as part of the comparison period was distortive. In Uranium from Ukraine, 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 base period because of shipment time lags.

SeAH asserts that due to shipment lag times, its 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, SeAH 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. SeAH claims that this is demonstrated by actual bill of lading dates for shipments that entered in June and contend that SeAH'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, SeAH and Western conclude that imports from other exporters were not significant during the post-petition comparison period.

Finally, SeAH argues that the Department should adopt an element of the critical circumstances methodology of the companion antidumping investigation and use monthly import data on an aggregate basis as AFA to determine whether imports from Shuangjie have surged.[15] In doing this, SeAH argues that the Department should use March through June, 2007, as the base period and July through October as the comparison period.

Kingland and MAN Ferrostaal 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 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"), Kingland, and MAN Ferrostaal 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 and MAN Ferrostaal contend that the Kingland FIS,[16] 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 and MAN Ferrostaal argue that these shipments involved no attempted circumvention or intention to increase shipments between the initiation and preliminary determination. Kingland and MAN Ferrostaal also argue that the Department should, in the

[14] See Uranium from Ukraine, 58 FR at 36646.

[15] 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 (A-570-910) (December, 11, 2007) at 5-7 and Attachment 2.

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

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 and MAN Ferrostaal 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.[17] Because Kingland's shipments were made to fulfill contracts concluded prior to the month of the petition, Kingland and MAN Ferrostaal 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 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 although, the importers and respondents say that the lag-time due to shipment 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 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.

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

Department's Position: The Department is continuing to define base and comparison periods within the bounds of its normal practice by including June 2007 in the post-petition period, and extending the comparison period up through the month prior to preliminary determination in the CVD investigation of CWP, to the extent shipment data are available on the record to do this. We have not included the month of the preliminary determination in the CVD investigation of CWP because the preliminary determination in the CVD investigation of CWP 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 CTVs from PRC and accompanying Issues and Decision Memorandum at Comment 3 and Fish Fillets from Vietnam and accompanying Issues and Decision Memorandum at Comment 7.

In CTVs from PRC, 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).[18] In CTVs from PRC, 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 from PRC, 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 SeAH and Kingland provide evidence that contracts for orders shipped in June 2007 were completed prior to that month, neither SeAH 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. Therefore, we are not analyzing June 2007 as part of the pre-petition period.

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 of CWP 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 AD duty investigation, the Department analyzed the PRC-wide entity shipment data using a 5-month base and comparison period of January 2007 through May 2007 and June 2007 through October 2007, respectively. See Memorandum from Abdelali Elouaradia, Office Director, to Stephen J. Claeys, Deputy Assistant Secretary, "Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe ("CWP") from the People's Republic of China ("PRC") - Final Affirmative Determination of Critical Circumstances," dated May 29, 2008.

[18] See CTVs from PRC at Comment 3.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final determination of this investigation, and the final weighted-average dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

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David M. Spooner
Assistant Secretary
for Import Administration

_____
Date