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

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

DATE: June 16, 2008

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Laminated Woven Sacks from the People's Republic of China

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I. Summary

On December 3, 2007, the Department of Commerce (the Department) published the preliminary determination in this investigation. See Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 72 FR at 67893 (December 3, 2007) (Preliminary Determination). Subsequent to the Preliminary Determination, the Department issued a memorandum containing our preliminary analysis of the new subsidy allegations regarding the provision of petrochemical inputs for less than adequate remuneration, and certain provincial and local subsidies See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, through Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from Barbara E. Tillman, Director, AD/CVD Operations, Office 6, Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China: Post-Preliminary Analysis of New Subsidy Allegations, dated April 22, 2008 (Post-Preliminary Analysis).

We requested parties to comment on these preliminary determinations. The Laminated Woven Sacks Committee and its individual members, Bancroft Bag, Inc., Coating Excellence International, LLC, Hood Packaging Corporation, Mid-America Packaging , LLC, and Polytex Fibers Corporation (collectively, petitioners), the Government of the People's Republic of China (GOC) and Zibo Aifudi Plastic Packaging Company Limited (Aifudi)[1] each submitted case briefs and rebuttal briefs. The following is a list of issues raise by interested parties in their briefs:

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[1] The Department selected four mandatory company respondents: Han Shing Chemical Co., Ltd. (Han Shing Chemical); Ningbo Yong Feng Packaging Co., Ltd. (Ningbo); Shangdong Qilu Plastic Fabric Group, Ltd. (Qilu), and Shandong Shouguang Jianyuanchun Co., Ltd. (SSJ) See Memorandum to Stephen J. Claeys, Deputy Assistant

Comment 1: Application of the Countervailing Duty Law to Non-Market Economy Countries
Comment 2: Whether the Department Can Measure Subsidies that have been Alleged to Occur Prior to the Department's Determination to Apply CVD Law to China
Comment 3: Whether the Department Should Apply Adverse Facts Available to All Mandatory Respondents
Comment 4: Whether the Department Can Find that a Program Has Been Used and Is Countervailable for Non-Cooperating Respondents
Comment 5: Whether the Calculated Rates for Aifudi Should be Applied as Adverse Facts Available to the Mandatory Respondents
Comment 6: Whether the Department Should Apply Partial Adverse Facts Available to Aifudi
Comment 7: Whether the Provision of Electricity for Less Than Adequate Remuneration Is Countervailable
Comment 8: Whether the GOC Provision of Land Can Be Countervailed
Comment 9: Whether the GOC's Sale of Land-Use Rights is Specific
Comment 10: Whether the Department Should Select Either a First-Tier or Third-Tier Benchmark for the Provision of Land-Use Rights for Less Than Adequate Remuneration
Comment 11: Whether the Department Can Lawfully Apply an External Benchmark for the Provision of Land-Use Rights for Less than Adequate Remuneration
Comment 12: Whether the Provision of Petrochemical Inputs for Less Than Adequate Remuneration by SOEs is Countervailable
Comment 13: Whether SOEs Distort the Market in the PRC
Comment 14: Alternative Benchmark for the Provision of Petrochemical Inputs for Less Than Adequate Remuneration
Comment 15: Whether the Department Can Use Data from the World Trade Atlas to Determine a Benchmark for Petrochemical Inputs
Comment 16: Whether the Sale of Petrochemical Inputs is Consistent with Market Principles
Comment 17: Whether the Department Should Make an Adjustment for Freight in the Benchmark for Petrochemical Inputs
Comment 18: Whether the GOC Provides Government Policy Lending to the LWS Industry
Comment 19: Whether the Department May Countervail the Policy Lending Program as Adverse Facts Available
Comment 20: The Appropriate Benchmark to Use for the Policy Lending Program

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Secretary for Import Administration, "Respondent Selection" (July 31, 2007). This memorandum is on file in Import Administration's Central Records Unit (CRU). Subsequently, we determined that SSJ was cross-owned with Shandong Longxing Plastic Products Co., Ltd. (SLP) (see Preliminary Determination,), and for purposes of this final determination, we are referring to this entity as SSJ/SLP. On October 24, 2007, the Department accepted Zibo Aifudi Plastic Packaging Company Limited (Aifudi) as a voluntary respondent for the investigation pursuant to 19 CFR 351.204(d)(2). See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Voluntary Respondent Selection" (October 24, 2007), on file in the Central Records Unit (CRU), Room 1117 of the main Commerce building.

Comment 21: The Determination of the All Others Rate

The "Subsidies Valuation Information" and "Analysis of Programs" sections below set forth our determinations with respect to the programs under investigation as well as the methodologies applied in analyzing these programs. In addition, the "Analysis of Comments" section below addresses the comments submitted by the parties in their briefs. We recommend that you approve the positions described in this memorandum.

II. Background

The following events have occurred since the publication of the preliminary determination in the Federal Register on December 3, 2007. See Preliminary Determination, 72 FR at 67893. On December 13, 2007, the Department issued supplemental questionnaires to Aifudi and SSJ/SLP. We issued a supplemental questionnaire to the GOC on December 14, 2007. We received responses to these questionnaires from SSJ/SLP on January 2, 2008, and from the GOC and Aifudi on January 3, 2008. We issued an additional supplemental questionnaire to SSJ/SLP on January 11, 2008, and received a response on January 17, 2008. On December 27, 2007, the Department received requests for a hearing from the GOC and the petitioners.

Parties submitted timely comments on December 27, 2007 on the Department's analysis of land-use rights as requested in the Preliminary Determination. Subsequent to the Preliminary Determination, parties also submitted factual information, comments, or clarifying information at several points prior to this final determination based on deadlines for submissions of factual information and/or arguments established by the Department in accordance with 19 CFR 351.301(a)(1).

On January 22, 2008, the Department decided not to verify SSJ/SLP. See Letter to SSJ/SLP, Countervailing Duty Investigation: Laminated Woven Sacks from the People's Republic of China (January 22, 2008) (on file in the CRU).

From January 16 through January 25, 2008, we conducted verification of the questionnaire responses submitted by Aifudi and the GOC, including the national, provincial, and local governments. The Department issued verification reports on February 28, 2008 and March, 4, 2008. See Memoranda to the File, Countervailing Duty Investigation: Laminated Woven Sacks (LWS) from the People's Republic of China: Verification of the Questionnaire Responses Submitted by Zibo Aifudi Plastic Packaging Co., Ltd. (Aifudi Verification Report); Countervailing Duty Investigation: Laminated Woven Sacks (LWS) from the People's Republic of China: Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Central Government (Central Government Verification Report); and Countervailing Duty Investigation: Laminated Woven Sacks (LWS) from the People's Republic of China: Verification of the Questionnaire Responses Submitted by the Government of the People's Republic Of China (GOC) – Provincial and Local Government (Provincial and Local Government Verification Report).

On April 22, 2008, we issued our post-preliminary determination regarding the new subsidy allegations, which we decided to investigate on November 2, 2007. See Memorandum to

David M. Spooner, Assistant Secretary for Import Administration, Post-Preliminary Analysis of New Subsidy Allegations, (April 22, 2008) (Post-Preliminary Analysis), on file in the Department's CRU.

We received case briefs from the GOC, Aifudi, and the petitioners on May 2, 2008. The same parties submitted rebuttal briefs on May 7, 2008. On May 8, 2008, the GOC's case brief was returned because the Department determined that it contained untimely new factual information, as well as timely filed new factual information related to the Department's Post-Preliminary Analysis. The GOC resubmitted its case brief on May 12, 2008 without the untimely filed new factual information. On May 8, 2008, we informed all parties that they had an opportunity to rebut the new factual information submitted by the GOC pertaining to the Department's Post-Preliminary Analysis. On May 12, 2008, petitioners submitted factual information to rebut information provided by the GOC. We held a public hearing for this investigation on May 14, 2008.

III. Application of Facts Available and Use of Adverse Inferences

Section 776 of the Tariff Act of 1930, as amended (the Act), governs the use of facts available and adverse facts available. Section 776(a) provides that if an interested party or any other person (1) withholds information that has been requested by the Department; (2) fails to provide such information by deadlines or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides such information but the information cannot be verified, the Department shall use the facts otherwise available in reaching its determination. The statute requires that certain conditions be met before the Department may resort to facts available. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or to explain the deficiency.

If the party fails to remedy the deficiency within the applicable timelines, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) of the Act if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1, 889-90 (1994) (SAA) at 870. The statute provides, in addition, that in selecting from among facts available the Department may, subject to the corroboration requirements of section 776(c) of the Act, rely upon information drawn from the petition, a final determination in the investigation,

any previous administrative review conducted under section 751 of the Act (or section 753 for countervailing duty (CVD) cases), or any other information on the record.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. See SAA at 869.

With regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as adverse facts available, the Department will not use it. See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR at 6812 (February 22, 1996).

A. Application of Facts Available, Including the Application of Adverse Inferences

In the Preliminary Determination, we determined that the application of facts available was warranted with respect to Han Shing Chemcial, Ningbo, and Qilu. Preliminary Determination, 72 FR at 67895-96. As noted in the Preliminary Determination, none of these companies provided information we requested that is necessary to determine a countervailing duty rate for this investigation. Because Han Shing Chemical, Ningbo, and Qilu have failed to provide information requested by the Department and the failure to provide this information within the established deadlines has impeded our investigation, we find that the application of facts otherwise available is warranted under sections 776(a)(2)(A), (B), and (C) of the Act. Thus, we have based their countervailing duty rates on facts otherwise available.

In selecting from among the facts available, the Department has determined that an adverse inference is warranted, pursuant to Section 776(b) of the Act, because Han Shing Chemical, Ningbo, and Qilu did not respond to our requests for information. Thus, these companies failed to cooperate by not acting to the best of their abilities, and our determination for these companies is based on the application of adverse facts available.

Based on the Department's finding in the Post-Preliminary Analysis and Memorandum to the File regarding Cross-ownership and the Application of Adverse Facts Available to Shandong Shouguang Jianyuanchun Co., Ltd. and Shandong Longxing Plastic Products Co., Ltd.,(SSJ/SLP Adverse Facts Available Memorandum), dated April 22, 2008, neither SSJ nor SLP provided essential information that is needed to accurately calculate the subsidy rate applicable to these cross-owned producers/exporters of subject merchandise. Since SSJ/SLP failed to provide complete information, the use of facts available is warranted pursuant to sections 776(a)(1) and

(2) of the Act. Furthermore, the Department has determined that an adverse inference is warranted, pursuant to section 776(b) of the Act, because SSJ/SLP failed to provide essential information despite numerous requests, and as such, SSJ/SLP did not cooperate to the best of its ability.

B. Selection of the Adverse Facts Available

In deciding which facts to use as adverse facts available, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any other information placed on the record. It is the Department's practice to select, as adverse facts available, the highest calculated rate in any segment of the proceeding. See, e.g., Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review (Pistachios from Iran), 71 FR 66165 (November 13, 2006), and accompanying Issues and Decision Memorandum at "Analysis of Programs" and Comment 1. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (Fed. Cir. 1990).

Because Han Shing, Ningbo, Qilu, and SSJ/SLP each failed to act to the best of their abilities, for each program examined, we have made the adverse inference that each company benefitted from the program unless the record evidence made it clear that the companies could not have received benefits from the program because, for example, we have found the program to be not countervailable or terminated. See e.g., Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Affirmative Countervailable Duty Determination, 67 FR at 62102 (October 3, 2002) and accompanying Issues and Decision Memorandum at 3. As such, we have not used adverse inferences with respect to the "Government Provision of Electricity" program and the "Exemption from Payment of Staff and Worker Benefit Taxes for Export-Oriented Enterprises" program. However, we continue to find, as we did in the Preliminary Determination that the GOC's statements regarding the possible non-use of certain programs by Han Shing Chemical, Ningbo, Qilu, and SSJ/SLP, are not sufficient for the Department to determine that these companies did not receive countervailable subsidies, absent verified information provided by the respondents themselves. See Preliminary Determination, 72 FR at 67896.

Consistent with the guidance set forth above, to determine the adverse facts available rate to apply to each program, we have generally relied upon the highest calculated program rate for the same or similar program that has been calculated for the sole, remaining, cooperative company respondent in this investigation (i.e., Aifudi). See Preliminary Determination, 72 FR at 67896; see also Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966, 31968 (June 5, 2008) (CWP from the PRC); see also Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645, 60647 (October 25, 2007) (CFS from the PRC). For all loan or interest rate programs, we are applying Aifudi's calculated rate for "Government Policy Lending." For the "Government Provision of Land for Less than Adequate Remuneration" program, we are applying Aifudi's calculated rate to all four adverse facts available companies. For the "Government Provision of Inputs for Less than Adequate Remuneration" program, we are applying Aifudi's calculated rate to all four adverse facts available companies.

For the nine income tax programs, we have applied an adverse inference that Ningbo, Qilu, HSC, and SSJ/SLP paid no income tax during the POI (i.e., calendar year 2006). The standard income tax rate for corporations in the PRC is 30 percent, plus a 3 percent provincial income tax rate. Therefore, the highest possible benefit for the income tax rate programs is 33 percent. We are applying the 33 percent adverse facts available rate on a combined basis (i.e., the nine listed programs combined provided a 33 percent benefit). See CWP from the PRC, 73 FR at 31968.

With respect to the provincial and local programs that we initiated based on the new subsidy allegations filed after the initiation of the investigation, we only assigned adverse rates to those mandatory respondents that the petitioners alleged were located in that respective province or locality. See Post-Preliminary Analysis, at 2 and 6. We continued to apply adverse subsidy rates to the provincial programs that were included in the original initiation of investigation. See Laminated Woven Sacks from the People's Republic of China: Initiation of Countervailing Duty Investigation, 72 FR 40839 (July 25, 2007).

For all other programs that were not loans, inputs, land or taxes for which we required an adverse facts available rate to apply to Han Shing Chemical, Ningbo, Qilu, and SSJ/SLP, we selected the highest calculated rate for any program used by Aifudi. This is consistent with the Department's practice to select, as adverse facts available, the highest calculated rate in any segment of the proceeding. See, e.g., CWP from the PRC, 73 FR at 31968; see also Pistachios from Iran, 71 FR 66165, and accompanying Issues and Decision Memorandum at "Analysis of Programs"' and Comment 1.

With regard to the requirements of section 776(c) of the Act, the calculated subsidy program rates we are using as adverse facts available are not considered secondary information as they are based on information obtained in the course of this investigation. See section 776(c) of the Act; see, also, SAA at 870. Accordingly, no corroboration is necessary for purposes of the application of adverse facts available to Han Shing Chemical, Ningbo, Qilu, and SSJ/SLP. In the "Analysis of Programs" section below, we have only listed the calculated rate for Aifudi for each particular program. The adverse facts available rates we are assigning to the four companies are set forth in detail in the Countervailing Duty Investigation of Laminated Woven Sacks from the

People's Republic of China: Final Calculation Memorandum, dated June 16, 2008 (Final Calculation Memorandum).

Finally, we have also applied facts available, including an adverse inference, in reaching our determinations of whether two GOC programs are countervailable: "Government Policy Loans," and "Government Provision of Inputs for Less than Adequate Remuneration." A complete discussion of the Department's decision to apply facts available in reaching a determination that these programs are countervailable can be found in the "Analysis of Programs" section for each of these programs.

All of the comments received by the Department on whether to apply adverse facts available are fully addressed in the "Analysis of Comments" section below.

IV. Critical Circumstances

Pursuant to section 705(a)(2) of the Act, in order to find critical circumstances, the Department must find that there are countervailable subsidies that are inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (the Subsidies Agreement), and that there have been massive imports over a relatively short period (i.e., that there has been a surge in imports). In the Preliminary Determination, we found that critical circumstances existed for Ningbo and Han Shing Chemical, but not for Qilu, SSJ/SLP, or all others. Preliminary Determination, 72 FR at 67897. For purposes of the surge analysis for the Preliminary Determination, we relied on monthly shipment data submitted by Han Shing Chemical, Qilu, and SSJ/SLP. Based upon our analysis of these data, we preliminarily found that SSJ/SLP's and Qilu's shipments did not meet the requirements of section 703(e)(1)(B) of the Act and that critical circumstances did not exist. See Memorandum to the File "Critical Circumstances Analysis for Han Shing Chemical's and SSJ's Import Shipments and All-Others" (November 26, 2007) (Import Analysis Memorandum) on file in the Department's CRU.

Based upon our analysis of Han Shing Chemical's data, however, we preliminarily found that Han Shing Chemical's shipments did meet the requirements of section 703(e)(1)(B) of the Act. Id. Furthermore, because we were basing Han Shing Chemical's subsidy rate on adverse facts available, and because we had initiated on certain programs alleged by the petitioners to be export subsidies and import substitution subsidies, we also found, based on adverse facts available, that Han Shing Chemical had received a countervailable subsidy that was inconsistent with the Subsidies Agreement, and thus the requirements of section 703(e)(1)(A) were met. Accordingly, we found that critical circumstances existed for Han Shing Chemical. Preliminary Determination, 72 FR at 67897.

Regarding Ningbo, as part of our adverse facts available determination in the Preliminary Determination, we made an adverse inference that there were massive imports over a relatively short period because Ningbo declined to answer our request for monthly shipment data. See Memorandum to the File from Thomas Gilgunn, Program Manager, at Attachment 2 (November 21, 2007). Therefore, we preliminarily determined that the requirements of section 703(e)(1)(B) of the Act had been satisfied, and since adverse facts available was also being applied to Ningbo, we also determined that the requirements of section 703(e)(1)(A) of the Act had been met and

that critical circumstances existed for Ningbo. In the Preliminary Determination, we did not address Aifudi. For all others, we preliminarily determined that there were not massive imports over a relatively short period based on Han Shing Chemical's, Qilu's, and SSJ/SLP's shipment data. See Import Analysis Memorandum. Therefore, we preliminarily determined that the requirements of section 703(e)(1)(B) of the Act had not been satisfied, and that critical circumstances did not exist for all other companies.

For purposes of this final determination, we are modifying our critical circumstances analysis and findings. As explained above in the "Application of Facts Available and Use of Adverse Inferences" section, we are now applying adverse facts available with respect to all four mandatory company respondents (Han Shing Chemical, Ningbo, Qilu, and SSJ/SLP). Although we have unverified shipment data for SSJ/SLP, Qilu, and Han Shing Chemical that we relied on in the Preliminary Determination, it is inappropriate to rely on unverified shipment data submitted by non-cooperating respondents for purposes of making a final determination. See Section 776(a)(D) of the Act; see also Notice of Final Determination of Sales at Less than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Lined Paper Products from Indonesia 71 FR 47171 (August 16, 2006), and accompanying Issues and Decision Memorandum at Comment 12. There was no reasonable way for the Department to assess the accuracy or completeness of the shipment data submitted by these respondents which declined to provide any or, in the case of SSJ/SLP, complete questionnaire responses. Furthermore, there is no other data on the record that the Department could use to determine the monthly imports from each of these companies before and after the petition was filed, including import statistics. As such, we are applying adverse facts available in determining that a surge in imports exists for these four mandatory company respondents, thereby satisfying the requirements of section 705(a)(2)(B) of the Act.

With regard to whether the requirements of section 705(a)(2)(A) have been met, we are also making, pursuant to our determination to apply adverse facts available to the four mandatory respondents, an adverse inference that these four companies benefitted from countervailable subsidies that are inconsistent with the Subsidies Agreement, as we did with Han Shing Chemical in the Preliminary Determination. Because sections 705(a)(2)(A) and (B) of the Act have been satisfied, we determine that critical circumstances exist for Han Shing Chemical, Ningbo, Qilu, and SSJ/SLP.

For the voluntary respondent, Aifudi, we verified that it has not received any subsidies that are inconsistent with the Subsidies Agreement, and as such, we make a negative final determination of critical circumstances. For all others, we normally rely on the findings for the investigated companies with respect to whether there has been a surge in imports; however, because adverse facts available is being applied to all of the mandatory respondents, we have determined not to apply an adverse inference to all others with respect to whether there has been massive imports over a relatively short period. Furthermore, we do not have other shipment data on the record that would allow the Department to evaluate whether there was a surge in imports for all others. As such, consistent with our practice in recent antidumping investigations, we find no critical circumstances exist for all others, under Section 705(a)(2) of the Act, See e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan, 72 FR 67271, 67274 (November 28, 2007).

V. Subsidies Valuation Information

A. Attribution of Subsidies and Cross-Ownership

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

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

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

Id. Thus, the Department's regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

The Court of International Trade (CIT) has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. See Fabrique de Fer de Charleroi v. United States, 166 F. Supp 2d, 593, 603 (CIT 2001) (Fabrique).
In the Preliminary Determination, we found, in accordance with 19 CFR 351.525(b)(6)(vi), cross-ownership exists between Aifudi and Golden Moon. Thus, we attributed subsidies received by Golden Moon to the combined sales of Aifudi and Golden Moon in accordance with 19 CFR 351.525(b)(6)(iii). See Preliminary Determination, 72 FR at 67899. At verification, we confirmed that Golden Moon and Aifudi are cross-owned. See Aifudi Verification Report at 2

and Exhibit 4. No parties have argued that Golden Moon and Aifudi are not cross-owned. Accordingly, based on the evidence on the record, we continue to find that Golden Moon and Aifudi are cross-owned. Therefore, we are attributing subsidies provided to Golden Moon to the combined sales of Golden Moon and Aifudi, less any inter-company sales, in accordance with 19 CFR 351.525(b)(6)(iii), and we are attributing subsidies provided to Aifudi to its sales in accordance with 19 CFR 351.525(b)(6)(i) and 19 CFR 351.525(b)(6)(iii).

B. Loan Benchmarks and Discount Rate

The Department is investigating loans received by respondents from Chinese banks, including state-owned commercial banks (SOCBs), which are alleged to have been granted on a preferential, non-commercial basis. Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." Normally, the Department uses comparable commercial loans reported by the company for benchmarking purposes. See 19 CFR 351.505(a)(2)(i). However, the Department does not treat loans from government banks as commercial if they were provided pursuant to a government program. See 19 CFR 351.505(a)(2)(ii). Because the loans provided to the respondents by SOCBs were made under the "Government Policy Lending" program," as explained below, these loans are the very loans for which we require a suitable benchmark.

The statute directs that the benefit is normally measured by comparison to a "loan that the recipient could actually obtain on the market." See Section 771(5)(E)(ii) of the Act. Thus, the benchmark should be a market-based benchmark, yet, as discussed in the Preliminary Determination and in Comment 20, below, there is not a functioning market for loans within the PRC. See Preliminary Determination, 72 FR at 67900; see also Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) and accompanying Issues and Decision Memorandum, at 6 (CWP from the PRC); see also Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) and accompanying Issues and Decision Memorandum, at Comment 10 (CFS from the PRC). Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, consistent with the Preliminary Determination, the Department continues to find that, because there is not a functioning market for loans within the PRC, it must rely on the same regression-based methodology employed in the Preliminary Determination to calculate a benchmark interest rate.

In the Preliminary Determination, the Department found that Chinese interest rates are not reliable as benchmarks for loans because of the pervasiveness of GOC interventions in the banking sector. See Preliminary Determination, 72 FR at 67900. Because of the special difficulties with respect to China's banking sector, the Department must use an external benchmark to determine whether loans were provided on a preferential, non-commercial basis from state-owned banks.

The use of an external benchmark is consistent with the Department's practice. For example, in Softwood Lumber, the Department used U.S. timber prices to measure the benefit for

government provided timber in Canada. See, e.g., Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002), and accompanying Issues and Decision Memorandum, at "Description of Provincial Stumpage Programs: Province of Quebec," (Softwood Lumber); see also Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia, 72 FR 60642 (October 25, 2007) and the accompanying Issues and Decision Memorandum at "GOI Provision of Standing Timber for Less Than Adequate Remuneration" (CFS from Indonesia).

In the current proceeding, the Department finds that the GOC's predominant role in the banking sector results in significant distortions that render lending rates in the PRC unsuitable as market benchmarks. Therefore, as in Softwood Lumber and CFS from Indonesia, where domestic prices are not reliable, we have resorted to prices (i.e., benchmarks) outside the PRC. We continue to find that these distortions are present in the PRC banking sector and, therefore, determine that interest rates of the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to respondents in this proceeding. Accordingly, for purposes of this final determination, we are continuing to use a market-based benchmark interest rate based on the inflation-adjusted interest rates of countries at a level of economic development similar to that of the PRC based on income categorizations of the World Bank (using per capita gross national income (GNI)), using the same regression-based methodology employed in CFS from the PRC. See CFS from the PRC, at Comment 10; see also CWP from the PRC, at 8.

As also discussed in CFS from the PRC, there is a broad inverse relationship between income levels and lending rates. In other words, countries with lower per capita GNI tend to have higher interest rates than countries with higher per capita GNI, a fact demonstrated by the lending rates across countries. As noted in the Preliminary Determination, this is demonstrated by the lending rates across countries as reported in International Financial Statistics (IFS) to the International Monetary Fund. See Preliminary Determination, 72 FR at 67901, citing to Memorandum to the File entitled "Loan Benchmark Information" (November 26, 2007) (Loan Benchmark Memorandum), at Attachment 3, http://www.imfstatistics.org. Therefore, the Department has determined that it is appropriate to compute a benchmark interest rate based on the inflation-adjusted interest rates of countries with similar per capita GNI to the PRC, using the same regression-based methodology that we employed in CFS from the PRC, at "Benchmarks" and Comment 10.

Since the Preliminary Determination, the Department has made two minor changes in its regression analysis in order to more accurately reflect data issues and income categorization changes from year-to-year. The first is that the initial basket of lower-middle income (LMI) countries in each year's analysis is based on the countries classified by the World Bank as LMI for that particular year. In addition, while the Department continues to determine that data from certain countries and certain years is aberrational and excludes aberrational data from the regression analysis; the Department has adjusted the regression so that a country's data is only taken out of the analysis for the year in which the data is considered aberrational. Previously the 2006 regression analysis excluded data from Angola, the Dominican Republic, and Samoa for being aberrational in prior years; however, none of these countries was found to be aberrational for 2006 and are now included in the analysis. Also, the initial basket of countries for the 2006 regression analysis remains the same as in the Preliminary Determination. For the 2005

regression analysis, the initial basket of countries is updated to exclude Bhutan, which in 2005 was considered lower income but moved to LMI in 2006 and to include Brazil and Bulgaria because they were considered LMI in 2005 but not in 2006. In the 2005 regression, the inflation-adjusted interest rates from Angola and Brazil are considered aberrational and are excluded from the analysis because they were nearly double the rate of the next lower country.

