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January 21, 2009

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

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Countervailing Duty Investigation on Certain Welded Austenitic Stainless Pressure Pipe from the People's Republic of China

SUBJECT: Issues and Decision Memorandum for Final Determination

I. Background

The Department of Commerce (the Department) is conducting an investigation on certain welded austenitic stainless pressure pipe (CWASPP) from the People's Republic of China (PRC). The Department issued the Preliminary Determination on July 10, 2008. See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 73 FR 39657 (July 10, 2008) (Preliminary Determination). On August 7, 2008, the Department issued the Amended Preliminary Determination. See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Notice of Amended Preliminary Countervailing Duty Determination, 73 FR 45954 (August 7, 2008) (Amended Preliminary Determination). On January 7, 2009, the Department issued an interim decision memorandum regarding newly alleged subsidy programs that were not addressed in the Preliminary Determination. See Memorandum to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, from Melissa G. Skinner, Director, Office 3, Operations, "Post-Preliminary Determination Decision Memorandum Regarding New Subsidy Allegations," (January 7, 2009) (Interim Decision Memorandum).

On December 16 and December 22, 2008, interested parties submitted case and rebuttal briefs concerning the Preliminary Determination. On January 12 and January 14, 2009, interested parties submitted case and rebuttal briefs regarding the Interim Decision Memorandum.

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

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

Comment 1: Whether the Department Reasonably Treated China as a Developed Country for CVD De Minimis Purposes

Comment 2: Whether Winner HK should be Treated as a PRC Entity for Purposes of Attribution

Comment 3: Whether the Total Sales Figure Used as the Denominator in the Preliminary Determination and Interim Decision Memorandum is Correct

Comment 4: Whether the Department Has the Legal Authority to Apply the CVD Law to the PRC While Simultaneously Treating the PRC as an NME in Parallel Antidumping Investigations

Comment 5: Whether the Provision of SSC to SOEs Constitutes the Provision of a Good by a Government Authority

Comment 6: Whether the Sale of HRS from Privately-Held Trading Companies Constitutes a Financial Contribution Under the Act

Comment 7: Whether the Provision of SSC is Specific and the Applicability of the Department's Use of AFA in its Determination of De Facto Specificity

Comment 8: Whether the Department Should Countervail the Provision of Land

Comment 9: Whether the Department Should Countervail FIE Tax Programs that Are Industry, Regionally, or Export/Domestic Use Neutral

Comment 10: Whether the Department's Prevailing Interest Rate Methodology Should be Used to Calculate any Subsidy in this Case

Comment 11: Whether the Department's Choice of Adverse Facts Applied to the Non-Cooperating Respondent is Contrary to Law

Comment 12: Whether the Department's Methodology for Determining the All-Others rate in its Amended Preliminary Results is Unreasonable

II. Period of Investigation

The period of investigation (the POI) for which we are measuring subsidies is January 1, 2007, through December 31, 2007, which corresponds to the PRC's most recently completed fiscal year. See 19 CFR 351.204(b)(2).

III. Application of Facts Available and Use of Adverse Inferences

A. The Government of the People's Republic of China (GOC)

As discussed below, the Department is investigating whether GOC authorities provided stainless steel coil (SSC), a major input in the production of CWASPP to respondents for less than adequate remuneration (LTAR). In our March 14, 2008, questionnaire we asked the GOC to respond to the items in the Standard Questions Appendix at Appendix One and Provision of Goods/Services Appendix at Appendix Five with respect to the GOC's alleged provision of SSC for LTAR. In its May 5, 2008, response the GOC stated that:

> Given that the GOC does not believe there is a program providing stainless steel coil for less than adequate remuneration, the GOC believes that responding to Appendices One and Five is improper.

See GOC's May 5, 2008 Questionnaire Response at 21.

On May 7, 2008, the Department issued a supplemental questionnaire to the GOC in which it again requested that the GOC respond to the items contained in Appendices One and Five of the Department's initial questionnaire, as they pertain to the GOC's alleged provision of SSC for LTAR. In the May 7, 2008, supplemental questionnaire, the Department explained that failure to respond to the Department's questions in a timely fashion and in the manner requested may result in the Department resorting to the use of adverse facts available (AFA) within the meaning of section 776(b) of the Tariff Act of 1930, as amended (the Act).

In its May 14, 2008, supplemental questionnaire response, the GOC provided responses to most of the Department's questions. However, the GOC failed to adequately respond to the Department's questions concerning de facto specificity as it pertains to the GOC's alleged provision of SSC for LTAR. Regarding this alleged subsidy program, the Department, referencing its initial questionnaire, instructed the GOC in its May 7, 2008, supplemental questionnaire to:

> Please provide a list by industry and by region of the number of companies which have received benefits under this program in the year the provision of benefits was approved and each of the preceding three years. Provide the total amounts of benefits received by each type of industry in each region in the year the provision of benefits was approved and each of the preceding three years.

Concerning the GOC's alleged provision of SSC for LTAR, the GOC stated that:

> No such list exists, nor does any data exist from which to derive such a list absent inquiring with every stainless steel coil producer in China. Such records would only reflect amounts sold and prices charged, as opposed to any "benefit" conferred by the transaction.

See GOC's May 14, 2008 Supplemental Questionnaire Response at 8.

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties.

In the Preliminary Determination, we found that because the GOC failed to provide the requested information by the established deadlines, the Department does not have the necessary information on the record to determine whether the GOC provided SSC to producers of CWASPP in a manner that was de facto specific within the meaning of section 771(5A)(D)(iii) of the Act. See Preliminary Determination, 73 FR at 39660. Therefore, we based our determination on the facts otherwise available in accordance with sections 776(a)(2)(A) and (B) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. For the reasons discussed below, we determine that, in accordance with sections 776(a)(2)(A) and (B) and 776(b) of the Act, the use of AFA is appropriate with respect to the GOC's alleged provision of stainless steel coil to producers of CWASPP for LTAR.

As noted, the GOC refused to respond to the Department's questions in the initial and supplemental questionnaires concerning de facto specificity as it pertains to the Provision of SSC for LTAR program. Therefore, in the Preliminary Determination, consistent with sections 776(a)(2)(A) and (B) of the Act, we found that the GOC did not act to the best of its ability and, therefore, we employed adverse inferences in selecting from among the facts otherwise available. See Preliminary Determination, 73 FR at 39660. Accordingly, pursuant to section 776(b) of the Act, we found that the provision of SSC to producers of CWASPP by GOC authorities was de facto specific within the meaning of section 771(5A)(D)(iii) of the Act. Thus, we preliminarily determined that the provision of SSC by GOC authorities to producers of CWASPP was countervailable to the extent that the provision of the goods constituted a financial contribution in accordance with 771(5)(D)(iii) of the Act and conferred a benefit upon producers of CWASPP within the meaning of 771(5)(E)(iv) of the Act. See 73 FR at 39660.

The Department's decision to rely on adverse inferences when lacking a response from a foreign government is in accordance with its practice. See, e.g., Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 71 FR 11397, 11399 (March 7, 2006) (Preliminary Results of CTL Plate from Korea) (unchanged in the Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 71 FR 38861, 38862 (July 10, 2006) (CLT Plate from Korea) (relying on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of the sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively)).

The GOC submitted comments regarding the Department's decision to apply adverse inferences when determining that the government's provision of SSC was specific to CWASPP producers. However, the arguments presented by the GOC have not led us to alter our findings from the Preliminary Determination. See Comment 7 for further discussion.

In addition, in regard to the provision of SSC for LTAR, at verification the GOC refused to provide information pertaining to the ownership of certain SSC suppliers identified in the Department's verification outline. The Department had provided the GOC with the names of respondents' SSC suppliers, and requested that the GOC indicate the extent to which each of the suppliers was owned by the government. In its response, the GOC provided a chart in which it indicated the SSC suppliers' ownership status. The ownership information in the chart was based on business registration forms that the GOC had obtained for each of the SSC suppliers. In the verification outline the Department issued to the GOC in advance of verification, the Department identified certain of respondents' SSC suppliers and requested that the GOC make available the capital verification reports and articles of association for each of the SSC suppliers listed in the outline. See Memorandum to Melissa G. Skinner, Director, Office 3, Operations, from Robert Copyak, International Trade Analyst, Office 3, Operations, "Verification Report for the Federal Government of the People's Republic of China (GOC) and the Local Government of Guangzhou," at pages 3 – 5 (December 9, 2008) (GOC Verification Report), of which a public version is on file in room 1117 of the Central Records Unit (CRU) of the Main Commerce Building, in which we described the records requested in the verification outline. We note that the SSC suppliers listed in the outline were limited in number and represented respondent's largest SSC suppliers in each ownership category.[1] Id. at 4. The outline did not request that the GOC provide the capital verification reports and articles of association for all of the SSC suppliers identified in the GOC's response. In addition, at the GOC's request, the Department

1 The SSC ownership categories of SSC suppliers referenced in the GOC Verification Report were government-owned producers, privately-owned producers, government-owned trading companies, and privately-owned trading companies.

agreed to conduct the portion of verification dealing with the ownership of respondents' SSC suppliers with GOC officials in Beijing rather than with Provincial government officials in Guangdong province. When asked at verification to provide the information for the SSC suppliers identified in the verification outline, the GOC failed to provide the requested information with regard to SSC suppliers classified as privately-owned trading companies. Id. at 5.

Business registrations forms are subject to revision as firms' capital structures and shareholders change. Thus, at verification the Department sought a means of confirming that the business registration forms were timely. Moreover, during verification it is standard practice for the Department to crosscheck factual information placed on the record by respondents with additional information obtained during verification. Specifically, at verification the Department sought to review the capital verification reports of the SSC suppliers identified in the verification outline. The capital verification reports are documents that firms must submit to the GOC whenever there is a change in their shareholdings. Thus, these documents are in the GOC's possession. The Department also sought, where possible, articles of association for the SSC suppliers identified in the verification outline. The articles of association also contain information on the firms' shareholders. In addition, the articles of association contain information concerning the firms' operational activities, which can be used to crosscheck whether SSC suppliers are, in fact, trading companies or producers.

We find that with regard to the suppliers of SSC to the Winner Companies that were classified by the GOC as privately-owned trading companies, the GOC has withheld requested information and impeded the Department's verification process within the meaning of section 776(a)(2)(A) and (D) of the Act.[2] As a result, we are applying facts available (FA). The GOC's refusal during verification to provide the requested information concerning SSC suppliers classified as privately-owned trading companies prevented the Department from confirming the contemporaneity of the information in the business registration forms and from crosschecking the ownership information in the business registration forms as they pertained to that category of suppliers. Therefore, we further find that the GOC has failed to act to the best of its ability and, when applying FA, we are relying upon adverse inferences under sections 776(b) of the Act. Accordingly, pursuant to section 776(b) of the Act, we are assuming that all of respondents' SSC suppliers that were classified as privately-owned trading companies were government-owned. We also are assuming, pursuant to section 776(b) of the Act, that the suppliers in question were producers of SSC, as opposed to acting as trading companies. Thus, in light of our findings, we find, pursuant to section 776(b) of the Act, that purchases of SSC from firms classified as privately-owned trading companies constitute a financial contribution under section 771(5)(D)(iii) of the Act.

We note that our decision to apply AFA under section 776 of the Act is based on the GOC's failure to provide information at verification that was in its possession (e.g., capital verification reports for SSC suppliers). We are not basing our decision to apply AFA under section 776 of the Act on the GOC's inability to provide information that was not in its possession (e.g., articles of association for privately-held firms).

2 The Winner Companies are Winner Stainless Steel Tube Co., Ltd. (Winner), Winner Steel Products (Guangzhou) Co., Ltd. (WSP), and Winner Machinery Enterprise Company (Winner HK).

B. Froch

In this investigation, Froch Enterprise Co. Ltd. (Froch) (also known as Zhangyuan Metal Industry Co. Ltd.) did not provide the requested information that is necessary to determine a countervailing duty rate. Specifically, Froch did not respond to the Department's March 14, 2008, initial questionnaire. Thus, in reaching our Preliminary Determination, pursuant to section 776(a)(2)(A) and (C) of the Act, we have based Froch's CVD rate on facts otherwise available.

In the Preliminary Determination, we explained that an adverse inference is warranted, pursuant to section 776(b) of the Act. See Preliminary Determination, 73 FR at 39661. By failing to submit a response to the Department's initial questionnaire, Froch did not cooperate to the best of its ability in this investigation. Accordingly, we found that an adverse inference is warranted to ensure that Froch will not obtain a more favorable result than had it fully complied with our request for information. Id.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. It is the Department's practice to select, as AFA, the highest calculated rate in any segment of the proceeding. See, e.g., Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006), and accompanying Issues and Decision Memorandum at "Analysis of Programs" and Comment 1.

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session (1994) at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990).

We have computed a total AFA rate for Froch generally using program-specific rates determined for the cooperating respondent or from past CVD cases involving the PRC. Specifically, for programs other than those involving income tax exemptions and reductions, we have applied the highest calculated rate for the identical program in this investigation if the responding company, the Winner Companies, used the identical program. If there is no identical program match within the investigation, we have used the highest non-de minimis rate calculated for the same or similar program in another CVD investigation involving the PRC. Absent an above-de minimis subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed, which could conceivably be used by Froch.

For the following seven alleged income tax programs pertaining to either the reduction of income tax rates or exemption from income tax, we have applied an adverse inference that Froch paid no income tax during the POI: (1) "Two Free, Three Half" program, (2) Income tax exemption program for export-oriented foreign-investment enterprises, (3) Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones, (4) Provincial and Local Tax Exemptions and Reductions for Productive FIEs, (5) Local Income Tax Reductions in Certain Development Zones, (6) Preferential Tax Policies for Town and Village Enterprises, and (7) Carry-forward of Tax Losses for FIEs. The standard income tax rate for corporations in the PRC is 30 percent, plus a 3 percent provincial income tax rate. Therefore, the highest possible benefit for these seven income tax rate programs is 33 percent and we are assigning that rate to these seven programs. See, e.g., Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966, 31968 (June 5, 2008) (CWP from the PRC). Our finding in this regard includes the Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones program even though we calculated a net subsidy rate for the Winner Companies for this program. See, e.g., Light-Walled Rectangular Pipe and Tube From People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination, 73 FR 35642, 35644 (June 24, 2008) (LWP from the PRC), and accompanying Issues and Decision Memorandum (LWP from the PRC Decision Memorandum) at "Income Tax Subsidies for Foreign Invested Enterprises (FIEs) - Reduced Income Tax Rates for FIEs Based on Location," (assigning an AFA rate of 33 percent for income tax programs alleged with respect to a non-responding mandatory respondent even though the Department calculated an income tax rate for a particular program for a mandatory respondent that participated in the proceeding).

This 33 percent AFA rate does not apply to income tax credit or refund programs. Id. For the Import Duty and Value Added Tax (VAT) Exemptions for Imported Equipment program, we have determined to use the net subsidy rate of the Winner Companies, which is 0.70 percent. For the remaining programs pertaining to either income tax credits or tax refund programs, the Department has not calculated rates for these programs in the instant or in any prior investigation. Therefore, we have determined to use the highest non-de minimis rate for any indirect tax program from a CVD investigation involving the PRC. The rate we selected is 1.51 percent, which corresponds to the net subsidy rate calculated in CFS from the PRC. See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Determination, 72 FR 60645 (October 25, 2007) (CFS from the PRC) and accompanying Issues and Decision Memorandum (CFS from the PCR Decision Memorandum) at "VAT and Tariff Exemptions on Imported Equipment" section.

Regarding the Loans and Export Credits Pursuant to the Northeast Revitalization Program and Preferential Loans Pursuant to Liaoning Province's Five-Year Framework programs, the Department has not calculated rates for these programs in the instant investigation. Therefore, we have determined to use the highest non-de minimis rate for any loan program from a China CVD investigation. The rate we selected is 8.31 percent, which corresponds to the net subsidy rate calculated in Amended Thermal Paper from the PRC. See Lightweight Thermal Paper from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 FR 70958 (November 24, 2008) (Amended Thermal Paper from the PRC) and Memorandum to Susan

Kuhbach, Director, Office 1, AD/CVD Operations, "Countervailing Duty Investigation: Lightweight Thermal Paper from the People's Republic of China: Ministerial Error Allegations" (October 29, 2008), of which the public version is on file in room 1117 of the CRU of the main Commerce building.

In addition, the Department has not calculated rates for the following grant programs in the instant investigation: Guangdong Province's "Outward Expansion" program, Support for Registered High-Tech Projects, Waiver of Land-Use and District Level Fees, Exemption and Reduction of Security Fees in the Huadu District, and Exemption and Reduction of Construction Fees in the Huadu District. Therefore, we have determined to use the highest non-de minimis rate for any grant program from a CVD investigation involving the PRC. The rate we selected is 44.91 percent, which corresponds to the net subsidy rate calculated in Amended CWP from the PRC. See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 FR 42545 (July 22, 2008) (Amended CWP from the PRC), and Memorandum to Susan Kuhbach, Director, Office 1, AD/CVD Operations, "RE: Countervailing Duty Investigation, Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Ministerial Error Memorandum," of which the public version is on file in room 1117 of the CRU of the main Commerce building.

