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

FROM: Stephen J. Claeys
Deputy Assistant Secretary
Import Administration

SUBJECT: Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation of Raw Flexible Magnets from the People's Republic of China

I. Summary

On February 25, 2008, the Department of Commerce (the Department) published the preliminary determination in this countervailing duty (CVD) investigation. See Raw Flexible Magnets from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 73 FR 9998 (February 25, 2008) (RFM Preliminary Determination). The "Application of Facts Available and Use of Adverse Inferences" section below describes the methodology followed in this investigation to determine the CVD rate for China Ningbo Cixi Import Export Corporation (Cixi) and Polyflex Magnets Ltd. (Polyflex) (collectively, respondents). Also below is the "Analysis of Comments" section, which contains the Department's response to the issues raised in the case brief and rebuttal comments submitted by the Government of the People's Republic of China (GOC) and petitioner,[1] respectively. Based on the comments received, we have made certain modifications to the RFM Preliminary Determination. We recommend that you approve the positions described in this memorandum.

[1] Petitioner is Magnum Magnetics Corporation.

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

Comment 1: Application of CVD Law to China
Comment 2: Imposition of CVD Law on China and Administrative Procedures Act
Comment 3: Specificity of Tax Programs to Foreign-Invested Enterprises (FIEs)
Comment 4: Countervailability of Value Added Tax (VAT) Export Rebates
Comment 5: VAT and Import Duty Exemptions on Imported Equipment Are One Program
Comment 6: AFA Rates for Provincial Programs

II. Scope Comments

In the notices of preliminary determination for the antidumping (AD) investigations on RFM from the People's Republic of China (PRC) and Taiwan,[2] the Department explained that, on November 7, 2007, SH Industries, a U.S. importer of subject merchandise, argued that magnetic photo pockets, which are flexible magnets with clear plastic material fused to the magnet to form a pocket into which photographs and other items may be inserted for display, should be excluded from the scope of the AD and CVD investigations on RFM from the People's Republic of China and Taiwan. On November 13, 2007, Magnum Magnetics Corporation (petitioner) filed a response to the request by SH Industries, arguing that magnetic photo pockets are within the scope of the investigations. On April 11, 2008, petitioner submitted additional arguments concerning this issue. Because we received this letter only four business days before the statutory deadline for the AD RFM Preliminary Determinations, we did not have an opportunity to consider it prior to issuance of those preliminary determinations.

In the AD RFM Preliminary Determinations, the Department invited interested parties to submit comments on petitioner's April 11, 2008, submission and to present evidence concerning the meaning of the terms "sheeting, strips, and profiles" as those terms are used within the industry. Additionally, because the scope language stated that "subject merchandise may be of any color and may or may not be laminated or bonded with paper, plastic or other material, which paper, plastic or other material may be of any composition and/or color," the Department encouraged interested parties to comment on whether the plastic photo pocket fused to the flexible magnet satisfies this description. In addition, the Department stated that interested parties could submit information that would be relevant in an analysis conducted pursuant to 19 CFR 351.225(k)(2).

In May and June 2008, petitioner, Target, A-L-L, and SH Industries filed comments and rebuttal comments regarding the scope of the investigations and magnetic photo pockets. On June 9, 2008, officials from the Department met with representatives of Target to discuss the scope of the investigations. See Memorandum to the File, dated June 10, 2008. On June 13, 2008, counsel for petitioner met with officials from the Department to discuss the scope of the investigations. See Memorandum to the File, dated June 16, 2008.

The Department has analyzed the comments submitted by SH Industries, Target, A-L-L, and petitioner and has determined that magnetic photo pockets are within the scope of the

[2] See Preliminary Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from the People's Republic of China, 73 FR 22327, 22328 (April 25, 2008), and Preliminary Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from Taiwan, 73 FR 22332, 22333 (April 25, 2008) (collectively referred to as "AD RFM Preliminary Determinations").

investigations. The Department has also modified the language describing the scope of these investigations to clarify the product coverage. In its request, SH Industries acknowledges that its magnetic photo pockets consist of flexible magnet material with a layer of plastic laminate fused along the sides of the flexible magnet. At no point does SH Industries argue that the flexible magnetic material in its photo pockets does not meet the physical description of the flexible magnets covered by the scope of the investigations. Rather, SH Industries argues that the attachment of a layer of clear plastic to the flexible magnet results in a product that is outside the scope of the investigations because the purpose of the product is to protect photographs.

