



**UNITED STATES DEPARTMENT OF COMMERCE**  
**International Trade Administration**  
Washington, D.C. 20230

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Section 129 Determination (WTO DS 379)  
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**DATE:** July 31, 2012

**MEMORANDUM FOR:** Paul Piquado  
Assistant Secretary  
for Import Administration

**FROM:** Christian Marsh *CM*  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Final Determinations: Section 129 Proceedings Pursuant to the  
WTO Appellate Body's Findings in WTO DS 379 Regarding the  
Antidumping and Countervailing Duty Investigations of Laminated  
Woven Sacks from the People's Republic of China

**I. SUMMARY**

Consistent with section 129 of the URAA, which governs the actions of the Department following adverse WTO dispute settlement reports, the Department is revising the determinations in the four AD and four CVD proceedings examined in WTO DS 379. We are revising the analysis underlying these determinations in accordance with findings in the relevant reports adopted by the WTO DSB.

More specifically, as part of this proceeding, as discussed in greater detail below, the Department has revised the CVD rates as well as its approach to certain analytical issues in the CWP, LWRPT, OTR Tires, and Sacks investigations. Additionally, the Department, as part of these proceedings, has made adjustments to the AD cash deposit rates determined in the less-than-fair value investigations of CWP, LWRPT, OTR Tires, and Sacks from the PRC in the manner described in the respective Preliminary Determination AD Cash Deposit Adjustment Memoranda.<sup>1</sup>

If the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement these determinations, in whole or in part, the revised AD cash deposit rates will apply to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs.

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<sup>1</sup> See CWP Preliminary Determination AD Cash Deposit Adjustment Memorandum; LWRPT Preliminary Determination AD Cash Deposit Adjustment Memorandum; OTR Tires Preliminary Determination AD Cash Deposit Adjustment Memorandum; and Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum.



Included at the end of this memorandum is an Attachment containing 1) a complete list of abbreviations and acronyms used in this memorandum and 2) a list of the Federal Register Notices, litigation, and other documents cited in the discussion of the issue.

## **II. ISSUES ADDRESSED PURSUANT TO WTO DS 379**

Given the number and complexity of the issues involved, the Department addressed the DSB's findings through separate preliminary determination memoranda with respect to each of the issues addressed in WTO DS 379. We have analyzed the factual information submitted to the records of these proceedings and the affirmative and rebuttal comments submitted by interested parties on the preliminary determinations in each of the section 129 proceedings. Because the loan benchmark and trading company issues were raised only in the context of the OTR Tires proceedings, those issues are addressed only in the final determination for the OTR Tires proceedings. Similarly, because the land specificity issue was raised only in the context of the Sacks CVD proceeding, we address that issue only in the final determination for the Sacks section 129 proceedings. Additionally, because the facts available issue pertains only to the CWP and LWRPT proceedings, that issue is addressed only in the final determinations for those section 129 proceedings. However, because the public bodies and double remedies issues are present in the proceedings covering CWP, LWRPT, OTR Tires, and Sacks, we have included in the final determinations for all eight of the proceedings the summary and Department's positions regarding all comments filed on those issues across the eight investigations.

For purposes of the final determinations, we are addressing all issues related to the concurrent AD and CVD investigations covering Sacks in a single memorandum. For ease of reference, we provide separate Background and Discussion of the Issues sections for each issue addressed in WTO DS 379.

As a result of our analysis, we have not made any changes to the respective preliminary determinations. Consequently, the Department is adopting the findings and analyses in the preliminary determinations for its final determinations in these proceedings. With regard to the issue of public bodies in particular, this means the Department is adopting the findings and categorization of the input producers at issue as found in the proprietary attachments to the preliminary determination. The Department is also adopting as final the May 18, 2012, Public Bodies Memorandum.

### **LAND SPECIFICITY**

**Background:** The Department opened the record with respect to this issue and the LWS Committee submitted new factual information on the record of the Sacks CVD proceeding on March 2, 2012. The GOC submitted a rebuttal to this information on the record of the Sacks CVD proceeding on March 8, 2012. The Department subsequently issued its preliminary determination regarding land specificity on April 9, 2012.<sup>2</sup> Thereafter, we provided interested

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<sup>2</sup> See Sacks Land Preliminary Determination.

parties with an opportunity to submit affirmative and rebuttal comments. The GOC submitted comments on the record of the Sacks CVD proceeding on April 16, 2012, and the LWS Committee submitted a rebuttal brief on the record of the Sacks CVD proceeding on April 20, 2012.

### **Discussion of the Issues**

#### **Comment 1: Whether Aifudi Resides Within A “Distinct Regime”**

- The GOC contends that the Department refers to no evidence in its preliminary determination establishing a “distinct regime,” beyond the fact that the county in which Aifudi resides (Huantai County) maintained different land prices for different districts of the county.
- According to the GOC, in determining the price for Aifudi’s land, the county government referred to the prices established in the circular it drafted in accordance with central government and city law (Huantai County Land Circular), as well as in relation to land prices in a neighboring county. Thus the county did not determine Aifudi’s land price in accordance with a distinct regime, but instead relied on these multiple sources in accordance with applicable law.
- The GOC argues that the Department’s conclusion that prices varied within the industrial park in which Aifudi resides according to the capital each resident invested is not borne out by the record. Even if there were such a policy, the GOC notes, Aifudi would not have been eligible for the lower rates given the small amount of its capital.
- The LWS Committee asserts that, charging different prices for land in different geographical regions is the essence of regional specificity. The assignment of different land prices to five designated geographical regions within Huantai County clearly demonstrates that the county government did not provide land on the same terms to everyone. The Panel’s findings emphasized the significance of such a price differential.
- The LWS Committee argues that the factual record does not support the GOC’s contentions that land prices were set in a consistent manner throughout Huantai County. The price for Aifudi’s land was set lower than elsewhere in order to promote certain government objectives.

**Department Position:** Consistent with the reasons given in the Sacks Land Preliminary Determination, the Department continues to find that the GOC provided land to Aifudi within a “distinct regime,” as defined by the Panel, and that, therefore, the provision of land to Aifudi was specific. While neither the Panel nor the Appellate Body elaborated at length regarding the concept of a distinct regime, the Panel noted explicitly that one indicator of a distinct regime might include “distinctive pricing.”<sup>3</sup>

Such distinctive pricing is demonstrated clearly by the Huantai Land Price Circular the GOC submitted in response to the first questionnaire the Department issued in this section 129 proceeding. As discussed in the Sacks Land Preliminary Determination, this document creates a distinct pricing regime for different industrial land districts. Aifudi acquired land use rights in

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<sup>3</sup> See Panel Report at para. 9.162.

one of those districts, and that specific district is within the confines of Huantai County, the government of which is the administrative authority responsible for providing land to Aifudi. The Huantai Land Price Circular, which was not on the record of the original investigation, and which, therefore, was not before the Panel or the AB, appears to be, on its face, precisely the type of evidence the Panel had in mind in its discussion of a “distinct regime.” Thus we disagree with the GOC that the county’s determination that the price of land should vary in different areas of the county constitutes no evidence of a distinct regime.

To be clear, the Department does not find that regional specificity exists wherever an administrative authority sets multiple prices for land within its jurisdiction. As we explained in the Sacks Land Preliminary Determination, a critical aspect in making the regional specificity finding in this situation is that the various prices fixed by the county do not stem from the use of “uniform, objective criteria, such as a uniform valuation policy.”<sup>4</sup> Thus, for example, a policy setting prices in different districts throughout the county based on surveys of recent arm’s length transactions between private parties might not result in a finding of distinct regimes, nor might a policy that uses other valuation criteria consistently, such as the distance between each district and major highways, or each district’s access to utilities such as water and electricity, population density, etc. As discussed in the Sacks Land Preliminary Determination, however, the GOC was unable to explain how the fixed prices in the Huantai Land Price Circular were established. As we also noted in the Sacks Land Preliminary Determination, a circular which fixes prices in each district across a fifteen-year period (1992 through 2007) is unlikely to be based on a policy referencing market prices; by definition, fixed prices over a significant period of time ignore market fluctuations, and thus a fixed price policy would only reflect market prices if there were no expectation that prices would change over 15 years.

As explained in the Sacks Land Preliminary Determination, the conclusion that the prices fixed in the Huantai County Land Circular for Aifudi’s district did not stem from a uniform pricing regime across the county is supported by several facts, and is not simply an inference drawn in the absence of any explanation from the GOC. As noted, there is a specific rate provided in the circular for FIEs, which is the lowest rate available in the county, equal only to the rate for Aifudi’s district. A single flat rate for all FIEs, equal to the lowest rate available in the county, has no discernible purpose other than to encourage foreign investment in the county, and so provides clear evidence that prices were set by Huantai County officials with certain policy goals in mind, rather than based on uniform, objective criteria. Such a conclusion is also supported by Aifudi’s statement in the underlying investigation that Huantai County set prices “to attract companies and businesses to invest in the Industrial Park. . . . In other words, the price of the land use rights in the Industrial Park was not as important as the tax revenue that would come to the town and county through the business generated on the site.”<sup>5</sup>

Finally, the Department’s conclusion in the Sacks Land Preliminary Determination is supported by information provided by the LWS Committee in the original investigation and again in this section 129 proceeding that prices within the industrial park in which Aifudi resides were tied to investment commitments.<sup>6</sup> In its March 8, 2012 submission of rebuttal information, the GOC

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<sup>4</sup> See Sacks Land Preliminary Determination at 6.

<sup>5</sup> See Aifudi’s November 6, 2007 questionnaire response at 11.

<sup>6</sup> See Sacks Land Preliminary Determination at 7.

objected that the LWS Committee's information could not be authenticated or dated. The GOC made the same claim in its rebuttal case brief, despite the fact that the information is from a GOC internet domain. The GOC claims that the website can no longer be accessed. As of the drafting of this memorandum, the Department is still able to access the information concerning the preferential policies in Aifudi's investment park on a website maintained by the government of Shandong province devoted to SMEs.<sup>7</sup> The Department does not understand why the GOC continues to claim it is unable to authenticate or date a policy published on a website maintained by the government of one of its largest provinces, concerning a policy in an industrial park operated by the county government.<sup>8</sup>

In addition, contrary to the GOC's statement that the Department relied on "one exhibit" in concluding that there is a link between prices in the industrial park and investment levels, the Department noted in the Sacks Land Preliminary Determination that, by its own admission, Aifudi had to commit itself to at least a five million RMB capital investment to reside in the industrial park.<sup>9</sup> While the GOC notes that Aifudi never reached the investment levels indicated in the policy the LWS Committee submitted, it did reach the five million RMB level.<sup>10</sup> Regardless of whether Aifudi was entitled to, or did in fact enjoy, the preference, the evidence still demonstrates that a policy tying investment levels to land prices existed inside the park, but not outside the park. This policy is further evidence that the provision of land to Aifudi was made within a distinct regime.

The Department, therefore, rejects the GOC's contention that the land prices within Huantai County were set in accordance with a uniform policy. While such prices may have been set in accordance with the central and local government law applicable at the time, the GOC has provided no evidence that the prices stipulated in the Huantai County Land Circular stem from any type of objective and uniform valuation policy applied consistently across the county. Rather, the information from the original investigation and gathered during this section 129 proceeding indicates the county used the discretion afforded to it under the applicable law to choose prices designed to promote investment goals. As discussed above and in the Sacks Land Preliminary Determination, such evidence includes the use of fixed prices immune to market movements over a 15 year period, special prices for FIEs, statements by Aifudi regarding its understanding of the county's motives, and price preferences within Aifudi's industrial park that

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<sup>7</sup> See <http://ht.smesd.gov.cn/info/?1002.html> (last accessed on July 19, 2012).

<sup>8</sup> According to the website, which has a GOC internet domain (i.e., "gov.cn"), the website is maintained by the Shandong Province Ministry of Industry and Information Technology, SME Division.

<sup>9</sup> See Sacks Land Preliminary Determination at 7.

<sup>10</sup> As noted in the Sacks Land Preliminary Determination, we cannot date the policy the LWS Committee has submitted and the GOC has apparently not attempted to do so. The discrepancy between the figures in the policy the LWS Committee submitted and the five million RMB figure applied to Aifudi could simply be attributable to the passage of time (i.e., the investment commitments are higher now than they used to be). When we asked the GOC about the version of this policy the LWS Committee submitted in the original investigation, the GOC stated: "The {policy} cannot be confirmed as to either its scope or applicability because of ambiguity in its content and source. The GOC can say, however, that the preferential policies enacted by Zibo municipality cannot be changed by the Huantai County government because Huantai County is a lower level government." The Zibo policies the GOC refers to in this statement also tie preferences to investment levels, but do not include preferential land prices. See the GOC's September 16, 2011 questionnaire response at 11. While arguably these additional Zibo policies, which only apply to industrial parks, are also evidence of distinct regimes, the Department did not consider them in the Sacks Land Preliminary Determination because they do not appear to affect the land pricing policy directly.

were tied to investment commitments. For these reasons we find that Aifudi's land-use rights were provided pursuant to a distinct regime, and we thus maintain our determination that the provision of such rights was specific.

During the initial investigation, the GOC informed the Department that Huantai County determined Aifudi's price by reference to two land transactions in a neighboring county in 2006. In response to the first questionnaire in this section 129 proceeding, however, the GOC informed the Department that prices were set in accordance with the 1992 Huantai Land Price Circular, a document never before referenced by the GOC and otherwise previously unknown to the Department. In response to the second questionnaire in this section 129 proceeding, and in its comments on the Sacks Land Preliminary Determination, the GOC attempts to dispel the apparent contradiction between these two explanations by claiming they are both true, *i.e.*, that the county relied on both the circular and the two transactions in the neighboring county. Thus, according to the GOC, the county did have a uniform policy for setting prices across the county, one that relied on a combination of the circular and an informal survey of recent transactions outside the county.<sup>11</sup> There is no language in the circular, however, that allows for or contemplates going beyond its stipulated prices. The circular does not indicate in any way that the stipulated prices are flexible or discretionary prices or that they are somehow only benchmarks to be used or adjusted in conjunction with other information. Further, the GOC has provided no information to the Department that reconciles this "hybrid" explanation regarding the determination of Aifudi's price with the text of the circular.<sup>12</sup>

In any case, regardless of whether the Huantai Land Price Circular was used by itself or in combination with an informal survey of neighboring transactions, it clearly establishes several districts with distinct land prices. As we explained in the Sacks Land Preliminary Determination and discuss again below, the evidence supports the conclusion that Aifudi's Industrial Park is a distinct regime within the meaning of the Panel's report. Thus, any prices based on these stipulated values, even if somehow adjusted through a survey of neighboring transactions, would still have emanated from the distinct regime established by the circular. While the two transactions in the neighboring county were at prices similar to that paid by Aifudi, these two transactions by themselves do not indicate that, on a comprehensive basis, there were, or were not, differences in prices or pricing policies inside and outside Aifudi's district. By contrast, the comprehensive evidence of the variance in prices and policies across the county provided by the Huantai County Land Circular demonstrates that the range of prices paid for industrial land use rights in Aifudi's district is less than all other districts and equal only to the preferential rate established for FIEs.

