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

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

DATE: October 17, 2007

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China

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Background

On April 9, 2007, the Department of Commerce (the Department) published the preliminary determination in this investigation. See Preliminary Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from the People's Republic of China, 72 FR 17484 (April 9, 2007) (Preliminary Determination). The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have described in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: Applicability of the CVD Law to China
Comment 2: The Administrative Procedures Act (APA) Claim
Comment 3: The Department's Justification for its Change in Practice from Sulfanilic Acid from Hungary
Comment 4: China's WTO Accession Protocol
Comment 5: Retroactive Application of the CVD Law to China
Comment 6: Comparison of the Department's Findings in the Georgetown Memo and the August 30 Market Economy Status Memo
Comment 7: Application of Adverse Facts Available to the GOC
Comment 8: Policy Lending
Comment 9: Countervailability of Foreign-denominated Loans

Comment 10: Benchmark for Policy Lending
Comment 11: Adjustment for Long-term Interest Rate Benchmark
Comment 12: Creditworthiness of GE and its Cross-owned Companies
Comment 13: Application of a Risk Premium to the Short-term Loan Benchmark
Comment 14: Specificity of Programs for FIEs
Comment 15: Over-calculation of the Two Free/Three Half Benefit
Comment 16: Specificity of VAT Programs
Comment 17: Attribution of GHS' Subsidies to GE
Comment 18: Attribution of Subsidies Bestowed on Input Suppliers
Comment 19: Whether the Department's Cross-ownership Regulations Provide for the Attribution of Upstream Subsidies to Cross-owned Companies
Comment 20: Attribution of Subsidies Bestowed on the Forestry Companies to CFS
Comment 21: Rate Adjustment for GE's Ad Valorem Subsidy Rate
Comment 22: Subsidies to Forestry Companies Discovered After the Preliminary Determination
Comment 23: Correction to GE's Domestic Sales Value
Comment 24: Application of Adverse Facts Available to Chenming
Comment 25: Certification of Non-Reimbursement of Duties

Scope Comments

On August 20, August 28, and September 10, 2007, the petitioner requested that the Department clarify the scope of the antidumping (AD) and countervailing duty (CVD) investigations of coated free sheet paper from Indonesia, Korea and the People's Republic of China to include coated free sheet (CFS) paper containing hardwood BCTMP. Because this request affected all six investigations, the Department set up a general issues file to handle this scope request. After considering the comments submitted by the parties to these investigations, we have determined not to adopt the scope clarification sought by the petitioner. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, entitled "Scope Clarification Request: NewPage Corporation" (Scope Memorandum), which is appended to this Issues and Decision Memorandum. All comments submitted by the parties to all six investigations are addressed in the Scope Memorandum.

Use of Adverse Facts Available

For reasons explained in the Federal Register notice, we are basing the net countervailable subsidy rate for Shandong Chenming Paper Holdings Ltd. (Chenming) on adverse facts available (AFA) for the final determination. As AFA in the instant case, the Department is relying on the highest calculated final subsidy rates for income tax, VAT and policy lending programs of the other producer/exporter in this investigation, Gold East Paper (Jiangsu) Co., Ltd. (GE). GE did not receive any countervailable grants, so for all grant programs, we are applying the highest subsidy rate for any program otherwise listed, which in this case is GE's rate for Policy Lending. As we were unable to verify which programs actually conferred benefits on Chenming, we are

making the adverse inference that Chenming received countervailable subsidies under the 20 subsidy programs listed below. See Comment 6, Application of Adverse Facts Available to Chenming, below.

	SUBSIDY PROGRAM	**TYPE**	**AFA RATE**
1.	"Other Subsidies" for Chenming	Grants	4.11
2.	State Key Technology	Grants	4.11
3.	Clean Technology Production	Grants	4.11
4.	Famous Brands	Grants	4.11
5.	Policy Loans	Government-	4.11
6.	The "Two Free/Three Half" program	Income Tax	0.76
7.	Income tax exemptions program for FIEs located in certain	Income Tax	0.76
8.	Local income tax exemption and reduction program for	Income Tax	0.76
9.	Income Tax Credits on Purchases of Domestically Produced	Income Tax	0.76
10.	VAT Rebates on Purchases of Domestically Produced Equipment	VAT	1.51
11	VAT & tariff Exemptions on Imported Equipment	VAT	1.51
12.	Domestic VAT Refunds (for Companies Located in the Hainan	VAT	1.51
13.	Direction Adjustment Tax on Fixed Assets	Income Tax	0.76
14.	Income tax exemption program for export-oriented FIEs	Income Tax	0.76
15.	Corporate income tax refund program for reinvestment of FIE	Income Tax	0.76
16.	Preferential tax policies for FIEs engaged in forestry and	Income Tax	0.76
17.	Preferential tax policies for enterprises engaged in forestry	Income Tax	0.76
18.	Special fund for projects for the protection of natural forestry	Grants	4.11
19.	Compensation fund for forestry ecological benefits	Grants	4.11
20.	Discounted Loans for Export-Oriented Enterprises	Government-	4.11
	TOTAL AFA NET SUBSIDY RATE FOR		**44.25**

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (AUL) of the renewable physical assets used to produce the subject merchandise. Section 351.524(d)(2) of the Department's regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (the IRS Tables). The AUL period in this proceeding is 13 years according to the IRS Tables. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulation at 351.525(b)(6)(i) states that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6) directs that the Department will attribute subsidies received by certain other companies to the combined sales of those companies if: (1) cross-ownership exists between the companies, and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the downstream product, or transfer a subsidy to a cross-owned company.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department's regulations states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations. The preamble to the Department's regulations further clarifies the Department's cross-ownership standard. (See Countervailing Duties; Final Rule, 63 FR 65348, 65401 (November 25, 1998) (CVD Preamble).) According to the CVD Preamble, relationships captured by the cross-ownership definition include those where

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

See id. 63 FR at 65401. Thus, the Department's regulations make clear that the agency must

look at the facts presented in each case in determining whether cross-ownership exists.

The Court of International Trade (CIT) has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. See Fabrique de Fer de Charleroi v. United States, 166 F. Supp 2d, 593, 603 (CIT 2001) (Fabrique).

Our findings regarding cross-ownership and attribution for GE follow.

GE has responded to the Department's questionnaires on behalf of itself; its parent company, Sinar Mas Paper (China) Investment Co. (SMPI); another paper producer in the SMPI Group, Gold Huasheng Paper Co. Ltd. (GHS); a pulp producer, Hainan Jinhai Pulp & Paper Co., Ltd. (HJP); and the following forestry companies: Guangxi Jinqinzhou High-Yield Forest Co. (Guangxi Jinqinzhou), Hainan Jinhua Forestry Co. Ltd. (Hainan Jinhua), Guangxi JinGui Forestry Co.Ltd. (Guangxi JinGui), Jin Qing Yuan Timberland (Papermill) Co. Ltd. (Jin Qing), and Jin Shaoguan First Quality Timberland Co. Ltd (Jin Shaoguan). All of these companies are "cross-owned" within the meaning of 19 CFR 351.525(b)(6)(vi), through common ownership.

In the Preliminary Determination, we attributed subsidies received by SMPI to the consolidated sales of the parent and its subsidiaries in accordance with 19 CFR 351.525(b)(6)(iii) and have continued to do so for this final determination. In a change from the Preliminary Determination, we are not including the subsidies received by GHS in our calculations. See Comment 17.

With respect to HJP and the forestry companies, we are attributing the subsidies received by these companies to sales of the downstream product in accordance with 19 CFR 351.525(b)(6)(iv). See Comments 18 through 20. We have changed our calculation methodology from the Preliminary Determination so that the amount of these subsidies attributed to the downstream product is consistent with 19 CFR 351.525(b)(6)(iv). Therefore, references in this memorandum to "GE and its cross-owned companies" include GE, HJP and the forestry companies listed above.

Benchmarks

The Department is investigating loans received by GE and Chenming from Chinese policy banks and state-owned commercial banks (SOCBs), which are alleged to have been granted on a preferential, non-commercial basis. Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." Normally, the Department uses comparable commercial loans reported by the company for benchmarking purposes. See 19 CFR 351.505(a)(2)(i). As explained further in Comment 10, however, the GOC's intervention in the banking sector creates significant distortions, even restricting and influencing private and foreign banks within the PRC. Therefore, loans from private and foreign banks in the PRC do not provide a suitable benchmark

for the policy lending under investigation in this case.

If a firm does not have any comparable commercial loans during the period, the Department's regulations provide that we "may use a national interest rate for comparable commercial loans." See 19 CFR 351.505(a)(3)(ii). As in our Preliminary Determination, we find that the Chinese national interest rates are not reliable as benchmarks for these loans because of the pervasiveness of the GOC's intervention in the banking sector. We also find that it is appropriate to use an external benchmark as we did in our Preliminary Determination. See Comment 10. However, we have changed our method for calculating the external benchmark for this final determination.

First, we have revised our calculation of the benchmark used in the Preliminary Determination. Second, we have calculated separate benchmarks for loans denominated in foreign currencies, in accordance with 19 CFR 351.505(a)(2).

Benchmarks for RMB-denominated Loans: The Department has determined that it is appropriate to compute a benchmark interest rate based on the inflation-adjusted interest rates of countries with similar per capita gross income (GNI) to the PRC. This pool of countries captures the broad inverse relationship between income and interest rates. Our reasons for adopting this methodology are explained in Comment 10.

We have determined which countries are similar to the PRC in terms of GNI based on the World Bank's classification of countries as: low income; lower-middle income; upper-middle income; and high income. The PRC, with its 2005 per capita GNI of $1740 falls in the lower-middle income category, a group that includes 53 countries as of July 2007. Many of these countries reported short-term lending rates to *International Financial Statistics* (*IFS*) and inflation rates to *World Economic Outlook* (*WEO*). With the exceptions noted below, we used this data set to develop a inflation-adjusted market benchmark lending rate for short-term RMB loans.

We did not include those economies that the Department considered to be non-market economies for AD purposes in 2005: the PRC, Armenia, Azerbaijan, Belarus, Georgia, Moldova, Turkmenistan, and Ukraine. The average necessarily also excludes any economy that did not report lending rates to *IFS* and inflation rates to *WEO* for 2005. Finally, the Department also excluded three aberrational countries, Angola, with a inflation-adjusted 2005 rate of 44.718, Sri Lanka, with an inflation-adjusted negative 2005 rate of -3.6, and Dominican Republic, with an inflation-adjusted 2004 interest rate of -18.866.

As discussed in more detail in Comment 10 below, the Department has determined to base the benchmark on a regression of the 33 remaining countries' inflation-adjusted lending rates on a composite index of certain World Bank governance indicators. These indicators report the quality of countries' institutions across several dimensions, including political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. These figures are constructed to facilitate cross-country comparisons and are not, in the case of China, directly impacted by the state's dominance of the banking sector. The interest rate derived from

this regression provides the most suitable market-based benchmark to measure the benefit from the Government Policy Lending Program, because it takes into account a key factor involved in interest rate formation, that of the quality of a country's institutions, that is not directly tied to state-imposed distortions in the banking sector discussed above.

Using this regression model, the Department calculated an inflation-adjusted 2005 benchmark lending rate of 7.56 percent. The inflation-adjusted benchmark lending rate for 2004 and 2003 are 8.03 and 8.96 percent, respectively. Because these are inflation-adjusted benchmarks, it is also necessary to adjust the interest paid by GE on its RMB loans for inflation. This was done using the PRC inflation figure as reported to *WEO*.

The lending rates reported in *IFS* represent short-term lending, and there is no publicly available long-term interest rate data. To identify and measure benefit from any long-term loans, the Department developed a ratio of short-term and long-term lending for 2005. The Department then applied this ratio to the benchmark short-term lending figure (discussed above) to compute a long-term lending rate. Specifically, the Department computed a ratio of the average one-year and five-year interest rates on interest rate swaps reported by the Federal Reserve for 2005. That is, if the long-term swap rate were 25 percent higher than the short-term swap rate, the Department would inflate the average short-term lending rate by 25 percent to arrive at a long-term interest rate benchmark. This methodology is appropriate because the ratio between short-term and long-term interest rate swap rates offers an estimate of the market consensus premium that borrowers would pay on a long-term loan over a short-term loan. See Comment 11.

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

As long-term foreign currency benchmarks, the Department made the adjustment described above for RMB-denominated loans.

Parties commented on the issue of a foreign-currency benchmark, the details of which contain proprietary information. For the complete comment and response, see Memorandum from Susan Kuhbach to Stephen Claeys: Analysis of Business Proprietary Information regarding Certain Issues for the Final Determination (October 17, 2007) (BPI Memo) at Comment 2.

Uncreditworthy Benchmark: As discussed below, the Department is finding GE and its cross-owned companies uncreditworthy in 2003 - 2005. To construct the uncreditworthy benchmark rate for those years, we used the long-term rates described above as the "long-term interest rate that would be paid by a creditworthy company" in the formula presented in 19 CFR 351.505(a)(3)(iii).

Creditworthiness

The examination of creditworthiness is an attempt to determine if the company in question could obtain long-term financing from conventional commercial sources. See 19 CFR 351.505(a)(4). According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. In making this determination, according to 19 CFR 351.505(a)(4)(i), the Department may examine, among other factors, the following four types of information: 1) the receipt by the firm of comparable commercial long-term loans; 2) present and past indicators of the firm's financial health; 3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and 4) evidence of the firm's future financial position.

With respect to item number one, above, pursuant to 19 CFR 351.505(a)(4)(ii), in the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee (either explicit or implicit), will normally constitute dispositive evidence that the firm is not uncreditworthy. However, according to the CVD Preamble to the Department's regulations, in situations, for instance, where a company has taken out a single commercial bank loan for a relatively small amount, where a loan has unusual aspects, or where we consider a commercial loan to be covered by an implicit government guarantee, we may not view the commercial loan(s) in question to be dispositive of a firm's creditworthiness. See CVD Preamble 63 FR at 65367.

In our final determination, we are treating GE and its cross-owned companies as uncreditworthy. See Comment 12 and Memorandum from Susan Kuhbach to Stephen Claeys, regarding "Final Creditworthiness Determination for Gold East Gold East Paper (Jiangsu) Co., Ltd. and its Cross-Owned Companies" (October 17, 2007) (Final Creditworthiness Determination).

Treatment of the Ad Valorem Rate Calculation and the Denominator

In the Preliminary Determination, the Department used the export sales value by GE's affiliated party, China Union (CU), in the calculation of the ad valorem subsidy rate. GE argues that this methodology results in an over-collection of duties and proposes a rate adjustment that has been applied by the Department in prior cases. We are making this rate adjustment in this final determination. See Comment 21 and BPI Memo at Comment 3.

Thus, in calculating the ad valorem subsidy rate, we have divided the value of GE's export sales of the subject merchandise to the United States (before mark-up) by the value of CU's sales to the United States (after mark-up). We then multiplied this ratio by the calculated subsidy rate to obtain an ad valorem subsidy rate for each countervailable program.

See Memorandum to the File from David Neubacher, International Trade Compliance Analyst, through Nancy Decker, Program Manager, and Susan Kuhbach, Director, Office 1, "Calculations for the Final Determination for Gold East Paper (Jiangsu) Co., Ltd." (October 17, 2007) (GE Final Calculation Memo).

Analysis of Programs

I. Programs Determined to Be Countervailable For GE

A. Government Policy Lending Program

Petitioner has alleged a GOC lending program to provide loans at a discount to the forestry and paper industry in accordance with the GOC's industrial policy, as set out, inter alia, in "The PRC Civilian Economy and Social Development 10th Five-Year Plan Outline" and "The Tenth Five-Year and 2010 Special Plan for the Construction of National Forestry and Papermaking Integration Project."

In the Preliminary Determination, the Department determined that loans provided by Policy Banks and SOCBs in the PRC constitute government-provided loans pursuant to section 771(5)(D)(i) of the Act. We further determined that this loan program is specific in law because the GOC has a policy in place to encourage and support the growth and development of the forestry and paper industry. See Section 771(5A)(D)(i) of the Act. Finally, the Department found that this program provides a benefit to the recipients, equal to the difference between what the recipient paid on the loan and the amount the recipient would have paid on a comparable commercial loan. See Section 771(5)(E)(ii) of the Act.

After examining all of the information on the record, the Department continues to find that the GOC has a policy in place to encourage and support the growth and development of the paper industry through preferential financing initiatives, as illustrated in the five-year plans and industrial policies on the record. Further, the Department continues to find that loans provided

by Policy Banks and SOCBs in the PRC constitute a direct financial contribution from the government, pursuant to section 771(5)(D)(i) of the Act. As we are finding this program to provide a financial contribution under this section of the Act, we do not reach the issue of whether this program is an indirect subsidy pursuant to section 771(5)(B) of the Act.

We further determine that this loan program is de jure specific because the GOC has a policy to encourage and support the growth and development of the forestry and paper industry. See Section 771(5A)(D)(i) of the Act. Because we have found this program to be de jure specific, the Department does not reach the question of whether the program is de facto specific in accordance with section 771(5A)(D)(iii) of the Act. For additional information regarding our final determination for this program, and our position in response to the parties' comments on this issue, see Comments 8 and 10.

Finally, the Department continues to find that this program provides a benefit to the recipients, equal to the difference between what the recipient paid on the loan and the amount the recipient would have paid on a comparable commercial loan. See Section 771(5)(E)(ii) of the Act. Since the Preliminary Determination, however, we have made some changes to the manner in which we have determined our benchmark interest rates for this program. See the "Benchmark" section, above, and the Department's position in response to Comment 10. To calculate the benefit, we used the interest rates described in the "Benchmark" section above and the methodology described in 19 CFR 351.505(c)(1) and (2).

On this basis, we determine that GE received a countervailable subsidy of 4.11 percent ad valorem under this program

B. The "Two Free/Three Half" Program

The *Foreign Invested Enterprise and Foreign Enterprise Income Tax Law (FIE Tax Law)*, enacted in 1991, established the tax guidelines and regulations for foreign invested enterprises (FIEs) in the PRC. The intent of this law is to attract foreign businesses to the PRC.

According to Article 8 of the *FIE Tax Law*, FIEs that are "productive" and scheduled to operate not less than 10 years are exempt from income tax in their first two profitable years and pay half of their applicable tax rate for the following three years. FIEs are deemed "productive" if they qualify under Article 72 of the *Detailed Implementation Rules of the Income Tax Law of the People's Republic of China of Foreign Investment Enterprises and Foreign Enterprises*. This provision specifies a list of industries in which FIEs must operate in order to qualify for benefits under this program. The activities listed in the law are: (1) machine manufacturing and electronics industries; (2) energy resource industries (not including exploitation of oil and natural gas); (3) metallurgical, chemical and building material industries; (4) light industries, and textiles and packaging industries; (5) medical equipment and pharmaceutical industries; (6) agriculture, forestry, animal husbandry, fisheries and water conservation; (7) construction industries; (8) communications and transportation industries (not including passenger transport); (9)

development of science and technology, geological survey and industrial information consultancy directly for services in respect of production and services in respect of repair and maintenance of production equipment and precision instruments; (10) other industries as specified by the tax authorities under the State Council. If an FIE meets the above conditions, eligibility is automatic and the amount exempted appears on the enterprise's tax return.

GE and certain of its cross-owned companies filed tax returns for a "free" year under this program during the POI.

We determine that the exemption or reduction in the income tax paid by "productive" FIEs under this program confers a countervailable subsidy. The exemption/reduction is a financial contribution in the form of revenue forgone by the GOC and it provides a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determine that the exemption/reduction afforded by this program is limited as a matter of law to certain enterprises, "productive" FIEs, and, hence, is specific under section 771(5A)(D)(i) of the Act. See Comment 14.

To calculate the benefit from this program, we treated the income tax exemption enjoyed by GE and its cross-owned companies as a recurring benefit, consistent with 19 CFR 351.524(c)(1). In the Preliminary Determination, we made a single calculation to compute the benefits conferred by the Two Free/Three Half and Reduced Income Tax Rates for FIEs Based on Location Programs. We have separated these calculations for the final determination. See Comment 15.

Thus, we attributed the tax savings received by GE and its cross-owned companies under the Two Free/Three Half Program to GE's total sales. We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we determine that GE received a countervailable subsidy of 0.76 percent ad valorem under this program.

C. Reduced Income Tax Rates for FIEs Based on Location

FIEs are encouraged to locate in designated coastal economic development zones, special economic zones, and economic and technical development zones in the PRC through preferential income tax rates. This program was originally created in 1988 under the *Provisional Rules on Exemption and Reduction of Corporate Income Tax and Business Tax of FIE in Coastal Economic Zone* of the Ministry of Finance and is currently administered under the *FIE Tax Law*, and *Decree 85 of the State Council of 1991 (Decree 85)*. Under Article 7 of the *FIE Tax Law* and Article 71 of *Decree 85*, "productive" FIEs located in the designated economic zones pay corporate income tax at a reduced rate of either 15 or 24 percent, depending on the zone. GE and certain of its cross-owned companies are located in reduced tax rate zones.

We determine that the reduced income tax rate paid by "productive" FIEs under this program confers a countervailable subsidy. The reduced rate is a financial contribution in the form of

revenue forgone by the GOC and it provides a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determine that the reduction afforded by this program is limited to enterprises located in designated geographical regions and, hence, is specific under section 771(5A)(D)(iv) of the Act.

To calculate the benefit, we treated the income tax savings enjoyed by GE and its cross-owned companies as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the companies' tax savings received during the POI by GE's total sales during that period. To compute the amount of tax savings, we compared the rate the companies would have paid (15 percent) in the absence of the Two Free/Three Half program to the rate that would have been paid by a domestic corporation in the PRC (30 percent). We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we determine that GE received a countervailable subsidy of 0.76 percent ad valorem under this program.

We received comments from interested parties related to the specificity and benefit calculation of this program. See Comments 14 and 15.

D. Local Income Tax Exemption and Reduction Program for "Productive" FIEs

Under Article 9 of the *FIE Tax Law,* the governments of the provinces, the autonomous regions, and the centrally governed municipalities have been delegated the authority to provide exemptions and reductions of local income tax for industries and projects for which foreign investment is encouraged. As such, the local governments establish the eligibility criteria and administer the application process for any local tax reductions or exemptions. Therefore, the requirements and application procedures for this program may vary between jurisdictions.

GE and certain of its cross-owned companies received an exemption from the local income tax based on their status as FIEs.

We determine that the local tax exemption and reduction program confers a countervailable subsidy. The exemption/reduction is a financial contribution in the form of revenue forgone by the local governments and it provides a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determine that the program is limited as a matter of law to certain enterprises, i.e., productive FIEs, and is specific under section 771(5A)(D)(i) of the Act for the reasons explained above.

To calculate the benefit, we treated the income tax savings enjoyed by GE and its cross-owned companies as a recurring benefit, consistent with 19 CFR 351.524(c)(1). To compute the amount of tax savings, we compared the zero percent rate they paid to the rate that would otherwise be paid by a domestic corporation in the PRC (3 percent). We attributed the tax savings received to GE's total sales. We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we

determine that GE received a countervailable subsidy of 0.15 percent ad valorem under this program.

E. VAT Rebates on Purchases of Domestically Produced Equipment

As outlined in *GUOSHUIFA (1999) No. 171, Trial Administrative Measures on Purchase of Domestic Equipment by Projects with Foreign Investment* (*1999 VAT Measures*), the GOC refunds the VAT on purchases by FIEs of certain domestically produced equipment. Article 3 of the *1999 VAT Measures* specifies that this program is limited to FIEs including exclusively foreign-owned enterprises. Article 4 of the *1999 VAT Measures* defines the type of equipment eligible for the VAT exemption, which includes equipment falling under the Encouraged and Restricted B categories listed in the *Notice of the State Council Concerning the Adjustment of Taxation Policies for Imported Equipment* (No. 37 (1997)) and equipment for projects listed in the *Catalogue of Key Industries, Products and Technologies Encouraged for Development by the State*. The receipt of the VAT rebates on domestically produced equipment is granted to FIEs upon presentation of documents showing their FIE status.

GE and certain of its cross-owned companies received VAT rebates on their purchases of domestically produced equipment during the POI.

We determine that the rebate of the VAT paid on purchases of domestically produced equipment by FIEs confers a countervailable subsidy. The rebates are a financial contribution in the form of revenue forgone by the GOC and they provide a benefit to the recipients in the amount of the tax savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a)(1). We further determine that the VAT rebates are contingent upon the use of domestic over imported goods and, hence, specific under section 771(5A)(C) of the Act. See Comment 16.

To calculate the benefit, we treated the VAT rebates as a recurring benefit, consistent with 19 CFR 351.524(c)(1). We attributed the amount of the VAT rebates received during the POI to GE's total sales. We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we determine that GE received a countervailable subsidy of 0.08 percent ad valorem under this program.

F. VAT and Tariff Exemptions on Imported Equipment

Enacted in 1997, the *Circular of the State Council on Adjusting Tax Policies on Imported Equipment (GUOFA No. 37) (Circular No. 37)* exempts both FIEs and certain domestic enterprises from the VAT and tariffs on imported equipment used in their production. The objective of the program is to encourage foreign investment and to introduce foreign advanced technology equipment and industry technology upgrades.

GE and certain of its cross-owned companies received VAT and duty exemptions under this

program due to their status as FIEs. Specifically, the 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.

We determine that VAT and tariff exemptions on imported equipment confer a countervailable subsidy. The exemptions are a financial contribution in the form of revenue forgone by the GOC and they provide a benefit to the recipients in the amount of the VAT and tariff savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a)(1). We further determine the VAT and tariff exemptions to be specific under section 771(5A)(D)(iii)(I). See Comment 16.

To calculate the benefit, we treated the VAT and tariff rebates as a recurring benefit, consistent with 19 CFR 351.524(c)(1). We attributed the amount of the VAT and tariff exemptions received during the POI to GE's total sales. We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we determine that GE received a countervailable subsidy of 1.51 percent ad valorem under this program.

G. Domestic VAT Refunds for Companies Located in the Hainan Economic Development Zone

According to Yangpu local tax regulations, enterprises located in the Economic Development Zone of Hainan may enjoy several tax preferences. These preferences are described in *Preferential Policies of Taxation,* which includes the eligibility criteria needed to qualify for the preferences. Under "Preferential Policies Regarding Investment by Manufacturer," high-tech or labor intensive enterprises with investment over RMB 3 billion and more than 1000 local employees may be refunded 25 percent of the VAT paid on domestic sales (the percentage of the tax received by the local government) starting in the first year the company has production and sales. The VAT refund can continue for five years.

One of GE's cross-owned companies was a qualifying manufacturing enterprise in the Economic Development Zone of Hainan and reported that it received the VAT refund in the POI. This company added that because the capital and number of employees are registered with the local government, the tax refund is automatically granted.

We determine that the domestic VAT refund confers a countervailable subsidy. The refund is a financial contribution in the form of revenue forgone by the local government and it provides a benefit to the recipient in the amount of the refunded taxes. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a). We further determine that the program is limited to enterprises located in a designated geographical region and, hence, is specific under section 771(5A)(D)(iv) of the Act. See Comment 16.

To calculate the benefit, we treated the VAT refund received by the cross-owned company as a

recurring benefit, consistent with 19 CFR 351.524(c)(1). We then attributed the VAT refund received in the POI to sales of the input and the downstream products. We adjusted the calculated ad valorem rate as explained in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above. On this basis, we determine that GE received a countervailable subsidy of 0.04 percent ad valorem under this program.

II. Programs Determined to Be Not Countervailable

A. Debt-to-Equity Swap for APP China

Based on record information, we determine that GOC state-owned banks were not involved in a debt-to-equity swap with GE and its cross-owned companies. Therefore, we do not find this program countervailable. See Memorandum to Susan Kuhbach, "APP Debt-to-Equity Analysis" (March 29, 2007) (memorandum is on file in Department's CRU).

III. Programs Determined Not To Have Been Used or Not To Have Provided Benefits During the POI for GE

A. The State Key Technology Renovation Project Fund

B. Clean Production Technology Fund

The purpose of this program is to provide incentives and rewards (monetary or non-monetary) to encourage enterprises to conduct clean production inspections, with the goal of protecting the environment. The program entered into force in October 2004, and was authorized by Decree No. 16 of the NDRC and the National Administration of Environmental Protection entitled *Provisional Measures on Clean Production Inspection* (*Decree No. 16*).

GE reported that it received a grant under this program.

Based on our analysis, any potential benefit to GE under this program is less than 0.005 percent. Where the countervailable subsidy rate for a program is less than 0.005 percent, the program is not included in the total CVD rate. See, e.g., Final Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 70 FR 39998 (July 12, 2005), and the accompanying Issues and Decision Memorandum, at "Purchases at Prices that Constitute 'More than Adequate Remuneration'" (citing Final Results of Administrative Review: Certain Softwood Lumber Products from Canada, 69 FR 75917 (December 20, 2004), and the accompanying Issues and Decision Memorandum, at "Other Programs Determined to Confer Subsidies").

C. Famous Brands

Record information indicates that among the SMPI companies only GHS received subsidies

under this program. See GE Supplemental Questionnaire Response (April 17, 2007) at 17. As we have determined that subsidies received by GHS should not be attributed to the subject merchandise, we are now treating this program as not used by GE. See Comment 17, Attribution of GHS' Subsidies to GE.

D. Income Tax Credits on Purchases of Domestically Produced Equipment by FIEs.

E. Income Tax Exemption Program for Export-oriented FIEs

F. Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export-oriented Enterprises

G. Direction Adjustment Tax on Fixed Assets

H. Discounted Loans for Export-Oriented Enterprises

I. Subsidies to Input Suppliers
   1. Preferential tax policies for FIEs engaged in forestry and established in remote underdeveloped areas
   2. Preferential tax policies for enterprises engaged in forestry
   3. Special fund for projects for the protection of natural forestry
   4. Compensation fund for forestry ecological benefits

IV. Programs Determined To Be Terminated

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

In its response, the GOC submitted a circular showing that this program was terminated on January 1, 2002. We confirmed at verification that no residual benefits would exist in our POI.

Analysis of Comments

Comment 1: Applicability of the CVD Law to China

The GOC argues that the Department does not have the authority to apply the CVD law to China as long as the Department continues to designate China as a nonmarket economy (NME). In support, the GOC points to the 1986 ruling by the Court of Appeals for the Federal Circuit (CAFC) in Georgetown Steel Corp. V. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel), in which the CAFC ruled that the CVD law does not apply to NMEs.

The GOC contends that the Department's preliminary interpretation of Georgetown Steel cannot be sustained for the following reasons: in Georgetown Steel the CAFC definitively ruled that, under the statutory scheme, the CVD law was not intended to be applied against NME countries;

the Department has consistently applied Georgetown Steel as controlling precedent to later time periods and under the current CVD law; and, subsequent Congressional action confirms that Georgetown Steel remains controlling precedent. These arguments are presented in turn.

In Georgetown Steel the CAFC definitively ruled that, under the statutory scheme, the CVD law was not intended to be applied against NME countries: According to the GOC, the CAFC's ruling does not reflect any deference to the Department, but rather the CAFC's own careful analysis of the issue. Moreover, the GOC claims that analysis led the CAFC to conclude that the CVD law could not be applied to NMEs because of the specific statutory scheme adopted by Congress. Specifically, the GOC quotes the CAFC that, "Congress ... has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the AD law." Georgetown Steel, 801 F.2d at 1318.