Consistent with the regression model employed in CFS from the PRC and CWP from the PRC, the Department calculated an inflation-adjusted 2006 benchmark lending rate of 7.67 percent and 8.58 percent for 2005. See CFS from the PRC, at "Benchmarks"; see also CWP from the PRC, at "Benchmarks for Short-Term RMB Denominated Loans." Because these are inflation-adjusted benchmarks, it is also necessary to adjust the interest paid by respondent on its RMB loans for inflation. The Department then compared its benchmarks with respondents' inflation-adjusted interest rate to determine whether a benefit existed for the loans received by Aifudi's cross-owned affiliate, Golden Moon, on which principal was outstanding or interest was paid during the POI.

In the Post-Preliminary Analysis, we determined, based on adverse inferences, that SSJ/SLP was uncreditworthy from 2004 through 2006. See Post-Preliminary Analysis, at 8. We also stated that if we countervailed loan programs in the final determination, we would add a risk premium to the calculation for SSJ/SLP. However, the final subsidy rate determined for SSJ/SLP in this final determination is based entirely on adverse facts available; as such, there is no reason to apply a risk premium because no individual rate was calculated for this company. In addition, we are only countervailing one loan program and all of the loans were short-term, and we do not add risk premiums to short-term loans. See 19 CFR 351.505(a)(3)(iii) and (a)(4); see also CVD Preamble, 63 FR at 65366 (explaining that "we do not believe it would be appropriate to include a risk premium in the short-term benchmark calculation").

The Department requires a long-term interest rate to use as a discount rate for purposes of allocating benefits received by the provision of land-use rights for less-than-adequate remuneration over the relevant length of each land-use agreement. However, as discussed above, because of the market-distorting effect of the GOC in the PRC banking sector, there are no market-based interest rates, including long-term interest rates, in China.

In CFS from the PRC, the Department developed a ratio of short-term and long-term lending to identify and measure the benefit from any long-term loans. See CFS from the PRC, at Comment 10. The Department then applied this ratio to the benchmark short-term lending figure (discussed above under "Loan Benchmarks") to compute a long-term lending rate. Specifically, the Department computed a ratio of the average one-year and five-year interest rates on interest rate swaps reported by the Federal Reserve for 2005. See Loan Benchmark Memorandum, at Attachment 3, on file in the CRU. In the Preliminary Determination, the Department relied on the same methodology to develop long-term interest rates for 2005 for purposes of allocating benefits to the POI. See Preliminary Determination, 72 FR at 67909.

For the final determination, the Department has determined that rather than base our calculation on swap rates, it is more appropriate to use commercial bond rates as the basis for calculating the long-term mark-up over short-term interest rates. Interest rate swaps typically involve the exchange of fixed-interest for variable-interest payments and, unlike commercial bond rates, do

not involve the commercial risk (i.e., default risk) normally associated with lending long-term. For this reason, we are replacing the Federal Reserve swap rates with the Bloomberg U.S. corporate BB-rated bond rates to calculate the adjustment for long-term loans and discount rates. See Final Calculation Memorandum.

VI. Analysis of Programs

A. Programs Determined To Be Countervailable

1. Government Provision of Land for Less Than Adequate Remuneration

In the Preliminary Determination, the Department determined that the provision of land-use rights to both SSJ and Aifudi constitutes a countervailable subsidy in the form of land-use rights provided for less than adequate remuneration. Preliminary Determination, 72 FR at 67905. We also found in the Preliminary Determination that both SSJ and Aifudi are located in industrial parks within a county in Shandong Province.[2] Since SSJ failed to provide information requested by the Department and the failure to provide this information within the established deadlines has impeded our investigation, we are applying facts otherwise available as noted in "Application of Facts Available and Use of an Adverse Inference" section above, with regard to its use of this program.

We continue to find that the GOC's provision of land-use rights provides a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For Aifudi, we continue to find the sale of land-use rights constitutes a financial contribution from a government authority in the form of providing goods or services pursuant to section 771(5)(D)(iii) of the Act. For the complete explanation regarding our finding that land-use rights should be analyzed as "goods or services," see Comment 8, below.

We noted in the Preliminary Determination that the county was responsible for creating an industrial park, and that the county approved which companies could locate in the park and approved their land-use agreements. At verification, we verified that the county controlled the granting of land-use rights within the industrial park. Specifically, officials from the Huantai County Land Bureau explained that the county "gives final approval to companies for land-use rights. The county government at all levels and all agencies must approve land-use rights." See Provincial and Local Government Verification Report at 8. Accordingly, we continue to find de jure specificity because the provision of land-use rights within the industrial park is limited to an enterprise or industry located within a designated geographical region pursuant to section 771(5A)(D)(iv) of the Act.

The Department also determines in these final results that the sale of land-use rights provides a benefit pursuant to 19 CFR 351.511(a). Pursuant to section 771(5)(E)(iv) of the Act, a benefit is conferred when the government provides a good or service for less than adequate remuneration. Section 351.511(a)(2) of the Department's regulations sets forth the basis for identifying comparative benchmarks for determining whether a government good or service is provided for

[2] Golden Moon obtained the land-use rights and shares its land with Aifudi. However, because we have determined these two companies to be cross-owned, we refer to Aifudi as the buyer.

less than adequate remuneration. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles. This hierarchy reflects a logical preference for achieving the objectives of the statute.

In the Preliminary Determination, the Department found that it cannot apply a first tier benchmark. As an initial matter, we noted that private land ownership is prohibited in China, and that all land is owned by some level of government, the distinction being between land owned by the local government or "collective" at the township or village level and land owned by the national government (also referred to as state-owned or "owned by the whole people"). Preliminary Determination, 72 FR at 67907. At verification, we confirmed that all urban land (industrial and commercial land) is state-owned, and all rural land is collectively owned (agricultural land, residential land, and land used by township enterprises). See Central Government Verification Report at 23.

Noting that the GOC, either at the national or local level, is the ultimate owner of all land in China, in the Preliminary Determination, we examined whether the GOC exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets. We continue to find that a first tier benchmark is not appropriate because Chinese land prices are distorted by the significant government role in the market. Preamble, 63 FR at 65377, which states that "where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy." On the basis of the evidence on the record, we continue to determine that there are no usable first tier in-country benchmarks to measure the benefit from the transfer of land-use rights during the POI. See Preliminary Determination,72 FR at 67908.

The second tier benchmark, according to the regulations, relies on world market prices that would be available to the purchasers in the country in question, though not necessarily reflecting prices of actual transactions involving that particular producer. See 19 CFR 351.511(a)(2)(ii). In selecting a world market price under this second approach, the Department will examine the facts on the record regarding the nature and scope of the market for that good to determine if that market price would be available to an in-country purchaser. As discussed in the Preamble, the Department will consider whether the market conditions in the country are such that it is reasonable to conclude that a purchaser in the country could obtain the good or service on the world market. See Preamble 63 FR at 65377. We continue to find that land-use rights cannot be evaluated using a second tier benchmark because they cannot be simultaneously "available to an in-country purchaser" while located and sold out-of-country on the world market. Preliminary Determination, 72 FR at 67908.

Since we are not able to conduct our analysis using a benchmark identified under the second tier of the regulations, consistent with the hierarchy, we next consider whether the GOC's pricing of land-use rights is consistent with market principles. This approach is also set forth in section 351.511(a)(2)(iii) of the Department's regulations and is explained further in the Preamble, 63 FR at 65378:

> (W)here the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. . . In our experience, these types of analysis may be necessary for such goods or services as electricity, land leases or water, and the circumstances of each may vary widely.

The regulations do not specify how the Department is to conduct such a market principle analysis. By its very nature, this analysis depends upon available information concerning the market sector at issue and, therefore, must be developed on a case-by-case basis. In the instant case, we continue to determine that due to the overwhelming presence of government involvement in the land-use rights market, as well as the widespread and documented deviation from the authorized methods of pricing and allocating land, the purchase of land-use rights in China is not conducted in accordance with market principles.

We continue to find that there is a wide divergence between the de jure reforms of the market for land-use rights and the de facto implementation of such reforms. See Attachment 2 of the Loan Benchmark Memorandum at 46 (stating that China's land laws, regulations, and statements, although often vague and contradictory, seem to support the provision of secure land-use rights to farmers and an open, transparent system for transferring commercial land-use rights). In practice, however, farmers' land-use rights are still not secure and fair compensation for farmers is an ongoing, market-distorting issue in China, as noted in the Preliminary Determination.[3] In addition, laws and regulations are routinely violated by individuals and local governments. While the private market for land-use rights has grown, state-owned enterprises (SOEs) received a significant portion of their land-use rights free of charge. Also, commercial land sales are often conducted illegally. In short, property rights remain poorly defined and weakly enforced. Preliminary Determination, 72 FR at 67908-09.

Also noted in the Preliminary Determination, another de facto problem with land supply in China which causes market distortions is that of local government corruption. Local governments most often transfer land through non-transparent negotiations with investors despite guidance that land should be transferred through a transparent bidding or auction process. This has led to widespread corruption where much of the compensation is retained by the local government officials. See Land Benchmark Memo, at Attachment 4 for article on "Law to Expose Illegal Land Deal, China Daily," dated August 1, 2006.

Our findings at verification confirm the deficiencies in the implementation of land laws and regulations. We were told by the Shandong Provincial Land Bureau representative that national regulations and policies are supposed to be used for the pricing of land, and that "{b}efore the land is sold, it has to be appraised based on laws from the national level." See Provincial and Local Government Verification Report at 8. However, in later discussions with a county representative, we inquired about the land appraisal report and found that there was no such

[3] Citing Attachment 2 of the Loan Benchmark Memorandum at 44 and article from The Economist Intelligence Unit, ViewsWire; "China Politics: Beware of Protests Foreigners," dated October 25, 2005.

report done for land in the industrial park used by Aifudi. As reflected in the verification report, "{w}e then asked if there was any documentation on how the county established the price and whether a government official had to approve the price. The official stated that there was not a documented report. . ." Id. at 10. Furthermore, it became clear at verification that the creation of the industrial park and the sale of land-use rights in the park had not been completed in accordance with the regulations and policies set at the national level. Id. at 10-11. Therefore, in light of all the evidence on the record, we continue to find that land-use rights in China are not priced in accordance with market principles.

Given this finding, we looked for an appropriate basis to determine the extent to which land-use rights are provided for less than adequate remuneration. We continue to base our finding on a comparison of prices for land-use rights in China with comparable market-based prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to, but outside of, China. As discussed in detail in the Preliminary Determination, we have determined that the most appropriate analysis in this case would be to compare respondents' land-use rights to the sales of certain industrial land in industrial estates, parks and zones in Thailand. Preliminary Determination, 72 FR at 67909.

As a general matter, we noted that China and Thailand have similar levels of per capita GNI, and that producers consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China. Therefore, we continue to determine that the "indicative land values" for land in Thai industrial zones, estates and parks provided in the Asian Industrial Property Reports present a reasonable and comparable benchmark to the land-use rights in the county industrial park at issue in this investigation.

As discussed in the Preliminary Determination, we have considered certain economic and demographic factors in arriving at this conclusion. Id. Although we received comments from the parties regarding other factors that may inform this decision, including the availability of data on prices, investment flows, availability of land, and industry density in a certain region, we continue to determine that, due to the overwhelming presence of government involvement in the land-use rights market, as well as the widespread and documented deviation from the authorized methods of pricing and allocating land, the sale of land-use rights in China is not conducted in accordance with market principles. Although parties have submitted information and argued that the Department should use data from either India or Taiwan as an alternative benchmark, for the reasons explained in Comment 10 below, we continue to find land prices in Thailand to be the most reasonable and comparable to the land-use rights under investigation.

In order to calculate the benefit, we first multiplied the benchmark land rate (deflated from 2007 to the year the transaction was officially approved by the county) by the total area of Aifudi's tracts. We then subtracted the price actually paid for these tracts by Aifudi to derive the total unallocated benefit. We next conducted the "0.5 percent test" pursuant to 19 CFR 351.524(b)(2) for the years in which the transaction was approved by dividing the total unallocated benefit by the appropriate sales denominator. As a result, we found that the benefits were greater than 0.5 percent of relevant sales and that allocation was appropriate. We allocated the total unallocated benefit across the term of the land agreement using the standard allocation formula in 19 CFR 351.524(d) and the discount rates discussed above in the "Subsidies Valuation Information"

section under "Loan Benchmarks and Discount Rate," to determine the amount attributable to the POI. We then divided the POI benefit by the total combined sales of Golden Moon and Aifudi (less any inter-company sales) to calculate a countervailable subsidy of 13.36 percent ad valorem.

As noted in the Post-Preliminary Analysis, since SSJ/SLP failed to provide critical information necessary for the conduct of this investigation, we did not verify and can no longer rely on its reported information that was used to calculate its company-specific program rates in the Preliminary Determination. Therefore, the Department determined that SSJ/SLP did not act to the best of its abilities in providing the necessary information to the Department. Accordingly, we are continuing to apply adverse facts available to SSJ/SLP for purposes of this final determination pursuant to sections 776(a)(2)(A), (B), and (C) and 776(b) of the Act. In the Preliminary Determination, we also determined that the application of adverse facts available is warranted with respect to Ningbo, Qilu, and Han Shing Chemcical because these companies failed to provide information we requested that is necessary to determine a countervailing duty rate. See Preliminary Determination, 72 FR at 67895. Accordingly, we determine to apply as adverse facts available, the highest subsidy rate by a respondent that was calculated in this investigation for this program. Aifudi was the only respondent for which we calculated a company-specific rate in this proceeding. Therefore, we are applying Aifudi's rate of 13.36 percent ad valorem to SSJ/SLP, Ningbo, Qilu, and Han Shing Chemical as adverse facts available for this program.

2. Government Provision of Inputs for Less Than Adequate Remuneration

The Department preliminarily found that the provision of biaxial-oriented polypropylene (BOPP) to the LWS industry was provided for less than adequate remuneration from state-owned petrochemical producers and countervailed this program. See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, through Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from Barbara E. Tillman, Director, AD/CVD Operations, Office 6, Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China: Post-Preliminary Analysis of New Subsidy Allegations (Post-Preliminary Analysis), dated April 22, 2008. We did not preliminarily find the provision of polypropylene (PP) or polyethylene (PE) to be countervailable. We continue to find, for purposes of this final determination, that provision of BOPP to the LWS industry is a countervailable subsidy, but that the provision of PP and PE to the LWS industry is not countervailable.

Section 771(5)(B) of the Act provides that a subsidy exists where a government authority provides a financial contribution to a person, and a benefit is thereby conferred. A financial contribution includes the provision of goods or services, other than general infrastructure. See section 771(5)(D)(iii) of the Act. We find that no subsidy exists with respect to Aifudi's purchases of PP, because it acquired PP from private parties, not SOEs. Accordingly, there is no financial contribution from an "authority" within the meaning of the Act. However, as discussed in detail below at Comment 12, we find that SOEs provided PE and BOPP to Aifudi, and that SOEs are authorities. Therefore, the provision of PE and BOPP to Aifudi constitutes financial contributions within the meaning of sections 771(5)(B) and 771(5)(D)(iii) of the Act.

Government provision of goods or services confers a benefit if the goods or services are provided for less than adequate remuneration. See section 771(5)(E)(iv) of the Act; see also 19 CFR 351.511(a). For the reasons explained in the Post-Preliminary Analysis, we continue to find for these final results that Aifudi's purchases of PE from SOEs were not for less than adequate remuneration, and therefore do not result in a countervailable subsidy to the company. In reaching this conclusion, we followed the provisions of 19 CFR 351.511(a)(2), which sets forth a hierarchy by which we will normally determine whether a benefit exists from government-provided goods or services. The potential benchmarks provided in the regulations are listed in order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles.

Based on the hierarchy established above, we must first determine whether there are market prices from actual sales transactions involving Chinese buyers and sellers that can be used to determine whether the government-provided PE and BOPP were sold for less than adequate remuneration. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department finds that the government provides the majority, or a substantial portion of the market for a good or service, prices for such goods and services in the country will normally be considered significantly distorted and will not be an appropriate basis of comparison for determining whether there is a benefit. See CVD Preamble 63 FR at 65377.

Because the GOC did not provide the requested information that is necessary for the Department to evaluate whether domestic prices can be used as a benchmark, we continue to determine that it is appropriate to apply facts available in accordance with sections 776(a)(1) and (2) of the Act as discussed in the Post-Preliminary Analysis at 10. We also find that the GOC did not act to the best of its ability in complying with our requests for information because the GOC did not answer our questions regarding state ownership and control of these input manufacturers, as discussed below in Comment 13 and in Post-Preliminary Analysis at 11. Therefore, consistent with the approach taken in CWP from PRC, 73 FR at 31966, with respect to hot-rolled steel provided at less than adequate remuneration, as an adverse inference, we determine that the production and sale of PE and BOPP in China is dominated by SOEs. Accordingly, we have rejected internal prices in China as benchmarks. See CVD Preamble, 63 FR at 65377.

As noted in the Post-Preliminary Analysis at 10, we found that the GOC did not act to the best of its ability in complying with our requests for information pertaining to state ownership and control over the respective companies producing and/or supplying PE and BOPP in the PRC. Therefore, the Department has determined that an adverse inference is warranted, pursuant to section 776(b) of the Act. We concluded as an adverse inference, that SOE involvement in the petrochemical industry distorts the market, and therefore it would be inappropriate to rely on private domestic input prices in China as a benchmark. We have no record evidence to contravene petitioners' allegation that SOEs such as China Petroleum and Chemical Corporation (Sinopec), which was alleged to control 90 percent of the Chinese petrochemical industry and produces PE and BOPP, distort the market. As such, we determine in this final determination

that domestic private prices for these inputs are distorted and not usable as benchmarks. See CVD Preamble, 63 FR at 65377 ("Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy"). This is consistent with our decision in CWP from PRC where, because of the government's overwhelming involvement in the PRC market for the inputs in question, the use of private producer prices in China would be akin to comparing the benchmark to itself, (i.e., such a benchmark would reflect the distortions of the government presence). See CWP from PRC at Comment 7. Furthermore, we note that Aifuidi did not import either PE or BOPP during the POI. Therefore, there are no alternative actual transactions that the Department could consider under tier one of the benchmark hierarchy.

Section 351.511(a)(2)(ii) of the Department's regulations provides for the use of world market prices that would be available to purchasers in the country under investigation as the next option in the benchmark hierarchy. We have therefore calculated a benchmark for PE produced/supplied to Aifudi by SOEs during the POI based on world market prices for PE as reported by the London Metals Exchange (LME). See Memorandum to the File, Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China: Polyethylene (PE) and Biaxial-Oriented Polypropylene (BOPP) Benchmarks (Benchmarks Memorandum), dated April 22, 2008. Pursuant to 19 CFR 351.511(a)(2)(iv), we have added the appropriate PRC import charges and value-added tax (VAT) to the PE benchmark price in order to calculate a price that Aifudi would have paid on the world market for these inputs. Because the LME prices are delivered prices only to Singapore, we added the additional freight charge necessary for delivery to China.

Finally, to determine whether there was a benefit to Aifudi from the SOE provision of PE, we compared the actual prices paid by Aifudi for PE with the price that Aifudi would have paid at the benchmark price for PE. The price Aifudi paid for such PE is higher than the PE benchmark. See Final Calculation Memorandum. Therefore, we continue to determine that there is no benefit, and no subsidy under section 771(5)(B) of the Act.

To determine whether there is a benefit from the provision of BOPP to Aifudi, we conducted the same analysis as set forth above. In relying on the same reasoning, and in accordance with 19 CFR 351.511(a)(2), we have based our benchmark on world market prices. For BOPP, we relied on world market prices as reported by the World Trade Atlas. See Benchmarks Memorandum. Pursuant to 19 CFR 351.511(a)(2)(iv), we have added freight charges to the FOB BOPP price reported in the World Trade Atlas, and we have also added the appropriate PRC import charges and value-added tax (VAT) to the BOPP price in order to calculate a benchmark price that Aifudi would have paid on the world market for BOPP.

Finally, to determine whether there was a benefit to Aifudi from the provision of BOPP produced/supplied by SOEs, we compared the actual prices paid by Aifudi for BOPP with the price that Aifudi would have paid at the benchmark price for BOPP. The price Aifudi paid for BOPP is lower than the BOPP benchmark. See Final Calculation Memorandum. Therefore, we determine for these final results that there is a benefit under section 771(5)(E)(iv) of the Act to the extent that BOPP is provided for less than adequate remuneration.

Next, we examine whether the provision of BOPP is specific within the meaning of section 771(5A) of the Act. We find that the industries which use BOPP are "limited in number" and, hence, that the provision of BOPP by SOEs is specific under section 771(5A)(D)(iii)(I) of the Act. This finding, as explained in the Post-Preliminary Analysis, is based on the GOC's list of users of BOPP (printing, packaging, adhesive tape, and bag manufacturers) that were identified in the GOC's November 16, 2007 questionnaire response at 6-7.

To calculate the benefit from the provision of BOPP produced/supplied by SOEs to Aifudi for less than adequate remuneration, we identified Aifudi's producers/suppliers of BOPP that are SOEs. Id. To calculate the BOPP benefit, we compared the average per-unit prices paid by Aifudi to the SOE supplier for BOPP to the 2006 world market benchmark price for BOPP noted above. We measured the benefit as the difference in the amount that Aifudi would have paid using the weighted-average benchmark price and the amount actually paid by Aifudi. We then divided this amount by Aifudi's total sales. On this basis, we determine a countervailable subsidy of 16.12 percent ad valorem for Aifudi's purchases of BOPP.

Because Aifudi was the only respondent for which we calculated a company-specific rate in this proceeding, we are applying Aifudi's rate of 16.12 percent ad valorem to SSJ/SLP, Ningbo, Qilu, and Han Shing Chemical as adverse facts available for this program.

3. Government Policy Lending

In the Preliminary Determination, we determined that the GOC's policy lending program provided a countervailable subsidy to LWS producers. We initiated an investigation on this program based on petitioners' allegation that LWS producers are part of the textile industry, and received financial assistance under the provisions of the GOC textile industry plans. See Initiation Checklist at 12. Because the GOC did not provide crucial information requested several times by the Department, we preliminarily determined, as adverse facts available, that LWS producers are considered part of the textile industry for the GOC's policy planning purposes. See Preliminary Determination, 72 FR at 67895. In addition to concluding that LWS are part of the textile industry for the GOC's policy planning purposes, we also preliminarily concluded, as adverse facts available, that there is a program of policy lending to the textile industry. We preliminarily determined that this loan program is specific in law because the GOC has a policy in place to encourage and support the growth and development of the textile industry and the LWS producers within it. See id. 72 FR at 67903; see also section 771(5A)(D)(i) of the Act. We further determined that this program provides a direct financial contribution by the GOC pursuant to section 771(5)(D)(i) of the Act, and a benefit to loan recipients equal to the difference between what recipients paid on loans from government-owned banks and the amount they would have paid on comparable commercial loans. See Preliminary Determination, 72 FR at 67903; see also section 771(5)(E)(ii) of the Act.

Subsequent to the publication of the Preliminary Determination, the Department provided the GOC with a final opportunity to submit translated copies of all of the economic plans for the textile industry that we had previously requested, including, but not limited to, the "9th, 10th, and 11th National Economic and Social Development Five-Year Plans," and textile plans for Shandong Province, Weifang City, and Zibo City. See the Department's December 14, 2007

Questionnaire at Attachment I. Because the GOC had also stated that LWS are classified as a plastic and thus, could not be covered under any textile plans, we also requested details concerning the GOC's process for classifying products into industries or industrial categories, and for a list of all national product categories in China and the source of this list. We had found in the Preliminary Determination that LWS are classified in the tariff schedules as textiles (see Preliminary Determination, 72 FR at 67902), and the GOC has consistently claimed that LWS are a plastics product; therefore, we sought to understand how a product can be classified in two industries. See the Department's December 14, 2007 Questionnaire at Attachment I. In this questionnaire, we reiterated the statutory provision that, if the GOC's questionnaire response was incomplete, we may use the facts otherwise available on the record, and that an inference adverse to the interests of the PRC may be applied. We informed the GOC that it was required to submit all of the textile plans requested. See id.

Although the GOC submitted a response to our December 14, 2007 questionnaire, it was incomplete. See GOC's January 3, 2008 Questionnaire Response. For example, the GOC's "11th Five-Year Plan for Textile and Apparel" did not include a translation of Chapter 6, which concerns policies and measures.[4] This chapter states, inter alia, that government agencies shall promote the upgrade, readjustment, and sustainability of the textile industry and it encourages government agencies to use policies to invest in technology innovation within this industry. See Petitioners' January 14, 2008 Submission at Exhibit I. Chapter 6 also states that government agencies shall support technological innovations, and shall accelerate the development of domestically produced technologies for the production of chemical fibers. See id. Further, the GOC stated that Zibo City does not have any five-year plans for the textile industry, and it was silent regarding our request for the five-year textile plan for Shandong Province. See GOC's January 3, 2008 Questionnaire Response at 1. After the GOC's response indicating that there was no textile plan for Zibo City, petitioners timely provided excerpts from a document titled "Zibo Textile '11th Five Year Plan' Completed." Petitioners also provided excerpts of another document titled "Shandong Province Textile Industry 11th Five Year Plan." See Petitioners' January 9, 2008 Submission. In addition, petitioners also submitted a document titled "Linzi Textile and Apparel Project: Plastic Woven Sacks with an Annual Production of 8,000 Tons," which indicates that the government of Zibo Municipality classifies LWS as a textile. See Petitioners' January 9, 2008 Submission, at Exhibit 25.

Prior to the Department's receipt of the GOC's January 3, 2008 questionnaire response, the Department had sent a draft verification outline to the GOC to aid it in preparation for verification. See the Department's December 14, 2007 Letter to the GOC. In issuing this draft verification outline, we informed the GOC that it was only a draft, and was subject to change pending the Department's receipt of the GOC's response to the December 14, 2007 questionnaire. See id. After reviewing the GOC's response, we revised our draft verification outline to indicate that we would limit our verification to the GOC's industrial classification system and policy planning implications of the classification of LWS as a plastic.[5] Specifically, we requested that the GOC be prepared to explain and demonstrate how product classification is

[4] Petitioners subsequently provided a translation of this chapter, pursuant to 19 CFR 351.301(c). See Petitioners' January 14, 2008 Submission at Exhibit I.