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<sup>11</sup> The GOC states that Huantai County did not undertake a formal survey of land prices until 2007. GOC December 19, 2011 questionnaire response at 4.

<sup>12</sup> The GOC states for the first time in response to the second questionnaire in this section 129 proceeding that both pricing methods were applied, but it does not explain how the two methods work together: "{T}he price to Golden Moon (Aifudi) was determined by its location in Zone 5 under the Huantai Land Price Circular. Furthermore, as discussed in the provincial government verification report Huantai County officials also looked at prices in surrounding counties outside the zone in setting the final price." GOC December 19, 2011 questionnaire response at 5. The Huantai Land Price Circular provides price ranges for most districts. Absent detailed evidence from the GOC, the Department can at best speculate that perhaps an informal survey of neighboring transactions was used to determine where in the range the price paid for land use should be set.

## **PUBLIC BODIES**

**Background:** The Department issued the preliminary determinations regarding public bodies on May 18, 2012.<sup>13</sup> Thereafter, we provided interested parties with an opportunity to submit affirmative and rebuttal comments. The GOC submitted comments on June 1, 2012 on the record of all four CVD section 129 proceedings. On June 8, 2012, rebuttal comments were submitted by U.S. Steel and Wheatland Tube in the CWP CVD proceeding, the USW in the OTR Tires CVD proceeding, as well as by the LWS Committee in the Sacks CVD proceeding.

### **Discussion of the Issues**

#### **Comment 1: Conduct Of The Public Body Inquiry And The RPT**

- The GOC argues that the Department’s conduct of the public body implementation proceeding was excessively burdensome.
- The GOC complains that the Department sought “unprecedented and excessive amounts of information” without informing the parties what evidence is relevant and what the Department’s analysis would be.
- It further complains that the Department unilaterally extended the RPT for implementation.
- Domestic interested parties<sup>14</sup> rebut the GOC’s comments and argue that the Department’s conduct of the investigation was consistent with the Appellate Body report and the GOC’s arguments before the WTO.

**Department Position:** In the underlying WTO dispute, the Appellate Body articulated a new interpretation of the term “public body,” finding that a public body is “an entity that possesses, exercises or is vested with governmental authority.”<sup>15</sup> Accordingly, the Department’s task in this proceeding has been to determine whether the producers in question possess, exercise or are vested with governmental authority. This is a fact-intensive inquiry that requires the Department to examine, among other things, the nature of Chinese government administration, the scope and extent of governmental functions in China, the government’s role in the economy, and individual circumstances of the producers at issue. As the Appellate Body stated, “just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.”<sup>16</sup> The Appellate Body noted that “determining whether an entity is a public or private body may be a complex exercise...”.<sup>17</sup> It stated that the Department “was under an obligation to actively seek out

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<sup>13</sup> See CWP Public Bodies and Facts Available Preliminary Determination Memorandum; LWRPT Public Bodies and Facts Available Preliminary Determination Memorandum; OTR Tires Public Bodies Preliminary Determination Memorandum, and Sacks Public Bodies Preliminary Determination Memorandum.

<sup>14</sup> Domestic interested parties filed rebuttal comments to the GOC’s public body comments in each of the Sacks, OTR and CWP section 129 proceedings, but not in the LWRP proceeding. They addressed this particular argument by the GOC in the CWP and Sacks proceedings.

<sup>15</sup> Appellate Body Report, para. 317.

<sup>16</sup> Appellate Body Report, para. 317.

<sup>17</sup> Appellate Body Report, para. 345.

information relevant to the analysis of whether a financial contribution had been made,” including “information relevant to the potential characterization of SIEs as public bodies.”<sup>18</sup>

In the underlying dispute, the GOC took the position that it was not sufficient for the Department to base a public body determination exclusively on government control established through majority shareholding. On this point, the Appellate Body agreed with the GOC. The Department’s actions throughout this 129 proceeding have been consistent with, and responsive to, the Appellate Body’s decision. The Department sought information from the GOC and the Chinese respondents that was relevant to its public body analysis. The GOC complains that the Department’s requests were excessive, but these requests were informed by and consonant with the Appellate Body’s newly articulated standard.

While the Department acknowledges that the very fact intensive nature of the public body analysis required considerable effort by both itself and interested parties, such an effort was an inherent consequence of the “complex exercise” envisioned by the Appellate Body. The GOC further complains that the Department did not inform parties what evidence would be relevant. However, all parties were aware of the Appellate Body’s findings, and the relevant evidence is simply evidence pertinent to those findings. Moreover, our preliminary determination further sets out our analysis and the relevant evidence, and we made that preliminary determination available for comment. The GOC elected not to provide detailed comments on this analysis, instead presumably reserving its views for potential future WTO dispute settlement.

Regarding the RPT, we note that these particular section 129 proceedings involve eight administrative proceedings, multiple complex issues in addition to the Appellate Body’s new interpretation of the term “public body”, and extensive administrative records. From the beginning of the proceeding, the United States has explained that it would be a time-consuming process. The GOC itself even asked for several extensions for its questionnaire response in order to provide the information requested. As described elsewhere in this determination, and as reflected in the administrative records of each section 129 proceeding, the Department has worked diligently and in good faith to complete this proceeding in a reasonable period of time.

#### **Comment 2: The GOC’s Claim That The Outcome Was “Preordained”**

- The GOC argues that the findings of the Public Bodies Memorandum appear to have been preordained and do not address any of the factual statements and documentation provided by the GOC.
- A domestic industry party<sup>19</sup> argues that the Department considered all record evidence and frequently relied upon evidence provided by the GOC.

**Department Position:** The Department’s findings were not “preordained.” The Department considered all record evidence in making its determinations. In fact, in the Public Bodies Memorandum, the Department relied upon approximately 20 documents submitted by the GOC in these section 129 proceedings. Moreover, we have responded to arguments made by the GOC

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<sup>18</sup> Appellate Body Report, para. 344.

<sup>19</sup> Only one domestic interested party, U.S. Steel in the CWP proceeding, addressed this issue.



in its questionnaire responses and elsewhere on the record, the majority of which already were addressed in the Public Bodies Memorandum or in our preliminary determinations. To the extent the GOC objects to our reliance upon documents and sources not submitted by the interested parties, we note that the Department has long valued and often relied upon the perspective of expert, third-party sources (e.g., the World Bank, the OECD, academic experts, etc.). Rather than explain its views as to why such sources are objectionable, or to otherwise support its assertion regarding the Department's conclusions, the GOC chose not to rebut any of the expert, third-party documents placed on the record by other parties, some of which were core sources for the Department's findings.

### **Comment 3: Initiation Standards**

- The GOC argues that the petitions in the underlying four CVD investigations lacked sufficient allegations and evidence that the input producers at issue were vested with governmental authority.
- According to the GOC, the Department's initiation of the investigations of whether goods were provided for LTAR raised serious concerns under Article 11 of the SCM Agreement. The GOC argues that the Department should have terminated these investigations.
- Domestic interested parties' arguments vary by investigation.<sup>20</sup> Generally, they argue that the Department's initiations are not a relevant issue in these section 129 proceedings.
- Domestic interested parties also argue that the Department had sufficient evidence on the record to justify initiating investigations into whether goods were provided to the respondents for LTAR.

**Department Position:** The Department's initiations of investigations into whether the respondents received goods for LTAR were not challenged by China in the underlying WTO dispute. The DSB made no findings or recommendations regarding initiation and, consequently, these initiations are not at issue in these section 129 proceedings.

### **Comments Made Prior To The Preliminary Determination**

In addition to responding to comments made by the interested parties in their case briefs on our Preliminary Determinations, we are also responding to certain comments and arguments raised by the GOC earlier in these section 129 proceedings. These comments and the Department's responses are set forth below. Our decision to address these issues in no way relieves interested parties of their obligation under 19 CFR 351.309(c)(2) to present all arguments that, in their view, continue to be relevant to the Department's final decision, including any arguments previously presented on the record. Normally, the Department in a final determination only addresses arguments raised in a case brief. However, because of the unique nature of this determination, and particularly in light of the GOC decision to provide only limited comments and its statement that it "will reserve for the appropriate forum – the DSB – its detailed views on the substance of the Department's public body findings," we are addressing certain other arguments and issues.

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<sup>20</sup> Domestic interested parties provided rebuttal comments on this argument by the GOC in all section 129 proceedings except LWRPT.

#### **Comment 4: The Relevance Of The Doctrine Of Sovereign Immunity To A Public Bodies Inquiry**

- In its Questionnaire Response, the GOC submits several documents which it states address the question of whether or not entities engaged in commercial activity are vested with or exercising government authority or government functions.<sup>21</sup> These include the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), the European Convention on State Immunity, a 2008 Report Prepared for the Special Representative of the UN Secretary-General on Business and Human Rights titled “State Immunity and State-Owned Enterprises”, and an OECD Working Paper titled “Foreign State Immunity and Foreign Government Controlled Investors.”<sup>22</sup>
- The GOC also notes that neither the GOC nor Chinese SIEs have claimed sovereign immunity when subject to antitrust lawsuits in the United States, relying instead on claims of sovereign compulsion and the act of state doctrine.<sup>23</sup>

**Department Position:** In the Department’s view, the issue of whether an entity can or does exercise a claim of sovereign immunity is not determinative of, or relevant to, the question of whether that entity is a public body. As stated by the Appellate Body, the test for whether an entity is a “public body” within the meaning of the SCM Agreement is whether it “possesses, exercises, or is vested with government authority.”<sup>24</sup> The Department’s Public Bodies Memorandum discusses the application of this test in the instant proceeding. Whether an entity possesses sovereign immunity is a separate question. The GOC has not stated any rationale for how discussions of the international law of sovereign immunity or the particular exercise of such claims in antitrust lawsuits bear on the issue of whether an entity is a public body within the meaning of the SCM Agreement. In the Department’s view, consideration of such matters has little bearing on the Department’s analysis in its public body inquiry and thus did not merit discussion in the Preliminary Determination.

The legal concepts of “sovereign immunity” and “public body” are not comparable, nor is one instructive of the other. The doctrine of sovereign immunity is, as the name implies, a jurisdictional defense of immunity from civil and criminal lawsuits. Those entities entitled to claim sovereign immunity include entities that are clearly not “public bodies” under the SCM Agreement. Government agencies and organs are a prime example. Conversely, public bodies and even government agencies are not entitled to claim sovereign immunity in all cases, even when they clearly “possess, exercise, or are vested with government authority.” For example, under the doctrine of sovereign immunity in general and in U.S. law in particular, foreign states are generally not entitled to claim sovereign immunity when the plaintiff’s claim is based on acts

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<sup>21</sup> See The GOC’s February 21, 2012, Questionnaire Response for CWP at pages 14-15 (“GOC Questionnaire Response”). Identical statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at pages 14-15 in OTR Tires; page 14 for Sacks; and pages 14 for LWRPT.

<sup>22</sup> *Id.* and Exhibits A-52 to A-55.

<sup>23</sup> See CWP GOC Questionnaire Response at page 11. Identical statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 11 in OTR Tires; page 10 for Sacks; and pages 10 for LWRPT.

<sup>24</sup> See Appellate Body Report, para. 317.

of commercial activity by the State.<sup>25</sup> In Republic of Argentina v. Weltover, the Supreme Court made clear that an activity may be considered “commercial” for purposes of sovereign immunity even where it was in pursuit of “fulfilling uniquely sovereign objectives.”<sup>26</sup> Thus, it is possible that an entity may “possess, exercise or be vested with government authority” (and thus be a public body), yet not be entitled to claim sovereign immunity. The fact that a government organ may not be entitled to claim, or chooses not to exercise a jurisdictional defense of, sovereign immunity because it is engaged in commercial activity thus has no bearing on whether the organ is properly considered to be part of the government. Similarly, the fact that an entity is engaged in commercial activity has no bearing on whether the entity is properly considered to be a public body.

Accordingly, it is not surprising that the GOC and Chinese SIEs have not attempted to claim sovereign immunity in U.S. antitrust lawsuits; whether such an entity is a government organ, a public body, or a private body, it would not be entitled to sovereign immunity for conduct stemming from its commercial activity. While the GOC has asserted that neither it nor its SIEs have claimed sovereign immunity in U.S. antitrust lawsuits, the Department finds that a failure to claim sovereign immunity in such circumstances has no bearing on whether such entities might be considered public bodies under the SCM Agreement.

#### **Comment 5: Whether All Chinese Firms Are Legally Independent From The Government And Afforded Equal Legal Footing**

- The GOC argues that a variety of laws provide Chinese firms with operational independence from the government. For example, with respect to the 2006 Company Law, the GOC argues that the law provides for the corporate governance structures for companies, defines the power of shareholders, the board of directors and the general manager of a company as well as “limits those matters subject to shareholder and board approval to significant matters,”<sup>27</sup> regardless of the enterprises’ ownership type.
- Further, the GOC argues that the laws of China do not distinguish between private companies and state-owned companies, including with respect to the formation, governance and operations of companies under the Company Law,<sup>28</sup> as well as with respect to rights, responsibilities and obligations under the Civil Law, the Criminal Law, the Bankruptcy Law<sup>29</sup>, the Labor Law,<sup>30</sup> the Enterprise Income Tax Law and the Interim Regulation of the PRC on Valued-Added Tax.<sup>31</sup>

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<sup>25</sup> E.g., United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), Article 10; 28 U.S.C. § 1605(a)(2); Republic of Argentina v. Weltover, 504 U.S. 607 (1992).