The Department has not calculated a rate concerning the Provision of Land Use Rights for LTAR in the instant investigation. Therefore, we have determined to use the highest non-de minimis rate for any provision of land for LTAR program from a CVD investigation involving the PRC. The rate we selected is 13.36 percent, which corresponds to the net subsidy rate calculated in Sacks from the PRC. See Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008) (Sacks from the PRC), and accompanying Issues and Decision Memorandum (Sacks from the PRC Decision Memorandum) at "Government Provision of Land for Less Than Adequate Remuneration" section. Regarding the provision of SSC for LTAR, we have determined to use the rate calculated for the Winner Companies in the instant investigation, which is 0.36 percent. In addition, as explained below, we are not calculating a subsidy rate for the alleged application of export restraints on SSC in this investigation. For further explanation of the derivation of Froch's AFA rate, see the Memorandum to the File, "Adverse Facts Available Rate for Froch" (January 21, 2008) (Final Froch AFA Memorandum), a public document on file in room 1117 of the CRU.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See, e.g., SAA at 870. The Department considers information to be corroborated if it has probative value. Id. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. See SAA at 869.

In instances in which it determines to apply AFA, the Department, in order to satisfy itself that such information has probative value, will examine, to the extent practicable, the reliability and relevance of the information used. With regard to the reliability aspect of corroboration, we note that these rates were calculated in prior final CVD determinations. No information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it. See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996). In the Preliminary Determination, we explained that, in the absence of record evidence concerning these programs due to Froch's decision not to participate in the investigation, we reviewed the information concerning China subsidy programs in this and other cases. See Preliminary Determination, 73 FR at 39661. For those programs for which the Department found a program-type match, we found that programs of the same type were relevant to the programs of this case. Id. In the Preliminary Determination, for the programs for which there was no program-type match, we selected the highest calculated subsidy for any China program from which Froch could conceivably receive a benefit to use as AFA. Id. We explained that the relevance of this rate is that it is an actual calculated CVD rate for a China program from which Froch could actually receive a benefit. Id. Due to the lack of participation by Froch and the resulting lack of record information concerning these programs, the Department corroborated the rates it selected in the Preliminary Determination to the extent practicable. Id.

The GOC submitted comments regarding the Department's decision to apply adverse inferences when determining the net subsidy rate for Froch. However, the arguments presented by the GOC have not led us to alter the approach we adopted Preliminary Determination. See Comment 11 for further discussion. On this basis, we determine the AFA countervailable subsidy rate for Froch to be 299.16 percent ad valorem. See Final Froch AFA Memorandum.

IV. Subsidies Valuation Information

A. Allocation Period

Under 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (AUL) of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2), there is a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (IRS Tables), as updated by the Department of Treasury. For the subject merchandise, the IRS Tables prescribe an AUL of 15 years. No interested party has claimed that the AUL of 15 years is unreasonable.

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

Additionally, we have determined that we will identify and measure subsidies in the PRC beginning on the date of the country's accession to the World Trade Organization (WTO), December 11, 2001. See, e.g., CWP from the PRC and accompanying Issues and Decision Memorandum (CWP from the PRC Decision Memorandum) at Comment 2; see also Final Affirmative Countervailing Duty Determination: Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China, 73 FR 70961 (November 24, 2008) (Line Pipe from the PRC), and accompanying Issues and Decision Memorandum (Line Pipe from the PRC Decision Memorandum) at "Allocation Period" section and Comment 18.

B. Adjustment to Net Subsidy Rate Calculation

Winner is affiliated with Winner HK and WSP. See Preliminary Determination, 73 FR at 39662. During the POI, Winner HK purchased finished subject merchandise from Winner for sale and consigned SSC to Winner and WSP for manufacturing into subject merchandise that Winner returned to Winner HK for sale. Winner further states that during the POI, WSP was a sub-contractor for Winner. Specifically, Winner provided coils or slit coils to WSP, which WSP slit and/or formed into pipe and returned to Winner. Winner states it then manufactured the processed coil into subject merchandise. In addition, WSP provided slit and/or formed pipe to Winner, which Winner used to make non-subject merchandise. Winner HK makes all of the export sales on behalf of the Winner Companies.

Prior to the Preliminary Determination, the Winner Companies argued that, in light of the fact that Winner HK, a Hong-Kong based affiliate, makes the final export sale to foreign customers (including U.S. customers) and because the prices ultimately charged to foreign customers are different from the prices charged in mainland China, the Department should calculate the sales denominator using the methodology described in CFS from the PRC and Thai Bearings. See CFS from the PRC Decision Memorandum at Comment 21; and Ball Bearings and Parts Thereof From Thailand; Final Results of Countervailing Duty Administrative Review, 57 FR 26646, 26447 (June 15, 1992) (Thai Bearings).

In CFS from the PRC and Thai Bearings, the Department evaluated whether it was necessary to adjust the subsidy calculations, specifically the ad valorem rate calculation, so that the amount of countervailing duty collected will reflect the amount of subsidies bestowed. See CFS from the PRC Decision Memorandum at Comment 21, and Thai Bearings, 57 FR at 26646. The Department used six criteria in its evaluation: (1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; (2) the exporter and the party that invoices the customer are affiliated; (3) the U.S. invoice establishes the customs value to which CVD duties are applied; (4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; (5) the merchandise is shipped directly to the United States; and (6) the invoices can be tracked as back-to-back invoices that are identical except for price.

Based on information submitted by the Winner Companies, which we have verified, we find that the companies' sales process fulfills the criteria the Department enumerated in CFS from the PRC and Thai Bearings. In response to the Department's request, the Winner Companies provided the invoice and sales documents for the largest volume sale the Winner Companies made to the United States during the POI. Regarding this sale, the Winner Companies provided the corresponding invoices that Winner/WSP issued to Winner HK and explained how the two sets of invoices were linked. See the Winner Companies' June 10, 2008

Questionnaire Response at 7 – 9 and Exhibit SE-12; see also Memorandum to, Melissa G. Skinner, Director, Office 3, Operations, "Verification of Information Submitted by Winner Stainless Steel Tube Co., Ltd., Winner Machinery Enterprise Company Limited and Winner Steel Products (Guangzhou) Co., Ltd. (collectively "Winner")," (Winner Companies Verification Report) at "Sales and Export Information." Therefore, in the final determination we have adjusted the net subsidy rate calculations to account for the fact that the "export values" recorded in the books of Winner and WSP do not reflect the actual U.S. prices because there is a mark-up on those sales by Winner HK, the Hong Kong-based affiliate. To calculate the adjusted net subsidy rate, we first calculated a program rate. The programs at issue in the final determination utilize a total sales denominator. Therefore, we divided the benefit by the Winner Companies' mainland China sales to arrive at the program rate. This sales denominator includes sales made to Winner HK from mainland China and is net of any intra-company sales made in mainland China.[3] Next, we multiplied the program rate by a ratio equal to the value of sales to the United States made by Winner/WSP through Winner HK divided by the value of Winner HK's sales to the United States, inclusive of Winner HK's mark-up. In this manner, we calculated the net subsidy rate.

C. Cross-Ownership and Subsidy Attribution

During the POI, Winner, Winner HK, and WSP were "directly or indirectly, partially or wholly, owned" by the same shareholders. Under 19 CFR 351.525(b)(6)(vi), cross-ownership exists between corporations if one corporation can use or direct the individual assets of the other corporation(s) in essentially the same way it uses its own. This section of the Department's regulations states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. Based on the information supplied by Winner indicating that the Winner Companies are owned by the same shareholders parent, we preliminarily determined that Winner, WSP, and Winner HK are cross-owned under 351.525(b)(6)(vi). See Preliminary Determination, 73 FR at 39662. We have reached the same conclusion in the final determination.

In this investigation, we are finding three subsidy programs countervailable: Provision of SSC for LTAR, Import Duty and Value Added Tax Exemptions for Imported Equipment, and Reduced Income Tax Rate for Foreign Investment Enterprises (FIEs) Located in Economic and Technological Development Zones and Other Special Economic Zones. WSP and Winner received subsidies under the first two subsidy programs. Under 19 CFR 351.525(b)(6)(iv), if there is cross-ownership between an input supplier and a downstream producer, and production of the input is primarily dedicated to the production of the downstream product, the Department will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations, net of intra-company sales. Therefore, for purposes of calculating the countervailable program rates, we have attributed subsidies received by WSP and Winner under the Provision of SSC for LTAR, Import Duty and Value Added Tax Exemptions for Imported Equipment programs to the combined sales of WSP and Winner, net of intra-company sales as provided under 19 CFR 351.525(b)(6)(iv).

Under 19 CFR 351.525(b)(6)(i), the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. Sub paragraph (ii) states that if

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3 For further discussion of how we derived the countervailable program rate for the three countervailable programs at issue in the instant investigation, see the "Cross-Ownership and Subsidy Attribution" section.

two (or more) corporations with cross-ownership produce subject merchandise, the Department will attribute the subsidies received by either or both corporations to the products produced by both corporations. Winner received a benefit under the Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones program while WSP did not. Therefore, pursuant to 19 CFR 351.525(b)(6)(i) and (ii), because Winner was the sole recipient of benefits under the program and because Winner is the sole producer of CWASPP among the Winner Companies, we have attributed the subsidies Winner received under the Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones program to the total sales of Winner. This approach revised our approach from the Preliminary Determination. See Comment 3 for further discussion.

Regarding Winner HK, in the Preliminary Determination we found that Winner HK is a Hong Kong company and did not receive any subsidies from the GOC. See Preliminary Determination, 73 FR at 39662. We have not changed our finding in this regard for the final determination.

D. Benchmark Interest Rates

In this investigation, we require a long-term discount rate denominated in Renminbi (RMB). Pursuant to 19 CFR 351.524(d)(3)(i)(A), the Department, in selecting a discount rate, will first seek to use the cost of long-term fixed-rate loans of the firm in question, excluding any long-term loans that the Department has determined to be countervailable. If no such loans are available, the Department, pursuant to sub-paragraph (B), will seek to use the average cost of long-term fixed-rate loans in the country in question. Lastly, pursuant to sub-paragraph (C), the Department will use a rate that it considers to be the most appropriate.

However, in the Interim Decision Memorandum we determined that the interest rates in China are not reliable as benchmarks for these loans because of the pervasiveness of the GOC's intervention in the banking sector. See Interim Decision Memorandum at "Subsidies Valuation Information" section. Specifically, we found that loans provided by Chinese banks reflect significant government intervention and do not reflect the rates that would be found in a functioning market. See, e.g., CFS from the PRC Decision Memorandum at Comment 10.

In our analysis of the PRC as a non-market economy in the antidumping (AD) investigation of certain lined paper products, the Department found that the PRC's banking sector does not operate on a commercial basis and is subject to significant distortions, primarily arising out of the continued dominant role of the government in the sector. See "The People's Republic of China Status as a Non-Market Economy," (May 15, 2006) (May 15 Memorandum); and "China's Status as a Non-Market Economy," (August 30, 2006) (August 30 Memorandum), both of which are referenced in the Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China, 71 FR 53079 (September 8, 2006) (AD CFS Final); see also Attachment 1 and Attachment 2, respectively. This finding was further elaborated in CFS from the PRC. See CFS from the PRC Decision Memorandum at Comment 10. In that case, the Department found that the GOC still dominates the domestic Chinese banking sector and prevents banks from operating on a fully commercial basis. See also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 71360, 71365 (December 17, 2007) (Tires from the

PRC Preliminary Determination) unchanged in the final results Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) (Tires from the PRC), and accompanying Issues and Decision Memorandum (Tires from the PRC Decision Memorandum) at "Subsidies Valuation: E. Loan Benchmarks and Discount Rates"; and Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008) (Thermal Paper from the PRC) and accompanying Issues and Decision Memorandum, (Thermal Paper from the PRC Decision Memorandum) at "Benchmarks and Discount Rates." In the Interim Decision Memorandum, we continued to find that these distortions are present in the PRC banking sector and, therefore, determined that the interest rates of the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to respondents in this proceeding. See Interim Decision Memorandum at "Subsidies Valuation Information" section.

Moreover, we found in the Interim Decision Memorandum that while foreign-owned banks do operate in China, they are subject to the same restrictions as the state-owned commercial banks (SOCBs) in China. Id. Further, we found that their share of assets and lending is negligible compared with the SOCBs. Id. Therefore, in the Interim Decision Memorandum and as discussed in greater detail in CFS from the PRC, because of the market-distorting effects of the GOC in the PRC banking sector, foreign bank lending does not provide a suitable benchmark. See CFS from the PRC Decision Memorandum at Comment 10. No new information has been placed on the record of this investigation to warrant reconsideration of the decision regarding the Chinese banking sector.

The benchmark discount rate should be a market-based benchmark, yet, in the Interim Decision Memorandum we determined that there is not a functioning market for loans within the PRC. See Interim Decision Memorandum at "Subsidies Valuation Information" section. Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department selected a market-based external benchmark rate. Id. We note that the use of an external benchmark is consistent with the Department's practice. For example, in Softwood Lumber First Review, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada. See Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 FR 75917 (December 20, 2004) (Softwood Lumber First Review), and accompanying Issues and Decision Memorandum (Softwood Lumber First Review Decision Memorandum) at "U.S. Log Prices are a More Appropriate Benchmark." In the Interim Decision Memorandum, the Department found that the GOC's predominant role in the banking sector results in significant distortions that render the lending rates in the PRC unsuitable as market benchmarks. See Interim Decision Memorandum at "Subsidies Valuation Information" section. Therefore, as in Softwood Lumber First Review, because domestic prices are not reliable, in the Interim Decision Memorandum we resorted to the use of benchmark interest rates outside the PRC. See Interim Decision Memorandum at "Subsidies Valuation Information" section.

The GOC submitted comments regarding the Department's decision to use benchmark interest rates outside of the PRC. However, the arguments presented by the GOC have not led us to alter the approach we adopted in the Interim Decision Memorandum. See Comment 10 for further discussion.

Selecting an appropriate external interest rate benchmark is particularly important in this case because, unlike prices for certain commodities and traded goods, lending rates vary significantly across the world. Nevertheless, as discussed in the Interim Decision Memorandum and the CFS from the PRC, there is a broad inverse relationship between income levels and lending rates. See Interim Decision Memorandum at "Subsidies Valuation Information" section and CFS from the PRC Decision Memorandum at Comment 10. In other words, we continued to rely upon the fact that countries with lower per capita gross national income (GNI) tend to have higher interest rates than countries with higher per capita GNI, a fact demonstrated by the lending rates across countries reported in International Financial Statistics (IFS). See, e.g., Tires from the PRC Preliminary Determination, 72 FR at 71365, (unchanged in the final determination, Tires from the PRC Decision Memorandum at "Loan Benchmarks and Discount Rates."). The Department, therefore, determined in the Interim Decision Memorandum that it was appropriate to compute a benchmark interest rate based on the inflation-adjusted interest rates of countries with similar per capita GNI to the PRC, using the same regression-based methodology that we employed in CVD proceedings involving the PRC. See Interim Decision Memorandum at "Subsidies Valuation Information" section; see also CFS from the PRC Decision Memorandum at Comment 10; and Tires from the PRC Decision Memorandum at "E: Loan Benchmarks and Discount Rates."

In the Interim Decision Memorandum, we determined which countries are similar to the PRC in terms of per capita GNI based on the World Bank's classification of countries as: low income; lower-middle income; upper-middle income; and high income. As explained in the CFS from the PRC Decision Memorandum at Comment 10, this pool of countries captures the broad inverse relationship between income and interest rates. In the Interim Decision Memorandum, we explained that the PRC falls in the lower-middle income category. Many of these countries reported short-term lending and inflation rates to the International Monetary IFS. Certain of the interest rates from the IFS used in our regression analysis may reflect maturities of longer than one year. Therefore, in the Interim Decision Memorandum, we did not treat the regression-based interest rate derived from these rates as a short-term rate. Instead, we applied our benchmark to loans with terms of two years or less. See Interim Decision Memorandum at "Subsidies Valuation Information" section. This approach is consistent with the Department's approach in Thermal Paper from the PRC. See Thermal Paper from the PRC Decision Memorandum at "Benchmarks and Discount Rates." We used this data set to develop an inflation-adjusted market benchmark lending rate for short-term RMB loans. See Interim Decision Memorandum at "Subsidies Valuation Information" section. We did not include those economies that the Department considered to be non-market economies for AD purposes. Id. The benchmark necessarily also excludes any economy that did not report lending and inflation rates to IFS.

The lending rates reported in IFS represent short and medium-term lending. There is no sufficient publicly-available long-term interest rate data upon which to base a robust benchmark for long-term loans. To address this problem, the Department in the Interim Decision Memorandum utilized an adjustment to the medium-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB rated bond rates. Because the short-term benchmark covers loans up to two years, we calculated the long-term adjustment based on the difference between: 1) the two-year BB bond rate; and 2) the n-year BB bond rate, where n equals or approximates the number of years of the term of the loan in question. See Interim Decision Memorandum at "Subsidies Valuation Information" section. This approach is consistent with the Department's approach in the Thermal Paper Final. See Thermal Paper from the PRC Decision Memorandum at "Benchmarks and Discount Rates."