[5] This was the only complete information relevant to the policy lending program that was actually submitted on the record by the GOC; thus, this was the only information that could be subject to verification.

done in China, and whether once a product is classified, it is legally excluded from consideration under other product classifications. See the Department's January 11, 2008 Letter to the GOC. Thus, we proceeded to verification with the narrow mandate of providing the GOC the opportunity to demonstrate that LWS are classified as a plastics product, and whether this classification renders LWS ineligible for inclusion in the textile plans.

At verification, the GOC explained, and provided examples to support its statement that, in the National Statistics Bureau (NSB) classification system, LWS are classified as a plastic in section 3030 of the NSB industrial classifications code, under the plastics industry. See Central Government Verification Report, at 8 and 9. However, the NSB could not show us an actual product classification for LWS, and NSB officials further explained that its industrial classification codes do not currently include product codes. In addition, the NSB explained that no product classification codes currently exist in China. See id. at 9. More importantly, the NSB noted that its industrial classification codes are considered to be "non-binding," meaning that they are not binding on other agencies, such as the GOC's National Development and Reform Commission (NDRC), which develops the national five-year plans. See Central Government Verification Report, at 2 and 11.

During verification, we also met with representatives of Shandong Province to gain a better understanding of the development and implementation of five-year plans at the provincial and municipal levels and to check whether there was a textile plan for Shandong Province because the GOC failed to provide any textile plans in its January 3, 2008 questionnaire response with respect to the provincial textile plans. See the GOC's January 3, 2008 Questionnaire Response; see also Provincial and Local Government Verification Report at 4. In explaining how the provincial government determines a company's classification in a particular industry, officials from the Shandong Province Development and Reform Commission (Shandong DRC) stated that industry associations and companies report their opinions to the provincial government, and that the provincial government either accepts a company's or industry association's classification, or decides on its own to classify a company in accordance with the national industry classification system of the central government NSB. See id. at 3. These officials further explained that the provincial industrial plan may name some of the products associated with the particular industry, but not all of the products that fall under a particular industrial classification code will necessarily be mentioned in the plan. See id. Shandong Province officials further explained that its "Blueprint for Comprehensively Constructing a Well-Off Society: Compilation Outline of the 11th Five-Year Plan for National Economy and Social Development of Shandong Province," contains a five-year plan for manufacturing. The officials stated that the Manufacturing Plan covered industries such as home electronics, chemicals, and textiles. We reviewed the Manufacturing Plan to check what was covered. We noted that there was a section in the plan for textiles and apparel, and the petrochemical industry. See id.

We then asked whether there was a textile plan for Shandong Province. The government representative stated that there was no textile plan. See id. We then pointed out that petitioners had placed on the record excerpts from a plan entitled "Shandong Province Textile Industry 11th Five Year Plan" that had been issued by Shandong Province, and we asked why the GOC did not provide this plan despite our numerous requests. We were told that it was prepared by another agency, the Shandong Province Committee on Economics and Trade (CET), and that they did not know about the Textiles Plan prepared by the CET. See id. at 4. However, it was clear from

our cursory review of the Manufacturing Plan that the CET had a role in the development and approval of that plan, because the CET was one of the signatories of the Manufacturing Plan. See id. at 4 and 5; see also Provincial and Local Government Verification Report at Exhibit A-9.

As discussed above in the section, "Application of Facts Available and Use of Adverse Inferences," section 776(a)(2)(A) of the Act states that the Department shall use facts otherwise available if, inter alia, an interested party withholds information that has been requested by the Department or provides information that the Department cannot verify. Further, section 776(b) states that if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.

In the SAA, Congress has explicitly stated that in determining if a party has not acted to the best of its ability, the Department should consider the extent to which a party may benefit from its own lack of cooperation. See SAA at 870. The Federal Circuit has stated that the Department need only show that a party has failed to cooperate to the best of its ability, i.e., information was not provided "under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." See Nippon Steel Corporation v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003) (Nippon Steel). The Federal Circuit stated in Nippon Steel that a finding that a company provided inadequate responses to agency questionnaires suffices under this standard. See id. Thus, for example, in Gourmet Equipment Corporation v. United States, 24 C.I.T. 572, 579, (CIT 2000), the Court of International Trade found that although a respondent responded to the Department's questionnaires, "it did not provide the kind of information Commerce required to verify the questionnaire responses." As such, the Court concluded that in "light of the fact that it was within (the respondent's) capacity to provide the right kind of information, Commerce's determination that (the respondent) failed to cooperate to the best of its ability is in accordance with law and supported by substantial evidence." Id. Thus, a respondent cannot substitute its judgment for the Department's judgment regarding what information is necessary for the Department's investigation and analysis.

As detailed above, neither the GOC's January 3, 2008 supplemental questionnaire response nor verification satisfactorily answered the questions regarding how LWS are classified in the PRC and how, in general, industrial classification is implemented for purposes of economic planning and policy development. The GOC did not provide the requested textile plans, and at verification, the Department confirmed that the GOC's questionnaire responses were incomplete because they did not provide all textile plans at the national, provincial and local levels.

While the GOC explained at verification that LWS are classified under section 3030, the plastics industry, in its National Statistics Bureau (NSB) industrial classification system, other evidence on the record, indicates that LWS are considered textiles. This evidence includes the fact that LWS are covered under the World Trade Organization's (WTO) Agreement on Textiles and Clothing, and the Harmonized Tariff Schedule of the United States (HTS) classifies LWS as a textile. Further, as also discussed above, at verification we were informed that NSB classification codes are "non-binding," meaning that agencies across the GOC are not required to follow them consistently. See Central Government Verification Report at 11. Furthermore, petitioners provided a document from the Investment Promotion Bureau of Zibo Municipality,

"Linzi Textile and Apparel Project: Plastic Woven Sacks with an Annual Production of 8,000 Tons," which indicates that the GOC has classified woven sacks, container sacks, and paper-plastic laminated sacks as textiles. Petitioners also submitted information showing that the GOC considers machinery on which LWS is produced as one of the "primary professional machines used in the textile industry." See Petitioners' November 8, 2007 Submission, at Exhibit 4. Thus, the record evidence indicates that the GOC has considered LWS a textile.

Furthermore, the U.S. International Trade Commission (ITC) preliminary determined that there is a reasonable indication that the establishment of an industry in the United States is materially retarded by imports of LWS from the PRC. See Laminated Woven Sacks from China Investigation Nos. 701-TA-450 and 731-TA-1122 Pub. 3942 at 1 (June 28, 2007) (ITC Preliminary Determination). In ITC Preliminary Determination, the ITC indicates that the technology used to produce LWS, which includes the melting of polyethylene or polypropylene pellets which are then extruded into sheets and then cut into thin strips that are spooled onto a bobbin for weaving into fabric, is a relatively recent technological innovation, noting that five of the seven domestic LWS producers began manufacturing LWS during the period of review. See ITC Preliminary Determination, at I-8. The Department notes that this production process appears to be identical to the LWS manufacturing process described at the verification of Aifudi. See Aifudi Verification Report, at 7. The Department further notes that the GOC 11th Five Year Plan for Textiles has policies to use advanced technology and to accelerate the development of domestically produced modern textile and chemical fiber production technologies. See the Petitioners' January 14, 2008 Submission at Exhibit I. Given the conflicting evidence regarding whether LWS are a plastic or a textile, it was essential for the Department to review all of the GOC's textile plans in order to evaluate whether LWS are ineligible for, or excluded from, these plans.

The GOC withheld the textile plans despite repeated requests by the Department. The information withheld was crucial to supporting the GOC's claim that LWS, as a plastic, would not be covered by provisions of the textile plans. The failure to provide this information has impeded our investigation, and we find that the application of facts otherwise available is warranted under sections 776(a)(2)(A), (B), and (C) of the Act. We also determine that the GOC has failed to act to the best of its ability because it did not provide the information requested by the Department. While we did consider the GOC's claim that because LWS are only a plastics product and cannot be considered textiles, and as such, cannot be covered under the textile plans, the GOC was unable to support this claim at verification. Thus, because we were not given all of the textile plans to review and evaluate, and because the GOC was unable to demonstrate that LWS could not be covered by the textile plans, we find that the GOC did not cooperate to the best of its ability and thus, we must use an adverse inference in applying facts otherwise available pursuant to section 776(b) of the Act.

Based on the all of the information as described above, and pursuant to sections 776(a) and (b) of the Act, as an adverse inference, we determine that the LWS are part of the textile industry. Furthermore, because the GOC did not provide complete national, provincial, and local textile plans, we are finding, as an adverse inference, that the textile plans provide for financing to the textile industry.

As such, we have determined as adverse facts available, pursuant to sections 776(a) and (b) of the Act, that this loan program is specific in law because the GOC has a policy and program in place to encourage and support the growth and development of the textile industry, including LWS producers. See section 771(5A)(D)(i) of the Act. Furthermore, because the GOI has failed to provide information requested by the Department, and failed to cooperate to the best of its ability, we have applied the adverse inference that this program provides a financial contribution by the GOC pursuant to section 771(5)(D)(i) of the Act. This program provides a benefit to the recipients equal to the difference between what recipients paid on loans from government-owned banks and the amount they would have paid on comparable commercial loans. See section 771(5)(E)(ii) of the Act.

Aifudi with its cross-owned affiliate, Golden Moon, had outstanding loans under this program during the POI. To calculate the benefit, we used the interest rates described in the "Benchmark" section above and the methodology described in 19 CFR 351.505(c)(1). We divided the benefit by the total combined sales of Golden Moon and Aifudi (less any inter-company sales) to calculate a countervailable subsidy of 0.06 percent ad valorem for this program.

Because Aifudi was the only respondent for which we calculated a company-specific rate in this proceeding, we are applying Aifudi's rate of 0.06 percent ad valorem to SSJ/SLP, Ningbo, Qilu, and Han Shing Chemical as adverse facts available for this program.

B. Program Determined To Be Not Countervailable

1. Government Provision of Electricity

In the Preliminary Results, we determined that the GOC's provision of electricity does not confer a countervailable subsidy to LWS producers because it is neither de jure nor de facto specific based on our finding that all industrial users within a locality, with the exception of a few particular industries that are eligible for discounts under the law, pay the same rate for their electricity. Preliminary Results, 72 FR at 67909. Electricity consumers are divided into broad categories such as residential, commercial, industrial, and agricultural users. The rates charged vary across customer categories based on the amount of electricity consumed. Within the industrial categories, there are different rates set based on the level of kilowatt consumption. For certain industrial users, the rates are specifically broken out and these industries receive discounted rates. We verified that LWS producers are not part of the industries receiving the discounted rates.

At verification, we also reviewed the published rate schedule submitted for Shandong province where respondent Aifudi is located. That rate schedule was submitted in the GOC's November 5, 2007 questionnaire response. See GOC's November 5, 2007 Questionnaire Response, Exhibit 10. We verified that Aifudi paid the electricity rate set forth in the rate schedule for its level of kilowatt consumption and that it received no discounts or rebates. See Provincial and Local Government Verification Report at 16 and Aifudi Verification Report at 3. Accordingly, we continue to find that the provision of electricity is not limited to an enterprise or industry or group thereof in accordance with section 771(5A)(D) of the Act, and therefore is not specific.

However, we have some concern that, while Aifudi did pay in accordance with the published rate schedule, we may not fully understand the basis for the different rate schedules within Shandong Province. See generally Central Government Verification Report at 29-31; and Provincial and Local Government Verification Report at 15-18. Although the GOC did provide in the questionnaire response a rate schedule that shows different rates applicable to different localities in Shandong Province (albeit with the same customer categories and variations solely based on different kilowatt consumption levels), we did not pursue this issue of varying rates within Shandong Province in our supplemental questionnaires. See, e.g., Department's December 14, 2007 Supplemental Questionnaire to the GOC at 5. Rather, we were focused on whether LWS respondents were being charged and were paying the rates published in the rate schedule for their level of electricity consumption, and that the only differentiation for industrial users in the rate schedule was based on consumption levels.

During verification, we discussed, in general, why there were different rates for different localities within Shandong Province. See Provincial and Local Government Verification Report at 15- 18. However, given that we had not requested more information about these different rates across localities within Shandong Province in our questionnaires, we were not able to verify, through examination of source documentation, all of the costs and pricing structures that flowed between the various levels of government and the end users. Accordingly, if a countervailing duty order is issued in this investigation and a subsequent administrative review is requested, the Department intends to examine this issue of different rates for different localities further to determine whether the provision of electricity may be countervailable.

C. Programs Determined To Be Not Used by Aifudi

We determine that Aifudi did not apply for or receive benefits under the following programs during the POI. We note that for those respondents to which adverse facts available is being applied, we are assigning subsidy rates attributable to the adverse facts available respondents for most of these programs. See "Application of Facts Available and Use of Adverse Inferences," above; see also Comments 3, 4, 5, 13, and 19; see also Final Calculation Memorandum.

1. VAT Rebate for FIE Purchases of Domestically Produced Equipment
2. VAT and Tariff Exemptions for FIEs Using Imported Technology and Equipment in Encouraged Industries
3. VAT and Tariff Exemptions on Imported Equipment (Domestic Enterprises)
4. Preferential Tax Policies for Enterprises with Foreign Investment (Two Free, Three Half)
5. Preferential Tax Policies for Export-Oriented FIEs
6. Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export-Oriented Enterprises
7. Tax Benefits for FIEs in Encouraged Industries that Purchase Domestic Origin Machinery
8. Tax Program for FIEs Recognized as High or New Technology Enterprises
9. Preferential Tax Policies for Research & Development
10. Tax Subsidies to FIEs in Specially Designated Geographic Areas
11. Preferential Tax Policies for Township Enterprises by FIEs

12. Local Income Tax Exemption and Reduction Programs for "Productive" FIEs
13. The State Key Technologies Renovation Project
14. Grants and Other Funding for High Technology Equipment for the Textile Industry
15. Grants to Loss-Making, State-Owned Enterprises
16. Export Interest Subsidy Funds for Enterprises Located in Zhejiang and Guangdong Provinces
17. Technology Innovation Funds Provided by Zhejiang Province
18. Programs to Rebate Antidumping Legal Fees
19. Loan Forgiveness for LWS Producers by the GOC
20. Grants for Market Exploration (Shandong Province)
21. Grants for Attending International Trade Fairs (Shandong Province)
22. Grants Key Export Enterprises (Shandong Province)
23. Interest Discount to Export Enterprises (Shandong Province)
24. Grants Covering Export Credit Insurance Fees (Shandong Province)
25. Grants to Enterprises Exporting Key Products (Shandong Province)
26. Interest Discounts for Export Enterprises (Shouguang Municipality)
27. Grants for Attending International Trade Fairs (Shouguang Municipality)
28. Preferential Treatment for Key Exporting Enterprises (Shouguang Municipality)
29. Grants for Exporting Key Enterprises (Shouguang Municipality)

D. Program Determined To Be Terminated

1. Exemption From Payment of Staff and Worker Benefits for Export-Oriented Industries

The Department determined that this program was terminated on January 1, 2002, with no residual benefits. See CFS from the PRC, 72 FR 60645 at 16.

VII. Analysis of Comments

Comment 1: Application of the Countervailing Duty Law to Non-Market Economy Countries.

The GOC argues it is unlawful for the Department to treat the PRC as a market economy for CVD purposes but continue to treat it as a non-market economy (NME) for AD purposes. The GOC claims that the Department has classified the PRC as an NME since 1981, despite the PRC's economic reforms and its membership in the WTO. The GOC argues that to be consistent with its policy, the Department should not now apply the CVD law to the PRC. The GOC further argues that as long as the Department continues to treat China as an NME for antidumping purposes, it must also continue to treat it as an NME to which the CVD law does not apply. According to the GOC, where the Department has determined that a free market does not exist, it cannot make comparisons between market-determined prices of a good, and those distorted by the government's involvement in the market. The GOC further claims that the Department is constrained from measuring an alleged benefit to a producer in an NME where the government is considered to have supplanted market forces.

The GOC continues by stating that the basis for finding a country to be an NME under the antidumping law is inconsistent with calculating a subsidy in that same country and that U.S. trade law does not provide for the application of the CVD law to NME countries. The GOC claims that the antidumping and CVD law contains a single definition of "nonmarket economy country," and that this definition applies equally to both antidumping and CVD proceedings. The GOC further claims that according to CVD law, the single statutory definition of "nonmarket economy country" requires the Department to find that a country "does not operate on market principles of cost or pricing structures." Such a finding, the GOC continues, is inconsistent with the application of the CVD law to that country because, without a market, there is no market to be distorted by subsidization.

According to the GOC, the Department's policy of not applying CVD law to NMEs originated in Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) (Steel Wire Rod from Czechoslovakia), where, the GOC states, the Department determined that an NME could not confer a "bounty or grant" within the meaning of section 303 of the Tariff Act, 19 U.S.C. § 1303 (repealed). Without a market, the GOC argues, the Department cannot determine the misallocation of resources caused by subsidies. According to the GOC, the Department concluded in Steel Wire Rod from Czechoslovakia that, "{i}t is this fundamental distinction – that in an NME system the government does not interfere in the market process, but supplants it – that has led us to conclude that subsidies have no meaning outside the context of a market economy." Steel Wire Rod from Czechoslovakia, 49 FR at 19371.

Citing, Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel), the GOC states that the Court of Appeals for the Federal Circuit (CAFC) affirmed the Department's conclusion that CVD law is inapplicable to NMEs. According to the GOC, the CAFC observed in Georgetown Steel that the CVD law was intended to protect against unfair competition resulting from subsidies to foreign producers that provide them with an advantage that they otherwise would not have. However, the GOC continues, the CAFC found that in exports from an NME, this kind of "unfair" competition cannot exist.

The GOC argues that the Department has attempted to circumvent the holding of Georgetown Steel by claiming the CAFC deferred to the Department's reasonable interpretation of the statute, and that the Department was free to change its practice and could subsequently find that the CVD law could be applied to NME countries. However, according to the GOC, the CAFC did not frame the issue before it in Georgetown Steel as one subject to reasonable interpretation and, the GOC continues, the CAFC, as required under the first prong of a *Chevron* analysis, made its own interpretation of the CVD law, and concluded that Congress did not intend for the CVD laws to be applied to NME countries. According to the GOC, the CAFC made clear in its holding that applying CVD laws to NME countries would require an act of Congress, rather than a change in the Department's policy. See Georgetown Steel, 801 F.2d at 1318.

Although Congress amended the original CVD statute adopted in the 1890s several times and addressed the NME issue consistently through changes to the antidumping law, the GOC contends that the legislative history over the last three decades indicates that Congress did not intend to authorize the Department's application of CVD law to NMEs. According to the GOC,

Congress amended the antidumping law to address NMEs for the first time through the 1974 Trade Act, which also included amendments to the CVD law. However, the GOC claims, there was no indication that Congress intended to change the CVD law to account for NME countries. Congress also revised the trade law in the Trade Agreements Act of 1979 (TAA), which re-enacted the surrogate country antidumping provisions applicable to NME countries. The GOC explains that the TAA also implemented into U.S. law the General Agreement on Tariffs and Trade (GATT) Subsidies Code, which permitted the regulation of imports from state-controlled economies based on surrogate methods under either the antidumping or CVD law. Citing Georgetown Steel, the GOC claims that Congress made various changes to the CVD law, but it gave no indication that it intended the law to apply to NMEs. Instead, the GOC continues, the antidumping law remained the sole means to address NME imports under U.S. trade law, consistent with the GATT Subsidies Code.

Citing the Omnibus Trade and Competitiveness Act of 1988, the GOC claims that Congress gave the Department authority to use market economy methodology to calculate antidumping duties for industries in NME countries where available data would permit. Citing Final Negative Countervailing Duty Determination: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992) (Ceiling Fans from the PRC), the GOC also claims that the Department has since interpreted the 1988 amendment of the antidumping law as allowing it to classify an industry in an NME country as "market-oriented" and to apply CVD law to that industry. According to the GOC, the Department concluded in Ceiling Fans from the PRC that Congress contemplated a situation in which a sector of an NME may be sufficiently free of NME distortion so that the actual prices and/or costs incurred in the NME could be used in dumping calculations and render meaningful results. The GOC states that the Department determined in Ceiling Fans from the PRC that the sector involved was not sufficiently market-oriented to apply the CVD law, and the Department reaffirmed the linkage between NME treatment under the antidumping law and non-application of the CVD law.

Furthermore, the GOC states that Congress' additional amendments to the CVD law via the Uruguay Round Agreements Act (URAA) did not address its applicability to NMEs. Indeed, the accompanying SAA stated that Georgetown Steel stood for the "reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries." SAA accompanying the URAA, H.R. Doc. 103-316, 103d Cong., 2d Sess., at 256. Thus, the GOC argues, Congress' approval of the SAA reflects its intent that existing CVD law was not applicable to NMEs.

Moreover, even if the statute authorized the Department's discretion, the GOC argues that the Department essentially codified its practice (of not applying CVD law to NMEs) via solicitation of public comment and in its formal rulemaking for the current CVD regulations (1988). See Potassium Chloride from the Soviet Union: Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984); Certain Steel Products from Austria, 58 FR 37217, 37261 (July 9, 1993); and Countervailing Duties: Final Rule, 63 FR 65347, 65360 (Nov. 25, 1998). The GOC contends these actions created a binding ruling under the Administrative Procedures Act (APA), and therefore, the Department cannot modify its practice without the public and comment period required of a formal APA rulemaking. Thus, given the Department's long-standing policy of not applying the CVD law to NMEs, the GOC

states that the lawful application of the CVD law to the PRC can only derive from either statutory amendment by Congress or from the Department's determination that the PRC is no longer a NME for both AD and CVD purposes.

The GOC states the Department is correct that the PRC no longer resembles the command economies of the Soviet bloc in the 1980s, however, the GOC continues, the same could be said with respect to Hungary in 1997 for which the Department cited the legal maxim that the CVD law does not apply to NMEs, and did not countervail grants provided to the respondent in Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002) (Sulfanilic Acid), because the grants were provided two months before the date that the Department recognized that Hungary was no longer an NME for antidumping purposes.

In addition, the GOC contends that it is irrational under economic theory for the Department to apply CVD law to the PRC while it is still deemed an NME. Disagreeing with the Department's finding that it cannot value goods in CVD investigations of NME countries because the goods are not sold in market conditions, the GOC argues that the Department cannot examine "adequate remuneration" in these instances because it has no basis for judging how much the government should charge when it sells something. The GOC further argues that by relying on external benchmarks that do not reflect Chinese market prices, the Department is applying NME dumping methodologies to a larger collection of alleged inputs to production and confirming that it cannot measure PRC subsidies. Moreover, the GOC contends that this practice guarantees double counting insofar as the inclusion of alleged domestic subsidies in the calculation of a CVD margin would result in double remedies for the same alleged subsidies, thereby violating the WTO Subsidies and Countervailing Measures Agreement (SCM Agreement) Article 19.4 and the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 Article 9.3. The GOC submits that the only way that the Department can avoid such double remedies is to completely offset the amount of the CVD duties in the AD case by increasing the export price or decreasing the normal value in the AD calculations by the amount of the CVD duties assessed.

The GOC also argues that economic theory supports the Department's authority to find an industry within an NME eligible for treatment as a "market-oriented industry" (MOI) (and thus subject to AD law and CVD law), but the Department has not yet to accept an MOI claim in practice. See Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992). Specifically, the GOC states that if a sector within an NME is considered to operate as a free market, then subsidies bestowed from government intervention become measurable with respect to an industry within that sector.

Finally, the GOC argues the Department's investigations of national planning and SOEs challenge the PRC's sovereignty with respect to its economy. Specifically, the GOC states "(t)he integrity of these investigations is corrupted by the hypocrisy of 'public utilities' in all countries, including the United States, and the common phenomenon of publicly or state-owned land and the influence of zoning." GOC Case Brief at 14. Because the assessment of subsidies in the PRC is "nonsensical as long as the Department claims there is no market," the GOC concludes

the Department must recognize and treat the PRC as a market economy before it can investigate subsidy allegations in the PRC (e.g. regarding land use rights). GOC Case Brief at 15.

Petitioners argue that there is no bar under U.S. law to applying CVD law to China. Petitioners state that the Department recognized in CFS from the PRC that the CVD law can be applied to China. See CFS from the PRC, 72 FR at 60648. According to petitioners, this decision identified several key aspects underlying its former practice involving Soviet-style economies and reasonably explained its decision to change its practice regarding the application of countervailing duty law to non-market economies.

Noting that the Court of International Trade (CIT) ruled that Georgetown Steel does not prohibit the Department's initiation of Chinese subsidy investigations, the petitioners argue that the court explained that "the Georgetown Steel court only affirmed Commerce's decision not to apply the countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs." See Government of China v. United States, 483 F.Supp.2d 1274 (CIT 2007). Thus, petitioners argue, Georgetown Steel is no impediment to the application of CVD law to China. Petitioners note that this decision was correct given the clear statutory authority to apply the CVD law to imports from all countries; the factual distinctions that exist between Soviet-style economies at issue and China today; and the GOC's clear acknowledgement throughout its WTO accession efforts that it would be subject to antidumping and countervailing duty cases.

According to petitioners, the statute does not prohibit the Department from applying the countervailing duty law to China. Petitioners cite to CFS from the PRC, 72 FR at 60648, where the Department noted that Congress granted the Department general authority to conduct countervailing duty investigations, and that this authority was not limited to market economies. In addition, petitioners argue that section 701(a)(1) of the Act requires that the Department impose a countervailing duty if it determines that:

> "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States … ."

Petitioners further note that section 771(3) of the Act makes no reference to distinctions between countries based on economic or political systems. Petitioners also note that the statutory definition of a countervailable subsidy in section 771(5)(A) and (B) of the Act is not limited to actions taken by particular governments with a particular type of economy. In conclusion, Petitioners state that there is no statutory bar to applying the countervailing duty law to China.