Similarly, Target asserts that, rather than being a raw flexible magnet, magnetic photo pockets are properly characterized as finished retail products which use magnetic sheeting as an input. Target also argues that the clear plastic laminate is neither bonded nor laminated to the magnetic sheeting.

A-L-L argues that the scope should be limited to products produced by the petitioner as evidenced by inclusion on the petitioner's website.

As an initial matter, the Department does not generally define subject merchandise by end-use application. Moreover, because the language of the scope stated originally that "{s}ubject merchandise may be of any color and may or may not be laminated or bonded with paper, plastic, or other material, which paper, plastic, or other material may be of any composition and/or color" (see RFM Preliminary Determination, 73 FR at 9999), the plastic laminate fused to the sides of the flexible magnet does not remove the photo pockets from the scope of the investigations. Finally, the issue of whether an item appears on the petitioner's website is not relevant to our analysis. For these reasons, we have determined that the magnetic photo pockets described by SH Industries are within the scope of the investigations. In addition, we have clarified that "{s}ubject flexible magnets may be in either magnetized or unmagnetized (including demagnetized) condition, and may or may not be fully or partially laminated or fully or partially bonded with paper, plastic, or other material, of any composition and/or color." Finally, because we have received inquiries concerning the terminology in the scope language and product coverage, we have clarified product coverage by reordering the scope language and including certain explanatory definitions. Our revised scope language neither enlarges nor contracts product coverage. See "Scope of Investigation" section in the final notice.

The Department received a scope-ruling request from Magnet LLC on May 21, 2008. Because this request was made after the AD RFM Preliminary Determinations, the Department has not addressed this request in this final determination. The Department will consider Magnet LLC's scope-ruling request in the event the Department publishes an AD or CVD order on RFM from Taiwan or the PRC.

III. Period of Investigation

The period of investigation (POI) for which we are measuring subsidies is January 1, 2006, through December 31, 2006. See 19 CFR 351.204(b)(2).

IV. Application of Facts Available and Use of Adverse Inferences

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (the Act), provide that the Department shall apply "facts otherwise available" if, inter alia, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been

requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

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

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as adverse facts available (AFA) information derived from the petition, the final determination, a previous administrative review, or other information placed 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. Secondary information is defined as "[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. 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.

The Department has concluded that it is appropriate to base the final determination for Cixi and Polyflex on facts otherwise available. Cixi failed to respond to the Department's October 25, 2007, shipment data questionnaire and October 25, 2007, initial CVD questionnaire. Because Cixi 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. Polyflex, which was the only active mandatory respondent, withdrew from the investigation on February 12, 2008. Consequently, in reaching our final determination, pursuant to sections 776(a)(2)(A),(B), (C), and (D) of the Act, we are basing Polyflex's CVD rate 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. By failing to submit a response to the Department's CVD questionnaires, Cixi did not cooperate to the best of its ability in this investigation. Polyflex withdrew from the investigation and did not provide to the Department all of the information requested[3] or the opportunity to verify the information that was submitted on the record. Thus, we find that both Cixi and Polyflex failed to cooperate by not acting to the best of their ability in this investigation, and our final determination is based on total AFA.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. It is the Department's practice to select, as AFA, the highest calculated rate for the same or similar type of program in any segment of the proceeding.[4] Where such information is not available, it is the Department's practice to apply the highest calculated subsidy rate for any program otherwise listed. See, e.g., Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006) (Pistachios from Iran), and accompanying Issues and Decision Memorandum at "Analysis of Programs" and Comment 1; and Coated Free Sheet Paper from the Republic of China: Final Determination of Countervailing Duty Investigation, 72 FR 60645 (October 25, 2007) (CFS China Final), and accompanying Issues and Decision Memorandum (CFS Decision Memorandum) at "Use of Adverse Facts Available" section and Comment 24.

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

Because Cixi and Polyflex failed to act to the best of their ability in this investigation, as discussed above, for each program examined, we made the adverse inference that each company benefitted from each program. To calculate the program rate for the nine alleged income tax

[3] Polyflex did not submit a response to the February 7, 2008, supplemental questionnaire.