The Department has consistently applied Georgetown Steel as controlling precedent to later time periods and under the current CVD law: The GOC points to the Department's consistent application of the Georgetown Steel precedent in various determinations, the Statement of Administrative Action, Doc. No. 103-316, pt. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 (SAA), and the CVD Preamble. Among these, the GOC highlights Final Negative Countervailing Duty Determination: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992), where the Department stated that "Congress could not have intended to apply the CVD law to NME countries;" the CVD Preamble where the Department stated that it intended to apply the prohibition against applying the CVD law to NMEs in all future cases; and, Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002), where the Department cited to and explicitly relied upon Georgetown Steel and the CVD Preamble to rule that the current CVD law does not apply to subsidies granted by NMEs.

Subsequent Congressional action confirms that Georgetown Steel remains controlling precedent: The GOC contends that Congress has amended the AD and CVD laws since Georgetown Steel several times, and each time has embraced either directly or indirectly the Georgetown Steel holding. Citing numerous judicial precedents, the GOC argues that the rules of statutory construction require the Department to recognize Congressional action and to conclude that Georgetown Steel remains controlling.

The GOC first discusses the 1988 Omnibus Trade and Competitiveness Act, claiming it left unchanged the basic CVD law, while amending the AD law applied to NMEs. Specifically, the GOC points out that this Act provided that in valuing the NME producer's factors of production, the Department should avoid using any prices that it has reason to believe or suspect may be dumped or subsidized. The GOC claims that in stating this, Congress made clear its intent that the NME methodology for calculating AD duties should fully address the distorting effect of subsidies. See Fuyao Glass v. United States, No. 2003-169, slip op. at 37-38 (CIT December 18, 2003) (quoting China National Machinery vs. United States, 264 F. Supp. 2d. 1229, 1238 (2003)). According to the GOC, this makes clear that Congress established a specific statutory

scheme under which allegedly unfair imports from NMEs would be addressed, i.e., under the AD law, not the CVD law. Also in connection with the 1988 Omnibus Trade and Competitiveness Act, the GOC claims that an early draft of the bill shows that the House Ways and Means Committee recognized that the Department did not have the authority to apply the CVD law to NMEs and that the Department needed an explicit act of Congress to do so.

The GOC next contends that the Uruguay Round Agreements Act (URAA), P.L. No. 103-465, 108 Stat. 4814 (1994), contained eight major changes to the AD law and six to the CVD law, but no changes were made to apply the CVD law to NMEs. Moreover, the GOC points out, the SAA explicitly reaffirmed the decision in Georgetown Steel. See SAA at 926. The GOC acknowledges that the URAA repealed section 303 of the Tariff Act of 1930 (section 303), but argues that this did not impact the statute's scope of application.

GE joins the GOC's position that application of the CVD law to China is incorrect.

Petitioner claims that the language of 19 U.S.C. § 1671(a)(1) is unambiguous in requiring the Department to apply CVDs when "the government of a country" provides a subsidy and, if the country is a "Subsidies Agreement country," the subject imports cause injury. The definitions of "country" (19 U.S.C. § 1677(3)) and "Subsidies Agreement country" (19 U.S.C. § 1671(b)(1)) are broad and cannot be read to exclude China, according to petitioner. Similarly, the definition of "countervailable subsidy" (19 U.S.C. § 1677(5)(A) & (B)) does not confine this concept to actions of market economy governments. The fact that neither NMEs nor China are mentioned in the CVD law is telling, in petitioner's view, because had Congress intended to exclude these countries from coverage, it would have done so explicitly.

Because the statute is unambiguous, petitioner claims there is no need to look at additional sources to interpret it. Nevertheless, petitioner addresses the GOC's arguments on this point. First, according to petitioner, the legislative committee reports related to the Trade Agreements Act of 1979 (which gave rise to the current CVD statute) are silent with respect to the application of CVD remedies to NMEs. Had Congress intended to exclude NMEs from the CVD law, petitioner claims Congress would have made its intent clear. Second, in two major changes to the CVD law since 1979, the 1988 Omnibus Trade and Competitiveness Act and the URAA, petitioner points out that Congress has never changed the CVD law so that it would not apply to NMEs. Third, petitioner contends that six years subsequent to the URAA, Congress expressly recognized the availability of CVDs as a remedy against imports from China as a result of China's accession to the WTO. Petitioner points to the fact that when China joined the WTO, China agreed to subject itself to the subsidies and AD disciplines under Article 15 of its Accession Protocol; Congress passed legislation indicating that it intended U.S. businesses to obtain the full opportunities available as a result of China's accession; and China's Normal Trade Relations legislation refers to the Department "defending United States AD and CVD measures with respect to" imports from China. See "Normal Trade Relations for the People's Republic of China," Public Law No. 106-286 (October 20, 2000) (NTR Legislation).

Petitioner further argues that Georgetown Steel does not prohibit the Department from imposing CVDs on imports from China. First, according to petitioner, the issue on appeal in Georgetown Steel was whether the Department had the discretion not to apply the CVD law to NMEs, and the CAFC found that the Department had such discretion. To support this, petitioner points to the CAFC's reliance on United States v. Zenith Radio Corp., 562 F.2d 1209, 1219 (C.C.P.A.), *aff'd* 437 U.S. 443 (1978)l; and Chevron, U.S.A., Inc. V. Natural Resources Defense Council, Inc. 467 U.S. 837, 842-45, 104 S. Ct. 2778 (1984), as evidence that the Court was deferring to the agency's discretion in the absence of a clear Congressional intent. Moreover, petitioner contends that the GOC relies on dicta in citing to the CAFC's discussion of legislation subsequent to section 303. In fact, only one court has had the occasion to address the question of applicability of the CVD law to China and that court agreed with the Department's preliminary conclusion that Georgetown Steel only affirmed the Department's discretion not to apply the CVD law. Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d 1274, 1282 (CIT 2007).

Petitioner argues further that the GOC's claim that Congress either acquiesced or embraced Georgetown Steel fails for many reasons. First, Georgetown Steel involved a different, now-repealed law (section 303). Thus, petitioner claims, if Congress acquiesced, it only acquiesced in a ruling that the Department had discretion not to apply section 303. Second, the conclusion in Georgetown Steel turned entirely on the specific language in section 303 regarding "bounty or grant," according to petitioner. The new statute replaces that term and contains detailed definitions of "subsidy" and "countervailable subsidy" at 19 U.S.C. § 1677(5). Moreover, petitioner claims, the new statutory language clarifies that the Department is not to consider whether the recipient of a subsidy is publicly or privately owned, or the effect of the subsidy, thus altering the factors considered in Georgetown Steel. Third, the GOC's claims regarding the failure to include a CVD provision for NMEs in the Omnibus Trade and Competitiveness Act of 1988 are pure speculation, according to petitioner. Fourth, petitioner states that the GOC's claims regarding the URAA are incorrect because, as even the GOC admits, the URAA repealed section 303 and provided broad new definitions of "subsidy." Although the GOC has cited language in the SAA equating "bounty or grant" with "subsidy," petitioner points out that the GOC selectively omits parts of the passage, which state that the terms are equivalent "in general" and unless such an interpretation "is inconsistent with the definition contained in the bill."

Finally, petitioner contends that the benefits of subsidies in China can now be measured because market-based benchmarks are prevalent in the country and, as provided for in China's WTO Accession Protocol at Article 15(b), benchmarks outside of China can be used where there are "special difficulties." See "Accession of the People's Republic of China," WT/L/432 (November 23, 2001) (available at www.wto.org) (Accession Protocol).

Department's Position

The Department has legal authority to apply the CVD law to China. Congress granted the Department the general authority to conduct CVD investigations. See, e.g., Sections 701 and

771(5) and (5A) of the Tariff Act of 1930, as amended ("the Act"). In none of these provisions is the granting of this authority limited only to market economies. For example, the Department was given the authority to determine whether a "government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy . . . ." See Section 701(a) of the Act. Similarly, the term "country," defined in section 771(3) of the Act, is not limited only to market economies, but is defined broadly to apply to a foreign country, among other entities. See also Section 701(b) of the Act (providing the definition of "Subsidies Agreement country").

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME." Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984); and Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984). 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 "Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy" (March 29, 2007) (citation omitted) (available at http://ia.ita.doc.gov/download/ prc-cfsp/CFS%20China.Georgetown%20applicability.pdf) (Georgetown Memo). Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in these Wire Rod cases is not a significant factor with respect to China's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from China.

The Federal Circuit 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 Federal Circuit 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 Federal Circuit 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).

Georgetown Steel, 801 F.2d at 1318 (emphasis added). The Georgetown Steel court did not hold that the statute prohibited application of the CVD law to NMEs, nor did it find that Congress spoke to the precise question at issue. Instead, it found that the question was within the discretion of the Department. Recently, the Court of International Trade concurred, explaining that "the Georgetown Steel court only affirmed the Department's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs." Gov't of the People's Republic of China v. United States, 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318). Therefore, the court declined to find that the Department's investigation of subsidies in China was ultra vires.

The GOC's argument that Congress' failure to amend the law subsequent to Georgetown Steel amounts to a Congressional action of non-application of the CVD law to NMEs is also legally flawed. The fact that Congress has not enacted any NME-specific provisions to the CVD law does not mean the Department does not have the legal authority to apply the law to NMEs. The Department's general grant of authority to conduct CVD investigations is sufficient. See, e.g., Section 771(5) and (5A) of the Act. Given this existing authority, no further statutory authorization is necessary.

In fact, 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 NTR Legislation. In section 413 of that law, which is now codified in 22 U.S.C. § 6943(a)(1), Congress authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the WTO, assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping *and countervailing duty measures with respect to products of the People's Republic of China.*" 22 U.S.C. § 6943(a)(1) (emphasis added). China was designated as an NME as of the passage of this bill, as it is today. Thus, Congress not only contemplated that the Department possesses the authority to apply the CVD law to China, but authorized funds to defend any CVD measures the Department might apply.

This statutory provision is not the only instance where Congress has expressed its understanding that the CVD law may be applied to NMEs in general, and China in particular. In that same trade law, Congress explained that "[o]n November 15, 1999, the United States and the People's Republic of China concluded a bilateral agreement concerning the terms of the People's Republic of China's eventual accession to the World Trade Organization." 22 U.S.C. § 6901(8). Congress then expressed its intent that the "United States Government must effectively monitor and

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

The GOC fails to discuss these statutory provisions and instead, cites to the fact that Congress has enacted revisions to the AD law to deal with NME methodologies, including in the 1988 Omnibus Trade and Competitiveness Act, but not to the CVD law. The fact that Congress enacted specific provisions for the application of the AD law, but not the CVD law, to NMEs simply reflects that the Department was applying the AD law to NMEs at the time rather than the CVD law. As the CVD law was not being applied to NMEs at that time, there was no reason to amend the CVD law to address concerns unique to NMEs. Further, the fact that the Department's factor-of-production methodology does not use prices that the Department has reason to believe or suspect may be dumped or subsidized, in no way speaks to the application of the CVD law to NMEs. It simply reflects the desire not to use knowingly distorted prices when constructing the normal value.

The GOC cites proposed language in the 1988 Omnibus Trade and Competitiveness Act that was ultimately removed before its passage and claims that the House Ways and Means Committee unambiguously stated that the Department did not have discretion to apply the CVD law to NMEs. The proposed language dealt with providing the Department the discretion to determine whether it could apply the CVD law to NMEs. The GOC's interpretation is flawed. The fact that a provision was considered that would have explicitly given the Department certain authority does not mean that the Department did not already have that authority under prior statutes. As the Supreme Court explained in Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers, "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others." Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 170 (2001) (citation omitted).

Likewise, in Butterbaugh v. Dept. of Justice, the Federal Circuit held that "congressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention." Butterbaugh v. Dept. of Justice, 336 F.3d 1332, 1342 (Fed. Cir. 2003). Therefore, the fact that a provision was removed from the final version of the 1988 Act does not mean that Congress concluded that the Department did not already have this authority. Moreover, as discussed above, Georgetown Steel did not hold that the CVD law could never apply to NMEs under any circumstances, but only that the Department's decision not to apply it in that case was reasonable. Thus, congressional action on this issue was not necessary.

Finally, the GOC's assertion that the SAA reaffirmed the decision in Georgetown Steel is equally flawed. Although the GOC fails to cite which passage supposedly supports this statement, there is one passage discussing Georgetown Steel. See SAA at 926. However, this statement merely explained that a NAFTA panel in another case had misunderstood the holding of Georgetown Steel to require an "effects test" in determining whether a subsidy can be countervailed. Congress summarized its view of the narrow holding of Georgetown Steel as being "limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries" in order to distinguish Georgetown Steel from the NAFTA panel ruling, not to express congressional intent that there be a legal bar to bringing a CVD case against an NME. Id. In sum, while Congress (like the Federal Circuit) 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. Arguments regarding the Department's past practice are discussed in Comments 2 and 3.

Comment 2: The Administrative Procedures Act (APA) Claim

Citing Carlisle Tire & Rubber Co. V. United States, 10 CIT 301, 305 (1986) (Carlisle Tire), the GOC contends that the Department must comply with the rulemaking requirements of the APA before it can change its position regarding the applicability of the CVD law to NMEs. To support its claim that this position is a binding rule, the GOC points to several actions taken by the Department. These actions include: a request for comments from the general public in the CVD investigation Textiles, Apparel, and Related Products from the People's Republic of China, 48 FR 46600, 46601 (October 13, 1983); findings in Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374, 19376 (May 7, 1984) ("[b]ecause the notion of subsidy is, by definition, a market phenomenon, it does not apply in a nonmarket setting.") and Potassium Chloride from the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984) (Soviet Potash) ("In light of our determination that, ..., as a matter of law, [subsidies] cannot be found in NMEs ..."); the General Issues Appendix in Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37261 (July 9, 1993) ("the CVD law is not applicable to nonmarket economies because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an

economy . . . in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place."); and the CVD Preamble, 63 FR at 65360.

The GOC places particular importance on the last action, i.e., the preambular language regarding the definition of "benefit" (19 CFR 351.503). The GOC claims this language was unequivocal: the Department would not apply the CVD law to NMEs and it would not examine subsidy allegations made against an NME. Citing Auto Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (Auto Parts and Accessories); and Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) (Alaska Hunters), the GOC claims that the preamble provides a definitive interpretation of the Department's regulation and that any change in that interpretation is an amendment of the regulation, which cannot be effected without first engaging in APA notice-and-comment rulemaking.

Petitioner contends that the Department's non-application of the CVD law to NMEs is a practice, not a rule, because no rulemaking procedures were employed in adopting the practice. Moreover, because it is a practice, the Department is free to change it so long as it provides a reasoned explanation for the change. See Allegheny Ludlum Corp. v. United States, 24 CIT 452, 458, 122 F.Supp 2d 1141 (2000) (Allegheny Ludlum).

At most, petitioner claims, the Department's non-application of the CVD law to NMEs could be considered a non-binding interpretative rule. Such a rule "advises the public of a statute's meaning or the manner in which it is to be applied," but is not a rule that must be followed. See Stein § 15.05{3} and 15.05{5}.

Further, the Department has made clear that its practice of not applying the CVD law to NMEs is not a binding, legislative rule, according to petitioner. In particular, petitioner points to the preambular language cited by the GOC, in which the Department referred to its "practice" of not applying the CVD law to NMEs and noted that the CAFC upheld this "practice" in Georgetown Steel. Similarly, in soliciting comments on the applicability of the CVD law to China in this proceeding, the Department referred to its non-application "policy."

Petitioner also disputes the GOC's claim that certain actions by the Department constitute notice-and-comment rulemaking proceedings. Specifically, petitioner claims that most of the cited actions, including the General Issues Appendix, were merely investigations that did not result in a binding rule. Moreover, the invitation to "all persons" to submit comments does not, in petitioner's view, transform the General Issues Appendix into a binding rule. See, e.g., Chem. Waste Mgmt., Inc. v. EPA, 869 F2d 1526 (D.C. Cir. 1989). Petitioner adds that the Department's statement in the General Issues Appendix actually supports the preliminary conclusion in this proceeding because it indicates that when subsidies can be identified and measured (a finding made by the Department in the Preliminary Determination), they can be countervailed.

Finally, petitioner addresses the GOC's claims about the CVD Preamble. First, petitioner points

out that the Department's practice of not applying the CVD law to NMEs does not appear in 19 CFR 351.503. Second, the preamble is not a part of the regulations according to petitioner. Instead, it is a statement of policy or "supplementary information," and will only be looked at by the courts for administrative construction of a regulation. See Tung Mung Development Co. v. United States, 25 CIT 752 (2001); Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982); and CVD Preamble, 63 FR at 65360. Furthermore, petitioner disputes the GOC's reliance on Auto Parts and Accessories because that case does not even refer to a preamble. Similarly, petitioner rejects the GOC's reliance on Alaska Hunters because that case involved an agency's amendment of its regulation rather than the agency's interpretation of a statute.

Department's Position

The Department's previous policy of non-application of the CVD law to NMEs is not a "rule" under the APA, but a practice. The GOC's claim that the Department has allegedly changed a prior binding rule regarding the application of the CVD law to NMEs without using APA rulemaking procedures is incorrect. The Department has never promulgated a rule pursuant to the APA regarding the application of the CVD law to NMEs.

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

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

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

The Court of International Trade has repeatedly recognized the Department's discretion to modify its practice and has upheld decisions by the Department to change its policies on a case-by-case basis rather than by rulemaking when it has provided a reasonable explanation for any change in policy. See, e.g., Budd Co., Wheel & Brake Div. v. United States, 746 F. Supp. 1093

(CIT 1990) (holding that the Department did not engage in rulemaking when it modified its hyperinflation methodology: "because it fully explained its decision on the record of the case it did not deprive plaintiff of procedural fairness under the APA or otherwise"); and 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 not through formalized rulemaking. See Ceramica Regiomontana, S.A. v. United States, 10 C.I.T. 399, 404-05, *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). The Department provided a fully reasoned analysis for its change of practice in this case. See Georgetown Steel Memo.

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.I. v. United States, 77 F. Supp. 2d 1349, 1359 (citing SAA at 892) ("Antidumping and countervailing proceedings . . . are investigatory in nature.")).

The GOC cites Carlisle Tire for the proposition that the APA applies generally to AD and CVD proceedings. Carlisle Tire, 10 C.I.T. at 305. Carlisle Tire, however, only held that the APA applied when the Department had created a rule (with respect to de minimis dumping margins) with application to other cases. The court ultimately found that it had not done so, and that the Department was free to use a different de minimis level, although the Department had to explain why the margin it chose was reasonable. Carlisle Tire, 10 C.I.T. at 306. Here, however, the decision whether to apply the CVD law to NMEs such as China has been made on a case-by-case basis, so no rule has been implemented under the reasoning in Carlisle Tire.

The GOC also cites to Alaska Hunters, 177 F.3d at 1033-34, to support its claim that the APA's requirements apply if the Department decides to apply the CVD law to an NME. However, in that case, the FAA had published a notice of general application. See id. at 1033; see also Compliance With Parts 119, 121, and 135 by Alaskan Hunt and Fish Guides Who Transport Persons by Air for Compensation or Hire, 63 FR 4 (Jan. 2, 1998) (notice to operators). This is not analogous to the Department's practice here, where the practice was developed on a case-specific basis – there was no broad notice of general application that the Department would never investigate future CVD complaints against NMEs.

In the wire rod cases that provided the Department's analysis on the Soviet bloc economies and examined whether the CVD law could be applied, the Department articulated its decisions based on the status of those economies at the time. For example, after analyzing the operation of the market (or lack thereof) in Poland, the Department explained that:

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

> grants. Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984).

The Department concluded that Congress had never clearly spoken to this issue. Id. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the countervailing duty law, cannot be found in an NME." Id.; see also Carbon Steel Wire Rod from Czechoslovakia, 49 FR 19370 (May 7, 1984) (final negative CVD determination). The Department based its decision upon the economic realities of these Soviet bloc economies. It did not create a sweeping rule against ever applying the CVD law to NMEs.

The GOC cites to Soviet Potash as a statement of the Department's position that it will not initiate subsidy investigations against NMEs. Soviet Potash, 49 FR 23438. However, that notice did not create a rule, but simply referenced the Department's previous decision in the wire rod investigations that it was not able to apply the CVD law to those types of economies. Indeed, the Department's subsequent actions demonstrate that it did not create a rule against the application of CVD law to NMEs. For example, in 1992, the Department initiated a CVD investigation against China, notwithstanding its status as an NME, after determining that certain industry sectors were sufficiently outside of government control. Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (Jan. 9, 1992) (Lug Nuts from the PRC).[1]

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

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

> In this regard, it is important to note here our *practice* of not applying the CVD law to non-market economies. The CAFC upheld this practice in Georgetown

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[1] The Department ultimately rescinded the CVD investigation on the bases of the AD investigation, the litigation, and subsequent remand determination, concluding that it was not a market-oriented industry. Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 10459 (Mar. 26, 1992).

> Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). See also GIA at 37261. We intend to continue to follow this *practice*.

CVD Preamble, 63 FR at 65360 (emphasis added). The GOC's claim that the Department promulgated a rule is unfounded; a statement in a preamble to a set of rules does not itself become a rule, particularly where, as here, the statement explicitly describes a practice that is not covered in that set of rules.

The Department has continued to explain that it has a practice of not applying the CVD law to NMEs, but has not referred to this practice as a rule. "The Preamble to the Department's regulations states that . . . it is important to note here our practice of not applying the CVD law to non-market economies. . . . We intend to continue to follow this practice." Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (Sept. 25, 2002), and accompanying Issues and Decision Memorandum, at Comment 1 (Hungarian Sulfanilic Acid) (emphasis added). The claim that the Department has somehow created a rule, when it has neither referred to its practice as such nor adopted notice-and-comment rulemaking for this practice, is erroneous.

Comment 3: The Department's Justification for its Change in Practice from Sulfanilic Acid from Hungary

The GOC contends that the Department's Preliminary Determination did not provide an adequate rationale for the agency's change in legal interpretation. The Department preliminarily concluded that the economy in today's China differs from the Soviet-style economies of the 1980s, but the agency did not provide any evidence that U.S. law recognizes different types of NMEs and that different rules should apply to them. The GOC contends this is because section 771(18) of the Act makes clear that there is only one definition of NME.

Moreover, according to the GOC, the Department has consistently adopted the position that there are no categories of NMEs. To support this, the GOC points to Hungarian Sulfanilic Acid, 67 FR 60223. In that case, the GOC claims, the Department said that the CVD law did not apply to Hungary in the year immediately before Hungary graduated to market economy status despite the fact that Hungary could no longer be considered a Soviet-style economy at that time. The GOC charges that the Department did not even address Hungarian Sulfanilic Acid in its Preliminary Determination. The GOC further contends that the Department did not explain why subsidies under Soviet-style economies had "no measurable impact" but somehow have an impact because China's nonmarket economy has "developed."

Petitioner responds that treating China as an NME under the AD law is irrelevant for the CVD law. Moreover, in arguing that the Department must explain its change from the practice from Hungarian Sulfanilic Acid, the GOC seeks to impose a burden on the Department that does not exist, according to petitioner. The Department has met the standard established in Allegheny Ludlum by reasonably explaining the change, in petitioner's view, and does not need to cite each and every case in which the formed practice was implemented.

Department's Position:

There is no requirement that the Department address each instance where a prior practice was applied when changing that practice. All that is required, is that the Department provide a "reasoned analysis" for its change. See, e.g., Rust v. Sullivan, 500 U.S. 173, 187. As explained by the Supreme Court:

> An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances. Id., 500 U.S. at 186-87 (citations and internal quotations omitted).

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., Hungarian Sulfanilic Acid, 67 FR 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, e.g., Georgetown Steel Memo. However, the determination of whether the CVD law can be applied does not necessarily create different types of NMEs. It is simply recognizing the inherent differences between NMEs. The GOC's arguments regarding why the Department determined it could not apply the CVD law to Soviet-styled NMEs, but could apply it to China is being addressed in Comment 6.

Comment 4: China's WTO Accession Protocol

GE argues Article 15 of China's Accession Protocol provides the basis for treating China as an NME for AD purposes but does not create any right to apply the CVD law to China as an NME. Specifically, GE asserts that Articles15(a) and (d), respectively, recognize Members' rights to apply special rules in AD proceedings and link the special rules to China's NME status. In contrast, GE claims, the Accession Protocol does not recognize the application of the CVD law in the NME context. GE allows that Article 15(b) confirms the applicability of Article 14 of the SCM Agreement to China but, unlike Articles 15(a) and (d), does not refer to the applicability of these provisions in the NME context. Moreover, according to GE, Article 15(b) addresses the "special difficulty" of applying Article 14 of the SCM Agreement to an economy such as China's but does not recognize the right to apply the CVD law to China while it is still classified as an NME. Instead, GE claims, the "special difficulties" language applies in case a Member does not consider China to be an NME but encounters special difficulties in applying Article 14 in a strict manner for certain sectors or products.

Petitioner disagrees. First, petitioner claims that the SCM Agreement does not exempt NME countries from the application of the CVD law (and does not even address NME country

imports). Second, according to petitioner, China made extensive commitments in its Accession Protocol, and these commitments would not have been negotiated and agreed upon if China was incapable of bestowing countervailable subsidies. Also, petitioner points to the reference in Article 15(b) of the Accession Protocol to proceedings under Part V of the SCM Agreement, which specifically covers CVD cases. Third, petitioner claims that GE fails to mention Articles 10(2) and 10(3) of the Accession Protocol, in which China agrees that subsidies provided to SOEs are specific (and, thus, actionable and countervailable) and that certain subsidies will be eliminated. Thus, petitioner states, there is no question that China is covered by the SCM Agreement's disciplines and remedies, and it would make no sense to say the U.S. CVD law, which was drafted to conform to the SCM Agreement, does not apply to China.

Department's Position:

The Department bases its decisions on U.S. law, which has been amended to make the "statutory changes required or appropriate to implement the Uruguay Round agreements." SAA, at 656. We note that our decision to apply the CVD law in this investigation is wholly consistent with both U.S. law and our international obligations. Section 701(b) of the Act defines a "Subsidies Agreement country" as, inter alia, a WTO member. China is now a WTO Member, and therefore, is subject to the SCM Agreement as implemented under U.S. CVD law. Nothing in U.S. law, or even the Accession Protocol, prohibits the application of the CVD law to Chinese imports. Please refer to Comment 1, above, for the Department's position on the applicability of the CVD law to China.

Comment 5: Retroactive Application of the CVD Law to China

GE contends that the Department is impermissibly applying the CVD law retroactively to subsidy transactions in 2005. In ALZ, GE claims that the CIT found that the Department cannot retroactively apply changes in its CVD rules to potential subsidy transactions that occur before the rule change takes effect. ALZ N.V. v. United States, 283 F.Supp. 2d 1302 (CIT 2003) (ALZ). To do so, according to GE, violates well-settled case law prohibiting such retroactivity. See, e.g., California Indus. Prods., Inc. v. United States, 350 F.Supp.2d 1135, 1142 (CIT 2004); Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 24 Ct. Int'l Trade 485, 492 (2000); Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005); and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (S. Ct. 1988).

GE contends that the restrictions on retroactivity apply not only to changes in the statute and regulations, but also to changes in policy that do not require formal notice-and-comment rulemaking. GE points to Parkdale Int'l v. United States, 429 F.Supp. 2d 1324 (CIT 2006) (Parkdale), in which the CIT applied the factors developed by the Supreme Court in Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (Landgraf), to determine whether the change in the Department's AD policy regarding resellers was permissible.

GE claims that the Department's retroactive application of the CVD law to 2005 subsidy transactions is impermissible because applying the law to conduct occurring more than two years before the change in policy announced on April 9, 2007, "impose[s] new duties," i.e., the duty

not to accept or provide countervailable subsidies, or to import such products into the United States, "with respect to transactions already completed," i.e., the bestowal/receipt of such subsidies in 2005. According to GE, impermissible retroactive decisions are those "that impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." See Parkdale, 429 F.Supp. at 1331 (citing Landgraf, 511 U.S. at 280). For the following reasons, GE contends that all of the Landgraf factors for finding an "impermissible retroactive effect" are met here:

> (i) whether the "rule, regulation, or decision . . . creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past:" GE claims that the decision announced by the Department in the Georgetown Steel Memo established a new legal obligation - liability for CVDs - related to direct or indirect subsidy transactions between the GOC and GE that occurred in 2005;
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> (ii) the "nature and extent of the change of the law:" GE claims that the change in policy represents a "sea change" in U.S. CVD law, overturning 20 years of practice and determinations affirmed by the CAFC in Georgetown Steel;
>
> (iii) "the degree of connection between the operation of the new rule and a relevant past event:" GE claims there is a direct connection between the Department's new policy (investigating subsidies to the Chinese CFS producers and preliminary application of CVDs) and a relevant past event (the subsidy programs as they existed in 2005 and GOC's bestowal of subsidies on CFS producers in that year) because application of the new policy to pre-2007 conduct resulted in the imposition of estimated countervailing duties; and
>
> (iv) "familiar considerations of fair notice, reasonable reliance, and settled expectation:" GE claims that the Department's change in policy reversed over 20 years of past practice and upset the settled expectations of the GOC, CFS paper producers, and U.S. importers that the CVD law would not be applied to imports from NMEs like China.

GE concludes that the Department recognized it cannot retroactively impose legal obligations when it stated in the CVD Preamble, "We intend to continue to follow this practice {of not applying the CVD law to NMEs}. Where the Department determines that a change in status from non-market to market is warranted, *subsidies bestowed by that country after the change in status* would become subject the CVD law." (emphasis added)

Petitioner responds with several arguments. First, according to petitioner, the Department's previous decisions not to apply the CVD law to NMEs reflect a longstanding practice, and such a practice can be changed so long as the Department provides a reasoned basis for doing so. See, Allegheny Ludlum, 24 CIT at 458; Rust v. Sullivan, 500 U.S. at 187; Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983). Also, petitioner states that the Department has never issued a binding, legislative rule with respect to the application of the CVD law to NMEs. Consequently, GE's reliance on ALZ is misplaced because that case involved a regulation which by its terms applied to investigations initiated after

the investigation into the new subsidies in question was initiated, according to petitioner.

Second, petitioner contends, even if the Department's practice of not applying the CVD law to NMEs could be considered an interpretative rule, it was not retroactive. To support this, petitioner cites to Parkdale: "{A} statute, rule, or policy, 'does not operate "retrospectively"' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches *new legal consequences* to events *completed* before its enactment." According to petitioner, the Department's application of the CVD law to China did not attach new legal consequences to events completed before the April 9, 2007, announcement because the Department has always had the authority to apply the CVD law to NMEs and because the NTR Legislation enacted in 2000 appropriated funds to the Department to defend U.S. CVD measures against China and to enforce the U.S. trade laws against China. Further, petitioner claims, the last statement by the Department about non-application of the CVD law to NMEs occurred in 2002 in Hungarian Sulfanilic Acid, and since then China has notified many of the subsidies being investigated here to the WTO. Accordingly, in petitioner's view, GE could have no settled expectation regarding the application of the CVD law to China that could have been upset by the Department's change in practice.