Petitioners argue that the Department can distinguish the Soviet-style economies in Georgetown Steel from China's current economy. Petitioners cite to CFS from the PRC, which noted that the economy in China was substantially different from Soviet-style economies. See CFS from the PRC, 72 FR at 60648. In addition, Petitioners state that the Georgetown Steel Memorandum issued by the Department states that the Department is capable of both identifying and measuring subsidies in China, based on the finding that "private industry now dominates many sectors of

the Chinese economy and entrepreneurship is flourishing . . . Given these developments, we believe that it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer (i.e., the subsidy can be identified and measured) and whether any such subsidy is specific." See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, at 10 (March 29, 2007) (Georgetown Steel Memorandum).

Petitioners rebut the GOC's claim that it is "irrational" as a matter of economics to apply the countervailing duty law to China. Petitioners argue that the Department has a legal obligation to apply the countervailing duty law to all countries and has the legal authority to make any factual determinations supported by substantial record evidence. Petitioners add that the Department's decision in CFS from the PRC recognizes that China's present-day economy is one in which subsidies can now be measured. Petitioners conclude that the GOC's theory on double counting is based on unsupported economic theory and that the GOC has not, and cannot, demonstrate that any double counting will actually occur in this investigation.

Department Position:

We disagree with the GOC regarding the Department's authority to apply the CVD law to China. See CFS from the PRC and accompanying Issues and Decision Memorandum, at Comments 1-3. The Department's position on the issues raised is fully explained in CFS from the PRC and CWP from the PRC. See id, and Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) (CWP from the PRC), and accompanying Issues and Decision Memorandum, at Comment 1.

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

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME." See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984); and Steel Wire Rod from Czechoslovakia, 49 FR 19370. The Department reached this conclusion, in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. Id. The Department explained that "{t}his is the background that does not allow us to identify specific NME government actions as bounties or grants." Id. Thus, the Department based its decision

upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, "although price controls and guidance remain on certain 'essential' goods and services in China, the PRC Government has eliminated price controls on most products . . . ." See Georgetown Steel Memorandum. Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in these Wire Rod cases is not a significant factor with respect to China's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from China.

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

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

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

The GOC argues that the Georgetown Steel court found that the CVD law cannot apply to NMEs. In making this argument, the GOC cites to select portions of the opinion and ignores the ultimate holding of the case and the court's reliance on Chevron to find the Department had reasonably interpreted the law. Id. The Georgetown Steel court did not hold that the statute prohibited application of the CVD law to NMEs, nor did it hold that Congress spoke to the precise question at issue. Instead, as explained above, the court held that the question was within the discretion of the Department.

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

The GOC's argument that Congress' failure to amend the law subsequent to Georgetown Steel amounts to a Congressional prohibition on the application of the CVD law to NMEs is also legally flawed. The fact that Congress has not enacted any NME-specific provisions to the CVD law does not mean the Department does not have the legal authority to apply the law to NMEs.

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

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

Congress then expressed its intent that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO." 22 U.S.C. § 6941(5). In these statutory provisions, Congress is referring, in part, to China's commitment to be bound by the SCM Agreement as well as the specific concessions China agreed to in its Accession Protocol. See Protocol of Accession of the People's Republic of China, WT/L/432 (November 23, 2001) (Accession Protocol), provided in the Petition at Attachment 2, Volume 2, Exhibit 85 (July 6, 2007).

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

The GOC fails to discuss these statutory provisions and instead, cites to the fact that Congress has enacted revisions to the AD Law to deal with NME methodologies, including in the 1988

Omnibus Trade and Competitiveness Act, but not to the CVD law. The fact that Congress enacted specific provisions for the application of the AD law, but not the CVD law, to NMEs simply reflects that the Department was applying the AD law to NMEs at the time rather than the CVD law. As the CVD law was not being applied to NMEs at that time, there was no reason to amend the CVD law to address concerns unique to NMEs. In sum, while Congress (like the CAFC) deferred to the Department's practice, as discussed in Georgetown Steel, of not applying the CVD law to the NMEs at issue, it did not conclude that the Department was unable to do so. To the contrary, Congress did not ratify any rule that prohibits the application of the CVD law to NMEs because the Department never made such a rule.

Moreover, contrary to the GOC's argument, the Department has never promulgated a rule pursuant to the APA regarding the application of the CVD law to NMEs. As an initial matter, the Department notes that the GOC, as well as all other parties in this investigation, have been provided due process through the substantial process that is mandated under the CVD law and the Department's Regulations (e.g., a hearing, submission of written argument, and submission of rebuttal argument). The APA's notice-and-comment requirements do not apply "to interpretative rules, general statements of policy or procedure, or practice." 5 U.S.C. § 553(b)(3)(A). Because the decision as to whether to apply the CVD law to NMEs involves the Department's practice or policy, it is not a promulgated rule and thus is not subject to the APA. Moreover, an agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or a practice. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (Chenery Corp.). Here, the decision of whether a subsidy can be calculated in an NME hinges on the facts of the case, and should be made exercising the Department's "informed discretion." See Chenery Corp., 332 U.S. at 203. The CIT recently agreed, stating that:

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

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

The CIT has repeatedly recognized the Department's discretion to modify its practice and has upheld decisions by the Department to change its policies on a case-by-case basis rather than by rulemaking when it has provided a reasonable explanation for any change in policy. See, e.g., Budd Co., Wheel & Brake Div. v. United States, 746 F. Supp. 1093 (CIT 1990) (holding that the Department did not engage in rulemaking when it modified its hyperinflation methodology: "because it fully explained its decision on the record of the case it did not deprive plaintiff of procedural fairness under the APA or otherwise"); and Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 966 (CIT 1988 (formal rulemaking procedures were not required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price). The Department has provided a fully reasoned analysis for its change of practice in this case. See Laminated Woven Sacks From the People's Republic of China:

Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination, 72 FR 67893, 67899 (December 3, 2007); see, also, Memorandum from Toni Page, Analyst, to the File "Placing the Georgetown Steel Memorandum on the File of the Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China, attachment 1 at 2 (November 26, 2007), on file in the Department's Central Records Unit (CRU).

The Department's decision to apply the CVD law in this investigation is also not subject to the notice-and-comment rulemaking of the APA because of the nature of the proceedings before the agency. The "APA does not apply to antidumping administrative proceedings" because of the investigatory and not adjudicatory nature of the proceedings, a principle equally applicable to CVD proceedings. See GSA, S.R.L. v. United States, 77 F. Supp. 2d 1349, 1359 (citing SAA at 892) ("Antidumping and countervailing proceedings . . . are investigatory in nature.")). In contrast to the GOC's APA arguments that fail to cite any case law, the Department's explanation in CFS from the PRC evidences that the courts have consistently held that the Department does not create binding rules under the APA when it develops its practice on a case-by-case basis in antidumping and CVD proceedings. See CFS from the PRC and accompanying Issues and Decision Memorandum, at Comment 2.

The GOC cites to various determinations where it claims the Department established a rule under the APA that it would not apply the CVD law to China. The Department does not create binding rules under the APA through its administrative determinations. Instead, in these determinations the Department expounds on its practice in light of the facts before the Department in each proceeding. Furthermore, in the determinations to which the GOC cites, the Department never found that the Congress exempted China from the CVD law.

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

> These are the essential characteristics of nonmarket economic systems. It is these features that make NME's irrational by market standards. This is the background that does not allow us to identify specific NME government actions as bounties or grants. Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984).

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

The GOC cites to Soviet Potash as a statement of the Department's position that it will not initiate subsidy investigations against NMEs. Soviet Potash, 49 FR 23438. However, that notice did not create a rule, but simply referenced the Department's previous decision in the wire rod investigations that it was not able to apply the CVD law to those types of economies. Indeed, the Department's subsequent actions demonstrate that it did not create a rule against the application of CVD law to NMEs. For example, in 1992, the Department initiated a CVD investigation against China, notwithstanding its status as an NME, after determining that certain industry sectors were sufficiently outside of government control. Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (Jan. 9, 1992) (Lug Nuts from the PRC).[6]

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

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

> In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).[7]

See CVD Preamble, 63 FR at 65360 (emphasis added). In a subsequent determination, the Department continued to explain that it has a practice of not applying the CVD law to NMEs, and did not refer to this practice as a rule. "The Preamble to the Department's regulations states that . . . it is important to note here our practice of not applying the CVD law to non-market economies. . . . We intend to continue to follow this practice." Sulfanilic Acid from Hungary and accompanying Issues and Decision Memorandum, at Comment 1 (emphasis added). The claim that the Department has somehow created a rule, when it has neither referred to its practice as such nor adopted notice-and-comment rulemaking for this practice, is erroneous.

With respect to Sulfanilic Acid from Hungary, after its initial analysis of the Soviet-styled economies in the Wire Rod investigations, the Department began a practice of not looking behind the designation of a country as an NME when determining whether to apply the CVD law

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

[7] See also General Issues Appendix 58 FR at 37261. We intend to continue to follow this practice.

to imports from that country (assuming no claim for a market-oriented industry was made). See, e.g., Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002). Now, the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that economy, much as it did in the original Wire Rod investigations. See, e.g., Georgetown Steel Memorandum. However, the determination of whether the CVD law can be applied does not necessarily create different types of NMEs, but rather is recognition of the inherent differences between NMEs. In addition, there is no requirement that the Department address each instance where a prior practice was applied when changing that practice. The Department is only required to provide a "reasoned analysis" for its change in practice (see, e.g., Rust v. Sullivan, 500 U.S. 173, 187 (1991)), which the Department did in CFS from the PRC. See, e.g., CFS from the PRC, and accompanying Issues and Decision Memorandum at Comments 3 and 6.

With respect to the GOC's argument that it is irrational for the Department to apply CVD law to the PRC while it is still deemed an NME since the Department's claim of an absent market means that it cannot value goods or determine "adequate remuneration," the Department disagrees.

The Georgetown Steel Memorandum makes clear that the PRC no longer has a centrally planned economy and, as a result, it no longer administratively sets most prices. As the Georgetown Steel Memorandum also makes clear, it is the absence of central planning, not market-determined prices, that makes subsidies identifiable and the CVD law applicable to China. As the Department explains in the Georgetown Steel Memorandum, extensive PRC government controls and interventions in the economy, particularly with respect to the allocation of land, labor and capital, undermine and distort the price formation process in China and, therefore, make the measurement of subsidy benefits potentially problematic. The problem is such that there is no basis for either outright rejection or acceptance of all PRC prices or costs as CVD benchmarks because the nature, scope and extent of government controls and interventions in relevant markets can vary tremendously from market to market. Some PRC prices or costs will be useful for benchmarking purposes, i.e., market-determined, and some will not, and the Department will take a case-by-case approach in making that determination, based on the facts and evidence on the record.

The Department also disagrees with the GOC's argument that use of external benchmarks is, effectively, confirmation that subsidies cannot be measured in the PRC. First, the Department notes its case-by-case analysis of benchmarks has not resulted in the use of external benchmarks in all instances. For example, in CWP from the PRC, the Department relied upon actual import transactions in China and world market prices we deemed to be equivalent to actual import transactions in China to value HRS. See CWP from the PRC, and accompanying Issues and Decision Memorandum, at Comment 7. Therefore, although the GOC can and does take issue with the particular benchmarks that the Department used for inputs and land, the GOC cannot claim that the Department summarily excluded all internal PRC prices from consideration. The fact remains that the Department followed a case-by-case approach and selected appropriate benchmarks on the basis of facts and evidence on the record in each case, as required by the mixed, transitional nature of China's economy.

With respect to the use of external benchmarks for measuring subsidy benefits, China is not special or unique. The Department's regulations do not limit the Department to actual in-country prices for a less than adequate remuneration analysis. Our regulations explicitly provide for the use of world market prices for these analyses. See 19 CFR 351.511(a)(2)(ii). The Department has several times in the past, in cases involving market economies, resorted to external benchmarks when facts and evidence on the record warrant it, consistent with our statute and regulations. For example, the Department found in CFS from Indonesia, that Malaysian export prices provided the most appropriate basis for determining an external benchmark price to use in assessing stumpage rates in Indonesia. See, CFS from Indonesia, and accompanying Issues and Decision Memorandum, at Comments 11 and 12. We found that these prices were consistent with market principles within the meaning of 19 CFR 351.511(a)(2)(iii) and were the most appropriate basis for deriving a market-based stumpage benchmark for determining whether the government of Indonesia provided stumpage for less than adequate remuneration. Furthermore, the Department also used an out-of-country benchmark in Lumber from Canada Investigation. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada, 67 FR 15545 (April 2, 2002) (Softwood Lumber from Canada Investigation), and accompanying Issues and Decision Memorandum, at "Provincial Stumpage Programs"; and Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada, 67 FR 36070, 36076 (May 22, 2002). In this case, the Department has followed its established practice of using out-of-country benchmarks where actual transaction prices are significantly distorted because of government involvement in the market. Moreover, a case-by-case approach is what China agreed to in its Accession Protocol, which explicitly provides for use of external benchmarks, where there are special difficulties in applying standard CVD methodology. See Accession Protocol, WT/L/432 at paragraph 15 (November 23, 2001). Thus, the use of world market prices is fully in accordance with the Department's regulations and the Department's past practice, and in no manner evidences that the CVD law should not be applied to China.

With regard to the GOC's double remedy argument, the GOC has not cited to any statutory authority that would allow us to terminate this countervailing duty investigation to avoid double counting and the CVD law provides no authority to make an adjustment to the CVD calculations to prevent double counting. If any adjustment to avoid a double remedy is possible, it would only be in the context of an antidumping investigation and no party raised or made an effort to demonstrate this claim in the companion antidumping investigation of LWS.

Comment 2: Whether the Department Can Measure Subsidies that have been Alleged to Occur Prior to the Department's Determination to Apply CVD Law to China

According to the GOC, the Department has stated that it could not countervail non-recurring benefits from alleged subsidies received prior December 11, 2001, the date of the PRC's accession to the WTO. However, the GOC argues that it is inconsistent with the Department's practice to treat any actions as countervailable while the Department has a policy not to apply CVD law to NME countries.

The GOC claims that, prior to November 2006, the Department had not treated China as a market economy with regard to CVD investigations and, that in CFS from the PRC, the Department determined it was possible to apply CVD law to China while continuing to maintain China's NME status in an antidumping context. The GOC argues that the Department has refused under similar circumstances to examine subsidy benefits prior to the time it determines it is appropriate to apply CVD law to a particular country, and claims that in Sulfanilic Acid from Hungary, the Department declined to countervail capital infusions received by a Hungarian respondent in the year before the Department found Hungary to have transitioned to market economy status.

Arguing that the fundamental principle applied in Sulfanilic Acid from Hungary applies in this case: the CVD law cannot apply to a period that pre-dates the point in time that an economy is susceptible to an examination of subsidies, the GOC concludes that the Department may not countervail any alleged benefits in the instant case, including benefits allegedly bestowed before 2006.

Petitioners counter that the GOC's contention, that the Department can only establish a cut-off date for measuring subsidies in China based on the Department's initiation of its first subsidies investigation of China on November 2006, is misplaced. Petitioners note the GOC's argument that the Department's determination in Sulfanilic Acid from Hungary, where the Department did not countervail benefits received prior to Hungary's recognition by the Department as a market economy, rested on the single premise that the Department not apply the CVD law to Soviet-style economies. As explained in the Georgetown Steel Memorandum, Petitioners state the Department has since fully articulated the reasons why the CVD law does not apply, and argue that any subsequent decisions which relied on Georgetown Steel, such as Sulfanilic Acid from Hungary, cannot serve as binding precedent in the instant case. Finally, petitioners state that there is no inconsistency in these findings regarding the point in time that an economy is susceptible to a reasonable examination of subsidies since the Department has cited extensive reforms in China in the 1990s. Therefore, petitioners conclude, that the Department has no reason to depart from its average useful life methodology when examining subsidies in China.

Department Position:

After careful consideration of the parties' comments, we continue to find that it is appropriate and administratively desirable to identify a uniform date from which the Department will identify and measure subsidies in the PRC for purposes of the CVD law, and have adopted December 11, 2001, the date on which the PRC became a member of the WTO, as that date.

Our decision to adopt this date is not based on whether the CVD law can or cannot be applied to non-WTO members. Rather, we have selected this date because of the reforms in the PRC's economy in the years leading up to its WTO accession and the linkage between those reforms and the PRC's WTO membership. See Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (October 1, 2001). The changes in the PRC's economy that were brought about by those reforms permit the Department to determine whether countervailable subsidies were being bestowed on Chinese producers. For example, the GOC eliminated price controls on most products; since the 1990s, the GOC has allowed the development of a private industrial

sector; and in 1997, the GOC abolished the mandatory credit plan. See Georgetown Steel Memorandum. Additionally, the PRC's Accession Protocol contemplates application of the CVD law. While the Accession Protocol, in itself, has no authority to preclude application of the CVD law prior to the date of accession, the Protocol's language in Article 15(b) regarding benchmarks for measuring subsidies and the PRC's assumption of obligations with respect to subsidies provide support for the notion that the PRC economy had reached the stage where subsidies and disciplines on subsidies (e.g., countervailing duties) were meaningful.

We acknowledge that there was not a single moment or single reform law that suddenly permitted us to find subsidies in the PRC; many reforms were put in place before the PRC acceded to the WTO. As discussed above, economic reform is a process that occurs over time. This process can also be uneven; reforms may take hold in some sectors of the economy or areas of the country before others.

We have rejected the approach of making specific findings for specific programs, opting instead for a uniform date of application based on the economic changes that have occurred across the entire Chinese economy. First, the cumulative effects of the many reforms implemented prior to the PRC's WTO accession give us confidence that by the end of 2001, subsidies in the PRC could be identified and measured. Second, a program-by-program, company-by-company approach is not administratively feasible. Using the instant proceeding as an example, we are investigating five LWS companies located in different provinces and more than 30 alleged subsidies administered at the national, provincial, and municipal levels. While certain programs such as reduced income tax rates can be relatively straightforward to investigate, alleged subsidies such as the provision of land for less than adequate remuneration and policy lending are not. They require analysis of several levels of government and banks because practices vary from jurisdiction to jurisdiction. If the Department were first required to determine whether subsidies could be identified and measured on a land plot-by-land plot or loan-by-loan basis and then investigate the subsidy, the Department could not complete CVD investigations on Chinese products within the statutorily mandated deadlines. These significant administrative concerns support a bright-line cutoff that allows the Department to focus its analysis on investigating the alleged countervailable subsidies. Furthermore, this bright line provides certainty to the parties concerned.

We further disagree that Sulfanilic Acid from Hungary is controlling here. As noted in the response to Comment 1, the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that country.

Comment 3: Whether the Department Should Apply Adverse Facts Available to All Mandatory Respondents

Petitioners state that three of the four mandatory respondents, Hanshing Chemical, Yonfeng (i.e., Ningbo), and Qilu Plastics, provided no meaningful responses to the Department's questionnaires. Because these mandatory respondents failed to provide the Department with the information necessary to determine countervailing duty rates, petitioners contend that the

Department should continue to use an adverse inference in selecting from among facts available for the final determination.

For the remaining mandatory respondent, SSJ/SLP, petitioners state that SSJ/SLP either provided the Department inaccurate information or refused to provide the requested information necessary to the Department's analysis of all subsidies benefiting its production. As an example, petitioners note that, after the Department had requested payment documentation to demonstrate that SSJ/SLP had paid a market price for its land use rights, SSJ/SLP later responded in its supplemental questionnaire that it had not made any payments. Petitioners also note that SSJ/SLP submitted an incorrect tax return supporting its claim that it did not benefit from income tax exemptions for FIEs, in spite of the Department's request for the relevant tax return for the POI. When SSJ/SLP provided the correct tax return, it demonstrated that SSJ/SLP had, in fact, used this program. Finally, petitioners argue that SSJ/SLP failed to provide essential information requested by the Department relating to SSJ cross-owned input supplier, SLP, which prevented the Department from analyzing the subsidies bestowed on SSJ/SLP's production.

In rebuttal, the GOC maintains that, should the Department apply adverse inferences to calculate a rate for each alleged program, the final determination must indicate that the adverse inferences apply only to the non-cooperative mandatory respondents, and not to the programs themselves, lest the program findings be cited as administrative practice in future proceedings. In addition, the GOC urges the Department to corroborate any information used in the calculation of the adverse facts available rates, and not to include in a company's rate programs that could not have been used by that company.

Department Position:

As discussed above in the section "Application of Facts Available and Use of Adverse Inferences," we are determining countervailable subsidy rates for the four mandatory respondents based on facts available and the use of adverse inferences. With respect to three of the four mandatory respondents, Hanshing Chemical, Ningbo, and Qilu, there is no reason to change our preliminary determination that the application of facts available and the use of adverse inferences were warranted because these companies did not respond to the Department's requests for information. See Preliminary Determination, 72 FR at 67894 – 897. With respect to the fourth mandatory respondent, SSJ/SLP, we determined, in the Post Preliminary Analysis, at 3-6, that the application of facts available and the use of adverse inferences was warranted. Therefore, as we did in the Post Preliminary Analysis, with the exception of the income tax programs, we are assigning a rate to each of these four companies for each program being investigated, unless there is information on the record showing that a company is not located in a province where a provincial program is offered. For all of the income tax programs we are assigning a rate, in the aggregate, of 33.00 percent, the total of the PRC national and local income tax rate.

In selecting a countervailable subsidy rate for each program investigated, we are using rates from within this investigation. See, e.g., Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) (CWP from

the PRC), and accompanying Issues and Decision Memorandum at page 2, and Comment 15; Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran; Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006) (Pistachios from Iran), and accompanying Issues and Decision Memorandum at Comment 1; and CFS from the PRC, and accompanying Issues and Decision Memorandum at "Use of Adverse Facts Available." We do not need to corroborate the calculated subsidy rates we are using as adverse facts available because they are not considered secondary information as they are based on information obtained in the course of this investigation. See section 776(c) of the Act.

With respect to the GOC's argument that the countervailable subsidy rates applied for each program cannot form administrative precedent regarding each program, it is speculative to consider how the Department's final determination will be used in future investigations or reviews. The statute requires the Department to make its determinations based on record evidence. Should these programs be at issue in a future investigation or review, we will evaluate the record evidence in reaching our determination.

Comment 4: Whether the Department Can Find that a Program Has Been Used and Is Countervailable for Non-Cooperating Respondents

The GOC noted that it reported non-use on the word of the respondent companies because there was no feasible way for it to determine from government records whether these alleged programs had been used. However, the GOC does not concede that any of the alleged programs, had they been used, would constitute countervailable subsidies. Furthermore, the GOC states that the Department's questionnaire noted that the GOC had no need to provide information about the alleged programs when it believed that they had not been used by the LWS manufacturers. Therefore, the GOC concludes that these programs cannot be countervailed because there is only evidence on the record that these programs were not used, and no evidence to support finding these programs countervailable if they had been used.

Petitioners did not submit any comments regarding the GOC's argument on non-use of subsidy programs.

Department Position:

The GOC itself indicated that its reports of company non-use of programs under investigation were based on companies' statements, and on a partial search of its own records. At the outset, we cannot rely solely upon the GOC's statements to make our determination of non-use. Furthermore, as noted in the Preliminary Determination, despite the GOC's statement that it had searched government tax records and found no use by the respondents, one company reported its use of a tax program. See Preliminary Determination, 72 FR at 67896. As such, we cannot rely on the information provided by the GOC to determine non-use of each program under investigation by the four mandatory respondents. Thus, we were not able to verify non-use using the GOC's records. More importantly, the mandatory respondents did not provide information to demonstrate their own non-use of each program (the mandatory respondents either did not participate fully or were deemed to have not cooperated to the best of their ability in our investigation such that adverse inferences are warranted).

The statute requires the Department to verify the information used in reaching a final determination. See section 782(i) of the Act. In this investigation, the Department was unable to verify the statements and information provided by the GOC that certain programs were not used by the LWS producers under investigation. Furthermore, the mandatory respondents provided no verifiable information. When information is unverifiable, the Department is required by statute to reach a determination based on facts otherwise available, and to use adverse inferences, if warranted. See sections 776(a)(2)(D) and 776(b) of the Act. Accordingly, for the mandatory respondents, the Department is countervailing the programs for which the GOC provided unverifiable information of non-use and the mandatory respondents failed to demonstrate the non-use of the programs.

Comment 5: Whether the Calculated Rates for Aifudi Should be Applied as Adverse Facts Available to the Mandatory Respondents

Petitioners argue that the most appropriate rates to use as adverse facts available for the mandatory respondents should be those rates calculated for voluntary respondent, Aifudi, because the Department was able to verify Aifudi's use of these programs. Petitioners state that section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to use information on the record. Petitioners add that the Department's normal practice is to select, as adverse facts available, the highest calculated rate in any segment of the proceeding. See, e.g., Pistachios, 71 FR 66165. According to petitioners, the Department must ensure that the rate is sufficiently adverse "to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8932 (February 23, 1998). In addition, petitioners argue that the Department should ensure that a party "does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870.

According to petitioners, as total adverse facts available, the benefit for each mandatory respondent from each of these programs preliminarily found to be used should be the same as that found for the most similar of the three programs for which there is a calculated rate, unless it was demonstrated that the company could not have benefited from a particular program. See, e.g., Notice of Preliminary Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand from India, 68 FR 40629 (July 8, 2003). For those programs not similar to the three programs noted above, petitioners argue that the Department should use the highest calculated rate available from these three programs with calculated rates. Petitioners state that because these calculated rates are based on information obtained in the course of this investigation, they should not be considered secondary information. See section 776(c) of the Act; see also SAA at 870. For income tax programs, petitioners argue that the Department should find, as adverse facts available, that each mandatory respondent paid no income tax and thus benefited from the combined income tax programs at the rate of 33 percent, the corporate income tax rate in the PRC during the POI.

The GOC's rebuttal argument is summarized in Comment 3, above.

Department Position:

As discussed above in the "Application of Facts Available and Use of Adverse Inferences," section and in Comment 3, we are using the calculated rates for Aifudi for the three programs found countervailable as the basis for the adverse facts available rates for each non-participating mandatory respondent, for each program under investigation. To the extent possible, for each adverse facts available program, we have used the rate calculated for Aifudi for the same or similar type of program. Where we cannot match the type of an adverse facts available program with the type of a program for which we have calculated a rate, we have used the highest program-specific rate calculated for Aifudi. As is our practice, we have made the adverse inference that the mandatory respondents paid no income taxes; as such, we have assigned the rate of 33.00 percent ad valorem to all of the tax programs in the aggregate. See CWP from the PRC, Issues and Decision Memorandum at Comment 15; Pistachios from Iran, Issues and Decision Memorandum at "Anlaysis of Programs." However, for certain provincial programs alleged as part of petitioners' New Subsidy Allegations, we have not assigned a rate if petitioners did not provide information showing that a mandatory respondent was located in that province.