[4] The Department's first preference is to use the highest calculated rate for the same program (i.e., identical program); if there is no identical program, then the Department's preference is to use the highest calculated rate for a similar program (e.g., tax program to tax program, loan program to loan program, etc.).

programs pertaining to either the reduction of the income tax or the payment of no income tax, we have applied an adverse inference that Cixi and Polyflex paid no income tax during the POI. The standard income tax rate for corporations in China is 30 percent, plus a 3 percent provincial income tax rate. Therefore, the highest possible benefit for these nine income tax programs is 33 percent. We are applying the 33 percent AFA rate on a combined basis (i.e., the nine programs combined provided a 33 percent benefit). This 33 percent AFA rate does not apply to tax credit and refund programs.

For the remaining programs in this investigation (including the tax credit and refund programs), consistent with the RFM Preliminary Determination, we are applying, where available, the highest subsidy rate calculated for the same or similar program in a China CVD investigation. Absent a subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed. At the preliminary determination, we relied on the subsidy rates calculated in CFS China Final as our AFA rates. See RFM Preliminary Determination, at 10001-2, and CFS Decision Memorandum at "Analysis of Programs." However, since the publication of the RFM Preliminary Determination, the Department has reached affirmative final CVD determinations in several investigations of products from the PRC. See 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 China Final); Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination, 73 FR 35642 (June 24, 2008) (Light-Walled China Final); and Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008) (Sacks China Final) and accompanying Issues and Decision Memorandum (Sacks Decision Memorandum). As such, we are including the subsidy rates calculated in those final determinations in our AFA analysis in the instant investigation because those final determinations were completed prior to the statutory deadline of the RFM investigation. We also continue to include, among the pool of available AFA program rates, the subsidy rates calculated in the CFS China Final.

For this final determination, we are able to match based on program type the following programs to subsidy rates calculated in the CFS China Final: Tax Credits on Domestic Equipment Purchases,[5] Reinvestment Tax Benefits for FIEs,[6] VAT Refunds on Exports,[7] VAT and Tariff Exemptions on Imported Equipment,[8] and Preferential Loan Programs and Interest Rates in Guangdong Province.[9] For the remaining programs,[10] we have selected as the AFA rate, the highest subsidy rate calculated in a completed China CVD investigation.

In applying the highest calculated subsidy rate for any program otherwise listed, we are disregarding the rates calculated under the programs "Hot-Rolled Steel for Less Than Adequate

[5] Program matched to "VAT and Tariff Exemptions on Imported Equipment," (calculated rate of 1.51 percent ad valorem) see CFS Decision Memorandum.
[6] Id.
[7] Id.
[8] Id.
[9] Program matched to "Government Policy Lending Program," (calculated rate of 4.11 percent ad valorem) see CFS Decision Memorandum.
[10] State Key Technologies Renovation Project Fund, GOC Payment of Legal Fees, Provincial and Local Direct Grants in Guangdong Province, Provincial and Local Direct Grants in Zhejiang Province, and Provision of Goods for Less Than Adequate Remuneration in Zhejiang Province.

Remuneration" (see CWP China Final and Light-Walled China Final) and "Government Provision of Inputs (i.e., biaxial-oriented polypropylene) for Less than Adequate Remuneration" (see Sacks China Final), because the RFM industry clearly cannot use the products for which those rates were calculated (i.e., hot-rolled steel and biaxial-oriented polypropylene) in the production of subject merchandise.[11] The Department's decision not to use, as AFA, these program rates is based on the particular facts of this investigation and this particular set of facts may not be applicable or identifiable in another proceeding. Thus, for this final determination, we have assigned as the AFA rate for the remaining programs the 13.36 percent ad valorem rate calculated for the "Provision of Land for Less Than Adequate Remuneration" in the Sacks China Final. See Sacks Decision Memorandum at "Provision of Land for Less Than Adequate Remuneration."

With regard to the reliability aspect of corroboration, we note that these rates were calculated in prior final CVD determinations. No information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of 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 AFA, the Department will not use it. See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review, 61 FR 6812 (February 22, 1996). In the absence of record evidence concerning these programs due to respondents' decision not to participate in the investigation, the Department has reviewed the information concerning China subsidy programs in this and other cases. For those programs for which the Department has found a program-type match, we find that programs of the same type are relevant to the programs of this case. For the programs for which there is no program-type match, the Department has selected the highest calculated subsidy for any China program from which the respondents could conceivably receive a benefit to use as AFA. The rate is therefore relevant to the respondents in that it is an actual calculated CVD rate for a China program from which the respondents could receive a benefit. No evidence had been presented or obtained which contradicts the reliability or relevance of the secondary information which was information from a prior China CVD investigation. See RFM Preliminary Determination at 10001 - 10002. Due to the lack of participation by the respondents and the resulting lack of record information concerning these programs, the Department has corroborated the rates it selected to the extent practicable.