In the Interim Decision Memorandum, to calculate long-term discount rates, the Department first developed a ratio of the BB bond rates discussed above. The Department then applied this ratio to the benchmark short-term lending figure (discussed above) to impute a long-term lending rate. In calculating long-term benchmarks and discount rates, the Department adjusted the long-term U.S. corporate BB-rated bond rates to correspond to the average useful life (AUL) of the steel industry, which we find is 15 years. Thus, to calculate the long-term discount rates, we adjusted the short-term benchmark lending rate for the year in question to reflect inflation in the PRC and then applied the appropriate mark-up ratio. See Interim Decision Memorandum at "Subsidies Valuation Information" section.

The GOC submitted comments regarding the manner in which the Department derived the discount rates utilized in the Interim Decision Memorandum. However, the arguments presented by the GOC have not led us to alter the approach we adopted in the Interim Decision Memorandum. See Comment 10 for further discussion.

V. Analysis of Programs

A. Programs Determined To Be Countervailable

1. Provision of SSC for LTAR

The Department is investigating whether GOC authorities provided SSC to producers of CWASPP for LTAR. As instructed in the Department's questionnaires, the Winner Companies identified the suppliers from whom they purchased SSC during the POI. In addition to the supplier names, the Winner Companies, as instructed, indicated the date of payment, quantity, unit of measure, purchase price (with and without VAT and quantity discounts), grade, and delivery terms.

In order to assess whether an entity should be considered to be the government for purposes of countervailing duty investigations, the Department has in the past considered the following factors to be relevant: 1) the government's ownership; 2) the government's presence on the entity's board of directors; 3) the government's control over the entity's activities; 4) the entity's pursuit of governmental policies or interests; and 5) whether the entity is created by statute. Not all of these criteria must be satisfied for an entity to be considered a government entity, but, taken together these five criteria inform our decision. See e.g., Coated Free Sheet Paper from the Republic of Korea: Final Affirmative Countervailing Duty Determination, 72 FR 60639 (October 25, 2007) (CFS from Korea), and accompanying Issues and Decision Memorandum (CFS from Korea Decision Memorandum) at Comment 11.

Having obtained permission from the Winner Companies to disclose the proprietary names of their suppliers to the GOC, we asked the GOC to provide certain information regarding the Winner Companies' domestic suppliers of SSC. See Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations, "Consent to Release Company-Specific Proprietary Information to the Government of China (GOC)" (May 28, 2008), a public document on file in the CRU. Specifically, we asked the GOC to provide information pertaining to the "Five Factor Test" for each of the Winner Companies' domestic SSC. In its response, the GOC states that none of the domestic suppliers of the Winner Companies' SSC met criteria two through five under the "Five Factor Test." However, the GOC provided information indicating that, in certain instances, domestic suppliers of the Winner Companies' SSC were majority-owned by GOC entities. See GOC's Second Supplemental Questionnaire Response at Exhibit 1; GOC's Supplement to its Second Supplemental Questionnaire Response at Exhibits 1 - 24.

Based on our review of the information submitted by the GOC, we determined in the Preliminary Determination that domestic suppliers of the Winner Companies' SSC that were majority-owned by the GOC during the POI constitute government authorities. See Preliminary Determination, 73 FR at 39663. The GOC submitted comments regarding the Department's finding that government-owned SSC suppliers are government authorities. However, the arguments presented by the GOC have not led us to alter the approach we adopted in the Preliminary Determination. See Comment 5 for further discussion.

In addition, we instructed the GOC to indicate whether the Winner Companies' domestic suppliers of SSC were trading companies, and if so, to provide information related to the five factors listed above as it pertains to the entities from whom the trading companies purchased the SSC. In its response the GOC identified which of the Winner Companies' domestic SSC suppliers were trading companies. However, the GOC did not provide the requested information concerning the "Five Factor Test" as it pertains to the producers from whom the domestic trading companies purchased the SSC. See GOC's Second Supplemental Questionnaire Response at 3 ("The GOC does not possess the information requested by the Department"). Thus, in the Preliminary Determination, we determined that the necessary information was not on the record, and we resorted to the use of facts available within the meaning of sections 776(a)(1) and (2) of the Act. See Preliminary Determination, 73 FR at 39663. In its response, the GOC provided information on the amount of SSC produced by state-owned enterprises (SOEs) and private producers in the PRC. See GOC's June 16, 2008, Second Supplemental Questionnaire Response at 4. Using these data, we derived the ratio of SSC produced by SOEs during the POI (82 percent). Thus, pursuant to sections 776(a)(1) and (2) of the Act, in the Preliminary Determination we resorted to the use of FA with regard to the SSC sold to the Winner Companies by domestic trading companies. Id. Specifically, we assumed that the percentage produced by government authorities is equal to the ratio of SSC produced by SOEs during the POI.[4] This approach is consistent with the Department's practice. See, e.g., CWP from the PRC Decision Memorandum at the "Hot-rolled Steel for Less Than Adequate Remuneration;" see also LWP from the PRC Decision Memorandum at the "Hot-rolled Steel for Less Than Adequate Remuneration." With the exception of the privately-owned trading companies discussed in the "Application of Facts Available and Adverse Inferences" section and the government-owned trading company discussed below, we have resorted to the use of FA with regard to the SSC sold to the Winner Companies by government-owned trading companies. For further discussion, see our description of the benefit calculations below.

Subsequent to the Preliminary Determination, we verified information provided by the the Winner Companies concerning the producers from which one of their trading company suppliers had acquired the SSC during the POI. Thus, we have used the information supplied by the Winner Companies to derive the share of SOE-produced SSC that was sold by this particular government-owned trading company. Specifically, we used the ratio SOE-produced SSC for this particular supplier in our benefit calculations in lieu of the 82 percent ratio calculated pursuant to sections 776(a)(1) and (2) of the Act.

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4 In other words, as FA, we are assuming that 82 percent of the SSC purchased by domestic trading companies during the POI was produced by SOEs.

Having identified the extent to which the Winner Companies' obtained SSC from GOC authorities, we determine that the GOC authorities' provision of SSC constitutes a financial contribution under section 771(5)(D)(iii) of the Act. Furthermore, as discussed above in the "Adverse Facts Available" section, pursuant to section 776(b) of the Act, we find that the provision of SSC to producers of CWASPP by GOC authorities is de facto specific within the meaning of section 771(5A)(D)(iii) of the Act.

As discussed in the Preliminary Determination, the Winner Companies argued that the Department should not include the SSC that WSP purchased from GOC authorities in our LTAR subsidy analysis because the inputs were not subsequently used to make CWASPP. See Preliminary Determination, 73 FR a 39663. In the Preliminary Determination, we disagreed with the Winner Companies' arguments. Id. We did not receive any comments from interested parties concerning our approach in this regard. Therefore, we have continued to include WSP's purchases of SSC in our benefit calculations.

In the Preliminary Determination we found that information on the record indicates that SSC that is of the grade 430 is incompatible with the production process used to produce CWASPP (i.e., SSC that is grade 430 is not austentitic). See Preliminary Determination, 73 FR at 39664; see also June 30, 2008, Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations, "Public Information Concerning Stainless Steel of Grades 201 and 430," (June 30, 2008) (Steel Grade Memorandum), of which a public document on file in room 1117 of the CRU. Therefore, because record evidence indicates that SSC of grade 430 cannot, by its nature, be used to make CWASPP, in the Preliminary Determination we excluded the grade from our LTAR subsidy calculations. Id.; see also 19 CFR 351.525(b)(5): "If a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product." We have continued to exclude sales of this grade from the subsidy calculations. We also have excluded purchases of SSC made by the Winner Companies outside of the POI from our subsidy calculations. Furthermore, we continue to find that private producers that provided SSC to the Winner Companies during the POI do not constitute government authorities and, thus, their provision of SSC to the Winner Companies does not constitute a financial contribution within the meaning of section 771(5)(D)(iii) of the Act.

The Department's regulation at 19 CFR 351.511(a)(2) sets forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (e.g., actual sales, actual imports or competitively run government auctions) ("tier one"); (2) world market prices that would be available to purchasers in the country under investigation ("tier two"); or (3) an assessment of whether the government price is consistent with market principles ("tier three"). As we explained in the Softwood Lumber Investigation, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation.[5] This is because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation.

Based on the hierarchy established above, we must first determine whether there are

5 See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002) (Softwood Lumber Investigation), and accompanying Issues and Decision Memorandum at 36 (Softwood Lumber Investigation Decision Memorandum).

market prices from actual sales transactions involving Chinese buyers and sellers that can be used to determine whether GOC authorities sold SSC to the Winner Companies for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government provides the majority, or a substantial portion of, the market for a good or service, prices for such goods and services in the country will be considered significantly distorted and will not be an appropriate basis of comparison for determining whether there is a benefit.[6]

As explained above, in the Preliminary Determination we found that SOEs account for approximately 82 percent of the SSC production in the PRC during the POI (and approximately 71 percent of production if available data on import volume are included). See Preliminary Determination, 73 FR at 39664. Consequently, because of the government's overwhelming involvement in the PRC's SSC market, we found that the use of private producer prices in China would be akin to comparing the benchmark to itself (i.e., such a benchmark would reflect the distortions of the government presence).[7] Id. As we explained in Canadian Lumber:

> Where the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. It is impossible to test the government price using another price that is entirely, or almost entirely, dependent upon it. The analysis would become circular because the benchmark price would reflect the very market distortion, which the comparison is designed to detect.[8]

For these reasons, in the Preliminary Determination we found that prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's actions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration. See Preliminary Determination, 73 FR at 39664. We note that our finding in this regard is consistent with the Department's finding in CWP from the PRC. See CWP from the PRC Decision Memorandum at Comment 7, n. 206:

> Even if, arguendo, we were to rely on the GOC's 71 percent production figure, we would still find that government production accounts for a significant portion of the industry, so that it is reasonable to conclude that private prices in China are significantly distorted, and therefore unusable as benchmarks.

In the final determination, we continue to find that prices stemming from private SSC transactions within China are not viable benchmarks.

Next, turning to tier one benchmark prices stemming from actual import prices, there is record evidence that Winner HK purchased SSC from a supplier located outside of China during the POI.[9] The SSC Winner HK imported from the foreign supplier accounts for a significant

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6 See Countervailing Duties; Final Rule, 63 FR 65348, 65377 (November 25, 1998) (Preamble).

7 See Canadian Lumber decision memorandum at 34.

8 See Canadian Lumber decision memorandum at 38-39.

9 The identity of the foreign supplier is business proprietary.

percentage of the SSC purchased by the Winner Companies during the POI. The company-specific import price data contain information on monthly prices. In addition, the data contain prices for every grade of SSC that the Winner Companies purchased from GOC authorities during the POI, though month-to-month comparisons of prices within grades are not possible in some instances due to the lack of company-specific import prices in certain months.

In addition, the Department has on the record of the investigation tier two benchmark prices for certain grades of SSC, namely grades 304 and 316. The sources for the tier two benchmark prices are the Steel Business Briefing (SBB) publication and Management Engineering and Production Services (MEPS). The data reported by SBB contain delivered, monthly prices for SSC, grade 304, for Europe, North America, Asia (on an import price basis), and the world for the POI. The data reported by MEPS contain monthly prices for SSC (both hot- and cold-rolled), grades 304 and 316, for Europe, North America, Asia, and the world for the POI. Further, as discussed above, the GOC reported aggregate import data for the POI, as reported by its Customs Service. However, these aggregate import data do not delineate the prices by grade or month. In the Preliminary Determination, we excluded the Customs Services' aggregate import pricing data from the benchmark calculations because the data did not delineate the prices by grade or month. See Preliminary Determination, 73 FR at 39665. In the final determination, we have continued to exclude these data from the benchmark calculations.

As stated above, we have determined that government production accounts for a significant portion of the SSC industry so that it is reasonable to conclude that private prices in China are significantly distorted, and therefore unusable as benchmarks. Given this finding, we must test the available company-specific import prices of SSC in order to ascertain whether they are also distorted by the dominance of government production in the PRC. In the Preliminary Determination, we conducted the test by comparing the company-specific import price data for SSC to the world price data for SSC reported in MEPS and SBB. See Preliminary Determination, 73 FR at 39665. In the Preliminary Determination, we found that our test validated the use of company-specific import prices with market-based world prices. Id. We have reached the same conclusion regarding these prices in the final determination.

Furthermore, as in the Preliminary Determination, we continue to find that the world prices for SSC reported by MEPS and SBB are comparable to the company-specific import prices reported by the Winner Companies. Therefore, we continue to conclude that the world prices for SSC reported by MEPS and SBB should be treated as surrogate import prices and, thus, serve as a tier one benchmark. Although the regulations refer to "actual imports," we see no meaningful difference in actual and potential market-determined import prices stemming from transactions outside the country.[10] This is particularly the case where, as here, an actual import price is comparable to world market-determined price, such as those contained in MEPS and SBB. In effect, because of the comparability between the company-specific import prices and the MEPS and SBB world prices, we consider the latter to be equivalent or surrogates for actual imports. These prices are thus appropriately considered tier one benchmark prices. We note that this approach is consistent with the Department's approach in CWP from the PRC. See CWP from the PRC Decision Memorandum at Comment 7. For these reasons, to measure

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

whether GOC authorities sold SSC to the Winner Companies for LTAR during the POI, we are relying on the simple average of the company-specific import prices, MEPS, and SBB.

To calculate the benefit, we first converted the benchmark prices into the same unit of measure (USD per tonne). Next, we converted the benchmark unit prices from U.S. dollars to renminbi (RMB) using average USD to RMB exchange rates, as reported by the Federal Reserve Statistical Release. We then compared the benchmark unit prices to the unit prices the Winner Companies paid to domestic suppliers of SSC during the POI.

We conducted the benefit calculation by comparing prices within each grade. Information concerning the grades of SSC imported by Winner HK during the POI is business proprietary. A discussion of the manner in which the Department conducted its grade comparisons in the Preliminary Determination is described in a Memorandum to the File. See the Memorandum to the File from Eric B. Greynolds, Program Manager, Office 3, Operations, "Comparisons of Grades of Stainless Steel Coil For Purposes of the Preliminary Determination" (June 30, 2008) (Grade Comparison Memorandum), a business proprietary document, of which the public version is on file in the CRU. In the final determination we have continued to conduct our subsidy calculations in the manner described in the Grade Comparison Memorandum.

Under 19 CFR 351.511(a)(2)(iv), in measuring the adequacy of remuneration, the Department will adjust the benchmark to reflect the price that a firm paid or would pay if it imported the product. This adjustment will include delivery charges and import duties. As discussed above, our benchmark prices reflect delivered prices. However, we verified that the Winner Companies did not pay import duties or VAT on the SSC they imported during the POI. See Winner Companies Verification Report at "Import Duty and VAT Exemptions on Raw Materials" section, of which a public version in on file in room 1117 of the CRU. Therefore, we have not included import duties and VAT in the prices the Winner Companies paid on imports of SSC that we are using in our benchmark calculations. However, we are including VAT in the SSC prices from MEPS and SBB. We would have also included import duties in the SSC prices from MEPS and SBB when conducting our benchmark calculations, but we lack record evidence regarding the applicable duty rates.

With regard to the prices the Winner Companies paid on purchases of SSC from government authorities, in keeping with our practice we have included domestic VAT when conducting our subsidy calculations. See Line Pipe from the PRC Decision Memorandum at Comment 9. Regarding petitioners' allegation concerning export restraints on SSC, we find that it is not necessary to examine the allegation because our benchmarks account for any influence that export restraints may have on domestic prices for the input.

In instances in which the benchmark unit price was greater than the price paid to GOC authorities, we multiplied the difference by the quantity of SSC purchased from GOC authorities to arrive at the benefit. As discussed in the "Application of Facts Available and Use of Adverse Inferences" section, we are treating the Winner Companies' purchases of SSC from privately-owned trading companies as purchases from government-owned producers. In instances in which the Winner Companies purchased the SSC from government trading companies, we multiplied the product of the price difference per unit and the quantity of SSC purchased by 82 percent to arrive at the benefit.[11]

To calculate the net subsidy rate, we first divided the total benefit by the combined total

11 We used the 82 percent ratio in our subsidy calculations in all transactions involving government-owned trading companies except for transactions involving the single government-owned trading company for which information was provided regarding the identities of suppliers from whom it acquired SSC.

sales of Winner and WSP for the POI. Next, we multiplied the program rate by a ratio equal to the value of sales to the United States made by Winner/WSP through Winner HK divided by the value of Winner HK's sales to the United States, inclusive of Winner HK's mark-up. See the "Adjustment to Net Subsidy Rate Calculation" section. On this basis, we calculated a total net subsidy rate of 0.36 percent ad valorem for the Winner Companies.

2. Reduced Income Tax Rate for Foreign Investment Enterprises (FIEs) Located in Economic and Technological Development Zones and Other Special Economic Zones

This program provides tax incentives for enterprises located in special zones. The GOC states that the program was first enacted on June 15, 1988, pursuant to the Provisional Rules on Exemption and Reduction of Corporate Income Tax and Business Tax of FIEs in Coastal Economic Zones, as issued by the Ministry of Finance. The GOC states that the program was continued on July 1, 1991, pursuant to Article 30 of the FIE Tax Law. Specifically, pursuant to Article 7 of the FIE Tax Law for productive FIEs established in a coastal economic development zone, special economic zone, or economic technology development zone, the applicable enterprise income tax rate is 15 or 24 percent, depending on the zones in which productive FIE are located, as opposed to the standard 30 percent income tax rate.