<sup>26</sup> Id. at 614.

<sup>27</sup> CWP GOC Questionnaire Response at page 6. Identical statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 6 OTR Tires; page 5 for Sacks; and pages 5 for LWRPT.

<sup>28</sup> CWP GOC Questionnaire Response at pages 5, 6 and 13. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at pages 5, 6 and 13 for OTR; pages 4, 5, and 12 for Sacks; and pages 5 and 13 for LWRPT.

<sup>29</sup> CWP GOC Questionnaire Response at page 14. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 14 for OTR; page 13 for Sacks; and page 13 for LWRPT.

- The GOC argues that SIEs are subject to the competition laws including the Anti-Monopoly Law and the Anti-Unfair Competition Law and are subject to the same scrutiny, for example, of mergers and acquisitions by the competition authorities as are private companies.<sup>32</sup>

**Department Position:** As explained in the Public Bodies Memorandum, the Department’s review of the record evidence demonstrates that the Chinese legal regime governing the operation and equal treatment of Chinese SIEs is both complex and often times contradictory. The Department’s analysis weighed the totality of the record evidence with respect to the legal regime and the de facto environment in which SIEs operate and concluded that certain Chinese SIEs are public bodies within the meaning of the SCM Agreement. Therefore, the Department’s analysis implicitly addressed the assertions made by the GOC in its questionnaire responses and the Public Bodies Memorandum accurately reflects this analysis for the purposes of the final determination.

To review that analysis, the Department notes for purposes of this final determination that many laws in China ostensibly provide for a certain level of commercial independence for economic actors and for equal treatment, regardless of ownership type. On the other hand, as noted in the Public Bodies Memorandum, many laws also explicitly provide for the protection and promotion of the state sector as well as explicitly and legally empower the government in China to play a pivotal role in ensuring that outcome.<sup>33</sup> Thus, in China today, under the current legal and regulatory regime, there are procedures and regulations for the establishment and operations of firms that appear to be legally empowered to make independent decisions. However, the same legal and regulatory regime (in fact, in some cases, the same law, policy or regulation) also gives the State the legal authority and wide, unspecified latitude to control, influence or interfere in the operations or decisions of SIEs.

For example, the 2006 Company Law cited by the GOC provides SIEs with the apparent legal right and obligation to act as independent economic entities. However, the very same law also explicitly leaves open the possibility for the government to use a variety of levers to influence or control firms in a manner above and beyond the regulatory role normally reserved for a government in a market-economy. In that regard, article 1 of the 2006 Company Law states that, in addition to regulating the organization and operation of companies and protecting the

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<sup>30</sup>CWP GOC Questionnaire Response at pages 7 and 8. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at pages 7 and 8 for OTR; pages 6 and 7 for Sacks; and pages 6 and 7 for LWRPT.

<sup>31</sup> CWP GOC Questionnaire Response at page 7. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 7 for OTR; page 6 for Sacks; and page 6 for LWRPT.

<sup>32</sup> CWP GOC Questionnaire Response at pages 10 and 11. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at pages 10 and 11 for OTR; pages 9 and 10 for Sacks; and pages 9 and 10 for LWRPT.

<sup>33</sup> Public Bodies Memorandum at page 6-8. In providing examples of the legal power and responsibility of the government to guide the socialist market economy and uphold the leading role of the state-owned economy, the Public Bodies Memorandum also cites to the Constitution of the People’s Republic of China, the 2007 Property Law of the People’s Republic of China, the 2008 Law on State-Owned Assets of Enterprises, the Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises (2003) and the Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises (2006).

interests of the relevant stakeholders, the law is also “formulated for the purposes of ... maintaining the socialist economic order and promoting the development of the socialist market economy.” The law does not elaborate on how the otherwise legitimate rights of a (supposedly) independent firm would be adjudicated if they stood in opposition to the “socialist economic order” or the “socialist market economy.”

With respect to the GOC’s assertions regarding the laws governing mergers and acquisitions, there is record evidence that suggests that the implementation of China’s competition laws may be ineffective, in particular when they affect the state-owned sector. For example, the joint DRC/World Bank Report expresses some concerns with the law, stating that “[i]n its current version, the law lacks teeth” and “is not actionable, leaving enforcement as a voluntary matter for higher authorities.” The report goes on to state that “[t]he relevant provisions are explicitly subordinate to other laws and regulations, almost guaranteeing that they will be overridden.”<sup>34</sup> It also remains unclear how China will implement a provision that requires protection for the lawful operations of state-owned enterprises and government monopolies in industries deemed nationally important. Therefore, while SIEs may be subject to the same anti-monopoly law as other enterprises, implementation of the law remains unclear and the continued administrative powers of agencies that are also deeply involved in industrial planning, such as the NDRC and SASAC itself, may hinder consistent application of the law across all enterprises. Further, as noted in the Public Bodies Memorandum, mergers and acquisitions (some forced by the government) have been found to be used by the government as a means to “manage competition”<sup>35</sup> and hence, are not necessarily “commercial decisions made by shareholders and their boards” as asserted by the GOC.

As a general matter, the Department addressed the substance of the GOC’s arguments in its Public Bodies Memorandum through its analysis of the legal framework that governs China’s economy and enterprises as well as the reality on the ground regarding the role of the government in China’s economy. Moreover, in doing so, the Department relied on laws placed on the record by the GOC, as well as on expert, third-party sources placed on the record by parties (which the GOC chose not to rebut). Based on the record of this proceeding and in keeping with the broader findings of the Public Bodies Memorandum, we find that the legal regime governing SIEs in China does not isolate SIEs from significant state intervention. As noted above, the legal regime’s expectations of the pursuit of profit frequently conflict with requirements to fulfill state objectives.

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<sup>34</sup> China 2030: Building a Modern, Harmonious, and Creative High-Income Society, the World Bank and the Development Research Center of the State Council of China (2012) (hereafter referred to as the joint DRC/World Bank Report) at page 119. As noted in footnote 37 of the Public Bodies Memorandum, the Department notes that this paper is still in “conference” form. Nevertheless, the Department also finds that the joint paper is informative and provides important insights into China’s economy and governance. In its press release for the report, the World Bank refers to the “key findings of a joint research report by a team from the World Bank and the Development Research Center of China’s State Council”-- without caveats regarding the finalization of the report -- stating further that these key findings “{lay} out the case for a new development strategy for China to rebalance the role of government and market, private sector and society, to reach the goal of a high income country by 2030.” See World Bank Press Release, “China: The Case for Change On the Road to 2030” (February 27, 2012).

<sup>35</sup> Public Bodies Memorandum at pages 24-26.

## **Comment 6: Whether SASAC Acts As An “Institutional Firewall” Between The Government And SIEs**

- The GOC argues that the 2006 Company Law does not expand SASAC’s rights beyond those normally enjoyed by shareholders under the Company Law and that SASAC was created to be an “institutional fire wall between the government ministries and offices performing traditional government function and the companies with government ownership.”<sup>36</sup>

**Department Position:** The Department addressed these arguments fully in its Public Bodies Memorandum. The Department noted that Article 7 of the 2003 Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises (the “Measures” that created SASAC) states that SASAC “shall not exercise the government’s function of administration of public affairs.”<sup>37</sup> Nevertheless, the Department found that “the enterprises that SASAC supervises are not insulated from the control and influence of the government” and that the Measures state that SASAC was established for the purposes of meeting “the demand{s} of the socialist market economy, to further activate the state-owned enterprises, to promote the strategic adjustment of the layout and structure of the state-owned economy, to develop and strengthen the state-owned economy, and to try to maintain and increase the value of the state-owned assets.”<sup>38</sup>

Further, the Department found that “despite the admonition in Article 7 of the 2003 Tentative Measures, the two Measures adopted in 2006 regarding investment plans and development strategies explicitly mandate that SASAC ensure consistency with government policy in the SIEs under its purview”<sup>39</sup>

In the context of the system of personnel appointments and career management in China,<sup>40</sup> separation may also never be fully achieved until the government does not have legal rights over SIE appointments. The GOC notes that the document Guidance Opinions on Top Managers Appointment by the Board of Directors of Central Enterprises (2008) concerns “standards processes and procedures for top managers appointments by the Board of Directors of Central SASAC Enterprises” and that “this document has been classified as confidential and by law cannot be released until such classification is changed.”<sup>41</sup> Apparently, this document is considered a state secret under the Law of the People’s Republic of China on Guarding State Secret<sup>42</sup> which could indicate that appointment of top managers and directors is, in fact, a matter of state and not simply a typical “shareholder concern.”

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<sup>36</sup> CWP GOC Questionnaire Response at pages 17-19. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at pages 17-19 for OTR; page 16 - 18 for Sacks; and pages 17-19 for LWRPT.

<sup>37</sup> Public Bodies Memorandum at page 27.

<sup>38</sup> Id.

<sup>39</sup> Public Bodies Memorandum at pages 26-27.

<sup>40</sup> Described in the Public Bodies Memorandum and sources cited therein.

<sup>41</sup> CWP GOC Questionnaire Response at page 5. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 5 for OTR; page 4 for Sacks; and page 4 for LWRPT.

<sup>42</sup> CWP GOC Supplemental Questionnaire Response at page 1. Parallel statements are found in the GOC’s questionnaire responses in the other Section 129 proceedings at page 1 for OTR; page 1 for Sacks; and page 1 for LWRPT.

## **DOUBLE REMEDIES**

**Background:** The Department issued the preliminary determination regarding double remedies on May 31, 2012.<sup>43</sup> At that time, the Department opened the record with respect to this issue and provided parties an opportunity to submit rebuttal factual information. On June 11, 2012, the USW submitted rebuttal factual information on the record of the OTR Tires CVD proceeding.

Thereafter, we provided interested parties with an opportunity to submit affirmative and rebuttal comments. On June 15, 2012:

- Allied Tube/TMK IPSCO submitted comments in the CWP, LWRPT, OTR Tires, and Sacks AD and CVD proceedings;
- The GOC submitted comments in the CWP, LWRPT, OTR Tires, and Sacks CVD proceedings;
- The LWS Committee submitted comments in the Sacks AD and CVD proceedings;
- U.S. Steel submitted comments in the CWP AD and CVD proceedings;
- The USW submitted comments in the OTR Tires CVD proceeding;
- Wheatland Tube submitted comments in the CWP AD and CVD proceedings.

On June 20, 2012:

- Allied Tube/TMK IPSCO submitted rebuttal comments in the CWP, LWRPT, OTR Tires, and Sacks AD and CVD proceedings;
- The LWS Committee submitted comments in the Sacks CVD proceeding;
- Titan submitted rebuttal comments in the OTR Tires CVD proceeding;
- U.S. Steel submitted rebuttal comments in the CWP CVD proceeding;
- Wheatland Tube submitted rebuttal comments in the CWP CVD proceeding.

### **Discussion of the Issues**

#### **Comment 1: Whether The WTO AB Decision Found That Concurrent Application Of The NME AD Methodology And CVD Necessarily Results In A “Double Remedy” And Whether An Adjustment Is Required Absent Positive Evidence That Subsidies Lowered Export Prices**

- The LWS Committee, the USW and Wheatland Tube assert that the WTO AB concluded that double remedies do not necessarily result from the concurrent application of duties calculated pursuant to the NME AD methodology and CVDs.
- Rather, the LWS Committee, U.S. Steel, Titan and the USW contend, pursuant to the WTO AB and the statute, the Department must conduct a sufficiently diligent investigation to

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<sup>43</sup> For double remedies the Department released the following preliminary memoranda: the respective Preliminary DR Estimation Memoranda (*i.e.*, CWP Preliminary DR Estimation Memorandum; LWRPT Preliminary DR Estimation Memorandum; OTR Tires Preliminary DR Estimation Memorandum; and the Sacks Preliminary DR Estimation Memorandum) and the Preliminary Determination AD Cash Deposit Adjustment Memoranda.

determine whether and to what extent domestic subsidies lowered export prices and base its decision on the relevant record facts.<sup>44</sup>

**Department Position:** The Department does not dispute the above characterization of the WTO AB Report. The WTO AB Report only found that “double remedies would likely result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties” and stated that it was “not convinced that double remedies necessarily result in every instance of such concurrent application of duties.”<sup>45</sup> In numerous prior determinations, including those subject to the WTO DS 379 dispute, the Department has similarly questioned the notion that concurrent application of NME ADs and CVDs automatically results in a 100 percent overlap of the two remedies, particularly in the absence of supporting evidence.<sup>46</sup>

However, as the Department summarized in its preliminary determinations, the WTO AB did find that “the Department did not attempt ‘to establish whether or to what degree it would offset the same subsidies twice by imposing antidumping duties calculated under its NME methodology, concurrently with countervailing duties.’”<sup>47</sup> It was by virtue of not undertaking such an inquiry in the four sets of investigations subject to the dispute that the Department was found by the WTO AB to have acted inconsistently with the obligations of the United States under Article 19.3 and, by consequence, Articles 10 and 32.1 of the SCM Agreement. Similarly, the applicable U.S. statute, section 777A(f)(1) of the Act, does not mandate that the Department always make an adjustment regardless of the factual circumstances, but does require that the Department make an adjustment when certain conditions are met.

In these proceedings conducted pursuant to section 129 of the URAA, the Department has now engaged in the necessary inquiry to implement the findings of the WTO AB as well as to comply with the applicable statute. Specifically, the Department has relied upon information placed on the record by the GOC and respondent parties – including information about how certain purchases of inputs were booked in the direct raw materials inventory at the cost of acquisition – to conclude that certain adjustments to AD cash deposit rates are warranted pursuant to section 777A(f) of the Act.<sup>48</sup> Importantly, the Department has not concluded in this determination or elsewhere that concurrent application of NME ADs and CVDs necessarily and automatically results in overlapping remedies. A finding that there is an overlap in remedies, and any resulting adjustment, requires that the Department conduct a fact-based inquiry which, consistent with the ruling of the WTO AB, the Department has done as part of this proceeding.

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<sup>44</sup> Appellate Body Report *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted March 11, 2011), at para 599 (“WTO AB Report”).