On this basis, we determine the AFA countervailable subsidy rate for Cixi and Polyflex to be 109.95 percent ad valorem. See Subsidy Chart below.

[11] The Department's finding that the industry under investigation in this proceeding cannot use the products for which those rates were calculated is based on information contained in the petition and the International Trade Commission's (ITC) preliminary analysis. See Raw Flexible Magnets from the People's Republic of China and Taiwan: Petition for the Imposition of Antidumping and Countervailing Duties, (September 21, 2007) Volume 1, at 5 -12; see also Raw Flexible Magnets from China and Taiwan: Investigation Nos. 701-TA-452 and 731-TA-1129 and 1130 (Preliminary), ITC Publication 3961, November 2007, at 6 – 8.

Subsidy Rate Chart

No.	Program	Type	AFA Rate
1	Preferential Tax Policies for FIEs (Two Free, Three Half Program) *	Income Tax	33.00%
2	Preferential Tax Policies for Export-Oriented FIEs *	Income Tax	33.00%
3	Tax Subsidies to FIEs Based in Specially Designated Geographic Areas *	Income Tax	33.00%
4	Tax Credits on Domestic Equipment Purchases	Income Tax Credit	1.51%
5	Reinvestment Tax Benefits for FIEs	Income Tax Refund	1.51%
6	Reduced Income Tax Rate for New High-Technology FIEs *	Income Tax	33.00%
7	Reduced Income Tax Rate For Technology and Knowledge Intensive FIEs *	Income Tax	33.00%
8	VAT Refunds on Exports	VAT	1.51%
9	VAT and Tariff Exemptions on Imported Equipment[12]	VAT	1.51%
10	State Key Technologies Renovation Project Fund	Grant	13.36%
11	GOC Payment of Legal Fees	Grant	13.36%
	Local and Provincial Programs		
12	Anhui Province *	Income Tax	33.00%
13	Zhejiang Province *	Income Tax	33.00%
14	Shanghai Municipality *	Income Tax	33.00%
15	Beijing Municipality *	Income Tax	33.00%
16	Preferential Loan Programs and Interest Rates in Guangdong Province	Loan	4.11%
17	Provincial and Local Direct Grants - Guangdong Province	Grant	13.36%
18	Provincial and Local Direct Grants - Zhejiang Province	Grant	13.36%
19	Provision of Goods for Less Than Adequate Remuneration in Zhejiang Province	LTAR	13.36%
	Total AFA Rate		**109.95%**

* We are applying the 33% AFA rate on a combined basis (i.e., the nine programs provide a 33% benefit).

[12] For the final determinate, we have combined the programs "Import Duty Exemptions on Imported Equipment" and "VAT Exemptions on Imported Equipment." See Comment 5.

V. Analysis of Comments

Comment 1: Application of CVD Law to China

The GOC argues that the Department does not have the authority to apply the CVD law to China as long as it designates China as a non-market economy (NME). The GOC asserts that the Congressional intent in the Act is clear that the CVD law does not apply to NME countries. The GOC asserts that the Department's interpretation in CFS China Final, that the exclusion of the term "non-market economy" in sections 701 and 771(5) and (5A) of the Act allows unrestricted use of the CVD law is unsupportable. The GOC contends that when the proper tools of statutory construction are used, and the entirety of the statute analyzed, the non-inclusion of this term in these sections, combined with its inclusion in others, demonstrates that the Department does not have the authority to apply the CVD law to NMEs. The GOC posits that the Act, in fact, expressly prohibits the Department from initiating CVD investigations against NMEs. The GOC states that, if the Department fully evaluates the context and structure of sections 19 U.S.C. § 1671, 1673, 1675, and 1677, which encompass the entirety of the U.S. AD and CVD law, and does not limit its evaluation to only sections 1671 and 1677(5) and (5A) as it did in the RFM Preliminary Determination and CFS China Final, then it will be clear that the Department does not have the authority to apply the CVD law to NMEs.