We preliminarily determined that this program constitutes a financial contribution in the form of revenue forgone and confers a benefit equal to the amount of tax savings within the meaning of sections 771(5)(D)(ii) and 771(5)(E) of the Act. See Preliminary Determination, 73 FR at 39662. Because eligibility under this program is limited to firms located within designated geographical regions, we preliminarily determined that the program is specific within the meaning of section 771(5A)(D)(iv) of the Act. Id. We note that the Department has found this program countervailable in previous CVD proceedings. See, e.g., CFS from the PRC Decision Memorandum at "Reduced Income Tax Rates for FIEs Based on Location" section. Our findings in this regard remain unchanged from the Preliminary Determination.

Under 19 CFR 351.509(b), in the case of an income tax reduction program, the Department normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the reduction. Normally, this date is the date on which the firm in question filed its tax return. The Winner Companies received an income tax reduction under the program with respect to the tax return filed during the POI. Therefore, we determine that the Winner Companies received a benefit under this program during the POI.

In accordance with 19 CFR 351.509(a), to calculate the benefit, we subtracted the income tax rate Winner paid under the program from the income tax rate that Winner would have paid absent the program and multiplied the difference by the Winner's taxable income.

To calculate the net subsidy rate, we first divided the total benefit by the total sales of Winner and for the POI. See Comment 3 below for an explanation why for this particular program we calculated the countervailable program rate using a denominator comprised solely of Winner's total sales. Next, we multiplied the program rate by a ratio equal to the value of sales to the United States made by Winner/WSP through Winner HK divided by the value of Winner HK's sales to the United States, inclusive of Winner HK's mark-up. See the "Adjustment to Net Subsidy Rate Calculation" section. On this basis, we calculated a total net subsidy rate of 0.04 percent ad valorem for the Winner Companies.

3. <u>Import Duty and Value Added Tax Exemptions for Imported Equipment</u>

Enacted in 1997, the State Council's Circular on Adjusting Tax Policies on Imported Equipment (Guofa No. 37) (Circular No. 37) exempts both foreign invested enterprises (FIEs) and certain domestic enterprises from the value-added tax (VAT) and tariffs on imported equipment used in their production. The National Development and Reform Commission (NDRC) and the General Administration of Customs are the government agencies responsible for administering this program. The objective of the program is to encourage foreign investment and to introduce foreign advanced technology equipment and industry technology upgrades. Under the program, companies are authorized to receive the exemptions based on their FIE status and the list of assets approved by the GOC at the time their FIE status was approved. Domestic enterprises eligible for the VAT and duty exemptions must have government-approved projects that are in line with the current "Catalog of Key Industries, Products, and Technologies the Development of Which is Encouraged by the State." Whether an FIE or domestic enterprise, only equipment that is not listed in the Catalog on Non-Duty Exemptible Article for Importation is eligible for the VAT and duty exemptions. Different catalogs are prepared for FIEs and domestic enterprises. To receive the exemptions, a qualified enterprise has to show a certificate provided by the NDRC, or its provincial branch, to the customs officials upon importation of the equipment.

The Winner Companies received VAT and duty exemptions under this program due to their status as a qualified FIE. In the Interim Decision Memorandum, we determined that VAT and tariff exemptions on imported equipment confer a countervailable subsidy. <u>See</u> Interim Decision Memorandum at "Tax Exemption for Imported Equipment" section. We further found that the exemptions are a financial contribution in the form of revenue forgone by the GOC, which provide a benefit to the recipients in the amount of the VAT and tariff savings. <u>See</u> sections 771(5)(D)(ii) and 771(5)(E) of the Act, as well as 19 CFR 351.510(a)(1). Our findings in this regard remain unchanged in the final determination.

We acknowledge that the pool of companies eligible for benefits is larger than FIEs because some domestic companies may also qualify for the exemptions. However, as explained above and in past CVD proceedings, the domestic enterprises must have government-approved projects which are in line with the current "Catalog of Key Industries, Products, and Technologies the Development of Which Is Encouraged by the State," and must be approved by the State Council, NDRC, or another agency to which authority has been delegated. Therefore, we determine that the addition of certain domestic enterprises as eligible users does not broaden the reach or variety of users sufficiently to render the program non-specific. On this basis, we continue to find the program is specific under section 771(5A)(D)(iii)(I) of the Act. Our determination to countervail this program is consistent with the Department's treatment of this program in past CVD proceedings involving the PRC. <u>See</u>, <u>e.g.</u>, CFS from the PRC Decision Memorandum at "VAT and Tariff Exemptions on Imported Equipment" and Comment 16; <u>see also</u> Tires from the PRC Decision Memorandum at "VAT and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment on Encouraged Industries."

Normally, we treat exemptions from indirect taxes and import charges, such as the VAT and tariff exemptions, as recurring benefits, consistent with 19 CFR 351.524(c)(1) and allocate these benefits only in the year that they were received. However, when an indirect tax or import charge exemption is provided for, or tied to, the capital structure or capital assets of a firm, the

Department may treat it as a non-recurring benefit and allocate the benefit to the firm over the AUL. See 19 CFR 351.524(c)(2)(iii) and 19 CFR 351.524(d)(2).

In this investigation, the Winner Companies provided lists of VAT and tariff exemptions that it received for imported capital equipment during the years 2001 through 2007. In light of our determination to only countervail subsidies provided after December 11, 2001, we have examined VAT and tariff exemptions in 2002 and following years. To calculate the amount of import duties exempted under the program, we multiplied the value of the imported equipment by the import duty rate that would have been levied absent the program. To calculate the amount of VAT exempted under the program, we multiplied the value of the imported equipment (inclusive of import duties) by the VAT rate that would have been levied absent the program. Our derivation of VAT in this calculation is consistent with the Department's approach. See, e.g., Line Pipe from the PRC Decision Memorandum at Comment 8, "we agree with petitioners that VAT is levied on the value of the product inclusive of delivery charges and import duties." Next, we summed the amount of duty and VAT exemptions received in each year. For each year, we divided the total grant amount by the corresponding total combined sales of Winner and WSP for the year in question.[12] Pursuant to 19 CFR 351.524(b)(2), we expensed the grant amounts to the year of receipt for those years in which the grant amount was less than 0.5 percent of the combined sales of Winner and WSP, net of intra-company sales. For those years in which the grant amounts were greater than 0.5 percent of the Winner Companies' total sales, we allocated the benefit to the period of investigation (POI) using the methodology described under 19 CFR 351.524(d). We derived the long-term discount rate using the methodology described in the "Subsidies Valuation Information" section of this memorandum.

To calculate the net subsidy rate, we first divided the total benefit by the combined total sales of Winner and WSP for the POI. Next, we multiplied the program rate by a ratio equal to the value of sales to the United States made by Winner/WSP through Winner HK divided by the value of Winner HK's sales to the United States, inclusive of Winner HK's mark-up. See the "Adjustment to Net Subsidy Rate Calculation" section. On this basis, we calculated a total net subsidy rate of 0.70 percent ad valorem for the Winner Companies.

B. Programs Determined to Provide No Benefit in the POI[13]

1. Tax Reductions for Firms Located in Third Industrial Park at Xiabu Village – *Value-Added Tax (VAT) Exemptions on Raw Materials*

In the Interim Decision Memorandum, we preliminarily determined that the VAT and import duty exemptions the Winner Companies received on their imports of raw materials did not provide a benefit during the POI. We found that information on the record and collected at verification indicates that the Winner Companies made VAT and duty-free importations of raw materials under the GOC's processing trade regime and not under any form of locally-operated program. Furthermore, we verified that VAT and import duty exemptions were only provided on imports of raw materials that were incorporated into an exported product. Our finding in this

12 We derived the total sales figures using the methodology described in the Preliminary Determination, 73 FR at 39662.

13 As explained above, Froch did not respond to the Department's initial questionnaire. Therefore, as AFA, we are assigning net subsidy rates to Froch for each of the programs listed in this section.

regard remains unchanged from the Interim Decision Memorandum.

2. Support for Registered High-Tech Projects

Winner reported receiving grants under this program in 2002 and 2004. At verification, we confirmed that the Winner Companies received the grants prior to the POI, and did not receive any grants during the POI. Pursuant to 19 CFR 351.524(b)(2), we conducted the "0.5 test" for the grants received in 2002 and 2004. Specifically, we divided the grant amounts received in each year by the Winner Companies' corresponding total sales for the year in question. We calculated the Winner Companies' denominator using the methodology described in the "Denominator" section of this memorandum. In the Interim Decision Memorandum, we determined that the grants received under this program were less than 0.5 percent of the relevant sales denominators and, thus, would be expensed before the POI; therefore, no benefit was received under this program during the POI. Our finding in this regard remains unchanged from the Interim Decision Memorandum.

C. Programs Preliminarily Determined To Be Not Used

We determine that the Winner Companies did not apply for or receive benefits during the POI under the programs listed below.[14]

1. Preferential Lending

   a. Loans and Export Credits Pursuant to the Northeast Revitalization Program Income Tax Programs

2. Tax Programs

   a. "Two Free, Three Half" Program
   b. Income Tax Reductions for Export-Oriented Foreign Investment Enterprises ("FIEs")
   c. Income Tax Credit or Refund for Reinvestment of FIE Profits
   d. Provincial and Local Tax Exemptions and Reductions for Productive FIEs
   e. Local Income Tax Reductions in Certain Development Zones
   f. Preferential Tax Policies for Research and Development at FIEs
   g. Carry-Forward of Tax Losses for FIEs

3. Indirect Tax Programs and Import Tariff Program

   a. VAT Refunds on Purchases of Domestically Produced Equipment by FIEs
   b. Tax Credits on Purchases of Domestically Produced Equipment by

14 As explained above, Froch did not respond to the Department's initial questionnaire. Therefore, as AFA, we are assigning net subsidy rates to Froch for each of the programs listed in this section, the exception being Export Restraints on Stainless Steel Coils. As explained above, the Department has determined it is not necessary to examine this subsidy program due to the benchmark used to calculate the benefit.

Domestically Owned Companies

c. Tax Reductions for Firms Located in the Third Industrial Park at Xiabu Village - Tax Incentives - *Import Duty Exemptions on Imported Equipment*

d. Tax Reductions for Firms Located in the Third Industrial Park at Xiabu Village - *Value Added Tax (VAT) Exemptions on Imported Equipment*

4. Provincial Subsidy Programs

a. Guangdong Province's "Outward Expansion" Program
b. Preferential Loans Pursuant to Liaoning Province's Five-Year Framework
c. Preferential Tax Policies for Town and Village Enterprises ("TVEs")

5. Provision of Goods or Services for Less than Adequate Remuneration

a. Provision of Stainless Steel Coil for Less than Adequate Remuneration
b. Provision of Land Use Rights for Less than Adequate Remuneration

6. Government Restraints on Exports

a. Export Restraints on Flat-rolled Steel

7. Grant Programs

a. Waiver of Land-Use and District Level Fees
b. Exemption and Reduction of Security Fees in the Huadu District
c. Exemption and Reduction of Construction Fees in the Huadu District

VI. Analysis of Comments

Comment 1: Whether the Department Reasonably Treated China as a Developed Country for CVD De Minimis Purposes

The Winner Companies state that in the Preliminary Determination, the Department without explanation used a de minimis threshold of one percent ad valorem. The Winner Companies argue, however, that under WTO rules (ASCM Articles 11.9 and 27.10), the amount of subsidies granted a product is considered de minimis if they are in total under one percent ad valorem for developed countries, and under two percent for developing countries. See also Sections 703(b)(4) and 705(a)(3) of the Tariff Act. The Winner Companies assert that because the PRC is considered a developing country, the de minimis threshold should be two percent for the final determination.

The Winner Companies further argue that in the companion AD investigation, the Department used, as the surrogate country, India, which is considered a developing country and qualifies for the two percent de minimis threshold. See, e.g., Final Negative Countervailing Duty Determination: Elastic Rubber Tape From India, 64 FR 19125, 19134 (April 19, 1999). The Winner Companies, therefore, argue that it is inconsistent and impermissible as a matter of law to treat China as a developed country in the instant case.

The GOC argues that consistent with the CVD statute and the U.S. WTO obligations under the SCM Agreement, the Department should find that the Winner Companies' net subsidy rate is de minimis and therefore terminate the proceeding with regard to Winner. The GOC contends that under the statute, the Department should disregard any de minimis total net subsidy rate, normally defined as a net countervailable subsidy rate that is in the aggregate less than one percent ad valorem and, for developing countries, less than two percent ad valorem. The GOC states that the PRC is a developing country and that over the course of the negotiations to accede to the WTO, the PRC made clear its expectation that it was entitled to any special and differential treatment accorded to developing countries under the WTO. The GOC also argues that, as indicated in the Report of the Working Party on China's Accession, China specifically reserved its right to a benefit from the provisions of Article 27.10 of the SCM Agreement.

The GOC further argues that U.S. law defines "developing country" as those countries designated by USTR and notes that USTR has evidently not updated its CVD de minimis standards for imports from members of the WTO since June 1998, more than three years before China acceded to the WTO. The GOC notes that the PRC has yet to be officially defined by USTR as either a developed, a developing, or a least-developed WTO member country for purposes of the CVD law and that it is ironic that the U.S. agency directly in charge of negotiating the PRC's WTO accession never updated its list of de minimis standards to include China. The GOC further argues that perhaps this reflects USTR's understanding, consistent with U.S.-WTO obligations, that the CVD law was never intended to apply to the PRC so long as it continued to be treated as a non-market economy for AD purposes. The GOC concludes that given this omission, the Department is obliged to consult with USTR to resolve any ambiguity before issuing and final determination in this case.

Petitioners point out that USTR has not made a finding regarding the PRC's development status, as described in the statute and state that this is the only possible legal basis for the Department to apply a two percent de minimis threshold. They further argue that the use of surrogate values in an AD proceeding has a different purpose than the de minimis threshold in the CVD statue. They argue that the former is designed to provide the most accurate understanding of the amount of dumping possible under the statute, and the latter is meant to comply with U.S. obligations under the WTO agreements. They note that the PRC may have a similar development level for purposes of calculating costs, but in terms of volume and value of trade and trade surpluses with the United States, the PRC vastly outstrips India. For these reasons, petitioners conclude that it is reasonable to not treat the PRC as a developing country for purposes of the de minimis threshold in a CVD investigation. Petitioners add that the GOC identifies no legal basis for treating the PRC as a developing country for purposes of the de minimis threshold. Petitioners contend no such legal basis exists.

Department's Position: The de minimis rate for countervailing duty investigations is set forth under section 703(b)(4) of the Act. Under section 703(b)(4)(A), the de minimis rate is one percent . Section 703(b)(4)(B) provides that a two percent de minimis rate will be applied only to countries designated as a "developing country" by USTR. USTR has not designated China as a developing country; therefore, the one percent de minimis rate is applicable to this investigation.

Comment 2: Whether Winner HK should be Treated as a PRC Entity for Purposes of Attribution

Petitioners discuss that in the Preliminary Determination, the Department found that Winner HK is a Hong Kong company and, thus, could not receive subsidies from the GOC under the transnational subsidy rule. See Preliminary Determination, 73 FR at 39662. As such, the Department did not include any of the SSC that Winner HK purchased from GOC sources in the benefit calculation of the Provision of SSC for LTAR program. Petitioners, however, argue that the Department should treat Winner HK as a PRC entity for purposes of subsidy attribution.

Petitioners first argue that information on the record demonstrates that Winner HK has no real operations in Hong Kong. See Winner Companies Verification Report at 7. They discuss that Winner HK has one subject merchandise production facility in the PRC and that Winner HK uses this facility under a tolling arrangement with a cross-owned company in China. Petitioners state that though Winner HK does not own the facility, the underlying commercial reality is that the company's operations are located in the PRC and not Hong Kong. They note that the Winner Companies themselves states that Winner HK "is registered in Hong Kong, however its business activities are carried out at Winner's site" in Guangzhou in the PRC. See the Winner Companies' New Subsidy Questionnaire Response at 2 (September 5, 2008). Petitioners submit that the Department has recognized that if a company has production operations in more than one country, it may receive subsidies from either country's government notwithstanding the transnational subsidy rule. See 19 CFR 351.525(b)(7). Petitioners also submit that Winner HK has more ties to the PRC than Hong Kong for the purposes of producing CWASPP and, as such, the Department should consider it "located" in the PRC.

Petitioners add that considering Winner HK to be "located" in the PRC rather than Hong Kong would best accord with the purpose of the transnational subsidy rule. They contend that the Department intended the transnational rule to ensure that it did not countervail foreign aid. Petitioners assert that in the instant investigation the provision by the GOC of SSC to Winner HK at low prices, in the PRC, for use in manufacturing CWASPP in the PRC, is not foreign aid. They state that the GOC has not benevolently supplied money to benefit an industry in another country. Instead, they submit that this program comprises part of the PRC's industrial policy of encouraging the manufacture and export of value-added steel products from the PRC. As such, the provision of SSC by Chinese state-owned firms to the nominally foreign Winner HK, which Winner HK uses in the PRC, should not escape countervailing duties by reason of the transnational subsidy rule.