Comment 6: Whether the Department Should Apply Partial Adverse Facts Available to Aifudi

Petitioners argue that the Department should use partial adverse facts available for the voluntary respondent, Aifudi, for all but three subsidy programs under investigation unless it was clearly documented that Aifudi could not have benefited from any particular subsidy program under investigation. According to petitioners, Aifudi has misled the Department and failed to act to the best of its ability in responding to the Department's questionnaires.

Petitioners state that Aifudi failed to report accurately its production processes as illustrated when the Department found at verification that Aifudi sources production from Zibo Hongfeng Plastic Woven Co., Ltd. (Hongfeng), a company that Aifudi had not previously identified. Contrary to Aifudi's characterization at verification, petitioners characterize Aifudi's relationship with Hongfeng as more like a cross-owned input supplier than as a toller, and cite to the verification report that one of Hongfeng's workshops "was devoted to Aifudi's production, around the clock, if need be, minus a few hours a week for maintenance." See Aifudi Verification Report at 7.

Petitioners argue that Aifudi's failure to report the existence of this facility prior to verification is a misrepresentation of its production processes that impeded the Department's investigation. Petitioners state that the Department was denied the opportunity to investigate subsidies to this facility that also produces subject merchandise for other Chinese companies, including mandatory respondents SSJ/SLP and Qilu, and that could transfer subsidies they receive to Hongfeng.

Second, petitioners argue that Aifudi provided the Department inconsistent information regarding its land use rights. According to petitioners, Aifuidi impeded the Department's investigation because it failed to provide accurate and consistent information relating to how Aifudi uses its land and what it pays to operate there. Petitioners specifically note as an example

that Aifudi originally reported that it used land of an affiliated company at no charge, but that after the Preliminary Determination, Aifudi discovered a rental agreement between itself and Golden Moon. In addition, petitioners state that during verification, Aifudi did not explain why Golden Moon was listed as the debtor when, according to the rental agreement, Aifudi should be paying the rent to Golden Moon. Petitioners also argue that Aifudi repudiated its earlier statements to the Department that, notwithstanding the express terms of its land use agreement, there had never been any enforceable investment requirements.

According to petitioners, Aifudi also submitted inaccurate information regarding its acquisition of petrochemical inputs from SOEs. Petitioners state that Aifudi reported to the Department that it did not purchase petrochemical inputs from SOEs or that were produced by SOEs. Petitioners argue that the information obtained during verification demonstrated, however, that Aifudi did purchase petrochemical inputs from SOEs. Petitioners note, as an example, Aifudi's misrepresentation in its statement made during verification that none of its suppliers or producers of its petrochemicals were SOEs when in fact petitioners' allegation had already identified Sinopec as an SOE.

Petitioners conclude that in light of these misrepresentations and because of Aifudi's failure to cooperate in multiple instances, the Department should base its final determination on adverse facts available with respect to all but three subsidy programs under investigation (Policy Lending, Government Provision for Land for Less Than Adequate Remuneration, and Government Provision of Inputs for Less Than Adequate Remuneration) unless the record clearly documents that Aifudi could not have benefited from any particular subsidy program under investigation.

Aifudi denies petitioners' claim that it attempted to conceal its relationship with Zibo Hongfeng Plastic Woven Co., Ltd. (Hongfeng). Rather, Aifudi believed that the tolling arrangement with Hongfeng was relevant to the antidumping duty proceeding, but not to the countervailing duty proceeding. Aifudi claims that petitioners had knowledge of Hongfeng's role in Aifudi's LWS production process, and that petitioners could have requested that the Department investigate Hongfeng at any time during this proceeding. Yet, Aifudi states, petitioners never alleged that Hongfeng could be a source of subsidies for Aifudi until the submission of its case brief.

Aifudi states that Hongfeng acted as a toller for it; Aifudi purchased the materials to produce cloth, and Hongfeng wove the materials into strips, which Aifudi manufactured into sacks. Aifudi claims that there is no record evidence showing Aifudi has controlled Hongfeng or its activities and, according to Aifudi, the Department confirmed at verification that Hongfeng is not state-owned. Additionally, Aifudi claims, Hongfeng is not Aifudi's cross-owned supplier, as there is no cross-ownership between the two companies.

Aifudi denies petitioners' claim that it misrepresented facts concerning its payment of rent to Golden Moon. Aifudi states that there was some confusion among its employees regarding the completion of the questionnaire regarding the rental agreement between Aifudi and Golden Moon. However, Aifudi continues, the actual facts regarding this rental agreement were submitted to the Department before the commencement of the verification proceedings. Aifudi claims that these facts were verified by the Department during Aifudi's verification proceedings

and therefore, Aifudi concludes, petitioners' claim that Aifudi has "impeded the Department's investigation" is not supported by substantial record evidence.

According to Aifudi, petitioners' claim that it attempted to deceive the Department by feigning ignorance that Sinopec is an SOE is inaccurate. Aifudi claims that Sinopec is listed on the New York Stock Exchange and, that the name "Sinopec" is often used as a trade name by Sinopec's former subsidiaries. According to Aifudi, it purchased input material not from Sinopec, but from the "Beijing Yanshan Branch of China Oil Company" (BYBCOC). Aifudi claims that at verification, it explained to the Department that it is difficult to determine the ownership of a specific Chinese company and that it honestly told the Department that it could not reliably speak to the ownership of BYBCOC.

Arguing that it cooperated in full in responding to the Department's questionnaires and at verification, Aifudi states that it also provided the Department with data concerning all of its BOPP purchases. According to Aifudi, these data showed that the prices of BOPP obtained from an SOE were higher than the prices from three private BOPP suppliers. Aifudi argues that, when the SOE prices are compared to these actual price benchmarks, no subsidy exists. Thus, according to Aifudi, because documentation exists that shows the actual prices Aifudi paid for BOPP to both SOEs and to private companies, there is no justification for the Department to rely on facts available to determine whether Aifudi received BOPP for less than adequate remuneration.

Department Position:

We do not agree with petitioners that the application of facts available and the use of adverse inferences are warranted with respect to Aifudi and the non-used programs. The verification report demonstrates that Aifudi did not receive any payments from the GOC, or assistance in addition to the benefits arising from the GOC's provision of land-use rights for LTAR, policy lending, and the provision of petrochemicals for LTAR. See Aifudi Verification Report at 12-13. While we were concerned about the tolling company when we learned about it at verification, we did not find any evidence of cross-ownership. However, should a CVD order be issued and an administrative review requested, we will continue to examine Aifudi's relationship with this tolling company.

Based on the results of our verification of Aifudi, we do not find that the application of facts available, under section 776(a) of the Act, is warranted. Thus, contrary to petitioners' arguments, there is no basis for the Department to use adverse inferences, under section 776(b) of the Act, to assign countervailable subsidy rates to Aifudi for the programs which Aifudi reported, and the Department verified, it did not use.

Comment 7: Whether the Provision of Electricity for Less Than Adequate Remuneration is Countervailable

The GOC states that the Department correctly found the provision of electricity for less than adequate remuneration not countervailable because electricity in China is sold at rates set according to commercially classified usage and consistent with market principles of cost recovery and profit. Furthermore, the GOC notes that the Department found no price discrimination according to enterprise or industry. Instead, the GOC adds, the Department found that distinctions among users are consistent with the patterns for public utilities everywhere for large and small users, such as industries and residences.

The GOC states that the Department verified that Aifudi paid the same basic rate applicable to almost all other industrial users, with no discrimination regarding what they manufacture. In addition, the GOC notes that these rates reflect market behavior because they have been rising in conjunction with the cost of coal. The GOC concludes that even if there were a financial contribution from the GOC's provision of electricity, there would be no finding of specificity since it is being equally distributed to all industries and enterprises without distinction.

Petitioners did not submit any comments regarding this subsidy program.

Department Position:

As noted above in the "Analysis of Programs" section for the "Government Provision of Electricity," we have determined that the GOC's provision of electricity does not confer a countervailable subsidy to LWS producers because the provision of electricity is not limited to an enterprise or industry or group thereof in accordance with section 771(5A)(D) of the Act and because Aifudi paid for its electricity in accordance with the applicable published rate schedule and did not receive any discounts. However, as noted above, we will continue examining this program, if a countervailing duty order is issued and an administrative review is requested, in order to more fully analyze whether the different rates charged in different areas of Shandong province may be countervailable.

Comment 8: Whether the GOC Provision of Land Can Be Countervailed

The GOC claims the record evidence shows that there is a market for land in China and that the GOC sells land-use rights according to commercial criteria, even though the GOC owns all of the land. Therefore, according to the GOC, to investigate subsidy allegations in the PRC, the Department must recognize the PRC as a market economy.

In addition, according to the GOC, land-use rights are not a "financial contribution," thus they are not countervailable. The GOC claims that the countervailing duty statute specifies that "financial contribution" means: 1) the direct transfer of funds; 2) foregoing or not collecting revenue that is otherwise due; 3) providing goods or services, other than general infrastructure, or; 4) purchasing goods, since the sale of land-use rights does not fall into any of the four activities as defined by the statute, the GOC contends there is no financial contribution through the sale of land-use rights.

The GOC claims that in the instant case, the criteria of the first activity cannot be met because the GOC did not make any transfer, or potential transfer, of funds or liabilities. The criteria of the second activity cannot be met, according to the GOC, because the GOC obtained revenue from the sale of the land-use rights. The criteria of the third activity cannot be met, the GOC argues, because land, and the rights to use land, are neither a good nor a service, but are considered realty. Finally, the GOC claims, the fourth activity, the government making a purchase, cannot exist because the transaction in question is a sale made by the government.

The GOC concludes that the Department may not lawfully countervail the sale of land-use rights in the PRC because none of the statutory prerequisites (i.e., a financial contribution that is specific and provides a benefit) exist. According to the GOC, the financial contribution prerequisite cannot be met because the Department incorrectly assumed that the sale of land-use rights is the provision of a good or service. This is incorrect, the GOC continues, because land is neither a good nor a service and thus, cannot be a financial contribution.

According to the GOC, the Department erred when using the adequacy of remuneration test to determine whether the sale of land-use rights conveyed a benefit in the Preliminary Determination. The GOC explains that the adequacy of remuneration test is used for determining whether a benefit was conferred only where goods or services are being provided, or where goods are being purchased by a government. Because land is considered to be realty, and not a good or a service, the GOC contends that the Department may not apply the adequacy of remuneration test to land. The GOC cites to the Uniform Commercial Code to argue that a good is "moveable" and "attached to realty," and relies on Black's Law Dictionary definition of a good as "{t}angible or moveable personal property, other than money," in contrasting a good from realty, which the GOC considers land and land-use rights to be.

Because land is neither a good nor a service, the GOC argues that the adequacy of remuneration test cannot be used to determine whether the sale of land-use rights conveyed a benefit. Therefore, the GOC further argues, the relevant question is whether Golden Moon paid less for its land-use rights than it would have in the absence of the government program. According to the GOC, Golden Moon paid more for its land-use rights in the industrial park in question than it would have paid had it purchased land rights in the surrounding geographic area. Thus, according to the GOC, there was no benefit provided to Golden Moon within the meaning of the CVD statute.

Aifudi also cites to the statutory definition of financial contribution to argue that the Department's preliminary determination is flawed as a matter of law because it does not identify the nature of the financial contribution that is bestowed as a result of the provision of land. Aifudi argues that while the Preliminary Determination concludes that "the sale of these land-use rights constitutes a financial contribution from a government authority in the form of providing goods or services pursuant to section 771(5)(D)(iii) of the Act," the Department does not support its legal conclusion that land rights constitute a "good or service." Aifudi states that legal authorities are unanimous in equating the term "goods" with personal property or chattel, and not land, which, according to Aifudi, is considered "realty." Aifudi argues that the Department's conclusion is contrary to the widely understood definition of the term "goods," and concludes

that, because the Department has wrongly construed the term "goods," it has also wrongly concluded that the provision of land constituted a financial contribution.

Petitioners argue that the Department should continue its preliminary finding that the provision of land-use rights to producers of subject merchandise confers countervailable subsidies. Petitioners rebut the GOC's and Aifudi's claim that land is not a "good or service" based on numerous precedents set by the Department. Petitioners add that both the GOC and Aifudi ignore the Department's past practice of finding land development rights to constitute a "good or service" in prior subsidy investigations. See, e.g., Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR at 37122, 37125 (June 23, 2003) (DRAMs from Korea); see also Final Negative Countervailing Duty Determination; Live Cattle from Canada, 64 FR at 57040, 57045 (October 22, 1999) (Live Cattle from Canada); see also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 71360, 71369 (December 17, 2007).

Department Position:

The Department has correctly identified the nature of the financial contribution for the provision of land-use rights as a "good or service," which is supported by the Department's regulations and past practice. The Preamble explains that the Department specifically contemplated land-use rights as "goods or services" as part of our analysis under 19 CFR 351.511(a)(2)(iii), which looks to the government's price-setting philosophy, costs or possible price discrimination. Citing to our past practice, the Department noted that "{i}n our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely. See, e.g. Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 3954 (July 13, 1992) and Venezuelan Wire Rod." Preamble, 63 FR at 65378. Furthermore, in the discussion of "general infrastructure," the Preamble states that:

> Any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is potentially countervailable. The provision of industrial parks and ports, special purpose roads, and railroad spur lines, to name some examples (some of which we have encountered in our cases), that do not benefit society as a whole, does not constitute general infrastructure and will be found countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit, See, e.g., Korean Steel.

Id. The statutory definition of a financial contribution is written broadly in recognition that governments have a variety of mechanisms at their disposal to confer a financial advantage on specific domestic enterprises or industries. The SAA confirms that the sweep of the statute is intended to be broad to ensure that such mechanisms are subject to the countervailing duty law:

> Section 771(5)(D) lists the four broad generic categories of government practice that constitute a "financial contribution." The examples of particular types of practices falling under each category are not intended to be exhaustive. The Administration believes that these generic categories are sufficiently broad so as to encompass the types of subsidy programs generally countervailed by Commerce in the past, although

> determinations with respect to particular programs will have to be made on a case-by-case basis.

See, SAA, at 927. Land leases were countervailed by the Department in the past, a fact well known to Congress when it enacted the current countervailing duty law. The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." Id.; see, also, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)("remedial legislation should be construed broadly to effectuate its purposes."). Courts have frequently explained that "a statute should be 'construed' not technically and restrictively, but flexibly to effectuate its remedial purpose." See SEC v. Zandford, 535 U.S. 813 (2002) (citation omitted).

The Department's past practice of examining land and land-use rights such as land leases, shows that we have treated them as "goods or services." In Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany, 62 FR at 54990, 54994 (October 22, 1997), we examined solely government-owned land-leases under our adequacy of remuneration test and assessed under 19 CFR 351.511(a)(2)(iii) whether the government price was consistent with market principles:

> With respect to the leasing of land, some of the options may be to examine whether the government has covered its costs, whether it has earned a reasonable rate of return in setting its rates and whether it applied market principles in determining its prices. In the instant case, we have found no alternative market reference prices to use in determining whether the government has leased the land for less than adequate remuneration. As such, we have examined whether the government's price was determined according to the same market factors that a private lessor would use in determining whether to lease land to a company."

In that case, we found that the respondent paid a standard rate charged by the Government of Hamburg to all enterprises leasing land similar to the respondents' land and that the prices were set in reference to market conditions. Thus, it was found to be not countervailable. See also Final Affirmative Countervailing Duty Determination: Certain Steel Wire Rod From Italy, 63 FR at 40474, 40481 (July 29, 1998) (involving the Department's examination of government leasing of land).

Contrary to the GOC's assertion that a good can only include things attached to realty but not land-use rights as realty itself, the Department examined grazing rights on public lands and found them to be a financial contribution as described in section 771(5)(D)(iii) of the Act as the provision of a "good or service." Live Cattle from Canada, 64 FR at 57045.

Accordingly, the Department has properly determined that land-use rights provide a financial contribution as "goods or services" within the meaning of the Department's statute and regulations. Moreover, the Department has properly used the adequacy of remuneration test to determine whether the sale of land-use rights conveyed a benefit.

Comment 9: Whether the GOC's Sale of Land-Use Rights is Specific

The GOC argues that the Department incorrectly found the sale of land-use rights to be regionally specific in its Preliminary Determination. The GOC continues that there is no difference between the Department's rationale for finding the sale of electricity to be not countervailable and the facts regarding land-use rights. The GOC claims that for electricity, the Department found that pricing was not specific to any enterprise or industry and that the same is true with regard to the sale of land-use rights.

Citing the Department's Preliminary Determination that the sale of land-use rights was regionally specific because the respondents received land on preferential terms by virtue of their location in industrial parks, the GOC claims that the record does not support this finding for the following reasons: 1) there is no record evidence that local authorities were engaged in anything other than normal zoning functions in designating the area as an industrial park and the record shows there is no discrimination as to an industry or enterprise within the industrial park's zoning distinctions, and 2) the record evidence shows that companies located within the industrial park did not receive any preferential treatment.

The GOC states that the Department did not address the de facto specificity factors in its Preliminary Determination. According to the GOC, the only limitation on the number of companies or industries that can purchase land-use rights from the local authority is the amount of available land. The GOC explains that Aifudi's affiliate, Golden Moon, is not a dominant user of the industrial park and, according to the GOC, local land-use authorities have not exercised discretion to favor Golden Moon over other companies or industries.

According to the GOC, the record shows that there are at least 21 different enterprises operating in the industrial park in question, of which 17 are paying the same rate without distinction by industry classification. The GOC states further that Golden Moon paid a higher rate for land use than comparable industrial users located outside the industrial park. Thus, the GOC argues, there is no basis for finding Golden Moon's acquisition of land-use rights a benefit specific to an enterprise or industry.

Furthermore, the GOC claims that the specificity prerequisite cannot be met because land-use rights in the PRC are sold without discrimination by industry or enterprise. It cannot be de jure specific, the GOC contends because the PRC does not expressly limit land-use rights to any particular industry. The GOC further states that the sale of land-use rights is not de facto specific because: 1) the only limitation on the number of companies or industries that can purchase land-use rights is the amount of available land; 2) Aifudi's affiliate, Golden Moon, is not a dominant user of the industrial park; 3) Golden Moon has not received a disproportionately large amount of land in the industrial park; and 4) the local land-use authorities have not exercised discretion in any way to favor Golden Moon over other companies or industries.

Aifudi states that the countervailing duty statute provides that a subsidy must be specific to certain enterprises and that government assistance, which is both generally available and widely and evenly distributed throughout the jurisdiction of the subsidizing authority, cannot be a subsidy. Aifudi argues that the Department's preliminary determination that the provision of

land was specific to a particular enterprise or industry is contrary to the facts. Aifudi continues by claiming that there is no evidence that only select enterprises or industries could locate in the same industrial park and that companies operating in various industries owned property in this industrial park. Citing the Department's verification report concerning the Chinese provincial and local governments, Aifudi states that the Department learned that industries in the industrial park include mechanical companies, trading companies, steel companies, and alcohol producers, et. al. Aifudi further states that local Chinese officials confirmed that neither Aifudi nor its affiliate Golden Moon received any special benefits or privileges and that all companies within the industrial park had the same price stipulated in their land agreements, regardless of their industry. Aifudi argues that the availability of land in the industrial park was never limited to any specific industry.

Aifudi also claims that under the Department's specificity test as applied in its Preliminary Determination, specificity is assumed because a finite number of companies purchased land-use rights in the industrial park. Aifudi argues that the Department should have analyzed the eligibility requirements for obtaining land-use rights and that the issue should have been whether the requirements for entry into the industrial park were tailored to a particular enterprise or industry. According to Aifudi, the record demonstrates that the eligibility criteria were neutral and objective and that no particular enterprise or industry was a predominant user of the subsidy. Thus, Aifudi concludes, the Department should reach a final determination that access to land-use rights in the industrial park is not countervailable because it is not specific to any industry or enterprise.

Petitioners state the record is clear that Aifudi's land-use rights were located in a specially designated geographic area, rendering them specific under countervailing duty law. Petitioners state that the land-use rights provided to Aifuidi are available only in a select area (i.e., a special industrial zone), and argue that they are specific in accordance with section 771(5A)(D)(iv) of the Act because they are "limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy . . . ."

According to petitioners, Aifudi is located in the Huantai New Century Industry Park, which comprises only a portion of the county's jurisdiction, and which is administered by the Huantai Land Resource Bureau. Petitioners argue that the prices for land in the industrial park are not available throughout Huantai Conty, and that companies in this portion of Huantai County are treated differently than other companies in the county. Petitioners add that Aifudi's land-use rights are also specific because Huantai New Century Industry Park contains only manufacturing enterprises and the actual recipients are limited in number. Petitioners support their specificity argument by stating that only twenty companies, focused on five industries, use the Huantai New Century Industrial Park.

Arguing that the manner in which the authority provides the subsidy indicates that an enterprise or industry is favored over others, petitioners state that Aifudi did not obtain its land-use rights through an open process or on the same terms any company would receive. Petitioners list examples on the record of the discretion exercised in connection with Aifudi's land-use rights and point to what they argue is a lack of objectivity used in the selection criteria, including: company-specific negotiations that are different from published guidelines; a number of

industries favored by the local government; a failure to document the basis for land evaluation costs and how the price was established and/or approved; a failure to require payment of certain fees or a set payment schedule; the selling of land prior to the land's conversion to industrial use; the deviation from established land prices set by the GOC; and the setting of prices in increments that do not appear to be based on market principles. Petitioners conclude by stating that verification demonstrated that Aifudi did not receive its land-use rights on the same terms as any other company.

Department Position:

We continue to find the provision of land-use rights to be specific because the provision of land-use rights in an industrial park within the county's jurisdiction is limited to an enterprise or industry or group thereof located within a designated geographical region pursuant to section 771(5A)(D)(iv) of the Act. Contrary to the GOC's claim that the specificity criteria cannot be met because land-use rights in the PRC are sold without discrimination by industry or enterprise, we find that Aifudi is situated in an industrial park that was created for the purpose of providing industrial land-use rights to industries within the jurisdiction of the government authority that provided the land-use rights in the park and set the terms of those rights, i.e., the New Century Industrial Park which is within the authority of Huantai County and thus, Aifudi received its land-use rights by virtue of its location in this industrial park.

As noted above in the "Analysis of Programs" section for the "Government Provision of Land-Use Rights for Less than Adequate Remuneration," we confirmed at verification that the county identified a specific, contiguous area of land within its jurisdiction, designated that land as an industrial park, and controlled the granting of land-use rights within the industrial park. Specifically, officials from the Huantai County Land Bureau explained that the county "gives final approval to companies for land-use rights. The county government at all levels and all agencies must approve land-use rights." See Provincial and Local Government Verification Report at 8. We also noted at verification that Huantai County's approval had to be cleared at the provincial level and that "the conversion of land from agricultural to industrial use must be approved by the provincial government." Id. at 8.

With respect to the GOC's argument that we cannot countervail land because there is no de facto specificity in the park and because we did not countervail electricity, we disagree. As noted above in the "Analysis of Programs" section for the "Government Provision of Electricity," we have determined the GOC's provision of electricity to be neither de jure nor de facto specific. Because the provision of land-use rights is regionally specific under section 771(5A)(D)(iv) of the Act, there is no requirement in our law for evaluating specificity on a de facto basis, i.e., pursuant to the criteria set forth under section 771(5A)(D)(iii). As such, the GOC's arguments about the number of users and the types of industries in the industrial park are not relevant to our specificity analysis. Furthermore, as noted above in the section "Government Provision of Electricity," we did not evaluate whether the provision of electricity may be regionally specific because the Department had not requested sufficient information to evaluate the program on that basis. We intend to examine this aspect of the provision of electricity if an order is issued and an administrative review is requested.

Comment 10: Whether the Department Should Select Either a First-Tier or Third-Tier Benchmark for the Provision of Land-Use Rights for Less Than Adequate Remuneration

The GOC argues that the Department should use a lawful first-tier benchmark based on prices charged by nearby land authorities in China. According to the GOC, local government authorities are competing with one another to attract industry, creating competitive market conditions for the sale of land-use rights. The GOC states that the Department has verified record evidence confirming that the pricing for land in China conforms to basic principles of land-use economics where location matters and prices decline roughly according to the distance from an urban center. The GOC specifically notes that the price Golden Moon paid for its land-use rights in New Century Industrial Park is higher than for land-use rights in a nearby industrial park in Boxing County, which is further from an urban center. Therefore, the GOC concludes that the GOC's sale of land-use rights to Golden Moon constituted a market transaction because Golden Moon could have located elsewhere for less money by a competing local industrial park authority.

Alternatively, the GOC argues that the Department could employ a third-tier analysis to demonstrate whether the price for land is consistent with market principles. The GOC states that the Department's Preamble describes such an analysis as including an assessment of "such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." See Preamble 63 FR at 65378. The GOC notes that the Department used this analysis in the Preliminary Determination by performing a price discrimination test to select a third-tier benchmark that was used for its preliminary finding that electricity is not being provided for less than adequate remuneration. In making this determination, the Department cited to the Preamble, 63 FR at 65378 and stated that; "where the government is the sole provider of a good or service, especially in the case of electricity, land or water, the Department may assess whether the government price was set in accordance with market principles, which may include an analysis of whether there is price discrimination among the users of the good or service that is provided and that '(w)e would only rely on a price discrimination analysis if the government good or service is provided to more than a specific enterprise or industry, or group thereof."

The GOC argues that this price discrimination test is especially relevant for land since the government is the sole supplier of land-use rights. Furthermore, the GOC states that these land-use rights are being provided to more than a specific enterprise, industry, or group thereof. Based on this test, the GOC maintains that the respondent has not benefited from any price discrimination in acquiring its land-use rights.