In support of its position, the GOC states that section 1671 "Imposition of Countervailing Duties" does not contain reference to NMEs. The GOC disagrees with the Department's interpretation in CFS China Final that section 1671 contains a "general grant of authority to conduct CVD investigations," and thus, demonstrates that the Department is free to apply, or not apply, the CVD law to NMEs. See CFS Decision Memorandum at Comment 1. The GOC observes that section 1673 "Imposition of Antidumping Duties" also does not contain reference to NMEs and, yet, the Department does not have the discretion not to apply the AD law to NMEs. The GOC further points out that while specific portions of sections 1677 (i.e., (5) and (5A)) do not contain reference to NMEs, that term is used elsewhere in the section in reference to AD proceedings and not CVD proceedings. The GOC adds that "non-market economy country" is referenced in section 1677(b) for instructions on the calculation of normal value for AD investigations, but is not referenced anywhere in the instructions on the calculation of subsidies for CVD investigations. The GOC contends that, had Congress intended to make the CVD law applicable to NMEs, even at the Department's discretion, then Congress would have included an express reference to investigations involving products from NME countries in a CVD section. Therefore, the GOC maintains that, absent new legislation, the Department did not have the discretion to initiate this or any other CVD investigation against China.

Further, contrary to the Department's position, the GOC discusses that the Court of International Trade (CIT) in Government of the People's Republic of China v. United States, 483 F. Supp. 2d 1272 (CIT 2007) (China v. U.S.), did not either affirm the Department's proposed procedure of applying CVD law to NME countries or agree with the Department's reasoning in the CFS China Final. Rather, in that case, the CIT solely ruled that it did not have jurisdiction to decide the merits of the case. Accordingly, the GOC contends the Department cannot reference China v. U.S. for any purpose other than its jurisdictional finding.

In addition, the GOC argues that not only is the current statute instructive, but also the history of the Court of Appeals for the Federal Circuit's (CAFC) and Department's interpretation of the predecessor statute, section 303. The GOC discusses the CAFC's 1986 ruling in

Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel), in which the CAFC ruled that the CVD law does not apply to NMEs. The GOC asserts that the Department's narrow interpretation of Georgetown Steel as only going to its discretion is not supported for the following reasons: in Georgetown Steel the CAFC definitively ruled that, under the statutory scheme, the CVD law was not intended to be applied against NME countries; the Department has consistently applied Georgetown Steel as controlling precedent to later time periods and under the current CVD law; and, subsequent Congressional action confirms that Georgetown Steel remains controlling precedent. These arguments are presented in turn.

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

The Department has consistently applied Georgetown Steel as controlling precedent to later time periods and under the current CVD law: The GOC discusses that, for two decades following Georgetown Steel, the Department has consistently dismissed CVD petitions involving NME countries based on the CAFC's statutory interpretation. See, e.g., Final Negative Countervailing Duty Determination: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992); and Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary, 67 FR 60223 (September 25, 2002) (Sulfanilic Acid from Hungary). The GOC insists that the Department made this decision categorically as applicable to all NMEs without analyzing any of the inherent differences between NMEs.

Subsequent Congressional action confirms that Georgetown Steel remains controlling precedent: The GOC contends that Congress has amended the AD and CVD laws since Georgetown Steel and each time has embraced either directly or indirectly the Georgetown Steel holding. The GOC discusses the 1998 Omnibus Trade and Competitiveness Act (Pub. L. No. 1900-148, 102 Stat. 1107 (1988)), claiming that, regarding this legislation, Congress refused to amend the CVD law to apply to NMEs. Also in connection with the 1988 Omnibus Trade and Competitiveness Act, the GOC claims that an early draft of the bill shows that the House Ways and Means Committee recognized that the Department did not have the discretion to apply the CVD law to NMEs and that the Department needed an explicit act of Congress to do so. The GOC next contends that with the URAA (Pub. L. No. 103-465, 108 Stat. 4814 (1994)), Congress had another opportunity to amend the CVD law to apply to NMEs, but again refused to do so. As such, the GOC maintains that Congress' refusal to amend the CVD law to apply to NMEs or codify the Department's discretion to do so is evidence that Congress agreed with the interpretation in Georgetown Steel that the statute proscribes the application of CVDs to NMEs.

Petitioner acknowledges that the CVD statute does not mention NME countries generally or China in particular in any provision, including the provision for the initiation of a CVD investigation (19 U.S.C. § 1671(a)). Petitioner discusses that Congress, however, could have added language to this provision expressly limiting the application of the CVD law to only market economy countries, or expressly prohibiting its application to NME economies. That Congress chose not to do so, petitioner contends, is a demonstration of its intent not to provide for any such limitations on the application of the CVD law. The language of 19 U.S.C. §

1671(a), petitioner claims, is unambiguous in requiring the Department to apply CVDs to any "country" without limiting or restricting their application to any particular country or type of economy.

