GPX International Tire Corporation v. United States, Consol. Court No. 08-00285
Slip Op. 09-103 (September 18, 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("Court") in GPX International Tire Corporation v. United States, Consol. Court No. 08-00285, Slip Op. 09-103 (Sept. 18, 2009) ("GPX"). The Court's opinion and remand order were issued in connection with Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 FR 51624 (Sept. 4, 2008) ("Final AD Determination"), and Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) ("Final CVD Determination"), as well as the accompanying Issues and Decision Memoranda and the resulting antidumping duty ("AD") and countervailing duty ("CVD") orders.

In GPX, the Court found that the Department has the authority to apply the CVD law to products from non-market economy ("NME") countries such as the People's Republic of China ("PRC" or "China"). GPX, Slip Op. 09-103, at 13. However, the Court also found that the concurrent imposition of CVDs on products from the PRC and application of the Department's NME AD methodology has a "high potential" for, and could "very well" result in, double remedies. GPX, Slip Op. 09-103, at 13, 17, 19. Further, the Court found that the Department's decision to not address the request by Hebei Starbright Tire Co., Ltd. ("Starbright") for market-oriented enterprise ("MOE") treatment was arbitrary. GPX, Slip Op. 09-103, at 24. Finally, the

Court decided that the Department's application of a December 11, 2001, uniform "cut-off date" for identifying and measuring subsidies in China was arbitrary and unsupported by the evidence. GPX, Slip Op. 09-103, at 31.

In the remand order, the Court ordered the Department either to forego imposition of CVDs on the merchandise at issue, or to adopt additional policies and procedures to adapt the Department's NME AD methodology and CVD methodology to account for the imposition of CVDs on merchandise from the PRC. GPX, Slip Op. 09-103, at 33. The Court also ordered the Department (if it decides to impose CVD remedies) to refrain from using a uniform cut-off date for identifying and measuring subsidies and to evaluate the specific facts of each subsidy to determine what kind of subsidy exists and whether it is measurable. Id.

At the outset, the Department notes that it respectfully disagrees with the Court's findings that led to the remand order. In particular, we disagree that there is a high potential for double remedies from the concurrent application of the NME AD methodology and our CVD methodology in this case, such that additional policies or procedures are necessary to "adapt" the two methodologies. Further, we disagree with the Court's findings regarding the necessity of considering MOE treatment for Starbright, and we disagree that application of a December 11, 2001, cut-off date for identifying and measuring subsidies in the PRC is arbitrary and unsupported by the evidence.

Nevertheless, we are complying with the Court's order, under protest, and addressing all of these issues on remand. To address the Court's concerns about the potential for double remedies, we have decided to continue to impose CVD remedies on imports of certain new pneumatic off-the-road tires ("OTR Tires") from the PRC, but we are offsetting those CVDs against GPX/Starbright's calculated AD cash deposit rate. We have given consideration to

Starbright's MOE request and the specific criteria identified by Starbright in support of its request and we determine that Starbright has not demonstrated that it should be treated as an MOE. We have also refrained from using a uniform cut-off date for identifying and measuring subsidies in China and instead evaluated the specific facts of each subsidy to determine what kind of subsidy exists and at what point in time each subsidy could be identified and measured.

BACKGROUND

In the Final CVD Determination, the Department determined that it would apply the CVD law to imports of OTR Tires from the PRC. See Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China ("CVD Decision Memorandum") at Comment A.1 (July 7, 2008). The Department also determined that it would apply a cut-off date of December 11, 2001, the date of China's accession to the World Trade Organization ("WTO"), for identifying and measuring subsidies in China. See CVD Decision Memorandum at Comment A.4. The Department found a final CVD rate of 14 percent for Starbright. Final CVD Determination, 73 FR at 40483.

In the Final AD Determination, the Department determined that, absent any statutory directive or evidence that domestic subsidies lowered U.S. price, it was inappropriate to make an adjustment to the dumping calculation to account for the imposition of CVDs on imports of OTR Tires from China. See Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China ("AD Decision Memorandum") at Comment 2 (July 7, 2008). We also determined to not treat Starbright as an MOE. See AD Decision Memorandum at Comment 75. Starbright's final dumping margin was 29.93 percent. Final AD Determination, 73 FR at 51625.

After publication of the CVD and AD orders on September 4, 2008, various parties challenged the Final CVD Determination and Final AD Determination. The Court consolidated several of the challenges to the two separate determinations into one case with, presumably, one consolidated record. Specifically, the Court consolidated the lawsuits filed by the following parties: GPX International Tire Corporation ("GPX") and Starbright; Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively, "Titan" or "petitioners"); Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC ("Bridgestone"); and Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC"). This consolidated case, GPX, is at issue here.

GPX/Starbright challenged: 1) the Department's authority to apply the CVD law to China while also treating China as an NME for AD purposes; 2) the Department's denial of MOE treatment for Starbright; 3) the choice of the December 11, 2001, cut-off date; and 4) various AD and CVD calculation and methodological issues. Titan challenged the Department's application of the uniform cut-off date, as well as various AD and CVD calculation and methodological issues. Bridgestone challenged the Department's application of the uniform cut-off date, as well as various AD and CVD calculation and methodological issues. TUTRIC only challenged certain CVD calculation and methodological issues.

In GPX, the Court deferred consideration of most of the various AD and CVD calculation and methodological issues.[1] As discussed above, it addressed the "coordination" of CVD and NME AD methodologies (i.e., double remedies), the Department's decision to not grant MOE

[1] The Court only ruled on one such issue, finding that Titan failed to exhaust its administrative remedies with respect to its challenge to the Department's decision not to investigate China's alleged "managed exchange rate subsidy." GPX, Slip Op. 09-103, at 3.

treatment to Starbright, and the Department's application of a uniform cut-off date for identifying and measuring subsidies in China. The Court originally ordered the remand redetermination to be filed within 90 days (i.e., by December 17, 2009), but then extended the due date to February 16, 2010. Due to the confusion about the final due date caused by GPX's filing of bankruptcy in federal bankruptcy court, the final due date subsequently changed to April 26, 2010.

On December 10, 2009, the Department issued questionnaires to the three respondents in the OTR Tires CVD investigation, Starbright, TUTRIC and Guizhou Tyre Co., Ltd. ("GTC"), to ensure that it had complete information on potentially countervailable subsidies for the time period prior to December 11, 2001, in the event that the Department concluded on remand to continue to impose CVD remedies in this case. On December 16, 2009, Starbright responded to this questionnaire, and also made several unsolicited comments, discussed below. On December 22, 2009, TUTRIC responded to this questionnaire. TUTRIC's response contained certain untimely filed factual information. On January 21, 2010, the Department returned the response to TUTRIC with instructions to re-file without the untimely information. TUTRIC re-filed its response on January 25, 2010. GTC did not respond to the questionnaire.

The Government of China ("GOC"), although not a party to the litigation, and Starbright each submitted unsolicited comments in response to the Department's questionnaire. The GOC and Starbright alleged that by seeking information on potentially countervailable subsidies granted prior to December 11, 2001, the Department was not following the Court's remand instructions and was acting in bad faith. On January 8, 2010, the petitioners requested that we strike the GOC's comments from the record because it is not a party to the litigation. We are not striking the GOC's comments. However, we disagree with the GOC and Starbright that we are

not following the Court's remand instructions and acting in bad faith. The remand order did not require or provide for the Department to issue specific results of each element of the remand determination sequentially. As such, it would have been impossible for the Department to meet the Court-imposed deadlines for this remand without seeking potentially relevant information or confirming that such information was already on the record. Furthermore, the gathering of information potentially necessary to comply with a remand order on a timely basis does not pre-judge the outcome of a proceeding. As is apparent below, we have addressed each of the Court's instructions in turn and have fully complied with the Court's remand order.

On January 29, 2010, we issued Draft Results of Redetermination Pursuant to Remand ("Draft Remand Results"). Concurrently with the Draft Remand Results, we placed all of the third-party source information referred to in our analysis on the record of this remand proceeding, along with a bibliography. See Memorandum to the File from Jun Jack Zhao, International Trade Compliance Analyst, AD/CVD Operations, Office 6, "Third-Party Sources Documents," dated January 28, 2010. We requested that parties provide comments on the Draft Remand Results by February 3, 2010. On February 3, we received comments from TUTRIC, and from the GOC, GPX, and Starbright, jointly. We also received, in lieu of comments, submissions from domestic parties to this proceeding, Titan and Bridgestone, noting a January 28, 2010 letter from GPX's bankruptcy counsel, served on all parties to this proceeding, regarding the automatic stay provisions of the U.S. bankruptcy code. Both companies stated their belief that they were precluded from complying with any submission deadlines in the remand proceeding as a result of the stay. Given the concerns expressed by these parties, we revised the deadline for the submission of comments by parties who had not already submitted

such comments to April 9, 2010. Subsequently, on April 9, 2010, we received comments from Titan and Bridgestone.

After reviewing all comments submitted, we have determined not to alter the conclusions of our Draft Remand Results. Furthermore, we have not made any additions to the documentation placed on the record with the Draft Remand Results. As a result, the analyses and decisions set forth in the Draft Remand Results are reproduced below with only minor alterations. For these final results of redetermination pursuant to remand, we have included a summary of the comments received and our responses to these comments.

ANALYSIS

I. CONCURRENT APPLICATION OF THE AD AND CVD LAWS IN AN NME COUNTRY

As noted, the Court found that the Department's decision to apply the CVD law to exports from China concurrently with AD duties determined under the NME methodology was unreasonable. Specifically, the Court found that the NME AD methodology has a "high potential" to remedy the subsidies, so that also imposing CVDs on exports subject to such AD duties has a "high potential" to constitute a double remedy. GPX, Slip Op. 09-103, at 13-19. Although the Court did not identify a specific provision of either the AD or CVD law with which the Department's determinations were inconsistent, the Court held that the Department "must apply methodologies that make such parallel remedies reasonable," (id. at 19), thereby requiring "coordination" between the AD and CVD law (id. at 12). The Court instructed the Department to either forego the imposition of CVDs or "adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies on merchandise from the PRC." GPX, Slip Op. 09-103, at 33.

Although the Department respectfully disagrees that the statute contains such a coordination requirement, in accordance with the Court's decision, the Department has evaluated three procedural options to avoid the potential double remedy the Court found to exist: (1) do not apply the CVD law to GPX/Starbright's exports; (2) treat either Starbright, in particular, or China, in general, under the market-economy AD methodology; or (3) offset GPX/Starbright's CVDs against GPX's AD cash deposit rate. In either of the first two cases, the potential for a double remedy would be eliminated, because the Department would not be concurrently applying the NME AD methodology and the CVD law. In the third case, offsetting the two remedies would prevent the two remedies from overlapping in the slightest degree. As explained below, the Department is adopting the third option, because it considers that to be the least objectionable of the three. However, the Department respectfully notes that it disagrees that any such offset is either necessary to prevent a double remedy or required by the statute.

With respect to the first option, the Department notes that CVD law at Section 701 of the Tariff Act of 1930, as amended ("the Act"), provides that, if a country is providing a countervailable subsidy with respect to the production or exportation of specific merchandise, a countervailing duty "shall" be imposed upon that merchandise. The Department finds this language to be completely unambiguous – there is no exception based on any conditions external to the CVD law, including the imposition of AD duties determined under the NME methodology.