The GOC further notes that the other tests used under the Department's third-tier benchmark also show that Golden Moon paid adequate remuneration for its land-use rights. Citing to the Department's practice in other cases, the GOC states that the Department also considers whether the government has covered its costs and earned a reasonable rate of return in setting rates, to determine whether it applied market principles in determining its prices. See, e.g., Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany, 62 FR at 54990, 54994 (October 22, 1997); see also Final Affirmative Countervailing Duty

Determination: Certain Hot-Rolled Carbon Steel from South Africa, 66 FR 50412 (October 3, 2001) and accompanying Issues and Decision Memorandum at section III.B. The GOC argues that where the government relieves itself of costs and realizes profit, either directly through rent or indirectly through revenue by putting the land to productive use, it satisfies these additional tests under the third-tier benchmark. According to the GOC, domination of the state through ownership of all land does not alter the conclusion that this benchmark is available and must be preferred to an external benchmark.

Stating that that the local government charged Golden Moon enough to cover its own costs and to turn a profit for managing and selling land-use rights, the GOC argues that the transaction with Golden Moon was according to commercial criteria and satisfies the statute's requirements for adequate remuneration under the third-tier benchmark. According to the GOC, Golden Moon's acquisition of land-use rights was the only instance verified by the Department but exemplifies the overall land use situation in China. The GOC states that these rights are being sold at market prices within the constraints of an economy where the government owns all the land, but where local governments are competing to attract industry and selling land consistent with the laws of land-use economics.

According to the GOC, the industrial park in question was not Golden Moon's only option for obtaining land-use rights, and that record evidence shows Golden Moon actually paid more for its land rights in the industrial park than it would have paid for land-use rights in the surrounding geographic areas. Because Golden Mood did not pay less for its land-use rights than it would have paid in the absence of the industrial park, the GOC continues, its purchase of land-use rights did not provide a "benefit" within the meaning of the statute.

Furthermore, the GOC argues that the Department may not use an out-of-country loan interest rate as the discount rate for allocating over time the alleged benefits from the sale of land-use rights, for the same reasons discussed in the GOC's policy loan arguments to address the Department's use of an out-of-country loan benchmark in its benefit calculation for policy loans. According to the GOC, the Department should have used the rates that Aifudi actually paid on its short-term borrowings as its long-term discount rate to allocate benefits over time for the sale of land-use rights. See, e.g., Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, 73 FR 7708 (February 11, 2008); see also Final Countervailing Duty Determination: Structural Steel Beams from the Republic of Korea, 65 FR 41051 (July 3, 2000).

Aifudi reiterates its claim that the countervailing duty statute requires that a determination of less than adequate remuneration be made in relation to prevailing market conditions for the good being purchased, or the good or service being provided, in the country subject to investigation or review. Therefore, Aifudi claims, the Department should have relied upon a benchmark in China to determine what constitutes adequate remuneration.

According to Aifudi, at the verification of the local and provincial governments, the Department had the opportunity to examine prices paid by other companies operating in other industries for land within the industrial park, and also, prices for land outside the industrial zone. Aifudi

argues that the prices of the neighboring parcels should be relied upon as benchmarks, rather than published land prices in another country.

In antidumping cases, Aifudi argues that the Department generally concludes that India, Sri Lanka, Egypt, Indonesia, and the Philippines each have a per capita gross national income comparable to China. Aifudi claims that Thailand is not generally on the list of countries that the Department considers comparable to China. Additionally, according to Aifudi, in virtually all antidumping investigations regarding China, the Department has used India as a surrogate country. Therefore, Aifudi concludes, should the Department continue to use its current methodology for purposes of the final determination, the Department should then rely upon sales prices in India, rather than Thailand, as a proxy for prices in China.

Petitioners argue that pervasive GOC involvement in the land-use rights market creates distortions that are based on the priorities of local development rather than profit maximization. As a result, the Department was unable to obtain a reliable measure of the market value for land-use rights for commercial land in China. The regulations require the Department to look outside the country of investigation when there is no internal market benchmark, as in this investigation. Petitioners argue that Taiwan provides the most appropriate benchmark for commercial land-use rights for industrial land. In the alternative, petitioners believe that Thailand provides the second most appropriate benchmark. Petitioners further contend that the Department undertook the analysis of substantial information which demonstrated that Thailand could serve as the source of a reasonable benchmark for land-use rights.

Department Position:

As noted above in the "Analysis of Programs" section for the "Government Provision of Land-Use Rights for Less than Adequate Remuneration," and explained in detail in the Preliminary Determination, we continue to find that a first-tier benchmark is not appropriate because Chinese land prices are distorted by the significant government role in the market that prohibits private land ownership in the PRC and results in all land being owned by some level of government. Preliminary Determination, 72 FR at 67907. At verification, we confirmed that all urban land (industrial and commercial land) is state-owned, and all rural land is collectively owned (agricultural land, residential land, and land used by township enterprises). See Central Government Verification Report at 23.

Noting that the government, either at the national or local level, is the ultimate owner of all land in China, in the Preliminary Determination, we examined whether the PRC government exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets. In summary, we found that the Chinese government authorities control, albeit on a de-centralized basis, the supply and allocation of land that can be used by non-state-owned enterprises for non-agricultural purposes. Moreover, due to the nature of the restrictions, the government controls extend not only to the primary market, but to the secondary market as well. This control significantly distorts the price paid for the granted land-use rights in both the primary and secondary markets. Preliminary Determination, 72 FR at 67907. Therefore, we continue to find no usable first tier in-country benchmarks to measure the benefit

from the transfer of land-use rights during the POI because Chinese land prices are distorted by the significant government role in the market.

Although the Department was provided some documentation at verification showing the prices charged for land-use rights in an industrial park in another county, these two contracts were not contemporaneous with the original contracts negotiated for Aifudi's land-use rights. Id. at 11. Furthermore, these two self-selected contracts do not demonstrate how the prices were determined in this other industrial park and therefore cannot be used to evaluate whether the price was set in accordance with market principles. Finally, we do not find two contracts from one industrial park to be a meaningful representation of the land-use rights' prices in Huantai county, where Aifudi and the industrial park in question are located. Similarly, our examination of two other contracts for industrial land located in Huantai county that is outside of the industrial park, did not provide us any information as to how these prices were determined.

In the instant case, we continue to determine that due to the overwhelming presence of government involvement in the land-use rights market, as well as the widespread and documented deviation from the authorized methods of pricing and allocating land, the purchase of land-use rights in China is not conducted in accordance with market principles under a third-tier analysis. As noted above in the "Analysis of Programs" section for the "Government Provision of Land-Use Rights for Less than Adequate Remuneration," and explained in detail in the Preliminary Determination, we find that there is a wide divergence between the de jure reforms of the market for land-use rights and the de facto implementation of such reforms. Therefore, we continue to determine that property rights remain poorly defined and weakly enforced. Preliminary Determination, 72 FR at 67908-67909. In light of all the evidence on the record, we continue to find that land-use rights in China are not priced in accordance with market principles.

We also note that our verification findings support this determination because the local jurisdiction failed to follow the appraisal process set forth in the national law and regulations. Specifically, we found that no land appraisal report was done for the land-use rights that were purchased by Aifudi in the industrial park, nor was the GOC able to provide any documentation that could establish how the county set and approved the price for Aifuidi's land-use rights. See Provincial and Local Government Verification Report at 10.

Finally, with regard to the GOC's argument that the Department may not use an out-of-country loan interest rate as the discount rate for allocating any benefit over time and that we should have used the rates that Aifudi actually paid on its short-term borrowings as the long-term discount rate to allocate the benefit over time from the sale of land-use rights, we recognize that the Department's regulations express a preference for discount rates based on the actual cost of long-term fixed-rate loans taken out by the firm, or an average of such loans in the country. However, the selection of a discount rate for purposes of allocating subsidy benefits over time does not in any meaningful way differ from the selection of a commercial benchmark interest rate to calculate the benefit from government-provided long-term loans. In the case of benchmarking, from the lender's standpoint, the interest rate establishes an economic equivalence between: (a) the loan (principal) disbursed today; and (b) the *future* loan repayments (principal and interest) the lender receives from the borrower. In the case of discounting, from the subsidy recipient's

standpoint, the discount rate establishes an economic equivalence between: (a) the grant equivalent received today as one lump sum; and (b) a *future* stream of smaller payments received over time. Since the economic equivalence established in these two cases (between "money now and money later") is fundamentally the same, the nature of the interest rates also must be fundamentally the same, which means that if interest rates are not a meaningful basis for establishing an economic equivalence in the first case, they are also not a meaningful basis for establishing an economic equivalence in the second case. In this case, because we have found that the role of the GOC in the PRC banking sector has distorted all PRC-lending rates, we rejected all internal PRC interest rates as benchmarks. We determine that it is appropriate to continue to use a regression-based long-term lending benchmark as the discount rate for allocating the benefits over time under 19 CFR 351.524(d)(3)(i)(C).

Comment 11: Whether the Department Can Lawfully Apply an External Benchmark for the Provision of Land-Use Rights for Less than Adequate Remuneration

The GOC argues that the Department's selection of out-of-country benchmarks was unlawful because it is impossible to compare prices for land-use rights in different geographic locations. According to the GOC, the value of land in China, as elsewhere, is based on derived demand because land has no intrinsic value; its value is determined by its best use and location. Accordingly, the GOC argues that the Department's selection of land values near Bangkok, Thailand as benchmarks is irrational as an economic proposition and contrary to law because it ignores available domestic benchmarks in favor of out-of-country benchmarks effectively forbidden by the WTO and U.S. law.

According to the GOC, the statute requires that a determination of less than adequate remuneration be made in relation to prevailing market conditions in the country, which is subject to investigation in accordance with section 771(5)(E)(iv) of the Act. The GOC argues that the Department's contention that there is no market in China does not absolve the Department from the statutory requirement to seek domestic benchmarks when they are available. According to the GOC, domestic benchmarks should be used because they are available in China. In addition, the GOC argues that a traditional market is not required for the valuation of land because land is not bought and sold as a good; rather, land requires a productive and valued use.

The GOC argues that even if no domestic benchmarks are available, an external benchmark for land would not be permissible under the statute because the value of land in another country can be determined only on the basis of the derived demand in that country. The GOC notes that the value of land in Thailand is unique to the land's productive use in Thailand such as its proximity to suppliers; transportation costs of inputs and for workers and customers within Thailand; availability and costs of utility services; and application of local regulations and taxes. As such, the GOC argues, none of these market conditions in Thailand could be the prevailing market conditions in China.

According to the GOC, the Department's justification to use an out-of-country benchmark was rejected by a NAFTA panel in Lumber IV at 27-35 (August 13, 2003). The NAFTA panel rejected the use of U.S. prices under the second tier "world market price" benchmark, in finding that "it is not possible to conclude that there is a 'world market price' for timber," given the

innumerable variables influencing stumpage values across countries. Id. at 34. The GOC further notes that the NAFTA panel ruled that it would be impossible to adjust stumpage prices to make them comparable to Canadian stumpage prices in rejecting the use of U.S. prices under any benchmark as contrary to law. Id. The GOC adds that the NAFTA panel held that the use of a cross-border benchmark failed to reflect the conditions prevailing in Canada, due to the Department's inability to adjust for any comparative advantage in lumber production enjoyed by Canadian producers. Id. at 35.

The resultant remand determination by the Department, the GOC states, employed a benchmark derived from stumpage prices using Canadian log sales that was upheld by the NAFTA panel. The GOC argues that once the Department issues a remand determination approved by the court (or NAFTA panel) that "remand determination, as a matter of law, replaces Commerce's original, final determination . . . ." See Decca Hospitality Furnishings, LLC v. United States, 42 F.Supp. 2d, 1249, 1256 n.11 (CIT 2006). Consequently, the GOC notes that the only support the Department has offered for using cross-border benchmarks has been overturned on appeal and cannot serve as the Department's administrative practice.

With the exception of the reversed determination in Lumber IV, the GOC argues that the Department has found cross-border benchmarks impermissible. The GOC notes other determinations made in softwood lumber from Canada proceedings where the Department rejected cross-border benchmarks because they failed "to account for differences in comparative advantage between countries," and because of "factors which could adversely affect the comparability of adjacent U.S. and Canadian timber (e.g., exchange rate fluctuations) merely underscore the appropriateness of remaining within the relevant jurisdictions." See Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 48 FR 24, 182 (May 31, 1983); see also Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 FR 22570 (May 28, 1992).

Stating that the economic law of comparative advantage cannot be distilled into a mathematical formula, which underscores the logic of the statutory requirement that benchmarks be constructed from prices inside the country under investigation, the GOC states that this applies particularly to land because location is critical in defining the land's productive use. As such, the market, geographical, political, and socio-economic conditions affecting land use in Thailand are not comparable to the conditions in China.

In arguing the obligation under U.S. law to use in-country benchmarks, the GOC notes that this is consistent with Article 14(d) of the SCM Agreement, which states that the adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." The GOC adds that the WTO Appellate Body, in interpreting this language, has concluded that adjusting a benchmark composed of prices in one country to reflect the conditions prevailing in another country would be difficult because "there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country…" See WTO Appellate Body ruling in United States: Softwood Lumber IV (WT/DS257/AB/R) (January 19, 2004).

According to the GOC, China's Protocol of Accession to the WTO reinforces the preference for using domestic benchmarks and restricts any deviation from the SCM requirements for domestic benchmarks to circumstances in which there are "special difficulties" in the application of that methodology. The GOC argues that those circumstances do not exist in this case where two of the three-tier hierarchy for benchmarks that employ domestic data are available and have been used by the Department in other cases. In the face of this, the GOC notes that the Department still found an external benchmark outside of China in the recent Post-Preliminary Analysis for the Provision of Land for Less Than Adequate Remuneration in the current countervailing duty investigation of light-walled rectangular pipe and tube from the PRC. In this case, however, the GOC states that the Department acknowledged that there is no world price for land and therefore, no second-tier benchmark is possible and instead, used Bangkok land prices as a third-tier benchmark.

The GOC disagrees with the Department's preliminary finding that it can turn to "market-based prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to the PRC." According to the GOC, the use of the language "comparable economic development" falls under the methodology of NME dumping and is not relevant to subsidy investigations. Using such benchmarks, the GOC notes, is not within the Department's practice for determining whether the government sale of a good or service conforms to market principles, which is an internal test.

Aifudi argues that, even if the sale of land constitutes the provision of a good under U.S. trade law and even if the sale were deemed to be specific, the statute requires that a determination of less than adequate remuneration be made in relation to prevailing market conditions for the good being purchased, or the good or service being provided, in the country subject to investigation or review. Aifudi states the value of land is determined principally by its location, and that its value is tied to its geographic location. According to Aifudi, to determine market value, real estate appraisers generally use information from recent sales with similar property characteristics in the same market area as the subject property. Aifudi claims that because land is unique and its value is tied to its location, the Department erred when it relied on land prices outside of China for its benchmark for land. Additionally, Aifudi argues that, unlike in an antidumping case, the Department lacks the mandate to resort to prices in a surrogate country.

Aifudi states that the price of land in Thailand is influenced by a variety of economic factors, such as access to roads and other infrastructure, the availability of public transportation for workers, and the availability of utility services, inter alia. Aifudi also argues that the Department has not analyzed these factors to determine if there is comparability between its land and the benchmark property and, that no adjustments were made to account for the differences in market conditions affecting the land values between Thailand and China.

Department's Position:

The Department continues to find that the benchmark land rates used in the Preliminary Determination are the most appropriate benchmark for land-use rights in the instant investigation. As a threshold matter, contrary to petitioners' suggestion to use Taiwan land prices as a benchmark, Taiwan cannot serve as an appropriate benchmark for land values because Taiwan is not economically similar to China. In the case of India, the land prices placed on the record by Aifudi represent values in a variety of different regions and areas of India, but Aifudi does not explain why or identify which, if any, of these land plots is more comparable to the particular region of China than the land benchmark prices used from Thailand. Furthermore, the Department found in the Preliminary Determination that producers consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China; however, there is no evidence that India competes directly with China in attracting producers. Preliminary Determination, 72 FR at 67909. Therefore, the Department will not use the land benchmark prices from India because there is no record evidence that land prices from India are more comparable to land values in China. The Department, therefore, considers the price information for land in Thailand to be the best and most appropriate information on the record of this investigation.

The Department notes that the use of India as a surrogate country for China in antidumping cases does not mean that the Department considers India to be more economically comparable to China. The selection of a surrogate country requires a different additional step and is not the same as the development of benchmark rates for measuring subsidies. In selecting a surrogate country, the Department looks at the list of economically comparable countries and then determines which of them, if any, is a significant producer of products comparable to the subject merchandise. The Department considers all countries on the list to be equally comparable in terms of economic development. As noted in the Preliminary Determination, the Department considers Thailand economically similar to China in terms of gross national income (GNI) per capita and does not consider India to be more economically comparable to China. Contrary to Aifudi's claims, in antidumping cases, the list of potential surrogate countries, those that are considered economically comparable to China, does contain Thailand. As noted in the Preliminary Determination, China and Thailand have similar per capita GNI income at $2,010 and $2,990, respectively. Preliminary Determination, 72 FR at 67909.

Contrary to the GOC's claims, the Department has followed its established practice of using out-of-country benchmarks where actual transaction prices are significantly distorted because of government involvement in the market. For example, the Department found in Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia, 72 FR 60642 (October 25, 2007) and the accompanying Issues and Decision Memorandum at "GOI's Provision of Standing Timber for Less Than Adequate Remuneration" and Comments 11 and 12, that Malaysian export prices provided the most appropriate basis for determining an external benchmark price to use in assessing stumpage rates in Indonesia. We found that these prices were consistent with market principles within the meaning of 19 CFR 351.511(a)(2)(iii) and were the most appropriate basis for deriving a market-based stumpage benchmark for determining whether the government of Indonesia provided stumpage for less than adequate remuneration. See, e.g., CFS from the PRC, and accompanying Issues and Decision

Memorandum, at Comment 10 (using an out of country benchmark for the policy lending program); and CWP from the PRC, at "Benchmarks for Short-Term RMB Denominated Loans" (using an out-of-country benchmark for GOC policy lending).

Furthermore, the Department also used an out-of-country benchmark in Softwood Lumber from Canada. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada, 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum, at "Provincial Stumpage Programs"; and Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada, 67 FR 36070, 36076 (May 22, 2002). The GOC argues that, because the Department was forced to revise its benchmark in a NAFTA remand, the use of an out-of-country benchmark in this case may not serve as an example of the Department's practice. It is important to note that in the remand, the Department continued to find that the out-of-country benchmark was the proper choice. Moreover, we note that NAFTA panel decisions are not precedential. See NAFTA Article 1904.9. Specifically, the Department explained that:

> We disagree with the Panel's conclusion that there was not substantial evidence to support the Department's determination that market conditions in Canada and the United States are comparable, and that the adjustments the Department made adequately account for differences. We continue to believe that the resulting benchmarks constitute world market prices for timber that are commercially available to purchasers in Canada, within the meaning of 19 CFR 351.511(a)(2)(ii).

Remand Redetermination, Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (Jan. 12, 2003) (available at www.ia.ita.doc.gov). The Department specifically indicated that it was not altering its practice in this respect.

As noted above in the "Analysis of Programs" section for the "Government Provision of Land-Use Rights for Less than Adequate remuneration," and explained in detail in the Preliminary Determination, the Department analyzed a number of variables in selecting Thailand as our benchmark for land values which includes the economic similarity of these two countries in terms of GNI per capita; the perception that producers consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China; and have considered certain economic and demographic factors, in making our finding that Thailand is comparable to China in terms of its prevailing market conditions. Preliminary Determination, 72 at 67909.

Comment 12: Whether the Provision of Petrochemical Inputs for Less Than Adequate Remuneration by SOEs is Countervailable

The GOC argues that GOC ownership of the input suppliers has no consequence for the price of production inputs used to make subject merchandise. According to the GOC, the Department did not perform the analysis required by the Department's practice to determine whether the sale of

petrochemical inputs by SOEs involved a financial contribution. The GOC states that the record evidence regarding the SOE that produced the PE sold to Aifudi, and the different SOE that sold BOPP, shows that neither supplier qualifies as a governmental entity for purposes of the financial contribution test.

The GOC states that the statute specifies that a financial contribution exists when an authority provides a financial contribution, or entrusts or directs a private entity to make a financial contribution, pursuant to section 771(5)(B). The GOC notes that the statute defines the term "authority" under section 771(5)(B) to mean "a government of a country or any public entity within the territory of the country." Contrary to the Department's conclusion in the instant case, the GOC argues that not every government-owned company is an "authority." The GOC notes that the Department's regulations state that its current practice is to treat "most" government-owned corporations as the government itself, thereby acknowledging that some government-owned corporations are not the government, and require a factual inquiry which was not done in the instant case.

The GOC argues that the Department's past practice of assessing whether an entity should be considered the government was articulated in Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003) (DRAMs from Korea), which noted that the following factors are relevant: 1) government ownership; 2) the government's presence on the entity's board of directors; 3) the government's control over the entity's activities; 4) the entity's pursuit of governmental policies or interests; and, 5) whether the entity is created by statute. See DRAMs from Korea and accompanying Issues and Decision Memorandum at 16-17. The GOC states that the degree of government ownership functions as only a threshold requirement but is of little relevance thereafter, because the Department has concluded in the past that even entities with 100 percent government ownership may not always be considered governmental authorities. Id. at 61. The GOC argues that the key is whether the entity exercises governmental authority. In the Preliminary Determination, the GOC notes that the Department did not apply the five factor test in DRAMs from Korea and relied only on the fact that the producers in question were SOEs. The GOC argues that respondents did provide sufficient information to permit the examination of each of these factors which demonstrates that these companies do not exercise any element of governmental authority. According to the GOC, there is significant private ownership in two of the companies in question, noting that one is a joint venture with a publicly-traded Hong Kong company, and the other is listed on stock exchanges and has private investors. Furthermore, the GOC argues that there is no record evidence of government presence on the Boards of Directors of either of these two companies. Because one of the companies is listed on domestic and foreign stock exchanges, the GOC states that the company is required to comply with extensive corporate governance requirements regarding the composition, activities and duties of its Board of Directors to protect the interests of minority shareholders. The GOC notes that a number of directors are independent non-executive directors and that some are officers of the company with no outside government positions.

The GOC argues that there is no evidence of government control over the two SOE producers in question, including pricing and production decisions. The GOC notes that the record shows there is no governmental authority that regulates plastics or petrochemical producers, or sets

prices in China. In addition, the GOC states that the evidence also shows that these companies pursue only commercial interests, and highlights the fact one company is a joint venture with a publicly listed corporation and the other is a publicly listed company with shares traded on foreign and Chinese stock exchanges.

According to the GOC, these companies have a fiduciary duty under "The Company Law of the People's Republic of China" to protect the interests of all shareholders and to maximize profitability. Furthermore, the GOC states that one of the two companies is listed on the New York Stock Exchange and is therefore subject to U.S. securities laws and civil actions by disgruntled investors. The GOC argues that as a matter of U.S. law, management must operate the company in the best interest of all shareholders. The GOC states that this company has done so by engaging in substantial joint ventures and recording net profits.

The GOC states that the record evidence shows that SOEs in the PRC operate under the same PRC company law as private enterprises. Accordingly, the GOC argues that none of these SOE producers of inputs exist by virtue of any special statute and therefore must be recognized as commercial enterprises and not as arms of the state.

The GOC concludes that the record evidence concerning each of the five factors that the Department examines to determine whether a government corporation is a government authority, shows that producers in question operate as entities distinct from the PRC, and are not part of the government itself. Therefore, the GOC argues, the Department should find that there is no financial contribution from their sales of BOPP to Aifudi or PE to private companies.

Petitioners note that the Department's analysis of whether a company is a public entity is guided by the factors articulated in DRAMs from Korea, and no one factor is more dispositive than the others. Petitioners refute the GOC's contention that the degree of government ownership is a threshold requirement, and further argue that the Department may rest its analysis on one factor alone. In fact, according to petitioners, the Department has found that government majority shareholding is dispositive to finding a company to be a government entity, and the Department has made such a finding without government majority shareholding.

Petitioners argue that Aifudi's PE supplier clearly acts as an arm of the government. Petitioners cite to BPI on the record which they maintain establishes that this supplier is an SOE, and capable of providing a financial contribution under the statute. Petitioners note that neither Aifudi nor the GOC disputes that the provision of PP, PE, and BOPP is specific under the Act. According to petitioners, the record shows that the primary purchasers of each of these petrochemical inputs are limited in number and therefore, the provision of these products is specific under section 771(5A)(D)(iii)(I) of the Act.

Department Position:

The GOC has argued that the Department must make a determination of whether government-owned petrochemical input suppliers are "authorities" within the meaning of section 771(5)(B)(i) of the Act by performing the five-factor test on each supplier. While we agree that the

Department has used such a test in some prior cases,[8] there is insufficient evidence on the record of this investigation to conduct a complete analysis. Beyond the levels of government ownership of the suppliers in question, the GOC has not provided the information that is needed to conduct a complete analysis. However, in response to the GOC's arguments and the limited evidence on which those arguments are based, we note the following.

First, the GOC itself notes in its May 12, 2008 case brief at page 52 that "the record is thin" in its attempt to examine these five factors. Specifically, the GOC addresses the factor of government ownership by its simple reliance on the fact that the suppliers are not wholly owned by the PRC. However, the GOC has not demonstrated its claim that these companies have significant private ownership. Rather, the record evidence is clear that the SOE suppliers in question are majority-owned by the government. See February 1, 2008 submission of verification exhibits at Exhibit B-1 and B-6-k.

In examining the other factors of this five-factor test, the GOC arguments on whether governmental authority is being exercised through boards of directors and whether these suppliers pursue government interests simply rests on the fact that these companies are listed on domestic and foreign stock exchanges. This argument rests on the unsubstantiated assumption that just being listed on these exchanges somehow shows that the directors of these companies act independently in pursuing only commercial and not governmental interests.

Regarding the factor of government control over the activities of these companies relating to pricing and production decisions, the GOC fails to acknowledge the role that the State-Owned Assets Supervision and Administration Commission of the State Council exercises over managing SOEs based on "the rights attendant to the ownership of shares." See GOC's January 2, 2008 questionnaire response at 12. In the instant case, this management would be substantial based on the government's majority ownership in these SOEs under investigation that supply PE and BOPP.