<sup>45</sup> *Id.* (original emphasis).

<sup>46</sup> See, e.g., Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) (“OTR Tires from China Final LTFV Determination”) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>47</sup> See Preliminary DR Estimation Memoranda at 3 (citing WTO AB Report at para. 604).

<sup>48</sup> See *id.* at 7-10.



## **Comment 2: Whether There Is A Basis To Apply An Offset To The AD Cash Deposit Rates.**

### **A. Whether The Burden Of Demonstration Is On Respondents And Whether Respondents Have Met That Burden**

- U.S. Steel, the LWS Committee and Wheatland Tube all contend that respondents have the burden of demonstrating that they are entitled to an adjustment for a double remedy. As a general matter, the LWS Committee and Wheatland Tube point out that the SAA and the Department's regulations both place the burden of proof on the respondent or the entity which is seeking an adjustment.<sup>49</sup>
- In this particular case, U.S. Steel, the LWS Committee and Wheatland Tube maintain that respondents in their respective proceedings did not meet this burden. Specifically, no entity provided evidence of double counting in the underlying investigation or in these section 129 proceedings.
- Moreover, the LWS Committee, Titan, U.S. Steel, the USW and Wheatland Tube point out that the Department provided ample opportunity for the respondents to do so. Specifically, despite the Department's multiple requests for information during these section 129 proceedings, no party provided evidence that domestic subsidies affected CWP, LWRPT, OTR Tires or sacks export prices during the relevant period.<sup>50</sup>
  - U.S. Steel further asserts that the GOC did not support its claims that potentially relevant cost data might be contained within the underlying CWP AD investigation record.
  - Titan and the USW highlight that the GOC failed to provide information regarding short-run pricing dynamics, how specific cost accounting categories are impacted by subsidies, and which of these costs, if any, factor into pricing in the short run.
  - Similarly, U.S. Steel notes that the GOC's general understanding of basic economics (i.e., that producers generally seek to set prices at a level that will cover at least their long-run costs) does not address the prices of the specific imports at issue in the section 129 proceedings on CWP.
- The domestic producers in each of the respective AD and CVD segments conclude that the Department should not apply a double remedy adjustment to the AD cash deposit rates because respondents have not met their burden of demonstrating that a countervailable subsidy reduced the average price of imports of the class or kind of merchandise at issue during the relevant period.

**Department Position:** The Department has determined that for the purposes of this proceeding respondent parties have met their respective burdens to receive an adjustment to their AD cash deposit rates pursuant to section 777A(f) of the Act.

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<sup>49</sup> See SAA, H.R. Rep. No. 103-316, at 829 (1994), reprinted in 1994 U.S.C.C.A.N. 4040; see also 19 C.F.R. § 351.401(b)(1).

<sup>50</sup> Citing the GOC's April 11 and 25, 2012, questionnaire responses, the LWS Committee and Wheatland Tube point to the GOC's failure to fully respond to certain sections of the Department's questionnaires regarding short-run price dynamics in their respective proceedings.

As correctly stated by domestic producers, the burden is on a respondent to demonstrate its entitlement to a particular adjustment.<sup>51</sup> The unique nature of these particular section 129 proceedings, however, placed certain limitations on the Department's ability to solicit and receive information from parties with respect to any alleged overlap of AD and CVD remedies. As explained in the Department's preliminary determinations, uncertainty accompanying the GPX litigation at the Federal Circuit as well as questions regarding the Department's authority under domestic law to come into compliance with the DSB's findings and recommendations compressed an already short time frame available to the Department to complete this proceeding.<sup>52</sup> Because section 777A(f) of the Act was enacted only in March 2012,<sup>53</sup> the Department had little time or flexibility to develop and hone its practice in applying the new law for the first time in these proceedings. To the extent that such constraints may have limited the Department's ability to make follow-up requests for information from the GOC or other interested parties, the Department was nevertheless able to supplement the record with publicly available information such as the CLSA Report and HSBC Report to aid in its economic analysis.<sup>54</sup>

Despite those constraints, the GOC and respondent parties did provide information necessary to the Department's determinations to make adjustments under section 777A(f) of the Act as part of these proceedings. As noted in the Department's preliminary determinations, the GOC's questionnaire responses permitted the Department to identify a high degree of similarity in industry conditions across a disparate group of manufactured products so that information provided by the GOC could be understood to be representative of China's manufacturing sector as a whole.<sup>55</sup> Furthermore, the Department relied upon information from respondent parties submitted during the underlying investigations to establish a link between a subsidy, variable cost, and price that is central to the Department's analysis under section 777A(f)(1)(B) of the Act.<sup>56</sup> In conjunction with additional record evidence establishing a correlation between changes in input costs and changes in output prices, information provided by the parties as to the manner in which subsidized inputs were booked has demonstrated the relationship between certain types of subsidies and export prices during the POI in the context of these section 129 proceedings.

#### **B. Whether The Department's Analysis Meets The Statutory Criteria For An Adjustment Because It Is Not Based On Industry-Specific Information**

- The LWS Committee maintains that the Department has consistently held that domestic subsidies do not necessarily have an impact on export prices, and U.S. Steel similarly contends that the Department has long recognized that concurrent application of the NME AD methodology and CVDs does not necessarily result in a double remedy.
- According to the LWS Committee, Allied Tube, TMK, Wheatland Tube and the USW, section 777A(f)(1) of the Act directs the Department to make an adjustment to the

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<sup>51</sup> See SAA at 829; 19 C.F.R. § 351.401(b)(1); Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1040 (Fed. Cir. 1996).

<sup>52</sup> See Preliminary DR Estimation Memoranda at 7 (citing GPX Int'l Tire Corp. v. United States, 678 F.3d 1308 (Fed. Cir. 2012) ("GPX").

<sup>53</sup> See Pub. L. No. 112-99, 126 Stat. 266.

<sup>54</sup> See, e.g., Preliminary DR Estimation Memoranda at Attachment 1.

<sup>55</sup> See id. at 8, n.43.

<sup>56</sup> See id. at 9, n.47.

antidumping cash deposit rates in the following narrowly defined circumstances: when (1) a “countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period,” and (2) the Department “can reasonably estimate the extent to which the countervailable subsidy... has increased the weighted average dumping margin for the class or kind of merchandise.”<sup>57</sup>

- Allied Tube, TMK and the USW assert that the Department’s current analysis does not fulfill the first of these two conditions because it does not demonstrate that the subsidies provided led to reduced export prices in the industries covered by these section 129 proceedings.
- Titan and the USW contend that because the Department was unable to uncover any evidence that domestic subsidies to the OTR Tires industry reduced that industry’s export prices, the Department improperly provided an adjustment for input subsidies based on evidence concerning the existence of a “cost-price link” in China during the relevant period.
- U.S. Steel asserts that the Department relied on national rather than industry data because the GOC refused to provide industry data and contends that the GOC’s failure to provide the requisite data does not constitute a lawful basis for the Department to depart from the statute, which mandates an industry-specific analysis. Titan and the USW assert that the lack of evidence regarding the effect of any subsidies to OTR tire producers on that industry’s export prices makes any adjustment both unnecessary under the AB’s findings and unjustifiable under the statute. Similarly, the LWS Committee and Wheatland Tube conclude that because the Department’s preliminary determination is not based on industry-specific data, it does not provide a reasonable basis to estimate the extent of any reduction in export prices resulting from a subsidy pass-through.

**Department Position:** The Department disagrees with domestic producers’ contentions that its determinations are not based upon industry-specific information. As an initial matter, domestic producers overstate the Department’s historical position with respect to the effect of domestic subsidies on prices. While it is correct that the Department has long contested the notion that concurrent application of AD and CVD remedies on imports from NME countries automatically results in a 100 percent overlap of remedies in every instance, the Department has otherwise pointed to the complexity of the relationship between subsidies and prices when presented with arguments that subsidies lower prices and, consistent with section 771(5)(C) of the Act, has generally refrained from speculating about the effect of a subsidy.<sup>58</sup> To the extent that the Department has made any categorical statements “when it has considered the issue, the Department has sometimes presumed that, whatever the effect, if any, of domestic subsidies upon the prices subsequently charged by their recipients, that effect would be the same for domestic prices and export prices.”<sup>59</sup> It is for this reason that the Department has recognized the potential of some overlap in remedies with respect to domestic subsidies through concurrent application of ADs and CVDs, but has required an evidentiary showing before considering any possible adjustment or offset.<sup>60</sup> It is this same reasoning that permeates the AB’s conclusion that

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<sup>57</sup> See 19 U.S.C. § 1677f-1(f)(1); Section 777A(f)(1) of the Act.

<sup>58</sup> See, e.g., OTR Tires from China Final LTFV Determination and accompanying Issues and Decision Memorandum at Comment 2.

<sup>59</sup> Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People’s Republic of China, 72 FR 60632 (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>60</sup> See, e.g., id.

the United States did not undertake the proper inquiry with respect to the double remedy issue in the underlying investigations giving rise to the dispute in WTO DS 379:

When the Department calculates a dumping margin in an anti-dumping investigation involving a product from an NME country, it compares the export price to a normal value that is calculated based on surrogate costs or prices from a third country. Because prices and costs in the NME country are considered unreliable, prices (or, more commonly, costs of production) in a market economy country are used as the basis for calculating normal value. In the dumping margin calculation, the Department compares the product's constructed normal value (not reflecting the amount of any subsidy received by the producer) with the product's actual export price (which, when subsidies have been received by the producer, is presumably lower than it would otherwise have been). The resulting dumping margin is thus generally considered to be based on an asymmetric comparison and is generally higher than would otherwise be the case.<sup>61</sup>

Hence, the “double remedies” theory adopted by the DSB presumes that domestic subsidies tend to have a symmetrical effect on normal value and export prices and that symmetrical effect is presumed to be a reduction to both components of the dumping comparison. Under this theory, the use of surrogate values under the NME AD methodology disrupts that symmetry because normal value presumably is no longer affected, i.e., reduced, by domestic subsidies.

Section 777A(f)(1)(B) of the Act requires a demonstration that a countervailable subsidy has “reduced the average price of imports of the class or kind of merchandise during the relevant period.” Evidence on the record of these proceedings demonstrates a correlation between changes in input costs and changes in output prices.<sup>62</sup> To the extent that certain types of subsidies have been shown to reduce input costs in an industry in the short run, the Department concludes that, in the context of these section 129 proceedings and consistent with the presumption of the AB, the effect of subsidies upon export prices would be a corresponding reduction to some degree.<sup>63</sup>

In response to the argument that the Department is relying upon national data rather than industry-specific data in its analysis, the Department has used these data to augment its analysis in light of some of the constraints endemic to these section 129 proceedings that are discussed above.<sup>64</sup> The record contains industry-specific evidence submitted by the GOC that provides a reasonable basis to conclude that industry conditions were similar enough to rely on data pertaining to the Chinese manufacturing sector as a whole.<sup>65</sup> Thus, the Department is making use of industry-specific data as well as national data, but has clearly identified the connection between the two sets of information and the rationale for using both in the context of these section 129 proceedings.

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<sup>61</sup> WTO AB Report at para. 542 (emphasis added).

<sup>62</sup> See Preliminary DR Estimation Memoranda at 8-9 & Attachment 1.

<sup>63</sup> As noted in the preliminary determination, the Department reaches this conclusion with the expectation that, as with all aspects of the Department’s practice, our administration and understanding of section 777A(f) of the Act will likely evolve with time and experience.

<sup>64</sup> See Preliminary DR Estimation Memoranda at 7-9.

<sup>65</sup> See id. at 8, n.43 (citing GOC questionnaire responses).

### **Comment 3: Whether The Department Correctly Framed Its Pass-Through Analysis**

#### **A. Whether The Department Correctly Limited Its Analysis To Input Subsidies**

- The GOC contends that the Department has no basis for limiting its analysis to alleged input subsidies because:
  - The Department presents no evidence or rationale in support of its determination to limit its analysis to alleged input subsidies.
  - The Department's reliance on the CLSA Report is unfounded because nothing in that document supports the proposition that pricing decisions are affected only by changes in variable costs.
  - The Department does not define variable costs.
  - The Department does not define the cost-price link, or explain the role of the cost-price link in how double remedies arise in NME cases.
- Rebutting the GOC's position, U.S. Steel contends that the Department properly declined to find any pass-through effects for subsidies other than input subsidies because the GOC failed to provide evidence to support its claim that the pass-through effect was not just limited to inputs. Allied Tube/TMK IPSCO, Titan and the USW also assert that the Department appropriately did not attribute a reduction in export prices to other subsidies.
- Allied Tube/TMK IPSCO contend that subsidies of different kinds may have many different effects, and different magnitudes in relationship to the government's financial contribution and provide a number of examples to that effect.
- U.S. Steel alleges that the GOC misinterpreted the Department's reliance on the CL report. Rather than relying on the report to support the proposition that pricing decisions are only affected by changes in variable costs, U.S. Steel concludes the Department relied on this report because it identified variable cost changes, and suggested that there might be a link between variable costs and prices.
- Contrary to the GOC's claims, U.S. Steel, the LWS Committee and Wheatland Tube assert that the Department did not find any pass-through for other types of subsidies because it found no evidence on the record with respect to other subsidies and the cost categories they might impact.
- U.S. Steel, the LWS Committee and Wheatland Tube conclude that this lack of evidence is the responsibility of the GOC for failing to provide such evidence in response to the Department's numerous and specific requests.

**Department Position:** The Department disagrees with the GOC that the evidence on the record does not support limiting the pass-through analysis to input subsidies that affect variable costs. As an initial matter, the Department agrees with U.S. Steel and similar comments from Wheatland Tube and the LWS Committee that the record lacked affirmative evidence that any other type of subsidy affected pricing behavior and that the GOC failed to provide evidence to support its claim that the pass-through effect was not just limited to inputs. The Department also disagrees with the GOC statement that the CLSA Report does not support the proposition that pricing decisions are affected only by changes in variable costs. As the Department noted in

its preliminary determinations, the CLSA Report finds that manufacturers in China changed output prices in response to increases in input costs over the previous month, and that only part of the cost increases were passed on to customers in the form of higher selling prices. The analysis in the CLSA Report does not extend to the relationship between changes in other types of costs and changes in output prices. Nor did the GOC proffer any affirmative data that would shed light on such an analysis. Therefore, as noted by U.S. Steel, the CLSA Report constitutes record evidence to support a link between costs and prices based on actual data and that link is focused on the relationship between changes in output prices and changes in input costs, i.e., variable costs.