Petitioner argues that the statute makes clear that it contemplates the application of CVDs against any "Subsidies Agreement country," by requiring the International Trade Commission (ITC) to determine whether the subject imports cause injury. The definition of "country" and "Subsidies Agreement country" are broad and cannot be read to exclude China, according to petitioner. Similarly, the definition of "countervailable subsidy" (19 U.S.C. § 1677(5)(A) & (B)) does not confine this concept to actions of market economy governments. The fact that neither NMEs nor China are mentioned in the CVD law is telling, in petitioner's view, because had Congress intended to exclude these countries from coverage, it would have done so explicitly.

Because the statute is unambiguous, petitioner claims there is no need to look at additional sources to interpret it. Nevertheless, petitioner addresses the GOC's arguments on this point. First, according to petitioner, the legislative committee reports related to the Trade Agreements Act of 1979 (which gave rise to the current CVD statute) are silent with respect to the application of CVD remedies to NMEs. Had Congress intended to exclude NMEs from the CVD law, petitioner claims Congress would have made its intent clear. Second, in two major changes to the CVD law since 1979, the 1988 Omnibus Trade and Competitiveness Act and the URAA, petitioner points out that Congress did not change the CVD law so that it would not apply to NMEs. Third, petitioner contends that six years subsequent to the URAA, Congress expressly recognized the availability of CVDs as a remedy against imports from China as a result of China's accession to the WTO. Petitioner points to the fact that when China joined the WTO, China agreed to subject itself to the subsidies and AD disciplines under its Accession Protocol. See "Accession of the People's Republic of China," WTO/L/432 (November 23, 2001). Petitioner adds that Congress passed legislation indicating that it intended U.S. businesses to obtain the full opportunities available as a result of China's accession and authorized appropriations to the Department for the purpose of defending the CVD measures with respect to products from China. See "Normal Trade Relations for the People's Republic of China," Public Law No. 106-286 (October 20, 2000).

Petitioner further argues that Georgetown Steel does not prohibit the Department from imposing CVDs on imports from China. The issue on appeal in Georgetown Steel, petitioner notes, was whether the Department had the discretion not to apply the CVD law to NMEs, and the CAFC found that the Department had such discretion. To support this, petitioner points to the CAFC's reliance on United States v. Zenith Radio Corp., 562 F.2d 1209, 1219 (C.C.P.A.), *aff'd* 437 U.S. 443 (1978); and Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842-45, 104 S. Ct. 2778 (1984) (Chevron), as evidence that the Court was deferring to the agency's discretion in the absence of a clear Congressional intent.

Petitioner also asserts that the GOC relies on dicta in citing to the CAFC's discussion of legislation subsequent to section 303. Petitioner observes that only one court has had the opportunity to address the question of applicability of the CVD law to China and that court agreed with the Department's preliminary conclusion that Georgetown Steel only affirmed the Department's discretion not to apply the CVD law. See China v. U.S., 483 F. Supp. 2d 1274, 1282. Petitioner further notes that the current CVD law was not at issue in Georgetown Steel and that section 303, the statute at issue in that case, has since been repealed and featured very different language (i.e., "bounty" or "grant" from a foreign government) than the current statute, which uses much broader language, such as "subsidies."

In addition, petitioner draws a distinction between Sulfanilic Acid from Hungary and this instant and other CVD investigations involving China. Specifically, petitioner discusses that unlike in Sulfanilic Acid from Hungary, the Department can quantify countervailable subsidies in China. Petitioner discusses that the benefits of subsidies in China can now be measured because market-based benchmarks are prevalent in the country and, as provided for in China's WTO Accession Protocol at Article 15, benchmarks outside of China can be used where there are "special difficulties."

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

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME." See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984) (Wire Rod from Poland); Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) (Czech Wire Rod) (collectively, Wire Rod investigations). 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 Applicability Memorandum.[13] 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.

[13] Department's memorandum regarding "Countervailing Duty Investigation of Coated Free Sheet Paper From the People's Republic of China – Whether The Analytic Elements Of The Georgetown Steel Opinion Are Applicable To China's Present-Day Economy" (March 29, 2007) (Georgetown Steel Applicability Memorandum). The memorandum is available at http://ia.ita.doc.gov/download/cfsp/china-cfs-georgetown-applicability.pdf.