Moreover, the Department does not agree that the statute necessitates the "coordination" of concurrent ADs and CVDs. GPX, Slip Op. 09-103, at 12. The AD law contains only one such provision: Section 772(c)(1)(C) of the Act. This provision is explicit, and applies exclusively to CVDs imposed to remedy export subsidies. As the Department noted in Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From

France, 69 FR 46501 (August 3, 2004), the specific provision for an offset for CVDs to remedy export subsidies, combined with the absence of any comparable provision for CVDs to offset domestic subsidies, is not silence on the issue of CVDs to offset domestic subsidies, but implies that Congress did not intend to require any such offset. See Ad Hoc Comm. v. United States, 13 F.3d 398, 401-03 (Fed. Cir. 1994).

With respect to the second option, the Department has explained that it does not consider that China has satisfied the statutory criteria to be classified as a market economy country under the AD law. See Notice of Final Determination of Sales at Less than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079, 53080 (Sept. 8, 2006); "Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")-China's status as a non-market economy ("NME")" (the "August 30, 2006 Memorandum"). In this investigation, China did not present the Department with any evidence to change that assessment. The Department's reasons for rejecting Starbright's request to be treated as an MOE are explained in the part of this remand redetermination specifically devoted to that issue.

The Department is selecting the third option not because the agency finds it unobjectionable, but because the Department considers that it will create less confusion than not applying the CVD law or than affording either China or Starbright market treatment for purposes of this remand. The Department believes that the offset complies with the Court's order either "to forego the imposition of CVDs" against GPX/Starbright or "to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies on merchandise from the PRC,"

because offsetting the CVDs against the ADs duties has the same effect as not applying the CVD law to GPX/Starbright's exports. GPX, Slip Op. 09-103, at 33.[2]

The Department would also like to note its disagreement with the Court's reading of the decision of the Court of Appeals for the Federal Circuit ("Federal Circuit") in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). The CVD law at section 701(a) of the Act explicitly requires the Department to impose CVDs on subsidized imports from "a country" that injures an industry in the United States. There is no limitation as to the type of country. In 1986, the Department found that it could not apply the CVD law to exports from the monolithic, Soviet-style economies of the 1980s, because the very concept of the government transferring a benefit to a producer or exporter in one of those state-controlled, centrally planned economies was meaningless. The Federal Circuit deferred to the Department's determination, observing that "[e]ven if one were to label these incentives as a 'subsidy' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves." Georgetown Steel, 801 F.2d at 1316.

In 2007, in light of certain developments in the Chinese economy, the Department determined that it could identify subsidies in China. Thus, the "impossibility" exception invoked

[2] The Department respectfully disagrees with the Court's statement that "Congress' silence with respect to domestic subsidies under {Section 772 of the Act}, as with its silence in other areas of the AD and CVD law, may well indicate that Congress did not consider this new hybrid when it enacted the export subsidy adjustment, and not, as Commerce argues, that Congress intended to prohibit adjustments to the NME AD methodology because of domestic subsidies." Id. at 16-17. In order to make such an offset, the Department would have expected to see an explicit statutory directive, such that the statute at section 772(c) would read, for example, as follows (additional statutory instruction italicized):

> (c) Adjustments for Export Price and Constructed Export Price – The price used to establish export price and constructed export price shall be – (1) increased by – * * * (C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy *or, in the case of exports for which the dumping margin is calculated using a normal value determined under the nonmarket economy methodology, also the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset a domestic subsidy*.

with respect to the command-and-control, Soviet-style economies of the mid-1980s and recognized by Georgetown Steel no longer applied to China. Once the Department made its determination that it could identify subsidies in China, the statute required the Department to apply the CVD law to China as simply one more "country" under the law. Section 701 of the Act. The Department's decision is in no way inconsistent with the Georgetown Steel decision, which simply defers to the agency's earlier finding that it was not possible to apply the CVD law to the command-and-control, Soviet-style economies in the mid-1980s. Indeed, if the United States were to trade with a centrally planned, command-and-control economy country and a CVD petition were filed against exports from that country, the Department might find it impossible to identify subsidies within that country. In that case, it would invoke Georgetown Steel as authority for not applying the CVD law in those circumstances.

Finally, as discussed further in the forthcoming MOE section, the Department respectfully notes its disagreement with the Court's findings that: (1) the NME AD law was designed to remedy subsidies (or to compensate for the Department's inability to apply the CVD law to NME countries); and (2) the CVD law was intended to correct any export price effects of subsidies. The Department does not believe that these interpretations are supported by the legislative history of the AD and CVD laws.

In conclusion, the Department has complied with the Court's remand order in these final results of redetermination pursuant to remand by fully offsetting GPX's calculated CVD rate against GPX's AD cash deposit rate.[3]

[3] In concurrent AD and CVD investigations, the Department does not make any addition to export price in the amount of export subsidies under section 772 (c)(1)(C) of the Act because no CVD duties have yet to be "imposed" as required by the language of the statute. Instead, the Department effectuates the same statutory objective in investigations by offsetting a respondent's calculated export subsidy rate against its calculated AD margin for

II. MARKET-ORIENTED ENTERPRISE TREATMENT FOR STARBRIGHT

On March 18, 2008, Starbright submitted a request for MOE treatment as part of the less than fair value ("LTFV") investigation. See GPX and Starbright's Second Submission of Additional Factual Information, dated March 18, 2008 at 2 ("MOE Request"). Starbright argued that MOE treatment was warranted by three factors: (1) its complete ownership by a U.S. company, GPX; (2) its focus upon external markets; and (3) its belief that any distortions to its manufacturing costs would be addressed in the companion CVD case. See MOE Request at 3-4. Starbright acknowledged that none of those three factors "are essential preconditions for finding an MOE," but instead argued that "these three key facts compel a conclusion that Starbright should be granted MOE status." MOE Request at 5.

On May 8, 2008, the Department declined to consider Starbright's MOE request as part of the LTFV investigation, stating that it "has no policies, procedures or standards for evaluating the MOE status of a company at this time." See Memorandum regarding Starbright Request for Market-Oriented-Enterprise ("MOE") Status and Market-Economy ("ME") Section B Response, dated May 8, 2008 at 2 ("MOE Determination"). In the final determination, the Department reaffirmed its position to not consider Starbright's MOE Request. See AD Decision Memorandum at Comment 75. The Department noted that it has no procedure or policy governing any category of NME companies as MOEs, as well as no criteria that could be used to qualify any respondent company as an MOE. See id.

The Court found the Department's failure to consider Starbright's MOE Request to be "arbitrary and capricious and unsupported by substantial evidence." GPX, Slip Op. 09-103, at

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purposes of determining cash deposit rates. See Dupont Teijin Films USA, LP v. United States, 407 F.3d 1211, 1212 (Fed. Cir. 2005). The Department is taking the same approach as part of this redetermination.

20. The Court reached that conclusion after determining that "{b}y refusing even to consider GPX's request for MOE status, Commerce did not meet {its} statutory requirement" under section 773(c)(1)(B) of the Act, to find "that available information does not permit the normal value of the subject merchandise to be determined." GPX, Slip Op. 09-103, at 21-22.

The Department respectfully disagrees with the Court's conclusion that it failed to meet its statutory requirement under section 773(c)(1)(B) of the Act in not considering Starbright's MOE Request. The statute does not compel the agency to formulate or evaluate an MOE methodology. Pursuant to section 771(18)(A) of the Act, when a country is determined to be an NME, it means that the designated country, in this case China, "[d]oes not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Consistent with the statute and its NME methodology, the Department in the underlying investigation based normal value upon the NME producers' factors of production valued in a surrogate market-economy country that the agency considered appropriate, a methodology that has been repeatedly upheld by the Courts. See, e.g., Sigma Corp. v. United States, 117 F.3d 1401, 1405 (Fed. Cir. 1997); Nation Ford Chem. Co. v. United States, 166 F.3d 1373 (Fed. Cir. 1999).[4]

[4] Under the NME presumption established by the statutory scheme, the only mechanism for market economy treatment currently available to respondents in NME proceedings is market-oriented industry ("MOI") classification. Commerce currently employs an industry-wide test to determine whether, under section 773(c)(1)(B) of the Act, available information in the NME country permits the use of the market economy methodology for the NME industry producing the subject merchandise. The MOI test affords NME-country respondents the possibility of market economy treatment, but only upon a case-by-case, industry-specific basis. This test is performed only upon the request of a respondent. See, e.g., Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 29302, 29302 (May 25, 2007) ("First MOE Comment Request"). Starbright did not request MOI treatment in the underlying investigation.

In the LTFV investigation, the Department articulated its rationale for invoking the NME methodology under section 773(c)(1)(B) of the Act with respect to all respondents. In the initiation notice, the Department stated as follows:

> In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and remains in effect for the purpose of initiating this investigation. Accordingly, the [normal value ("NV")] of the product is appropriately based on factors of production [("FOP")] valued in a surrogate market-economy country in accordance with section 773(c) of the Act.

Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires From the People's Republic of China, 72 FR 43591, 43593 (Aug. 6, 2007). In the preliminary determination, the Department reaffirmed that finding:

> We compared NV to weighted-average [export prices and constructed export prices] in accordance with section 777A(d)(1) of the Act. Further, section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under its normal methodologies.

Certain New Pneumatic Off-The-Road Tires From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 9278, 9288 (Feb. 20, 2008) ("Preliminary AD Determination").

In both the initiation notice and preliminary determination, the Department determined that it would continue to treat China as an NME in the underlying investigation. Explicit in that determination was the finding that the necessary condition of section 773(c)(1)(B) of the Act – i.e., that there was no available information permitting the calculation of NV under section 773(a) of the Act – was met for all respondents. More directly, the Department determined in

the preliminary determination (unchanged in the final determination) that the "presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under its normal methodologies." Preliminary AD Determination, 73 FR at 9288. The Department thus made the required statutory finding under section 773(c)(1)(B) of the Act that it could not determine the NV of the subject merchandise under the market economy methodology.

Notwithstanding the Department's conclusion that it made the requisite statutory findings in the LTFV investigation, in accordance with the Court's order, the Department hereby evaluates Starbright's MOE request. Accordingly, the Department is considering Starbright's MOE request and the specific criteria identified therein on remand.

As an initial matter, the Court notes correctly that the Department does not have established procedures to consider an MOE request in an LTFV investigation involving an NME country. Despite the Court's reminder that "Commerce chooses to proceed without regulations in many instances" where it "must make case-by-case determinations," id. at 24, the Department stated in the AD investigation of coated free sheet paper from China that no determination had been made "whether it would be appropriate to introduce a market oriented enterprise process" in NME antidumping investigations. See Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 60632 (Oct. 25, 2007), and accompanying Issues and Decision Memorandum at Comment 1. Speaking to the complexity of the issue, the Department has twice asked for public comment on whether it should consider granting market-economy treatment to individual respondents operating in NMEs, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect antidumping calculations for such qualifying respondents. See First MOE

Comment Request, 72 FR at 29302-03; Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, 72 FR 60649 (Oct. 25, 2007). The Department received numerous comments in response to the two Federal Register notices. See MOE Determination at 3. The Department is still actively considering those comments while considering whether to adopt an official policy concerning MOEs.

As previously noted, Starbright identified three factors to support its request for MOE status: (1) its complete ownership by a U.S. company; (2) its focus upon external markets; and (3) its belief that any distortions to its manufacturing costs would be addressed in the companion CVD case. See MOE Request at 3-4. However, Starbright's cursory analysis in support of its MOE Request provides insufficient explanation of how those factors warrant an MOE classification. Moreover, many assertions made by Starbright in support of its arguments are not supported by substantial, or even any, record evidence.