While the Department did not explicitly define “variable costs,” the Department did consider carefully which subsidy programs on each record would affect the costs that were captured in the CLSA Report’s analysis. The Department found that direct raw materials constitute a variable cost of production and, for reasons described above, limited its pass-through analysis to those subsidies that affected such costs. Moreover, as noted by U.S. Steel, the LWS Committee and Wheatland Tube, the GOC provided no subsidy-cost mapping, alternative framework or definitions; nor did it otherwise provide any rebuttal factual information that calls into question the reasonableness of the variable cost-price finding in the Department’s preliminary determinations.

#### **B. Whether The RCT Provides The Proper Basis To Assess The Extent Of Pass-Through**

- The GOC argues that the Department’s RCT does not provide a basis to evaluate the extent to which subsidies passed through to prices.
  - The GOC claims that the Department’s adjustment methodology compares the ratio of change between the purchasing price index (CNPIY) and the PPI (CHEFTYOY). Thus, the GOC maintains, in any given period, if the CNPIY declined by six and the PPI declined by three, the Department’s approach would yield the result that 50 percent of the decline in input prices was passed through in the form of lower sales prices ( $3/6 = .5$ ). However, the GOC maintains that comparing rates of change in this manner does not indicate how much of a subsidy was passed through to the consumer in the form of lower prices.
  - Rather, the GOC contends, the Department should compare absolute changes in costs and prices. According to the GOC, when a producer lowers the sales price by the full amount of the subsidy, the Department’s methodology finds that only a portion of the subsidy passes through to the export price, when according to the GOC, the entire amount of the subsidy passes through.<sup>66</sup>
  - Therefore, the GOC claims that the Department’s RCT provides no insight into the price effects of subsidies and, for that reason, is irrelevant to the double remedy inquiry even if

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<sup>66</sup> Specifically, the GOC provides an example where a producer receives a subsidy of 15 percent, which is passed on to the consumer in full. According to the GOC, the Department’s methodology determines the percentage change in the price and the producer’s input cost, then divides the percentage change of the export price by the percentage change of the input price. Because the value of the original pre-subsidy export price is higher than the producer’s pre-subsidy input cost, the relative percentage change in the export price will be smaller than the change in the input price, when the absolute value of the subsidy is applied to both.

one accepts the mistaken proposition that the double remedy occurs entirely on the price side of the dumping comparison.

- The GOC alleges that the Department's finding that only 63 percent of the alleged input subsidies passed through to the price of subject merchandise is contrary to the rationale for imposing countervailing duties in the full amount of the subsidy.
- The LWS Committee and Wheatland Tube assert that the GOC's argument that the Department's assumption regarding the percentage of subsidies retained by PRC producers is erroneous, fails because the GOC offers no evidence to demonstrate that the Sacks or CWP industries, respectively, were price sensitive to the extent that a decrease in cost would result in lower prices. Moreover, they contend, the GOC's arguments are not supported by economic theory.
- Furthermore, Titan and the USW contend, the GOC's claims that, in its calculations, the Department should have examined the relationship between absolute costs and prices rather than the rate of change in costs and prices to estimate the extent of pass-through is based on a flawed assumption that input subsidies pass through completely in the form of lower prices, an assumption that, as reviewed above, is not merited as a legal matter under the AB's findings or U.S. law and that is not supported as a factual matter on the record of this proceeding.
- Titan and the USW proffer that the GOC's reasoning that prices decline absolutely by as much as the absolute decline in a single input cost, and that such absolute price declines demonstrate a pass-through ratio of 100 percent, is circular. Titan and the USW argue that this conclusion erroneously stems from an assumption that the decline in price is due solely to the decline in input cost as a result of a subsidy, when there could be any number of factors that could have also affected the price decline. Thus, they argue that the absolute figures for one input and overall price are meaningless when compared to one another in isolation.

**Department Position:** As explained in the preliminary determinations, the Department in these proceedings has relied on the extent of manufacturing sector-level pass-through of (variable) cost inflation as a proxy for the extent of subsidy pass-through. For that purpose, the Department used data available from Bloomberg, where the data was reported as a percentage year-on-year change in index values, to measure rates of input cost and price inflation.<sup>67</sup> The Department's use of the indexes in this manner is consistent with the analysis typically done at the aggregate level to understand how input cost changes are passed through to the price of the ex-factory product.<sup>68</sup>

Moreover, the GOC provided no rebuttal factual information that could have provided an alternative estimate of the extent of subsidy pass-through apart from its constructed example. The GOC in these proceedings provided no affirmative cost or pricing evidence on any basis – firm-, industry-, or sector-specific – that substantiates a claim of full subsidy pass-through. All of the information on the record of this proceeding – the CLSA Report, manufacturing sector cost-price data, and HSBC Report<sup>69</sup> – provide positive evidence to the contrary and further

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<sup>67</sup> See Preliminary DR Estimation Memoranda at Attachment 2.

<sup>68</sup> See Preliminary DR Estimation Memoranda at Attachment 3.

<sup>69</sup> See Preliminary DR Estimation Memoranda at Attachments 1, 2, 4, and 5.

corroborate the reasonable estimate in the Department's preliminary determinations. With respect to the GOC's argument that any pass-through estimation less than 100 percent is contrary to the rationale underlying the countervailing duty law, the Department notes that the GOC cites no legal authority to support its claim. Furthermore, the CVD law does not require the administering authority to assess the extent to which a subsidy passes through to price for purposes of assessing the CVD.<sup>70</sup>

### **C. Whether The Department Should Further Refine Its Pass-Through Analysis To Focus On The Specific Inputs In Question**

- The USW maintains that, if the Department makes a double remedy adjustment in its final determinations, it should use the following method to estimate pass-through effects that are specific to the class or kind of merchandise at issue on both the cost and price side and that are specific to U.S. imports on the price side.
  - Record the U.S. import prices of natural rubber, synthetic rubber and OTR Tires for the period covering the POIs of the AD and CVD investigations (January 2006 through March 2007).<sup>71</sup>
  - Calculate the percentage change  $((B-A)/A)$  for each month compared to the January 2006 import price for natural rubber, synthetic rubber and OTR Tires.<sup>72</sup>
  - Calculate the ratio  $(B/A)$  between the change in rubber input cost and the change in tire import price for each month of the antidumping POI for natural and synthetic rubber.
  - Calculate an average ratio for the antidumping POI as a whole<sup>73</sup> to arrive at an estimated pass-through ratio of 41.85 percent for natural rubber and 13.07 percent for synthetic rubber.
- The USW maintains that, if the Department employs this alternative methodology, it must acknowledge that any methodology used in these proceedings is limited to the unique and expedited circumstances of this proceeding, that it does not constitute the establishment of agency practice, and that the Department's approach in this area will continue to evolve with time and experience.

**Department Position:** As explained, a detailed analysis of the relationship between changes in the specific input costs in question and the output prices of the subject merchandise was not possible in the context of the truncated time period of these section 129 proceedings. For example, in the OTR Tires proceedings, there are multiple types of rubber inputs that are utilized in the production of OTR Tires.<sup>74</sup> While, given sufficient time and information, the Department might have been able to aggregate these input costs for each respondent, the USW did not propose any method or provide any basis for doing so. Further, the Department may need to assess the effect of varying utilization rates in production in order to properly apply the appropriate pass-through rates. The Department continues to consider the RCT based on

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<sup>70</sup> See section 771(5)(C) of the Act.

<sup>71</sup> See USW Section 129 Comments at 14.

<sup>72</sup> See *id.* Comments at 15.

<sup>73</sup> *Id.*

<sup>74</sup> See Preliminary Surrogate Value Memorandum, dated February 5, 2008, at Attachment II.



manufacturing sector data as a reasonable estimate for each industry's input costs, given the time and data constraints that were present in these proceedings.

#### **D. Whether Aggregate Cost-Price Changes Are A Reasonable Estimate Of The Subsidy-Variable Cost-Price Linkage In These Proceedings**

- The LWS Committee, Wheatland Tube and the USW assert that the aggregate PPI for the manufacturing sector in the PRC is not an appropriate proxy for changes in export prices to the United States because it covers all goods and the conditions prevalent in China's overall manufacturing sector and, hence, may not necessarily reflect the individual conditions of the industries subject to these section 129 proceedings. For example, the LWS Committee and Wheatland Tube suggest that the impact of cost increases on all PRC ex-factory prices may be far greater than the impact of cost increases on PRC export prices and the USW maintains that the conditions may differ if a particular industry has received countervailable subsidies or the merchandise being sold to the United States is dumped.
- The USW and Allied Tube/TMK IPSCO aver that the cost and price indexes used in the Department's analysis reflect only an estimate of the impact that increases in variable costs have on increased prices, but do not reflect the impact of input price declines caused by subsidies.
- The LWS Committee, U.S. Steel and Wheatland Tube further claim that the Department's approach is based on data that show how firms in the PRC respond to industry-wide changes in variable costs, which may be different from the way in which they respond to input subsidies specific to an individual firm. From this, they conclude that the methodology reflects an upward bias.
- More specifically, the LWS Committee asserts that, contrary to the GOC's assertion, record evidence suggests that Chinese sacks producers' prices did not cover costs during the POI. Thus, there is no reason to assume that respondent Aifudi's pricing was based on its costs.<sup>75</sup>
- The USW concludes that aggregate input cost increases (such as rises in the price of energy or a major input) affect all producers in an industry similarly, whereas the impact of subsidies, which reduce costs for particular producers, is much more variable.

**Department Position:** The Department continues to find that the variable cost-price link, as measured by the RCT in these proceedings, is consistent with section 777A(f)(1)(C) of the Act and is a reasonable estimate of the extent to which subsidies that impacted variable cost passed through to prices. The Department recognizes that there may be a range of other factors which may warrant further consideration as the Department refines its analytical framework in future proceedings and gains greater experience in implementing section 777A(f) of the Act. The Department, however, must carefully weigh the benefits of collecting all potentially relevant information against the administrative challenges of identifying, collecting, analyzing, and verifying this data.

As noted in the preliminary determinations, the Department initially focused its analysis at the industry level in these section 129 proceedings in recognition of the possibility that there might

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<sup>75</sup> See GOC Double Remedies Questionnaire Response, dated April 11, 2012, at page 5; see also CVD Response of Zibo Aifudi Plastic Packaging Co., Ltd., dated September 10, 2007, at Appendix 2.

be variations in accounting practices or other export market dynamics that were industry-specific. The Department determined, however, that the industry-level information provided by the GOC was reasonably similar across all four industries in the section 129 proceedings, which covered the same period of time and spanned a highly disparate group of manufactured products.<sup>76</sup> The Department also explained that in light of the compressed schedule of these section 129 proceedings after passage of Public Law 112-99, there was insufficient time for the Department to make further inquiries of the GOC or conduct a *de novo* investigation of individual firms, including with respect to industry- or firm-specific price and cost data, which may have provided a basis to further refine the pass-through estimate.<sup>77</sup>

The LWS Committee, Wheatland Tube and the USW also argue that increased aggregate material costs and their effect on ex-factory prices may not provide an exact proxy for subsidy pass-through, particularly in the case where subsidies affect one of many costs incurred by a firm. We acknowledged as much in our preliminary determinations, stating that:

The extent of input price inflation pass-through is an inexact proxy for the extent of subsidy pass-through, not only because input price inflation and subsidies push cost in opposite directions, but because the impact of input price inflation may be more uniform and systemic in nature.<sup>78</sup>

However, putting the feasibility of such a detailed analysis aside, the records of these expedited section 129 proceedings do not provide a reliable basis for increasing the precision of the reasonable estimate to accommodate such firm-specific refinements in the manner proposed by domestic producers.

#### **E. Whether And To What Extent The Department Should Account For Market Dynamics In Its Pass-Through Analysis Framework**

- The GOC alleges that the Department presents no evidence in support of its conclusion that Chinese producers retain any of the alleged input subsidies rather than passing them through to the price. Rather, the GOC asserts, producers in competitive markets tend to compete away any temporary advantage that they obtain from lower costs by passing anything that reduces their cost to the consumers in the form of lower prices.
  - The GOC argues that the Department's presumption that a producer who has lower costs can retain a significant portion of the cost reduction implies that the producer possesses market power. According to the GOC, the Department presented no evidence that competitive conditions in the industries subject to these section 129 proceedings support its conclusion that the Chinese producers in these industries had the market power to retain more than one-third of the value of the input subsidies they received.
  - Further, the GOC asserts that the products at issue here are commodity products and that the relevant industries comprise many different producers who compete on price. Under such conditions, the GOC avers, one expects producers to compete away any reduction in

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<sup>76</sup> See Preliminary DR Estimation Memoranda at 8.

<sup>77</sup> See *id.* at 7-8

<sup>78</sup> *Id.* at 10.

input costs and there is no evidence on the record to support the Department's assumption to the contrary.