Therefore, for purposes of this Final Determination and consistent with CWP from the PRC, we have applied a rule of majority ownership to determine whether a government-owned petrochemical input supplier is an "authority" within the meaning of section 771(5)(B)(i) of the Act. Specifically, where a petrochemical input producer is majority-owned by a government entity, as in the case of each SOE in question which is a producer of either PE or BOPP, we are treating that entity as an "authority." See CWP from the PRC at Comment 7. This is consistent with the Preamble, which states that "we intend to continue our longstanding practice of treating most government-owned corporations as the government itself . . ." See Preamble, 63 FR at 65402.

Because we are finding that these producers are "authorities," we do not reach the issue of whether they are private entities entrusted or directed by the GOC to provide a financial contribution to the respondents pursuant to section 771(5)(B)(iii) of the Act.

[8] See, e.g., DRAMs from Korea, Issues and Decision Memorandum at pages 16-17, and Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 30954 (July 13, 1992).

Comment 13: Whether SOEs Distort the Market in the PRC

The GOC argues that the Department has no basis to conclude that the GOC did not act to the best of its ability when it does not have and does not collect the requested information. The GOC notes that even the United States cannot provide data on the quantity and value of U.S. imports of BOPP because, unlike many other countries, BOPP is included in a basket category with many other propylene products. The GOC states that the Department has no basis to conclude that the PRC did not act to the best of its ability when, as a developing country, it cannot produce complex and highly refined statistical data. According to the GOC, the Department's assumption that certain data must be collected and maintained cannot shift the burden of record-building onto the PRC by insisting that the PRC must have information it does not have.

The GOC states that the Department's finding that most of the production of inputs used to produce subject merchandise must be state-owned because the PRC is unable to establish the proportion of production under state ownership and control, is not justified or warranted. According to the GOC, the record shows that Aifudi purchased BOPP from a private and a partially state-owned company, but that the Department treated all these purchases as from wholly state-owned companies.

The GOC argues that the Department's use of an adverse inference that the production and sale of PP, PE, and BOPP in China is dominated by SOEs because the GOC failed to provide information concerning the percentage of state ownership in the petrochemical industry, is not justified because the information requested does not exist. Even assuming that this was the case, the GOC argues that the Department cannot assume without any record evidence or inquiry, that the private market is so distorted by government involvement that actual private market prices must be disregarded.

The GOC argues that the Department must look beyond the degree of government ownership and consider the actual nature and structure of the market to determine whether the government's involvement distorts prices. As examples, the GOC states that a government entity may be able to distort the market because it is able to set prices for a product, yet the government ownership is modest or non-existent. Alternatively, the GOC notes that the government could have substantial ownership in a market through government pension funds, but the distortion is minimal because the government is a passive investor in publicly-traded companies. According to the GOC, the Department should follow its practice by conducting an adequate remuneration analysis on a case-by-case basis. See Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Papers Products from Indonesia, 71 FR 47174 (August 16, 2006) (Lined Paper from Indonesia).

As previously noted, the GOC states that in In the Matter of Certain Softwood Lumber Products from Canada, NAFTA USA-CDA-2002-1904-03 (June 7, 2004) (Lumber IV), the NAFTA panel held that "the law prefers market-based, actual transactions that occur in the country of export," and stated that "it is unreasonable to conclude, without further support, that where the government is a majority provider, private prices may not be used as a benchmark." See Lumber IV at 23. In the Department's remand determination, the GOC noted, the Department followed

its statutory mandate to determine the adequacy of remuneration based on prevailing market conditions in Canada despite a finding of significant market involvement by the government. See Lumber IV at 10. Accordingly, the GOC argues that the Department should assess the actual nature of the market in determining whether government involvement precludes the use of market prices.

The GOC argues that the nature and structure of the Chinese market demonstrates that the level of government ownership does not distort the prices charged by private producers. According to the GOC, the record shows that there is no single or uniform government-set price, nor is there a government agency that sets or regulates prices for BOPP. The GOC adds that SOEs operate in accordance with market principles and that the State-Owned Assets Supervision and Administration Commission abides by all PRC company laws and does not directly manage or interfere with the operations of the company.

The GOC argues that the number of private producers in the petrochemical industry demonstrates that SOEs are not distorting the market. Noting that there are 968 private enterprises in the petrochemical industry, the GOC states that if SOEs were distorting the market with low prices, or dominating the market and suppressing prices, private producers would not enter the market. The GOC concludes that there is no evidence showing that SOEs producing and selling BOPP have distorted the market and therefore, the law requires the Department to use prices charged by private producers as the benchmark to measure the benefit.

Petitioners argue that record information demonstrates that the GOC, through government-owned and controlled SOEs, dominates and distorts the market for petrochemicals in China. Petitioners further argue that there are no market-determined prices for petrochemicals in China. Therefore, according to petitioners, the Department should continue to rely on the world market prices as benchmarks for the final determination.

Department Position:

During the course of this proceeding, the Department made numerous requests to the GOC in questionnaires and at verification to provide information about the state ownership of the petrochemical industry and the companies which produce PP, PE and BOPP in the PRC. As noted in the Post-Preliminary Analysis, the GOC neither explained the nature of its relationship with the domestic producers of PP, PE and BOPP, nor did it state whether and to what extent they are owned by the government. See January 2, 2008 GOC questionnaire response at 10. We also asked the GOC to provide the total volume and value of domestic production for each of these inputs, and to report the total sales of each input that is accounted for by SOEs. The GOC did not answer these questions regarding state ownership of these input manufacturers or their production volumes. Id.

While the GOC did note in its questionnaire responses that it does not maintain specific data on the percentage of total domestic consumption of PP, PE and BOPP that is supplied by state-owned producers, the GOC's explanation for not providing more general data concerning the number of companies that manufacture these inputs was "{d}ue to the limited time available to respond to this question . . ." When we asked if the GOC could even identify the top ten SOE

petroleum and chemical companies in the PRC, the GOC made no such arguments about this information not being routinely collected and maintained by the GOC. Instead, the Department was told that the GOC "continues to work on this question and will provide the answer as soon as possible." See GOC January 2, 2008 supplemental questionnaire response at 10. No such answers were later provided to the Department.

We also gave the GOC another opportunity at verification to provide information regarding the percentage of state ownership in the petrochemical industry, but it could only clarify "that not all polypropylene, polyethylene and BOPP was produced by SOEs." See GOC Verification Report at 40. Because the GOC failed to provide us with the necessary information, we are unable to gauge the extent of government involvement in the petrochemical industry which produces these three inputs. Without such information, the Department is unable to analyze the nature and structure of the market in order to determine whether the level of government ownership significantly distorts the prices for these inputs in the PRC. We find that necessary information is not on the record, within the meaning of section 776(a)(1) of the Act, and that the GOC withheld information requested by the Department, within the meaning of section 776(a)(2)(A) of the Act. Accordingly, we will use the facts otherwise available. Further, we note that we informed the GOC of its deficient responses, in accordance with section 782(d) of the Act, but that the GOC never provided satisfactory responses to our requests to remedy the deficiencies, nor did it suggest alternative approaches to gathering the necessary information as provided in section 782(c)(1) of the Act.

We find that the GOC did not act to the best of its ability in complying with our requests for information pertaining to state ownership and control over the respective industries. The Federal Circuit has noted that the "best of its ability" standard does not condone "inattentiveness, carelessness, or inadequate record keeping." Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Despite the GOC's protestations to the contrary, we find that the types of information we requested are the types the GOC should have kept and maintained. Therefore, the Department has determined that an adverse inference is warranted, pursuant to section 776(b) of the Act. Moreover, we find that section 782(e) of the Act is not applicable, because the GOC did not act to the best of its ability, and the information we requested was never submitted by the required deadlines. See Sections 782(e)(4) and (e)(1) of the Act. As an adverse inference, we conclude that the SOE involvement in the petrochemical industry distorts the market, and therefore it would be inappropriate to rely upon domestic private input prices in China as a benchmark.

Finally, the GOC's argument that the Department treated all of Aifudi's purchases of BOPP as being from wholly state-owned companies is simply inaccurate. The Department found that one of the suppliers that provide BOPP to Aifudi is a state-owned company. See February 1, 2008 submission of verification exhibits at Exhibit B-6-k regarding this company's ownership information. The Department has measured the benefit only on the BOPP provided by this company.

Comment 14: Alternative Benchmark for the Provision of Petrochemical Inputs for Less Than Adequate Remuneration

The GOC argues that even if a financial contribution were provided, a comparison of SOE prices to benchmark prices from private suppliers proves that no benefit exists because Aifudi paid adequate remuneration for its petrochemical inputs produced by SOEs.

The GOC states that even if the Department continues to find a financial contribution from the sales of PE and BOPP, the Department must use contemporaneous prices that Aifudi paid to its private company suppliers of BOPP as the benchmark for determining whether it was sold for less than adequate remuneration. The GOC argues that the Department should not have considered whether PE was supplied for less than adequate remuneration to private companies because no upstream subsidy allegation was filed and no analysis conducted. In consideration of this, the GOC does not object to the Department's use of the second tier benchmark for PE because there is no information on the record regarding prices of PE that was not produced by an SOE.

According to the GOC, the Department must respect the test for adequate remuneration as outlined in section 771(5)(E)(iv) which requires that it be determined "in relation to prevailing market conditions for the good or service being provided . . . in the country which is the subject of the investigation." The GOC further notes that 19 CFR 351.511(a)(2)(i) states that the Department will "normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." The GOC argues that in the instant case, Aifudi purchased BOPP from only one partially government-owned supplier and from several private suppliers. The GOC adds that the Department gathered internal benchmark delivered prices for BOPP, concerning actual monthly transactions, on a supplier-specific basis. Therefore, the GOC argues, the Department has the information for calculating a market-determined, monthly benchmark price, which it can reject only upon finding that these prices are significantly distorted as a result of the government's involvement in the market.

Aifudi states that the Department relied on facts otherwise available to preliminarily determine that the BOPP industry in China is dominated by SOEs because the GOC did not cooperate to the best of its ability in responding to the Department's questions regarding the extent of government ownership of domestic producers. However, Aifudi claims that it has cooperated to the best of its ability during this investigation, and that it does not have the power to control the actions or responses of the GOC. Under these circumstances, Aifudi continues, the Department's determination to reject the use of domestic prices as a benchmark is unduly punitive. Aifudi argues that in evaluating the provision of BOPP, the Department has applied adverse facts available twice: once to find that the BOPP industry is dominated by SOEs, and the second time in rejecting the use of domestic prices. For the final determination, Aifudi urges the Department to use Chinese market prices as its benchmark, as, according to Aifudi, there is no record evidence that the Chinese market prices are significantly distorted as a result of government involvement in the market.

Petitioners reiterate their support for the Department's preliminary determination that it could not apply a first-tier benchmark for land, lending, or the provision of petrochemicals. Petitioners urge the Department to disregard the alternative benchmark information provided by the GOC. According to petitioners, the pricing information provided by the GOC is dated after the POI and is identified only as "sample" data. Therefore, petitioners contend that the Department cannot use it for purposes of the final determination.

Additionally, petitioners support the Department's conclusion, using adverse inferences, that the GOC dominates the petrochemical market through the SOEs. According to petitioners, information they provided in their new subsidies allegations establishes GOC control of the petrochemical market. Because the GOC did not provide information the Department requested about the industry, or domestic price information for PP, PE, or BOPP, petitioners argue that the Department's reliance on adverse inferences was warranted. In addition, petitioners contend that the GOC dominance of the industry indicates that there are no market-determined prices for petrochemicals in China, and the Department should continue to use a benchmark based on world market prices for BOPP in the final determination.

Department Position:

As explained above in Comment 13, because the GOC failed to provide us with the necessary information to examine the extent of government involvement in the PP, PE and BOPP industries, and to ascertain whether the domestic markets for these inputs are dominated by SOEs, the Department used an adverse inference in finding that government ownership distorts the prices for these inputs in the PRC. Consequently, the use of private producer prices in China would be akin to comparing the benchmark to itself, (i.e., such a benchmark would reflect the distortions of the government presence).[9] As we explained in Canadian Lumber:

> Where the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. It is impossible to test the government price using another price that is entirely, or almost entirely, dependent upon it. The analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect.[10]

For these reasons, prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration.

For purposes of this final determination, we also considered whether there were other actual company-specific import transactions that we could consider using as a benchmark price. However, Aifudi had no actual imports of either PE or BOPP during the POI that could be evaluated as an alternative actual market-determined price. Therefore, pursuant to 19 CFR 351.511(a)(2)(ii), the Department appropriately used as our benchmark prices for PE and BOPP,

[9] See Canadian Lumber Issues and Decision Memorandum, at 34.
[10] See Canadian Lumber Issues and Decision Memorandum, at pages 38-39.

world market prices that would be available to purchasers in China. These world market prices for PE and BOPP, as described more fully in Comment 15 below, represent prices that LWS producers would have access to and that would be readily available to them during the POI.

Comment 15: Whether the Department Can Use Data from the World Trade Atlas to Determine a Benchmark for Petrochemical Inputs

The GOC argues that the Department's use of World Trade Atlas data to determine the "world price" for BOPP demonstrates that there is no world market price for BOPP. The GOC states that World Trade Atlas data is used by the Department as a source for surrogate values in dumping cases, and that this approach cannot be substituted in a countervailing duty case. The GOC notes that the requirements of section 773(c)(4) of the Act are different than the adequate remuneration standard for selecting prices because deriving surrogate values requires the selection of a market economy country or countries at a comparable level of economic development that are significant producers of the subject merchandise.

The GOC argues that the Department's construction of the second tier benchmark for BOPP used in its Post-Preliminary Analysis was unlawful, and that the World Trade Atlas data the Department used to construct this second tier benchmark is secondary information that cannot be used without corroboration. The GOC claims that the only lawful benchmark supported by information on the record is the first-tier prices for sales of BOPP in China made by private companies.

According to the GOC, a world market price for BOPP does not exist. The GOC notes that the World Trade Atlas data shows that the prices are very different in different parts of the world and are the antithesis of a commodity price that is the essential characteristic of a world market. The GOC argues that there can be no world market price using the World Trade Atlas data when the price varies by more than 320 percent from country to country. These prices, states the GOC, are reflective of a multitude of highly divergent local markets and not a world market.

The GOC states that the Department can only use a world market price if such prices would be available to purchasers in the country within the meaning of section 351.511(a)(2)(ii) of the Department's regulations. Furthermore, the GOC notes that the Department has previously stated that in selecting a world market price, it will "examine the facts on the record regarding the nature and scope of the market for that good to determine if that market price would be available to an in-country purchaser." See Lined Paper from Indonesia at 60645. The GOC argues that there is no evidence on the record to suggest that the nature and scope of the highly divergent markets chosen by the Department for its world price for BOPP are comparable to the nature and scope of the market in China for BOPP. In a similar situation, the GOC notes that the NAFTA Panel rejected the Department's use of U.S. stumpage prices as a commercially available world market price. See Lumber IV at 28 and 31.

Furthermore, the GOC argues that the World Trade Atlas data is a proprietary and expensive publication that is not publicly available. Because the World Trade Atlas is unavailable, the GOC states that it is unable to test the accuracy and completeness of the information, and the basis of its collection. According to the GOC, the law does not permit the use of this proprietary

publication as publicly available information. The GOC adds that the Department has not verified the World Trade Atlas information upon which it relied. The GOC states that this information's proprietary nature makes it impossible both to determine how it was compiled and to evaluate the accuracy of the information itself. Furthermore, the GOC argues that the Department's use of data from a source the GOC cannot access deprives the respondents from commenting on this information in a meaningful manner. Furthermore, because the Department has put this information on the record well after the deadline for the parties to submit factual information, the GOC maintains that the parties have not been given the opportunity to submit information to either clarify or rebut the Department's new data. Accordingly, the GOC concludes that the Department may not use this information for purposes of its final determination because it violates respondents' due process rights. See e.g. Patlex Corp. v. Mossinghoff, 771F.2d 480, 485 (Fed. Cir. 1985).

Even if the World Trade Atlas data is considered admissible, the GOC argues that this data is defective. The GOC states that using an average price of all exports from the four countries the Department used to calculate a benchmark in its Post-Preliminary Analysis means by definition that the average price cannot be a price of any actual exports to China. The GOC adds that there is no record evidence that shows that any of these countries exported BOPP to China during the months in question, or during any part of the POI. Moreover, as an example, the GOC notes that Chinese import statistics for October and November 2006 show that the PRC had no imports from Chile under the tariff code that includes BOPP. Since the law requires that a world market price be available in the country under investigation, the Department cannot consider these prices valid as a second-tier benchmark.

The GOC also argues that the World Trade Atlas data used by the Department contains an amalgam of unspecified and undifferentiated BOPP that may represent sales of some unknown type of propylene sheets that may not include BOPP. The GOC, using reports available on the Internet from ICISpricing.com, states that the spot prices in October 2007 for BOPP on a cost and freight basis for delivery throughout East Asia, including mainland China, was less than one-third the Department's benchmark price. This demonstrates, according to the GOC, that had the Department used a benchmark that reflected actual prices for BOPP imported into China, there could be no subsidy finding.

According to the GOC, there are additional indications that the Department's world market price is legally incorrect. According to the GOC, world market prices on commodity exchanges, such as the one used for PE by the Department, are based on delivered prices. The GOC argues that were these world market prices not based on delivered prices, there would be no common world price. The GOC states that the Department's adjustments for freight, duties, and VAT of the World Trade Atlas prices is contrary to the principles of world market prices and results in an unreasonable inflation. According to the GOC, by removing this adjustment and treating the World Trade Atlas data as delivered prices, the Department would find that BOPP sales do not provide a subsidy.

Petitioners urge the Department to exclude from its benchmark construction the export data from India, as BOPP is classified in a basket category in India's Harmonized Tariff Schedule. In using the Indian HTS as an example to refute the GOC's argument that the U.S. harmonized

tariff schedule is unusual in including BOPP in a basket category, petitioners aver that the Department's intention was to capture only export data from countries which have a HTS category limited to BOPP. As such, the Department should not include the Indian data, as the basket category is not limited to BOPP.

Petitioners argue that the GOC's dominance of the production and sale of BOPP, PP, and PE, through its control of SOEs, requires the Department to turn to a world market price. The Department's reliance on data from the World Trade Atlas, and export data from several countries was appropriate because Word Trade Atlas data are accurate and provided by a reliable source, and have been used by the Department in numerous antidumping proceedings. Because it is reasonable to conclude that the export prices from the World Trade Atlas data would be available to purchasers of BOPP in China, petitioners state that the Department should continue to rely on the world price calculated in the Preliminary Determination in the final determination.

Department Position:

The Department frequently uses World Trade Atlas data in its proceedings because it considers this data to be reliable, publicly available information. This information satisfies the Department's requirement of public availability because the data has intentionally been made available, through paid subscription or otherwise, to the general public by its publisher. We consider the appropriate indication of public availability to be whether any entity can obtain the data. At the very least, public availability should enable any interested party to obtain the same information. World Trade Atlas data satisfies this requirement because this data can be obtained by anyone. The Department would consider information to be not publicly available in instances where only a select limited group is permitted to have access to this information by its publisher.

The Department routinely uses World Trade Atlas data because it is a reliable and independent source of information. Specifically, the World Trade Atlas data is a compilation of information that is derived from publicly available sources of import and export statistics from various countries. The World Trade Atlas export data that we selected for BOPP is based on FOB prices that we adjusted to calculate a delivered price to China, as explained further in Comment 17, below. Furthermore, we used the most specific harmonized tariff category for BOPP available in the World Trade Atlas data.

Once we isolated the most specific harmonized tariff category, we included all exports from all countries that had exports during the months of October and November 2006 when Aifudi purchased the BOPP. Contrary to the GOC's claim, we did not limit or exclude any country's export data in our calculation. The World Trade Atlas data was at the same eight-digit level of harmonization to ensure consistency across all countries. Petitioners, however, submitted information regarding the Indian export statistics for BOPP in the World Trade Atlas by including in Attachment 2 of their May 12, 2008 submission, a copy of the relevant section of India's Harmonized Tariff Schedule which shows that that this is a basket category for all PP films that are "flexible, plain." Therefore, we have excluded these Indian export statistics from our benchmark calculation. We received no other information to rebut our use of the other three countries.

Regarding the other three countries, and contrary to the GOC's argument, such exports would be available in China. The very fact that there are imports into China from the other countries that exported BOPP belies the GOC's argument that we cannot include Chilean exports because there were no imports into the basket Chinese harmonized tariff category that covers BOPP. Furthermore, the fact that the World Trade Atlas data reflect actual exports means that these goods are available to purchasers around the world. Therefore, we find it reasonable to conclude that the export prices from Chile, Singapore, and South Africa selected from the World Trade Atlas data would be available to purchasers of BOPP in China.

The GOC, in making its argument that the World Trade Atlas data are not accurate, is itself recognizing an alternative world market price for BOPP by noting ICIS spot prices in October 2007. Although this comparison is not meaningful since it is outside the POI (one year ahead of the October 2006 World Trade Atlas data used by the Department), this ICIS data provides additional evidence that a world market price for BOPP does exist.

Comment 16: Whether the Sale of Petrochemical Inputs is Consistent with Market Principles

The GOC argues that, should the Department reject the use of actual in-country transactions and prices for BOPP as a benchmark, then the Department should measure the adequacy of remuneration by assessing whether the prices charged in China are consistent with market principles in accordance with section 351.511(a)(2)(iii) of the Department's regulations. In assessing this, the GOC states that the Department will consider the government provider's price-setting philosophy, costs (including rates of return), or possible price discrimination. See CVD Preamble at 65378; see also Final Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 62 FR 55003, 55007.

Using the Department's test to assess whether the BOPP sales by the supplier in question are consistent with market principles, the GOC argues that the prices at which this supplier sold BOPP to Aifuidi are consistent with market principles. The GOC states that this supplier displayed returns sufficient to sustain future operations, and notes that there is no evidence of any price discrimination.

Department Position:

As explained above in the "Analysis of Programs" section for "Provision of Government Inputs for Less Than Adequate Remuneration," and in Comment 14 and Comment 15, the Department is using world market prices for BOPP as the benchmark to measure the adequacy of remuneration. Therefore, the Department does not need to consider whether the government price is consistent with market principles in accordance with section 351.511(a)(2)(iii) of the Department's regulations, because this analysis is only relevant in instances where "there is no world market price available to purchasers in the country in question. . ."

Comment 17: Whether the Department Should Make an Adjustment for Freight in the Benchmark for Petrochemical Inputs

The GOC argues that even if it was consistent with a world market price to add freight, the Department's freight calculation is unreasonable. The GOC contends that the freight data used by the Department is irrational and shows that the further the merchandise traveled, the cheaper the total freight cost. The GOC also notes that the freight rate from India was inflated because the Department chose Bangalore instead of a port city in India, thereby adding an inland haulage charge within India to the basic ocean freight rate. In addition, the GOC states that the Department incorrectly assumed that the standard 40 foot container holds only 2,000 kilograms when it can actually hold up to 30,400 kilograms according to the Maersk website. This website provides a guide for calculating rates (Maersk Line Quick Guide for Rates) that assumes a payload of 20,000 kilograms.

Petitioners note that export data is normally provided on FOB port of export terms. Petitioners argue that it is appropriate for the Department to add an amount for international freight and import duties and taxes in order to ensure that the world market price benchmark is stated on delivered terms. Further, section 351.511(a)(2)(iv) of the Department's regulations requires the Department to "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties."

In addition, petitioners argue that there is no basis in the record for the GOC's contentions that a shipping container has a capacity of 30,400 kilograms, the weight of a container of steel, and that a container holding BOPP would weigh as much as one that held steel. Neither is there information in the record, according to petitioners, to support the GOC's contention that the transportation charges for the heavier container would be the same as the charges for a lighter container. Petitioners contend that the quotations the Department obtained were from a well-known shipping company, and the GOC has not provided any information which would render these quotations invalid or unusable. Neither has the GOC provided an alternative. Thus petitioners maintain that the Department should continue to adjust the export data for freight as it did in the preliminary analysis.

Department Position:

Pursuant to section 351.511(a)(2)(iv) of the Department's regulations, we have adjusted the World Trade Atlas export data used as our benchmark price for BOPP to reflect the price that Aifudi would have paid had it imported BOPP at the time that it made purchases from the SOE producer/supplier in question. Because the World Trade Atlas export data for BOPP is based on an FOB price, we have correctly added an amount for international freight and import duties and taxes in order to ensure that the world market price benchmark is stated on delivered terms.

We have corrected an error in our per unit calculation of ocean freight based on the Maersk guidelines, as noted by the GOC, in calculating rates for a standard 40-foot container. See Final Calculation Memorandum.

Comment 18: Whether the GOC Provides Government Policy Lending to the LWS Industry

The GOC claims that the record shows that LWS are considered in the PRC to be a plastics product, and not a textile. The GOC further claims that, while the GOC has national and provincial plans for textiles, there are no government plans for plastics. Furthermore, according to the GOC, the existence of a "plan" for an industry is of no consequence for purposes of the CVD law unless there is a financial contribution associated with it. In this case, there is no record evidence of the implementation of any plan (national, provincial, or local) pertaining to LWS.

According to the GOC, there is no record evidence of any favorable treatment or financial contribution to the manufacture or export of LWS that would have been conferred because of government plans concerning the textile industry. Further, the GOC continues, record evidence shows that Aifudi did not receive any loans from state-owned banks and that loans SSJ/SLP received from state-owned banks were made on a commercial basis.

Petitioners maintain, notwithstanding the GOC's argument to the contrary, that there is conclusive evidence that the GOC maintains a policy lending program for the benefit of the textiles industry, under which LWS producers are eligible to receive loans. In addition, the GOC's failure to cooperate, according to petitioners, provides the basis for the Department to make adverse inferences. Having refused to provide the relevant information, petitioners argue, the GOC cannot now argue that the Department lacks the information necessary for its analysis.

According to petitioners, the GOC's arguments do not acknowledge its repeated failures to provide a substantial amount of requested information relevant to the Department's investigation of policy lending by Chinese banks to LWS producers. Petitioners note that the GOC repeatedly declined to provide industrial policies, including the textile industry five year plans, based on its claim that LWS are not part of the textile industry and that such policies are irrelevant. In addition, petitioners themselves provided the textile industry five year plan, as well as documents that demonstrate that even the local government in Zibo City maintains a five year plan for the textile industry.