Starbright first cites its 100-percent ownership by GPX, an American tire producer, as a basis to grant it MOE status. The Department has previously acknowledged the relevance of foreign ownership to its separate rate analysis involving respondents from NME countries. See, e.g., Brake Rotors From the People's Republic of China: Preliminary Results of the Tenth New Shipper Review, 69 FR 30875, 30876 (June 1, 2004), unchanged in the final results, Brake Rotors From the People's Republic of China: Final Results of the Tenth New Shipper Review, 69 FR 52228 (August 25, 2004); Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 FR 71104 (December 20, 1999); Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China, 61 FR 19026, 19027 (April 30, 1996). However, the Department's separate

rate analysis focuses on whether an exporter operates independently of the government with respect to its own export activities.[5] Starbright fails to provide an adequate explanation of how foreign ownership and export behavior are relevant to an MOE analysis in calculating NV. Starbright's primary justification in highlighting its U.S. ownership is that "[f]or an American owned company, . . . particularly an American manufacturer that has transferred its own managerial systems to its subsidiary company in China, the Department can have much greater confidence that market principles and market oriented managerial decisions are being applied." MOE Request at 3. The Department notes that Starbright offers no elaboration, let alone citations to record evidence, about its "managerial systems," and the manner in which they may or may not be oriented to market principles and, importantly, why such a "managerial system" would warrant MOE treatment. See MOE Request at 3-4. Specifically, Starbright makes no effort to link or to provide evidence linking a market-oriented "managerial system" to production costs, a necessary factor to determine whether available information permits the calculation of NV under section 773(a) of the Act. See id.

Other factual claims by Starbright related to its U.S. ownership are similarly unsupported. Starbright highlights the fact that its Managing Director and General Manager, who are "[f]oreigners," "apply market oriented practices to their management and control of this business" without any discussion or documentation to support this conclusion. Id. From such observations, Starbright deduces that "[i]t is simply not credible to argue that U.S. management would apply and U.S. capital would allow anything other than market oriented principles to [sic] the operation of this company," but again makes no effort to support that conclusory statement

[5] See People's Republic of China Separate Rate Application and Required Supporting Documentation at 15, n.18, available at http://ia.ita.doc.gov/nme/nme-sep-rate.html.

with reasoned explanation or record evidence, especially with respect to the production-side of operations that take place within China. MOE Request at 4. Starbright's reliance on unsubstantiated assumptions and generalities is not sufficient to support a finding that Starbright's U.S. ownership necessitates MOE treatment.

The second factor identified by Starbright – its reported orientation to external markets – is similarly flawed. According to Starbright, "[w]ith almost an exclusive focus on external markets outside of China, there is simply less opportunity for non-market factors to affect the business decisions of either the Starbright factory, or its American parent company GPX." Id. Again, however, Starbright fails to connect the dots between export behavior orientated towards external markets and whether the Department has available information under section 773(c)(1)(B) of the Act that would permit it to use the market economy methodology to calculate NV for subject merchandise manufactured by Starbright. A company's emphasis on sales to external markets does not speak to domestic production nor does it overcome the Department's conclusion in the preliminary determination that the "presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under its normal methodologies." Preliminary AD Determination, 73 FR at 9288. In its request for MOE treatment, Starbright makes no effort to explain why "there is simply less opportunity for non-market factors to affect the business decisions" of Starbright or GPX when Starbright continues to operate within an NME country under Chinese law. MOE Request at 4. Moreover, Starbright does not elaborate on what it means by "less opportunity" or why the existence of any "opportunity for non-market factors to affect business decisions" would not in turn affect prices and costs. Without that explanation, the Department cannot reasonably

conclude that Starbright's orientation towards export markets is sufficient to warrant MOE status.

As a third and final reason in support of MOE treatment, Starbright essentially restates its position that concurrent application of the AD and CVD laws to imports from NME countries results in double counting by suggesting the ability of the companion CVD case to capture "potential distortions associated with manufacturing in China" Id. As noted previously in this remand, the Department fundamentally disagrees with such an assertion. The AD and CVD laws established under Title VII of the Act are separate legal regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. See Title VII, Subtitle A, of the Act. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its NV. See Title VII, Subtitle B, of the Act.

On this issue, the Department respectfully disagrees with the Court's finding that "the AD and CVD law when applied to NME countries both work to correct government distortion of market prices." GPX, Slip Op. 09-103, at 13. The Department nonetheless determines that substantial record evidence does not support relying on the presence of a companion CVD case as grounds to grant Starbright MOE status. As with its other stated criteria, Starbright presents only conclusory statements unsupported by record evidence in its MOE Request. Starbright's lone rationale in support of this factor is that "any residual distortions would be captured by any CVD duty imposed on this manufacturer." MOE Request at 4. Starbright, however, never identifies what those distortions may be and how they may be equivalent across the AD and

CVD cases, so as to be addressed by any companion CVD proceeding. Moreover, Starbright makes no attempt to quantify the level of potential distortions to demonstrate its point. See id. Starbright's assertion that production-side distortions are addressed by CVDs says nothing about whether record evidence supports an MOE finding as part of the separate AD proceeding. As with its other criteria, Starbright relies primarily on conjecture to support its argument. Accordingly, the Department determines that it has no factual or legal basis to conclude that the presence of a companion CVD case and findings that a company has received countervailable subsidies are relevant to whether it is appropriate to determine the NV of merchandise produced in an NME country based on anything other than the NME methodology.

After evaluating Starbright's request for MOE status on its merits on remand under respectful protest, the Department concludes that, pursuant to section 773(c)(1)(B) of the Act, available information does not support a finding that MOE treatment is warranted for Starbright.

III. CVD CUT-OFF DATE

The March 2007 memorandum, "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy," ("the 2007 Georgetown Memorandum"), focused on whether the analytical elements of the opinion in Georgetown Steel, which were framed according to the traditional, monolithic, Soviet-style economies of the 1980s, are applicable to China's current non-market economy.

The Department noted in the 2007 Georgetown Memorandum that traditional, Soviet-style economies were characterized by "the deliberate and almost complete severance between market forces and allocation and use of resources," stating further that:

> In 1984, virtually every aspect of these economies was governed by extensive mandatory five-years plans created and administered by central planners. Production quotas were set for all [state-owned enterprises ("SOEs")] with near-complete government ownership and operation of all industries, banking, transportation, and communication systems, trade and public services, and most of the agricultural sector. Leaders and planners directed the flow of all materials, directly setting prices for nearly all factors of production, including labor and capital. The central government exercised complete control over investment and consumption in accordance with party priorities, the details of which extended down to the level of every enterprise.[6]

As the 1986 Georgetown Steel Court noted, subsidies have no meaning in a command-control economy. Georgetown Steel, 801 F.2d at 1316. In such a situation, subsidies could not be separated from the amalgam of government directives and controls. Both the Federal Circuit's and the Department's reasoning focus on the *nature* of the NME in question, and not merely the label of "non-market economy." Subsidies can be meaningful, for example, in an NME that is no longer comprised of a monolithic entity that is ultimately responsible for all economic activity.

In the 2007 Georgetown Memorandum, the Department found that China's economy, "though riddled with the distortions attendant to the extensive intervention of the People's Republic of China's ("PRC") government, is more flexible than these Soviet-style economies." 2007 Georgetown Memorandum at 5. This "flexibility," in which "constrained market forces operate alongside of (and sometimes in spite of) government plans," includes both the existence of economic actors capable of undertaking commercial activity outside of the state-run monopoly over all production as well as a certain degree of "freedom of movement," i.e., the ability of commercial actors to respond to changes in their economic environment, even if that

[6] 2007 Georgetown Memorandum at 4-5, citing to Library of Congress Country Studies, Czechoslovakia, Economic Structures and Its Control Mechanisms (August 1987) and Library of Congress Country Studies, Soviet Union, Economy (May 1989).

environment is otherwise distorted. For example, the Department found in the 2007 Georgetown Memorandum that "many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces." 2007 Georgetown Memorandum at 10. It is this fundamental change from China's command-control past to a more flexible, although highly distorted economy, with sufficient freedom of movement that rendered subsidies meaningful and made it possible to determine whether the GOC has made a financial contribution and bestowed a benefit upon a Chinese producer (i.e., the subsidy can be identified and measured) and whether any such subsidy is specific.

"Flexibility" and "freedom of movement" result from a variety of factors in the economy that *collectively* determine the freedoms or restrictions on the activities of commercial actors. This is at the heart of the 2007 Georgetown Memorandum, which addressed a number of economic factors that, in concert, define the economic operating environment for all enterprises in China, finding that there was sufficient flexibility in China's economy to render subsidies meaningful and to allow the Department to identify and measure subsidies.

In the 2008 final affirmative determination of CVDs in circular welded carbon quality steel pipe from the PRC, the Department found that it was "appropriate and administratively desirable to establish a uniform date from which the Department will identify and measure subsidies in China for purposes of the CVD law."[7] Accordingly, the Department adopted December 11, 2001, the date on which China became a member of the WTO. This date was closely linked to the analysis that the Department undertook in the 2007 Georgetown Memorandum, namely:

[7] Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

> [W]e have selected this date because of the reforms in the PRC's economy in the years leading up to its WTO accession and the linkage between those reforms and the PRC's WTO membership. The changes in the PRC's economy that were brought about by those reforms permit the Department to determine whether countervailable subsidies were being bestowed on Chinese producers. For example, the GOC eliminated price controls on most products; since the 1990s, the GOC has allowed the development of a private industrial sector; and, in 1997, the GOC abolished the mandatory credit plan.[8]

Commentators have noted the substantial reform efforts that preceded China's accession to the WTO. For example, the OECD noted that "the momentum towards a freer economy has continued this decade with membership of the World Trade Organization, resulting in the standardization of a large number of laws and regulations."[9] Further, regarding China's WTO accession commitments, a paper from the International Monetary Fund noted that:

> Apart from market access, China has major commitments on trade-related activities, such as national treatment and non-discrimination principles, and with respect to Trade-Related Investment Measures (TRIMs) and Trade-Related Aspects of Intellectual Property (TRIPs). Compliance with such commitments is likely to have far-reaching implications domestically, including by encouraging greater internal integration of domestic markets (through the removal of inter-provincial barriers). Moreover, the commitment to comply with the principles and rules of the international trading system will improve the transparency of the domestic policy environment.[10]

Other reforms that preceded China's accession to the WTO include a 1999 amendment to the PRC's Constitution that placed a greater emphasis on the role of the private sector;[11] 2000 amendments to the *1986 Law on Wholly Foreign-Owned Enterprises* (the "*WFOE Law*"), which

[8] Id. (internal citations omitted).

[9] Economic Survey of China (Paris: Organization for Economic Cooperation and Development, 2005), p. 16.

[10] China's Growth and Integration into the World Economy, Prospects and Challenges (Washington, DC: International Monetary Fund, 2004), p. 10.