- Allied Tube/TMK IPSCO disagree with the GOC's argument that in a competitive industry in a free market, none of the companies will be able to "retain" any subsidy because they will tend to "compete away" any temporary advantage that they obtain from having lower costs. According to Allied Tube/TMK IPSCO, there are many potential effects of subsidies other than being passed through to export price or being kept as profits.
  - For these reasons, Allied Tube/TMK IPSCO urge the Department not to make any adjustment to the antidumping duties in these cases to account for alleged double counting. In any case, Allied Tube/TMK IPSCO argue that the Department should reject the GOC's suggestion that the Department increase the adjustment.
- Titan and the USW also contend that the economic theories put forth by the GOC fail to justify an assumption of 100 percent pass-through, arguing that, even in a competitive market, firms may have an incentive to retain much or all of their cost reductions without passing them through in the form of lower prices if their competitors have not experienced similar cost declines.
- Allied Tube/TMK IPSCO refute the assumption of a uniform pass-through rate that is applicable across all markets, including the domestic market, arguing that the pass-through effects differ in different markets.
  - Changes to Chinese raw material prices have a greater impact on domestic output prices than on export prices because exports are sold into separate foreign markets where prices are determined primarily by foreign market conditions, not Chinese supply considerations.
  - A change in the Chinese producers' input costs affects how much output Chinese producers are willing to supply at any given price, which in turn has an effect on Chinese supply and, therefore, on Chinese price.
- Allied Tube/TMK IPSCO argue that prices in every country are determined by supply and demand so that changes in costs affect the quantity of output producers are willing to supply. They present a number of hypothetical examples explaining how the provision of a subsidy (e.g., the provision of steel to Chinese manufacturers of steel pipes at a 50 percent discount) would result in varying degrees of increased production and shipments, and price reductions.
- Allied Tube/TMK IPSCO request that the Department forego a pass-through adjustment in these cases, or modify its adjustment to account for the relevant import market share.
  - Allied Tube/TMK IPSCO argue that the general increases in Chinese input costs were not passed through to Chinese export prices since Chinese domestic input costs were rising at the same time that the prices of U.S. imports were falling.<sup>79</sup>

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<sup>79</sup> Allied Tube/TMK IPSCO also claim that the Department has found in its investigations that Chinese domestic price signals are frequently not at world market levels. The Department notes that Allied Tube/TMK IPSCO have not provided any citations to support this claim.

- Allied Tube/TMK IPSCO maintain that any impact would be smaller in the United States than in China because market conditions are different and there are other potential sources of supply in the United States that do not exist in China.
- Therefore, Allied Tube/TMK IPSCO argue that the Department would achieve more industry-specific pass-through calculations by multiplying the Chinese domestic RCT by the percentage market share of each subject product in the U.S. market for each industry.
- The USW argues that unique aspects of competition in export markets limit the ability of producers to pass on subsidy benefits in the form of lower export prices, and these factors do not apply to the same extent throughout the domestic market in China. For example, the USW argues that:
  - In the U.S. market, Chinese firms compete with U.S. and third country competitors, while foreign competition is restricted in the Chinese domestic market.
  - No foreign firms receive the same subsidy benefits that Chinese producers receive in the domestic market, whereas some other domestic producers may have received the same subsidies as the producers at issue.
- The LWS Committee, U.S. Steel and Wheatland Tube argue that firms with differentiated products are more willing to increase prices in response to increased input costs than to decrease prices in response to decreased input costs.<sup>80</sup> They maintain that this is especially relevant here because the Department used the ratio of input costs to ex-factory prices for the PRC manufacturing sector during a time of inflation, when input prices were rising and, thus, the analysis can only measure producer responses to increased input costs and not to specific subsidies which reduce those costs.

**Department Position:** The GOC assumes that a subsidy’s impact on cost translates dollar-for-dollar to price, but provides no basis or justification in fact or theory for that assumption. It appears that the GOC is conflating the cost effects and price effects of a subsidy. The Department agrees that where a subsidy impacts cost, the reduction in cost is dollar-for-dollar, *i.e.*, a (dollar-for-dollar) vertical displacement of the marginal cost curve. But a dollar-for-dollar reduction in cost does not necessarily result in a dollar-for-dollar reduction in price, as the GOC asserts, since such a drop in price could bring about an increase in production and sales. Firms that expand output increase their demand for production inputs, and this increased demand is associated with suppliers raising their prices charged for these inputs. The result is rising marginal cost, as reflected in movement *along* a rising cost curve as output expands. In fact, during the POI, manufacturers in China reported that their higher production requirements led to sharp cost inflation, shortages of inputs, and longer delivery times.<sup>81</sup> For the GOC argument to

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<sup>80</sup> See CWP Petitioner’s submission regarding Factual Information Relating to the Department’s Preliminary Double Remedy Analysis, dated June 11, 2012, at Exhibit 1 (Export Report of Dr. George G. Korenko at 10).

<sup>81</sup> See Preliminary DR Estimation Memorandum at Attachment 1, “Higher production requirements underpinned a further rise in purchasing activity. Despite easing slightly from November’s nineteen-month high, the rate of growth of input buying remained robust. As a result, stocks of purchases increased at a solid pace. Strong demand for inputs meant that suppliers remained under pressure in December. Consequently, average lead-times lengthened for an eleventh successive month, with delivery delays blamed on a lack of availability of raw materials and transportation problems. Firms operating in the Chinese manufacturing sector continued to face a sharp rate of input

have merit, manufacturers in China would have to be able to increase their purchases of inputs without *any* change in the unit cost of these inputs or any constraints or limitations on the volume of these purchases. As such, although the Department agrees that when subsidies impact cost, it is reasonable to assume that they reduce cost dollar-for-dollar, there is no basis in theory (even in the case of highly competitive markets) or the facts on the record of this proceeding to assume or conclude that there was also a dollar-for-dollar reduction in price, because of the impact increased production had on cost.

Petitioner has proposed an adjustment to the Department's pass-through estimate to make it specific to exports to the United States, but the Department knows of no economic theory or rationale that would support the proposed adjustment. The Department agrees with Allied Tube/TMK IPSCO that PRC export prices/U.S. import prices of subject merchandise may be the more appropriate price measure. That said, the Department has not switched to PRC export/U.S. import data for purposes of the RCT in these proceedings for the following reason. The RCT should, to the extent possible, (1) match price and cost to the subject merchandise and (2) pair cost and price series from the same universe, or group, at the firm, industry or sector level. Only in this manner can the Department ensure that the cost series and price series are actually associated with one another. To accomplish this, the Department relied on manufacturing sector data from the same source, with similar coverage: manufacturing sector variable costs and manufacturing sector prices. Switching to PRC export/U.S. import data as suggested by Allied Tube/TMK IPSCO would nullify this matching and, in fact, reduce the validity of the measurement given the possibly opposite trends in domestic and export prices identified by Allied Tube/TMK IPSCO. In order to ensure a true "apples-to-apples" cost and price comparison, the Department elected to match the price and cost series rather than rely upon a sub-group or subset of the overall manufacturing sector for prices when the cost series is measured using the entire group. Furthermore, data constraints precluded the Department from disaggregating U.S. import data to ensure a one-to-one mapping.

#### **Comment 4: The Relevant Period Covered By The Section 129 Proceedings**

- U.S. Steel contends that any implementation of the WTO AB Report is prospective in nature and, therefore, is not applicable to the AD and CVD investigations of CWP, but only to subsequent reviews covering imports after implementation of the section 129 determinations.
- U.S. Steel continues that because the pass-through ratios are based on five-year-old data from the investigation on CWP, they bear no relationship to future imports of CWP, which are the imports affected by the prospective WTO ruling.
- According to U.S. Steel, any offset based on such data would fail to comply with section 777A(f)(1)(B) of the statute which directs that the demonstration must be made with respect to imports "during the relevant period."

**Department Position:** Although determinations issued pursuant to section 129 of the URAA apply prospectively to all subject merchandise entered, or withdrawn from warehouse, for

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price inflation in December, with a wide variety of items reported to have increased in cost since the previous month. Nevertheless, the latest rise in input prices was slightly weaker than in November" January 2007.

consumption on or after the date on which the USTR directs the Department to implement,<sup>82</sup> the Department must nonetheless engage in an inquiry to determine the extent of any overlapping remedies and to make any resulting adjustments to AD margins used as the basis for AD cash deposit rates in order to comply with the WTO AB Report and section 777A(f) of the Act. As the Department’s regulations state, “the Act does not specify the precise period of time that the Secretary should examine in an antidumping or countervailing duty investigation.”<sup>83</sup> Section 777A(f)(1)(B) of the Act provides no further clarification as to what is meant by the term “relevant period.” For that reason, the Department has limited its examination in this proceeding to the period of investigation used in the underlying investigations and prescribed by 19 CFR 351.204(b) and intends to apply these determinations prospectively in the form of revised cash deposit rates.

With regard to the argument that implementation should apply to subsequent administrative reviews, the Department notes that the effective date of Public Law 112-99, which amended the Act to include section 777A(f), requires that section 777A(f) of the Act be applied to administrative reviews initiated on or after March 12, 2012.<sup>84</sup> Therefore, subsequent administrative reviews will be subject to section 777A(f) of the Act.

**Comment 5: Whether The Statute Requires That Offsets Be Made To AD Duties, Not Cash Deposit Rates**

- According to U.S. Steel, if an adjustment is made, it should be made to the AD assessment rates and not cash deposit rates because cash deposits are “conditional payments” of estimated antidumping duties.
- Because section 777A(f)(1) of the Act makes no allowance for the Department to adjust cash deposit rates, but only applies to the antidumping duty actually assessed against imports of subject merchandise during the relevant time period, the application of an offset to cash deposit rates in this case finds no basis in law and should be rejected.

**Department Position:** Although section 777A(f)(1) only refers to reducing “the antidumping duty” upon the satisfaction of certain conditions to address overlapping remedies, the Department nonetheless finds it appropriate to make similar adjustments to estimated ADs in the form of cash deposits as part of the investigations subject to these proceedings.

Interpreting section 777A(f)(1) in this fashion is consistent with the Department’s practice in analogous circumstances involving adjustments to export price and constructed export price for export subsidies under section 772(c)(1)(C) of the Act. That provision directs the Department to increase the price used to establish export price and constructed export price by “the amount of countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy.”<sup>85</sup> In the case of concurrent AD and CVD investigations, even though the imposition of CVDs at specific assessment rates does not take place upon the completion of an investigation and section 772(c)(1)(C) of the Act makes no reference to adjusting cash deposit

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<sup>82</sup> See section 129(c)(1)(B) of the URAA.

<sup>83</sup> 19 CFR 351.204(a).

<sup>84</sup> See Pub. L. No. 112-99, 126 Stat. 266-267 (2012).

<sup>85</sup> Section 772(c)(1)(C) of the Act (emphasis added).

rates, the Department nonetheless reduces the AD cash deposit rate by the portion of the companion CVD rate attributable to export subsidies.<sup>86</sup> The Federal Circuit in Dupont Teijin has upheld the Department’s practice of adjusting the AD cash deposit rate in this manner.<sup>87</sup>

Following a similar principle, the Department here seeks to effectuate the statutory objective of section 777A(f)(1) of the Act in the context of concurrent AD and CVD investigations by making an adjustment to estimated ADs in the form of cash deposits.<sup>88</sup> As with section 772(c)(1)(C) of the Act, the language of section 777A(f)(1) of the Act makes no specific mention of cash deposit rates. However, based upon the discretion afforded the Department as reflected in the Dupont Teijin decision to make adjustments to AD cash deposit rates in the context of section 772(c)(1)(C) of the Act, the Department finds it to be an equally reasonable interpretation of section 777A(f)(1) of the Act to permit adjustments to estimated ADs arising from overlapping AD and CVD remedies determined to have offset the same subsidization twice. Such adjusted cash deposit rates – aside from possibly serving as the basis for assessment in the absence of a completed administrative review of the AD order – reflect an amount of estimated duties that takes into account the adjustment to “the antidumping duty” required by section 777A(f)(1) of the Act.

**Comment 6: Whether The Department’s Focus On The Price Effects Of Alleged Subsidies Addresses The Problem Of Double Remedies In The NME Context**

- The GOC claims that the Department provides no analytical framework in which to evaluate the existence of a double remedy resulting from the use of an NME AD methodology in conjunction with the application of CVDs to the same products. Rather, the GOC contends that the Department erroneously considers a double remedy to arise exclusively from the effect that subsidies have on the price of subject merchandise based on section 771A(f)(1)(B) of the Act, which instructs the Department to determine whether a “countervailable subsidy is demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period.” The GOC argues, however, that neither the preliminary determinations nor the legislative history of section 771A(f) of the Act explains why the existence of a double remedy in the NME context depends exclusively on the effect that subsidies have on prices.
- To the contrary, the GOC asserts, the double remedy arises in NME cases because the Department’s NME AD methodology affects only the determination of normal value (i.e., the cost side) and, thus, has no effect on the determination of export price. The GOC argues that when the Department replaces a producer’s actual costs with market-determined, unsubsidized costs, it increases the resulting dumping margin in direct proportion to any subsidy received by the producer. Consequently, the GOC contends that a double remedy occurs even if the subsidies have no impact on the price of the imported product.

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<sup>86</sup> See, e.g., Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611, 50612-13 (October 4, 2001)

<sup>87</sup> See Dupont Teijin Films USA, LP v. United States, 407 F.3d 1211, 1212 (Fed. Cir. 2005) (“Dupont Teijin”).

<sup>88</sup> See section 735(c)(1)(B)(ii) of the Act (requiring the posting of a cash deposit, among other instruments, as estimated duties upon a final determination in an AD investigation).

- Acknowledging that subsidies affect the price of subsidized merchandise, the GOC argues that absent such an effect, there would be no rationale for imposing CVDs. However, the GOC claims that the Department’s methodology, by imposing CVDs in the full amount of the subsidy, presumes that the entire amount of the subsidy had an effect on output and price. As a result, the GOC argues that the Department should have similarly assumed that there was a 100-percent pass through of the subsidy to the price of the imported product in its double-remedy analysis.
- The GOC continues that, even if the Department assumed that there was no pass through, any amount of pass-through increases the excess remedy over and above the double remedy that occurs if one assumes no pass-through because the dumping comparison offsets the subsidy in two different places: once in the replacement of the producer’s actual costs with market-determined costs (*i.e.*, on the cost side), and then again in the increased differential between the unsubsidized normal value and the subsidized export price (*i.e.*, on the price side). As a result, asserts the GOC, imposing a CVD on top of any dumping margin results in offsetting the subsidy in three different places and serves to increase the excess remedy that the NME methodology already creates on the cost side of the dumping comparison, relative to a baseline assumption of no pass-through.
- Therefore, for the final determinations, the GOC argues that the Department should modify its adjustment methodology to focus on the double remedy that occurs on the cost side of the dumping comparison.
- Titan and the USW disagree with the GOC’s argument that double remedies arise as a result of the impact of the NME AD methodology on the cost side of the dumping comparison. While they acknowledge that the difference between the market-economy and NME AD methodologies rests on how normal value is calculated, Titan and the USW disagree that the Department can examine the extent to which double remedies arise by limiting its analysis to the impact subsidies have on costs.
- Citing the WTO AB Report, Titan and the USW assert that double remedies arise in NME cases because of the “asymmetric comparison” between the export price (the exporter’s actual export price) and the normal value (based on market-economy surrogate values) that underlies the dumping calculation. Titan and the USW argue that when both the normal value and U.S. price used in the dumping calculations are based on the producer’s actual prices, the extent to which subsidies pass through to the price is irrelevant, because the subsidy is likely to pass through to both sides of the dumping calculation to the same extent, without having an impact on the dumping margin. In such a case, Titan and the USW reason, no double remedy arises, because any effect on export price will be balanced by a similar effect on normal value. Thus, Titan and the USW argue that the Department has no obligation to examine the extent of a subsidy’s effect on export prices in market-economy cases.
- Titan and the USW contend, however, that when the comparison is asymmetrical, such as in NME cases, the WTO AB Report requires the Department to determine whether, and to what extent, a subsidy affects export prices in order to determine whether the lack of symmetry gives rise to a potential double remedy.