Petitioners further argue that to interpret the term "located" under the transnational subsidy rule to allow firms that incorporate in a third country and operate only by "tolling arrangements" with cross-owned affiliates to escape countervailing duties would invite circumvention of the CVD law. They submit that a manufacturer could easily set up a paper subsidiary in Hong Kong or some other tax haven, owned by the same or similar shareholders, and have that company keep title to its raw materials as they are processed. Petitioners contend that this would allow the company to escape all or most countervailing duty liability, without any substantive change to its operations. Petitioners add that if a company could freely assign production of non-subject goods to this paper entity, and the Department included such production in the subsidy denominator, such an arrangement can not only immunize the firm from countervailing duties on some subsidies, but dilute the countervailing duty rate on any subsidies the Department considers it to have received.

The Winner Companies argue that Winner HK is registered in Hong Kong as a Hong Kong company. The Winner Companies also state that any purchase of SSC by Winner HK was carried out as an offshore transaction, and was subsequently imported to China under the "processing trade" mode of consignment. The Winner Companies assert that none of the SSC purchased during the POI by Winner HK was from any Chinese state-owned firms.

Department's Position: We verified that the Winner HK did not purchase SSC from government authorities in the PRC, such as SOEs. See Winner Companies Verification Report at "Stainless Steel Coil (SSC) Purchased for Less than Adequate Remuneration (LTAR)," in which the Department confirmed that all of the purchases of SSC by Winner HK were from suppliers that were not owned by the GOC. Therefore, there is no relevant issue to address for purposes of this final determination.

Comment 3: Whether the Total Sales Figure Used as the Denominator in the Preliminary Determination and Interim Decision Memorandum is Correct

The Winner Companies argue that in the Preliminary Determination and Interim Decision Memorandum, the Department did not correctly calculate the total export sales of the Winner Companies. They argue that the Department should revise its denominator calculations to the extent it continues to incorporate the sales of Winner HK in the denominator. The Winner Companies argue that, with respect to the total export sales of the Winner Companies, the Department inappropriately used "Total Export Sales of Winner HK" minus "Total Export Sales Made to Winner HK by Winner and WSP" to obtain "Total Net Export Sales Made by Winner HK." They argue that, to correctly calculate the total sales, the Department should aggregate the sales of all affiliated companies, excluding intra-group sales among the affiliated companies; that is, only the sales to unaffiliated companies would be included as the denominator to calculate the net countervailable subsidy rate.

The Winner Companies further argue that, for export sales, since Winner HK makes the final sale to the United States and every transaction Winner HK made during the POI were all to unaffiliated companies, the Department should have used the figure reported for "Total Export Sales of Winner HK" as the total export sales of Winner Companies because there were no intra-company sales the figure reported for "Total Export Sales of Winner HK."

They also contend that, while the Department further deducted the figure reported for "Total Export Sales Made to Winner HK by Winner and WSP" from "Total Export Sales of Winner HK," this approach indicates that the Department used only the profits of Winner HK as the export sales value because "Total Export Sales Made to Winner HK by Winner and WSP" is the purchase cost Winner HK paid to Winner and WSP for acquiring goods or processing services and such costs were recorded under the cost of goods sold (COGS) line item in Winner HK's 2007 financial statements, rather than sales revenues of Winner HK. Accordingly, since the Department mistakenly took only the profits of Winner HK to be the export sales value, the net countervailable subsidy rate calculated in the Preliminary Determination and Interim Decision Memorandum was inappropriately and artificially enlarged. They conclude that only if the "Total Exports Sales Value of Winner & WSP" was included in the denominator calculation, could the Department deduct the intra-group sales for Export (i.e., "Total Export Sales Made to Winner HK by Winner and WSP"). Since all the export sales value Winner and WSP made were to Winner HK, the "Total Exports Sales Value of Winner & WSP" after excluding intra-company sales would be totally offset to zero.

Petitioners state that, under 19 CFR 351.525(b)(6)(i), even when companies are cross-owned, the Department attributes subsidies only to the company that received them. They further state that, under 19 CFR section 351.525(b)(6)(iv),where a supplier of inputs to a cross-owned producer of subject merchandise receives subsidies, and the input is primarily dedicated to production of the subject merchandise, the Department will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both firms (excluding inter-company transfers to avoid double-counting). They therefore argue that because Winner produces subject merchandise and WSP and Winner HK supply it with inputs, the Department should attribute subsidies received by WSP to the sales of Winner and WSP, and subsidies received by Winner HK to the sales of Winner and Winner HK.

Petitioners also argue that the Department should attribute any subsidies that Winner itself receives only to Winner's own sales. For such subsidy programs, such as the Tax Exemption for Imported Equipment program, 19 CFR 351.525(b)(6)(iv), does not apply. Rather, they argue that with regard to the Tax Exemption for Imported Equipment program, 19 CFR 351.525(b)(6)(i) is the applicable regulation. Petitioners contend that 19 CFR 351.525(b)(6)(iv) does not apply to Winner HK because that regulation applies only to subsidized input suppliers, and therefore, there is no basis to include Winner HK's sales in the denominator for any such program. Finally Petitioner's argue that adjusting Winner sales figures upward to account for Winner HK's markup would create a risk of allowing circumvention of the CVD law.

The Winner Companies rebut petitioners' arguments by contending that the sales values to which any Chinese subsidies are being attributed do not include the mark-up charged by Winner HK to the export customers, including U.S. customers. They argue that when calculating the CVD rate, the Winner Companies' sales revenues need to be adjusted to take account of the Winner HK markup and the value of the consigned coils, noting that only then does the subsidy percentage assed on entered value in the United States equal the amount of subsidies actually received by the Winner Companies. The Winner Companies argue that, to achieve the correct result, the Department should follow its methodology in Thai Bearings and CFS from the PRC. See Thai Bearings, 57 FR at 26647, and CFS from the PRC Decision Memorandum at Comment 21, in which the Department adjusted the program rate calculated for each countervailable program to account for the mark-up charged by the affiliated entity located outside of the country under investigation.

The Winner Companies argue that in Thai Bearings and CFS from the PRC, the Department adjusted the programs rates after satisfying itself that: (1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; (2) the exporter and the party that invoices the customer are affiliated; (3) the U.S. invoice establishes the customs value to which CVD duties are applied; (4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; (5) the merchandise is shipped directly to the United States; and (6) the invoices can be tracked as back-to-back invoices that are identical except for price. See, e.g., CFS from the PRC Decision Memorandum at Comment 21. The Winner Companies argue that they have met the Department's established criteria. The Winner Companies argue that the Department should therefore apply the adjustment utilized in past CVD proceedings when attributing all subsidies found to have been received by Winner and WSP.

The Winner Companies conclude that, if the Department does not follow its methodology in Thai Bearings and CFS from the PRC, it should use Winner HK's sales prices, which are the basis for the declared customs values of the merchandise as it enters the United States.

Petitioners rebut arguing that the Winner Companies identify no legal basis for including the sales of Winner HK in the denominator of the net subsidy rate calculation.

Department's Position: When calculating the countervailable program rates, we have continued to attribute subsidies received by WSP and Winner under the Provision of Stainless Steel Coil for LTAR and Import Duty and Value Added Tax Exemptions for Imported Equipment programs to the combined sales of WSP and Winner (net of intra-company sales).

However, in this final determination, we agree with petitioners that 19 CFR 351.525(b)(6)(i) applies with regard to the Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones program. Under 19 CFR 351.525(b)(6)(i) the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. Sub paragraph (ii) states that if two (or more) corporations with cross-ownership produce subject merchandise, the Department will attribute the subsidies received by either or both corporations to the products produced by both corporations. Winner was the only member of the Winner Companies that received benefits under the income tax reduction program and is the sole producer of CWASPP among the Winner Companies. Therefore, we have attributed the subsidies Winner received under the Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones program to the total sales of Winner.

We agree, however, with respondents' arguments concerning the manner in which to account for the mark-up that Winner HK applies on sales to the United States. In keeping with the Department's practice, we find that the amount of countervailing duty collected must reflect the amount of subsidies bestowed. See Thai Bearings, 57 FR at 26647; see also CFS from the PRC Decision Memorandum at Comment 21. The Department has established six criteria to determine whether it is appropriate to adjust the net subsidy rate so that it matches the level of subsidies bestowed. As explained in the "Adjustment to Net Subsidy Rate Calculation" section, based on information provided by the Winner Companies, we find that the companies' sales process fulfills the Department's established criteria. Therefore, we have adjusted the net subsidy rates for each countervailable program (i.e., the program rates) by multiplying the rates by a ratio equal to the value of sales to the United States made by Winner/WSP through Winner HK divided by the value of Winner HK's sales to the United States, inclusive of Winner HK's mark-up.

As described in the "Adjustment to Net Subsidy Rate Calculations" section, our calculations of the countervailable program rates rely solely on sales data from WSP and/or Winner. Therefore, we find it is not necessary to respond to interest parties' comments concerning the manner in which the sales of Winner HK should be incorporated into the denominator used in the countervailable program rate calculation. Furthermore, we find it is not necessary to address petitioners' comments concerning the manner in which to attribute subsidies received by Winner HK because the firm did not use any of the subsidy programs covered by the instant investigation.

Comment 4: Whether the Department Has the Legal Authority to Apply the CVD Law to the PRC While Simultaneously Treating the PRC as an NME in Parallel Antidumping Investigations

The GOC argues that the Department's application of the CVD law to the PRC, while continuing to treat China as a non-market economy (NME) for purposes of the antidumping law, is invalid. The GOC argues that the Court of Appeals for the Federal Circuit (CAFC) found that the statutory scheme does not permit the Department to impose countervailing duties against NME countries. See Georgetown Steel Corporation, et al., v. the United States, 801 F.2d 1308, 1314 (Fed. Cir. 1986) (Georgetown Steel). The GOC contests the Department's interpretation of Georgetown Steel (i.e., that the Court granted the Department discretion not to apply the CVD law to NME countries) lacks a credible legal basis and cannot be reconciled with the clear language of Georgetown Steel. The GOC argues that, even if one could construe the CAFC's opinion in Georgetown Steel as ambiguous on the issue of the Department's discretion, the CAFC's cogent analysis of Congressional intent and the statutory scheme dictates the same conclusion that the CVD law as it exists today cannot apply to countries designated as NMEs under the antidumping statute. The GOC then argues that there has been no meaningful change in the statute since the CAFC's opinion in Georgetown Steel that would alter the analysis.

The GOC also takes issue with what it claims is the Department's efforts to factually distinguish the PRC's economy from the traditional planned economies of the 1980s. The GOC claims this rationale ignores the reality of section 771(18) of the Act, which holds that a country may either be designated an NME country or a market economy country, not both. The GOC claims the Department acknowledged this interpretation of section 771(18) of the Act in the Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002) (Sulfanilic Acid from Hungary) and accompanying Issues and Decision Memorandum at Comment 1 (Sulfanilic Acid from Hungary Decision Memorandum), in which it refused to apply the CVD law to Hungary a year before Hungary graduated to a market economy status.

The GOC further argues that the application of the CVD law to the PRC constitutes a retroactive amendment to a binding rule that requires a formal rulemaking. The GOC argues that the Department has articulated this rule against the application of the CVD law against NME countries on three occasions.[15] The GOC asserts that the Department's decision to apply the CVD law to NME countries fundamentally reverses the rule of these three past actions and, therefore, requires a formal rulemaking. On this basis, the GOC argues that the Department should terminate the current CVD proceeding with no further action.

Petitioners argue that the Department has properly rejected the argument that the Department lacks authority to apply the CVD law to China, while at the same time considering China a non-market economy for purposes of the antidumping law. As authority, they cite the Department's recent determinations. See, e.g., Line Pipe from the PRC Decision Memorandum

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15 The three instances cited by the GOC are: 1. Textiles, Apparel, and Related Products from the People's Republic of China, 48 FR 46600 (October 13, 1983) and Carbon Steel Wire Rod from Poland; Preliminary Negative Countervailing Duty Determination, 49 FR 6768 (February 23, 1984), where the Department declined to apply the CVD law to NME countries after a comment period, 2. Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217 (July 9, 1993) (General Issues Appendix), which included a general issues appendix that resolved various CVD law-related issues, and 3. the Department's CVD regulations, 63 FR at 65360, where the Department limited the scope of its regulations to exclude NME countries.

at Comment 16; see also Thermal Paper from the PRC Decision Memorandum at Comment 1.

Department's Position: The Department has previously addressed the argument made by the GOC. See, e.g., Thermal Paper Decision Memorandum at Comment 1; see also Line Pipe from the PRC Decision Memorandum at Comment 16. The Department's position on these issues remains the same; CFS from the PRC Decision Memorandum at Comments at 1 - 6; and Line Pipe from the PRC Decision Memorandum at Comment 16.

Congress granted the Department the general authority to conduct CVD investigations. See, e.g., sections 701 and 771(5) and (5A) of the Act. In none of these provisions is the granting of this authority limited only to market economies. For example, the Department was given the authority to determine whether a "government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy . . . ." See Section 701(a) of the Act. Similarly, the term "country," defined in section 771(3) of the Act, is not limited only to market economies, but is defined broadly to apply to a foreign country, among other entities. See also Section 701(b) of the Act (providing the definition of "Subsidies Agreement country").

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME." See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984) (Wire Rod from Poland) and Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) (Wire Rod from Czechoslovakia). The Department reached this conclusion, in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. Id. The Department explained that "{t}his is the background that does not allow us to identify specific NME government actions as bounties or grants." Id. Thus, the Department based its decision upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, "although price controls and guidance remain on certain 'essential' goods and services in China, the PRC Government has eliminated price controls on most products . . . ." See Thermal Paper Decision Memorandum at Comment 1, citing to Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy" (March 29, 2007), a public document available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf) (Georgetown Steel Memorandum). Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in Wire Rod from Poland and Wire Rod from Czechoslovakia is not a significant factor with respect to China's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from China.

The CAFC recognized the Department's broad discretion in determining whether it can apply the CVD law to imports from an NME in Georgetown Steel, 801 F.2d at 1318. In doing so, the CAFC recognized that the statute does not speak to this precise issue and deferred to the Department's decision. The Georgetown Steel court did not find that the CVD law prohibited the application of the CVD law to NMEs, but only that the Department's decision not to apply the law was reasonable based upon the language of the statute and the facts of the case. Specifically, the CAFC recognized that:

> {T}he agency administering the countervailing duty law has broad discretion in determining the existence of a "bounty" or "grant" under that law. We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

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

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

Recently, the CIT concurred, explaining that "the Georgetown Steel court only affirmed {the Department}'s decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs." See Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318). Therefore, the court declined to find that the Department's investigation of subsidies in China was ultra vires.

The Department's general grant of authority to conduct CVD investigations is sufficient. See, e.g., Section 771(5) and (5A) of the Act. Given this existing authority, no further statutory authorization is necessary. Furthermore, since the holding in Georgetown Steel, Congress has expressed its understanding that the Department already possesses the legal authority to apply the CVD law to NMEs on several occasions. For example, on October 10, 2000, Congress passed the PNTR Legislation. In section 413 of that law, which is now codified in 22 U.S.C. § 6943(a)(1), Congress authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the WTO, assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China." 22 U.S.C. § 6943(a)(1). China was designated as an NME as of the passage of this bill, as it is today. Thus, Congress not only contemplated that the Department possesses the authority to apply the CVD law to China, but authorized funds to defend any CVD measures the Department might apply.

This statutory provision is not the only instance where Congress has expressed its understanding that the CVD law may be applied to NMEs in general and China in particular. In that same trade law, Congress explained that "{o}n November 15, 1999, the United States and the People's Republic of China concluded a bilateral agreement concerning the terms of the People's Republic of China's eventual accession to the World Trade Organization." 22 U.S.C. § 6901(8). Congress then expressed its intent that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO." 22 U.S.C. § 6941(5). In these statutory provisions, Congress is referring, in part, to China's commitment to be bound by the SCM Agreement as well as the specific concessions China agreed to in its Accession Protocol.

The Accession Protocol allows for the application of the CVD law to China, even while it remains an NME. In fact, in addition to agreeing to the terms of the SCM Agreement, specific provisions were included in the Accession Protocol that involve the application of the CVD law to China. For example, Article 15(b) of the Accession Protocol provides for special rules in determining benchmarks that are used to measure whether the subsidy bestowed a benefit on the company. Id. at 9. Paragraph (d) of that same Article provides for the continuing treatment of China as an NME. Id. There is no limitation on the application of Article 15(b) with respect to Article 15(d), thus indicating it became applicable at the time the Accession Protocol entered into effect. Although WTO agreements such as the Accession Protocol do not grant direct rights under U.S. law, the Protocol contemplates the application of CVD measures to China as one of the possible existing trade remedies available under U.S. law. Therefore, Congress' directive that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO," contemplates the possible application of the CVD law to China. See 22 U.S.C. § 6941(5).

In sum, while Congress (like the CAFC) deferred to the Department's practice, as was discussed in Georgetown Steel, of not applying the CVD law to the NMEs at issue, it did not conclude that the Department was unable to do so. To the contrary, Congress did not ratify any rule that the CVD law does not apply to NMEs because the Department never made such a rule.