[11] See Article 16 of the 1999 Constitution Amendments, amending Article 11 of the Constitution of the People's Republic of China ("The non-public sector of the economy such as individual and private sectors of the economy, operating within the limits proscribed by law, constitute an important component of the socialist market economy.").

granted greater flexibility to foreign investors in establishing wholly-foreign owned enterprises;[12] and, the promulgation of the *Contract Law*, effective October 1, 1999, which made a substantial movement towards creating a universal framework for contractual obligations in China.[13] These reforms represent a significant movement towards a more flexible economic environment that enabled a greater degree of entrepreneurial discretion and protection. The increasing degree of openness, foreign investment and world integration, culminating in China's accession to the WTO, are indicators that the legal reforms promulgated over the 20 years preceding accession had begun to take root in the economy. This assessment was based on years of experience, research and analysis of a vast pool of third-party, expert sources that continually assess and update the ongoing reforms of China's economy. This is especially true of the time period covering the reforms necessary for China's accession to the WTO, which was closely analyzed world-wide by private researchers and WTO-member governments alike. In other words, the Department is confident that, as of 2001, China's reforms had progressed to the point that there was sufficient flexibility in the economy as a whole to warrant the application of the CVD law. As one commentator stated, "(a)lthough some analysts have viewed WTO accession as the start of a new stage in China's economic reform process, it is better seen less as a driver of further reform than as a manifestation of the stage reached by China's ongoing reform process."[14]

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[12] Zimmerman, James, China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises, 2nd edition (Chicago: American Bar Association, 2005) at 78-79, citing to *Wholly Foreign-Owned Enterprise Law of the People's Republic of China* (April 12, 1986, as amended on October 31, 2000).

[13] Id. at 249-250, citing to the *Contract Law of the People's Republic of China*, (March 15, 1999) (the "*Contract Law*").

[14] Clarke, Donald, et al., "The Role of Law in China's Economic Development," in China's Great Economic Transformation, Loren Brandt & Thomas G. Rawski, eds. (New York: Cambridge Univ. Press, 2008), p. 392.

That said, the Department is also aware that China's reforms have been incremental in nature and that China's accession to the WTO may not have been the precise moment that sufficient flexibility was achieved. However, it is very difficult to look backwards in time and pinpoint the precise moment that the tides turned and sufficient flexibility was achieved. Given the broad nature of the analysis, identifying a date different from December 11, 2001, may also be feasible.

The Department stresses however, that regardless of the ultimate date, the analysis of the economic factors that provide the basis for sufficient flexibility to determine that subsidies are meaningful and to identify and measure subsidies will always result in a uniform cut-off date that cuts across all subsidies because it focuses on the business environment and institutional factors that act in concert. Therefore, the Department maintains that a single, uniform cut-off date, regardless of subsidy type, is the proper approach. The extent of flexibility and freedom of movement are characteristics of the operating environment of all of the commercial actors in an economy and are not dependent upon the type of incentive being offered.

The Court, however, has ordered the Department to assess each subsidy at issue, in turn, and not arrive at a uniform cut-off date. Therefore, for the purposes of this remand, the Department must adopt a different approach. In order to comply with the Court's order, we have analyzed each subsidy type with respect to the context of the government bestowal, rather than the nature of the recipients' economic environment. Given the Court's order, for the purposes of this final remand redetermination, we have assessed relevant laws or regulations underlying each non-recurring, allocable subsidy type at issue in this proceeding. For the purposes of this analysis, the Department assessed when a sufficiently developed legal framework relevant to that particular type of subsidy existed that would enable the Department to identify the sphere of

commercial activity involved, the economic actors involved and the government action required to bestow that type of subsidy.

As in any CVD investigation, the Department will not countervail any subsidies provided prior to the average useful life ("AUL") of the assets. See 19 CFR 351.524(a) and (b) (stating that recurring benefits are expensed in the year in which the benefit is received, and non-recurring benefits are allocated over the AUL.) Therefore, any non-recurring countervailable subsidies provided prior to the AUL would not provide a benefit during the period of investigation ("POI"). In the present case, the POI was 2006 and the Department found that the AUL of the assets used in the production of OTR Tires was 14 years. See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 71360, 71361 (December 17, 2007) ("Preliminary CVD Determination") (unchanged in Final CVD Determination); CVD Decision Memorandum at 5; 19 CFR 351.524(d)(2). Therefore, the earliest year to which the Department would reach back to examine the countervailability of subsidies would be 1993. Furthermore, the application of the AUL is only relevant with respect to non-recurring subsidies. See 19 CFR 351.524(a) (stating that recurring benefits are expensed in the year in which the benefit is received). Accordingly, only non-recurring subsidies that are normally allocated over a period of years are at issue here because only those subsidies were affected by the Department's application of a uniform cut-off date. See GPX, Slip Op. 09-103, at 25. As such, the only investigated programs subject to this remand's analysis are: a) the State Key Technology Renovation Fund, i.e., a grant; b) Government Debt Forgiveness; i.e., a credit-oriented subsidy; c) value-added tax ("VAT") and Tariff Exemptions for foreign invested enterprises ("FIEs") and Certain Domestic Enterprises

Using Imported Equipment in Encouraged Industries, i.e., tax-oriented subsidies; and d) Government Provision of Land to SOEs, i.e., a land-oriented subsidy.

A. Grants (State Key Technology Renovation Project Fund)

A grant is a very straightforward incentive that does not require a specific legal framework guiding government action. However, the Department does need to be able to identify distinct economic actors, in contrast to the monolithic Soviet-style economy described in the 1986 Georgetown Steel opinion. The legal basis for entrepreneurship, the basis upon which the Department can identify discrete economic actors, is perhaps one of the most important reform areas in China's post Soviet-style economy. As one commentator states:

> The great expansion in the number and importance of economic actors that are not core parts of the traditional state system reinforced the process of growing out of the system of administrative directives. Privately owned enterprises have had to rely on the legal system for organizational vehicles and remedies for wrongs suffered. Early on, the legal system did not provide much, but over time it became more responsive.[15]

As of 1993, the earliest date possible for attributing non-recurring subsidies to the POI for the purposes of this remand, different types of enterprises were operating in China, including wholly foreign-owned enterprises,[16] SOEs, joint ventures,[17] and domestic enterprises, including township and village enterprises.[18]

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[15] Id. at 379.

[16] Zimmerman, James, China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises, 2nd edition (Chicago: American Bar Association, 2005) at 78-79, citing to the "*WFOE Law*."

[17] Id. at 90, citing to *The Chinese-Foreign Contractual Joint Ventures Law of the People's Republic of China* (April 16, 1988, revised October 31, 2000).

[18] When some government authority was decentralized, local authorities saw an opportunity to open businesses; this led to the development of rural enterprises known as township and village enterprises. These reforms began the process of providing the legal basis for a variety of economic actors, as opposed to a single state-run monopoly over production. See August 30, 2006 Memorandum at 66.

In 1993, the GOC moved away incrementally from central planning and recognized the role of other economic actors. First, China amended its Constitution to reflect changes in its economy. Article 15 was changed from "(t)he State practices planned economy" to "(t)he State practices socialist market economy."[19]

The GOC also promulgated the first *Company Law* in December 1993, which covered limited liability companies and joint stock companies. The law recognized the legal standing of privatized firms and further specified the legal status of SOEs, setting forth the principles of business autonomy, responsibility for profits and losses, and right to own assets.[20] The year in which the *Company Law* came into effect, 1994, marks a legal transition away from the classic Soviet-style economy and the beginning of a new phase of economic development where distinct economic actors were legally extended the flexibility to engage in commercial activity. The Department considers that it may have been able to identify and measure grants in China as early as 1994. However, the grant program at issue, the State Key Technologies Renovation Project Fund, was created on September 10, 1999. See Preliminary CVD Determination, 72 FR at 71372 (unchanged in Final CVD Determination). Given the continued legal enterprise reforms throughout the mid to late 1990s,[21] the Department finds, for the purposes of this remand, that the countervailability of grants in China could be evaluated at least as of September 10, 1999.

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[19] See Article 7 of the Amendment to the Constitution of the People's Republic of China, March 29, 1993.

[20] See Articles 5-7 of the *Company Law*.

[21] For example, a variety of laws were passed which governed the relations between these enterprises: "The Law against Unfair Competition of 1993 was followed in 1997 by the Price Law, which established the principle that the great majority of prices should be set by the market while still containing provisions designed to control prices deemed excessively high or excessively low. The Economic Contract Law was amended in 1993 to cover almost all domestic contracting parties except individuals. Essentially any properly registered and licensed business entity could now enter into legal contracts. The Economic Contract Law, together with the Foreign Economic Contract Law, was replaced in 1999 by a unified Contract Law, designed to cover contracts by individuals and enterprises

The Department notes, however, that the space created for these economic agents remains constrained and uneven. Significant regulatory barriers, along with the government's reliance on ad hoc administrative measures and government intervention in resource allocation, continue to control the extent of these interactions and blur the line between state and commercial actors. The GOC still does not have a comprehensive privatization plan for its SOEs and continues to reserve a key role for SOEs in the economy, especially in "core industries" such as energy, defense, metals, motor vehicles, transport, and telecommunications.[22] The result is a mixed economy that features both private economic initiative and significant government control over allocation of resources.

B. Credit-Oriented Subsidies (Government Debt Forgiveness)

In the present case, credit-oriented subsidies include government debt forgiveness. When analyzing whether credit-oriented subsidies can be considered countervailable in the context of an NME, the Department needs to be able to identify the loan as a legal, binding contract between distinct parties.

As discussed in the August 30, 2006 Memorandum, a series of reforms in the banking sector leading up to 1993 established a two-tier banking system with the People's Bank of China acting in a supervisory role. The second tier of the banking sector consisted of the "Big Four" state-owned commercial banks, three state-owned policy banks, and a host of other, smaller, officially designated commercial banks and non-bank financial institutions, e.g., rural and urban

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alike, regardless of ownership or nationality." Clarke, Donald, et al., "The Role of Law in China's Economic Development," in China's Great Economic Transformation, Loren Brandt & Thomas G. Rawski, eds. (New York: Cambridge Univ. Press, 2008), p. 392.

[22] August 30, 2006 Memorandum at 38, citing to Economic Survey of China (Paris, Organization of Economic Cooperation and Development, 2005), p. 106.

credit cooperatives, local government-owned joint stock commercial banks and trust and investment companies. The Department was therefore able, as of 1993, to identify the specific economic actors involved in providing credit in China. As discussed above, parallel legal reforms leading up to 1993 regarding entrepreneurship supported the creation of distinct enterprise types, and hence, distinct borrowers.

The 1995 *Commercial Bank Law* introduced prudential regulation standards.[23] The 1995 law defined a commercial bank as a legal entity that is sufficiently capitalized to engage in banking services. Under this law, commercial banks became legally responsible for their own profits and losses and were afforded legal autonomy from the state in several matters. The *General Rules on Loans* were enacted in 1996 to control and regulate activities related to loans and to protect the lawful rights and interests of all parties.[24] Taken together, these reforms allow the Department to identify distinct legal economic actors in the credit market as well as to examine specific loans and potential forgiveness of such loans. The 1996 *General Rules on Loans*, in particular, set out the legal rights and obligations for both lenders and borrowers, providing the legal basis for defining the four corners of any given loan. Given these reforms, the Department considers that it may have been able to evaluate the countervailability of credit-related subsidies for the purposes of this remand starting from 1996.

However, as described in both the 2007 Georgetown Memorandum and the August 30, 2006 Memorandum, these reforms are far from complete. There are still substantial problems in

[23] *The Commercial Banking Law of the People's Republic of China* (May 10, 1995)("*Commercial Bank Law*").