- Moreover, Titan and the USW disagree with the GOC’s claim that U.S. law embodies a presumption that subsidies pass through completely to export prices. Rather, Titan and the USW argue that the Department assesses countervailing duties equal to the full amount of the subsidy, not because the subsidy passes through to the price of the merchandise, but in order to offset the full amount of the benefit and unfair advantage that results from the subsidy, regardless of the subsidy’s impact on prices or output. Furthermore, Titan and the USW claim that the statute explicitly instructs the Department not to consider the impact of the subsidy on prices or output in making a CVD determination. Moreover, they also contend that the statute allows no adjustment to dumping margins for double remedies unless such subsidies are demonstrated to have lowered export prices.
- Titan and the USW contend that, by comparing the rate of change in input costs to the rate of change in prices, the Department was able to evaluate the extent to which the pace of cost increases may have been reflected in the pace of price increases. Titan and the USW further assert that examining the rate of change accounts for the fact that absolute changes in output prices will tend to be larger than absolute changes in any individual input costs, and thus avoids relying on the distorted appearance of full (or even more than full) pass-through where none in fact can be demonstrated.
- The LWS Committee and Wheatland Tube also contest the GOC’s position that the Department should have assumed 100 percent pass-through, asserting that there is no factual merit to the GOC’s position as the GOC has not provided any evidence that any PRC producers within the sacks or CWP industries, respectively, passed through any subsidies to their export prices.
- Additionally, the LWS Committee, Wheatland Tube and Allied Tube/TMK IPSCO reason that there is no legal basis for the GOC’s claim. Specifically, the LWS Committee and Wheatland Tube argue:
  - the AB made no finding regarding the extent of the potential pass-through, and only required that the Department (1) conduct a “sufficiently diligent ‘investigation’” to determine whether subsidies have an effect on export prices; and (2) base a determination on positive record evidence, and
  - section 777A(f) of the Act does not permit an assumption regarding the extent of the pass-through. Instead the Act requires a demonstration that a countervailable subsidy reduced the average price of imports, based on record evidence.<sup>89</sup>
- U.S. Steel takes issue with the GOC’s assertions that the Department’s preliminary determinations did not present an analytical framework for its evaluation of the existence and extent of double remedies. Rather, U.S. Steel asserts, the Department clearly identified its focus as the effect of the subsidies on U.S. import prices.
- U.S. Steel, the LWS Committee and Wheatland Tube refute the GOC’s position that the Department’s focus should have been on cost, claiming such a position has no basis in either U.S. law or the WTO AB Report. Rather, they maintain, the Department’s analysis specifically followed the framework directed by the WTO AB which directed that the Department should have investigated whether a countervailed subsidy resulted in reduced

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<sup>89</sup> Citing GPX.

export prices. Moreover, they contend, the Department's analysis is consistent with section 777A(f) of the Act, which the LWS Committee and Wheatland Tube assert was enacted to implement the AB findings on double remedies. The LWS Committee and Wheatland Tube point out that there is no analogous provision in the Act regarding the impact of such subsidies on costs.

- Arguing that the GOC failed to provide the factual evidence that was requested by the Department, thus failing to meet the U.S. law and AD Agreement requirement that determinations be based on positive evidence,<sup>90</sup> U.S. Steel posits that the GOC is basing its arguments on hypothetical scenarios.
- According to the LWS Committee and Wheatland Tube, the arguments made by the GOC in these proceedings have already been considered and rejected. They are similar to those that the GOC submitted to the WTO Panel, and the AB implicitly rejected the cost-based double remedy arguments by finding that the Department only needed to assess the effect of subsidies on export prices.
- Allied Tube/TMK IPSCO assert that, because in NME proceedings normal value is based on surrogate costs of inputs from other countries, subsidies that reduce the price of inputs in China do not, as a matter of law, reduce normal value.
- As a result, Allied Tube/TMK IPSCO construe the GOC's position not as a double counting argument, but as an assertion, with no supporting legal basis, that if a subsidy reduces normal value, the AD rate should automatically be reduced.
- Focusing on a market economy-based argument, Allied Tube/TMK IPSCO posit that the GOC's methodology also lacks any economic basis. Specifically, Allied Tube/TMK IPSCO assert that in a market economy, if a government reduces the cost of one input to an end product, production of the end product tends to increase resulting in increased consumption of all inputs to that end product. This, Allied Tube/TMK IPSCO claim, tends to increase the prices of the other inputs which results in increases to the total cost of production. As a result, Allied Tube/TMK IPSCO maintain that one cannot consider the subsidized input in isolation, and cannot say exactly how large the total price/cost effects would be in an NME country without constructing an entire economy-wide set of prices.
- Arguing that there are many reasons that costs in China might deviate from surrogate values, Allied Tube/TMK IPSCO assert that it makes no sense to consider only factors that cause Chinese costs to be lower than in the surrogate country. According to Allied Tube/TMK IPSCO, U.S. law avoids this problem by determining normal value using only prices from surrogate market economies without deviating from this procedure to selectively account for a subset of hypothetical price movements within investigated NME countries.
- Finally, contending that there are numerous other legal and economic flaws (which it does not identify), in the GOC's analysis, Allied Tube/TMK IPSCO state that since the GOC has not offered any legal basis for its positions, the Department should ignore them.

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<sup>90</sup> See 19 U.S.C. § 151a(b)(1)(B)(i); see also Appellate Body Report, United States – Softwood Lumber from Canada VI (Article 21.5 – Canada), WT/DS277/AB/RW (Adopted April 12, 2006), para. 93.

**Department Position:** The Department disagrees with the GOC’s contention that the Department has provided no analytical framework by which to evaluate the presence of a double remedy resulting from the concurrent application of NME ADs and CVDs. The Department also rejects the GOC’s argument that a double remedy arises in NME cases because the Department’s NME methodology affects only the determination of normal value.

As indicated in the Department’s preliminary determinations, the Department has adhered to the analytical approach identified by the WTO AB Report and required under section 777A(f) of the Act. The AB rejected arguments by the GOC that a double remedy in the NME context occurs because the calculation of normal value under the NME AD methodology captures entirely the effects of subsidization. Instead, the AB found that the existence of a double remedy “depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.”<sup>91</sup> Under the theory of double remedies endorsed by the WTO AB Report, domestic subsidies, which are presumed to have a symmetrical effect on normal value and export prices in most instances, continue to affect export prices in an NME context, but have no effect upon the normal value component of the AD comparison because normal value is essentially imported from a surrogate market economy country not affected by domestic subsidies.<sup>92</sup> Section 777A(f) of the Act, which was adopted, in part, to ensure that the United States is able to implement the DSB’s recommendations and rulings in the ongoing WTO dispute with respect to double remedies,<sup>93</sup> reflects the WTO AB Report’s concern with the purported asymmetrical impact of domestic subsidies on export price and normal value in the NME context through its requirement that a countervailable subsidy be demonstrated to have reduced the average price of imports.<sup>94</sup>

In applying section 777A(f) of the Act for the first time in this proceeding, the Department has therefore employed the analytical framework proposed by the WTO AB Report and required by the statute. Accordingly, the Department has examined in these section 129 proceedings (1) whether a countervailable subsidy (other than an export subsidy) has been provided with respect to a class or kind of merchandise, (2) whether such countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period, and (3) whether the Department can reasonably estimate the extent to which that countervailable subsidy, in combination with the use of normal value determined pursuant to section 773(c) of the Act, has increased the weighted average dumping margin for the class or kind of merchandise.<sup>95</sup> For a subsidy meeting these criteria, the statute requires the Department to reduce the antidumping duty by the estimated amount of the increase in the weighted average dumping margin subject to a specified cap.<sup>96</sup> As explained in the preliminary determinations and above, the Department conducted its analysis in this proceeding on an industry level and, based upon record evidence, identified a subsidy-(variable) cost-price link in

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<sup>91</sup> WTO AB Report at para. 599.

<sup>92</sup> See id. at para 542.

<sup>93</sup> See, e.g., 158 Cong. Rec. H1167 (daily ed. March 6, 2012 (statement of Rep. Camp) (“This legislation also brings the United States into compliance with its obligations by requiring the Department of Commerce to make an adjustment when there is evidence of a double remedy.”)).

<sup>94</sup> See section 777A(f)(1)(A) of the Act.

<sup>95</sup> See section 777A(f)(1)(A)-(C) of the Act.

<sup>96</sup> See section 777A(f)(1)-(2) of the Act.

the case of input price subsidies in the relevant industry.<sup>97</sup> From there, the Department applied a test derived from a documented ratio of price-cost changes in the Chinese manufacturing sector to estimate the extent of price responsiveness during the POI to changes in variable cost for Chinese producers.<sup>98</sup> Thus, contrary to the GOC's assertions, the Department has applied a clearly identifiable analytical framework focusing on the relationship between certain costs and price that is consistent with both the WTO AB Report and the statute.

Contrast the Department's analytical framework with the GOC's argument that a double remedy uniquely arises in NME cases because the Department's NME methodology only affects the determination of normal value. Aside from the fact that the GOC's argument was rejected by both the WTO Panel and AB, the GOC's theory wrongly equates normal value with the remedy in question, namely the antidumping duty. In evaluating the GOC's comments, it is important to bear in mind that the two remedies in question – AD and CVD measures – are both duties imposed upon the importation of the product under investigation. Normal values, of course, are not in and of themselves AD duties. The GOC's focus on normal values overlooks the fact that, depending upon the export price, a \$50 per unit subsidy could be accompanied by an NME dumping margin of \$0, \$1, or \$100. Thus, even under China's theory, NME AD dumping margins do not necessarily offset subsidies, and may have very little relationship to them.

Even assuming for the sake of argument that normal values, by themselves, could create a double remedy, the GOC's theory about NME normal values – that they necessarily are high enough to cover the full value of any subsidies provided within China – is unsound. The GOC's argument amounts to the assertion that NME normal values necessarily equal at least the sum of: (1) the cost of production that the Chinese producers would have had, if China had been a market economy country at the time of the investigation; plus (2) the amount by which those costs would have been lowered by the subsidies to those producers. The theory that NME normal values necessarily offset the amount by which normal values in a “market economy China” would have been lowered by subsidies is based on the assumption that NME normal values are completely unaffected by subsidies. This is simply not true.

First, put simply, while NME subsidies may not directly reduce the factor values used to calculate normal value in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the product under investigation. The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the surrogate factor values are multiplied by the NME producer's lower factor quantities, they result in lower normal values and, hence, lower dumping margins. Any reduction in factor usage by NME producers would reduce normal value in a second manner, because the final factor values are also used to calculate the amounts to be added to normal value for overhead, general and administrative expenses, and profit.

Second, the GOC's economic theory rests upon the mistaken presumption that normal value calculated under the NME AD methodology reflects subsidy-free surrogate values. Although Congress instructed the Department to avoid using as surrogate values “any prices which it has

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<sup>97</sup> See Preliminary DR Estimation Memoranda at 7-9.

<sup>98</sup> See *id.* at 9-10.

reason to believe or suspect may be dumped or subsidized prices,” Congress specifically cautioned that “the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time.”<sup>99</sup> Accordingly, the Department conducts no formal investigation and, consequently, makes no determination that the factor values to be used are not subsidized. Rather, the Department relies upon generally available information, such as existing countervailing duty orders, to determine whether factor values from certain countries are appropriate.<sup>100</sup>

Moreover, in determining normal value in NME cases, the Department does not exclusively use factor quantities in the NME countries, valued in the surrogate, market economy country. Factor values may also be based on the prices of inputs imported into China from market economy countries.<sup>101</sup> Given that the input suppliers in these countries are often competing with Chinese suppliers of those same inputs, it is by no means safe to assume that those prices are not lower as the result of competing with subsidized products in China.

Furthermore, in at least some cases, the NME exports of the product under investigation will account for a large enough share of the world market to influence prices in world markets. In such cases, particularly where the industry is export-oriented or has excess capacity, subsidies could increase output and exports from China, which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets, which, in turn, would reduce the profit rates the Department derives from their financial statements to add to normal value.

Also mistaken is the GOC’s argument that there must be a 100-percent pass through of a subsidy to the price of an imported product. The WTO AB Report to which this determination is responding expressly rejected the notion of an automatic pass-through of subsidies – 100 percent or otherwise – when it stated, “{W}e are not convinced that double remedies necessarily result in every instance of such concurrent application of duties.”<sup>102</sup>

### **III. FINAL DETERMINATION**

#### **Revised Countervailing Duty Rates**

As part of these section 129 proceedings, the Department has revised the CVD rates in the Sacks investigation as follows:<sup>103</sup>

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<sup>99</sup> Omnibus Trade and Competitiveness Act of 1988, House Conference Report No. 100-576, 1988 U.S.C.A.N. 1547, 1623 (emphasis added).

<sup>100</sup> See, e.g., OTR Tires/PRC AD Preliminary Determination (February 20, 2008), unchanged in OTR Tires/PRC AD Final Determination (July 15, 2008).

<sup>101</sup> See e.g., id. at 9288, unchanged in OTR Tires/PRC Final AD Determination (July 15, 2008).

<sup>102</sup> WTO AB Report at para. 599.

<sup>103</sup> See Sacks Section 129 Preliminary CVD Calculation Memorandum, at Attachment 3.