Petitioners claim that the GOC did not provide these documents because they establish the existence of target growth and export rates of the type that Chinese banks use to determine access to lending. Indeed, according to petitioners, the Shandong Province Textile Industry Five-Year Plan, which they provided and the GOC did not, establishes a fund to promote textile exports, industrial zone improvement, and textile industrial bases. Furthermore, petitioners maintain that the GOC significantly impeded the Department's investigation by failing to identify Shandong Provincial economic development authorities and the textile policy they drafted prior to verification.

Petitioners argue that there is no record evidence to support the GOC's argument that LWS are considered to be a plastics product, not a textile. According to petitioners, the verification report shows the opposite, and there is ample evidence in the record to confirm that LWS are part of the textiles industry.

The GOC counters that the record does not support petitioners' policy lending allegations, which depend upon LWS being a textile for purposes of the PRC's economic planning. According to the GOC, the record shows that LWS are considered to be a plastics product in the PRC, and not a textile. Further, the GOC claims that there are no government plans for plastics and, the record does not show any favorable treatment or financial contribution to the manufacture or export of LWS.

In addition, the GOC states that the Department's verification of Aifudi demonstrates that the company did not receive any loans from state-owned banks, which means, according to the GOC, Aifudi could not have participated in the alleged program.

Petitioners take issue with the GOC's argument that Aifudi never received loans from state-owned banks. Rather, petitioners argue that the record shows that Aifudi was unable to support its claims that the banks were not state-owned. See Aifudi Verification Report at 9.

Department Position:

As explained above in the section on Government Policy Lending, the GOC was unable to substantiate its claim that LWS are only a plastics product and, as such, cannot be covered by the Textile Plans. Therefore, because it failed to provide the Department with complete requested five-year plans for the textile industry at the national, provincial, and local level, despite numerous opportunities to provide these plans, the Department has determined, as adverse facts available, pursuant to sections 776(a) and (b) of the Act, that LWS are part of China's textile industry. Additionally, as adverse facts available, the Department has determined that the Textile Plans provide for financing of the textile industry.

The Department attempted to ascertain whether LWS are classified as a plastics product as claimed by the GOC, and the meaning that product classification has in the context of economic planning and policy development. In order to evaluate whether LWS are covered by the textile plans, we needed all of the GOC's textile plans in their entirety. Further, we provided the GOC with an opportunity to demonstrate its claim that LWS are a plastic product and as such, could not be considered part of the textile industry and included in any of the textile plans.

While the GOC explained at verification that LWS are classified under section 3030 in its National Statistics Bureau (NSB) industrial classification system under the plastics industry, other evidence on the record, such as the fact that LWS are covered under the World Trade Organization's (WTO) Agreement on Textiles and Clothing, and the Harmonized Tariff Schedule of the United States (HTS) classifies LWS as a textile, contradicts the GOC's claim. Furthermore, petitioners provided a document from the Investment Promotion Bureau of Zibo Municipality, "Linzi Textile and Apparel Project: Plastic Woven Sacks with an Annual Production of 8,000 Tons," which indicates that the GOC has classified woven sacks, container sacks, and paper-plastic laminated sacks as textiles. See Petitioners' January 9, 2008 Submission, regarding additional factual information, at Exhibit 25. Further, as also discussed above, at verification we were informed that classification codes are "non-binding," meaning that

agencies across the GOC are not required to follow them consistently. See Central Government Verification Report at 11.

Although the GOC stated that Zibo City does not have a textile plan, and was silent in response to our requests for textile plans for Shandong Province, we found at verification that, in fact, there was a provincial plan for textiles. Petitioners had submitted, in accordance with 19 CFR 351.301(b)(1) as a result of their research, a copy of a document entitled "Shandong Province Textile Industry 11th Five Year Plan" immediately preceding verification. In addition, petitioners also submitted evidence showing that Zibo City had a policy plan for the textile industry, and that LWS producers are located in Zibo City. The failure of the GOC to provide the requested plans is evidence of the GOC not cooperating to the best of its ability during the course of this proceeding.

The GOC argues that the existence of a plan is not consequential to CVD law unless there is a financial contribution associated with that plan. However, because the GOC did not provide us with all of the plans that we requested, we could not evaluate this issue. The translation of excerpts of various plans submitted by petitioners does indicate that financing is one aspect of the types of assistance that is listed under the national textile plan. See Petitioners' January 14, 2008 Submission at Exhibit I. Further, petitioners submitted an excerpt of the GOC's "Textile Industry 10th Five Year Plan," which indicates that the GOC has a policy to use "fiscal, financing and other measures," regarding the textile industry, inter alia, to "macro-control the economy." See Petitioners' January 9, 2008 Submission at Exhibit I.

The GOC has stated that the Department's verification of Aifudi demonstrates that Aifudi did not receive any loans from state-owned banks, and thus, Aifudi could not have participated in the policy loan program. In its January 3, 2008 questionnaire response, Aifudi provided information regarding bank ownership for its loans under investigation. See Aifudi's January 3, 2008 Submission at Appendix S2-6. At verification, Aifudi stated that it received this bank ownership information by telephone from an attorney in Beijing who had access to this information. Aifudi was unable to provide supporting documentation regarding the ownership of the banks from which it received loans relevant to this investigation. See Aifudi Verification Report at 9; see also Government Policy Lending, above. Therefore, contrary to the GOC's claim, there is no record evidence that these banks are not state-owned. As such, we are relying on facts otherwise available and using an adverse inference in accordance with sections 776(a) and (b) of the Act to evaluate the banks' ownership and to find that these banks are state-owned. Because the GOC did not cooperate to the best of its ability, we have determined, as adverse facts available pursuant to sections 776(a) and (b) of the Act, that the GOC's policy lending program provides a financial contribution by the GOC in accordance with section 771(5)(D)(i) of the Act.

Comment 19: Whether the Department May Countervail the Alleged Policy Lending Program as Adverse Facts Available

According to the GOC, the Department's voluntary decision not to verify the state-owned banks that made loans to SSJ/SLP cannot be a basis for an adverse facts available assumption that the banks made loans to respondents for non-commercial reasons. The GOC argues that the Department's decision not to verify these banks had nothing to do with a lack of cooperation on

the part of the GOC. Rather, the GOC continues, the Department decided to cancel the verification of SSJ/SLP, and that, according to the GOC, the SSJ/SLP verification was the Department's primary reason to visit the city where the banks are located. According to the GOC, facts available can only be applied when the relevant record information "cannot be verified," not when the information could have been verified, but the Department chose not to.

Petitioners argue that the GOC's failure to cooperate in this aspect of the investigation leaves the Department with no choice under the statute but to assume that the GOC's refusals to cooperate were intended to deny the Department information that is adverse to the GOC's interests. Petitioners further argue that the GOC's claims are without merit.

Department Position:

The GOC argues that the Department cannot use adverse facts available on policy lending when it was the Department's decision not to verify SSJ/SLP that resulted in the Department not going to Zibo City, and therefore not conducting verification at the banks that made the loans under investigation. As a threshold matter, we note that the basis for the Department's decision not to verify SSJ/SLP was the fact that it withheld requested information about affiliations and cross-ownership, despite evidence on the record that SSJ/SLP was cross-owned with another producer of subject merchandise. See Petitioners' November 13, 2007 Submission; see also Post-Preliminary Analysis at 3. As such, verification would have been futile because there would be no way for the Department to establish that all loans provided to all cross-owned companies (which SSJ/SLP had declined to provide complete information on) could be examined. The Department cannot verify information that is not on the record.

Moreover, the GOC's assumption that the Department's decision to cancel verification of SSJ/SLP was the only reason the Department did not go to Zibo City is incorrect. We established at the provincial government verification that the GOC had not provided the five year textile plan prepared by a Shandong Province government agency. This plan was evident to the Department based on petitioners' January 9, 2008 submission. Furthermore, it was also evident, based on the same submission, that there was also a plan from the government of Zibo City that directly discussed an LWS producer located in Zibo City. The record shows that both Aifudi and SSJ/SLP are located in Shandong Province; the record also shows that Aifudi is located in Zibo City. Further, the GOC did not provide these requested plans in the questionnaire responses, and we were unable to evaluate the content and coverage of these plans. In addition, the GOC stated at the Central Government verification that LWS' industrial classification as a plastic by the NSB was not binding on other GOC agencies. Because the Department had already determined that the questionnaire response of SSJ/SLP was so incomplete that it could not be verified, there was no reason for the Department to meet with the banks providing loans to SSJ/SLP.

The information requested by the Department is in control of the GOC respondent. Because the GOC itself decided that the requested textile plans were not necessary to our investigation, we have determined that the GOC impeded our investigation. See Government Policy Lending, above; see also Nippon Steel Corporation v. United States, 337 F.3d 1373, 1384 (Fed. Cir. 2003). Further, the courts have ruled that if the Department were forced to use the partial information submitted by respondents, interested parties would be able to manipulate the process by

submitting only beneficial information. Thus, respondents, not the Department, would have the ultimate control to determine what information would be used for a margin calculation. This is in direct contradiction to the policy behind the use of facts available. See also Steel Authority of India v. United States, 149 F. Supp 2d. 921, 928 (CIT 2001); see also Rhone Poulenc, Inc. v. United States, 710 F. Supp. 341, 347 (1989), aff'd, Rhone Poulenc, 899 F.2d 1185 (holding that the "Best Information Available" rule, the forerunner to facts available, is designed to "prevent a respondent from controlling the results of an administrative review by providing partial information"). Additionally, the courts have stated that the Department has been given great discretion in administering the countervailing duty laws. This includes the discretionary authority to determine the extent of the investigation and information it needs to determine whether a respondent received any countervailable benefit. See PPG Industries v. United States, 978 F.2d 1232, 1238 (Fed. Cir. 1992). As such, it is up to the Department to determine the information relevant to its countervailing duty investigations.

Despite the numerous opportunities provided, which includes providing the GOC an opportunity to submit the requested information after the Preliminary Determination, the GOC withheld information requested by the Department; the failure to provide this requested information has impeded our investigation. Therefore, we have determined that it is appropriate to countervail the Government Policy Lending Program, as adverse facts available, pursuant to sections 776(a) and (b) of the Act.

Comment 20: Whether the Department Used the Appropriate Benchmark Regarding the Alleged Policy Lending Program in the Preliminary Determination

The GOC argues that the Department committed a legal error in the Preliminary Determination when it used an out-of-country benchmark to determine whether the alleged policy loans provided a benefit. According to the GOC, the CVD statute provides that a benefit is conferred, in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan actually obtained on the market. The GOC claims that, when calculating the interest rate benchmark, the Department used world-wide interest rates that do not represent loans that a recipient in China could actually obtain. See section 771(5)(E)(ii) of the Act. Thus, the GOC concludes, the Department's interest rate benchmark is unlawful.

Petitioners agree with the Department's preliminary determination that external interest rate benchmarks are appropriate for measuring the benefit of policy lending.

Department Position:

In the Preliminary Determination, the Department made the finding that the "GOC's predominant role in the banking sector results in significant distortions that render the lending rates in the PRC unsuitable as market benchmarks." See Preliminary Determination, 72 FR at 67900; see also CFS from the PRC, and accompanying Issues and Decision Memorandum, at Comment 10. As a result, the Department preliminarily determined that interest rates in the domestic Chinese banking sector do not provide a suitable basis for benchmarking the loans provided to respondents in this investigation, and thus, determined to use an external benchmark to measure the benefit of countervailable loans. See Preliminary Determination, 72 FR at 67901. The Department finds that no new information has been submitted on the administrative record of this proceeding to give it reason to revisit its preliminary finding regarding the use of an external benchmark to measure the benefit of loans found to be countervailable.

In CWP from the PRC, the Department indicated that for loan purposes, benchmarks must be a comparable commercial loan, i.e., they must be from a commercial lending institution, and they must be similar in structure to government loans with respect to whether they are fixed or variable, the date of maturity, and the currency in which they are granted. See CWP from the PRC at Comment 14. However, where we have determined that interest rates in the country are distorted, such interest rates are unusable to measure the benefit from government loans. See id.

Furthermore, in CFS from the PRC, the Department noted that it is not possible to adjust for these market distortions, stating that any such endeavor would be a "highly complex, speculative, and impracticable exercise," and that for these reasons, it is appropriate to resort to an external benchmark with regard to GOC policy lending programs. See CFS from the PRC, and accompanying Issues and Decision Memorandum, at Comment 10.

Normally, the Department uses comparable commercial loans reported for benchmarking purposes. See 19 CFR 351.505(a)(2)(i) and (ii). However, because we find that the GOC's intervention has created distortions in the PRC's banking sector, we find that there are no actual commercial loans and, that there are no national interest rates that would make a suitable benchmark. See 19 CFR 351.505(a)(3). Therefore, the Department finds that it is appropriate to use an external benchmark to calculate the benefits provided under this program.

Further, the use of external benchmarks is consistent with the Department's practice in such situations where government intervention into a sector prevents us from applying an internal benchmark. See, e.g., Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum, "Provincial Stumpage Programs Determined to Confer Subsidies;" see also CFS from the PRC, and accompanying Issues and Decision Memorandum, at Comment 10; see also CWP from the PRC, at "Benchmarks for Short-Term RMB Denominated Loans."

For all these reasons, we determine that is appropriate to use the external benchmark methodology as used in the Preliminary Determination. Since the publication of the Preliminary Determination, the Department has made minor revisions to the external benchmark used to calculate the benefit conferred to recipients of policy loans through this program. See the above section regarding Loan Benchmarks and Discount Rate.

Comment 21: The Determination of the All Others Rate

Petitioners state that the most reasonable method for calculating the all others rate is to use the same method as they described above for the four mandatory respondents. Petitioners argue that in situations where multiple mandatory respondents refuse to cooperate and other respondents provide inaccurate information, the Department should calculate the all others rate in a way that does not reward the respondents as a whole for refusing to participate in the investigation. According to petitioners, section 705(c)(5)(A)(ii) of the Act does not prohibit the use of facts available to calculate the all others rate when all mandatory respondents have a rate based on facts available.

The GOC argues that the Department is prohibited from using any rates calculated on the basis of total facts available when determining the all others rate. The GOC states that while the statute provides an exception when countervailable subsidy rates established for all exporters and producers examined are based on facts available, according to the GOC, this exception is unavailable to the Department in the instant case because the rate for Aifudi, a voluntary respondent, would not be determined on the basis of facts available. According to the GOC, the statute makes no distinction between voluntary and mandatory respondents.

Citing Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, 66 FR 37007 (July 16, 2001), the GOC states that it recognizes the Department's regulations contain a provision to exclude voluntary respondents' rates from the calculation of the all others rate. However, the GOC continues, where there is a conflict between the requirements of the statute and the Department's regulation, as there is here, the Department's regulation must yield to the statute.

According to the GOC, the Department should calculate the all others rate based on a company that was individually investigated because: 1) this rate is based on actual industry experience, which makes the rate more probative and reliable than facts available; 2) the use of a facts available rate would be contrary to the overall purpose of the countervailing duty statute, which is to determine a trade remedy as accurately as possible and; 3) the CIT stated in Yantai Oriental Juice Co. vs. United States, 27 CIT 477 (CIT 2003) (Yantai 1) that, the Department's use of a facts available rate in calculating an all others rate was unreasonable, and the Department should have used only the zero rates actually calculated for the mandatory respondents. In the instant proceeding, the GOC concludes, the Department should treat the voluntary respondent, Aifudi, as a mandatory respondent, and base the all others rate on Aifudi's calculated rate.

While the GOC agrees with petitioners that the Department should base the all others rate in the final determination on the rate actually calculated for Aifudi, it does not agree with petitioners that the Department should multiply Aifudi's rate by the number of alleged programs under investigation to derive the all others rate in the same manner as the adverse facts available rates to be applied to the non-cooperative mandatory respondents. Such a method, according to the GOC, would be without precedent and contrary to law.

The GOC claims that the statute prohibits the Department from using any rates calculated on the basis of total facts available in determining the all others rate. The GOC notes that the statute does provide an exception when the countervailable subsidy rates established for all exporters and producers individually examined are based on facts available. However, this exception is unavailable in the instant case because Aifudi's rate would not be determined on the basis of facts available.

Furthermore, the GOC argues that the Department may not apply adverse inferences unless it finds that the party against whom it is applying those adverse inferences has failed to cooperate to the best of its ability in responding to the Department's requests for information. According to the GOC, the Department cannot make such a finding with respect to the parties who would be covered by the all others rate in the instant case because the Department has not asked any questions of those parties. Moreover, the GOC continues, without such a finding, the use of adverse facts would violate the Constitution's guarantee of due process, which, according to the GOC, governs the Department's unfair trade proceedings and protects foreign producers.

Finally, according to the GOC, the statute and the regulations specify that the all others rate is to be derived by averaging the rates of the individually investigated respondents whose rates have not been excluded due to the ban on using total facts available rates. The GOC claims that in Yantai 1, the CIT found that the Department's use of a facts available rate in the calculation of an all others rate was unreasonable and that the Department should have used only the zero rates actually calculated for the mandatory respondents. Therefore, the GOC concludes, the Department should use Aifudi's rate to calculate the all others rate, even if the Department calculates a zero or de minimis rate for Aifudi.

Department Position:

Pursuant to section 705(c)(5)(A)(i) of the Act, the all others rate is to be the weighted average of the rates established for respondents individually investigated, excluding zero or de minimis rates or rates based entirely on facts available. Pursuant to section 705(c)(5)(A)(ii) of the Act, if the rates established for all individually investigated respondents are zero, de minimis or based entirely on facts available, the Department may use "any reasonable method" to determine the all others rate, including weight averaging the rates determined for the individually investigated respondents. Based on the facts and circumstances of this investigation, we find that section 705(c)(5)(A)(ii) is applicable in determining the all others rate. In this case, the Department selected four mandatory respondents as representative of all producers/exporters of LWS from the PRC. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, "Respondent Selection" (July 31, 2007) on file in CRU. Three of these four company respondents did not respond to the questionnaire and thus we have determined their countervailable subsidy rates based entirely on adverse facts available (see, "Adverse Facts Available" section above). The fourth company respondent provided significantly deficient questionnaire responses pertaining to its affiliated and cross-owned companies, which is information essential to the Department's analysis of the total subsidization on the manufacture, production and export of subject merchandise. See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China: Post-Preliminary Analysis of New Subsidy

Allegations, April 22, 2008. See also Memorandum to the File, Countervailing Duty Investigation of Laminated Woven Sacks from the People's Republic of China: Application of Adverse Facts Available for Shandong Shouguang Jianyuanchun Co., Ltd. and Shandong Longxing Plastic Products Co., Ltd, April 22, 2008. (Public versions of these memoranda are on file in the CRU.) As such, we have also determined its countervailable subsidy rate based entirely on adverse facts available. Id.

The Department did accept a voluntary response from Aifudi and did calculate a rate for Aifudi. This is the only calculated rate in this proceeding. While section 782(a) of the Act discusses the treatment of voluntary respondents in countervailing duty and antidumping investigations and reviews, it does so in the context of calculating an individual rate for the voluntary respondent provided it meets all of the criteria set forth in the statute. Because the Department does not consider a voluntary respondent to be "individually investigated" for purposes of the all others provision in the Act, its rate should not be included in the all others rate determined under section 705(c)(5)(A)(i) of the Act. In accordance with 19 CFR 351.204(d)(3), the Department does not include voluntary respondent's rates in the calculation of the all others rate. In commenting on the proposed regulation, one commenter argued, as the GOC does in this case, that this regulation was inconsistent with the statutory language. The Department disagreed, noting that "the statute does not define the term 'investigated' and does not directly address the question of whether voluntary respondents should be considered to be part of the Department's investigation." CVD Preamble, 62 FR at 27310. Analyzing the statutory provisions (with regard to antidumping) found at section 735(c)(5), which mirror the language of section 705(c)(5)(A), the Department explained that the better interpretation of the Act was that producers who were not "'selected' by the Department (i.e., voluntary respondents) are not considered to have been 'examined' (i.e., investigated), so that their margins should not contribute to the all others rate. In effect, the Department conducts parallel proceedings for voluntary respondents." Id.

Accordingly, the Department disagrees with the GOC's interpretation of the Act with regard to Aifudi's calculated rate and the all others provision. The Department's interpretation is reasonable, consistent with the Department's regulations, and most importantly, addresses a genuine concern about the possibility of manipulation of the Department's investigation proceedings. As the Department explained in the CVD Preamble,

> exclusion of the voluntary respondents from the determination of the all-others rate serves the obvious purpose of preventing distortion or outright manipulation of the all-others rate. The producers or exporters most likely to submit voluntary responses are those with reason to believe that they will obtain a lower margin by volunteering than they would obtain by being subject to the all-others rate. Inclusion of rates determined for voluntary respondents thus would be expected to distort the weighted-average for the respondents selected by the Department on a neutral basis.

Although the preamble addresses this issue in the antidumping context, the same principles are applicable in the CVD context. As such, because we do not include voluntary respondents in the calculation of the all others rate when we have actual calculated rates for the mandatory

respondents, it is entirely inappropriate to rely solely on the voluntary respondent's calculated rate as the all others rate. CVD Preamble, 62 FR at 27310.

In this case, we are faced with the situation that the subsidy rate for every mandatory company respondent is not calculated and is, instead, based on adverse facts available. Accordingly, section 705(c)(5)(A)(i) is not applicable in this case and we must turn to section 705(c)(5)(A)(ii) to determine the all others rate – any reasonable method. We disagree with petitioners that we should determine an all others rate under section 705(c)(5)(A)(ii) by applying the adverse facts available rates for each individual program and summing those rates to determine an overall subsidy rate applicable to all others. The Department has never approached the calculation of the all others rate in this fashion and petitioners' arguments are not persuasive that this would provide a more reasonable approach to establishing the all others rate when all mandatory respondents' rates are based on adverse facts available. We also disagree with the GOC, for the same reasons set forth above, that we should rely solely on Aifudi's rate for the all others rate. Contrary to the GOC's arguments, a voluntary respondent's information cannot be considered to be representative of the entire industry's experience since a voluntary respondent comes forward when it thinks its own experience is quite different from (i.e., its subsidies were significantly lower than and thus it was unrepresented by) the mandatory respondents' experience; and by extension, different from all other producers/exporters of subject merchandise. That three of the mandatory company respondents chose not to participate at all and the fourth impeded the Department's ability to analyze fully all potential subsidies received by its cross-owned and affiliated companies indicates that their subsidy rates would likely be high, and that the adverse facts available rates may be more probative of the experience of all other companies than the calculated rate of a voluntary respondent whose incentive for participating in the investigation is that its subsidy rate is significantly lower than the mandatory respondents' rates.

With respect to the GOC's reliance on the Court of International Trade's (CIT) decision in Yantai Juice Co. v. United States, 27 CIT 1709 (Nov. 20, 2003) (Yantai 2) as support for its argument that the Department is not allowed to use adverse facts available rates in its calculation of the all others rate, this description of the Court's analysis and finding is incorrect. In Yantai 1, the Court's remand ordered the Department to "justify the use" of a methodology that increased the value of the non-reviewed respondents' margins in an earlier remand even though the margins for all reviewed respondents' became zero as a result of a change in the Department's calculations. Yantai 1, 27 CIT at 487-88. Upon remand, the Department modified its all others calculation to use information derived from the questionnaire responses of participating mandatory respondents and information derived from the petition. Yantai 2, 27 CIT at 1712. The CIT affirmed the Department's remand in full. Id. at 1719. The Court never stated that the Department could not use adverse facts available under the all others antidumping provision, nor did it say that the Department could not use zero or de minimis margins. To the contrary, it noted that the SAA explicitly states that if the "expected" "method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." Yantai 1, 27 CIT at 487, citing SAA at 873. In this case, the "expected" methodology of section 705(c)(5)(A)(i) is not available, so it is reasonable for the Department to use another "reasonable method" under section 705(c)(5)(A)(ii).

We also disagree with the GOC's argument that inclusion of the mandatory respondents' adverse facts available rates in the all others rate would violate the due process of all other non-selected producers and exporters. The United States Court of Appeals for the Federal Circuit has recognized that the Department's statutory and regulatory procedures provide protections for all interested parties to an antidumping or countervailing duty investigation. See NEC Corps. v. United States, 151 F. 3d 1361, 1373-74 (Fed. Cir. 1998), cert. denied, 525 U.S. 1139 (1999). Indeed, the statutory and regulatory procedures provide all of the process to which interested parties are due. See Gulf States Tube Division of Quanex Corp. v. United States, 981 F.Supp. 630, 652 (CIT 1997) (holding "parties simply have a right to the procedures set forth in the antidumping statute or in the agency regulations implementing that statute"). Moreover, the courts have recognized that the Department has to be flexible in administering its procedural requirements, and that a decision to exercise such discretion is not reviewable as long as the substantial rights of the parties are not affected. See, e.g., NEC, 151 F.3d at 1373. This is particularly relevant with respect to the Department's application of "any reasonable method" under section 705(c)(5)(A)(ii) of the Act, which, by its terms, grants the Department discretion and flexibility, which was Congress' intention, as described further in the SAA language referenced above, and as explicitly recognized by the CIT in Yantai 1. See Yantai 1, 27 CIT at 488 (stating that "{t}he plain language of the statute allows Commerce the flexibility to formulate a methodology that permits it to best comply" with its mandate to calculate an accurate margin).

Given the unusual circumstances of this case, in which the subsidy rate for all four of the mandatory company respondents has been based entirely on adverse facts available and there is a single calculated rate for a voluntary respondent, we have determined that the most reasonable method for establishing the all others rate, pursuant to section 705(c)(5)(A)(ii), is to average all of the rates determined in this investigation. In the Department's view, it would be inappropriate to ignore the fact that adverse facts available had to be applied to all four of the mandatory company respondents. These were the very companies selected as representative of all producers/exporters. As such, it is reasonable to include their rates in the all others rate. We find that it is also reasonable to include the rate for the voluntary respondent in establishing the all others rate. Although the regulations state that voluntary respondents' rates will not be included in the calculation of the all others rate, here, we are not "calculating" the all others rate because we have no calculated rates for mandatory respondents upon which to rely. Rather, we are searching for a reasonable method to establish the all others rate. It is the Department's view that a simple average of all five rates – the adverse facts available rates for the four mandatory company respondents as well as the calculated rate for the voluntary – is reasonable because that average reflects the total average subsidization found to be attributable to the manufacture, production and exportation of LWS from the PRC.

VIII. Recommendation

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

Agree_____ Disagree_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date