[24] *The General Rules on Loans* (August 1, 1996).

China's banking sector despite the reform efforts to address them.[25] The remaining reform challenges relate to the formation of market-based interest rates and overcoming the persistent legacy problems of government intervention in the sector. For example, interest rates have only been partially liberalized and floors and caps for deposit rates and lending rates remain.[26]

C. Tax- related Subsidies (VAT and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries)

In the present case, two respondents reported importing capital equipment during the AUL under a program that exempted them from having to pay VAT and import duties. See CVD Decision Memorandum at 22-23. For the purposes of this remand, the Department considered the point in time in which a comprehensive legal framework existed in China for identifying tax payers, as well as for assessing and collecting taxes, especially with respect to border measures. The Department also considered the point in time when economic actors generally had the right to engage in international trade, in contrast to a system of state trading enterprises which characterized Soviet-style economies.

Prior to the era of economic reform, taxes in China served as an accounting device to transfer funds from one arm of the government to another. The importance of a functioning tax regime for state revenue increased as the GOC implemented policies aimed at attracting foreign

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[25] "Despite these efforts and reforms, credit continued to be allocated on a noncommercial basis. Non-performing loans ("NPLs") accumulated and the Big Four essentially became insolvent. As a result, in 1998, the government injected U.S. $33 billion into the Big Four, and, in 1999-2000, four state-owned asset management companies purchased U.S. $169 billion of NPLs at face value." August 30, 2006 Memorandum at 51-52, citing to Santa Barbara, Daniel, China's Banking Reform: An Assessment of Its Evolution and Possible Impact (Madrid: Banco de Espana, 2005), p 313. See also Barth, James, Koepp, Rob, and Zhongfei Zhou, Banking Reform in China: Catalyzing the Nation's Financial Future (Milken Institute, February 2004), pp. 10-11.

[26] August 30, 2006 Memorandum at 58, citing to Putting China's Capital to Work: The Value of Financial System Reform (McKinsey & Company, May 2006), pp. 30-31.

investment and transitioning towards a more flexible economy.[27] The foundations of the present tax system were established in 1994 with the implementation of China's first comprehensive tax legislation. On January 1, 1994, a series of tax laws came into effect, including regulations regarding VAT, consumption taxes, business taxes, enterprise income taxes, individual income taxes and resource taxes.[28]

Reforms were also undertaken to improve coordination between the central government and provinces. For example, the State Administration of Taxation was established after 1994 as the supervisor of national tax services, which has the primary responsibility for collecting central and shared taxes.[29] These reforms reflected the GOC's efforts to simplify the implementation of

[27] See Trade Policy Review, The People's Republic of China (Geneva: World Trade Organization, February 28, 2006), para. 27, p. 16.

[28] The objectives of these reforms were "to collect necessary tax revenues in an equitable manner, enhance the role of taxation as a tool of macroeconomic policy, encourage foreign investment, and make taxation more compatible with reforms of SOEs and enhance their self-management. The reforms were thus to create a tax system more conducive to China's economic development." Trade Policy Review, The People's Republic of China (Geneva: World Trade Organization, February 28, 2006), para. 27, p. 16. (1) *Provisional Regulations of the People's Republic of China on Value Added Tax*, adopted November 26, 1993, by the 12th session of the Standing Committee of the State Council, became effective on January 1, 1994. (2) *Provisional Regulations of the People's Republic of China on Consumption Tax*, adopted November 26, 1993, by the 12th session of the Standing Committee of the State Council, became effective on January 1, 1994. (3) *Provisional Regulations of the People's Republic of China on Business Tax*, adopted November 26, 1993, by the 12th session of the Standing Committee of the State Council, became effective on January 1, 1994. (4) *Provisional Regulations of the People's Republic of China on Individual Income Tax*, adopted November 26, 1993, by the 12th session of the Standing Committee of the State Council, became effective on January 1, 1994. (5) *Provisional Regulations of the People's Republic of China on Resource Tax*, adopted November 26, 1993, by the 12th session of the Standing Committee of the State Council, became effective on January 1, 1994. (6) *Provisional Regulations of the People's Republic of China on Enterprises Income Tax*, adopted by the 12th Session of the Standing Committee of the State Counsel on November 26, 1993, became effective on January 1, 1994.

[29] See Trade Policy Review, The People's Republic of China (Geneva: World Trade Organization, February 28, 2006), para. 31, p. 39.

its tax laws, standardize tax collection and limit tax evasion to bring China's tax system into conformity with international practices.[30]

With respect to the right to engage in international trade, all foreign trade and importation of goods in Soviet-style economies was conducted through a state monopoly with central planners mandating the type and volume of goods to be exported and imported.[31] Similarly, in China prior to the late 1970s, all foreign trade was conducted through twelve state-trading enterprises ("STEs") managed by the Ministry of Foreign Trade. Each of these STEs had a monopoly over a well-defined range of commodities and was responsible for arranging contracts, securing financing and negotiating prices.[32] Due to reforms leading up to the mid-1990s, this STE monopoly began to give way to an increasing number of enterprises that were allowed to engage in foreign trade.[33] With the adoption of the Foreign Trade Law on May 12, 1994, all individuals as well as legal persons and other organizations were permitted to engage in foreign trade, providing that they meet certain registration and licensing requirements, indicating that the GOC had greatly reduced its direct oversight, management and control over international trade.[34]

Given these reforms, the Department considers that it may have been able to evaluate the countervailability of tax-related subsidies, including those related to border measures such as

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[30] Zimmerman, James, China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises, 2nd edition (Chicago: American Bar Association, 2005), p. 335.

[31] 2007 Georgetown Memorandum at 7, citing to Czechoslovakia Study, Economic Structure and Its Control Mechanisms, August 1987.

[32] Lardy, Nicholas, Integrating China into the Global Economy (Washington, D.C., 2002), p. 40.

[33] Id.

[34] All entities that wish to engage in import and export of goods or technologies are required to register with local foreign-trade authorities authorized by the Ministry of Commerce. See Trade Policy Review, The People's Republic of China (Geneva: World Trade Organization, February 28, 2006), para. 62, p. 82.

VAT and import tariffs, starting from 1994. However, the Department also notes that the program relevant to this investigation, which was created through the December 29, 1997 *Circular of the State Council Concerning the Adjustment in the Taxation Policy of Import Equipment,* came into effect in 1998. See Preliminary CVD Determination, 72 FR at 71371 (unchanged in Final CVD Determination); CVD Decision Memorandum at 22-23. Therefore, for the purposes of this redetermination pursuant to remand, the Department is countervailing all subsidies provided under this program since it came into effect on January 1, 1998.

D. Land-oriented Subsidies (Government Provision of Land to SOEs)

In the present case, the Department investigated and countervailed the provision of land (in conjunction with government debt forgiveness, which is addressed above under "Credit-Oriented Subsidies"). In the context of this analysis, for the purposes of this remand, the Department considered at what point the legal framework for the land transactions in China was sufficiently developed to allow the Department to identify 1) specific land-use rights or land-ownership rights, 2) transactions between different parties for such rights, and 3) the government's role in these transactions.

As noted in the 2007 Georgetown Memorandum and the August 30, 2006 Memorandum, private land ownership is prohibited in China.[35] All land is owned by some level of government, the distinction being between land owned by the local government or "collective" at the township or village level, as opposed to land owned by the national government (also referred to as state-owned or "owned by the whole people").

As described in the August 30, 2006 Memorandum, the government promulgated the *Land Administration Law* in 1986, which allowed for the ownership of land-use rights and, in

[35] Articles 9 and 10 of the Constitution of the People's Republic of China, as amended in 2004.

certain circumstances, their transfer. This law conflicted with China's Constitution, which banned selling, leasing, and transferring land. Accordingly, Article 10, section 4 of the Constitution was amended in 1988 to allow transfer of land-use rights.[36] However, the concepts of land use rights and the methods of selling and/or transferring land-use rights were still vague and ill-defined.

It was not until 1998, when the government promulgated the revised *Land Administration Law* that the first embodiment of long-term land use rights was codified.[37] Also in that year, China promulgated regulations that specified the types of permitted transactions, including transfer, lease, and equity contribution.[38] By 1999, the year that both the revised *Land Administration Law* and its implementing regulations came into effect, the government had established the legal framework for basic elements of land transactions. For the purposes of this remand, the Department finds that 1999 is the first year in which it could evaluate the countervailability of land-related subsidies in China.

The Department notes that while the state withdrew sufficiently to enable these non-state agents to interact, the state's involvement in land allocation continues to constrain this space and blurs the line between state and commercial actors. SOEs retain a significant number of land-use rights that they received free of charge.[39] Land seizures have increased despite legal reform

[36] August 30, 2006 Memorandum at 41, citing to Ding, Chengri and Song, Yan, Emerging Land & Housing Markets in China (Cambridge, MA: Lincoln Institute of Land Policy, 2005), p. 14.

[37] *Land Administration Law of the People's Republic of China*, promulgated August 29, 1998, effective January 1, 1999.

[38] Article 29 of the *Regulations on the Implementation of the Land Administration Law of the Peoples Republic of China*, promulgated December 27, 1998, effective January 1, 1999.

[39] August 30, 2006 Memorandum at 46.

efforts and remain the most significant threat to land security in rural areas.[40] User rights over rural, urban, and construction land remain subject to uneven definition, utility, and security that depresses the price of rural land and increases the incentive for local governments to expropriate and readjust those rights without paying adequate compensation.

IV. ADDITIONAL SUBSIDIES

Given the analysis above, the Department is countervailing additional subsidies provided before December 11, 2001. Our analysis of the record indicates the following additional subsidies were provided to the respondents prior to December 11, 2001.

A. State Key Technology Renovation Project Fund

In the Final CVD Determination, we determined to countervail several grants to GTC under this program provided after the cut-off date. There were additional grants provided pursuant to the same project which we did not countervail, however, because they were provided before the cut-off date. As discussed above, we have determined that we can identify and measure grants at least as far back as September 10, 1999, when this program was created.[41] Thus we are revising the benefit figures for GTC to include all of these grants.

In accordance with the Final CVD Determination, to measure the benefits allocable to the POI from each of these grants, we first conducted the 0.5 percent test, dividing the total amount approved separately in each year by the relevant sales for each of those years. See 19 CFR 351.524(b)(2). As a result, we found that all grants approved were greater than 0.5 percent of relevant sales in the year of approval and properly allocated over the AUL. Following the same

[40] National Bureau of Asian Research, "Secure Land Rights as a Foundation for Broad-Based Rural Development in China," November 2009, pp. 15-16.

[41] See Exhibit GOC-F-1 of the GOC's October 15, 2007 questionnaire response, which includes the measures issued by the GOC in creating this program (i.e., Guojingmaotouzi {1999} 886).

methodology used in the Final CVD Determination regarding allocating benefits over time, we calculated the benefits allocable to the POI and we then divided the benefits allocable to the POI by the total value of GTC's sales during the POI. On this basis, we determine the revised countervailable subsidy rate for this program to be 0.77 percent ad valorem for GTC.

B. VAT and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries

In the Final CVD Determination, we determined that both GTC and TUTRIC received countervailable exemptions under this program after the cut-off date. Both companies received additional exemptions which we did not countervail, however, because they were received pursuant to equipment imported prior to the cut-off date. As discussed above, we have determined that we can identify and measure tax exemptions, including non-recurring, capitalized VAT and tariff exemptions, starting from January 1, 1998, when this program was created. [42] Thus, we are revising the benefit figures for GTC and TUTRIC to include all exemptions received under this program.