We disagree with the GOC's contention that the application of the CVD law to the PRC constitutes a retroactive amendment to a binding rule that requires a formal rulemaking. An agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or a practice. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (Chenery Corp.) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). Here, the decision of whether a subsidy can be calculated in an NME hinges on the facts of the case, and should be made exercising the Department's "informed discretion." See Chenery Corp., 332 U.S. at 203. The CIT recently agreed, stating that:

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

The CIT has repeatedly recognized the Department's discretion to modify its practice and has upheld decisions by the Department to change its policies on a case-by-case basis rather than by rulemaking when it has provided a reasonable explanation for any change in policy. See, e.g., Budd Co., Wheel & Brake Div. v. United States, 746 F. Supp. 1093 (CIT 1990) (holding that the Department did not engage in rulemaking when it modified its hyperinflation methodology: "because it fully explained its decision on the record of the case it did not deprive plaintiff of procedural fairness under the APA or otherwise"); Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 966 (CIT 1988) (formal rulemaking procedures were not required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price). This is because it is necessary for the Department to have the flexibility to observe the actual operation of its policy through the administrative process and as opposed to formalized rulemaking. See Ceramica Regiomontana, S.A. v. United States, 10 CIT 399, 404-05, aff'd, 810

F.2d 1137 (Fed. Cir. 1987). The Department provided a fully reasoned analysis for its change of practice in this case. Thermal Paper Decision Memorandum at Comment 1; see also Georgetown Steel Memorandum.

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

The GOC additionally argues that the Department cannot make a determination in this case that is different from Sulfanilic Acid from Hungary because the AD law only contains one definition of NMEs. Contrary to the GOC's claims, the Department has not established types of NMEs. After its initial analysis of the Soviet-styled economies in the Wire Rod investigations, the Department began a practice of not looking behind the designation of a country as an NME when determining whether to apply the CVD law to imports from that country (assuming no claim for a market oriented industry was made). See, e.g., Sulfanilic Acid from Hungary, 67 FR at 60223. Now, the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that economy, much as it did in the original Wire Rod investigations. See Thermal Paper Decision Memorandum at Comment 1; see also Georgetown Steel Memorandum. However, the determination of whether the CVD law can be applied does not necessarily create different types of NMEs; it is simply recognizing the inherent differences between NMEs.

Comment 5: Whether the Provision of SSC to SOEs Constitutes the Provision of a Good by a Government Authority

The GOC argues that the Department's preliminary finding that the provision of SSC to the respondent companies by SOEs was for LTAR and therefore conferred a subsidy on the respondents is flawed and should be reversed. The GOC also argues that, even if the Department determines that the cooperating respondent in this case received de minimis subsidies, the Department should eliminate consideration of this program so that it does not infect the total AFA rate applied to Froch or the all others rate.

Arguing that a financial contribution may only be conferred by a government authority or public entity, or a private actor entrusted or directed by a government authority to perform such function, the GOC argues that SOE producers and suppliers of SSC are not authorities within the meaning of the statute. The GOC argues that none of the producer suppliers of the Winner Companies met criteria two through five of the Department's "Five Factor Test," although some were majority-owned by the government. The GOC contends that the Department has simply equated government control in form of an ownership interest with the existence of a government authority within the meaning of the statute. The GOC argues that, to the extent ownership reflects control the Department has previously concluded that entities with even majority government ownership should not be considered government authorities, and this has included entities that were 100 percent government owned. The GOC also adds that principles of international law otherwise indicate that the real issue is not government ownership or control, per se, but whether an entity exercises elements of government authority. The GOC notes that the five factor test attempts to get at this issue and should be applied consistently with this principle rather than discarded altogether.

In support of its position that the GOC's role in the operations of commercial enterprises through its ownership interest is separate and independent of the GOC's traditional role in public administration, the GOC states that reforms over the past 20 years have severed any public function from the commercial operations of SOEs such that SOEs do not exercise elements of government authority and, therefore, do not confer financial contributions within the meaning of the statute. The GOC refers to certain laws including the 1988 State-Owned Enterprises Law, which gave SOEs separate legal status from that of the government and gave management of the operations of the enterprise to the enterprise's managers. The GOC also discusses the establishment in 2003, of the State-Owned Assets Supervision and Administration Commission (SASAC), which assumed the role of investor in SOEs on behalf of the State. The GOC states that the SASAC is accorded the rights of a shareholder in the enterprises in which it invests and, just like any shareholder, the performance is evaluated based on the return on assets it generates from its investments. The GOC asserts that the Interim Measures, which established the SASAC, reinforce the independence of SOEs and the separation of State ownership from SOE operations. For example, the GOC notes that Article 10 of the Interim Measures establishes that SOEs "are entitled to the right of autonomy in business operations."

The GOC further discusses the 1998 Price Law, which under Article 18, states that government-guided and government-set prices were confined to a narrow band of vital or rare commodities, natural monopolies, public utilities, and essential non-profit services as set forth in government pricing catalogs. The GOC states that the most recent catalog, issued in 2001, lists 13 broad types of commodities under price control and notes that steel is not among the listed commodities. The GOC discusses that the Price Law establishes enterprise operators as autonomous decision-makers, citing Article 6 that states that market regulated prices "shall be practiced and determined autonomously by the operators." The GOC also explains that Article 11 further lists among those rights held by operators the right to autonomous determination of prices under market regulations (i.e., those prices not "government-guided" or "government-set").

The GOC concludes that the record simply does not allow for a finding that SSC produced and/or supplied by SOEs are exercising elements of government authority sufficient to find a capacity to confer a financial contribution within the meaning of the statute, because ownership allow does not confer this status. The GOC contends that, beyond ownership, there exists in China laws and measures intended to separate government ownership from the operational functions of the individual SSC producers in which the government, through, SASAC is invested. The GOC maintains that there is no evidence that these laws and other measures are not effective in maintaining this separation and that the record evidence indicates that SSC producers and/or suppliers that are SOEs do not set their operational plans, either in terms of investment, production or pricing, in accordance with, or under the direction of, the government. The GOC states that this reality is reinforced by a Price Law that repeats the basic principle that enterprises, no matter whether state-owned or private, are autonomous with respect to the determination of prices. The GOC states that in no sense does the record indicate that SSC producers and/or suppliers that are SOEs are exercising elements of governmental authority; rather, they are pursuing commercial objectives with the principal objective being preservation and enhancement of shareholder value. For these reasons, no financial contribution can be found.

Petitioners argue that the Department has correctly decided that it cannot evaluate the five-factor test unless the responding government provided sufficient information and that the GOC has not provided such information. They argue that the state, by definition, has the best access to information about its role in state-owned firms and that the Department could not simply accept selective disclosure by the GOC favorable to its position. They further argue that under Chinese law the majority owner of a firm has the ability to determine its actions, and evidence indicates that the GOC appoints directors to firms that it owns. Therefore, the GOC has authority over them and their operations.

Petitioners argue that whether an SOE has used government authority is not the test for whether and SOE is an authority. They argue that the GOC clearly exercises authority over the economic resources of each SOE. They also argue that the provision of goods for LTAR is by definition not a commercial function, because the goods are not provided on commercial terms. Petitioners argue that it is a quintessentially public function and the record shows that the SOEs have, in fact, exercised public authority to perform public functions.

Finally, petitioners argue that a government may set prices either by deliberately setting specific transaction prices below market levels, or by other actions such as building excess capacity to depress prices, or keeping capacity open that would ordinarily close, to avoid social unrest or layoffs. They contend that the absence of a price list established by a higher level of government does not undercut the fact that steel producing SOEs are government authorities.

Department's Position: Section 771(5)(B) of the Act defines "authority" as a "government of a country or any public entity within the territory of a country." Therefore a financial contribution by either a government or a public entity that is specific and confers a benefit is considered a subsidy. We note that our decision on this issue is consistent with the Department's practice in recent CVD proceedings involving the PRC. See, e.g., Line Pipe from the PRC Decision Memorandum at Comment 3; and Tires from the PRC Decision Memorandum Comment D.2.

The Department has used the five-factor test in prior cases to determine whether a company is an "authority" under section 771(5)(B) of the Act. See, e.g., CFS from Korea Decision Memorandum at Comment 11. However, there are other cases, particularly cases where a government producer provides an input, where the Department has not conducted such an analysis. See, e.g., Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review, 73 FR 40295 (July 14, 2008) (HRC from India) and accompanying Issues and Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration" (countervailing the provision of iron-ore from a mostly government-owned mine without any reference to the five factor test). In addition, the Department has stated that we do not need to consider all five factors, such as in instances where the government has majority ownership of an entity. See, e.g., Tires from the PRC Decision Memorandum at "Government Provision of Rubber for Less Than Adequate Remuneration." More importantly, the Preamble states that "we intend to continue our long-standing practice of treating most government-owned corporations as the government itself." See Preamble, 63 FR at 65402.

Furthermore, the majority of the GOC's arguments relate to statements that the SOEs, although owned by the GOC, operate as commercial entities. In these arguments, the GOC is confusing the issue of benefit with financial contribution. Whether SOEs act as commercial entities with respect to their pricing decisions is determined upon an examination as to whether the goods or service being provided by the SOEs are provided for adequate remuneration under section 771(5)(E)(iv) of the Act, which relates to the provision of a benefit, not to financial contribution.

Comment 6: Whether the Sale of HRS from Privately-Held Trading Companies Constitutes a Financial Contribution Under the Act

The GOC argues that Department's preliminary decision to countervail purchases of SSC from private trading companies based on the percentage of SSC produced by SOE producers in the Chinese market, as in CWP from the PRC is inconsistent with the statute. The GOC contends that the statute and court precedent dictate that the Department must find a financial contribution and benefit to the respondent end user.[16] According to the GOC, it is insufficient to find a financial contribution only to an unrelated trading company and then a benefit to the end user, particularly with respect to subsidy benefits expensed as the time of receipt as in the case of the provision of goods such as SSC.

The GOC asserts that the Department preliminarily ruled on the existence of an upstream subsidy, for which no allegation was ever made by the petitioners, no investigation undertaken, and no findings made by the Department. The GOC asserts that the Department has made no findings that private trading companies received both a financial contribution and benefit by means of their purchase of HRC from SOE stainless steel coil producers. To the GOC, absent such findings, an upstream subsidy analysis cannot take place. It is incumbent on the Department to demonstrate how the private trading company itself provided a financial contribution and benefit to the end user through the sale of SSC. The GOC asserts that this analysis requires a finding that the private trading companies are "authorities" within the meaning of the statute or were otherwise "entrusted or directed" by the government to provide a financial contribution; an analysis that the Department has failed to do. The GOC argues that it makes no difference whether the price paid by the end user is below the Department's benchmark, as the legal element of financial contribution has not been established and, therefore, there is no basis for the Department to countervail any purchases of SSC from trading companies.

Petitioners argue that the Department has repeatedly found that goods provided through a private trading company constitute countervailable subsidies, irrespective of upstream allegations. They argue that when a government provides goods directly or indirectly to producers of subject merchandise, it provides a financial contribution to them, regardless of whether the goods are provided via an intermediary. Where a government authority manufactures and sells the input products, the benefit to production of subject merchandise at least equals the difference between the market value of the good when it reached the producer of subject merchandise and the price it actually paid.

They further contend, citing 19 CFR 351.523(a)(1)(i), that this differs from an upstream subsidy situation in which a government provided a subsidy "in respect to an input product," i.e., subsidizes the production of the input, rather than the provision of the input itself being a subsidy. They argue that, here, the government is providing an input, not necessarily subsidizing

16 See Section 771(5) of the Act; Delverde, SRL v. United States, 202 F.3d 1360, 1365 (Fed. Cir. 2000) ("The language of the statute is clear. In order to conclude that a 'person' received a subsidy, Commerce must determine that a government provided that person with both a 'financial contribution' (or equivalent as described in section 771(5)(B)(ii) and (iii) of the Act and a 'benefit.'")

the input's production, and this differs from a situation in which the government "entrusts or directs" a private company to provide a subsidy. Such a subsidy could consist of a good produced and sold by the private company, as opposed to one produced by an SOE acting as an authority.

Department's Position: As a general matter, the Department has previously found that a financial contribution (i.e., provision of a good or service) made by a government agency through a private trading company is countervailable. See, e.g., CWP from the PRC Decision Memorandum at "Hot-Rolled Steel for Less Than Adequate Remuneration"; see also Tires from the PRC Decision Memorandum at Comment D.4. Furthermore, as explained in Line Pipe from the PRC, the GOC's financial contribution (the provision of an input produced by government-owned producers) is made to the trading company suppliers that purchase the input, while all or some portion of the benefit is conferred on the respondents who purchase the input from the trading company. Where the price paid by the producers is less than the benchmark price, the producers receive a benefit when they purchase these government-provided goods and, accordingly, receive these inputs for LTAR. Therefore, the Department includes purchases of all inputs produced by government-owned producers in its subsidy calculations. See Line Pipe from the PRC Decision Memorandum at Comment 4.

However, as explained in the "Application of Facts Available and Use of Adverse Inferences" section, we find that with regard to the suppliers of SSC to the Winner Companies that were classified as privately-owned trading companies, the GOC has withheld requested information and impeded the Department's verification process within the meaning of section 776(a)(2)(A) and (D) of the Act. We further find that, due to the GOC's refusal to provide the requested information at verification, the GOC has failed to act to the best of its ability and, when applying FA, we are relying upon adverse inferences under sections 776(b) of the Act. Accordingly, pursuant to section 776(b) of the Act, we are assuming that all of the Winner Companies' SSC suppliers that were classified as privately-owned trading companies were government-owned. We also are assuming, pursuant to section 776(b) of the Act, that the suppliers in question were producers of SSC, as opposed to acting as trading companies. In light of our decision to treat as government producers the suppliers of SSC that were classified as private trading companies, the GOC's comments on whether sales by private trading companies constitute a financial contribution under the Act are moot. The Department's application of AFA in this regard is consistent with its practice. See, e.g., Line Pipe from the PRC Decision Memorandum at Comment 4.

Comment 7: Whether the Provision of SSC is Specific and the Applicability of the Department's Use of AFA in its Determination of De Facto Specificity

The GOC contends that the Department's question on the sale of SSC in the Chinese market to assist in its examination of specificity was absurd because what the Department seeks with this question is the detailed sales lists of every domestic producer of SSC for the past three years, categorized by region and customer type. The GOC asserts that no database exists and that the GOC has no authority to demand detailed sales lists, nor would it even be feasible. The GOC states that it was able to confirm with the Department that SSC touches virtually every sector of the economy, and that the numbers of industries that may consume SSC are too numerous to reduce to a simple list. The GOC explains that SSC is used in consumer and industrial applications where the corrosion resistance, heat resistance, or design characteristics of stainless steel are desired. The broadest examples would be the automotive industry, pipe and tube, construction, chemical, appliance, and industrial equipment industries, all of which would be defined by numerous and extremely distinct sub-categories. The GOC asserts that SSC is hardly a commodity for which de facto specificity may be found.

The GOC further argues that the Department's resorting to adverse facts is unjustified. The GOC states that the Department's explanation of why it applied adverse facts must include "{a}t a minimum" a determination "that a respondent could comply . . ." (See China Steel Corp. v. United States, 264 F. Supp. 2d 1339, 1360 (CIT 2003) (quoting Nippon Steel Corp. v. United States, 24 CIT 1158, 1171 (2000)) and "a willful decision not to comply or behavior below the standard for a reasonable respondent." See Nippon Steel Corp. v. United States, 264 CIT 1158, 1171 (2000) (Nippon Steel). The GOC asserts that no such explanation was offered and no attempt was made by the Department to fashion an appropriate question to explore the particular facts of the "program" it is attempting to examine. Rather, the GOC contends that the Department's choice of question was little more than boilerplate, did not fit the issue at hand, and could not possibly be answered. The GOC maintains that a poor question should not be grounds for applying adverse facts, particularly when the GOC offered information to explain both the nature of SSC consumption in the PRC and the inability to obtain information sought by the Department. As such, the GOC argues the circumstances of this case do not warrant the application of adverse facts, particularly given the responsive information it provided to the Department.

Petitioners argue that the Department has reasonably found that the GOC has not supplied complete information necessary to evaluate specificity, and certainly the GOC has not supplied the information the Department reasonably requested. Petitioners argue that this provides a sufficient basis for the Department's decision.

Petitioners take issue with the GOC's claim that SSC touches virtually every sector of the economy, arguing that there is no "touch" test for specificity. They explain that, pursuant to 19 CFR section 351.502(b), the test for specificity is whether a good is generally available like public infrastructure such as roads and bridges, or is confined to a particular group. – which need not share any common characteristics. They surmise that, as to SSC, only industries that fabricate from ferrous metal will use any, only those for which metal fabrication is a major activity will use much, and of those, the industries that must extensively fabricate highly corrosion-resistant metal products will be the predominant users of SSC. Thus, masses of industry (e.g., plastics, wood, non-ferrous metals, ceramics, etc.) will use little or none, and the actual beneficiaries of this subsidy will inevitably be concentrated into a limited group, albeit one that may have diverse activities. They conclude that the Department has already found the provision of hot-rolled coil to be specific within the Chinese economy, and it defies belief that provision of SSC, a more specialized and much more expensive product, would be more broadly available throughout the economy.

Department's Position: We agree with petitioners that it is appropriate to apply AFA to our de facto specificity analysis of the provision of SSC at LTAR because the GOC failed to act to the best of its ability in providing the requested information. As explained in the "Application of Facts Available and Use of Adverse Inferences," on two occasions, we requested from the GOC information on the provision of SSC to companies by industry and by region in order to have information to conduct our analysis. It is the Department's established practice to examine the government's provision of an input, such as SSC, to recipients by industry and by region for the year in which the provision of the benefit was approved and the prior three years. See, e.g., Line Pipe from the PRC Decision Memorandum at Comment 6; see also HRC from India Decision Memorandum at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration" section. In response to the Department's request for information, the GOC stated the no such list of information exists and that no data was available from which to derive such a list. The GOC neither asked the Department for clarification of the question and data sought, nor suggested other means to provide data that would be informative to the Department's specificity analysis. See GOC's May 5, 2008 Questionnaire Response at 21; see also GOC's May 14, 2008 Supplemental Questionnaire Response at 8.