Third, petitioner contends that even if the change in practice is considered to be an interpretative rule with retroactive effect, it is still permissible under Chenery Corp., 332 U.S. at 202-03. In that case, according to petitioner, the Supreme Court recognized that an agency may change policy through ad hoc litigation, and that retroactivity is not necessarily fatal to the validity of such changes in policy. Moreover, in petitioner's view, the Department's change in policy regarding the application of the CVD law to NMEs passes the Landgraf/Parkdale test for permissible retroactive application. Petitioner's application of several of those factors follows:

> (i) the "nature and extent of the change of the law:" Petitioner claims that the change in this case was not a significant change in the law because the statute has always permitted application of the CVD law to NMEs and the CAFC's decision in Georgetown Steel merely affirmed the Department's discretion not to do so. Petitioner further contends that if there has been a significant change in the law, it was the NTR Legislation and China's accession to the WTO.
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> (ii) "the degree of connection between the operation of the new rule and a relevant past event:" Petitioner finds little or no connection between the change in practice and the GOC's subsidy practices because there is no evidence that the GOC relied on the Department's practice when it bestowed subsidies on GE. Further, according to petitioner, when China acceded to the WTO and notified its subsidies (many of which are being investigated here), it did so with the knowledge that the subsidies might be countervailed and, nonetheless, continued to subsidize GE.
>
> (iii) "familiar considerations of fair notice, reasonable reliance, and settled expectation:" Petitioner claims that the language of the statute, the narrow holding in Georgetown Steel, the fact that the Department characterized its practice as "practice" in the preamble to its

1988 rulemaking and did not codify its practice as a rule, the NTR Legislation, and China's accession to the WTO was or should have been "a flashing red light" to GE that the subsidies it received from the GOC might be countervailed. Hence, in petitioner's view, GE had no reasonable basis for relying on the Department's past practice and any expectations it might have had could not be considered "settled."

Department's Position:

We disagree with GE's claim that the Department's application of the CVD law to China involves impermissible retroactive application. The Department lawfully announced a change in practice that will apply, if an order is issued and based on the results of the relevant administrative review, to entries made by GE after April 9, 2007, four months after the Department announced its decision to initiate a CVD investigation of CFS from China.

It is settled law that the Department has the authority to change its practice in a given case as long as it provides a reasoned analysis for its decision to do so. See, e.g., Rust v. Sullivan, 500 U.S. at 187. In this proceeding, the Department has exercised its discretion, which was recognized by the Federal Circuit in Georgetown Steel, and has explained why the circumstances in this investigation permit a change in practice. See Georgetown Steel Memo.

Having given notice of a change in practice, the Department's application of the CVD law in this investigation is not an impermissible retroactive application of the CVD law, as GE claims. First, the facts of this case do not support GE's position. The Department initiated this investigation on November 27, 2006, indicating it was reexamining the application of the CVD law to China. Moreover, in a notice separate from this investigation, the Department explicitly stated that it would be reviewing its policy of not applying the CVD law to NMEs. See Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment, 71 FR 75507 (December 15, 2006). Therefore, parties were on notice that the Department would be revisiting its practice of not applying the CVD law to NMEs. Four months after initiation, on April 9, 2007, the Department's affirmative preliminary determination marked the first date on which entries of GE's imports could be affected by any change in this practice. If countervailable subsidies were provided to GE in 2005, any imports benefitting from such subsidies that entered prior to April 9, 2007, will be liquidated without any liability for countervailing duties. Thus, no impermissible retroactive application has taken place.

Second, the ALZ and Parkdale decisions on which GE relies do not support its position. ALZ is inapposite because it deals with a change to a regulation, not a practice, and because the regulation specified an effective date. As explained above, the courts have recognized that the Department can change a practice in an administrative proceeding.[2] In addition, the facts of the ALZ case are quite distinguishable from this investigation. ALZ deals with a situation where the

[2] We note that GE acknowledged that this is a policy (i.e., practice) and not a rule, in its brief. See GE Case Brief, at Part 2, p. 16 (stating that the Department "reversed over 20 years of Department policy" and referring to this as a "policy change" and "agency policy").

Department, in an investigation, found transactions not to be countervailable. ALZ, 283 F. Supp. 2d at 1308. However, subsequent to the investigation the Department changed its methodology and re-analyzed these transactions in a later administrative review. Id. Using this new methodology, the Department determined that these same transactions were countervailable. Id. at 1305. The court found that the "plain language of the regulations . . . directly speaks to the temporal reach of the regulations and requires that they be applied prospectively to investigations initiated on the basis of petitions filed after December 28, 1998." Id. at 1311. Therefore, because "that section contains an express command regarding the temporal reach of the countervailing duty regulations, this court must follow such language." Id. As GE acknowledges, there is no such regulation with "temporal reach" involved in the Department's application of the CVD law to China.

GE also cites to the Parkdale decision as supporting its position, but that case actually demonstrates that the Department's decision to apply the CVD law in this investigation is not an impermissible retroactive application. First, at issue in Parkdale was a published clarification to the Department's *regulation* regarding duty assessment. Moreover, as the court explained, the "retroactive rule 'must have a significant retroactive connection with past events.'" Parkdale, 429 F. Supp. 2d at 1333 (citation omitted). The court stated that "courts have looked at liquidation as the relevant 'past event' with respect to the operation of a new rule." Id. at 1334. This is because "[u]nder Customs law, importers are put on notice that changes may occur to duties until liquidation or reliquidation of entries at issue." Id. at 1333. Under this analysis, GE's argument fails because the Department's decision here only applies to subject merchandise that enters *after* the publication date of the Preliminary Determination, for which liquidation will occur at the earliest (assuming there is an order in place) over a year and a half *after* the Preliminary Determination. Therefore, Parkdale, supports the conclusion that the Department's decision to apply the CVD law in this investigation is not an impermissible retroactive application of the law.

Third, we also disagree with GE's reliance on its "settled expectation" that the U.S. CVD law would not apply to its imports. The fact that the Department previously has initiated a CVD investigation on Chinese imports contradicts that expectation. See Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (Jan. 9, 1992). Indeed, the Department has expressed the view that it possesses sufficient legal authority to apply the CVD law to NMEs such as China.[3] The Department's view is consistent with actions by Congress. For example, on October 10, 2000, it passed NTR Legislation. As explained in Comment 1 above, this law authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the WTO, assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping *and countervailing duty measures with respect to products of the People's Republic of China.*" 22 U.S.C. §6943(a)(1) (emphasis added). By

[3] For example, in a letter provided to the U.S. Government Accountability Office on June 1, 2005, the Department again explained that there is no legal bar to applying the CVD law to an NME. See "U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties," GAO-05-474, at Appendix III (June 2005) (available at www.gao.gov/new.items/d05474.pdf).

doing so, Congress authorized funds for the Department to apply the CVD law to China. The law also provided 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). As previously explained, this provision refers to, in part, China's commitment to be bound by the SCM Agreement as well as the specific concessions China agreed to in its Accession Protocol. For all of the foregoing reasons, there was no basis for GE's settled expectation in 2005 that the CVD law would never be applied to imports from China.

Comment 6: Comparison of the Department's Findings in the Georgetown Memo and the August 30 Market Economy Status Memo

GE argues that the Department's determination to overturn its policy regarding the application of the CVD law to NMEs was factually incorrect, because the determination was based on a flawed and selective analysis of the available data. GE argues that despite analyzing the same factors and the same data, the Georgetown Memo and the August 30 Memorandum reached opposite, and mutually exclusive, conclusions. Finally, GE argues that, in the Preliminary Determination, the Department did not account for certain facts that were analyzed in the August 30 Memorandum, indicating a selective use of the facts.

GE further alleges that the Department ignored certain information in the Georgetown Memo, noting that the Department's analyses in both the Georgetown Memo and the August 30 Memorandum are essentially the same and rely on the same set of facts for the first four statutory factors: currency convertibility, wage rates, foreign direct investment, and government ownership or control of the means of production. With respect to the fifth and sixth statutory factors, GE argues that the Department failed to account for a number of factors in the Georgetown Memo that were considered in the August 30 Memorandum. First, GE argues that the Department has not taken into account a number of factors that "allegedly showed that the GOC purposefully engages in resource allocation," including the continued distorting presence of state owned enterprises ("SOEs"). Second, it argues that, in the Georgetown Memo, the Department failed to account for institutional weaknesses regarding rule of law, the lack of clear property rights and an effective bankruptcy law, corruption both in the government and in the commercial sphere, and *guanxi*, i.e., "the use of personal connections to circumvent the law."

In response, petitioner argues that the calculations of dumping margins and CVD margins are fundamentally different. First, the statute prescribes a list of factors that must be considered in determining whether a country should be designated an NME, while the CVD law does not prescribe a set of factors in determining whether the CVD law can be applied to an NME country. Further, petitioner argues that a finding that prices and costs cannot be used in a dumping calculation has no bearing on whether the Department can calculate a CVD duty.

Department's Position:

As discussed in greater detail in the Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China (October 10, 2007) and accompanying Issues and Decision Memorandum at Comment 1, the Department found in its

August 30 Memorandum that, despite the progress that China has made in moving away from being a traditional command economy, the extent of government control and direction over the country's economy warrants the continued designation of China as an NME for AD purposes. Notwithstanding the central conclusion that prices and costs within China are still too affected by government intervention to permit their use in the calculation of normal value, the August 30 Memorandum also described many positive reforms that set China apart from its pre-reform era. The Georgetown Memo, which relies on the very same set of facts as the August 30 Memorandum, compared the Soviet-style economies at issue in Georgetown Steel with China's present-day economy with respect to a number of similar factors, viz., wages and prices generation, entrepreneurship, the conduct of foreign trade, and resource allocation. In conducting this comparison, the Department found in the Georgetown Memo that while China's economy still features extensive state intervention and control, it is nevertheless more flexible than traditional command economies.

The limits the GOC has placed on the role of market forces are not consistent with recognition of China as a market economy under the U.S. AD law, hence the Department reaffirmed China's status as a non-market economy in the August 30 Memorandum. However, given the substantial difference between the Soviet-style economies and China's economy in recent years, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as bar to proceeding with a CVD investigation involving products from China. See generally Georgetown Memo. Therefore, contrary to GE's assertions, the Department did not arrive at contradictory conclusions. Rather, the analysis underlying the question of "whether PRC prices and costs can be used for purposes of the antidumping law" versus the question of "whether it is possible to determine that the PRC government has bestowed a countervailable subsidy upon a Chinese producer" are fundamentally different. GE fails to explain how these conclusions are contradictory.

We also disagree that the Georgetown Memo ignored certain information. The two memos rely on the same set of facts for the first four statutory factors, as GE concedes. First, we note that the Georgetown Memo discusses at length the continued role of the state in resource allocation, especially financial resources, ultimately finding that "{i}nstead of directly allocating all financial resources in the economy, the PRC central and local government's primary levers of economic and financial control lie in the use of administrative measures (which allow for *ad hoc* discretionary policy implementation), five-year plans and industrial policies which may serve as guidance for lending and growth, and decentralized (local) control over the banking sector." See Georgetown Memo, at 9. With respect to SOEs, the Department found that "SOEs have the legal right and obligation to act as independent economic entities under the 1994 Company Law (as amended in 2006), including independent import and export decisions on both amounts and price. However, significant non-market forces may also constrain the actions of SOEs." See Georgetown Memo, at 8.

GE claims that the Department failed to account for the facts behind two factors that were discussed in the August 30 Memorandum. The Department notes that GE does not state how these factors relate to the application of the CVD law to China, and thus, how they would affect the Department's findings in the Georgetown Memo. These factors are especially relevant to the

total economic environment that gives rise to the prices and costs in an economy, but do not detract from the fact the government has receded from complete state control of resource allocation, which was the analysis at issue in the Georgetown Memo. Each of these factors speak to the *transitional* nature of China's economy, including the *incomplete* framework for rule of law, which permits the continued use of guanxi in business transactions. Furthermore, contrary to GE's assertions, the Georgetown Memo addresses property rights explicitly, explaining that "{p}ersonal property rights, an important precursor to private enterprise, were extremely limited in Soviet-style economies." See Georgetown Memo, at 6. Contrasting this with China's today, the Georgetown Memo finds that China's economy "features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance." Georgetown Memo, at 6. Therefore, the Department's analysis did not ignore any of the relevant information analyzed in the August 30 Memorandum. Moreover, none of the factors identified by the GE are either relevant or contradict the Department's finding in the Georgetown Memo, namely, that China's economy is more flexible than the traditional Soviet-style economies at issue in Georgetown Steel. Rather, the factors identified by GE provide further evidence of the transitional nature of China's economy.

Comment 7: Application of Adverse Facts Available to the GOC

Petitioner asserts that the GOC withheld requested information, failed to provide information in the form or manner requested, impeded the investigation and otherwise failed to act to the best of its ability in responding to certain of the Department's requests. Petitioner contends that as a result, the administrative record lacks certain necessary information and some of the information that was provided was submitted after the deadlines established by the Department. Petitioner says this has prejudiced petitioner and imperiled the Department's ability to conduct its analysis. Petitioner argues that as a result of these acts and omissions, the Department should use facts available in making certain decisions regarding its final determination, and apply adverse inferences where appropriate, as provided in sections 776(a) and 776(b) of the Act.

Petitioner describes different instances during the investigation where it contends that the GOC failed to provide information requested by the Department in a complete and timely manner. As evidence of the GOC's failure to cooperate to the best of its ability, petitioner points to the December 4, 2006, questionnaire and the Department's grant of a three-week extension for this response, after which the GOC filed a suit at the CIT challenging the legality of the investigation. The GOC then submitted what petitioner considers to be an incomplete response on January 31, 2007. Petitioner maintains that while the GOC may have a right to seek a preliminary injunction of an investigation, its decision to divert resources to this effort does not reduce its responsibility to participate in the investigation to the best of its ability. See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (Nippon Steel). Thus, petitioner states that for any requested information that the GOC failed to provide in the January 31, 2007, response, the Department should apply AFA in the final determination. Regarding the GOC's first supplemental questionnaire response filed on March 15, 2007, petitioner claims that the GOC failed to provide requested information on forestry subsidy programs and stone-walled the Department regarding requests for information from the GOC-owned banks.

Petitioner asserts that the information in the GOC's May 29 and June 14, 2007, submissions is also untimely and should not be used in the final determination. In particular, the information on policy lending submitted by the GOC on May 29, 2007, missed the deadline by two weeks, according to petitioner. Petitioner further argues that the GOC effectively granted itself an additional extension of time to submit information to the Department by delaying issuance of visas to the verification team. Petitioner asserts that this enabled the GOC to submit another large amount of data with its June 14, 2007, submission. Therefore, petitioner argues that the Department should use AFA in place of the untimely submitted information.

Petitioner further asserts that the Department's verification gives rise to several situations in which the use of AFA would be justified. First, despite the Department's request to meet with four departments of the NDRC during verification, only three officials representing two of the requested departments in addition to the official from the "international" division participated. Petitioner claims that none of the NDRC officials sent to verification was competent to discuss forestry policies or programs. Petitioner also claims that the GOC's failure to provide any personnel or documents from the State Economic and Trade Commission (SETC) during verification means that there is no evidence on the record other than unsubstantiated statements that the *10th Five Year Plan for the Paper Making Industry (Papermaking Plan)* is no longer operational. Petitioner argues that, as facts available, the Department should find for purposes of its final determination that the *Papermaking Plan* remains in force.

Second, petitioner asserts that the GOC's decision "to forbid" the Jiangsu Province Development and Reform Commission in Jiangsu Province from meeting with the verification team means that no information related to provincial industrial planning or programs was verified in that province. Third, petitioner claims, the GOC refused to allow the Department to speak to independent experts on the Chinese financial system. Petitioner concludes that the Department should use AFA to determine that the GOC maintains a policy lending program for the benefit of paper and related industries.

The GOC contests petitioner's arguments that it failed to act to the best of its ability in providing information to and otherwise cooperating with the Department in the investigation. The GOC argues that there is no basis for the Department to apply facts available, except with respect to the utilization of programs by Chenming that the Department finds to be countervailable. As explained below, the GOC stresses that it is important to consider petitioner's non-cooperation allegation within the factual and legal context of the CFS investigation.

With regard to the legal context of this investigation, the GOC asserts that petitioner has not provided any evidence to support a finding that the GOC did not act to the best of its ability to provide information other than an allegation that the GOC diverted its resources to block the CVD investigation in the CIT. Other than this, the GOC claims, petitioner's case for non-cooperation by the GOC rests solely on: (1) the fact that the GOC was not always able to submit requested information as quickly as the original deadlines; and (2) limitations on the verification. The GOC argues that neither of these factors had a demonstrable effect on the ability of the Department to understand the Chinese banking system and the possible role of local and national industrial policy in bank lending decisions.

With regard to the factual context of this investigation, the GOC highlights that the CFS investigation is the first full-fledged CVD investigation ever conducted against China and complains of the Department's failure to provide any meaningful opportunity to the GOC to consult before initiation. The GOC contends that this failure to lay the groundwork for the investigation before initiation placed an enormous burden on the GOC.

During the investigation, the GOC states that it tried to work with the Department to build an adequate and properly verified record. When it was unable to obtain and translate requested information in the time frames specified by the Department, the GOC claims it sought and obtained extensions from the Department for the submission of information. The GOC argues that, contrary to petitioner's assertions, the GOC obtained extensions for all of its submissions and complied with the deadlines set in those extensions.

The GOC acknowledges that some of its responses were incomplete when they were first submitted, but asserts that this was due to the numerous entities at the central, provincial and local levels from whom the GOC had to obtain information. Therefore, the GOC argues, incomplete responses and frequent extension requests had nothing to do with whether the GOC was cooperating to the best of its ability, but were attributable to the cumbersome process required to obtain the necessary information. The GOC further contends that the need for these extensions resulted in part from: the Department's failure to warn the GOC in advance that it was contemplating a change in its longstanding practice regarding the application of CVD law to NMEs; the Department's decision to initiate the investigation without providing any opportunity for public comment and without determining how the parallel CVD investigation would influence NME methodology in the companion AD investigation.

Finally, the GOC rejects the petitioner's claim that the GOC hindered verification. The GOC claims that without the approval of the other Chinese participants, the Ministry of Commerce could not issue the invitation letters needed to obtain visas. To get that approval, the Ministry of Commerce had to address the concerns of the agencies, banks, and similar entities about protecting their own confidentiality rules and those of their clients and customers, according to the GOC.

The GOC insists that petitioner's complaint that the GOC limited the Department's access to relevant agencies during verification is without merit. The GOC argues that the fact that the Ministry of Commerce made an abundance of bank and government officials available to discuss China's industrial policies as they related to bank lending is proof of this. According to the GOC, these representatives were fully responsive to the Department's questions and provided documents that were requested by the verification team.

With respect to the NDRC, the GOC maintains that the Department knows from the GOC submissions, the interviews with the independent experts, and its interviews with the banks and bank regulators, that the NDRC "plans" may affect certain government policies at both the central and local levels, but these policies do not affect bank lending, except to the extent that the NDRC policies such as restricting polluting industries affect the risk of making a particular loan. The GOC claims that the banks acknowledged that the NDRC may alert them to problems with

loans to certain sectors, to certain types of enterprises, or to projects of sub-optimal scale, but the verification team's discussions with the bank officials also confirmed that national industrial policies, as such, have no effect on loan approvals by the banks, and agencies in charge of these policies have no influence over either individual or general bank lending policies. Consequently, the GOC questions what the Department could have obtained from a longer conversation with the NDRC or a meeting with the Jiangsu Development and Reform Commission (DRC). The GOC states that it respects the need for the Department to be satisfied regarding the accuracy of the information it uses, but the GOC is convinced that any additional discussions with the NDRC or the provincial DRC would only have provided redundant information. The GOC acknowledges the absence of NDRC forestry and agriculture specialists, but suggests that it was enough that the officials present explained the basis of the five-year paper-making plan.

The GOC dismisses petitioner's complaint that the verification team received no documents from the SETC, stating that the fact that the SETC is no longer in existence explains the absence of documents and representatives. The GOC notes that the NDRC officials offered to respond to the verification team's questions on the SETC in writing since the NDRC's Legal Department was best equipped to address these questions.

Department's Position:

The level of the GOC's cooperation in this investigation was, at times, problematic. However, under the circumstances of this particular investigation, and based on the discretion granted to the Department under sections 776(b) and 782(d) and (e) of the Act, we find that the deficiencies on the part of the GOC in its responses and at verification do not form an adequate basis for the Department to apply AFA as advocated by petitioner in this particular case.

In our analysis of whether the GOC acted to the best of its ability in providing the requested information, we must first consider whether the GOC provided us with sufficient and verifiable information within the deadlines set by the Department to reach a determination. The GOC's January 31, 2007, response to our original questionnaire, as petitioner indicated, did not provide all of the information we had requested in our original December 4, 2006, questionnaire. However, in instances where the GOC did not provide the requested information, it attempted to provide an explanation of why it was unable to do so. The Department issued supplemental questionnaires and obtained much of the information not provided in the original response.

Regarding petitioner's specific allegations that GOC's May 29, 2007, and June 14, 2007, submissions were untimely, the record shows that the GOC properly requested and obtained extensions for each submission. See May 14, 2007, Letter from Li Ling, Director General, Bureau of Fair Trade for Imports and Exports, Ministry of Commerce of the PRC, to David Spooner, Assistant Secretary for Import Administration; May 17, 2007, Letter from David Spooner, Assistant Secretary for Import Administration, to Li Ling, Director General, Bureau of Fair Trade for Imports and Exports, Ministry of Commerce of the PRC; May 29, 2007, Memorandum to File from Martin Claessens regarding a meeting between Deputy Assistant Secretary Stephen Claeys and counsel for the GOC; and May 31, 2007, Letter from Susan Kuhbach, Director Office 1, Import Administration, to the GOC. Therefore, we consider the

May 29 and June 14, 2007, submissions to be timely.

We note that it is not unusual in CVD or AD investigations for respondents to have serious omissions in their initial responses. Sections 782(c), (d) and (e) of the Act anticipate that the Department will exercise its discretion in providing the respondent with reasonable opportunities to correct these deficiencies within the statutory time limits of the investigation. Section 782(e) specifies that the Department will not decline to consider information submitted by an interested party that is necessary to the determination but does not meet all applicable requirements established by the Department if:

1. the information is submitted by the established deadline;
2. the information can be verified;
3. the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination;
4. the interested party demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information; and
5. the information can be used without undue difficulties.

We find that the GOC has, on balance, satisfied the requirements of section 782(e) of the Act. With the exception of our determination regarding Chenming, the Department has been able to formulate the instant final determination based on record evidence.

While we conclude that, on balance, the GOC acted to the best of its ability to provide the information we requested in this investigation, we do have concerns regarding the level of the GOC's cooperation in the investigation. First, as acknowledged by the GOC, there were problems involving cooperation between the GOC's central government agencies, local governments and state-owned banks in this investigation that hampered the GOC's efforts to obtain the requested information. Second, as explained in our treatment of policy loans, the limited opportunity to meet with the NDRC, and the total lack of opportunity to meet with the provincial DRC, meant that the Department was unable to pursue a full understanding of the nexus between the role of the central and local governments in implementing central government industrial plans. As a result, the Department has relied in part on secondary information in reaching its determination on the policy lending program. In response to the GOC's questioning the necessity of meeting with the provincial DRC, the authority lies with the Department, not the GOC, to determine what information is necessary to conduct its investigation. See, e.g., Steel Authority of India, Ltd. v. United States, 149 F. Supp. 2d 921, 928 (CIT 2001) (citation omitted) (explaining that "if the Department were forced to use the partial information submitted by respondents, interested parties would be able to manipulate the process by submitting only beneficial information."). Third, the GOC's lateness in issuing the invitation letters for verification, and allowing verification to take place, forced the Department to rearrange its schedule for this (and other cases) several times. The Department is not always this flexible in scheduling verification and may not be in the position to be this flexible in future CVD verifications in China.

Finally, we note the GOC's arguments that its participation in this investigation was seriously handicapped by the Department's failure to consult adequately with the GOC and to provide an opportunity for public comment prior to initiation of the investigation. We reiterate that nothing in our CVD law or regulations prevented us from amending our policy regarding the application of the CVD law to China and provide our detailed position on this issue in our response to Comment 1. In addition, we note that China has been a member of the WTO and an SCM Agreement signatory since 2001, and provisions in the Accession Protocol clearly anticipated that CVD law might be applied to China by other WTO members. Finally, as required by the SCM Agreement, we offered to consult with the GOC prior to the initiation of this investigation and those consultations were held on November 20, 2006. See Memorandum to File from David Layton: Consultations with Officials from the Government of People's Republic of China (November 20, 2006).

Although there were areas where the GOC's cooperation was not ideal, given the novelty of the issues raised in this investigation, we have determined not to apply AFA, as requested by petitioner.

Comment 8: Policy Lending

Respondents argue that the Department erred in the Preliminary Determination by finding that loans from Chinese Policy Banks and state-owned commercial banks (SOCBs) constitute countervailable subsidies. Specifically, respondents argue that information on the record does not support a conclusion that loans from Policy Banks and SOCBs constitute a financial contribution or that lending by these banks is specific to the forestry and paper industries.

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

Evidence on the record does not demonstrate that there is a program in place to provide preferential lending to the paper industry: Respondents argue that the Department erred in investigating policy loans to respondent companies absent evidence of a program. Specifically, respondents contend that "Policy Banks " and "policy lending," as such, no longer exist in China. Respondents note that Policy Banks in China were created in the mid-1990's to carry out government industrial policy, but by the year 2000, the need for policy lending and, therefore, Policy Banks, was dwindling. As such, they contend that most of the lending from Policy Banks by that time had shifted from policy loans to commercial loans. Further, respondents assert that even in making policy loans, these banks are operating on a commercial basis.

Citing to the Government of the People's Republic of China Verification Report: Policy Lending (August 20, 2007) (Policy Lending Verification Report), respondents claim that record evidence demonstrates that both SOCBs and Policy Banks function essentially as commercial banks, independent from government influence. More specifically, respondents argue that statements by the People's Bank of China ("PBOC") and the China Bank Regulatory Commission ("CBRC") clearly demonstrate that industrial policy is simply one factor that banks may take into consideration in analyzing risk. Ultimately, however, the banks must make their decisions based

on commercial considerations. With regard to loans provided to GE and its cross-owned companies, respondents argue that there is no evidence that these companies received any "policy loans" during the POI, even if they did borrow from SOCBs, as these loans were all provided at commercial rates.

Loans provided by SOCBs do not constitute a financial contribution: Respondents disagree with the Department's finding in Preliminary Determination that loans provided by SOCBs constitute a direct financial contribution. Specifically, respondents note that finding the SOCBs to be majority-owned by the GOC is not sufficient to determine that loans from these banks constitute a direct financial contribution. Instead, they argue that the Department must address whether the government exercises control or influence over these banks' decisions. Further, they contend that the record evidence does not demonstrate that the GOC exercises control over these banks or that SOCBs allocate credit in accordance with government policies. They argue that because of the ample amount of credit available in the Chinese market, there is no need for the government to direct lending to certain applicants. In addition, respondents contend that there is no evidence on the record to support the conclusion that the GOC is able to persuade SOCBs to lend to uncreditworthy companies or provide certain companies more favorable interest rates. Respondents point to the Private Financial Experts Verification Report (August 20, 2007) (Experts Verification Report) and the Policy Lending Verification Report to support this assertion. Specifically, respondents refute petitioner's assertion that there is disproportionate lending to SOEs and contend that this cannot be supported by record evidence. Specifically they note that both the experts interviewed by the Department and government officials provided information indicating that central and local governments in China exercise a decreasing level of influence over banks' lending decisions. In their estimation, this was evidenced by: 1) the adoption by banks of modern corporate governance systems; 2) improved risk management systems; 3) increased accountability of individual bank officials for lending decisions; 4) the creation of the CBRC; 5) CBRC supervision and inspection of banking practices; and 6) the introduction of international strategic investors and their effect on bank governance and practices.

Next, respondents argue that record evidence does not support a finding that policy lending in China constitutes an indirect subsidy. Specifically, they argue that the evidence on the record is not sufficient to find that the three prerequisites of "entrustment or direction," as interpreted by a WTO dispute settlement panel in United States – Measures Treating Export Restraints as Subsidies, WT/DS194/R (June 29, 2001), exist in this case. These prerequisites include: 1) an affirmative action, be it delegation or command; 2) that action is addressed to a particular party; and 3) the object of which action is a particular task or duty. They note that even statements by experts in the Experts Verification Report do not support such a conclusion and, at best, indicate a lack of consensus on what, if any, effect government intervention has on lending.

Respondents claim that when determining whether entrustment or direction exists, the Department must focus on the nature of the government action and not its effect on the private actor. In other words, respondents claim that generalized government expressions of support are not sufficient to establish entrustment or direction by a government. They claim that record evidence provides no support for the conclusion that the policies embodied in China's

government policy documents have the effect of channeling investment to certain industries and away from others. In the case of China, respondents claim that there is no evidence on the record to indicate that a mechanism exists, either through the PBOC or the CBRC, to monitor or enforce compliance by lenders with central government industrial policy. In fact, respondents claim that record evidence supports a conclusion that banks in China lend on a commercial basis free of government influence or direction.

Respondents point to other characteristics of the banking system to demonstrate that SOCBs as well as Policy Banks, such as the China Development Bank, operate on a commercial basis and act independently from the government. First, respondents point to the detailed loan application and approval processes, which they claim are similar to those in the United States and other countries. They also note that at verification, it was demonstrated that the government was not involved in the loan negotiation process, citing to the Gold East Paper (Jiangsu) Co., Ltd. Verification Report (August 15, 2007) (GE Verification Report). Second, respondents point to these banks' risk analysis systems. They note that record evidence demonstrates that by 2005, banks in China had adopted and implemented risk analysis systems based on best practices, the implementation of which was monitored by the CBRC. The positive effect of the improved risk assessment system, they claim, can be demonstrated by looking at the declining number of non-performing loans (NPLs) from Chinese banks. They also note that SMPI companies have been denied loans, evidence that they do not enjoy a preference in obtaining loans from SOCBs. Lastly, respondents claim that record evidence demonstrates that banks compete regarding interest rates and customers are able to shop around for the best rates, citing again to the GE Verification Report.

Further, respondents argue that petitioner has misconstrued government involvement in the Chinese financial sector. They argue that, to the extent that the government is able to affect the allocation of credit by banks, the role of the GOC is similar to that of any other government in allocating credit to specific industries. First, respondents note that there is no support for petitioner's claim that the PBOC is able to ensure that banks' lending decisions and credit allocations comport with State industrial policies. Respondents contend that the main role of the PBOC is macroeconomic analysis and monetary policy, including issues such as interest rates and inflation, which does not indicate that they are able to direct bank lending in China.

Second, respondents contend that petitioner has misconstrued the application of Chinese banking legislation. With regard to the Commercial Banking Law of China, respondents acknowledge that there is an "apparent tension" between provisions which, on one hand, prohibit government interference in the banks and on the other encourage lending consistent with State industrial policy. However, respondents assert that these provisions, in fact, are not inconsistent with each other. Taken together, they provide that prudential lending should take into consideration State industrial policy and its effect on the borrower or the project to be financed. Further, respondents note that the banking reforms undertaken by China in recent years are not simply policy statements but are actions by the GOC, which have been implemented. In contrast, the assumption that banks base their lending decisions on industrial policy is not only inconsistent with the banking reforms in China, but is entirely based on "policy statements" and not actions by the government.