In accordance with the Final CVD Determination, to measure the benefits allocable to the POI from each of the exemptions, we first conducted the 0.5 percent test, dividing the total exemption approved separately in each year by the relevant sales for each of those years. See 19 CFR 351.524(b)(2). As a result, we found that exemptions provided in two additional years were greater than 0.5 percent of relevant sales for GTC and properly allocated over the AUL. None of the exemptions for TUTRIC passed the 0.5 percent test, and thus were determined not to be allocable beyond the year of receipt. Following the same methodology used in the Final CVD

[42] See Exhibit GOC-O-2 of the GOC's October 15, 2007 questionnaire response, including "Circular of the State Council Concerning the Adjustment in the Taxation Policy of Import Equipment," issued by the GOC in creating this program.

Determination regarding allocating benefits over time, we calculated the benefits allocable to the POI, and then divided these benefits by the total value of GTC's sales during the POI. On this basis, we determine the revised countervailable subsidy rate for this program to be 0.41 percent ad valorem for GTC. TUTRIC's rate remains 0.44 percent ad valorem.

C. Government Provision of Land To SOEs

In the preliminary determination in the CVD investigation, we found that the provision of certain land-use rights to GTC was countervailable. See Preliminary CVD Determination, 72 FR at 71368. We preliminarily determined these rights were provided to GTC after the December 11, 2001 cut-off date and were otherwise countervailable. Id. In the Final CVD Determination, we reversed our determination in light of a contract reviewed at verification indicating the land had been provided earlier than indicated in initial questionnaire responses and before the cut-off date. In reversing our earlier determination, we noted simply that "{t}he evidence on the record of this case shows that GTC's and TUTRIC's land use contracts were dated prior to the December 11, 2001 cut-off date. Therefore, for purposes of this final remand redetermination, we are finding that the Government Provision of Land-Use Rights was not used by GTC and TUTRIC." See CVD Decision Memorandum at 26.

While the contract date established at verification is before the December 11, 2001 cut-off date, it is not before the 1999 date determined in our analysis above.[43] Therefore, for this final remand redetermination, we are returning to our preliminary determination that the

[43] The exact date is business-proprietary information ("BPI"). Along with all of the remand calculations affecting GTC, it can be found in Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, "Draft Remand Calculations for Guizhou Tire Co., Ltd. (GTC)," dated January 28, 2010, on file in the Central Records Unit ("CRU"), Room 1117 of the main Department of Commerce building.

provision of this tract by the GOC to GTC constitutes a countervailable subsidy. In the Preliminary CVD Determination, we determined "{t}he allocated land rights provided to Guizhou Tire are available only to SOEs and thus are specific under section 771(5A)(D)(i) of the Act. We further determine that the GOC's provision of land rights is a financial contribution within the meaning of section 771(5)(D)(iii)."

GTC's contract required the payment of an annual rent for this particular tract of land, and did not require any up-front payments. Thus, we calculated a benefit by comparing the annual rent it paid against a benchmark rental rate. This is the same methodology used in the Final CVD Determination to calculate the benefit for land rented by Starbright. Specifically, in order to calculate the benefit, we first multiplied the benchmark rental rate used in the Final CVD Determination[44] (adjusted to the POI) by the total area of the countervailable land. We then deducted rent paid by GTC during the POI to derive the total POI benefit. We divided the POI benefit by the appropriate sales denominator to calculate a subsidy rate of 0.11 percent ad valorem for GTC.

D. Remaining Non-Recurring Subsidies

Additional subsidies provided during the AUL, but before the date established in the above Section III, "CVD Cut-Off Date," for each type of non-recurring subsidy, were not countervailed. These include instances of debt forgiveness for TUTRIC that the Department determined in the Final CVD Determination occurred before the December 11, 2001 cut-off date. We determined the date of forgiveness for this debt occurred when the loans matured, as there was no record evidence that repayment was expected or otherwise forthcoming, and, unlike other

[44] This benchmark rate is discussed in detail in the Preliminary CVD Determination, 73 FR at 71370, and went unchanged in the Final CVD Determination.

TUTRIC debt, no renegotiations for repayment took place. See CVD Decision Memorandum at 15 and footnote 20. The date of the forgiveness of these debts is BPI. It is, however, before 1996, the earliest year, according to our analysis above, in which we might be able to evaluate the countervailability of credit-oriented subsidies. For a complete analysis, see Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, "Draft Remand Calculations for Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC)," dated January 28, 2010 ("TUTRIC Remand Calculation Memorandum"), on file in the CRU. Therefore, we have not countervailed these instances of debt forgiveness as part of this final remand redetermination.

Additional tracts of land were provided to GTC and TUTRIC as well. However, the dates on which we find these tracts to have been provided, whether based on contract date or land-use certificate date, are before 1999, the year determined above to be the earliest year in which we might be able to evaluate the countervailability of land-oriented subsidies. Therefore, we have not countervailed the provision of these particular tracts as part of this final remand redetermination. See GTC Remand Calculation Memorandum and TUTRIC Remand Calculation Memorandum.

The Department's examination of the record indicates that no other non-recurring subsidies were provided to respondents on or after the dates discussed above and that were not already countervailed in the Final CVD Determination.[45]

[45] All non-recurring subsidies already countervailed by the Department (i.e., all non-recurring subsidies occurring after December 11, 2001) fall within one of the four subsidy categories analyzed by the Department above in the "CVD Cut-Off Date" section. As the Department has concluded that all of those four types involved subsidies that could be countervailed prior to December 11, 2001, no additional analysis is required to continue countervailing those subsidies for this final remand.

COMMENTS ON DRAFT REMAND RESULTS

As noted above, we issued Draft Remand Results on January 29, 2010, and received comments on the draft from the GOC, GPX, and Starbright, jointly, on February 3. We received comments from Titan and Bridgestone on April 9, 2010.

I. CONCURRENT APPLICATION OF THE AD AND CVD LAWS IN NME COUNTRIES

The GOC, GPX, and Starbright (collectively, "the GOC and GPX") contend that the Department did not properly address the Court's remand instructions and that using an offset is neither "contemplated by the statute nor reasonable." They reiterate their arguments that CVD investigations of NME countries should not be undertaken, and claim that the statutory framework, court precedent, and the Department's prior reasoning do not allow for the use of any "quick fix offsets" to resolve the problems caused by applying both the AD and CVD law to NME countries. The GOC and GPX claim the Department has objected to the use of offsets to eliminate double counting in the past, citing a GAO publication in which the Department is quoted as stating that U.S. law does not allow for the use of offsets in AD calculations to counteract domestic-subsidy duties and that such offsets would place China in a special category in AD and CVD investigations. The GOC and GPX claim the Department repeats this position on page 8 of the Draft Remand Results.

The GOC and GPX argue that, even if, contrary to the Department's previous assertions, the statute allows for such an offset, the Department must offer an explanation as to why this action is more reasonable than other options – namely, the more "obvious" options of not applying the CVD law to China, or not applying the NME AD methodology, which the GOC and GPX suggest are the only options implied by the Court's opinion. They argue that the

Department's claim that the offset option will eliminate confusion is both an insufficient and incorrect justification. They claim that the Department's proposed solution in fact maintains the confusing contradictions of our prior CVD investigations of China, such as claiming subsidies can be measured in an NME, but always denying the existence of reliable internal benchmarks for such measurements. Moreover, they continue, it is unreasonable to require foreign parties to spend time and money calculating CVD rates that will be eliminated through parallel investigations and reviews.

Bridgestone concurs with the Department and also disagrees with the Court's finding regarding the high potential for double remedies as a result of the imposition of CVDs and ADs concurrently. To the extent that the Department uses the analysis set forth in the Draft Remand Results, Bridgestone requests that the Department continue to make its findings under protest and in a manner that preserves the appellate rights of all parties.

Bridgestone also notes that to offset GPX/Starbright's subsidy rate, the Draft Remand Results refer to both adjusting GPX/Starbright's cash deposit rate, and adjusting its dumping margin. Bridgestone requests that the Department adjust GPX/Starbright's cash deposit rate, rather than its dumping margin, which, according to Bridgestone, is consistent with the Department's practice and precedent. Titan fully concurs with, and incorporated by reference, the April 9, 2010 comments filed by Bridgestone.

DEPARTMENT'S POSITION:

As discussed in detail above, our redetermination pursuant to Court remand fully addresses the Court's remand instructions. The Court instructed the Department either to forego the imposition of CVDs or "to adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies on merchandise from

the PRC." GPX, Slip Op. 09-103, at 33. As explained above, the Department identified and evaluated three procedural options to comply with the Court's order before determining that an offset, while still objectionable, would create the least amount of confusion and uncertainty. See pages 8-11 of this Remand Redetermination.

The GOC and GPX identify no other options available to the Department to comply with the Court's remand order than those already identified by the Department above. See GOC and GPX Comments at 4. Instead, the GOC and GPX contend that the Department should have opted for one of the other two options, i.e., not applying the CVD law to China or not applying the NME AD methodology. However, as previously explained by the Department, neither of those options is viable or reasonable.

Section 701 of the Act unambiguously states that, if a country is providing a countervailable subsidy with respect to the production or exportation of specific merchandise, a countervailing duty "shall" be imposed upon that merchandise "in addition to any other duty imposed." Consistent with the holding in Georgetown Steel, the Department has no choice under the express language of the statute but to apply the CVD law to China once a determination had been made that subsidies could be identified in China. See page 11 of this Remand Redetermination.

Applying the market economy AD methodology on remand is a similarly untenable option. The Department has determined that China has not satisfied the statutory criteria to be classified as a market economy country under the AD law. See Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China, 71 FR at 53080; August 30, 2006 Memorandum. Without any evidence on record in this proceeding to change that assessment

(and absent any basis to treat Starbright as an MOE), the Department is required by law to apply the NME AD methodology to China. See sections 771(18)(A) and 773(c)(1)(B) of the Act.

The GOC and GPX raise several concerns about the Department's chosen approach of offsetting GPX/Starbright's CVD cash deposit rate against GPX's AD cash deposit rate. Many of those concerns are shared by the Department, which explain in part why the Department is adopting the offset approach under protest. See pages 7-11 of this Remand Redetermination. Notwithstanding the Department's position in this proceeding and elsewhere that an offset is neither necessary to prevent a double remedy nor required by the statute, an offset is the only option available to the Department under the Court's remand order that is not plainly inconsistent with explicit language in the statute. Moreover, the offset complies with the Court's order because it is an adaptation of the NME AD and CVD methodologies that "account[s] for the imposition of CVD remedies on merchandise from the PRC." GPX, Slip Op. 09-103, at 33. Hence, the offset represents the least objectionable approach for the Department to comply with the Court's remand instructions.

Bridgestone correctly observes that, consistent with Dupont Teijin Films USA, 407 F.3d at 1212, see page 11, footnote 3 of the Draft Remand Results, the offset made as part of this Remand Redetermination should apply to Starbright/GPX's AD cash deposit rate, not to its dumping margin. Accordingly, the Department has replaced those references to "dumping margin" identified by Bridgestone in the Draft Remand Results with appropriate references to "antidumping duty cash deposit rate" for this final remand.