The Department finds that no new information has been submitted on the record of this proceeding to give it reason to revisit its preliminary finding regarding the application of AFA to the specificity analysis of the provision of SSC at LTAR. As such, we continue to find, consistent with sections 776(a) & (b) of the Act that the GOC failed to provide the requested information. We further find that the GOC failed to act to the best of its ability and, therefore, in selecting from among the facts otherwise available, we have employed adverse inferences as described under section 776(b) of the Act. Specifically, we find that the provision of SSC to producers of CWASPP by GOC authorities is de facto specific within the meaning of section 771(5A)(D)(iii) of the Act.

The Department's decision to rely on adverse inferences when lacking a response from a foreign government is in accordance with its practice. See, e.g., Line Pipe from the PRC Decision Memorandum at Comment 6, see also Preliminary Results CTL Plate from Korea, 71 FR at 11399 (March 7, 2006) (unchanged in CTL Plate from Korea, 71 FR at 38862, relying on adverse inferences in determining that the Government of Korea directed credit to the steel industry in a manner that constituted a financial contribution and was specific to the steel industry within the meaning of the sections 771(5)(D)(i) and 771(5A)(D)(iii) of the Act, respectively).

Comment 8: Whether the Department Should Countervail the Provision of Land

The GOC claims that the provision of land-use rights does not confer a financial contribution because the sale of usage rights does not fall within any categories described by section 771(5)(D) of the Act. The GOC argues that a land-use right is neither a good nor service, but realty. In support, the GOC points to Black's Law Dictionary, and claims that land does not fall under the definition of either good or service. The GOC asserts that the Department's practice has no real bearing when the practice is inconsistent with the law and, therefore, the provision of land cannot be considered a financial contribution.

The GOC also objects to the benchmark used by the Department in past cases to measure whether adequate remuneration was received on land sold by the GOC. First, the GOC contends that the statute requires the Department to consider adequate remuneration in relation to prevailing market conditions for land in the PRC and not through the use of an out-of-country benchmark price, which in past CVD proceedings involving the PRC has been obtained from Thailand. The GOC states that the market conditions to be considered are price, quality, availability, marketability, transportation, and other conditions of purchase or sale in the PRC. The GOC asserts that none of these market conditions for the price of land in Thailand, the country from which the Department has obtained benchmark prices for land, can be the prevailing market conditions in China. The GOC adds that domestic benchmarks are available in this case.

The GOC argues that even if there were no domestic benchmarks available, an external land price benchmark would not be permissible under the statute because the value of land in another country can be determined only on the basis of the derived demand in that other country. The GOC states that the Department has sought to justify its rationale for an out-out-country benchmark based on its determination in Sacks from the PRC. See Sacks from the PRC Decision Memorandum at Comment 11, where the Department references its use of an out-of-country benchmark in the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia, 72 FR 60642 (October 25, 2007) (CFS from Indonesia) and accompanying Issues and Decision Memorandum (CFS from Indonesia Decision Memorandum) at "GOI's Provision of Standing Timber for Less Than Adequate Remuneration" and Comments 11 and 12 and Softwood Lumber Investigation Decision Memorandum at "Provincial Stumpage Programs." The GOC, however, notes that a NAFTA panel rejected the use of cross-border benchmarks for timber in the Softwood Lumber Investigation.[17] Concerning CFS from Indonesia, the GOC argues that because the Department's determination with respect to land was not challenged does not make the practice correct. See CFS from Indonesia Decision Memorandum) at "GOI's Provision of Standing Timber for Less Than Adequate Remuneration."

The GOC also states that the Department rejected cross-border benchmarks in the Lumber I litigation as "arbitrary and capricious," recognizing that cross-border differences in "terrain and climate" make cross-border comparisons impossible.[18] The GOC adds that the Department made a similar finding in Lumber III[19] and in the Lumber IV remand determinations complied with the NAFTA panel's decision and determined that, to calculate the benefit, "the methodology should rely on prices and costs in Canada."[20] According to the GOC, land is even more unique than timber and economic conditions affecting land use in Thailand are not and cannot be considered comparable to conditions in China.

The GOC further claims that Article 14 of the SCM Agreement exhibits a clear preference for "in-country" benchmarks. The GOC concedes that Article 14 does not mean that in-country benchmarks must be used in every circumstance, but that the WTO Appellate Body made clear in the context of Article 14(d) that the situations in which surrogate, third country benchmarks may be used is limited. The GOC states that an administrating body must establish that the market of the investigated member country cannot yield reliable benchmarks. The GOC also argues that any alternative benchmark must be validated by demonstrating that it relates to the prevailing market conditions in the country of provision. The GOC asserts that nothing in China's Protocol of Accession alters the disciplines that govern the use of surrogates under Article 14 of the SCM Agreement. In fact China's Protocol states that although "prevailing terms and conditions in China may not always be available as appropriate benchmarks," the

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17 See In the Matter of Certain Softwood Lumber Products from Canada, NAFTA USA-CDA-2002-1904-03 (August 13, 2003) Panel Decision at 27-35.

18 See Certain Softwood Lumber Products from Canada, 48 FR 24159, 24168, and 24182 (May 31, 1983).

19 See Certain Softwood Lumber Products from Canada, 57 FR 22507 (May 8, 1992).

20 See In the Matter of Certain Lumber Products from Canada, Secretariat File No. USA-CDA-2002-1904-03, First Remand Determination at 5 (January 12, 2004).

importing WTO member country should, where practicable, "adjust such prevailing terms and conditions before considering the use of terms and conditions outside of China."[21] The GOC adds that if adjustments are not practicable, then third-country benchmarks may be used but there must be a rational basis for the selected surrogate. In this investigation, the GOC argues that the Department cannot demonstrate that its Thai surrogate is rationally related to conditions in China. In fact, the GOC posits the Department has made no adjustments for differences in market conditions affecting land values between Thailand and China.

Even if the Department does not believe there is a competitive market for land-use rights in China, the GOC claims that the Department should find Chinese prices are consistent with market principles. The GOC posits that there is a functioning land-use rights market in China bound by specific laws and regulations defining how land-use rights may be transferred and at what price; minimum prices established for government granted land; and standards in place to appraise land-use right values; and pricing benchmarks established at the provincial level and local jurisdictions without an industrial policy. Therefore, the GOC argues that since land-use price benchmarks calculated by the government are consistent with market principles, the land price benchmarks in China should at least be utilized within the context of third-tier benchmarks under the Department's regulations.[22]

Petitioners argue that the Department has correctly rejected the GOC's argument that the provision of land use rights does not provide a financial contribution. They argue that the GOC has used a wide range of means to manipulate exports to the United States without triggering countervailing duties, such as export taxes on upstream goods, currency manipulation, and selective duty drawbacks.

Petitioners further argue that, given that the GOC own all the land in China, it is disingenuous for the GOC to complain that the Department has looked outside China for a benchmark to get the best possible estimate of land market value in China. They argue that the Department has in the past chosen external land that has many similar characteristics and thus has a reasonable relationship to Chinese land in value.

Department's Position: First, we note that no interested party challenged the Department's finding in the Preliminary Determination that the land transactions of the Winner Companies occurred before December 11, 2001, the date of the PRC's accession to the World Trade Organization (WTO). See Preliminary Determination, 73 FR at 39665. Second, as explained above, we have determined that we will identify and measure subsidies in the PRC beginning on or after December 11, 2001. See, e.g., Line Pipe from the PRC Decision Memorandum at "Allocation Period" and Comment 18. Consistent with our findings in the Preliminary Determination, we continue to find that the Winner Companies purchases of land use rights occurred prior to the December 11, 2001, "cut-off" date and, therefore, the transactions did not provide countervailable benefits during the POI. See Preliminary Determination, 73 FR at 39665. Thus, interested parties' comments concerning whether land-use rights are countervailable and the benchmark that should be applied to measure the benefit in such situations are moot.

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21 See Accession of the People's Republic of China, WT/L/432 at para. 15(b) (November 23, 2001).

22 See 19 CFR 351.511(a)(2)(iii).

Comment 9: Whether the Department Should Countervail FIE Tax Programs That Are Industry, Regionally, or Export/Domestic Use Neutral

The GOC argues that although the Department has found tax programs that provide tax exemptions or credits to an entire class of enterprises – foreign-invested enterprise (FIEs)—to be specific in its Preliminary Determination and in past investigations, where such programs are neither geographically limited, limited by industry, nor contingent on export or use of domestic goods, they are not specific. The GOC further argues that FIEs are a type of corporate form, subject to their own tax liability, much like a partnership or standard corporation is subject to differing tax treatment, and thus, should not be deemed specific under U.S. law. The GOC asserts that, according to 19 CFR 351.502(c), the Department's regulations provide that domestic subsidies provided, for example, to small and medium-sized firms are not specific, indicating that programs limited to particular classes of enterprises are not specific. Rather, pursuant to section 771(5A) of the Act, the subsidy must be limited to an enterprise or industry or group of enterprises. The GOC thus argues that finding an entire class of enterprise defined neither by geographic region or industry as meeting the specificity requirement is contrary to law, and where an FIE tax program is neutral as to geographic region, industry, exports or use of domestic over imported goods, it should not be found countervailable, whether for purposes of the cooperating or non-cooperating respondent in this case.

Petitioners take issue with the GOC's argument that tax breaks for foreign investors are not specific, if the tax breaks do not discriminate based on the industry or region in which the foreigners invest, or between export and domestic production. Petitioners argue that, under 19 CFR 351.502(b), in deciding whether a subsidy is being provided to a group of enterprises or industries, the Department is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for or actually receive a subsidy. They posit that FIE's are a group because they are all foreign invested enterprises, and the Department need not find that they share any other characteristics to find that subsidies to this group are specific.

Department's Position: Consistent with our practice in CFS from the PRC, we do not agree with the GOC's characterization of our finding, i.e., that we are determining specificity based solely on the form of the corporation. See CFS from the PRC at Comment 14. FIEs can take many forms: equity joint ventures, contractual joint ventures, and wholly owned foreign enterprises. Of these, the latter two forms may choose to incorporate or not. Thus, contrary to the GOC's claim, it is not the corporate form that makes these firms eligible for the tax breaks in question it is the fact that they have foreign investment (at least 25 percent in the case of an equity joint venture and 100 percent in the case of a wholly foreign owned enterprise). This restriction makes these tax subsidies de jure specific as a matter of law under section 771(5A)(D)(i) of the Act. Having made a finding of de jure specificity under subsection (i) of 771(5A)(D), we do not examine whether the program is specific under subsection (iii). We also note that this is consistent with the SAA, which states that once the de jure prong of the specificity test has been met, "further inquiry into the actual use of the subsidy is unnecessary." See SAA at 930.

Comment 10: Whether the Department's Prevailing Interest Rate Methodology should be Used to Calculate any Subsidy in this Case

The GOC takes issue with the Department's practice of calculating benchmark interest and discount rates using a regression analysis of World Bank governance indicators and lending rates published by the IMF for over 30 countries classified by the World Bank as lower middle-income countries and adjusting the calculated rate to long-term rates of various terms by multiplying the short-term rates by the ratio of United States below-investment grade BB corporate short- and long-term bond rates. The GOC explains that the starting point for the Department's computation of benchmark interest rates in the PRC has been IMF statistics for "lending rates" presented in its IFS database. The GOC argues that in the past, the Department characterized the IMF's lending rates as short-term, thought it never substantiated that the rates were short-term. The GOC points out, however, that in Thermal Paper from the PRC, the Department acknowledged that the lending rates from the IMF were not short-term but reflect the bank rate the usually meets the short- and medium-term financing needs of the private sector. See Thermal Paper Decision Memorandum at the "Benchmarks and Discounts Rates." Thus the IFS data are not limited to short-term loans, but also encompass longer term loans, as is clear from examining the descriptions given for each of the individual country interest rates utilized by the Department. The GOC explains that, in the past, Department has applied these rates, not as short-term rates, but as long-term rates. However, the Department has done very little to adjust for this reality. The GOC thus argues that the Department's new formulation that its benchmark derived from these IMF rates covers loans of "two years or less" is not supported by substantial evidence.

The GOC further argues that many of the individual rates used by the Department do not indicate that they are short term or are for loans of two years or less, and therefore should be presumed to be of longer term. The GOC contends that some rates clearly indicate a maturity of a much longer duration than short term, and are not even proposed as representative rates, but maximum rates that necessarily skew the Department's results. The GOC contends that this mix of short and long-term rates cannot be treated as a data set of short-term rate or rates for loans of two years or less. Furthermore, the Department cannot take the result of its regression analysis using this data and then adjust it upward by a factor computed from exclusively short-term rates and exclusively long-term rates to determine a long-term benchmark rate. The Department's so-called short-term or "two-year or less" benchmark already is based on longer term rates. The GOC asserts that this adjustment is punitive, and the Department cannot apply its calculated rate as an exclusively short-term rate to measure short-term transactions. The GOC maintains that the Department has offered no basis for selecting its "two years or less" threshold with respect to its calculated rate. Rather, the record in this and prior proceedings supports a finding that the Department's calculated rate cannot be used as a short-term rate or "two years or less" rate and more appropriately reflects a rate applicable to loans of a much longer maturity.

The GOC argues that the Department's use of a regression analysis to determine an interest rate for China using a composite governance indicator (GI) and interest rates classified by Gross National Income (GNI) is also invalid. The regression statistics that have accompanied the Department's regression calculations in prior cases demonstrate that there is no statistically significant relationship between the average GI and the CPI adjusted lending rate. Due to the absence of any correlation, the Department has done little more than average the different interest rates it has collected, and thus the rate it calculates is not statistically different than the mean. The GOC concludes that the rate has nothing whatsoever to do with economic or monetary conditions in China, and is not in statistical sense a meaningful estimated interest rate for the PRC.

The GOC argues that, in selecting an appropriate benchmark for loans, the Department's regulations require it to compare the effective interest rate on the potentially countervailable loan with the amount the firm would pay on a comparable commercial loan that the firm could actually obtain on the market. The GOC contends that a commercial loan is defined as a loan taken out by the firm from a commercial lending institution or a debt instrument issue by the firm in a commercial market, and the Secretary will treat a loan from a government-owned bank as a commercial loan unless there is evidence that the loan from a government-owned bank is provided on non-commercial terms or at the direction of the government. If the firm has no comparable commercial loans, the Department may use a national average interest rate for comparable commercial loans. The GOC asserts that nowhere does the regulation purport to authorize the Department to use an out-of-country interest rate, whereas the regulations do authorize the use of out-of-country benchmarks in the case of the provision of a good or service.

The GOC further argues that the regulation contains no requirement that the loan must be market-determined, and it cannot be seriously argued that Chinese interest rates, whether those published by the People's Bank of China (PBOC) or elsewhere, cannot be used because the government sets the interest rates. Interest rates in every country, particularly short-term rates, are a function of monetary policy. The GOC also states that, in the United States, the Federal Reserve Bank is a government authority that effectively sets short-term lending rates through its control over the discount rate, reserve requirements, and its other monetary policy tools. For these reasons, the GOC argues that the Department should rely on Chinese interest rates to calculate any loan or discount rate benchmark required in this case.

Department's Position: We have reviewed the information submitted by the GOC and agree that certain of the interest rates used in our regression analysis may reflect maturities of longer than one-year. Indeed, the notes to the IFS state that these rates apply to loans that meet short- and medium-term financing needs. Therefore, we find that these rates should not be treated as exclusively short-term in nature. See 19 CFR 351.102, where a short-term loan is defined as having repayment terms of one-year or less. To address this concern, we have used interest rate data from the IMF and regression-based benchmark rate methodology, but have applied it to loans with terms of two years or less. This approach is consistent with the Department's approach in prior investigations. See, e.g., Thermal Paper from the PRC Decision Memorandum at "Benchmark and Discount Rates" section; and Line Pipe from the PRC Decision Memorandum at Comment 12.

We disagree with the GOC's argument that the assumptions underlying the benchmark calculation are flawed and that there is no relationship between GNI and interest rates. In the Preliminary Determination, we calculated an external benchmark using the regression-based methodology first developed in CFS from the PRC and further refined in such proceedings as Tires from the PRC, and Thermal Paper from the PRC. See Interim Decision Memorandum at "Subsidies Valuation Information" section; see also CFS from the PRC Decision Memorandum at Comment 10; Tires from the PRC Decision Memorandum at Comment E.4; and Thermal Paper from the PRC Decision Memorandum at Comment 9. This benchmark interest rate is based on the inflation-adjusted interest rates of countries with per capita gross national incomes similar to that of the PRC, and takes into account a key factor involved in interest rate formation, that of the quality of a country's institutions, that is not directly tied to state-imposed distortions in the banking sector.