Finally, respondents argue that there is no evidence on the record to demonstrate that party officials or other officials appointed by the government to banks are there to implement government industrial policies. In fact, respondents argue, there is nothing on the record to indicate that they are not there to ensure that the government banking reforms are implemented.

Respondents also refute petitioner's allegation that there is directed lending and credit allocation in China, and contend that there is no direct evidence on the record to support such a claim. First, while petitioner points to studies that support its argument that the Chinese government directs lending to certain industries, these studies rely on outdated data from periods earlier than 2005. In addition, respondents argue that these same studies are subject to interpretation and could be read to support the exact opposite of what petitioner is arguing. In addition, respondents argue that numerous studies have noted the significant amounts of capital flowing into and out of China through informal channels, which, they argue, suggests that the GOC is not able to strictly constrain Chinese capital markets as contended by petitioner. Lastly, respondents disagree with petitioner's assertion that the GOC has suppressed the stock and bond markets to prevent alternative investment markets from developing. Instead, respondents point out that the under-developed stock and bond markets in China are a natural evolution of a developing financial market, citing to a study on the record as evidence.

Lastly, in determining whether there is a financial contribution, respondents argue that statutory evidentiary standards require the Department to distinguish between primary and secondary sources of information, and assert that the Department must take particular care in evaluating these different types of evidence. See Section 516A of the Act. Specifically, in the case that information from secondary sources (e.g., articles, and commentaries) is in conflict with primary source information, the Department should rely on the primary source information. In this case, respondents argue, direct evidence from primary sources on the record of this investigation indicates that SOCBs and Policy Banks function as commercial banks. Specifically, there are statements by bank officials, bank loan approval documents, bank project guidelines as well as banking regulations and policies that indicate that banks evaluate loans on a commercial basis and that government industrial policies are a minor factor in the loan decision making process.

Lending by SOCBs and Policy Banks in China is not specific: Respondents also disagree with the Department's Preliminary Determination that policy lending by SOCBs and Policy Banks in China is specific. In order to find this program to be de jure specific, respondents argue that the Department must establish with positive evidence that the five-year plans and related documents contain an "express limitation," as required under the statute. See Section 771 (5A)(D)(i) of the Act. They argue that in the Preliminary Determination, the Department did not adequately demonstrate how the five-year plans and other government documents served as mandated preferences in relation to lending to the forestry and paper industries, and contend that these documents do not contain any "express limitation," as required by the statute. As evidence, respondents refer to the GOC's questionnaire responses in which it denies that such a mandate exists and note that the evidence gathered at verification supports this assertion.

In addition, respondents argue that a de jure specificity call is inconsistent with the statute because the Department was not able to link the specific loans provided by state-owned banks to

Chinese paper companies to any alleged government policy. Further, respondents argue that the Department failed to examine the loan agreements to determine the means by which the GOC carried out this policy specifically with regard to the forestry and paper industry.

Respondents also argue that record evidence does not support a finding of de facto specificity with respect to lending to the forestry and paper industry, as provided under section 771 (5A)(D)(iii) of the Act. First, respondents argue that, based on record evidence, there is not a reasonable indication that banks in China cater to the forestry and paper industry in a manner that demonstrates a preference. For example, there is no evidence that banks provide a disproportionate amount of loans to companies in this industry or that loans provided to the paper and forestry industry are made on terms more favorable than those received by companies in other industries. Specifically with regard to GE and its cross-owned companies, respondents argue that there is no evidence that these companies received preferential rates compared to other companies or industries and note that record evidence demonstrates that "coated paper producers such as GE/GHS borrowed at interest rates set for all borrowers by the PBOC." See GE Case Brief at 90. In fact, respondents claim, loans are widely distributed throughout the Chinese economy and the breakdown in lending by banks that loan to the respondents in this case confirms that no preference for respondents exists. As such, even if the Department determines that a financial contribution was made in this case, respondents argue that it occurs on a widely available, generalized basis insufficient to support a finding of de facto specificity.

In fact, respondents reason that because the Department has found that there is pervasive government influence in the allocation of credit across the entire Chinese economy as guided by five-year plans, for purposes of the specificity analysis the Department should consider all loans in China to be integrally linked and part of the same alleged program under 19 C.F.R. § 351.502(c). If the Department were to undertake such an analysis, respondents argue, it would find that the Tenth Five Year Plan touches upon a diverse range of industries and sectors that would make a de facto specificity finding impossible. In fact, respondents point out that "policy lending" has been alleged in almost every CVD petition against imports from China that has been filed subsequent to the Preliminary Determination. Because these petitions cover a wide range of industries, respondents argue this further demonstrates that "government policy lending" cannot be considered to be specific.

Petitioner argues that the Department should continue to find that policy loans from SOCBs are countervailable subsidies. Petitioner makes the following arguments to support its position:

The Department should apply AFA with regard to policy lending: For reasons described in Comment 7, petitioner argues that the GOC impeded the Department's investigation of the policy lending program and failed verification, which justifies the application of AFA. Further, as AFA, the Department should find that GOC maintains a policy lending program that is specific to the paper industry.

The GOC maintains a policy to support the paper industry that is specific: Even if the Department does not apply AFA, petitioner argues that record evidence supports the finding that the GOC maintains a policy to encourage the paper industry. As evidence of a program,

petitioner points to several of China's industrial planning documents (e.g., the Tenth Five Year Plan, the Papermaking Plan, the Resolution on Accelerating the Development of Forestry and the Tenth Five-Year Plan ("The Resolution") and the 2010 Special Plan for the Construction of a National Forestry and Papermaking Integration Project). Petitioner highlights that each of these plans specifies the paper industry, the integrated paper industry or an industry producing paper inputs such as pulp or pulp logs, as a beneficiary. Petitioner argues that these plans, while in some respects oblique, are unequivocal regarding the GOC's plans to build a world-class, integrated paper industry, and that, in order to implement that plan, the government will provide loans, including discounted loans, to companies in the paper industry. As such, these plans constitute a program by the GOC to direct loans to the forestry, pulp and paper industries. Petitioner also points to information on the record to demonstrate that this policy has been effective. See NewPage Case Brief, at 32. In fact, petitioner states that "There can be no doubt about what the policies announced in the Resolution mean, or what a regional government planning office or bank branch in Hainan, Jiangsu or Shandong province will do as a result if a company applies for permits and loans to establish a forestry plantation."

Because the GOC has in place a program to provide loans to the paper industry, petitioner argues that these loans are de jure specific under the statute. As such, petitioner argues that no demonstration of entrustment or direction is necessary in this case.

The GOC is able to implement this program through its influence over the banking sector: Petitioner goes on to argue that the record demonstrates that the GOC continues to direct lending to favored industries through its control over the SOCBs. Petitioner notes that the GOC is able to control the banking sector through several means. First, petitioner points out that the GOC owns and controls all of the banks in China. Next, petitioner argues that laws and regulations in China require lending to comport with industrial policies. Specifically, petitioner points to the Commercial Banking Law, which requires that SOCBs "carry out their loan business upon the needs of national economy and the social development and under the guidance of state industrial policies." To buttress this claim, petitioner points to the Policy Lending Verification Report, in which several banks confirmed that industrial policies are a factor in their lending decisions. Petitioner also notes that the GOC controls the appointment, promotion and termination of bank directors and management through its role as a shareholder. In addition, petitioner claims that the GOC is able to control the appointment process through a vast patronage system in which the Communist Party is able to make appointment decisions in the State sector, including Chinese banks. Petitioner refutes respondents' argument that GOC control of its financial sector is similar to that of other countries around the world. Petitioner argues that the level of control, as described above, is unparalleled.

Petitioner also argues that the GOC exercises influence over the lending decisions and credit allocation of Chinese banks through various means. For example, petitioner notes that Party committees and the PBOC ensure that banks' lending decisions comport with industrial policy, which includes employing administrative measures to punish banks that stray from industrial policy. In addition, the PBOC holds monthly meetings with Chinese banks to monitor and direct their credit allocation. Through these means, the Party committees and the PBOC have succeeded in directing the flow of credit to favored industries and to state-owned enterprises

(SOEs). Petitioner also cites to several studies on the record as well as evidence gathered at verification, which indicate that commercial banks in China continue to be subject to local government influence. Lastly, petitioner points to evidence on the record that the GOC used its control over SOCBs to make policy loans to the paper industry, including respondents in this case, in order to carry out the policy objectives laid out in China's industrial policies. As examples, petitioner cites to SMPI's Hainan Jinhai integrated pulp facility and Shandong Chenming's Zhanjiang pulp facility.

Petitioner also asserts that, due to government control over the banking sector, Chinese banks do not lend in accordance with commercial considerations. As evidence, petitioner notes that while private companies in China are more profitable than SOEs, they continue to have limited access to the formal financial system while state-owned and controlled enterprises receive the bulk of funding from the financial system. And, while respondents explain that excess liquidity in the Chinese market negates the need for directed lending to favored industries in China, petitioner notes that this "excess liquidity" is only available for favored industries and that government intervention in the financial sector has led SOCBs to continue to lend to the least productive sectors of the Chinese economy, such as SOEs. Petitioner argues that this bias in favor of SOEs can only be explained by the influence of State industrial policy.

In fact, petitioner argues that SOCBs would have failed long ago without GOC support. In order to keep SOCBs solvent, petitioner contends that the GOC has directed household income into the banking system by suppressing the stock and bond markets, blocked competition among Chinese banks and injected money into banks to help ease the burden of large amounts of NPLs. And, while the GOC has enacted laws to help create a commercial banking system in China, petitioner argues that this has done little to alter the reality of the banking system in China. Petitioner also points to the large gray market in China as evidence of the non-commercial nature of China's financial system.

Lastly, petitioner disputes respondents' arguments regarding the treatment of "direct" and "secondary" evidence. Petitioner argues that the Department not only has the right to consider secondary sources of information, but also has an obligation to do so, citing to Hynix Semiconductor Inc. v. United States, 391 F. Supp. 2d 1337, at 1347 (Hynix). Further, petitioner argues that the "secondary" sources on the record offer objective evidence of government intervention in the financial sector while statements by government and bank officials should be viewed with skepticism, as they are not from an impartial party.

Based on the arguments set out above, petitioner concludes that loans from Chinese banks should be considered to confer a direct financial contribution within the meaning of 771(D)(i) of the Act. Petitioner notes that the Department's practice is to treat loans from Policy Banks , such as the China Development Bank, as direct financial contributions, citing to Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 72 FR 70175 (February 14, 2007) (DRAMS from Korea Admin Review). For other state-owned banks, including SOCBs, because of the legacy of control by the government in the banking sector, petitioner asserts that the Department should continue to find that loans from these banks also confer a direct financial contribution.

Department's Position:

We disagree with respondents. As discussed above, after examining all of the information on the record, the Department continues to find that the GOC has a policy in place to encourage and support the growth and development of the paper industry through preferential financing initiatives, as illustrated in the five-year plans and industrial policies on the record. Further, the Department continues to find that loans provided by Policy Banks and SOCBs in the PRC constitute a direct financial contribution from the government, pursuant to section 771(5)(D)(i) of the Act.

As explained in the Preliminary Determination, to determine whether the policy alleged by petitioner confers countervailable subsidies on the producers and exporters of the subject merchandise, the Department must first ascertain whether the GOC has a policy in place to support the development of the paper industry. Specifically, the Department must determine whether record evidence supports the conclusion that the GOC carries out industrial policies that encourage and support the growth of the paper sector through the provision of preferential loans.

By its very nature, an investigation of governmental policies to provide preferential lending to a specific enterprise or industry involves a wide range of facts and evidence, often from secondary sources. As such, in this inquiry, the Department has carefully weighed all of the record facts and evidence, and based its conclusions on information it finds most probative with respect to the alleged program.

To determine whether the GOC has a policy in place to promote the paper industry through initiatives that involve preferential financing, the Department examined each government plan, policy and administrative measure (collectively "governmental paper policies") on the record. The Department also examined the GOC's ability to carry out the specific goals and objectives embodied in the plans, policies and measures as they relate to government policy lending to the pulp and paper industry. See, e.g., Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Affirmative Countervailing Duty Determination, 68 FR 37122 (June 23, 2003) and accompanying Issues and Decision Memorandum, at "Direction of Credit and Other Financial Assistance" ("DRAMS from Korea Investigation"); and Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 FR 30636, 30641-42 (June 8, 1999). Furthermore, we also carefully considered the information and argument made by the parties concerning the implementation of the GOC's governmental paper policies.

First, we evaluated the "Outline of the 10th Five-Year Plan for the Development of National Economy and Society" (the "10th Five-Year Plan). See Petition at Exhibit III-2. The stated goal of this plan, which is partially echoed in the GOC's statements in this proceeding, is to serve:

> {a}s a great blueprint for the national economy and economic development in the 10th Five-Year Plan period (from 2001 through 2005)… This outlines expounds the state's strategic schemes, specifies the government's priorities and provides market players with a guide for action. The course and the priorities this outline sets are ideas for market

players and the government will guide them with economic policies and other policies. 10th Five-Year Plan, Introduction.

The Department's verification report details the long process by which the plan is drafted, debated in the State Council and ultimately adopted, demonstrating that the plan plays an important role in China's governance and economy. See Policy Lending Verification Report, at 1.

The 10th Five-Year Plan, as a "great blueprint," covers a wide variety of industries across China's economy and generally is not a detailed catalogue of individually identified industries. Nevertheless, Chapter IV, entitled "Optimize the Industrial Structure to Enhance the Capabilities of Participating in International Competition," specifically refers to the pulp and paper industry, stating that, "we will actively develop the production of wood pulp, high quality paper, cardboard . . . (and several other 'light and textile industry' products.)" The introduction of the same chapter states that "{d}uring the course of industrial reorganization, we will . . . give investment projects proper guidance. . . " 10th Five-Year Plan, Chapter IV.

With respect to whether the plan contemplates action on the part of the State, in its March 15th response, the GOC stated that the five-year plan is merely a "projection of the state-council's economic work in the forthcoming years." They contend that this means that the goals and objectives of the plan "are not necessarily translated into any specific action." See GOC March 15, 2007 Response, at 24. We believe that this statement itself nevertheless contemplates potential future action, i.e., a work plan, on the part of the State Council. In subsequent submissions and at verification, the GOC stated that the five-year plans "merely provide suggestions or guidance to industries on possible economic development." See Policy Lending Verification Report, at 2. Both explanations of the purpose of the 10th Five-Year Plan are reflected in the text of the Plan. For example, the Plan shall "provide market players with a guide for action" and follow "the rules of market economy." On the other hand, the Department notes that the Plan also specifically calls for "strategic schemes," "active" development of the paper industry, and "proper guidance" for investment, potentially including curbing investment where the government perceives "unscrupulous expansion and redundant construction." See Petition, at Exhibit III-2. The tension in the text of the 10th Five-Year Plan between market forces and government intervention illustrates the Department's previous finding that "China has resisted a definitive break with its command-economy past, opting instead to introduce some market mechanisms alongside government plans, and to shrink the role of the state in some areas while preserving it in others." See *China's Status as a Non-Market Economy*, at 80 (August 30, 2006) ("August 30 Memorandum"), at 80. While the potential for market forces and private actors are mentioned in the blue-print, the five year plans demonstrate that the State clearly maintains an "active" role in the economy, with the stated objective to guide financial resources.

All parties agree that the 10th Five-Year Plan reflects a broad presentation of the government's economic policy objectives. The Department, therefore, also considered the other plans, policies and administrative measures on the record that speak to a program of support for the pulp and paper industry.

As discussed in the Preliminary Determination, the 10th Five-Year Plan for the Papermaking Industry (the "Papermaking Plan") was drafted "with a view for meeting the requirements for the development of light industry in the Outline of the 10th Five-Year Plan for the Development of National Economy and Society." The opening paragraph speaks to the plan being "promulgated for implementation." See GOC May 14, 2007 Submission, at Exhibit 15 (citing to The Tenth "Five-Year Plan"of Papermaking Industry).

The Papermaking Plan identifies the products of the industry as including "paper pulp, machine-made paper, cardboard, processed paper and hand-made paper," which should be developed *via* "opening essential financing channels for adjustment and development of the industry" (among other measures). Id.

Under the section "Implementation of the 9th Five-Year Plan, Intensified Domestic Investment," the Papermaking Plan notes that during that period, the "State had arranged 51 projects, … {including} key technical transformation projects of national debts with discount interest, involving a total investment of about 20 billion yuan." Id. This text refers to a period prior to the POI and indeed, prior to many market reforms later implemented in China. However, "Section C. Existing Problems, (5) Serious shortage of funds," also states that "currently, papermaking enterprises suffer from *insufficient own funds, weak fundraising power* and unitary channel for fundraising, making it extremely difficult for them to launch upgrading, transformation or expansion projects" Id. (emphasis added). The following subsection states, "{t}he *feeble competitive force* in resources and capital is the root cause for the large gap with the world papermaking industry" Id. (emphasis added). The plan therefore describes the paper industry in 2001 as a previous recipient of State financing, yet in further need of funding in order to meet the Plan's development objectives, in part due to problems in obtaining the necessary financing to achieve these goals. Given this state of the industry in 2001, a key policy recommendation addressed in the Plan is "encouraging the opening of multilateral investment and financing channels to increase technological restructuring and rapid growth," recommending both the increased use of foreign capital as well as "the exploitation of domestic financing channels and the use of civil capital," presumably public capital. Id. As with the 10th Five-Year Plan, the Papermaking Plan contemplates mobilizing both market resources, i.e., foreign capital, as well as State financial resources in order to develop the industry. The Department attempted to gather further information on this plan during verification; however, the representatives from the NDRC were unable to answer many of those questions fully. See Policy Lending Verification Report, at 3.

The Department notes that there was some debate among parties on whether this Plan was still in force in 2005, however the GOC could not provide any documentation that it had been repealed. See Policy Lending Verification report, at 3. Further, the Department notes the GOC does not refer to this plan as "repealed" in its briefs. GOC Brief, at 46. Finally, the Department notes that the plan presents production targets, including volume, variety and quality targets, which appear to have been adopted by the industry. A 2006 document entitled "2005 China's Papermaking Industry Survey and Summary of Tenth Five Year Plan" notes that "{t}otal output and consumption of domestic paper and cardboard accomplished the goals of the Tenth Five-year Plan ahead of time," also presenting a table that compares the industry's "accomplishment" with

the "Tenth Five-Year Plan's" production targets. See Memorandum to the File, at Exhibit 8 (July 9, 2007).

Similar to the Papermaking Plan, the 2010 Special Plan for the Construction of a National Forestry and Papermaking Integration Project (the "Integration Plan"), was drafted "in accordance with the spirit 'actively developing wood pulp, high-end paper and cardboard paper,'… as explicated in the {10th Five-Year Plan…}." See Petition, at Exhibit III-6. The stated purpose of the Integration Plan is to facilitate the integration between the papermaking industry and its sources for pulp. Like the Papermaking Plan, the Integration Plan sets specific production targets for the industry, stating that "{w}e plan to construct pulp producing capacity of 1.13 million ton" and after 2010 "we can build a pulp producing capacity of more than 2.15 million ton. . . and a matching paper making capacity of about 2.3 million ton." Id.

The Integration Plan estimates that the amount of investment required during the period of the 10th and 11th Five-Year Plans to be RMB 244.3 billion, stating that, "therefore, investment has to be strengthened vigorously and financing channels are to be widened. . . " Id. Similar to the Papermaking Plan, the Integration Plan contemplates the use of both foreign capital as well as domestic capital, discussed in Section E(1) "State Assistance," which states:

> To provide guidance and orientation for the capital of the society, to motivate the loans from the banks, and to bring into full play the government's role in macroeconomic regulation and control, the national government, while strengthening its general plans, may provide appropriate financial support to the construction of forestry and papermaking integration in its early phases by way of infusing capital in cash or loans with discount. Id.

The Integration Plan separates the responsibilities of the industry from the responsibilities of the State. For example, "{p}ulp and papermaking businesses and forestry management bases should *use various incentives such as capital and economic benefits as a vital nexu*s, endeavor to nurture and develop large scale corporation, …(etc.)" Id. (emphasis added). In other words, the industry should, inter alia, make use of the financial incentives available to it in order to achieve the Plan's objective. The State, on the other hand, should "seek guidance from the needs of the market, *change* the traditional administrative and management model in which forestry and papermaking are separated, *make unified general planning*, *build* a reasonable industrial structure, focus on the key issues, and take a step-by-step approach to *implementation*." (emphasis added) Id., at Section C.(1). This section, thus, clarifies that the Plan contemplates an active role for the State in the development of the industry as well in the implementation of the Plan.

Finally, the Department considered Decision No. 40 of the State Council on Promulgating and Implementing the "Temporary Provisions on Promoting Industrial Structure Adjustment ("Decision No. 40," referred to within the document as "Temporary Provisions"). Decision No. 40 calls for strengthening financing (among other benefits) to a catalogue of industries, including specifically the paper industry. See Directory Catalogue on Readjustment of Industrial Structure (Version 2005), XVI (1) Production of integrated wood pulp, paper and carton in line with

economic scale. These documents serve as "important basis for guiding investment decisions, and for the governments to administer investment projects." See GOC May 14, 2007 Submission, at Exhibit 16 and 17. Decision No. 40 is explicit in its mandate for the State at all levels:

> The people's governments of all provinces, autonomous regions, and municipalities directly under the Central Government *shall* take the promotion of industrial structure adjustment as an important reform and development task at present and within a period in the future… *lay emphasis on implementation* and shall, in accordance with the "Interim Provisions"… *formulate specific measures*, *rationally guide the investment directions*, *encourage and support the development of advanced production capacities*, restrict and eliminate outdated production capacities… All relevant administrative departments shall speed up the formulation and amendment of policies on public finance, taxation, *credit*, land, import, export, etc., effectively *intensify the coordination and cooperation with industrial policies*, and further improve and promote the policy system on industrial structure adjustment. Id. (emphasis added)

This provision explicitly details an active role for the State in implementing industrial policies, whether through industrial policy coordination or through the guidance of financial resources towards those industries that the State favors (such as large integrated paper companies) and away from those that the State considers outmoded. As such, Document No. 40 makes it plain that the State, at all levels, has the ability and means to implement these measures. Again, the Department attempted to gather further information about Document No. 40 during verification, but was not able to speak with qualified officials to discuss this document. See Policy Lending Verification Report, at 3 and 7.

With regard to respondents' arguments concerning whether there is a requirement at the local level to implement central government industrial policies, record information indicates that the central government continues to exercise influence over local governments with regard to industrial planning. As discussed in the Preliminary Determination, Chinese law dictates that the implementation of plans, policies and administrative measures drafted by State Council and other central government entities is delegated to the local governments. In line with the text of Decision 40, which mandates implementation by the governments at all levels, the GOC stated in its March 15 questionnaire response that "the administrative system ensures that provincial and local policy goals and objectives are in conformity with the central policy goals and objectives." According to the 1979 Law of Local People's Congresses at Various Levels and Local People's Government at Various Levels of the PRC, as amended, local governments must follow the laws and regulations made by the central government. See Chinese Law and Legal Research, Wei Luo, at 31 (2005), as cited in the Preliminary Determination at 72 FR 17492. Further,

> {t}he State Council guides the local administration in terms of policies and assigns tasks to local governments in terms of plans. In doing so, the central government confers on the local governments the necessary authorities to carry out the policies of the central government. The central government also evaluates the local governments' application of policies, laws and plans made by the central government. See id.

In other words, local governments must align their industrial policies with stated central government policies and carry out those polices to the extent that such measures affect their locality. As such, record evidence indicates that implementation of the governmental paper policies described above are carried out at the central, provincial and local level.

Moreover, despite stating for the record that it does not have local level branches and is not associated with the local DRCs, the central NDRC cancelled the Department's scheduled verification meeting with the local DRC in Jiangsu province. See Policy Lending Verification Report, at 4. As a result of the GOC's failure to provide full access to local DRC officials at verification, the Department was unable to pursue a full understanding of the nexus between the role of central and local government in implementing central government industrial plans (as evident from, for example, Decision No. 40, described above). The GOC's actions at verification, therefore, did not allow us to pursue further some of the arguments made by the respondents concerning whether these policies had been implemented at the local level.

The Department continues to find that these governmental paper policies, when viewed collectively, document and provide evidence of the GOC's specific and detailed policy to encourage the development of the domestic forestry and paper industry through preferential financing initiatives. Importantly, the cited documents contemplate affirmative State action to implement the government's policies and, in fact, mandates their implementation by various levels of government, as opposed to providing mere guidance, as claimed by respondents.

As such, the Department continues to determine that loans provided by Policy Banks and SOCBs in the PRC constitute government-provided loans pursuant to section 771(5)(D)(i) of the Act. We further determine that this loan program is de jure specific because the GOC has a policy in place to encourage and support the growth and development of the forestry and paper industry. See Section 771(5A)(D)(i) of the Act. Because we have found this program to be de jure specific, the Department does not reach the question of whether the program is de facto specific, as argued by respondents.

Moreover, with regard to respondents' argument that the Department should find all loans in China to be integrally linked as part of the same program, we find that respondents have not met the burden as set out in 19 CFR 351.502(c). We note that under this provision, the Department will consider whether two programs are integrally linked for purposes of making its specificity determination, but the burden lies with the respondent to claim that all loans in China are linked and to provide evidence in support of the claim. See also CVD Preamble, 63 FR at 65357; and AK Steel Corp. v. United States, 192 F.3d 1367, 1380-81 (Fed. Cir. 1999). Respondents have not met this burden.

Having determined that the record evidence establishes a de jure government policy or program to support the forestry and paper industry through preferential lending initiatives, the Department next turns to arguments provided by the parties concerning whether these policies were carried out by the central and local governments through the provision of loans extended by GOC Policy Banks and SOCBs.

As discussed in the Preliminary Determination, under the Department's practice, loans provided by government Policy Banks, such as the China Development Bank, are considered government loans and, thus, constitute direct financial contributions under the Act. See, e.g., (DRAMS from Korea Admin Review, 72 FR 7015, and accompanying Issues and Decision Memorandum, at 6. Loans by SOCBs, however, are not necessarily treated as government loans because these types of banks may operate on a commercial basis in some countries. See CVD Preamble, 63 FR at 65363. However, as discussed in the Preliminary Determination and in greater detail below, information on the record indicates that the PRC's banking system remains under State control and continues to suffer from the legacies associated with the longstanding pursuit of government policy objectives. These factors undermine the SOCBs ability to act on a commercial basis and allow for continued government control resulting in the allocation of credit in accordance with government policies. Therefore, treatment of SOCBs in China as commercial banks is not warranted in this case.

As discussed in the Preliminary Determination, citing to the Georgetown Steel Memo and the August 30 Memorandum regarding the PRC's status as a non-market economy, the PRC's banking system is more flexible than the Soviet-style banking sectors, where central banks directly allocated all credit in accordance with the wishes of the party and the central planners. Specifically, the Department found that "{w}hile the Big Four (along with smaller regional banks and cooperatives) now have more autonomy than in the past, government interests at both the central and local levels still exercise a great deal of control over banking operations and lending decisions." See the Department's May 15, 2006 Memorandum, *The People's Republic of China (PRC) Status as a Non-Market Economy* in the investigation of Certain Lined Paper Products from China ("May 15 Memorandum"), at 5.

Third-party commentators have arrived at similar conclusions regarding the State's continued influence on SOCB operations. For example, a 2005 Organization for Economic Cooperation and Development (OECD) report found that,

> The chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice. Moreover, the traditionally close ties between government and bank officials at the local level have created a culture that has given local government officials substantial influence over bank lending decisions. See August 30 Memorandum, at 60, n. 294 and 301 (citing to Economic Survey of China, Paris: Organization for Economic Cooperation and Development, at 140-141 (2005)).

A 2005 IMF Staff Report concurred, stating that, "{t}he staff acknowledged the progress made in reducing government involvement in management and business operations of banks. However, more needs to be done, particularly with regard to local governments, to remove this serious impediment to fully commercializing banks." See August 30 Memorandum at 60 (citing People's Republic of China: 2005 Article IV Consultation - Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion, Washington, DC, International Monetary Fund, at November 2005), at 19).

As noted by the IMF, "{r}ooting out the legacy of government directed lending, and training

banks to make lending decisions based on purely commercial considerations, with adequate regard to viability and riskiness of projects remains a major reform challenge." See August 30 Memorandum, at 52, n. 248 (citing Finance and Development, Next Steps for China, Washington, DC: International Monetary Fund, (September 2005)).

The OECD has reported that "{b}ank management is not under a clear mandate to return value to the owners of the company or even to protect the interest of the owners, but instead responds to a variety of pressures from within the bureaucracy or the Communist Party, or from local governments." See Petitioner's July 5, 2007 Submission, at Exhibit 13 (citing to China in the Global Economy: Governance in China, Organization for Economic Cooperation and Development (2005), at 382).

The Department recognizes that the scope and extent of government control over SOCBs is changing and that record evidence regarding government control over these banks during the POI is mixed. In the Georgetown Steel Memo, the Department found that evidence of reforms can be seen in virtually every sector of the economy, including the banking sector. As discussed below, however, the PRC Government has been relatively cautious about banking sector reforms, so banking sector reforms have, by design, lagged those in other sectors of the economy. As a direct result, and because China's banks have never before acted on a commercial basis and were never previously privately owned, the government remains very involved in the sector – a view expressed to varying degrees by all the private experts interviewed by the Department.

One expert noted the complicated relationship between banks and the government, stating "banks are still the domain of the State and the State may have policies that it wants the banks to follow," but that "regardless of government policies, the bottom line for any bank manager will nevertheless be profit and growth. On the other hand, consistently going against a policy, may lead to repercussions." See Experts Verification Report, at 10 and 11. This same expert noted that, in general, recent trends have moved away from local government influence over bank operations. Id.

Another expert noted that "{t}here still is some local government control over the bank branches, but this has lessened in recent years." Id., at 2-3. In addition, this same expert noted that "{b}ank officials have a lot more autonomy from government, but banks still prefer not to generate opposition from local government officials and still find advantages in earning their support." Id. In general, he noted that while independence started to improve in 2004-2005, it is still an ongoing process. He also noted that local governments still have incentive to promote investment "and can provide lower cost credit or more access to credit to certain types of industries such as high tech." Id.

Yet another expert acknowledged that changes in the banking law prohibited government interference in lending decisions but also stated that "some third-party reports have noted that this prohibition was not very effective in decreasing local government influence over the banking sector." Id., at 6-7. In fact, the expert noted that legal prohibitions against local government influence were not effectively implemented between 1995 and 2003, but that the creation of the CBRC was the turning point, leading to significant decreases in the extent of local government

interference in lending decisions. However, this same expert goes on to note that third-party sources have stated that CBRC continues to lack the enforcement powers it needs to properly implement its regulations and fulfill its mandate. Id.