II. MOE TREATMENT FOR STARBRIGHT

The GOC and GPX allege that the Department failed in the Draft Remand Results to comply with the Court's instructions to explain why the Department could not use Starbright's

third country sales, or some other non-surrogate method, to calculate NV. They claim that during the underlying investigation, Starbright provided the Department with responses to the standard market economy AD questionnaire, which included sales to its largest third country export market. They argue that, despite having this information, the Department failed to explain why it is not able to use this information to calculate NV, regardless of the decision on granting MOE status.

The GOC and GPX dispute the Department's conclusion in the Draft Remand Results that assertions made by Starbright to support its MOE arguments were not supported by substantial record evidence. They provide a chart to specify where in the evidentiary record support for Starbright's request for MOE status can be found.[46] With regard to the Department's claims that Starbright did not provide a "link" or "evidence" connecting U.S. ownership to production costs or market orientation, the GOC and GPX claim that the Department ignores the self evident point that a U.S. controlled company, relying upon money borrowed from U.S. investors, would seek to make a profit and would not, therefore, pay more than required for key components. Also, regarding the "reliance on external markets" factor of the Department's analysis, they claim that if a U.S. owned company could obtain cheaper inputs outside China, it would do so.

They argue the Department fails to understand the importance of the parallel CVD proceeding to Starbright's request for MOE treatment. The GOC and GPX argue that, with the ability to treat any unfairness in domestic input pricing through a parallel CVD investigation, the only basis for the Department to doubt the company's own reported costs for domestically sourced inputs has been eliminated.

[46] See GOC and GPX Comments at 13.

Finally, the GOC and GPX allege that the Department has failed even to request the information the Department now claims is required to evaluate Starbright's request for MOE treatment. During the AD investigation, the Department refused to verify the sales and cost databases or discuss any aspect of the MOE request. The Department also failed to ask questions regarding MOE treatment in the remand questionnaire. They argue that the Department cannot claim there is insufficient information to consider MOE treatment if the Department has not made an effort to gather such information.

Bridgestone supports the Department's determination that Starbright is not entitled to treatment as an MOE.

DEPARTMENT'S POSITION:

The Department has complied with the Court's specific remand instructions in considering Starbright's request for MOE treatment**.** In finding the Department's failure to consider Starbright's MOE request to be "arbitrary and capricious and unsupported by substantial evidence," GPX, Slip Op. 09-103, at 20, the Court determined that "Commerce did not meet {its} statutory requirement" under section 773(c)(1)(B) of the Act, to find "that available information does not permit the normal value of the subject merchandise to be determined." Id. at 21-22. Notwithstanding the Department's respectful disagreement with the Court on this issue, the Department's analysis on remand directly addresses whether application of the market economy AD methodology to Starbright on a company-specific basis would be reliable under the statute.

Contrary to the GOC and GPX's assertions, certain data submitted by Starbright in conjunction with its MOE request, such as third-country sales data, have no bearing on that threshold inquiry. In evaluating Starbright's request for MOE treatment, "Commerce must

address whether it may use third country sales or some other measure to determine normal value, . . . or whether all non-surrogate methods of calculating normal value for Chinese goods are unreliable under 19 U.S.C. § 1677(18)." Id. at 22, n.13 (internal citations omitted). Starbright identified three reasons why it should be entitled to MOE treatment: (1) Starbright's complete ownership by a U.S. company, GPX; (2) its focus upon external markets; and (3) its belief that any distortions to its manufacturing costs would be addressed in the companion CVD case. See MOE Request at 3-4. However, Starbright has not demonstrated how the mostly quantitative data it submitted as part of its MOE Request relate to the fundamental question of how those three factors merit MOE treatment in light of the Department's expressed concern about the reliability of Starbright's production costs in the context of government controls in the Chinese economy. See Preliminary AD Determination, 73 FR at 9288.

In discussing the three criteria justifying MOE treatment in the underlying request, Starbright never once referred to the data that it now claims the Department failed to consider. See MOE Request at 3-4. Moreover, in explaining the nature of the factual information submitted, Starbright did not connect those data to the threshold inquiry of whether it warranted MOE treatment and, more specifically, to the three criteria identified by Starbright in its request. See MOE Request at 5-17. In fact, Starbright acknowledged that it submitted the factual information in conjunction with its MOE request for a completely different and specific reason:

> Substantially all of the information needed to determine market economy dumping margins for Starbright is already on the record of this case. To the extent that certain information needs to be supplemented, we are providing that information in this final factual submission.

MOE Request at 5 (emphasis added). Thus, the nineteen exhibits that the GOC and GPX claim that the Department ignored in the Draft Remand Results were submitted by Starbright for the

express purpose of calculating a market economy dumping margin upon an independent finding by the Department that Starbright would be eligible for MOE treatment. Starbright did not rely upon any of the data in addressing whether available information on the record permitted the Department to determine NV in a reliable manner under the market economy AD methodology. See section 773(c)(1)(B) of the Act; GPX, Slip Op. 09-103, at 21-22; MOE Request at 3-4. The Department continues to be unable to identify any connection between the factual information submitted by Starbright as part of its MOE Request and Starbright's stated rationale for MOE status. Any suggestion now by the GOC and GPX that those data supported Starbright's MOE claim mischaracterizes the nature of Starbright's MOE Request.

The structure of Starbright's request for MOE treatment supports that understanding. In arguing that it was entitled to MOE status, Starbright stated that "[t]hree key facts make this claim for MOE status . . . unique and compelling." MOE Request at 3. Those factors are the same three criteria analyzed above: (1) Starbright's ownership by a U.S. company; (2) its focus upon external markets; and (3) the presence of a parallel CVD case. See MOE Request at 3-4; pages 12-20 of this Remand Redetermination. Starbright summarized its argument in support of MOE treatment as follows:

> Taken individually and collectively these three factors strongly demonstrate that the Department should consider Starbright to be a MOE. Again, we are not arguing that any of these factors are essential preconditions for finding an MOE. Rather, we are simply arguing that in this case, [sic] these three key facts compel a conclusion that Starbright should be granted MOE status.

MOE Request at 5 (emphasis added). Conspicuously absent from Starbright's discussion of those three factors is any citation or reference to the factual information submitted in conjunction with the MOE request as well as any explanation how the third-country sales data and market

economy responses attached as exhibits to its MOE request relate to the central question of whether Starbright was eligible for MOE treatment.

The GOC and GPX are also incorrect in suggesting that the Department misunderstood Starbright's three proffered justifications in support of MOE treatment. The Department has not disputed the factual claims made by Starbright that it was wholly owned by an American company, had other U.S.-based investors, was managed by foreigners, and was export oriented in its sales. See pages 12-20 of this Remand Redetermination. The deficiency in Starbright's MOE request lies in Starbright's failure to draw the necessary link between those facts and a conclusion that the company is sufficiently market-oriented to overcome the Department's express finding in the underlying proceeding that "the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under its normal methodologies." Preliminary AD Determination, 73 FR at 9288. Neither Starbright in its original MOE Request, nor the GOC and GPX in their comments on the Draft Remand Results, directly confront the relationship between U.S. ownership and export orientation to production costs, which is an essential element to determine whether available information permits the calculation of NV under section 773(a) of the Act. Furthermore, the GOC and GPX's emphasis on the argument that the parallel CVD proceeding would capture price distortions in input costs reflects a mistaken understanding of the law. As stated above, the CVD law provides for the imposition of duties to offset foreign government subsidies without regard for price effects. See Title VII, Subtitle A, of the Act; pages 12-20 of this Remand Redetermination.

Lastly, the Court's remand instructions placed no obligations on the Department to solicit additional information from Starbright concerning its request for MOE treatment. In accordance

with the Court's remand instructions, the Department has given full consideration to Starbright's MOE Request. In reaching this conclusion on remand that MOE treatment for Starbright is not warranted, the Department has made no adverse or negative inferences. Instead, the Department has merely considered the arguments affirmatively made by Starbright and the factual information submitted in support thereof and concluded that, because of government controls in the Chinese economy that render price comparisons and the calculation of production costs invalid under its normal methodologies, available information specific to Starbright does not permit the Department to calculate NV for Starbright under the market economy AD methodology.

III. CVD CUT-OFF DATES

With regard to the four specific subsidy classes at issue in the Draft Remand Results: (1) grants; (2) credit-oriented subsidies; (3) tax-related subsidies; and (4) land, the GOC and GPX reject the Department's implicit conclusion that standard market-economy tools can be applied to measure the benefit from such subsidies. They claim that the Department has not complied with the Court's order to assess the significance of each subsidy, assessments that must necessarily be made within the highly distorted markets the Department claims exist in China, if the Department intends to be consistent in its conclusions. They contend that, with regard to each subsidy under examination, the Department has failed to demonstrate the separation of state and commercial actors that would allow application of the CVD law to an NME, nor has the Department succeeded in reconciling its findings in this context with prior conclusions regarding the pervasiveness of government involvement in Chinese markets, particularly two of the specific markets relevant here: lending and land.

DEPARTMENT'S POSITION:

The Department believes that the analysis in this remand redetermination fully meets the Court's remand order to assess each subsidy in turn and not arrive at a uniform "cut-off date."

It is not contradictory to state that China's current economy is neither a true "command-and-control economy" nor a "market economy," where prices and costs are meaningful. The Department's analysis indicates that China's economy lies in the vast grey area between these two poles, where economic actors have some flexibility to act and respond, but where government constraints still prevent the systemic development of market-based prices and costs. As the Department stated, China's economy is characterized by constrained market forces that operate alongside of (and sometimes in spite of) government plans.

The analyses underlying both this remand redetermination as well as the 2007 Georgetown Memorandum include an assessment of the Department's ability to identify well-defined economic actors and spheres of commercial activity -- in contrast to the *monolithic* Soviet-style economies at issue in Georgetown Steel. As such, the Department maintains that it has demonstrated sufficient separation of government and economic actors that would allow the application of the CVD law to China. One might view this analysis as an assessment of how far reforms have brought China away from its command-and-control roots, as opposed to how "market" China's economy has become. The question of whether prices and costs arising out of this same economy are meaningful is an entirely different analysis, and one which is not germane to the question of whether the policy underlying Georgetown Steel, i.e., the policy of "impossibility" described above, *bars* the application of the CVD law to China.

As stated above, the Department maintains that once it was determined that the Department could identify subsidies in China, the statute requires the Department to apply the

CVD law to China as simply one more "country" under the law. See Section 701 of the Act. Therefore, in applying the CVD law to China, the Department uses its normal benchmark practices, which are sufficiently flexible to account for a variety of circumstances, including the circumstance of government distortion of the market that renders in-country benchmarks unusable. Accordingly, we disagree with the GOC, GPX and Starbright that there is some conflict between our cut-off date analysis on remand and our benefit measurement tools.

The GOC, GPX and Starbright argue that the Department's Draft Remand Results is inconsistent with the Court's opinion, especially with respect to the state's involvement in resource allocation which "blurs the line between state and commercial actors." Specifically, they complain that the Department treats state-owned banks and other state-owned enterprises both as "authorities" within the meaning of section 771(5)(B) of the Act and as potential recipients of subsidies, and they cite to the Court's concern about countervailing transfers from "one government arm to another." However, it is well-established that state-owned enterprises can be subsidy recipients. Section 771(5)(C) of the Act states that a "determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned…." Therefore, private companies are not the only possible recipients of countervailable subsidies; government-owned companies may also receive them. This has been well-accepted for some time. See, e.g., Final Affirmative Countervailing Duty Determination; Carbon Steel Plate From Brazil, 48 FR 2568, 2577 (January 20, 1983) ("The subsidy nature of a program to aid the steel sector does not change depending upon who owns the steel companies."). Indeed, there would be no need for a privatization methodology, by which the Department examines whether a privatization of a state-owned company extinguishes any benefits from past subsidies granted to that state-owned company, if state-owned companies

could not receive subsidies in the first place. See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003).