In the Interim Decision Memorandum, the Department made the finding that the GOC's predominant role in the banking sector results in significant distortions that render the lending rates in the PRC unsuitable as market benchmarks." See Interim Decision Memorandum at "Subsidies Valuation Information" section; see, e.g., CFS from the PRC Decision Memorandum at Comment 10; and Sacks from the PRC Decision Memorandum at Comment 20. As a result, the Department preliminarily determined that interest rates in the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to respondents in this investigation and, thus, determined to use an external benchmark to measure the benefit of countervailable loans. See Interim Decision Memorandum at "Subsidies Valuation Information." The Department finds that no new information has been submitted on the record of this proceeding that calls into question the Department's previous findings regarding its rejection of internal benchmarks and its use of out-of-country benchmarks.

The Department's regulations stipulate that benchmarks must be comparable commercial loans, i.e., they must be from a commercial lending institution, and they must be similar in structure to government loans with respect to whether they are fixed or variable, the date of maturity, and the currency in which they are granted. See 19 CFR 351.505 (a)(2)(i). Because we find that the GOC's intervention has created distortions in the PRC's banking sector, we find that there are no actual commercial loans and, that there are no national interest rates that would make a suitable benchmark. See 19 CFR 351.505(a)(3). Where we have determined that interest rates in a country are distorted, the Department is directed to find that such interest rates are unusable to measure the benefit from government loans. Id. Furthermore, in the CFS from the PRC Final, the Department noted that it is not possible to adjust for these market distortions, stating that any such endeavor would be a "highly complex, speculative, and impracticable exercise," and that for these reasons, it is appropriate to resort to an external benchmark with regard to GOC lending programs. See CFS from the PRC Decision Memorandum, at Comment 10. Therefore, the Department finds that it is appropriate to use an external benchmark to calculate the benefits provided under this program.

Further, the use of external benchmarks is consistent with the Department's practice in such situations where government intervention in a sector prevents us from applying an internal benchmark. See, e.g., Softwood Lumber First Review Decision Memorandum at "U.S. Log Prices are a More Appropriate Benchmark;" see also CFS from the PRC Decision Memorandum, at Comment10, CWP from the PRC Decision Memorandum at "Benchmarks for Short-Term RMB Denominated Loans," and Sacks from the PRC Decision Memorandum at Comment 20.

Comment 11: Whether the Department's Choice of Adverse Facts Applied to the Non-Cooperating Respondent is Contrary to Law

The GOC takes issue with the Department's application of total AFA to Froch, a non-cooperating respondent. The GOC argues that seven of the sixteen components of the AFA rate (involving 1. the Guangdong Province's "Outward Expansion" Program and 2. income tax programs) the Department used information that either has no legal relevance or reasonable relationship to any subsidy allegedly received by Froch. The GOC argues that the Department must discard this information in favor of relevant and corroborated information.

The GOC states that when applying adverse inferences to non-cooperating respondents under section 776(b), the Department has the discretion to choose the sources and facts it will rely on to support those adverse inferences, but, citing F.LLI de Cecco di Filippo Fara S. Martino S.p.A. v United States, (216 F. 3d 1027, 1032 (Fed. Cir. 2000) (De Cecco), that discretion is not unbounded. The GOC argues that the adverse inferences provision is intended "to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins" and that "Commerce must balance the statutory objectives of finding an accurate . . . margin and inducing compliance, rather than creating and overly punitive result." Id. at 1032. By imposing a corroboration requirement on the Department, "Congress could not have intended for Commerce's discretion to select unreasonably high rates with no relationship to the respondent's actual . . . margin." Id. Rather, corroboration requires the Department to assess that the information it is using has probative value. When information has been thoroughly discredited or can have no legal bearing on a respondent's subsidy margin, use of such information is contrary to law.

The GOC first takes issue with the Department's application of the highest program rate calculated in a CVD proceeding against China as AFA applicable to Froch with respect to the Guangdong "Outward Expansion" program. The GOC contends that the choice of 44.84, which was the rate calculated in CWP from the PRC with respect to the provision of hot-rolled steel (HRS) at LTAR, cannot be reconciled with the statute. The GOC argues that: 1) the Guangdong "Outward Expansion" program has nothing to do with the provision of HRS at LTAR, and 2) the provision of HRS is irrelevant to this proceeding because HRS is not an input used for the production of subject merchandise.

The GOC further argues that the purpose of the Guangdong "Outward Expansion" program is to provide eligible private enterprises special funding for the development of export activities and therefore has nothing to with the provision of goods for LTAR. In addition, the GOC contends that even if Froch purchased HRS from SOEs and received that steel at LTAR, such facts would be irrelevant to the calculated subsidy margin for the subject merchandise. Under the Department's regulations, when a subsidy is tied to a particular product, the Department will attribute the subsidy only to that product. Because HRS cannot be used to make CWASPP, any purchases of HRS at LTAR would not be attributed to CWASPP. Thus, the GOC asserts that applying the HRS LTAR rate as AFA with respect to the "Outward Expansion" program is completely arbitrary, explicitly punitive with no relation to Froch's level of subsidization for the subject merchandise, and cannot be corroborated. The GOC proposes that the Department should instead adopt the highest calculated CVD rate for the relevant program. The GOC states that, in LWP from the PRC, the Department found that the Guangdong Guanhao High-Tech Co., Ltd. utilized an "Outward Expansion" grant and determined a CVD subsidy of 0.08 percent. The GOC contends that this rate, which is for the same program, provides the corroboration necessary under the statute.

With regard to income tax programs, the GOC takes issue with the Department's determination that Froch paid zero income tax during the POI and the corresponding application of a combined 33 percent AFA rate for six income tax programs. The GOC argues that this rate is aberrational and overly punitive.

The GOC contends that totaling the highest rate ever calculated for each of the five previously investigated programs across all of the Department's CVD cases involving China results in a rate of 6.52 percent. Even assuming that the program never before calculated – Preferential Policies for Town and Village Enterprises — matched the highest rate ever calculated for a China CVD income tax program, the total AFA rate would be less than 11 percent for the six tax programs. This is because the Department has only calculated a CVD rate or greater than one percent in one single instance, involving one program.

The GOC's rationale for this argument is that, under the statute, an AFA rate serves a deterrent purpose, but it must also offer some reasonable estimate of Froch's actual level of subsidization. The GOC argues that the Department has not justified the use of its 33 percent income tax program rate and offers no explanation of how the 33 percent applies to Froch. The GOC thus asserts that the rate is totally uncorroborated, and the Department's experience with the relevant programs indicates that the 33 percent rate is simply punitive. The GOC proposes two alternatives to the 33 percent rate. The first proposal, similar to the approach used in <u>CFS from the PRC</u>, be would to assign be to assign The Winner Companies' highest calculated rate for any of the income tax programs to the five programs previously calculated by the Department. The GOC argues this method eliminates the need for corroboration because the rates are not considered secondary information, as they are based on information obtained in the course of investigation. This approach takes advantage of actual calculations for the very same programs and very same subject merchandise, and because it uses the highest calculated rate to deter non-participation by future respondents.

The GOC argues that, for Froch, the Department should apply 0.08 percent, which is highest rate calculated for a tax program in this investigation, as its AFA rate for each the five the tax programs it investigated in this investigation. For the sixth program, Preferential Policies for Town and Village Enterprises, the Department should apply the highest rate ever calculated for a China CVD income tax program, 4.11 percent. The GOC argues that taken together, this methodology produces and AFA rate of 4.51 percent and eliminates the concerns of the corroboration and relation because it is derived overwhelmingly form information obtained in the investigation. The GOC notes that the 0.08 percent is the rate calculated for the program Reduced Income Tax Rate for FIEs Located in Economic and Technological Development Zones and Other Special Economic Zones, and argues that this program should not be countervailed because it does not meet the specificity requirements. The GOC suggests that, if the Department agrees, it should adopt the highest rate ever calculated for a tax program that meets all three elements of a countervailable subsidy.

The GOC offers as a second proposal that the Department adopt a similar methodology in calculating the AFA rate for the income tax programs as it has for nearly every other program under investigation and use the highest tax program rates found in previous investigations. Based on a review of prior Department decisions, this methodology would results in an AFA rate of 10.63 percent. This calculation considers the highest subsidy benefit ever found by the Department for each of the five income tax programs under investigation for which the Department has previously calculated a rate, and for the sixth program, the Department should apply the 4.11 percent rate. Use of the maximum rates for each of the programs with prior calculations, in conjunction with the maximum rate for any income tax program as a surrogate for the remaining program, significantly increases the AFA rate relative to the Winner Companies and serves the necessary deterrent purpose. The GOC claims that unlike the 33 percent figure, this alternative has probative value and meets the standard applied to the other programs as a calculated CVD rate.

Petitioners argue that the Department has broad discretion to deal with uncooperative respondents and that the inferences the Department makes must have a reasonable relationship to the conduct at issue, but may include an increase in a CVD rate to act as a deterrent to non-compliance, especially with respect to future proceedings. Petitioners argue that, where a party fails to cooperate or participate at all in a countervailing duty investigation, it deprives the Department of any opportunity to examine or verify the level of subsidization it has received, other than through the use of publicly available information. To deter total non-compliance of this type, the Department should not use any rate less than the highest suggested by the petitioner or other publicly available information. If it did, and the publicly available information accurately described the extent of subsidization, respondents would have an incentive not to participate, to avail themselves of a lesser rate. Conversely, if the Department selects a total facts available rate that exceeds a company's actual level of subsidization, that company can request and participate in a review to obtain a lower rate.

Petitioners argue that, in this case, Froch refused to participate in any way. They contend that the Department's use of AFA with respect to Froch complied with the statute and that the rates selected for each program had a reasonable relation to conduct at issue, rested on publicly available information, and allowed for an increased rate to promote cooperation.

Petitioners take issue with the GOC's proposal of using the 0.08 percent rate as the AFA rate for the Outward Expansion program. They argue that if companies know that their non-cooperating AFA rates would be no more than a negligible rate previously established for another company under a given program, those companies would never cooperate in future investigations or reviews of that program. According to petitioners, strict adherence to past CVD rates would thus understate the extent of subsidization and discourage cooperation in investigations. They argue that the same objection applies to the GOC's proposed methodology for calculating adverse facts available for tax programs.

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

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

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

Froch failed to participate in the instant investigation. As a result the Department does not have the necessary information on the record to determine the extent to which Froch benefitted from certain programs within the meaning of section 771(5)(E) of the Act. Therefore, the Department must base its determination on facts otherwise available in accordance with section 776(a)(2)(A) of the Act. Furthermore, we determine that by failing to participate, Froch has failed to cooperate to the best of its ability and, thus, pursuant to section 776(b) of the Act, the use of adverse inferences in applying the facts otherwise available is warranted.

Accordingly, pursuant to section 776(b) of the Act, we find that all alleged subsidy programs that could conceivably be used by Froch constitute financial contributions and are specific pursuant to sections 771(5)(D) and 771(5A) of the Act, respectively.

As explained above in the "Application of Facts Available and Use of Adverse Inferences," we have computed a total AFA rate for Froch generally using program-specific rates determined for the cooperating respondent or from past CVD cases involving the PRC. Specifically, for programs other than those involving income tax exemptions and reductions, we have applied the highest calculated rate for the identical program in this investigation if the responding company, the Winner Companies, used the identical program. If there is no identical program match within the investigation, we have used the highest non-de minimis rate calculated for the same or similar program in another China CVD investigation. Absent an above-de minimis subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed, that could conceivably be used by Froch. Our approach in this regard is consistent with the Department's practice. See, e.g., HRC from India Decision Memorandum at Comment 37, and Sacks from the PRC Decision Memorandum at "Application of Facts Available and Use of Adverse Inferences."

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rate to induce respondents to provide the Department with complete and accurate information in a timely manner." See Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (Fed. Cir. 1990).

We note that in recent CVD proceedings, the Department has excluded provincial specific programs from the calculation of the AFA rate for a non-responding company where record evidence indicated that the respondent did not operate within the relevant provinces. See CWP from the PRC Decision Memorandum at "Use of Adverse Facts Available" section. However, interested parties provided no such information in the instant investigation.

Comment 12: Whether the Department's Methodology for Determining the All-Others rate in its Amended Preliminary Results is Unreasonable

The GOC argues that the Department's method of calculating the all other's rate, that is, averaging the cooperating respondent's subsidy rate with the total AFA rate received by the lone non-cooperating respondent, is unreasonable. The GOC argues that the total AFA rate involved is extremely punitive and, given the Department's experience with respect to the alleged programs and the dramatic reversal of the initial all other's rate, the Department must revise the all others rate to provide a reasonable rate that does not penalize the "all others" class.

The GOC states that, under section 776(b) of the Act, the Department may resort to AFA where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority." The GOC argues that, unlike actual respondents, the Department makes no specific demand for information from the all others class. The GOC thus contends that, because the Department does not make explicit requests for information from this class, any application of the "all others rate provision under section 705(c)(5)(A)(ii) of the Act should be tempered by the reality that a member of the "all others" class has not ability to demonstrate that it has cooperated "to the best of its ability."

The GOC argues that the Department's experience over many cases regarding income tax programs demonstrates that not all respondents are FIEs or located in the regions, where regional subsidies are alleged by the petitioner. The GOC argues that it is one thing to presume these facts with a non-cooperating mandatory respondent, but it is very different and expressly punitive to apply the same set of adverse facts to the "all others" class. The GOC argues that the guiding principle of the all others provision where the Department is presented with only zero, de minimis, and total AFA rates is that any all-others rate calculated should be reasonable. The GOC contends that, unlike the AFA provision of the statute, deterrence is not one of the objectives. Thus, the GOC argues that where a weighted-average of a de minimis rate and total AFA rates produces an exorbitant all others rate that bears no relationship to the rate issued to a corresponding respondent, the all others rate should be considered unreasonable and a new method of calculation should be chosen.

The GOC argues that, in Yantai Oriental Juice Co., Et Al., v. United States, Court Number 00-00309, Slip Op. 03-33 (March 21, 2003) (Yantai), the Court of International Trade has provided some guidance as to a more reasonable calculation. The GOC argues that the Court instructed the Department to insure that any methodology it employs "is based on the best information and establishes antidumping margins as accurately as possible." The GOC argues that the facts in this case are in principle the same as the facts in Yantai since the application of adverse facts to the all others class cannot be attributed to any explicit failure to cooperate. The GOC then argues that if the fully cooperating respondent's rate remains de minimis in the final determination, the Department should refrain from AFA to the extent possible and that the Department should endeavor to use the best information available and assign and all others rate that best approximates the rate assigned to the cooperating respondent, that is, a rate of zero.

The GOC argues that in the alternative, the Department could assign an all others rate of two percent. This would be the least adverse to the all others class while still subjecting that class to the discipline of the order and provides the closest approximation of the rate calculated for the fully cooperating respondent. The GOC concludes that under no circumstances should the Department calculate an all others rate that is in any way derived from the highest calculated rate for each individual program under investigation drawn from this or past investigations, or rates from prior investigations that do not directly correspond to the investigate programs in this case.

Petitioners rebut by noting that the GOC admits that the statute permits the Department to average a lone cooperating respondent's rate. Petitioners then argue that GOC's proposed approach of assigning a rate of two percent would fail to provide adequate relief for the U.S. industry. They argue that, if one respondent cooperates because it has relatively low subsidization and the other does not because (one may infer) that it has a higher rate of subsidization, then it is highly unrealistic to assume that all other producers in the country have a subsidization level equal to the lone cooperating respondent's. Petitioners thus argue that their rates probably reflect a combination of the two.

Petitioners further argue that the Department's methodology in Yantai properly reflects this, stating that it involved selecting an all others rate for fully cooperating separate rate respondents in an antidumping case. They note that the fully cooperating separate rate respondents in that case had made their information available to the Department and ran the risk that, if they were dumping at high rates, the Department could investigate this. Petitioners argue that, in this case, the companies that the GOC urges should benefit from the Winner Companies' low rate have not provided any information that could allow the Department to test their levels of subsidization. They contend that the most reasonable inference is that on average other companies' subsidization experience lies somewhere between the Winner Companies' and Froch's and if other companies want individualized CVD rates based on their actual experience, they can request administrative reviews.

Department's Position: Pursuant to section 705(c)(5)(A)(i) of the Act, the all others rate is to be the weighted average of the rates established for respondents individually investigated, excluding zero or de minimis rates or rates based entirely on facts available. Based on the facts and circumstances of this investigation, we find that section 705(c)(5)(A)(i) is applicable in determining the all others rate. In this case, the Department selected the Winner Companies and Froch as the two mandatory respondents to serve as representative of all producers/exporters of CWASPP from the PRC. Froch did not respond to the questionnaire, and thus we have determined its countervailable subsidy rates based entirely on AFA (see, "Adverse Facts Available" section above). The other respondent, (the Winner Companies, did participate in the instant investigation, and we have a calculated for them a total net subsidy rate of 1.10 percent ad valorem.

In the Amended Preliminary Determination, the Winner Companies rate was de minimis. Therefore, we were unable to follow the method preferred by the statute. See Amended Preliminary Determination, 73 FR at 45955. Consequently, we calculated the all others rate by averaging the total net subsidy rates of the Winner Companies rate and Froch. See Preliminary Determination, 73 FR at 45954. For the final determination, because the Winner Companies' net subsidy rate is affirmative and is not based entirely on facts available, we determine the all others rate to be equal to the total net subsidy rate of the Winner Companies.

VII. Recommendation

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

__________ Agree __________ Disagree

____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

____
Date