Finally, one last expert, in addressing a question regarding the "legacy problem" in China reiterated that, first, "companies on the scale of the large SOCBs can't change quickly. Second, these banks have never made real credit decisions before. Third, there is still a control perspective, as banks continue to be dominated by government and are exposed to outside political influences." Id., at 14.

The continued need to root out the legacy effects of state-planning is also evident in information provided by the GOC in its own record submissions, especially in the 2005 PBOC Annual Report, which states that, "[a]s the economic reform was not completed yet, investment was still orchestrated to a large extent by government, especially the local government. Yet the risk restraint mechanism was incomplete; the soft constraint of budget still existed; factor prices and investment costs were distorted. Institutional factors caused frequent duplication of low level projects and inefficient investment." See January 31, 2007 GOC Submission, at Exhibit 4 (citing to the 2005 PBOC Annual Report, at 26).

Discussing excessive investment in the PRC economy, the PBOC's 2004 Annual Report states that "some local governments still seek to promote economic growth by expanding investment." See January 31, 2007 GOC Submission, at Exhibit 3 (citing to the 2004 PBOC Annual Report, at 16-17).

The PBOC also stated in its 2004 China Monetary Policy Report:

> In 2004 the PBC under the guidance of the central government to differentiate credit support to various sectors earnestly carried out macroeconomic adjustment policies by strengthening its window guidance and credit policy advice for commercial banks to follow the State industrial policy constrain credit to overheated industries and those inconsistent with the State industrial policy and to increase financial support for development of agriculture small and medium-sized enterprises consumption employment education and non-state sector guided."

See Petitioner's July 5, 2007 Submission, at Exhibit 89 (citing to China Monetary Policy Report, Peoples Bank of China Q4 2004 at 11).

In its 2005 Monetary Policy Report, the PBOC further stated that,

> {t}he PBC implemented in earnest the macroeconomic strategy mapped out by the central government which called for differentiated treatment to different sectors by timely conveying to financial institutions the governments policy intentions so as to guide the commercial banks in taking forward-looking approach to respond to changes of economic cycles and industrial development and to improve the credit structure.

See Petitioner's July 5, 2007 Submission, at Exhibit 92 (citing to China Monetary Policy Report, Peoples Bank of China Q2 2005, at 13-14).

Together, this evidence provides a strong indication that while the banking reforms noted by respondents may be starting to take effect, they have not yet been implemented fully, and that State influence remains a significant factor in the operation of China's banking sector. In particular, the evidence cited above further suggests that during the POI, the PBOC continued to carry out central government policies and guided commercial banks in this endeavor.

We next examined the specific characteristics of China's banking system that would support or detract from our preliminary finding that the GOC continues to provide loans to the paper industry in accordance with the governmental paper policies due to its control over the SOCBs.

First, state-ownership of the banking sector in China is one factor that underlies the legacy effects mentioned above. Respondents do not dispute the near complete state-ownership of the banking sector in China; however, they argue that this alone is not sufficient for the Department to find that the GOC exercises control over these banks or that SOCBs allocate credit in accordance with government policies.

Second, the Department considered the legal framework under which China's banking sector operates, which remains contradictory with regard to the SOCB's independence from the State. Despite the general support for the banking sector provided by the GOC, as described in Comment 10, under the 1995 Commercial Banking Law of the People's Republic of China, commercial banks are responsible for their own profits and losses, must protect the interests of their depositors, and are protected from government influence. However, Article 34 of the Commercial Banking Law paradoxically states that banks are required to "carry out their loan business upon the needs of national economy and the social development and under the guidance of State industrial policies." See Petitioner's July 5, 2007 Submission, at Exhibit 56.

At verification, the Department asked the PBOC to comment on the Commercial Banking Law, specifically with respect to these provisions. The PBOC responded by stating that the Commercial Banking Law provides banks a legal guarantee to operate free from government intervention. At the same time, it may be necessary for banks to heed industrial policies; banks may be taking on greater risk if their customers use loans in a way that is inconsistent with industrial policies. See Policy Lending Verification, at 4.

Evidence on the record further indicates that, consistent with the Commercial Banking Law, banks continued to take industrial policy into account when making lending decisions. For example, the BOC Global Offering states that "{t}he PRC Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions. Accordingly, commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies." See May 29, 2007 GOC Submission, at Exhibit 7 (citing to the BOC Global Offering at 76).

This is further reflected in statements by bank officials, who explained at verification that banks

continue to take industrial policy into consideration to some extent when evaluating possible loans. See Policy Lending Verification Report, at 4, 11, 13, 18, 23, 28, 30 and 33. Similar support is provided at Exhibits 22, 33 and 35 of the GOC's June 15, 2007 Submission. While the GOC has explained in the course of this proceeding that industrial policies are one factor among many that may be considered in the loan approval process, it has not documented through a sufficient number of relevant individual loan documents how or to what extent industrial policy was considered.

Further, the 2004 decision of the State Council on the "Reform of the Investment System" states that the government *should* recede and the banks *should* make independent decisions, indicating that the legacy of State control was sufficiently a problem in 2004 to warrant a specific State Council decision. See 2004 Decision of the State Council on the "Reform of the Investment System," Guofa No. 20 in 2004 (emphasis added). See Memorandum to the File, at Exhibit 2 (July 9, 2007). This 2004 sentiment is reiterated in the 2006 report from State Council, where Wen Jibao reports that "[r]eform of the investment system *will focus on implementing* a system that grants independence in investment coupled with responsibility for risk," indicating that these reforms are an ongoing process and certainly were not complete in 2005. See GOC May 14, 2007 Submission, at Exhibit 14 (citing to Report on the Work of Government 2006). (emphasis added).

Third, the Department also evaluated record evidence regarding the banking reforms taking place in China to determine whether there continues to be State influence in the banking sector. Although we recognize that China's SOCBs may have taken steps toward market-orientation in certain respects, record evidence also indicates that these banks still lack adequate risk management and analysis skills. This is in part evidenced by the fact that interest rates remain generally undifferentiated. PBOC officials explained that the banks' interest rate spread centered fairly tightly around the PBOC set rate because "the Big Four attract the largest borrowers and are 'in the wholesale lending business.' The largest borrowers are creditworthy, are good credit customers, and have long-term relationships with the banks." See Policy Lending Verification Report, at 3. However, one expert interviewed attributed the interest rate "spread" to the relative lag in reform of the banking sector. See Experts Verification Report, at 3. As discussed elsewhere in this comment and the Department's position in Comment 10, SOCBs continued to be under State influence during the POI.

The Department has continued to consider risk assessment in our evaluation of China's banking sector because, if implemented in a meaningful way, risk assessment, inter alia, could provide one means to overcome the legacy effects described above. Based on direct statements from bank officials at verification, as well as the experts and third party sources cited above, it appears that the risk analysis system for most of these banks was not fully in place during the POI. For example, the PBOC stated that certain mechanisms have been put in place to support Chinese banks, such as the ceiling on the deposit rate, "in order to afford banks time to restructure and a floor on lending rates to maintain order in the market. According the PBOC, these restrictions will eventually be eliminated when banks have fully developed risk management and cost controls." See Policy Lending Verification Report, at 3. The CBRC explained that is has already established a framework for achieving an international level of risk management, but at the same

time acknowledged that, "establishing such a framework does not necessarily indicate a high level of risk management in practice." See Id., at 6. The BOC stated that its risk management implementation "is an on-going process" and confirmed that, "there was not a comprehensive risk management system fully established in 2005, and that the bank did face challenges in implementing systems of risk management across their branches in 2005." See Id., at 18.

Further, during this investigation the Department did not receive the evidence necessary to document in a comprehensive manner the process by which loans were requested, granted and evaluated to the paper industry, which would speak to the risk assessments associated with each bank. The documents provided by the banks (or short translated sections thereof) were self-selected and presented information relating to isolated aspects of a handful of loans to the paper industry. Despite several requests (e.g., in the February 22 and April 23 supplemental questionnaires to the GOC), the Department was not provided with sufficient evidence to follow a loan through the application process, the several levels of approvals and subsequent review, let alone with the documentation necessary to show that loans to the paper industry are consistently considered and granted on a commercial basis.

With regard to China's "highly liquid environment," there is little dispute that there are large amounts of capital flowing through China's banking sector. However, the Department notes that excess liquidity, or even high volumes of loans, does not indicate that the GOC cannot have control over the SOCBs and guide their loan portfolios. For example, as discussed above, the GOC's plans and policies assume that the State at all levels has the ability and means to guide financial resources towards those industries that the State favors and away from those industries that the government considers to be outmoded. As such and as cited above, a PBOC stated goal is:

> to differentiate credit support to various sectors earnestly carried out macroeconomic adjustment policies by strengthening its window guidance and credit policy advice for commercial banks to follow the state industrial policy constrain credit to overheated industries and those inconsistent with the state industrial policy and to increase financial support for development of agriculture small and medium-sized enterprises consumption employment education and non-state sector guided."

See Petitioner's July 5, 2007 Submission, at Exhibit 89 (citing to China Monetary Policy Report, Peoples Bank of China Q4 2004, at 11).

Similarly, the 2005 PBOC report notes that "the PBC followed the principle of differentiated treatment, ensuring credit support to certain sectors while suppressing credit to other sectors, so as to strengthen credit structure adjustment in line with the national industrial policy aimed to prevent heedless and duplicated constructions and investment." See January 31, 2007 GOC Submission, at Exhibit 4 (citing to the 2005 PBOC Annual Report, at 42).

While the Department acknowledges that there has been some progress in recent years in the efforts by the GOC to reform the banking sector, the extent of government influence over the

banking sector, as described herein and in Comment 10," is very significant. Even where reforms have been "implemented," as argued by respondents, progress has been lagging and reforms are still in transition. Therefore, China's banking reforms are not yet sufficiently developed so as to preclude continued government influence in bank lending decisions. This is particularly evident when viewed in light of the evidence cited above, demonstrating that government influence is still present and that those banking reforms cited by respondents have not yet been fully implemented.

For the reasons stated above, the Department, therefore, determines that loans provided by Policy Banks and SOCBs in the PRC constitute a direct financial contribution from the government, pursuant to section 771(5)(D)(i) of the Act. As we are finding this program to provide a financial contribution under this section of the Act, we do not reach the issue of whether this program is an indirect subsidy pursuant to section 771(5)(B)(iii) of the Act, as argued by respondents.

We further determine that this loan program is de jure specific because the GOC has a policy in place to encourage and support the growth and development of the forestry and paper industry. See Section 771(5A)(D)(i) of the Act. Finally, this program provides a benefit to the recipients, equal to the difference between what the recipient paid on the loan and the amount the recipient would have paid on a comparable commercial loan. See Section 771(5)(E)(ii) of the Act.

With regard to respondents' arguments on the issue of primary and secondary information, we agree that section 516A(b)(1)(B)(i) of the Act requires that the Department's decisions must be supported by substantial evidence. It is precisely this provision that requires the Department to fully evaluate all record evidence, including contradictory evidence. The U.S. Court of Appeals for the Federal Circuit has explained that in order to "determine if substantial evidence exists, we review the record as a whole, including all evidence that 'fairly detracts from the substantiality of the evidence.'" Micron Tech. v. United States, 117 F.3d at 1392 (citing Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Specifically on the issue of secondary evidence, in DRAMs from Korea Investigation, the Department noted that when investigating an alleged program of subsidization, "secondary sources can be particularly credible as these observers are independent and without a vested interest in the outcome." See DRAMS from Korea Investigation, accompanying Issues and Decision Memorandum, at 50. As such, the Department has fully evaluated the record as a whole to come to its determination, relying on both primary and secondary sources of information on the record.

With regard to respondents' argument that many of the third-party sources rely on data prior to 2005, while some third party sources deal with a time period prior to the relevant POI, those sources indicate the problems in China's banking sector were deep rooted, institutional in nature, indicating that significant, long term reforms would be required to overcome them. Therefore, these issues would be relevant, at least in part, during the POI. Furthermore, to the extent possible, the Department has confirmed information through many sources, including primary sources, directly relating to the POI.

Comment 9: Countervailability of Foreign-denominated Loans

GE argues that even if the Department continues to find policy lending a countervailable subsidy, the Department has no grounds to countervail foreign-currency loans provided to GE and its cross-owned companies. Specifically, respondents argue that the May 15 Memorandum and the August 30 Memorandum, which the Department relied on to find that the GOC controlled the banking sector in China, simply found government control of RMB-denominated lending and deposit rates, but did not make a similar finding for foreign currency lending by domestic and foreign banks. In addition, respondents note that there is no record evidence that demonstrates that the GOC controls interest rates on such loans. As such, respondents argue that there is no basis to find foreign-currency loans countervailable.

Petitioner disagrees, noting that in the May 15 Memorandum and the August 30 Memorandum, the Department did not limit itself to a review of the PBOC benchmark rates, but rather cited this as one of several factors that demonstrated the distortions in domestic interest rates in China. Petitioner argues that simply because the Department cited the existence of PBOC benchmark rates for loans in domestic currency does not mean that other forms of lending are not under the control of the central government.

Department's Position:

The Department continues to find foreign currency-denominated loans to be countervailable for purposes of the final determination. As noted above in the "Analysis of Programs" section, the Department continues to find that loans provided by Policy Banks and SOCBs in the PRC constitute government-provided loans pursuant to section 771(5)(D)(i) of the Act. We further determine that this loan program is de jure specific because the GOC has a policy in place to encourage and support, in part with bank financing, the growth and development of the forestry and paper industry. See Section 771(5A)(D)(i) of the Act. As such, the countervailability of this program does not rest on whether the loan in question is an RMB or foreign currency-denominated loan. The benefit of such loans will be determined by comparing the rates of these loans to a benchmark, as explained above in the "Benchmark" section, above. The Department has a further addressed the issue of a foreign-currency benchmark below in Comment 10.

Comment 10: Benchmark for Policy Lending

The GOC and GE disagree with the benchmark used by the Department in the Preliminary Determination to calculate the benefit of the Government Policy Lending Program. Specifically, they argue that there are appropriate commercial benchmarks in China that the Department should use in the benefit calculation.

The Department should adhere to the WTO agreements when choosing a benchmark: First, the GOC maintains that the WTO agreements, specifically Article 14 of the SCM Agreement, strongly suggest that the market to be examined when searching for an appropriate comparable commercial benchmark is the market of the Member country being investigated. Further, the GOC notes that the WTO Appellate Body has made clear that in order to use a third country

benchmark, the administering authority must establish that the market of the investigated Member does not contain any reliable benchmarks. See United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber in Canada, WT/DS57/AB/R at paras. 102-106 (February 17, 2004) ("United States - Softwood Lumber"). The GOC argues that the Accession Protocol does not alter this presumption. Instead, the GOC notes that China's Accession Protocol provides that Members may only go outside of China for benchmarks when there are "special difficulties" in finding a market benchmark. However, the GOC argues, the Department did not satisfy this requirement and simply assumed that "special difficulties" exist because the United States has found China to be an NME for purposes of the AD law. Further, the GOC argues that the Department failed to demonstrate how it was "not practicable" to adjust the prevailing terms and conditions inside of China, which it is required to do before going outside of China for a benchmark.

Interest rates in China can serve as an appropriate benchmark: Further, the GOC disagrees with the Department's conclusion that interest rates in China do not reflect rates that would be found in a functioning market. In fact, the GOC argues, record evidence demonstrates that while there may have been government intervention in setting interest rates in the past, the GOC has not done so in the recent past, and certainly not during the POI. Specifically, it notes that the GOC has undertaken a gradual liberalization of the financial markets in China. And while the government does continue to indirectly help guide interest rate formation, the GOC argues that this is no different than actions taken by other governments around the world that affect the supply and demand conditions in financial markets. For example, the GOC asserts that a deposit rate cap is a mechanism maintained by many countries around the world. Further, it maintains that there is no evidence on the record that such a mechanism would cause all lending rates in China to be distorted. Moreover, the GOC argues that any intervention on behalf of the government has had the effect of keeping market rates too high, not too low as a domestic interested party, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW) has asserted in its case brief. For example, the PBOC has mandated minimum lending rates, which have the effect of keeping interest rates higher than they otherwise would be. The GOC points to record evidence to support this assertion. See BOFT Case Brief, at 72. The GOC also disagrees with USW's argument that the GOC has artificially created an excess supply of capital, represented by a high savings rate.

The GOC further disputes the argument that a narrow spread of interest rates charged to borrowers by Chinese banks implies a lack of adequate risk analysis by these banks. It claims that other reasons such as the types of borrowers to which SOCBs lend (i.e., larger borrowers) and excess liquidity in the Chinese market are more valid reasons for this narrow band. Furthermore, it disagrees that the GOC has artificially created the high level of savings in China, as asserted by USW. Instead, the GOC points to other factors such as the transitional nature of the economy and uncertainty about the future as reasons for the high level of savings in China.

GE suggests several options as appropriate commercial interest rates in China. First, GE suggests using interest rates for foreign-currency loans in China as benchmarks, which it claims are determined by the market and not influenced by government policy. GE notes that in the

August 30 Memorandum, the Department found government control only of RMB-denominated lending and deposit rates, and not of foreign-currency lending in China. Furthermore, it notes that the Department also did not determine that the GOC controlled foreign-currency lending practices in the Preliminary Determination. Therefore, GE argues that interest rates for foreign-currency loans can be used as commercial benchmarks. Alternatively, GE also suggests using interest rates from loans received by SMPI companies from a privately-owned Chinese bank, which were fully verified, as a benchmark.

Finally, GE disputes USW's argument that loans provided by SOCBs cannot be used as appropriate benchmarks because they are the very policy loans that are being countervailed. GE argues that, because there is no evidence on the record to support the finding of a policy lending program, there is no basis to disregard such loans as benchmarks.

The Department should change its methodology from the Preliminary Determination to calculate an international benchmark: If the Department continues to reject interest rates in China as appropriate benchmarks, the GOC argues that the Department should make several changes to its methodology when calculating an out-of-country benchmark. Specifically, the GOC argues that the Department should not rely on gross national income ("GNI") to determine the appropriate basket of comparison countries. First, the GOC contends that the categorization developed by the World Bank, and used by the Department in the Preliminary Determination, is outdated and, given the recent dramatic changes in China's economy, inappropriate. Next, it argues that the Department's benchmark methodology is contrary to its practice in AD cases involving China, in which the Department has designated five countries as being "at a level of economic development comparable to the PRC in terms of per capita gross national income (GNI)." The GOC notes that only one of those countries was included in the basket of countries use to calculate the international benchmark.

As such, the GOC argues that the Department, instead of relying on GNI, should look at the national savings rate as the key variable for selecting comparable countries to find an appropriate benchmark. Specifically, it argues that the savings rate is the best proxy for the funds available to make loans in a country, citing to the Drazen Report. See GOC's July 5th Submission, at 25. The GOC contends that another key factor to consider is the rate of inflation in order to determine the real cost of a loan. If these factors are not taken into consideration, the GOC argues that the Department would continue to overstate the benchmark. It attempts to demonstrate this by applying the methodology set out in the Drazen report to this "more appropriate" group of comparison countries. Based on this methodology, the GOC suggests that a more appropriate benchmark rate would be 6.3 percent, which is not much higher than the current PBOC set rate. The GOC also points to Chinese forward currency markets, which it argues demonstrate that interest rates in China are actually higher than comparable commercial rates outside of China. The GOC claim that this same evidence also provides the Department sufficient reason to find that the PBOC rate is a reasonable benchmark. However, the GOC asserts that if the Department does not accept the PBOC set rate as an appropriate benchmark, it should at least take factors such as the national savings rate and inflation into account in developing an international benchmark.

USW argues that the Department must continue to rely on lending rates from outside of China to determine an appropriate benchmark and that lending rates in China cannot be used as appropriate commercial benchmarks.

Relying on a Chinese benchmark would be contrary to the statute: USW asserts that relying on lending rates in China would be contrary to the statute and the Department's regulations because lending decisions in China are not based on commercial considerations due to government intervention in the financial sector. See Section 771(5)(E)(ii) of the Act and 19 C.F.R. § 351.505(a)(2)(ii).

USW begins by refuting the argument that the GOC's intervention in China's financial sector is similar to how other governments regulate their financial markets. Specifically, USW argues that China's financial sector is distorted by a wide range of government interventions, which prevent interest rates from reflecting market fundamentals. As an example of GOC intervention in the financial sector, USW cites to distortions in lending rates due to China's maintenance of an interest rate floor and deposit rate cap, set by the PBOC. And, while USW notes that lending rates have been liberalized in recent years, it also points to evidence on the record that loan pricing by state-owned banks remains undifferentiated, demonstrating that lending appears to be driven mainly by availability of funds in the form of savings deposits and not based on the profitability of the enterprise in question. USW also argues that capital controls imposed by the GOC have insulated the banking system from external competition, which has contributed to the high savings rate and, thus, low interest rates in China. USW also points to evidence from the Experts Verification Report to support this point. USW disagrees with the GOC's argument that the forward currency market in China demonstrates that lending rates in China are higher than comparable commercial lending rates outside of China. Instead, USW argues that any differential between onshore and offshore interest rates for the RMB reveals only that China's capital controls limit capital movements and segment the internal and external markets for the RMB.

USW argues that government intervention in the prices for basic resources as well as land and labor go further to artificially suppress interest rates in China. It also cites to the large gray market in China to demonstrate that credit is not being allocated based on market principles and as further proof of the non-commercial nature of China's financial system. In fact, USW notes that the rates in China's gray market refute the argument that rates in China would be lower if not for the floor rate set by the PBOC. Lastly, USW points to China's pegged exchange rate as an additional factor that distorts the financial market in China. Specifically, it argues that because China maintains an undervalued currency, inflation is artificially depressed and interest rates are effectively sealed off from upward pressure.

USW disagrees with the GOC's argument that the SCM Agreement and China's Accession Protocol exhibit a clear preference for an in-country benchmark. Specifically, it notes that the language in Articles 14(b) and 14(c) of the SCM Agreement, which provide guidance in calculating the benefit from loan programs, does not mention any preference for in-country benchmarks. This is in contrast to Articles 14(a) and 14(d), which specifically mention that benchmarks for equity capital and the provision of goods and services should be determined in

relation to prices inside the country at issue. Further, USW argues that the WTO Appellate Body has found that Members are not barred from using out-of country benchmarks when required to adequately measure the full benefit conferred by a subsidy program, citing to United States – Softwood Lumber, at paras. 88-96. Furthermore, USW argues that China's Accession Protocol supports going outside of China for a commercial benchmark, particularly because "special difficulties" exist due to government interference with regard to lending rates in China. In addition, USW claims that there is no evidence on the record that adjusting rates in China is would be "practicable," as provided in China's Accession Protocol. Instead, USW argues that evidence on the record suggests that government interference in China's banking sector is so complex and widespread that it cannot be adjusted for through any practical means.

For the reasons cited above, USW maintains that using an out-of-country benchmark is the only method that complies with the U.S. statute and the Department's regulations, which require the Department to use a commercial lending rate for benchmark purposes. USW also cites to CLPP from Indonesia at 71 FR 47174 and Final Results of the Countervailing Duty Investigation of Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002), in which the Department made a similar determinations and turned to external benchmarks because of a lack of a national market-determined benchmark.

USW argues that there is no evidence that any of the SMPI companies had comparable commercial loans during the POI. Specifically, USW notes that loans provided by SOCBs to CFS producers were provided under the Government Policy Lending Program, which makes them unsuitable as benchmarks, as provided under the statute. Further, USW objects to using interest rates from loans received by SMPI companies from a privately owned Chinese bank. Specifically, USW cites to the Preliminary Determination, in which the Department noted that the distortions in the Chinese banking sector also affect foreign banks in the PRC. With regard to GE's arguments regarding benchmarks from foreign banks or other private banks in China, petitioner argues that the high level of government intervention in the banking sector renders loans from such banks unsuitable as benchmarks.

The Methodology Employed by the Department at the Preliminary Determination is Reasonable: As such, USW agrees with the Department's methodology of selecting countries with comparable level of economic development to China to calculate the international benchmark. Further, USW disagrees that the Department should revise its methodology from the Preliminary Determination to take the national savings rate into account when determining an international benchmark. Specifically, while respondents claim that the low interest rates in China are due to a high savings rate, USW argues that this savings rate is not the result of market forces but the result of government intervention in the financial market, such as capital controls, that close off other investment opportunities and funnel capital to the banking sector. As such, accounting for savings rates would bring the same distortions into the benchmark that the Department is attempting to eliminate by going to an out-of-country benchmark in the first place. In addition, USW objects to using the methodology set out in the Drazen Report, which it believes is flawed. Specifically, it argues that the methodology employed in the Drazen Report unjustifiably and arbitrarily limits the universe of countries to determine the correlation between GNI and interest rates, while imposing no such limitation on the number of countries used to determine the

correlation between GNI and savings rates. In fact, when using the entire available universe of countries for both determinations, USW argues that GNI correlates more highly with interest rates. As such, USW argues that the Department should disregard the methodology set out in this report.

Petitioner generally agrees and supports the arguments put forth by USW.

Parties made additional comments on the issue of a foreign-currency benchmark, the details of which contain proprietary information. For the complete comment and response, see BPI Memo.

Department's Position:

The Department disagrees with respondents that there are interest rates within China that could offer a suitable benchmark for measuring the benefit of GE's loans. Contrary to the GOC's assertions, the Department is not basing its assessment of interest rates in China simply on the fact that the Department designates China as an NME for purposes of the AD law, but rather on analysis performed in connection with that decision. The Department recently analyzed the PRC banking sector in the context of its analysis of whether the PRC should be treated as an NME in its AD investigation on lined paper. In this analysis, 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 May 15 Memorandum and August 30 Memorandum).

As an initial matter, China's banking sector remains almost entirely state-owned. See August 30 Memorandum (citing to Economic Survey of China, Paris: Organization for Economic Cooperation and Development, at 140 (2005)). While state-owned banks are a feature in many economies, the data provided by the OECD demonstrate that state ownership in the Chinese banking sector is much more widespread than in any other major world economy. Id. While it is true that some of the largest SOCBs, including the Bank of China ("BOC"), the China Construction Bank ("CCB"), the Agricultural Bank of China ("ABC") and the Industrial and Commercial Bank of China ("ICBC") (collectively, the "Big Four") have recently undergone reorganization to become formal corporate entities, their primary shareholder remains the GOC.

This remains true after the limited initial public offerings these banks have undergone and the sales of minority stakes in these banks to foreign banks. Foreign investment in PRC banks is tightly constrained, with total foreign ownership limited to 25 percent in existing SOCBs, and the GOC has signaled its intention to preserve this control over the banking sector indefinitely. See May 29, 2007 GOC Submission, at Exhibit 7 (citing to the BOC Global Offering at 63). See also August 30 Memorandum at 61 (citing to "Go Away, Crocodiles?," the Economist Intelligence Unit, Business China (March 27, 2006)). As for the limited ownership diversification brought about by the banks' initial public offerings, while this may help improve corporate governance and transparency at the SOCBs, majority control continues to lie mostly with GOC. For example, in 2005 about 75% of the CCB was held by the State. See GOC's March 15, 2007 Submission, at Exhibit 20 (citing to China Construction Bank Annual Report at 31). The continued overwhelming dominance of state ownership in Chinese banks, along with the GOC's

stated intention to preserve this dominance, and the GOC's long history of using the banks to allocate resources in the economy in accordance with its policy objectives, all raise questions about the reliability of interest rates generated within this system, and their suitability as commercial benchmarks.

The GOC argues that the 2003 creation of the China Banking Regulatory Commission (CBRC) has led the PRC banking sector to become fully market-based. At verification, CBRC officials explained their role in supervision of the banking sector and in encouraging Chinese banks to improve their risk management systems. See Policy Lending Verification Report, at 6-9. While the creation of the CBRC is a positive step, the PBOC held the supervisory role of the CBRC until 2004, when the CBRC began operations, and it is unclear how this supervisory function has fundamentally changed. In addition, given the deeply rooted legacies of government control over the banking sector and the hundreds of thousands of employees at the major Chinese banks, it is improbable that a new government agency could revolutionize the operations of the banking sector only one year after assuming its supervisory role. This assessment is supported by the fact that the CBRC has identified numerous problems in risk management and control in its inspections of the banks, the details of which the Department did not have access to but which are referenced in the SOCBs' publications. See Policy Lending Verification Report at 6, where the CBRC officials noted that the details of these inspections are confidential. See also May 29, 2007 GOC Submission, at Exhibit 7 (citing to the BOC Global Offering at 88-89), which discusses the deficiencies the CBRC found on a recent inspection of the BOC, the details of which are confidential. Other documents issued by the SOCBs confirm the fact that, while the banks are improving their risk management capacities, it is an ongoing process that was not completed in 2005. Id. at 167 and 172 (describing the ongoing introduction of new risk management systems). While the record evidence does suggest that supervision of and management in the SOCBs is improving, the way interest rate formation is regulated in China both distorts lending rates and provides an explicit recognition that banks in China are not yet fully able to set interest rates on a market basis.

For example, China maintains both a deposit rate cap and a lending rate floor. See January 31, 2007 GOC Submission, at Exhibit 4 (citing to the 2005 PBOC Annual Report, at 145). The GOC is correct that various countries have at different times maintained caps on deposit rates or floors on lending rates. What sets China apart, however, is the fact that China maintains both a deposit rate cap and lending rate floor simultaneously, and that the PBOC has set these restrictions in such as a way to guarantee the banks a considerable profit margin on each of their loans. The PBOC conceded at verification that this floor and cap system sets China apart from other countries and that it is necessary because the banks have not yet fully implemented risk control. See Policy Lending Verification Report at 2-3. While the PBOC's imposition of a guaranteed profit spread for the banks may be an appropriate measure for a banking system as historically weak as China's, it does not reflect a confidence that the banks are able to independently price loans on a commercial basis. The banks themselves implicitly confirmed this fact at verification. See, e.g., Policy Lending Verification Report, at 11-12 (ICBC officials stating that "market disorder" would result if these regulations did not exist). See Id., at 25 (CCB officials explained that these restrictions are necessary to prevent excess competition from "hurting" the banks).

As the banks noted, the primary purpose of the lending rate floor is to prevent the banks from pricing their loans at unsustainably low levels. The lending floor functions as a binding constraint on the banks, which is demonstrated by the fact that most bank loans being issued are around this interest rate floor. See August 30 Memorandum (citing to Economic Survey of China, Paris: Organization for Economic Cooperation and Development, at 153 (2005)). As such, the GOC is correct that the interest rate floor does have the effect of preventing lending rates from being even lower. Lower rates would not necessarily be market-based, however, since the lending rate floor is in place precisely because the SOCBs individually and collectively are not yet able to fully price their loans on a commercial basis and the banking sector remains distorted by government policies other than the lending rate floor, including the cap on deposit rates, which is discussed below.