The question of whether an entity is an "authority" capable of making a financial contribution within the meaning of section 771(5)(B) of the Act is a different question entirely, and is not at issue in this remand redetermination or in the underlying litigation. The issue in this remand redetermination is the date at which it is possible to identify and measure different types of subsidies in China. For the reasons set forth in detail above at pages 20-36, we have chosen 1999 as the date for grants and land-related subsidies, 1996 as the date for credit-related subsidies, and 1998 as the date for tax-related subsidies.

IV. THE DEPARTMENT SHOULD OFFSET TUTRIC'S AD MARGIN BY ITS ENTIRE CVD MARGIN AS IT DID WITH STARBRIGHT

TUTRIC objects to the Department limiting its revised application of U.S. CVD law to Starbright only. TUTRIC notes that it had challenged the Department's application of the CVD law to China in the original investigation, that the Court did not require an affirmative argument by each party to prove double counting, and that the application of the CVD law to China is not an issue specific to a single party. TUTRIC argues that the Court's order and overall fairness dictate that the Department offset TUTRIC's AD margin by its entire CVD margin.

DEPARTMENT'S POSITION:

TUTRIC did not include double remedies as a cause of action in its Complaint, request relief on that issue, or address the issue in any brief that it filed with the Court. See TUTRIC Complaint at 4-6; TUTRIC CVD Brief; TUTRIC CVD Reply Brief. It is axiomatic that a party cannot obtain relief for claims that are not asserted in its complaint or arguments to the Court.

See U.S.C.I.T. R. 8(a) & 56.2(c). Hence, TUTRIC, as a matter of law, is not entitled to relief on an issue that it did not properly raise before the Court.

V. THE DEPARTMENT IMPROPERLY REJECTED NEW INFORMATION SUBMITTED BY TUTRIC

TUTRIC contends that the Department's rejection of certain information in its December 22, 2009 remand questionnaire response violates the Court's order to review the "specific facts" of each subsidy to determine whether a cut-off date is appropriate. TUTRIC claims that, rather than assess each subsidy as the Court intended, the Department incorrectly analyzed each subsidy type. TUTRIC argues that the Court recognized that different debt forgiveness programs might require different analysis and demand different conclusions. TUTRIC argues that to analyze properly the specific facts of each alleged subsidy, as the Court requires, the Department must examine the information contained in the December 22, 2009 submission, which concerned the timing of a specific instance of alleged debt forgiveness, and other subsidy-specific information.

TUTRIC also maintains that the reasons given for the rejection of the information are contrary to the language of the questionnaire issued by the Department at the outset of the remand proceeding. TUTRIC argues that, having issued what it claims was an open-ended request for all missing information for the period 1993 to 2006, the Department cannot subsequently reject such information based on a previously unexpressed purpose or intent later ascribed to the remand questionnaire. TUTRIC maintains that the remand questionnaire plainly afforded all respondents the opportunity to provide additional information, and that the Department cannot accept only new evidence that is adverse to TUTRIC.

TUTRIC requests that the Department accept the information now and conduct an analysis of the appropriate cut-off date for the particular instance of debt forgiveness at issue.

DEPARTMENT'S POSITION:

During the investigation, we found, as adverse facts available ("AFA"), that respondent TUTRIC had benefitted from debt forgiveness during the POI, because both TUTRIC and the GOC had failed to provide complete information concerning the sale of TUTRIC's debt from one state-owned bank to another, and eventually to a private party. Neither party had provided an agreement that the Department had requested between the two stated-owned banks. The GOC had claimed it did not control the state-owned parties involved and could not compel these parties to provide information requested by the Department. After multiple requests for the document, the Department informed the GOC that this issue would be struck from the verification outline.[47]

During verification, the GOC (or, more specifically, the Bank of China) offered to "discuss" the debt sale during the course of the Department's verification of other parts of the record.[48] Consistent with our earlier decision and letter to the GOC, we declined to discuss the matter.[49]

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[47] See Letter to the Government of the People's Republic of China from Barbara Tillman, Senior Director, Office 6, AD/CVD Operations, dated February 29, 2008, informing the GOC that the relevant items were being deleted from the final version of the verification outline (we had provided the GOC with a draft version of the outline earlier) after the GOC had once again refused to provide the requested information in a February 27, 2008 questionnaire response.

[48] See Memorandum to Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, "Meetings with the Government of Tianjin Municipality Regarding Tianjin United Tire & Rubber International Co., Ltd. and Affiliates," dated April 22, 2008 at 13.

[49] Id. It is not clear from the record that the GOC intended to provide the agreement even at that time, but only that it was willing to "discuss" the issue to some extent at least. In any case, the Department refuses to accept new information at verification pursuant to 19 CFR 351.301(b)(1), with the exception of the correction of minor clerical errors. Obviously, the examination of the terms of a large debt transfer between two state-owned entities acting in

TUTRIC subsequently included this issue in its motion before the Court, claiming the Department was unjustified in applying AFA.[50] The Court did not provide an opinion on this issue, however, leaving it, along with several other CVD issues, unaddressed until resolution of the current remand.

The Department continues to determine that the information provided by TUTRIC was untimely and properly rejected. We believe the overall context of the remand questionnaire indicated the Department was seeking to confirm that we had complete information on subsidies on which a determination had not already been made in the Final CVD Determination. The Department had been concerned parties may not have carefully considered our previous requests for information pertaining to subsidies granted prior to the cut-off date, given that the use of the cut-off date, and thus the irrelevance of such earlier subsidies, was becoming established precedent during the investigation. The Department concluded, therefore, that it was reasonable and prudent to provide parties an additional chance to report such earlier subsidies, now that it was possible, given the CIT's instruction regarding our cut-off date decision, that these subsidies might be identifiable and measurable. By contrast, neither the questionnaire nor anything else on the record of this remand proceeding or the underlying litigation indicates the Department had any intention of reopening the record of the investigation without limits and re-examining issues we deemed settled and which have not yet been addressed by the Court.

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the capacity of investment bankers does not involve a minor clerical error, and the Department could not possibly have prepared meaningful, probing questions on the matter without having been given prior notice and opportunity to review whatever documents the GOC may have intended to provide. Domestic parties also would have been denied the opportunity to provide commentary on such documentation beforehand in anticipation of the verification.

[50] Brief in Support of Plaintiff Tianjin United Tire & Rubber International Co., Ltd.'s Rule 56.2 Motion for Judgment upon the Agency Record at 9-14.

TUTRIC's claims to have interpreted our questionnaire as some sort of desire to rebuild the record from scratch – a record that was completed over several months through several questionnaires, supplemental questionnaires, and verification – is simply a disingenuous assertion designed to take advantage of certain statements in the questionnaire. This becomes clear through TUTRIC's arguments that submission of the debt agreement was somehow related to the Court's instructions regarding cut-off date; i.e., that the Department requires, in TUTRIC's reasoning, the debt agreement to make a subsidy-specific assessment of whether benefits from debt forgiveness could be identified and measured at the time of the debt forgiveness. TUTRIC never states exactly, or even in broad terms, what might have been in this agreement that would have undermined the Department's conclusion that this act of debt forgiveness constituted an identifiable and measurable subsidy. In fact, there was not a word in TUTRIC's remand questionnaire response, in which the rejected agreement was included, indicating TUTRIC believed this agreement had anything at all to do with the cut-off date analysis. Thus, TUTRIC's current argument appears to be an attempt to characterize the agreement as somehow germane to the issues now under examination in this remand when, as noted above, the issue of whether we properly applied AFA in countervailing this portion of TUTRIC's debt forgiveness is still pending before the Court, and accepting this information now would alter the factual record still under judicial review.

Finally, we note that even if we had accepted this information, it is not clear it would have had any effect on our determination. It is an agreement between two state-controlled banks. The GOC, however, provided no meaningful opportunity to verify this agreement or otherwise examine it in a timely manner, aside from a last minute, surprise willingness to "discuss" the underlying transaction. The agreement by itself, unverified and unexamined, and without any

commentary or contextual discussion from any of the GOC agencies involved, is not helpful for understanding what might have taken place between those agencies and what benefits might have been provided to TUTRIC through their decisions and their design of the agreement.

VI. THE DEPARTMENT SHOULD REVISE ITS AD VALOREM CALCULATIONS FOR DEBT FORGIVENESS TO REFLECT THE DEPARTMENT'S CURRENT METHODOLOGY

TUTRIC argues that the Department should apply its revised methodology for calculating discount rates, adopted in Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 16836 (April 13, 2009), in this remand redetermination. TUTRIC contends that this more accurate methodology would significantly reduce the benchmark discount rate applied to TUTRIC's countervailed debt forgiveness. It submits that, with the record open, there is no reason for the Department to use a methodology that has been invalidated. TUTRIC requests that the Department revise the calculation of its countervailing subsidy rate for all debt forgiveness using such a revised discount rate.

DEPARTMENT'S POSITION:

TUTRIC did not raise this issue as a cause of action in its Complaint, request relief on that issue, nor address the issue in any brief that it filed with the Court. See TUTRIC Complaint at 4-6; TUTRIC CVD Brief; TUTRIC CVD Reply Brief. It is axiomatic that a party cannot obtain relief for claims that are not asserted in its complaint or arguments to the Court. See U.S.C.I.T. R. 8(a) & 56.2(c). Additionally, a party may generally not introduce a new issue in a remand proceeding outside the scope of a remand order. See, e.g., Zhejiang Machinery Import & Export v. United States, 473 F. Supp. 2d 1365, 1378 n.12 (Ct. Int'l Trade 2007). Here, the Court's remand instructions make no mention of applying a new methodology to calculate

discount rates. See GPX, Slip Op. 09-103, at 33-34. Consequently, TUTRIC is not entitled to relief on an issue that it did not properly raise before the Court and that lies outside the scope of the Court's remand instructions.

FINAL REMAND REDETERMINATION RESULTS

I. SUMMARY OF REVISED SUBSIDY RATES

	Final CVD Determination	Final Remand Redetermination
GTC	2.45%	3.35%
Starbright	14.00%	14.00%
TUTRIC	6.85%	6.85%
All Others	5.62%	6.04%

II. SUMMARY OF REVISED WEIGHTED-AVERAGE DUMPING MARGINS

Exporter	Producer	Final AD Determination	Final Remand Redetermination
Starbright/GPX	Starbright	29.93%	15.93%

CONCLUSION

Based on the forgoing analysis and discussion, the Department has decided, pursuant to the remand order of the U.S. Court of International Trade, to continue to impose CVD remedies on imports of OTR Tires from China, but, the Department has also offset those countervailing duties against GPX/Starbright's calculated AD cash deposit rate. Further, the Department determines that Starbright did not demonstrate that it should be treated as an MOE. Finally, as instructed by the Court, the Department has refrained from applying a uniform cut-off date for identifying and measuring subsidies and has, instead, evaluated each type of subsidy to determine at what point in time it could be identified and measured.

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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(Date)