<b>Amended Countervailable Subsidy Rates (Percent) Laminated Woven Sacks from the People's Republic of China</b>		
<b>Exporter</b>	<b>CVD Rate (Investigation) 104</b>	<b>Revised CVD Rate<sup>105</sup></b>
ZIBO AIFUDI PLASTIC PACKAGING CO., LTD.	29.54	83.34
HAN SHING CHEMICAL CO., LTD.	223.74	277.54
NINGBO YONG FENG PACKAGING CO., LTD.	223.74	277.54
SHANDONG SHOUGUANG JIANYUAN CHUN CO., LTD./ SHANDONG LONGXING PLASTIC PRODUCTS COMPANY LTD.	352.82	406.62
SHANDONG QILU PLASTIC FABRIC GROUP, LTD.	304.40	358.20
ALL OTHERS	226.85	280.65

### **Pass-Through Estimates**

Based on the Department's findings in the Sacks Preliminary DR Estimation Memorandum, the Department has also identified those input price subsidies demonstrated to have reduced the OTR Tires industry's export prices during the POI and made pass-through estimates.<sup>106</sup>

### **Revised Antidumping Duty Cash Deposit Rates**

Based upon the methodology described in the Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum for making adjustments pursuant to section 777A(f) of the Act, the Department has, for purposes of these final section 129 determinations, revised the AD duty cash deposit rates as follows:<sup>107</sup>

<sup>104</sup> See Sacks CVD Final Determination.

<sup>105</sup> See Sacks Section 129 Preliminary CVD Calculation Memorandum, at Attachment 3..

<sup>106</sup> See Attachment 2 to the Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum (Pass-Through Ratios for Input Price Subsidies).

<sup>107</sup> See Attachment 1 to the Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum, (Calculation of Revised Cash Deposit Rates), for the full adjustment calculations.

<b>Amended Cash Deposit Rates (Percent)</b> <b>Laminated Woven Sacks from the People's Republic of China</b>			
<b>Exporter</b>	<b>Producer</b>	<b>Weighted-Average Dumping Margin (Investigation)<sup>108</sup></b>	<b>Revised AD Cash Deposit Rate<sup>109</sup></b>
ZIBO AIFUDI PLASTIC PACKAGING CO., LTD.	ZIBO AIFUDI PLASTIC PACKAGING CO., LTD.	64.28	20.19
POLYWELL INDUSTRIAL CO., a.k.a. FIRST WAY (H.K.) LIMITED	POLYWELL PLASTIC PRODUCT FACTORY	64.28	20.19
ZIBO LINZI WORUN PACKING PRODUCT CO., LTD.	ZIBO LINZI WORUN PACKING PRODUCT CO., LTD.	64.28	20.19
SHANDONG QIKAI PLASTICS PRODUCT CO., LTD.	SHANDONG QIKAI PLASTICS PRODUCT CO., LTD.	64.28	20.19
CHANGLE BAODU PLASTIC CO. LTD.	CHANGLE BAODU PLASTIC CO. LTD.	64.28	20.19
ZIBO LINZI SHUAIQIANG PLASTICS CO. LTD.	ZIBO LINZI SHUAIQIANG PLASTICS CO. LTD.	64.28	20.19
ZIBO LINZI QITIANLI PLASTIC FABRIC CO. LTD.	ZIBO LINZI QITIANLI PLASTIC FABRIC CO. LTD.	64.28	20.19
SHANDONG YOULIAN CO. LTD	SHANDONG YOULIAN CO. LTD	64.28	20.19
ZIBO LINZI LUITONG PLASTIC FABRIC CO. LTD.	ZIBO LINZI LUITONG PLASTIC FABRIC CO. LTD.	64.28	20.19
WENZHOU HOTSON PLASTICS CO. LTD	WENZHOU HOTSON PLASTICS CO. LTD	64.28	20.19
JIANGSU HOTSON PLASTICS CO. LTD.	JIANGSU HOTSON PLASTICS CO. LTD.	64.28	20.19
CANGNAN COLOR MAKE THE BAG	CANGNAN COLOR MAKE THE BAG	64.28	20.19
ZIBO QIGAO PLASTIC CEMENT CO. LTD	ZIBO QIGAO PLASTIC CEMENT CO. LTD	64.28	20.19
PRC-WIDE RATE		91.73	47.64

<sup>108</sup> See Sacks AD Final Determination.

<sup>109</sup> See Attachment 1 to the Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum, entitled Calculation of Revised Cash Deposit Rates.

**IV. CONTINUATION OF THE SUSPENSION OF LIQUIDATION**

In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, we will instruct CBP to continue to suspend liquidation of all imports of the product at issue from the PRC that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs us. CBP shall continue to require a cash deposit equal to the estimated AD duty margins. The suspension of liquidation instructions will remain in effect until further notice.

**RECOMMENDATION:**

In light of the findings of the Panel and Appellate Body and based on our analysis of the comments received, we recommend adopting all of the above positions, which will render our determination not inconsistent with the recommendation and rulings of the DSB.

Agree  Disagree

Paul Piquado  
Paul Piquado  
Assistant Secretary  
for Import Administration

31 July 2012  
(Date)



## ATTACHMENT I

### Acronym Table

Acronyms	
AB	Appellate Body
Act	Tariff Act of 1930, as amended
AD	Antidumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Aifudi	Zibo Aifudi Plastic Packaging Co., Ltd.
Allied Tube	Allied Tube and Conduit
Allied Tube/TMK IPSCO	Allied Tube and Conduit and TMK IPSCO
CBP	U.S. Customs and Border Protection
CHEFTYOY	Bloomberg PPI YoY Index
CLSA Report	Credit Lyonnais Securities Asia China PMI Report on Manufacturing
CNPPIY	China Purchase Price YoY Index
CVD	Countervailing Duty
CWP	Circular Welded Carbon Quality Steel Pipe
CWP Petitioner	Wheatland Tube Company
Department	Department of Commerce
DRC	Development Research Center of the State Council of China
DSB	WTO Dispute Settlement Body
Federal Circuit	United States Court of Appeals for the Federal Circuit
FIEs	Foreign Invested Enterprises
GOC	Government of China
HSBC Report	Hong Kong and Shanghai Banking Corporation-Markit China Manufacturing PMI Report
LTAR	Less Than Adequate Remuneration
LWRPT	Light-Walled Rectangular Pipe and Tube
The LWS Committee	Laminated Woven Sacks Committee (aka Sacks Petitioner)
NDRC	National Development and Reform Commission
NME	Non Market Economy
NV	Normal Value
OECD	Organization for Economic Cooperation and Development
OTR Tires	Certain New Pneumatic Off-the-Road Tires
POI	Period of Investigation
PP	Purchase Price
PPI	Producer Price Index
PRC	People's Republic of China
RCT	Ratio Change Test - the ratio between changes to an index of Chinese producer prices (Bloomberg's monthly CHEFTYOY producer price index) and changes to an index of producer input costs (Bloomberg's monthly CNPPIY index)
RPT	Reasonable Period of Time

<b>Acronyms</b>	
SAA	Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, 838 (1994)
Sacks	Laminated Woven Sacks
Sacks Petitioner	Laminated Woven Sacks Committee
SASAC	State Asset Supervision and Administration Commission
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIEs	State-Invested Enterprises
SMEs	Small and Medium Enterprises
Titan	Titan Tire Corporation
TMK	TMK IPSCO
URAA	Uruguay Round Agreements Act
U.S. Steel	United States Steel Corporation
The USW	The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC
Wheatland Tube	Wheatland Tube Company
WTO	World Trade Organization
YoY	Year-on-Year

<b>Unpublished Memoranda</b>	
CWP Preliminary Determination AD Cash Deposit Adjustment Memorandum	Memorandum to Paul Piquado, “Section 129 Proceeding Pursuant to the WTO Appellate Body’s Findings in WTO DS379 Regarding the Antidumping Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China from the People’s Republic of China: Preliminary Determination of Adjustments to the Antidumping Duty Cash Deposit Rates,” dated May 31, 2012
CWP Preliminary DR Estimation Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: ‘Double Remedies’ Analysis Pursuant to the WTO Appellate Body Findings in WTO DS379,” dated May 31, 2012
CWP Public Bodies and Facts Available Preliminary Determination Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Preliminary Section 129 Determination Regarding Public Bodies and Facts Available in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379),” dated May 18, 2012

<b>Unpublished Memoranda</b>	
LWRPT Preliminary Determination AD Cash Deposit Adjustment Memorandum	Memorandum to Paul Piquado, "Section 129 Proceeding Pursuant to the WTO Appellate Body's Findings in WTO DS379 Regarding the Antidumping Duty Investigation of Light Walled Rectangular Pipe and Tube from the People's Republic of China from the People's Republic of China: Preliminary Determination of Adjustments to the Antidumping Duty Cash Deposit Rates," dated May 31, 2012
LWRPT Preliminary DR Estimation Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, "Section 129 Determination of the Countervailing Duty Investigation of Light Walled Rectangular Pipe and Tube from the People's Republic of China: 'Double Remedies' Analysis Pursuant to the WTO Appellate Body Findings in WTO DS379," dated May 31, 2012
LWRPT Public Bodies and Facts Available Preliminary Determination Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, "Preliminary Section 129 Determination Regarding Public Bodies and Facts Available in the Countervailing Duty Investigation of Light-Walled Rectangular Pipe and Tube from the People's Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379)," dated May 18, 2012
OTR Tires Loans and Trading Companies Preliminary Determination	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, "Preliminary Section 129 Determination of the Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China (PRC); Definitive Anti-Dumping and Countervailing Duties on Certain Products from the PRC (WTODS 379)," dated April 6, 2012
OTR Tires Preliminary Determination AD Cash Deposit Adjustment Memorandum	Memorandum to Paul Piquado, "Section 129 Proceeding Pursuant to the WTO Appellate Body's Findings in WTO DS379 Regarding the Antidumping Duty Investigation of Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China from the People's Republic of China: Preliminary Determination of Adjustments to the Antidumping Duty Cash Deposit Rates," dated May 31, 2012
OTR Tires Preliminary DR Estimation Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, "Section 129 Determination of the Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: 'Double Remedies' Analysis Pursuant to the WTO Appellate Body Findings in WTO DS379," dated May 31, 2012
OTR Tires Public Bodies Preliminary Determination Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, "Preliminary Section 129 Determination Regarding Public Bodies in the Countervailing Duty Investigation of Certain New Pneumatic Off-The Road Tires from the People's Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379)," dated May 18, 2012

<b>Unpublished Memoranda</b>	
Public Bodies Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Section 129 Determination of the Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People’s Republic of China: An Analysis of Public Bodies in the People’s Republic of China in Accordance with the WTO Appellate Body’s Findings in WTO DS379,” dated May 18, 2012
Sacks Land Preliminary Determination	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Preliminary Section 129 Determination of the Countervailing Duty Investigation of Laminated Woven Sacks from the People’s Republic of China (PRC); Definitive Anti-Dumping and Countervailing Duties on Certain Products from the PRC (WTO DS 379),” dated April 9, 2012
Sacks Preliminary Determination AD Cash Deposit Adjustment Memorandum	Memorandum to Paul Piquado, “Section 129 Proceeding Pursuant to the WTO Appellate Body’s Findings in WTO DS379 Regarding the Antidumping Duty Investigation of Laminated Woven Sacks from the People’s Republic of China from the People’s Republic of China: Preliminary Determination of Adjustments to the Antidumping Duty Cash Deposit Rates,” dated May 31, 2012
Sacks Preliminary DR Estimation Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Section 129 Determination of the Countervailing Duty Investigation of Certain New Pneumatic Laminated Woven Sacks from the People’s Republic of China: ‘Double Remedies’ Analysis Pursuant to the WTO Appellate Body Findings in WTO DS379,” dated May 31, 2012
Sacks Public Bodies Preliminary Determination Memorandum	Memorandum for Paul Piquado, Assistant Secretary for Import Administration, “Preliminary Section 129 Determination Regarding Public Bodies in the Countervailing Duty Investigation of Laminated Woven Sacks from the People’s Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379),” dated May 18, 2012
Sacks Section 129 Preliminary CVD Calculation Memorandum	Memorandum for File, “Section 129 Determination Regarding Public Bodies in the Countervailing Duty Investigation of Laminated Woven Sacks from the People’s Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379), RE: Section 129 Preliminary Determination Calculation Memorandum; Provision of Petrochemicals at Less Than Adequate Remuneration,” dated May 18, 2012.

<b>Unpublished Memoranda</b>	
Trading Company Memorandum	Memorandum to Christian Marsh, Deputy Assistant Secretary, Antidumping and Countervailing Duty Operations, "Section 129 Determination for the Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Trading Company Rubber Suppliers," dated October 19, 2011

<b>Submissions</b>	
GOC Double-Counting Questionnaire	Letter from GOC, "Government of China's Response to the Section 129 Double Counting Questionnaire: Certain Off-the-Road Tires from China," dated April 11, 2012.
GOC's June 15, DR Comments/OTR Tires	Letter from GOC, "Government of China's Comments on the Department's Preliminary Double Remedy Determination: Certain Off-the-Road Tires from China," dated June 15, 2012
USW June 11, DR Factual Submission	Letter from USW, "Section 129 Proceeding Regarding the Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from China: Factual Information Regarding Double Remedies," dated June 11, 2012
USW June 15, DR Comments	Letter from USW, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Section 129 Proceeding Regarding Double Remedies; Comments of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC," dated June 15, 2012
USW June 20, DR Rebuttal Comments	Letter from USW, "Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Section 129 Proceeding Regarding Double Remedies; Rebuttal Comments of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC," dated June 20, 2012

<b>Published FRs</b>	
<u>OTR Tires/PRC AD Final Determination (July 15, 2008)</u>	<u>Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008)</u>
<u>OTR Tires/PRC AD Preliminary Determination (February 20, 2008)</u>	<u>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, 9288-89 (February 20, 2008)</u>
<u>Sacks AD Final Determination</u>	<u>Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 35646 (June 24, 2008)</u>

<u>Sacks CVD Final Determination</u>	<u>Laminated Woven Sacks From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008), and accompanying Issues and Decision Memorandum</u>
<u>Sacks AD Preliminary Determination</u>	<u>Laminated Woven Sacks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Determination of Critical Circumstances, and Postponement of Final Determination, 73 FR 5801 (January 31, 2008)</u>