Moreover, while the Drazen Report points out that there are equivalents for lending rates in China that are not regulated by the government, such as the issuance of commercial paper or corporate bills, the interest rates of these instruments are also not "market-based" in any meaningful way. The Drazen Report is correct that these instruments are similar to bank loans, and that they constitute a carefully managed exception to the usual regulatory framework on lending. Accordingly, since this regulatory framework serves, in part, to keep rates higher than they would be otherwise, the rates of these financial instruments are lower than that of standard bank loans, as the Drazen Report points out. See GOC's July 5th Submission. This is not a genuine market outcome, however. Instead, it is the result of factors that would push lending rates down to a level that could endanger China's financial system, which is why the PBOC maintains a floor on lending rates to prevent this outcome, allowing these alternative financial instruments to constitute only a limited exception. See May 29, 2007 GOC Submission, at Exhibit 7 (citing to the BOC Global Offering at 60) (noting that bank loans accounted by over 90% of total financing in China in 2004 and that equity issuances formed part of the rest, so the alternative financial instruments proposed in the Drazen Report, therefore, account for a very small share of total financing in China).

In addition, resource allocations in and out of the banking sector illustrate the distortive effect of government policies and the fact that "prices" there do not function normally. For example, the cap on deposit rates was both binding in 2005 and set at a level that was barely higher than inflation. See January 31, 2007 GOC Submission, at Exhibit 4 (citing to the 2005 PBOC Annual Report, at 145), which shows that the one-year time deposit cap in 2005 to have been 2.25 percent, barely higher than the 1.82 percent inflation rate for China in 2005. This means that savers in China were prevented, by law, from receiving more than a negligible real return on their savings. This means that banks in China do not compete on deposit rates and have access to the savers' capital at very little cost. Moreover, as the government has tightly restricted alternative investment channels, Chinese savers had few options (particularly in 2005) beyond depositing their savings with the banking system. See GOC's March 15, 2007 Submission, at Exhibit 20 (citing to China Construction Bank Annual Report at 48) (which attributes the rapid increase in deposits at that banks as being due, in part, to "limited alternative investment channels"). Given the fact that government policy channels China's savings to the banking sector, that banks cannot compete on deposit rates, and that the government permits only a low return on deposits, the concern about the banks driving interest rates down on their own to unsustainable levels is not

surprising.

Such a tightly regulated financial system may be understandable to protect a fragile sector that has historically seen very high levels of non-performing loans ("NPLs") and which required large and frequent government bailouts of the banks. For a discussion of these bailouts, See August 30 Memorandum at 51-52, citing to Garcia-Herrero, Alicia, Gavila Sergio, and Santabarbara Daniel, *China's Banking Reform: An Assessment of Its Evolution and Possible Impact* (Madrid: Banco de Espana, 2005), p 16-17. Nevertheless, putting aside the development dimension, the fact remains that a market-based banking system has not yet fully formed, which precludes the use of a benchmark within China for measuring the benefit of the policy loan program because no fully market-determined rates exist, including the lending rates of the few foreign banks in China that operate in the same distorted environment. As discussed in the Preliminary Determination, foreign banks are subject to the same restrictions as the SOCBs. In addition, foreign banks' share of assets and lending is negligible compared with the SOCBs. See August 30 Memorandum (citing to Economic Survey of China, Paris: Organization for Economic Cooperation and Development, at 151(2005)). Additionally, while foreign banks are slowly increasing their participation in the domestic PRC banking sector, the OECD has observed that foreign banks, in addition to providing only a tiny share of credit in the PRC, still operate mostly in niche markets, and, as a general rule, don't compete directly with the state-owned commercial banks. Id. Accordingly, foreign bank rates do not offer a suitable benchmark for measuring the benefits of loans by the SOCBs.

GE argues that if the Department rejects the use of all RMB-denominated rates in China as a loan benchmark, it should use the rates for foreign-currency loans in China as a benchmark for measuring the benefit of respondents' RMB-denominated loans. The Department disagrees that this proposal would provide an accurate benchmark for measuring the benefit of respondent's loans issued in RMB. While foreign currency lending rates in China may follow international trends to some extent (being influenced, ultimately, by the monetary policies of the foreign country's central bank), foreign currency lending in China forms a very small portion of the overall financial sector. See Policy Lending Verification Report at 29. For example, at CCB, foreign currency loans only accounted for 5 percent of their total loans Moreover, foreign currency lending rates only suggest the cost of lending in U.S. dollars, for example, and do not provide any basis for a benchmark of what RMB cost would prevail in a market situation. Because of state domination of and intervention in the PRC banking sector, such a benchmark does not exist in China.

Moreover, it is not possible to adjust for these distortions, as the GOC suggests, due to the counterfactual nature of the analysis required. For an adjustment to be practical, an underlying market-based rate must exist (such as, for example, adjusting a market rate for inflation, as is discussed below). For example, to convert a nominal (market-based) interest rate to an effective rate, the Department could take into account all relevant loan-related charges and fees. However, where no underlying market-based rate exists (as is the case in China), determining what the necessary adjustments would be in order to form a market-determined interest rate in China, absent the numerous government-imposed distortions in the system, would be highly complex, speculative and impracticable exercise.

For these reasons, the Department continues to find that an it is appropriate to resort to an external benchmark. In that regard, the Department disagrees with the GOC's contention that the Department must use China's level of savings as the key variable in constructing an external benchmark, rather than per capita income. The GOC is correct that the level of savings in an economy is a key factor in interest rate formation, as savings form a large portion of the supply of funds in the financial system in many economies. However, in the case of China, the Department has already found the financial system not to be market-based, thus necessitating a third-country benchmark. Controlling for factors specific to China that drive interest rate formation would undermine the purpose of selecting an external benchmark, which is to find a rate that it is not affected by these China-specific factors. In other words, controlling for some of these factors (e.g., savings rate) would be inserting into our external benchmark the very distortions that were the basis for using an external benchmark in the first place. In the case of savings, it is impossible to know what the savings rate would be if the government-imposed cap on deposit rates did not exist, for example, or if savers had access to a wider range of investment vehicles.

Instead, the Department continues to find that the best comparison group in constructing an external benchmark is the group of lower-middle income countries as reported by the World Bank. See Final Calculation Memorandum. As the Department noted in the Preliminary Determination, there is broad inverse relationship between income levels and lending rates. Countries with higher per capita gross national income (GNI) tend to have lower interest rates. However, as the Drazen Report points out, per capita GNI is a proxy for other factors that may drive interest rate variation across income levels, including institutions, level of savings, market risk, and transaction costs. See GOC's July 5th Submission. The Department has determined that several of these factors directly incorporate distortions related to the PRC government's interventions in and control of the financial system and are thus unusable for purposes of the benchmark calculation, as discussed above. Commerce sought advice from banking experts at other U.S. government agencies, such as the Federal Reserve and the Department of Treasury. Based on the information gathered from this process, the Department has determined for purposes of this investigation that it is possible to analyze the interest rate data of the lower-middle income countries by using a regression of inflation-adjusted (see below) interest rate on a composite index of certain World Bank governance indicators that apply to all of these countries. These indicators report the quality of each country's institutions across several dimensions, including political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. These figures are constructed to facilitate cross-country comparisons and are not, in the case of China, directly impacted by the state's dominance of the banking sector. Therefore, the interest rate derived from this regression takes into account a key factor involved in interest rate formation that is not directly tied to China's state-imposed distortions in the banking sector, i.e., that of the quality of a country's institutions, as discussed above.

The Department also disagrees with the GOC that forward currency markets provide a basis for benchmarking PRC loans. Although the implied interest rate in offshore non-deliverable foreign exchange contracts is lower than interest rates within China, this does not indicate that the market RMB lending rate would be lower than the current rates prevailing within China. Instead, this is an indication that China maintains capital account controls, which segment the internal and external markets for RMB, as is documented by the GOC's own submissions. See GOC's July

16 Submission, Exhibit 13 at 88. Moreover, as is pointed out by USW, this spread may also reflect a market expectation that China's currency will appreciate. Thus, the spread between the yields of offshore non-deliverable forward contracts and rates within China is not an indication that rates in China would be lower, absent government controls.

The GOC's argument that the Department's method of constructing its lending benchmark is inconsistent with its practice in its AD proceedings is not on point. In AD proceedings, the statute directs the Department to select a surrogate that is both economically comparable to the NME country and which is a significant producer of comparable merchandise. See Section 773(c)(4) of the Act. Moreover, the Department's regulations direct the Department to normally value all of the NME factors of production with data from the primary surrogate country. See 19 CFR 351.408(c)(2). Accordingly, the Department's initial list of possible surrogate countries is a non-exhaustive selection of countries that have, in the Department's experience, sufficient data available on which to base the AD proceeding. The construction of this external benchmark for lending rates, in contrast, is a fundamentally different exercise. Here, the Department requires data only on lending rates, rather than a host of data on all the factors of production and surrogate financial ratios. Moreover, in contrast to the preference for a single surrogate in an AD proceeding, the Department's preference in the current proceeding is to base the benchmark on a wide range of countries, so as to average out country-specific factors that might affect this single key data point. Therefore, the Department is basing its benchmark on all lower-middle income countries that reported lending rates for 2005 (and inflation figures, as is discussed below), a pool not comparable to the countries the Department considers as surrogate in AD proceedings.

However, the Department agrees with the GOC that it should adjust for inflation. In this benchmarking exercise, the Department is comparing the price of funds in China to the price of funds abroad to determine whether PRC CFS producers were conferred a benefit in their loans from the SOCBs. Normally, when comparing prices across countries, the Department converts these prices into a common currency. In this case, however, that is not possible: the benchmark rate is a not specific to any given currency, being a composite of the available lending rates of all market economy lower-middle income countries. As a proxy for currency conversion, however, the Department will adjust for inflation. Adjusting for inflation allows the Department to base its loan benefit calculation on comparable interest rates. Adjusting for inflation is a fundamentally different exercise than other adjustments advocated by the GOC, e.g., for levels of savings. Controlling for savings would be an attempt to explain what factors might drive differences in the real cost of money across countries. As discussed above, that is not a useful exercise in the present proceeding because the factors that drive lending rate formation in China are tainted by the government's domination of the financial system. Accordingly, only an adjustment for inflation is necessary to allow for a comparison between the real cost of money in China and in the group of benchmark countries.

Comment 11: Adjustment for Long-term Interest Rate Benchmark

The GOC disagrees with how the Department determined the adjustment for long-term interest rates. Specifically, the GOC argues that this adjustment had the effect of dramatically overstating the long-term benchmark. As an alternative, the GOC suggests using data from the

PBOC on long-term lending rates and asserts that even if the Department does not use interest rates in China as a base-level interest rate, the Department has not provided any credible reason why such data could not be used to determine the spread between short- and long-term rates.

No other parties commented on this issue.

Department's Position:

The Department agrees with the GOC that an adjustment to the Department's methodology for calculating a premium for respondent's long-term lending is warranted, but disagrees with the methodology proposed by the GOC. The Department has already explained that rates set by the PBOC are not suitable as a benchmark: they are government-set and reflect a host of distortions generated by the GOC's intervention in and the banking sector. Because the PBOC rates are not market-based, the spread between short-term and long-term lending cannot be used as a market benchmark for a term premium, i.e., for the premium of borrowing money for a longer versus a shorter period.

However, the Department agrees with the argument in the Drazen Report that the methodology the Department used in the Preliminary Determination overstated the long-term interest rate premium. See GOC's July 5th Submission. Specifically, in the Preliminary Determination the Department compared the short-term cost of money as represented by three-month LIBOR rates to a long-term rate as reflected in the prevailing interest rates for five-year interest rate swaps. While the Department disagrees with GOC's specific argument in the Drazen Report that LIBOR rates and interbank bank swap rates are not comparable, it agrees that the best estimate of the spread between short- and long-term is the ratios between one-year and five-year interest rates. Accordingly, for the Final Determination, the Department based the long-term loan premium on the ratio between one-year and five-year interest rate swap rates, as reported by the Federal Reserve.

Comment 12: Creditworthiness of GE and its Cross-owned Companies

GE asserts that the Department's analysis of a company's creditworthiness must focus on what a domestic commercial bank would do when deciding whether to issue a loan that is under investigation to the company that received the loan. See CVD Preamble, 63 FR at 65365-7. In analyzing this situation, GE states that the bank must first examine whether the borrowing company has the ability to pay-off the loan. This would involve the bank reviewing the borrower's credit history and its ability to pay off any new debt obligations. The bank must also take any collateral or guarantees, including the guarantor's history, into consideration in analyzing the risk involved with lending to the borrowing company. GE argues that the Department must follow the structure of this analysis for its creditworthiness determination and cites six fundamental areas where it has departed from the above.

First, GE claims the Department failed to follow its regulations by basing its creditworthiness determination on the financial ratios of the SMPI group without regard to GE or the other cross-owned companies involved in the production of CFS. Citing 19 CFR 351.505(a), GE argues that

the Department must make a creditworthiness determination on the "firm" that received the loan in question. Furthermore, GE asserts that the Department is bound by its regulations to determine whether a benefit exists by comparing the amount the firm paid on the loan with the amount the firm would pay on a comparable commercial loan. Therefore, the Department must carry out its creditworthiness assessment with respect to the "firm" receiving the loans under investigation. See 19 CFR 351.505(a)(4). By examining the consolidated SMPI group's financial statements, GE argues that the Department not only included many companies having no involvement in CFS production, but also violated the explicit requirement of the regulation. See id. See also CVD Preamble, 63 FR at 65365.

Citing 19 CFR 351.505(a)(6), GE asserts that the Department's regulations prohibit it from investigating uncreditworthiness in the absence of a specific allegation that the firm is uncreditworthy. GE notes that both the creditworthiness initiation and petitioner's uncreditworthiness allegation only analyzed GE and the other cross-owned companies involved with the production of CFS. GE further cites to the Department's subsequent April 20, 2007, supplemental questionnaire, which only requested creditworthiness information from GE and the financial ratios of, individually, GE and its cross-owned companies that produced coated free sheet paper, and not the SMPI group as a whole.[4] Therefore, GE claims that the Department followed the regulatory requirement in the initiation and subsequent requests for information. In contrast, GE states that the Department's Preliminary Creditworthiness Determination was made at the SMPI group level and ignored the financial ratios of GE and its cross-owned companies, whose loans are under investigation. See Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, regarding "Preliminary Creditworthiness Determination for Gold East Gold East Paper (Jiangsu) Co., Ltd. and its Cross-Owned Companies" (August 30, 2007) (Preliminary Creditworthiness Determination).

Second, GE argues that the Department's uncreditworthiness decision is not supported by the actual record and ignores the logic of a bank's lending decision. Citing the CVD Preamble, GE asserts that the Department's analysis disregards how a bank would make a determination to issue a loan. See CVD Preamble, 63 FR at 65365-66. GE claims that a commercial bank would not ignore the creditworthiness of the borrowing party and instead focus solely on the party's parent or affiliated company as the Department did in the Preliminary Creditworthiness Determination. Moreover, GE argues that the factual record of the case supports the approach of analyzing the producer of the merchandise under investigation, GE, and the other group companies that received significant loans at issue (GHS, Hainan Jinhai and the forestry companies). As evidence, GE states that loan agreements on the record show that the banks lending to SMPI companies were contracting with and, therefore, concerned only with the company party to the loan agreement. GE also notes that only the borrowing company would be held liable for any breach or default and none of the loan agreements reference the borrower's

[4] As an example, GE claims that the Department declined to collect loan information from Ningbo Zhonghua after determining the company did not produce the merchandise under investigation.

parent company or impose any legal obligation on the parent or the borrower's affiliates.

GE also argues that the Department's interviews with Chinese bank officials indicated that most banks focus on the borrower and its subsidiaries, not the parent company. Although some bank officials stated they may examine the parent company, none of the banks examine only the parent. GE states the examination of the parent company may be relevant if it is the guarantor on the loan; however, GE asserts it would only provide additional security and would be secondary to GE's primary liability on such loans.

GE further argues that the SMPI consolidated level is not the appropriate basis for making a creditworthiness determination due to SMPI's limited borrowing and operational relevance. GE cites SMPI's 2005 outstanding bank loans, its limited role in the export of CFS and its small turnover as evidence of this. Moreover, GE states that SMPI's financial statements consolidate 56 companies many of which involve products and services other than CFS. Out of the 56 companies, GE claims that the Department only requested loan information from nine companies and only one company, GE, actually is involved with the merchandise under investigation that is shipped to the United States. Therefore, SMPI at the consolidated level bears little relevance to the loans under investigation.

Third, GE asserts that the Department applied a different creditworthiness standard to Chenming than it did to GE and its cross-owned companies. In the Preliminary Determination, the Department found Chenming to be creditworthy based on both the consolidated financial statements and the operating company's financial statements. See Preliminary Determination, 72 FR at 17490. GE also contends that the Department could have reached a different conclusion in its preliminary analysis of GE had it followed the same analytical approach it applied to Chenming. GE argues that the Department's failure to follow a consistent approach is arbitrary and unsupportable.

In addition to examining both the consolidated and unconsolidated financial statements for Chenming, GE states the Department also found that weak financial data can be justified where increases in liabilities are due to expansion efforts. GE asserts that the factual record shows that SMPI's increased liabilities from 2003 to 2004 went to fund expansion efforts, which, as with Chenming, diminishes any alleged weakness in SMPI's financial ratios. GE argues that the Department did not address these facts in the Preliminary Creditworthiness Determination.

Fourth, GE argues that a company-specific analysis demonstrates that GE, GHS, Hainan Jinhai and SMPI were creditworthy. Citing 19 CFR 351.505(a)(4)(ii), GE states that receipt of a long-term commercial loan will normally constitute dispositive evidence that a firm is creditworthy. GE argues that the Chinese commercial banks, regardless of state ownership, extend credit on a commercial basis, as was demonstrated at both the GE and GOC policy lending verifications. Therefore, the long-term loans received by GE and its cross-owned companies from Chinese banks should be considered dispositive evidence of the companies' creditworthiness. GE finally notes that it, GHS and Hainan Jinhai received loans from a privately owned Chinese bank, which demonstrates that major private Chinese bank considered the companies creditworthy.

GE also argues that the Department's SMPI group level analysis led it to reject evidence of creditworthiness. In its July 5th submission, GE provided information about and analysis of the financial ratios of Chinese paper companies that had public offerings from 2001 - 2005. GE argues that a meaningful analysis takes into account industry and country-specific norms so that a company's financial data is measured in relation to the same domestic industry and ownership structure. GE asserts that the Department has placed considerable value in such comparisons. See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003) and accompanying Issues and Decision Memorandum at Comment 5 (Korean DRAMS).

GE states that the Department disregarded the submitted ratios in the Preliminary Creditworthiness Determination, because it was examining SMPI's consolidated information and decided that the submitted companies did not adequately match SMPI's wide range of operations. GE argues the Department's rationale in not comparing the other paper companies' ratios to SMPI's highlights the problem with the Department's analysis. Namely, according to GE, it makes no sense to determine creditworthiness based on SMPI when only nine of SMPI's consolidated 56 companies are relevant to this investigation. Therefore, for the final determination, the Department should only use GE's financial ratios and only within the context of the ratios of the other Chinese paper companies. GE asserts that this will show a favorable comparison for GE and demonstrate the company's creditworthiness.

GE also argues that the Department should consider the credit ratings provided by Chinese banks for GE, GHS and Hainan Jinhai. GE asserts that banks assess risk carefully and the submitted credit ratings demonstrate all of the above companies were creditworthy. GE further notes that it, GHS and Hainan Jinhai were not denied loans in 2005 based on credit assessments and were never unable to repay a loan or interest on time.

GE further points to two feasibility studies it submitted, and it argues that both show that GE was creditworthy. These arguments are proprietary in nature and are discussed in a separate proprietary memorandum, the Final Creditworthiness Determination.

GE argues that the Department gave no weight to the existence of securities and guarantees provided for the loans under investigation. The respondent provides an example and contends that pledged assets and guarantees add a level of protection to the lending bank, and the Department erred in not considering and examining this aspect in its Preliminary Creditworthiness Determination.

Fifth, GE argues that the Department erred in determining that SMPI was uncreditworthy. GE first notes that the Department miscalculated the quick ratios for 2003 - 2005. GE then contends that the Department's comparison of SMPI to Chenming is inapt. GE argues that Chenming's scope of activities is narrower than SMPI's and cites to SMPI's involvement in forestry operations as an example. The record evidence makes clear that Chenming's position is almost exclusively in paper production, while SMPI is integrated, involved not only in paper production, but also in upstream forest and pulp production. Therefore, the differing business strategies and investments prevent SMPI's and Chenming's consolidated statements from being compared. GE

contends that two of the Chinese companies named in its July 5 submission, Bohui and Nine Dragons, were consolidated and would be appropriate to compare with SMPI.

In addition, GE holds that the corporate make-up of the companies also does not allow for a reliable comparison. GE states that Chenming has been a public company since 2000. GE contends that public companies rely on the massive equity infusion that a share offering provides for liquidity and expansion efforts. In contrast, private companies, such as GE and its cross-owned companies, must rely on debt to finance operations and growth. GE argues that this point explains the radical difference in public versus private companies' ratios, even in the same industry and is supported by the record. See GE's July 5th Submission, at Exhibit S4-9. Therefore, according to GE, financial ratios, which can be radically different even in the same industry, as well between companies, cannot be compared.

Furthermore, GE argues SMPI's profitability, return on equity, and increasing sales, demonstrate the company's creditworthiness. In addition, GE asserts that the Department's analysis of SMPI's financial ratios, on which the Department made its uncreditworthy determination, is incorrect. Because this concerns proprietary information, this argument is discussed in the Final Creditworthiness Determination.

GE argues that SMPI's expansion efforts - mainly financed by debt - distorted its 2004 financial ratios. GE further argues that SMPI's financial performance would likely improve in the future due to increased sales and production, and the improved financial data for SMPI and GE bears this out.

Finally, GE contends that Hainan Jinhai and the cross-owned forestry companies were "start-up" companies. GE argues the Department has noted that it expects start-ups' "capital and other start-up related expenses would absorb revenue in the initial years and would cause the company to experience some difficulty in meeting its debt obligations in its initial years." See Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment with the Final Antidumping Duty Determinations: Certain Hot-Rolled Carbon Steel Flat Products From Thailand, 66 FR 20251, 20254 (April 20, 2001) (not making a creditworthiness finding in the final determination because there were no benefits from those programs, 66 FR 50410 (October 3, 2001) and accompanying Issues and Decision Memorandum, at "Discount Rates."). Therefore, the Department should consider the cross-owned forestry companies start-ups and find them creditworthy.

GE's additional argument involves extensive proprietary information and is addressed in Final Creditworthiness Determination.

The GOC endorses GE's arguments. Citing 19 CFR 351.505(a), the GOC argues that the Department's preliminary creditworthiness analysis was flawed because it relied on the consolidated statements of the SMPI companies, rather than the financial statements of GE or other companies involved in the production of CFS. The GOC also reiterates GE's argument that the Department must consider the actual producer of merchandise under investigation and borrower in determining creditworthiness. According to the GOC, the Department's analysis

ignored GE's financial data, as well as the fact that, according to actual loan documents, GE was obligated to pay the loan, not SMPI.

In rebuttal to GE and the GOC, the petitioner asserts that the Department's preliminary determination of uncreditworthiness for GE and its cross-owned companies is consistent with the applicable regulations and the Department's prior practice, as well as commercial realty.

Citing to its July 5th Factual Submission, the petitioner states that the Asia Pulp and Paper (APP) worldwide group of companies faced financial turmoil leading up to its announcement of a unilateral debt moratorium totaling more than $14 billion. The petitioner notes that in early March 2001, APP China defaulted on interest payments on the $403 million bond due in 2010 and had its Standard & Poor's credit rating reduced on March 19, 2001.

Petitioner's additional arguments regarding the APP worldwide companies rely on proprietary information, and are addressed in the Final Creditworthiness Determination.

The petitioner also argues that the Department may examine the consolidated SMPI financial statements and should make the analysis on the basis that makes the most sense given the financial structure of the companies in question. The petitioner notes that in this case, the companies are cross-owned. The petitioner also cites to proprietary information that is discussed in the Final Creditworthiness Determination.

The petitioner further contends that nothing in the regulations precludes the Department from examining creditworthiness at the SMPI group level. First, the regulations do not specify what constitutes a firm for purposes of a creditworthiness determination. The petitioner further notes that the Department adequately explained in the Preliminary Creditworthiness Determination that using SMPI's consolidated financial statements provides the most complete picture of the companies as a whole.

Citing 19 CFR 351.525(b)(6)(ii) and (iv), the petitioner asserts that the Department essentially collapses cross-owned companies and treats them as a single firm for purposes of determining the benefit. In such instances, the petitioner argues, it would seem entirely reasonable to analyze consolidated financial data of the combined cross-owned companies. In response to GE's argument that the Department was inconsistent in analyzing individual company financial data for the initiation and consolidated SMPI financial data for the Preliminary Creditworthiness Determination, the petitioner notes that it made its uncreditworthiness allegation in March 2007, based only on information that was on the record at that time. Therefore, the petitioner's allegation does not preclude the Department from conducting its own analysis based on the totality of the record and in a way that makes the most sense given the specific facts in the case. See Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55813 (August 30, 2002). The petitioner argues that the Department did not ignore the individual results of GE and its cross-owed companies, but rather examined them as reflected in the financial statements of the parent. Moreover, the petitioner notes the Department based its preliminary uncreditworthiness determination on another proprietary factor as well. See Preliminary Creditworthiness Determination at 3.

The petitioner provides several supporting arguments for the Department's decision to analyze the financial ratios at the SMPI group level, relying on proprietary information. Similarly, petitioner's arguments regarding loans from the private Chinese bank, the feasibility studies, and the SMPI companies' credit ratings are proprietary. Therefore, these arguments are addressed in the Final Creditworthiness Determination.

The petitioner maintains the Department pointed out important differences between the SMPI companies and Chenming. First, the petitioner notes that Chenming is the parent of the Chenming Group and the producer of merchandise under investigation. The petitioner also states that there is no information that any of Chenming's subsidiaries received countervailable subsidies. Accordingly, in petitioner's view, there is a reasonable basis for determining creditworthiness on the performance of Chenming itself. In contrast, the petitioner points out that GE is one of several companies within the SMPI group that are involved with the production of CFS. Moreover, companies other than GE have been found to receive countervailable subsidies in the Preliminary Determination. These factors, as well as other economic differences and circumstances between the companies explain the Department's rationale for using a different analysis for each entity.

The petitioner also argues that it inappropriate to use GE's or GHS's individual financial data for a creditworthiness analysis and, thus, a comparison to the other Chinese paper companies suggested by GE is invalid. In addition, petitioner notes that those other paper companies were self-selected by GE, and petitioner notes that it provided financial ratios for three additional Chinese paper companies who had public offerings.

Department's Position:

According to 19 CFR 351.505(a)(4)(i), the Department will generally consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. In making this determination, according to 19 CFR 351.505(a)(4)(i)(A)-(D), the Department may examine, among other factors, the following: (1) receipt by the firm of comparable commercial long-term loans; (2) present and past indicators of the firm's financial health; (3) present and past indicators of the firm's ability to meet its costs and fixed financial obligations with its cash flow; and (4) evidence of the firm's future financial position. If a firm has taken out long-term loans from commercial sources, this will normally be dispositive of the firm's creditworthiness. See 19 CFR 351.505(a)(4)(ii). According to 19 CFR 351.102, "firm" is defined as: "the recipient of an alleged countervailable subsidy, including any individual, company, partnership, corporation, joint venture, association, organization, or other entity" for purposes of identifying and measuring countervailable subsidies.

For purposes of this final determination, we have undertaken the creditworthy analysis on both the SMPI consolidated level and the unconsolidated level for the companies receiving countervailable loans. As many of the details of this analysis are proprietary, our full analysis is in the Final Creditworthiness Determination. Our analysis shows that GE and the other operating companies that received countervailable loans are uncreditworthy whether the creditworthiness

analysis is conducted at the consolidated or unconsolidated level.

GE has argued that our preliminary creditworthiness analysis, which looked at the SMPI group as a whole rather at the individual operating companies involved in coated paper production, was incorrect because it contravened the Department's regulations which refer to "firm" in the singular and to the firm receiving the loans under investigation. We disagree. The definition of firm in the regulations is rather broad. Indeed, in the past, the Department has performed creditworthiness analyses based on consolidated and unconsolidated companies depending on the facts of the case. See, e.g., Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Canada, 62 FR 54972, 54974 (October 22, 1997) (analyzing the consolidated parent/holding company); Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determinations: Oil Country Tubular Goods From Austria, 60 FR 4600, 4601 (January 24,1995) (analyzing the consolidated company) (unchanged in the final determination, 60 FR 33534, 33535 (June 28, 1995)); and Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55805 (August 30, 2002) and accompanying Issues and Decision Memorandum, at Creditworthiness (analyzing an unconsolidated company). As noted above, in the present case, since our analysis gives the same result at both levels, we do not reach a determination at this time.

GE argues further that SMPI's consolidated statements are not an appropriate basis for determining creditworthiness due to SMPI's limited borrowing experience and operational relevance. Whatever SMPI's experience or role, GE's comment is misplaced because our preliminary analysis was of the consolidated statements, which include not only SMPI, but GE and the other operating companies that received countervailable loans, not of the SMPI company alone.

We disagree with GE's argument that loans received by GE and the cross-owned companies constitute dispositive evidence of the companies' creditworthiness. As these are the very loans that the Department is considering countervailable, they cannot be used to support a determination of creditworthiness. Similarly, our finding that these banks are providing loans in accordance with GOC paper plans, precludes us from relying on credit ratings assigned by those banks or the terms of the contracts they negotiated. GE also argues that the Department ignored record evidence establishing that the Chinese banks' contractual rights on all loans exist with respect to the individual operating companies and not the parent or the consolidated group, and that the Department should consider the credit ratings given to the SMPI companies by the Chinese banks. However, as explained in the "Analysis of Programs" section above, the Department continues to find that loans provided by Policy Banks and SOCBs are countervailable government loans, provided in accordance with the China's governmental paper policies. See also Comment 8, above. Therefore, the loans and credit ratings made by these banks, which the Department has found to be under PRC Government control, cannot be considered for purposes of the Department's creditworthiness analysis of GE/SMPI.

Similarly, regarding GE's assertion that the Department failed to consider that the loans under

investigation are secured and guaranteed, we disagree that this is relevant in this case. First, as explained above, the loans under investigation are countervailable, so it is not appropriate to rely on the lending practices of the banks providing these loans. Second, some commercial banks may require a security or guarantee from uncreditworthy companies to protect the bank's interest. Protecting the banks's interest and the existence of a security or guarantee does not prove a company's creditworthiness, only that the bank has sought to protect its interests.

We further disagree with GE's allegation that our preliminary creditworthiness determination for the SMPI companies was not consistent with our preliminary creditworthiness analysis of Chenming. For Chenming, our analysis was based on Chenming's consolidated financial statements. We did touch briefly on certain company-level information (Chenming's calculated ratios and a publicly available half-year financial statement), but our analysis and determination was based on the consolidated level. GE similarly alleges that the Department justified Chenming's increased liabilities because they were dedicated to expansion efforts, but inconsistently claimed that the same facts supported an uncreditworthiness determination for SMPI. The Department disagrees that we justified Chenming's increased liabilities in such a manner. We were analyzing Chenming's complete financial picture to aid in our decision, and the fact that the company was expanding was not the sole basis for our creditworthy finding. In our final creditworthiness analysis for GE and its cross-owed companies, we have considered the expansion efforts of SMPI and its subsidiaries (including GE and its cross-owned companies). See Final Creditworthiness Determination.

We agree with GE that in analyzing financial ratios, the ideal would be to take into account industry- and country-specific norms. However, this comparison is not always possible and this should not preclude us from analyzing the company's financial ratios. For instance, as GE noted, with a consolidated company, a comparison to other companies may not make sense if the consolidated company is in different industry sectors. There would likely be no company to compare it to that is in exactly the same industries. We also disagree that the ownership structure would necessarily affect a comparison of financial ratios. Furthermore, we do not have the capacity or the data available to analyze every possible factor that might affect a company's financial ratios. In Korean DRAMS, we stated that it is not the Department's normal practice, and generally not within the Department's capacity, to make a full assessment of the macroeconomic environment and to make forecasts on future performance. See Korean DRAMS, Issues and Decision Memo, at Comment 5. Also, in Korean DRAMS, we compared the financial results of the participating respondents in making a decision about cyclicality. See id. We did not state that this comparison has to be done in general, as GE seems to argue, and in many cases, a comparison is not done.

In this case, both GE and petitioner have placed the financial information of Chinese paper companies on the record. In addition, financial statements for Chenming are on the record, and Chenming is primarily a paper company.[5] The financial information for the other Chinese paper

[5] Page 20 of Chenming's 2005 consolidated financial statements states that sales of paper accounted for over 90 percent of the consolidated turnover and result of the Group. See Petition, at Exhibit III-12 (October 31, 2006).

companies that GE and petitioner have placed on the record are not incomplete. We have only limited financial statements and untranslated financial statement notes. Without this information, we can not evaluate these companies to ensure they are valid comparisons, and it is possible that we could consider some or all of these companies uncreditworthy. Given this, we can not rely on the submitted information for comparison to the financial information of GE and its cross-owned companies. In Korean DRAMS, we were comparing financial data for two responding companies, but in a limited fashion. See id.

GE alleges that the Department incorrectly calculated the quick ratios, as the standard definition is the sum of current assets minus inventories, divided by current liabilities. In Intermediate Accounting: Concepts, Methods, and Uses, Fourth Edition, by Davidson, Hanouille, Stickney and Weil, 1985, at page 1245, however, the definition of quick ratio is the sum of cash, marketable securities, and accounts receivable, divided by current liabilities. The second formula is a more conservative formula, as it omits prepaid expenses. For more discussion of this calculation, see Final Creditworthiness Determination. For the final determination, we have calculated the quick ratio both ways, and have found it does not affect our creditworthiness decision in this case. In addition, while GE claims that SMPI's profitability, return on equity, and increasing sales demonstrate the company's creditworthiness, we find that the existence of some positive financial factors alone does not make a company creditworthy. Our creditworthiness determination is a combination of all factors. See further discussion and analysis of specific factors in the Final Creditworthiness Determination.

GE has alleged that the Department has incorrectly disregarded the feasibility studies of GE and Hainan Jinhai. We disagree with GE on this point. Since the feasibility studies are proprietary, they are discussed in the Final Creditworthiness Determination.

We disagree with GE's assertion that Hainan Jinhai and the forestry companies should be judged as "start-ups" and, therefore, considered creditworthy. While we agree that we should take these companies' start-up status into consideration in our analysis, we do not believe that this status automatically makes them creditworthy. GE cites to Hot-Rolled Steel from Thailand to support its argument. We note while the Department acknowledged in that case that a start-up may have difficulty meeting its debt in initial years, 1) the Department was analyzing the Thai respondent's creditworthiness after its initial start-up period; and 2) we did not find that the start-up companies are automatically creditworthy. In making our creditworthiness determination, we are trying to determine whether a conventional commercial bank would lend to the entity in question. A reasonable banker, given the limited information available in analyzing a start-up, would next seek information on the parent company of the start-up and its affiliated companies, as this gives information about the operations of the group in control of these start-ups and is often the only information reasonably available. This is especially true in this case, where the products from the start-ups feed into the production of the affiliated companies. In this case, this would lead to analyzing SMPI's consolidated information. We note that this is appropriate even if one takes a narrow definition of firm to mean a singular company. The Department's regulations at 19 CFR 351.505(a)(4)(i)(A)-(D) states that "the Department may examine, among other factors, the following: (1) receipt by the firm of comparable commercial long-term loans; (2) present and past indicators of the firm's financial health . . ." Thus, the regulations are quite broad and do

not limit us to the four factors listed in the regulations. In addition, the consolidated financials are relevant as they represent the combined position of the group and, in many cases, it is the group resources that the parent controls and that will be used to support new start-ups, even if many of the companies are not involved with the same products. Therefore, in analyzing the creditworthiness of Hainan Jinhai and the forestry companies by themselves, we conclude as we do for SMPI, that GE and its cross-owned companies are uncreditworthy in 2003, 2004, and 2005.

Comment 13: Application of a Risk Premium to the Short-term Loan Benchmark

Petitioner contends that the Department should apply a risk premium to the short-term benchmark applied to GE's loans. Petitioner acknowledges that the Department typically does not include a risk premium for short-term loans because they are less risky than long-term loans. Petitioner believes, however, that an exception is warranted in this case because the short-term loans received by GE in many instances were more like long-term loans. Specifically, these loans were not associated with specific transactions such as discounts of accounts receivable and, hence, were not like the loans the Department considered when writing its regulation, according to petitioner. Additionally, petitioner claims, due to the immature nature of the Chinese banking system, it is not uncommon for firms to borrow short-term to finance long-term projects.

GE asks the Department to reject petitioner's argument on many grounds. First, GE contends that petitioner is asking the Department to ignore 19 CFR 351.505(a)(4)(ii), which requires the agency to base its creditworthiness assessment on the firm's ability to obtain long-term loans. Because the Department does not assess a firm's creditworthiness with respect to short-term loans, there is no basis to impose a risk premium on short-term loans, according to GE.

Second, GE points to the preambular language for this regulation, where the Department stated that it would not be appropriate to apply a risk premium when looking at short-term loans, even in situations where it was not using a company-specific benchmark. See CVD Preamble, 63 FR at 65366. GE notes that petitioner has not pointed to any precedent to support its request, and is not able to do so because the Department has never applied an uncreditworthy risk premium to a benchmark for short-term loans and has long refused to do so. See, Certain Carbon Steel Products from Brazil: Final Affirmative Countervailing Duty Determinations, 49 FR 17988, 17998 (April 26, 1984).

Third, in making its argument petitioner quotes out of context the rationale put forth by the Department in the CVD Preamble, according to GE. The examples given by the Department of why it is inappropriate to apply a risk premium do not mean that the Department will distinguish among different types of short-term loans by applying a risk premium to some and not others, in GE's view. Rather, GE claims that the Department stated categorically that it would be inappropriate to apply a risk premium in evaluating short-term loans.

Fourth, GE disagrees with petitioner's claim that many of GE's short-term loans are like long-term loans. According to GE, the Department verified that GE correctly classified its loans with repayment terms of one year or less as short-term loans. Also, GE questions petitioner's claim

that it is not uncommon for companies in China to borrow short-term to finance long-term projects. Even if true, GE claims that it is irrelevant to the question of whether loans are short-term.

Finally, GE argues that if the Department were to accept petitioner's claim that GE's short-term loans should be treated as long-term loans, the Department would have to find GE creditworthy because it received short-term loans from a privately-owned Chinese bank.

Department's Position

We have not adopted petitioner's position that a risk premium should be included in the short-term loan benchmark. Our regulations and the CVD Preamble make clear that a risk premium will only be applied to long-term loans. 19 CFR 351.505(a)(3)(iii) and (a)(4), and CVD Preamble, 63 FR at 65366.

At verification, the Department reviewed several short-term loan documents and determined that they were properly classified as short-term loans. See Gold East Paper (Jiangsu) Co., Ltd. Verification Report, at 14 -21. Petitioner cites to various loan terms to support its request. However the Department's regulations define loans as short-term or long-term based solely on whether the term of repayment is one year or less (short-term) or more than one year (long-term). See 19 CFR 351.102. Therefore, we have continued to treat these loans as short-term loans and have not applied a risk premium to them.

Comment 14: Specificity of Programs for FIEs

The GOC contests the Department's finding in the Preliminary Determination that tax programs for foreign invested enterprises (FIEs) are specific in law. In the GOC's view, the reach of this finding is unprecedented and it ignores the "rule of reason" dictated by the SAA to avoid countervailing subsidies spread throughout an economy.

In China, the GOC claims, FIEs are a distinct business form and are taxed differently from other forms of businesses in the country, just as different business forms are taxed differently in the United States. Moreover, FIEs are not anomalous or narrowly circumscribed entities, according to the GOC. Instead, they operate in a wide variety of industries and are numerous (594,000 FIEs were approved between 1978 and 2006, and a total of 218,215 were in operation at the end of 2006). Of this number, the GOC claims that 80 percent were "productive FIEs," i.e., the FIEs eligible for the tax programs in question.

The GOC contends that the Department verified that "productive FIE" status is broadly conferred and governed by well-established and transparent criteria. Thus, the GOC claims, the programs reflect generally applicable tax policy at the national and local level, which cannot be found countervailable under Article 2.2 of the SCM Agreement, nor are they de jure specific under section 771(5A)(D)(ii) of the Act. Further, there is no basis, in the GOC's view, for finding de facto specificity because FIEs operate in nearly every sector of the Chinese economy, no single category or grouping of categories is truly predominant, no industry or enterprise receives

disproportionately large benefits, and nothing in the designation process for FIEs evidences favor towards an industry or enterprise.

GE joins in the GOC's arguments and contends further that it would be inconsistent with the Department's practice if it were to find a program de jure specific when the enacting legislation names numerous enterprises and industries as beneficiaries. In support, GE lists several precedents in support of its claim. See, Preliminary Negative Countervailing Duty Determination: Certain Laminated Hardwood Flooring ("LHF") from Canada, 61 FR 59079, 59084 (November 20, 1996); Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Laminated Hardwood Flooring (LHF) from Canada, 62 FR 5210, 5205 (February 4, 1997); Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 64 FR 30636, 30647 (June 8, 1999); Final Affirmative Countervailing Duty Determination: Grain Oriented Electrical Steel from Italy, 59 FR 18357, 18364 (April 18, 1994); and Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Stainless Steel Wire Rod from Italy, 63 FR 809, 823-824 (January 7, 1998). GE also points out that the United States provides similar tax breaks under the American Jobs Creation Act of 2004, Pub. L. No. 108-357 §102, 118 Stat. 1418 (2004). According to GE, these tax breaks were designed to provide WTO-consistent tax incentives for U.S. companies and that by countervailing the Two Free/Three Half Program, the United States is deeming its own practice countervailable. Finally, GE urges the Department to clarify that the "productive" FIEs eligible for benefits under these programs are production companies, as distinguished from companies involved in wholesaling and retailing.

Petitioner supports the Department's finding that FIEs are a de jure specific group because these companies clearly constitute a group of enterprises. Petitioner objects to the GOC's argument, stating that the data regarding the number of FIEs and the number of productive FIEs was not verified. Moreover, even accepting the total number of FIEs created (not accounting for those that have ceased operation or are not productive FIEs), FIEs still amount to less than 2 percent of all Chinese enterprises. Consequently, petitioner urges, even if the Department does not find these programs to be de jure specific, it should find them to be de facto specific.

Department's Position

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. As the GOC noted in its response, 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 specific as a matter of law under section 771(5A)(D)(i) of the Act.

Having made a finding of specificity under subsection (i) of 771(5A)(D), we do not reach the

issue of whether the programs are governed by well-established and transparent criteria (subsection (ii)), or whether the benefits are de facto specific (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.

GE points to several cases in which, it claims, the Department refused to find de jure specificity in situations where the enacting legislation names numerous enterprises or industries. Based on our review of those cases, we agree that the laws or regulations establishing those programs made benefits available to firms in numerous industries, as do the various FIE programs being investigated here. However, none of the programs in the cited cases additionally restricted the recipients based on their level of foreign ownership.

Finally, without commenting on any similarities or differences between the Chinese and U.S. tax laws, we note that U.S. tax law is irrelevant to finding a countervailable subsidy in this case.

Comment 15: Over-calculation of the Two Free/Three Half Benefit

GE comments that the Department erred in calculating the benefit received by one of its cross-owned companies under the Two Free/Three Half Program because the Department computed a 30 percent tax savings. GE claims that 19 CFR 351.509(a)(1) requires the Department to measure the benefit using the tax rate the company would have paid in the absence of the program. In this case, the company would have paid tax at a rate of 15 percent in the absence of the Two Free/Three Half Program, according to GE.

Petitioner did not comment on this issue.

Department's Position:

We agree with GE that we computed a 30 percent tax savings under this program, despite the fact that the company's savings under the Two Free/Three Half Program were 15 percent. We did this because the company also received a benefit (another 15 percent tax savings) under the "Reduced Income Tax Rates for FIEs Based on Location" Program, which we also determined was countervailable. No separate, additional benefit was calculated for the latter program. Thus, there was no effect on the overall rate calculated for GE in the Preliminary Determination. However, for the final determination we are treating the two benefits separately in our calculations.

Comment 16: Specificity of VAT Programs

GE contends that the Department erred in finding that various VAT programs conferred countervailable subsidies because none of these programs is specific. With respect to VAT rebates on purchases by FIEs of domestically produced equipment, GE claims that the Department must take into account that a similar rebate is available on imported equipment. Therefore, in GE's view, there is no import substitution contingency under this program.

Moreover, the benefits under this program are available to all productive FIEs, a non-specific group, according to GE. With respect to the VAT and tariff exemptions on imported equipment, the exemption extends beyond FIEs to include a number of domestic enterprises.

Finally, GE contests the Department's finding that the Hainan Domestic VAT Refund Program is specific. According to GE, the record shows that this is a locally administered program and, hence, not specific to a particular region. In particular, GE claims that the program is administered by the Yangpu local government and is available to any high tech or labor-intensive industry in Yangpu with investments over RMB 3B and more than a thousand local employees. Thus, the Department erred in finding this program de jure specific and, moreover, should conclude that the program is not de facto specific.

Petitioner challenges GE's arguments that the VAT rebates for domestically sourced and imported equipment essentially cancel out each other. According to petitioner, GE has neither provided legal support for its argument nor evidence that the programs were enacted simultaneously (or were otherwise linked).

Regarding the domestic VAT refunds, petitioner states that GE does not point to any record evidence to support its claims. Petitioner contends that the enabling regulations for the program make clear that it is part of the GOC's program to provide special treatment to companies located in the free trade and economic development zones, and, contrary to GE's claim, localities in China do not have any independent taxing authority. Thus, in petitioner's view, the Department was correct in finding this program regionally specific under section 771(5A)(D)(iv) of the Act.

Department's Position:

Although VAT rebates are available to FIEs for both domestically sourced and imported equipment, we are analyzing the two programs separately for specificity purposes because the respondents have not demonstrated that the two programs are integrally linked.[6] As we explained in the Preliminary Determination, the burden lies with the GOC to claim that the VAT exemptions/rebates are linked and to provide evidence in support of the claim. See Preliminary Determination at 17496; CVD Preamble, 63 FR at 65357; and AK Steel Corp. v. United States, 192 F.3d 1367, 1380 - 81 (Fed. Cir. 1999). That burden has not been met because the GOC has merely stated that the policy goal of the VAT rebate on domestically sourced equipment is to equalize the tax burden on the purchase of domestic and imported equipment. Additionally, an examination of the circulars establishing the two programs, GUOFA [1997] No. 37 (related to tariff and VAT exemptions on imported equipment) and GUOSHUIFA [1999] No. 171 (related to the VAT rebate on domestically sourced equipment), shows that the two programs have different purposes and were not linked at inception. The purpose of the former program is to expand foreign capital utilization, bring advanced technologies and equipment from abroad, promote industrial adjustment and technological advance, and maintain healthy development of

[6] Two programs are "integrally linked" for purposes of determining specificity when they have the same purpose; they bestow the same type of benefit; they confer similar levels of benefits on similarly situated firms; and, they were linked at inception. See 19 CFR 351.502(c).

the economy, while the purpose of the latter is to encourage foreign-funded enterprises to use domestic equipment. See Government of China Questionnaire Response, at Exhibit 18 (January 31, 2007) and Government of China Supplemental Questionnaire Response, at 18 and Exhibit SQ-16 (March 15, 2007). Moreover, the circular establishing the VAT rebate on domestically sourced equipment, the program established later in time, makes no reference to the circular establishing the VAT and tariff exemptions on imported equipment, indicating it was not linked at its inception to the earlier program. Therefore, we continue to find the VAT rebate on purchases by FIEs of domestically produced equipment contingent on the use of domestic goods over imported goods and, hence, specific under section 771(5A)(C) of the Act.

With respect to the VAT and tariff exemptions on imported equipment, 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 we explained in the Preliminary Determination, 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 Encourage by the State," and must be approved by the State Council, NDRC, or another agency to which authority has been delegated. See Preliminary Determination at 17496. No further information has been presented since the Preliminary Determination regarding the approval process for domestic firms to receive VAT and tariff exemptions or the numbers or types of industries that receive benefits under this program. Therefore, we continue to find the VAT and tariff exemption program specific under section 771(5A)(D)(iii)(I).

Finally, we continue to find the Hainan Domestic VAT Refund Program countervailable. A closer reading of the regulation establishing this program indicates that it may be administered by the Yangpu government, as GE claims. However, it also appears that the authority for the program derives from the national government because the regulations state, "According to . . . the State Council's Reply on Attracting Foreign Investment in Yangpu Hainan . . ." and "The State Council's Reply on Sales Contract of Co-operation Right on State-owned Land in Yangpu Hainan." Therefore, we find the program specific under section 771(5A)(D)(iv).

Comment 17: Attribution of GHS' Subsidies to GE

GE contends that the Department erred in the Preliminary Determination when it attributed subsidies bestowed on GHS to the combined sales of GE and GHS. GE does not contest that the two companies are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi), but argues that because GHS did not and does not produce the subject merchandise, it does not fall under 19 CFR 351.525(b)(6)(ii).

GE charges that the standard used by the Department in the Preliminary Determination, i.e., that "there is no evidence that GHS could not produce subject merchandise," is incorrect. Preliminary Determination, 72 FR at 17486 - 7. In GE's view, the Department's regulation and precedents require that the cross-owned company actually produce the subject merchandise before its subsidies can be attributed to sales of the subject merchandise. See 19 CFR 351.525(b)(b)(ii); Preliminary Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 5967, 5970 (February 8, 2002), unchanged in Final

Determination, 67 FR 55805 (August 30, 2002); and Preliminary Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey, 67 FR 5976, 5978 (February 8, 2002), unchanged in Final Determination, 67 FR 55815 (August 30, 2002).

Moreover, GE claims, the Department cannot rely on Fabrique as that proceeding dealt with subsidies tied to subject merchandise. See Fabrique 166 F. Supp.2d at 604. The subsidies in the instant investigation are "untied" domestic subsidies. See CVD Preamble, 63 FR at 65400 (discussing tied versus "un-tied" subsidies).

Finally, GE contends that the Department should ignore the petitioner's lab test which purports to show that GHS produces subject merchandise.

Petitioner did not comment on this issue.

Department's Position:

We determine that GHS did not produce subject merchandise during the POI. Moreover, the Department also found at verification that it could not produce subject merchandise given the limitations of its machinery. See GE Verification Report, at 4-5. Therefore, pursuant to 19 CFR 351.525(b)(6)(ii), we determine that subsidies received by GHS should not be attributed to the subject merchandise .

Comment 18: Attribution of Subsidies Bestowed on Input Suppliers

GE argues that the Department erred in attributing subsidies bestowed on HJP to the combined sales of GE/GHS and HJP. GE makes the following arguments to support this claim:

HJP pulp is not and cannot be used in exported paper: GE claims that the Department verified that paper exported to the United States during the POI (and afterwards through 2007) contained no HJP pulp produced by HJP. According to GE, the verification showed that there are two reasons that neither GE nor GHS can use HJP pulp for its exported paper. Although details are proprietary, GE argues, inter alia, that using HJP pulp would be illegal. Moreover, GE claims that it demonstrated at verification that no HJP pulp could have been used inadvertently to produce exported paper because domestic pulp is segregated from pulp used for export during transport, storage and at all stages of the production process.

HJP pulp is not an "input product" under the Department's regulations: Under 19 CFR 351.525(b)(6)(iv), the Department will attribute subsidies bestowed on an input supplier to the combined sales of the input supplier and its cross-owned downstream producer if the input product is primarily dedicated to the production of the downstream product. Citing CLPP from Indonesia, 71 FR 47174 (August 16, 2006) (CLPP from Indonesia), GE contends that in the past, the Department has defined the "input product" to cover inputs into the production of the subject merchandise. GE also points to 19 CFR 351.523(b), where the Department defines "input product" as "any product used in the production of the subject merchandise." Because HJP pulp is not used to produce subject merchandise, HJP is not an input supplier and, GE argues, the

requirements of 19 CFR 351.525(b)(6)(iv) are not met in this case.

The Department cannot countervail a subsidy if it does not benefit subject merchandise imported into the United States: GE claims that the Department adopted an erroneous standard in the Preliminary Determination when it required a showing that HJP pulp cannot be used to produce CFS paper sold to the United States in order for pulp subsidies to HJP not to be attributed to exported CFS. Instead, according to GE, the statute at section 701(a)(1) requires that subsidies be provided directly or indirectly with respect to "merchandise imported, or sold (or likely to be sold) for importation, into the United States." The Department implements this, GE claims, through its "tying" regulations. See 19 CFR 351.525(b)(4) and (5). In GE's view, the statute and regulations make clear that only benefits linked or tied to merchandise imported into the U.S. market during the POI can be countervailed. This position is supported, GE claims, by Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, 67 FR 9685, 9693 (March 4, 2002) (unchanged in final determination, 67 FR 62102, and accompanying Issues and Decision Memorandum, at 19) (Cold-rolled Steel from Korea); and Ball Bearings and Parts Thereof from Thailand: Final Results of Countervailing Duty Administrative Review, 62 FR 728, 730 (January 6, 1997) (Thai Bearings).

GE also points to the binational NAFTA panel finding in Certain Durum Wheat and Hard Red Spring Wheat from Canada, Final Affirmative Countervailing Duty Determinations, USA-CDA-2003-1904-05 (March 10, 2005) (Canadian Wheat - NAFTA Panel), and to the Department's redetermination in that case. See Redetermination on Remand in the Matter of Certain Durum Wheat and Hard Red Spring Wheat from Canada: Final Affirmative Countervailing Duty Determination, USA-CDA-2003-1905-05 NAFTA Binational Panel Review (August 8, 2005) (Canadian Wheat - Remand Determination).

The Department's reliance upon CLPP from Indonesia is misguided: GE claims that in CLPP from Indonesia, the pulp and pulp logs in question were used to produce CLPP exported to the United States, unlike the situation in this case.

The Department should ignore petitioner's unsubstantiated claims regarding the quality of HJP pulp: GE contends that the Phillips "report," which was submitted by the petitioner, and addresses the feasibility of using HJP pulp in exported CFS, is irrelevant. For the reasons explained above, GE claims that the issue is whether the pulp *is* used to produce subject merchandise, not whether it *can be* used in exported CFS paper. Moreover, GE contends, petitioner has not even shown that HJP pulp *can* be used in light of Chinese law and GE/GHS' internal quality standards. Finally, other information submitted by petitioner regarding the size and quality of HJP's facilities is not relevant and, in fact, can be read to support the conclusion that HJP pulp is only for domestic sale.

In its rebuttal brief, GE elaborates on its arguments regarding the position taken by the Department in the Preliminary Determination that, "Absent a showing that the pulp cannot be used to produce CFS paper sold to the United States, there is no basis to tie subsidies bestowed

on these input products exclusively to sales in the domestic Chinese market."

First, GE claims that section 701(a)(1) of the Act clearly prohibits the Department from countervailing subsidies to HJP and that the Department's tying regulations are not and cannot be an expansion of the statute. Second, 19 CFR 351.525(b)(4) and (b)(5) relating to market and product tying demonstrate that the Department cannot countervail subsidies that do not enter the United States or are restricted to non-subject merchandise, according to GE. Third, GE claims that the cases cited by petitioner to support the position taken by the Department in the Preliminary Determination address 19 CFR 351.525(b)(5), which deals with tying of subsidies given directly to producers of the subject merchandise, and not to affiliated producers of a potential input product. Those cases also deal with situations where the inputs *could* have been used in the production of the merchandise exported to the United States, according to GE. Finally, GE asks the Department to reject petitioner's argument regarding Cold-rolled Steel from Korea because if money were fungible, as petitioner posits, then all of the Department's tying rules would be rendered meaningless.

Petitioner urges the Department to continue countervailing subsidies received by HJP. In petitioner's view, the vertically integrated SMPI companies in China provide a "textbook example" of why the CVD regulations contain a provision for attributing subsidies bestowed on input producers to the combined sales of the input and downstream products. In claiming that subsidies bestowed on HJP should not be attributed to U.S. sales of CFS, GE is effectively claiming that the subsidies are tied to either the domestic Chinese market or to non-subject merchandise, according to petitioner. However, these tying claims cannot be supported in petitioner's view. Citing CVD Preamble, 63 FR at 65403, petitioner argues that the Department determines whether a subsidy is tied based on its intended purpose at the time of bestowal, and there is no evidence that the subsidies were intended to benefit pulp used in paper for the domestic market. Where the subsidy is not tied, according to petitioner, the benefit is firm-wide. See Certain Iron Metal Castings from India: Final Results of Countervailing Duty Administrative Review, 65 FR 31515 (May 18, 2000). Petitioner further claims that the Department does not trace the actual effect of subsidies or examine events subsequent to the bestowal. See Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review, 63 FR 13626 (March 20, 1998) (IPA from Israel). Petitioner rejects GE's reliance on Cold-rolled Steel from Korea because that case involved provision of a good rather than money and, according to petitioner, money is fungible.

Petitioner puts forth the following arguments in rebuttal to GE's arguments:

The CVD law does not limit the Department to investigation of subsidies bestowed on "subject merchandise:" Beginning with the statutory language, petitioner points to the term "such merchandise" used in section 701(a)(2) of the Act, arguing that the term must refer to the "class or kind of merchandise" used in section 701(a)(1). In petitioner's view, section 701(a) read as a whole, requires the Department to impose CVDs if subsidies are bestowed on a class or kind of merchandise, regardless of whether the merchandise is actually sold in the United States. Petitioner further points to USEC Inc. et al v. United States, 281 F. Supp. 2d 1334, 1347 (CIT 2003) aff'd sub nom. Eurodif S.A. et al v. United States, 411 F.3d 1335 (Fed. Cir. 2005); and

Final Remand Determination: USEC Inc. et al v. United States, at 84-85 (March 25, 2003) pursuant to 259 F. Supp. 2d 1310 (CIT 2003), aff'd 281 F. Supp. 2d at 1347, aff'd sub nom. Eurodif S.A. et al v. United States, 411 F. 3d 1335. Petitioner claims that GE has made no argument that paper made from HJP pulp is a distinct class or kind of merchandise from that sold in the United States. Petitioner contends further that the legislative history of the *Uruguay Round Agreements Act of 1994*, Joint Report, 103d Cong. 2d Sess., 103-412, at 33, and section 771(25) of the Act make clear the distinction between "class or kind of merchandise" and "subject merchandise."

Petitioner claims that the Department's regulations at 19 CFR 351.525(b)(5)(ii) and (6)(iv) do not require inputs to be primarily dedicated to production of the subject merchandise but only to downstream products. This approach, in petitioner's view, is consistent with the Department's position that it does not need to examine the ultimate use or effect of a subsidy. Moreover, according to petitioner, the Department has addressed a similar situation in CLPP from Indonesia and found that 19 CFR 351.525 appropriately refers to downstream products and should not be limited to subject merchandise. Petitioner also points to Final Results and Partial Rescission of the Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada, 67 FR 67388 (November 5, 2002) (Canadian Lumber) where the Department rejected respondents' claim that subsidies to non-subject merchandise should not be included in the benefit calculation.

GE's preference not to use HJP pulp in CFS sold to the United States is irrelevant: Petitioner, citing CVD Preamble, 63 FR at 65361, argues that the Department is concerned with what subsidies go into the company and not with what the company does with the subsidies. Consequently, according to petitioner, the Department must disregard respondent's arguments that (1) GE does not currently use HJP pulp in its exported paper; (2) GE cannot used HJP pulp in its exported paper; and (3) GE keeps imported and domestic pulp separated.

Petitioner further contends that regardless of the feasibility of use of HJP pulp for exported CFS, it is not disputed that HJP pulp is used to make CFS. Thus, there is no basis on which the Department can determine that CFS manufactured by GE with HJP pulp should not be subject to a CVD order. In this connection, petitioner points to section 781(c)(1) of the Act, which states that the class or kind of merchandise subject to an order, "shall include articles altered in form or appearance in minor respects," and to Wheatland Tube Co. V. United States, 161 F.3d 1365, 1370 (Fed. Cir. 1998).

Petitioner additionally states that contrary to GE's claim, Chinese law does not prohibit GE from using domestic pulp in exported CFS. Instead, according to petitioner, any restrictions are self-imposed by GE.

The Department should disregard GE's arguments that rely on Canadian Wheat - NAFTA Panel because that decision has no precedential value: Petitioner argues that the Department cannot determine issues in this case based on binational panel decisions because such decisions are non-precedential.

Department's Position:

We acknowledge that HJP pulp was not used to produce the CFS that GE exported to the United States during the POI. Nonetheless, we continue to attribute subsidies bestowed on HJP to CFS produced by GE, including CFS exported to the United States, based on the standard articulated in our Preliminary Determination, i.e., "absent a showing that the domestic pulp cannot be used to produce CFS sold to the United States, there is no basis to tie subsidies bestowed on these input products exclusively to sales in the domestic Chinese market." Preliminary Determination, 72 FR at 17487. Having carefully reviewed the evidence in this investigation, we determine that HJP pulp could be used to produce CFS for the United States and was used to produce in-scope CFS that was sold during the POI. The fact that it was not used in producing CFS that was exported to the United States resulted from business decisions made by GE.

GE's arguments go to these two basic points: the correct standard for determining whether subsidies on inputs should be attributed to particular downstream products, and whether HJP pulp can be used to produce CFS exported to the United States. We address the comments relating to the standard here, but our response to the latter arguments relies on business proprietary information and is presented in a separate memorandum. See BPI Memo at Comment 1.

Section 351.525(b)(6)(iv) of our regulations addresses situations where cross-owned suppliers receive subsidies and directs that those subsidies be attributed to the combined sales of the input and downstream products, as long as the input product is primarily dedicated to the production of the downstream product. There does not appear to be any dispute in this case that pulp is primarily dedicated to the production of paper, as the Department found in CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 3. However, GE challenges the relevancy of CLPP from Indonesia because in that case, unlike here, the pulp was used to produce in-scope merchandise exported to the United States. Although GE's characterization of the facts in CLPP from Indonesia is correct, GE misstates the legal standards set forth in 19 CFR 351.525(b)(6)(iv), i.e., whether HJP pulp is an input product used in the production of the downstream product.[7]

GE and petitioner cite several cases that they argue answer the question of whether subsidies on an input that is not used to produce merchandise exported to the United States can, nonetheless, be attributed to those exports. Based on our review of those cases, we find that none deals with 19 CFR 351.525(b)(6)(iv). However, in Canadian Lumber, the Department faced a similar fact pattern that is addressed in 19 CFR 351.525(b)(5)(ii). See Canadian Lumber, 67 FR 67388, and accompanying Issues and Decision Memorandum, at Section III, Comment 8. Subparagraph (b)(5)(ii) deals with situations where the input and downstream products are both produced by

[7] GE contends that the Department has defined the term "input product" to mean an input into the "subject merchandise." GE is correct that such a definition is included in 19 CFR 351.523(b), but its application is limited to that section of the regulations that addresses upstream subsidies. Also, we note that the term "subject merchandise" as defined in section 771(25) of the Act means, "the class or kind of merchandise that is within the scope of an investigation" and is not limited to only products exported to the United States.

the same corporation (as opposed to two cross-owned corporations) and, like subparagraph (b)(6)(iv), requires that subsidies tied to the input product will be attributed to both the input and downstream products.

In Canadian Lumber, only one of the respondent's mills produced the subject merchandise. See Canadian Lumber, 67 FR 67388, and accompanying Issues and Decision Memorandum, at Section III, Comment 8. The respondent claimed, therefore, that the subsidized inputs into its other mills that did not produce subject merchandise should not be included in the subsidy calculation. The Department disagreed stating, "Nothing in the regulations directs the Department to trace the input to the downstream output and to ascertain that the output is an in-scope product before determining whether the input carries a subsidy." Id.

In the instant proceeding, GE is essentially asking us to trace the subsidized pulp input to non-U.S. merchandise. While Canadian Lumber dealt with tracing inputs to in-scope and out-of-scope merchandise, we believe the same principle applies to tracing inputs to merchandise sold to the United States and merchandise sold to other markets. In general, the Department does not trace subsidies. See CVD Preamble, 63 FR at 65403, and, e.g., Canadian Lumber, 67 FR 67388, and accompanying Issues and Decision Memorandum, at Section III, Comment 8.

IPA from Israel also supports our decision not to trace subsidized inputs. See IPA from Israel, 63 FR at 13628 - 30. In that case, the Department rejected the methodology it had used in prior reviews of apportioning subsidies bestowed on inputs (phosphate rock and green acid) to the output (IPA) according to the consumption of each input product in IPA production. In adopting its new methodology, the Department reasoned that the benefit flowed equally to all downstream products that could use the subsidized inputs, including IPA, even if the some of the subsidized inputs were not actually used to produce IPA during the period of review. Id. Thus, rather than tracing subsidized inputs from the mines through the production process into particular downstream products, the Department attributed the input subsidies to all of the downstream products they could be used to produce, regardless of whether they were in fact used during any given proceeding. Id.

GE also points to Cold-rolled Steel from Korea. See Cold-rolled Steel from Korea, 67 FR at 9693. In that case, the Department was investigating the government's provision of an input (hot-rolled coil) for less than adequate remuneration. Because one of the respondents did not purchase the input to produce the subject merchandise, the Department did not calculate a subsidy for the cold-rolled products under investigation. However, in this case, the subsidy goes into the subject merchandise as defined in section 771(25) of the Act.

Canadian Wheat - Remand Determination also deals with a situation where the Department was attributing a subsidy given directly to the exporter of the merchandise, and not to an input supplier. See Canadian Wheat - Remand Determination at p. 22. Because the Canadian government had to approve the countries eligible to receive a lending guarantee, and the United States was not an approved country, the Department found that the subsidy conferred by the lending guarantees was tied to other markets. Id. This was a straightforward application of the tying rule in 19 CFR 351.525(b)(4). There is no claim in the instant proceeding that subsidies to

HJP are tied in this manner to non-U.S. markets.

GE also cites to the 1994 administrative review in Thai Bearings as a case where the Department sought information from an input supplier only after the Department learned that the input in question was used to produce merchandise exported to the United States. See Thai Bearings, 62 FR at 730. In that case, it appears that the administrative review was requested for certain companies within a group and the Department only learned at verification of the additional group member, at which point the Department requested a response from that company. Regardless of what prompted the Department to seek subsidies information from this input supplier, the administrative review in question was conducted under proposed rules that did not address the attribution of subsidies on inputs. See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments, 54 FR 23366 (May 31, 1989). The current CVD regulations present a much clearer description of how subsidies to separately incorporated, cross-owned companies will be addressed.

Beyond the regulations and case precedents, GE argues that section 701(a)(1) of the Act requires that subsidies be provided directly or indirectly with respect to "merchandise imported, or sold (or likely to be sold) for importation into the United States." We disagree that section 701(1)(a) of the Act precludes the Department from applying countervailing duties to GE's CFS. To accept GE's interpretation of this provision would mean that the Department would have to trace subsidies and subsidized inputs on a dollar-by-dollar, input-by-input basis through the recipient companies and their production processes. As noted above, tracing subsidies is neither practical nor required by the CVD law. Instead, the Department has devised attribution rules that reasonably assign benefits based on who receives the subsidy and the express purpose of the subsidy at the time it was bestowed. See CVD Preamble, 63 FR at 65403 - 65404. Furthermore, the CIT has rejected the same argument put forward by GE. In Fabrique 166 F. Supp. 2d at 603, the court stated "There is nothing in the statute or case law to suggest that those specific items actually imported into the United States must have benefitted from the subsidies."

GE also raises the issue that several of the case precedents discussed above relate to situations where the input could have been used to produce the merchandise exported to the United States, while HJP pulp cannot be used for that purpose. As we noted, our findings regarding HJP pulp are necessarily addressed in a separate See BPI Memo at Comment 1. However, we are able to address in this memorandum why we include subsidies bestowed on inputs that could be used to produce subject merchandise exported to the United States, even if the inputs are not actually used for that purpose during a given period of investigation or review.

Whether a producer uses a particular input is usually driven by business considerations. For example, a producer may choose different inputs based on the demands of different customers. Also, government regulations may make it more or less costly to use certain inputs depending on where the product is to be sold. In such situations, it is perfectly rational for the producer to create a business model that takes these factors into account. However, these business choices should not dictate how the Department attributes subsidies bestowed on the inputs. As explained above, the Department has implemented tying regulations to attribute subsidies rather than tracing subsidies through the company. By analogy, we will not trace subsidized inputs through

a company's production process.

Comment 19: Whether the Department's Cross-ownership Regulations Provide for the Attribution of Upstream Subsidies to Cross-owned Companies

GE claims that the Department's regulation regarding attribution of input subsidies to downstream products, 19 CFR 351.525(b)(6)(iv), is inconsistent with the statute because the statute directs how input subsidies should be addressed in section 771A of the Act (regarding upstream subsidies). Contrary to the scheme established in section 771A of the Act, the Department's regulation creates an irrebutable presumption that an upstream subsidy benefits the downstream product when cross-ownership exits, according to GE. If Congress had intended an exception to the upstream subsidy provision for transactions between cross-owned companies, it would have drafted the provision differently, according to GE.

Petitioner objects to GE's position stating that 19 CFR 351.525(b)(6)(iv) comports with the intent of section 771A of the Act and cites, in support, Canadian Meat Council et al. v. United States, 661 F. Supp. 622, 627 (CIT 1987). Petitioner points out that the requirement for cross-ownership is stringent, requiring more than mere affiliation (which would be addressed under the upstream provision). As a refinement of the Department's practice of countervailing subsidies bestowed on inputs, petitioner claims that 19 CFR 351.525(b)(6)(iv) is not ultra vires to the statute. Finally, petitioner cites to CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 2, where the Department has already addressed the consistency of its attribution rule with the upstream provision in the Act.

Department's Position:

There is no indication that the statutory provision for upstream subsidies was intended to be the only provision that addresses subsidies bestowed on input products. The Department has squarely addressed this issue in CLPP from Indonesia. CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 2.

Section 351.525(b)(6)(iv) of the Department's regulations provides that, if there is cross-ownership between an input supplier and the producer of a downstream product, and the input product is primarily dedicated to production of downstream product, the subsidy to the input supplier is attributed to sales of both the input and the downstream product. The Department also possesses authority to conduct upstream subsidy investigations pursuant to section 771A of the Act, which the Department has implemented through 19 CFR 351.523. Upstream subsidy investigations examine purchases of inputs from affiliates that are "used in the production of the subject merchandise." See 19 CFR 351.523. Further, the legislative history makes it clear that the intent of Congress in enacting the Trade and Tariff Act of 1984 was to broaden the Department's ability to examine upstream subsides when companies are not cross-owned, not to restrict the Department's abilities to countervail subsidies received by cross-owned companies. See Report of the House Committee on Ways and Means, H.R. Rep. No. 98-725 (1984) at 7,

33 -34.

When the issue is the validity of a regulation issued under a statute an agency is charged with administering, it is well established that the agency's construction of the statute is entitled to great weight. See Melamine Chem., Inc. v. United States, 732 F.2d 924 (Fed. Cir. 1984) ("Melamine Chem"). In Melamine Chem the Court stated "{A}gency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute." Id. at 928. Thus, the question is whether regulation is based on a permissible construction of the statute. See, e.g., Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213, 1216 (CIT 1998); see also RSI (India) Pvt., Ltd., v. United States, 687 F. Supp. 605, 610 (CIT 1988) (Court must accord substantial weight to an agency's interpretation of the statute it administers).

Section 351.525(b)(6) is not inconsistent with the statute. The CIT has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. See Fabrique 166 F. Supp. 2d at 603. As the Court noted in Fabrique, "{t}he underlying rationale for attributing subsidies between two separate corporations {with cross-ownership} is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits)." Id. at 600 (citing CVD Preamble, 63 FR at 65401).

The Department specifically considered the proper treatment of cross-owned companies relative to the upstream subsidy provision of the statute. In the Department's proposed CVD regulations, the term "cross ownership" was applied in the context of upstream subsidy investigations. See Proposed Rules: Countervailing Duties, Part II, 62 FR 8818, 8843 (February 22, 1997). In the CVD Preamble to the Department's final regulations, however, the Department explained it was specifically changing the standard for upstream subsidy investigations from cross-ownership to affiliation, noting that attribution and cross- ownership were addressed in a different provision of the final regulations. See CVD Preamble, 63 FR at 65390. As the Department explained, it re-examined the initial upstream subsidy regulation based upon numerous objections that the Department was elevating form over substance. Focusing upon inputs purchased from affiliates and used to produce subject merchandise in upstream subsidy investigations is strictly consistent with the statute.

As accepted by the Court in Fabrique, the attribution between cross-owned companies does not exceed the Department's authority to investigate upstream subsidies. See Fabrique 166 F. Supp. 2d at 603. Rather, our attribution regulation addresses a separate situation, namely, where one corporation can use or direct the individual assets of the other. With regard to attribution, in the final regulation, the Department explained that

> The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product - - the type of input that is merely a link in the overall production . . . Accordingly, where the input and downstream production takes place in

> separately incorporated companies with cross-ownership and the production of the input is primarily dedicated to the production of the downstream product, paragraph (b)(6)(iv) requires the Department to attribute the subsidies . . . to the combined sales of the input and downstream product.

See CVD Preamble, 63 FR at 65401. Countervailing duties are intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from subsidies paid by their governments. See Zenith Radio Corp. v. United States, 437 U.S. 443, 455-56 (1978). The narrow reading given to the statute by respondents would undermine the purpose of the statute by allowing a company to "avoid countervailing duty exposure for input subsidies simply by separately incorporating the division that makes the input," while retaining the ability to control the division's assets. See CVD Preamble, 63 FR at 65401. Therefore, we have continued to apply 19 CFR 351.525(b)(6)(iv) in this case.

Comment 20: Attribution of Subsidies Bestowed on the Forestry Companies to CFS

For the same reasons that the Department should not attribute subsidies bestowed on HJP pulp to CFS, GE contends that the Department should not attribute any subsidies to the cross-owned forestry companies to CFS.

Petitioner claims that all subsidies to the cross-owned forestry companies should be attributed to CFS.

Department's Position:

For the reasons explained in response to Comment 18, we are attributing subsidies bestowed on HJP pulp to the downstream products, including CFS, produced by GE and other cross-owned companies. As the Department found in CLPP from Indonesia, pulp is produced from pulp logs. CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 3. This conclusion from CLPP from Indonesia is not disputed in this investigation. Therefore, in accordance with 19 CFR 351.525(b)(6)(iv) and consistent with CLPP from Indonesia, we have attributed the subsidies received by GE's cross-owned forestry companies to the downstream products, including CFS produced by GE.

Comment 21: Rate Adjustment for GE's Ad Valorem Subsidy Rate

GE contends that the "export value" recorded in GE/GHS' books does not reflect the actual U.S. price because there is a mark-up on those sales by the affiliated company, China Union (CU). The method the Department used in its Preliminary Determination is not correct and will result in an over-collection of duties. Citing 19 CFR 351.525(a), GE states that the sales value will normally be determined on a f.o.b. (port) basis. To achieve the correct result in this case, GE argues that the Department should follow the methodology adopted in Ball Bearings and Parts Thereof From Thailand; Final Results of Countervailing Duty Administrative Review, 57 FR 26646 (June 15, 1992) (Antifriction Bearings from Thailand).

In that case, the Department made an adjustment to the ad valorem subsidy rate 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. GE states that its sales meet these criteria, as demonstrated in its response and at verification.

GE further argues that if the Department chooses not to follow the adjustment methodology put forth in Antifriction Bearings from Thailand, it should use CU's sales prices (which are the basis for the declared customs values of merchandise as it enters the United States).

Petitioner, in rebuttal, states that the Department's regulations and policies indicate that the Department should use CU's f.o.b. sales values in the calculation of the ad valorem subsidy rate. The petitioner states that the Department should not apply the adjustment methodology as provided in Antifriction Bearings from Thailand. The petitioner asserts that application of the adjustment would allow GE to alter its future subsidy rates by adjusting its sales price to CU.

Petitioner argues that Antifriction Bearings from Thailand preceded the Department's current regulations, which clearly specify how to calculate ad valorem subsidy rates. It asserts that the CVD Preamble describes a similar adjustment in which the Department used "a ratio of the invoice value of exports to the United States to the f.o.b. value of exports to the United States." CVD Preamble, 63 FR 65399. Petitioner notes that the above experiment failed and the Department reverted back to its traditional f.o.b. methodology. Id. Petitioner also argues that the current f.o.b. methodology does not result in an over-collection of duties, but merely places a burden on respondents to adjust their book values when reporting data. Therefore, instead of using a potentially manipulated adjustment, the Department should use CU's f.o.b. sales value.

Finally, Petitioner provides further arguments that involve proprietary information. We addressed these comments in a separate memorandum. See BPI Memo at Comment 3.

Department's Position:

Based on our further analysis of Antifriction Bearings from Thailand and Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France, 66 FR 65901 (December 21, 2001), and accompanying Issues and Decision Memorandum at "Treatment of the Ad Valorem Rate Calculation and the Denominator" (Uranium from France), we are making the adjustment requested by GE. Specifically, we agree that GE has met the unique circumstances under which we will consider making such an adjustment. As in Antifriction Bearings from Thailand, the value of the subject merchandise entering the United States is greater than the sales revenue received by GE due to a sizeable mark-up charged by the affiliated, third-country exporter of the merchandise to the United States; the sales values to which the Chinese subsidies are being attributed do not include the mark-up; and failure to make

the adjustment would result in the collection of CVDs in amounts greatly exceeding the subsidy. Additionally, we verified that the merchandise is shipped directly to the United States, and that the invoices can be tracked as back-to-back invoices that are identical except for price as in Antifriction Bearings from Thailand. See GE Verification Report, at 9 - 11.

Petitioner has argued that Antifriction Bearings from Thailand precedes the Department's regulations. However, the Department has also used this methodology in Uranium from France, which post-dates the adoption of the current regulations. See Uranium from France, Issues and Decision Memorandum at "Treatment of the Ad Valorem Rate Calculation and the Denominator." Although Uranium from France presented the Department with a different situation than that in Antifriction Bearings from Thailand, the issue was comparable in that the Department wanted to "ensure that we are only collecting duties equal to the amount of the countervailable subsidies." See id. To address this, the same methodology employed in Antifriction Bearings from Thailand was also used in Uranium from France. While we expect that the criteria for such an adjustment will rarely be met, we are satisfied that GE's situation warrants the adjustment.

We acknowledge petitioner's concern about GE's ability to manipulate the CVD rate in the future by adjusting its sales price to CU. However, this is not a basis to deny the adjustment given its consistency with our past practice. Instead, we agree that this may be an issue to examine in future reviews, and, if this investigation results in a CVD order, we will carefully monitor the continued basis for making this adjustment in those future proceedings in order to avoid any such manipulation.

Accordingly, we have applied the adjustment described in the "Treatment of the Ad Valorem Rate Calculation and the Denominator" section above, for each program used by GE.

Comment 22: Subsidies to Forestry Companies Discovered After the Preliminary Determination

The petitioner asks the Department to find countervailable certain benefits received by the SMPI forestry companies that were not reported until after the Preliminary Determination, when the companies submitted their financial statements and tax returns. Among these programs are payments under the Grain for Green Program. Petitioner alleges that these payments are direct transfers of funds that provide recurring benefits, and are specific because they are limited to forestry companies. The petitioner also argues that some of the benefits were only addressed at verification and, therefore, the Department would be justified in finding these benefits countervailable as facts available.

GE claims that the forestry programs alleged in the petition were examined thoroughly at verification and found to not be used. GE further contends that the Department has no basis to investigate or countervail "suspicious" entries in the SMPI companies' financial statements, particularly as there is no basis for finding any of these benefits countervailable. Finally, GE argues that the petitioner's allegations are untimely. According to 19 CFR 351.311, the Department will not investigate new subsidy allegations, or what appear to be new subsidies

where there is insufficient time to do so. In this instance, the petitioner's allegations come less than six weeks before the final determination and it is clear that the time for investigating these claims has passed. In support, GE cites to Bethlehem Steel Corporation, et al., v. United States, 162 F. Supp.2d 639, 642-43 (CIT 2001); and Final Results and Partial Rescission of Countervailing Duty Administrative Review": Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 68 FR 13267 (March 19, 2003) and accompanying Issues and Decision Memorandum at Comment 4 (Stainless Steel Sheet and Strip in Coils from Korea).

Department's Position:

The Department first became aware of these programs when, in response to the Department's April 20, 2007, request, GE submitted the 2005 income tax returns and 2001 - 2005 financial statements for its cross-owned forestry companies. These responses were received on May 25, 2007, and June 18, 2007. The Department scheduled verification to begin on June 18, 2007 (with a June 14, 2007, deadline for factual information), which was later postponed until July 11, 2007 (with a July 5, 2007 deadline for factual information). See Letter from Susan Kuhbach, Director, to the GOC, "Countervailing Duty Investigation: Coated Free Sheet Paper from the People's Republic of China" (May 31, 2007) and Letter from Susan Kuhbach, Director, to the GOC, "Countervailing Duty Investigation: Coated Free Sheet Paper from the People's Republic of China" (June 11, 2007). Thus, we did not have sufficient time to send a questionnaire to the government authorities administering the programs or to request additional information from the GE affiliates prior to verification. While we were able to gather some information in the course of the GE verification, this information does not permit us to determine whether these programs meet the elements laid out in sections 771(5) and (5A) of the Act to find a subsidy. The most notable omission is that the Department does not have the necessary information on the record to make a specificity decision according to 771(5A) of the Act.

Our regulations at 19 CFR 351.311(b) and (c) discuss how we will handle practices discovered in the course of an investigation that appear to be subsidies. According to 19 CFR 351.311 (c), "If the Secretary concludes that insufficient time remains before the scheduled date for the final determination . . . the Secretary will: (2) During an investigation or review defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any."

As explained above, we did not have sufficient time to investigate these programs given the short time between receipt of the information and verification. Therefore, in accordance with 19 CFR 351.311(c)(2), the Department will defer a determination on the alleged benefits until a subsequent review, if any.

Comment 23: Correction to GE's Domestic Sales Value

GE argues that the Department incorrectly used the c.i.f. factory value of GE's domestic sales in the denominator for its rate calculations for the Preliminary Determination. GE states that 19 CFR 351.525(a) requires the Department to use the f.o.b. value instead.

Petitioner did not comment on this issue.

Department's Position:

In the Preliminary Determination, we used the sales values reported by GE and GHS, and the sales values reported or provided in the financial statements from GE's cross-owned companies. This is the first instance that GE has characterized those amounts as c.i.f. values. In its May 25, 2007 submission, GE stated at page 15 that the Department, "improperly determined the ad valorem subsidy over a hybrid denominator that included the marked-up export sales values *plus f.o.b. factory value of domestic sales*"(emphasis added) in the Preliminary Determination. Furthermore, it stated on the same page that "GE/GHS reported in their supplemental response of April 17 {(originally filed on March 9th and the basis of our denominator in the Preliminary Determination)} . . . (since revised in Exhibit S3-16) . . . the f.o.b. export values for U.S. and third-country sales and the *f.o.b. factory values for domestic sales*" (emphasis added). No changes to the domestic sales value were made in the revised exhibit. We further note that GE did not submit subsequent responses that adjusted GE's or the cross-owned companies' domestic sales values because it had previously reported or claimed that the Department used c.i.f. values. Moreover, there were no indications or statements by officials at verification that any reconciled sales value contained c.i.f. values. As GE has not provided specific examples in its case brief of the Department using c.i.f. domestic values, we are continuing to treat the reported amounts as f.o.b. values.

Comment 24: Application of Adverse Facts Available to Chenming

Petitioner argues that Chenming's failure to cooperate with the Department's investigation warrants the use of total AFA under section 776(b) of the Act. On June 13, 2007, Chenming filed a letter stating that it was withdrawing from the investigation as an active participant and petitioner notes that at that time the Department had outstanding questionnaires to which Chenming never responded. Petitioner further asserts that the responses Chenming provided before withdrawal were incomplete and were never verified.

Petitioner argues that the Department has ample information in the Petition and on the record in this case to make an AFA determination with regard to Chenming. Petitioner maintains that the Department should not base its determination on any of the information supplied by Chenming and cites to Certain Lined Paper Products from Indonesia, in which the Department found that, "by refusing verification, respondents effectively nullified their responses." See CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 1. Moreover, petitioner argues that the Department must use AFA "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." SAA at 870.

In its case brief, petitioner provides its views on the appropriate AFA rate for each alleged

subsidy. Petitioner advocates that the Department assume that subsidies were provided to cross-owned input suppliers (subsidiaries in the Chenming Group) and are attributable to CFS sales or CFS export sales, depending on the program. Petitioner further proposes that the Department adversely infer that the Chenming Group's forestry and pulping operations benefitted from government loans, tax programs and grants.

For policy lending, petitioner argues that the Department should make the adverse inferences that: (i) Chenming is uncreditworthy; (ii) the total policy loans outstanding for Chenming equal aggregate Chenming "borrowing" and "convertible loan note" amounts from the consolidated financial statements for the Chenming group provided in the petition; (iii) the weighted-average interest rates reported in the consolidated financial statements were paid on outstanding loans; and (iv) the resulting benefit was attributed to CFS sales. See 2005 Shandong Chenming Consolidated Financial Statements, Petition, Volume III, Exhibit III-12 at Notes 26 and 27 (October 31, 2006) (2005 Financial Statements). See also Petitioner's Case Brief, Exhibits 1-3 (September 7, 2007).

Petitioner proposes that we calculate a lump sum benefit for all income tax exemption or reduction programs based on the adverse assumption that Chenming paid no taxes. To calculate this, petitioner recommends that we use a public profit figure from Chenming's 2005 unaudited Annual Report and apply a normal corporate rate of 30 percent, attributing the benefit to CFS export sales. See 2005 Chenming Annual Report, Petition, Vol. III, Exhibit III-13, at 26.

For VAT and duty exemptions, petitioner would use the benefit values from the public version of Chenming's preliminary determination calculations, but would attribute the benefit to CFS exports only. Petitioner proposes that the Department countervail all "expansion grants" reported for the Chenming group in the 2005 Consolidated Financials as a separate item and attribute the reported amount to CFS sales. In addition, it would have the Department calculate separate subsidy rates for the State Key Technology Renovation Project Fund grants and Chenming's "Other Subsidies" based on the benefit values from the Preliminary Determination, but, in the case of the "Other Subsidies," use CFS export sales as the denominator in the subsidy rate calculation.

No other interested party commented regarding the calculation of Chenming's final determination net subsidy rate or rebutted the positions taken by petitioner on AFA treatment for Chenming in the final determination.

Department's Position: For reasons explained in the Federal Register notice, we agree with petitioner that AFA treatment is warranted for Chenming in the final determination. However, for reasons discussed below, we have not used the approach proposed by petitioner for calculating the net subsidy rate.

We are not using information from Chenming's response, in particular sales values reported by the company, because it withdrew from the case and no verification of the company was conducted. Therefore, the respondent effectively nullified the response. As a result, we are not

making petitioner's suggested AFA calculations, which incorporate the sales values reported by Chenming. See, e.g., CLPP from Indonesia, 71 FR 47174, and accompanying Issues and Decision Memorandum at Comment 1. We also are not using the financial data from the 2005 consolidated financials statements because they do not break out the subsidy values or sales values for those entities in the Chenming Group that produce CFS. We are not using a Chenming tax return provided by the GOC because it is a return filed in 2006 for tax year 2005. Any benefits shown on this return would be realized in the year it was filed, which is the year after the POI. 19 CFR 351.509(b) provides that for direct tax programs we "normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay taxes associated with the exemption or remission. Normally this date will be the date on which the firm filed its tax return." We also are not using other Chenming subsidy data provided by the GOC because we do not have verifiable Chenming sales values to use as denominators in our subsidy rate calculation.

Instead, the Department has decided, as AFA, to use the highest available calculated subsidy rates from the other respondent in the final determination of this investigation, GE. This is consistent with the Department's approach in Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006) (Pistachios AR). In that case, the Department used the highest rate listed for a subsidy program in the final determination of that proceeding.

We do not need to corroborate the calculated subsidy rates we are using as AFA because they are not considered secondary information as they are based on information obtained in the course of this investigation, pursuant to section 776(c) of the Act.

In the Preliminary Determination, based on the information provided in Chenming's questionnaire responses, we found that Chenming received benefits from eight different countervailable subsidy programs or groups of programs. For purposes of this final determination, as we were unable to verify which programs actually conferred benefits on Chenming, we are making the adverse inference that Chenming received countervailable benefits under 20 of the 22 subsidy programs alleged by petitioner during the course of this proceeding. See "Use of Adverse Facts Available" section above. Two of the alleged subsidy programs are excluded from our AFA calculation for Chenming because record evidence indicates that these programs could not have conferred countervailable benefits on Chenming during the POI. The first, "Exemption from Payment of Staff and Worker Benefits for Export-oriented Enterprises," was terminated on January 1, 2002, and no residual benefits would exist in our POI. See above, at "Analysis of Programs" section. The "Debt-to-Equity Swap for APP China" allegation is based on the particular situation of the parent company of the other respondent in the investigation and is, thus, not applicable to Chenming. See above, at "Analysis of Programs" section.

Based on adverse inferences, for each of the 20 programs that we are treating as countervailable for Chenming, we are assigning the highest calculated CVD rate received by GE for the same "type" of subsidy program, where possible. See "Use of Adverse Facts Available" section

above. For example, we have assigned GE's highest calculated CVD rate for any of the income tax programs to all nine of the income tax programs we are countervailing for Chenming. On that same basis, we are applying the rate received by GE under the "Policy Lending" program to Chenming for both the "Policy Lending" program and the program providing discounted loans to export-oriented enterprises. Further, GE's highest program rate for VAT and tariff exemptions or refunds (VAT and Tariff Exemptions on Imported Equipment) will apply to the three corresponding Chenming programs. Regarding grant programs, the two in which GE participated both yield minuscule benefits. Consequently, if we were to apply GE's grant rates to the six grant programs we are countervailing for Chenming, the result would be significantly less adverse than what we obtained in the Preliminary Determination using Chenming's own information for these programs. In other words, if we used GE's rate for these programs, Chenming would receive a lower rate than it likely would have had it fully participated. Therefore, for each of the six grant programs we are countervailing for Chenming in the final determination, we are using the highest subsidy rate from any GE program as the AFA rate.

Comment 25: Certification of Non-Reimbursement of Duties

Petitioner states that 19 CFR 351.402(f)(2) requires that importers certify whether they have been reimbursed any or all duties assessed on goods under an AD or CVD order. Petitioner argues that in accordance with this regulation, if the Department determines that imports of subject merchandise have benefitted from countervailable subsidies and imposes a CVD order, it should instruct the United States Customs and Border Protection (CBP) to require that importers file the certificate regarding reimbursement prior to liquidation.

Department's Position: The Department agrees with petitioner, provided that a companion AD order is also imposed. If the Department imposes both a CVD order and a companion AD order on CFS from the PRC, then, in accordance with 19 CFR 351.402(f)(2), it will instruct CBP, prior to liquidation of any covered entries, to require that importers provide certificates regarding the reimbursement of both AD and countervailing duties for covered entries. To be clear on this point, we note that the reimbursement regulation is only relevant with respect to reimbursement of countervailing duties in the context of an AD duty order. Conversely, the reimbursement of countervailing duties would not have an effect if there were only a CVD order in place.

The reimbursement regulation calls for a deduction in export price in an amount equal to the CVD reimbursed. 19 CFR 351.402(f)(1)(i). Pursuant to the statute, the Department uses export price in determining the dumping margin, and thus the amount of the AD duty. See Sections 731, 771(35)(A) of the Act. By contrast, in a CVD proceeding, the Department is concerned with whether an authority has provided a financial contribution which confers a benefit. See Section 771(5)(B) of the Act. That is, the Department focuses on whether the foreign government has granted a countervailable subsidy. The Department does not engage in a comparison of the price paid by the importer with any other price for purposes of determining the amount of countervailing duties. The terms "export price" and "constructed export price" have no relevance to a CVD proceeding.

The preamble to the Department's regulations confirms that the reimbursement regulation does not apply when there is only a CVD order:

> A deduction for reimbursed countervailing duties neither increases the amount of countervailing duties assessed nor imposes duties for the same situation of dumping and export subsidization. The deduction simply recognizes that the reimbursement of countervailing duties constitutes a reduction in the price paid by the purchaser. Moreover, any reimbursement of countervailing duties on specific sales is directly tied to such sales and is no different in substance from any of the other types of price adjustments that the Department routinely factors into its calculations.

62 FR 27296, 27355. As is clear from the preamble, the aim of a CVD proceeding is to address the action of a foreign government, whereas the aim of an AD proceeding is to address the pricing behavior of exporters or producers. Accordingly, the Department has recognized that its adjustment to export price for the reimbursement of countervailing duties would have no effect on the countervailing duty itself.

Based upon the above, in determining the amount of AD duties, export price or constructed export price is reduced by the amount of any countervailing duty paid directly or reimbursed by the exporter or producer. This is equivalent to an increase in the AD duty in the amount of countervailing duty that has been reimbursed. However, no adjustment to the amount of countervailing duties determined by the Department is necessary or lawful for purposes of addressing reimbursement of countervailing duties.

Recommendation

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

AGREE ____ DISAGREE ____

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David M. Spooner
Assistant Secretary
for Import Administration

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(Date)