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 China v. U.S., 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318). Therefore, the court declined to find that the Department's investigation of subsidies in China was ultra vires.

The GOC's argument that Congress' failure to amend the law subsequent to Georgetown Steel amounts to a Congressional action of non-application of the CVD law to NMEs is also legally flawed. The fact that Congress has not enacted any NME-specific provisions to the CVD law does not mean the Department does not have the legal authority to apply the law to NMEs. The Department's general grant of authority to conduct CVD investigations is sufficient. See, e.g., Sections 771(5) and (5A) of the Act. Given this existing authority, no further statutory authorization is necessary. Furthermore, since the holding in Georgetown Steel, Congress has expressed its understanding that the Department already possesses the legal authority to apply the CVD law to NMEs on several occasions. For example, on October 10, 2000, Congress passed the Permanent Normal Trade Relations 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." See 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." See 22 U.S.C. § 6941(5). In these statutory provisions, Congress is referring, in part, to China's commitment to be bound by the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) as well as the specific concessions China agreed to in its Accession Protocol.

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

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 was discussed in Georgetown Steel, of not applying the CVD law to the NMEs at issue, it did not conclude that the Department was unable to do so. To the contrary, Congress did not ratify any rule that the CVD law does not apply to NMEs because the Department never made such a rule.

The GOC additionally argues that the Department cannot make a determination in this case that is different from Sulfanilic Acid from Hungary. As an initial matter, the Department has fully explained the differences between Sulfanilic Acid from Hungary and applying the CVD law to imports from China.[14]

The Department's decision in Sulfanilic Acid from Hungary is not categorically applicable to all NMEs. After its initial analysis of the Soviet-styled economies in the Wire Rod investigations, the Department began a practice of not looking behind the designation of a country as an NME when determining whether to apply the CVD law to imports from that country (assuming no claim for a market-oriented industry was made).[15] Now, the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it

[14] See generally Georgetown Steel Applicability Memorandum.
[15] See e.g. Sulfanilic Acid from Hungary, 67 FR 60223.

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.[16] However, the determination of whether the CVD law can be applied does not necessarily create different types of NMEs. It is simply recognizing the inherent differences between NMEs.

Furthermore, 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.[17] As explained by the Supreme Court:

> An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.

Id., 500 U.S. at 186-87 (citations and internal quotations omitted).

Comment 2: Imposition of CVD Law on China and Administrative Procedures Act

Assuming, *arguendo*, that the Department has the discretion to apply CVDs to NMEs, the GOC states that the Department's sudden substantive change in its long-standing approach is an impermissible violation of the Administrative Procedure Act's (APA) rulemaking procedures. The GOC contends that whenever the Department makes a new rule or changes a previous rule it must comply with the APA's notice-and-comment procedures. See Shinyei Corp. of Am. v. United States, 355 F.3d 1297, 1309 (Fed. Cir. 2004) (finding consistently that the APA generally applies to CVD and AD proceedings). The GOC insists that the initiation of a CVD case against China, an NME, is a substantial revision of the Department's previous rule of not applying CVDs to NMEs and, therefore, the Department is required to provide a notice and comment period to give interested persons an opportunity to participate in the rule-making process and then publish its final clarification with detailed responses to all the comments received.

The GOC further insists that the Department's long-standing statutory interpretation that the CVD law does not apply to NMEs satisfies the requirement of a rule rather than a policy or practice. The GOC emphasizes that the repeated affirmation of this position over a 20-year period solidifies the fact that the Department has codified this approach. In support of its position, the GOC cites to Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030, 1031, 1034 (D.C. Cir. 1999) (Alaska Hunters), where the court found that an FAA interpretation followed for almost 30 years, and affirmed in agency adjudication, constituted an authoritative interpretation that could not be altered without notice and comment rulemaking. The GOC also cites to Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001), in which the court found that a change in "long established and consistent practice that substantially affects the regulated industry" was subject to APA notice and comment requirements.

To further support its claim that the Department's non-application of the CVD law to NMEs is a binding rule, the GOC points to several actions taken by the Department, which include a request for comments from the general public in the CVD investigation on Textiles, Apparel, and Related Products from the People's Republic of China, 48 FR 46600, 46601 (October 13, 1983); findings in Wire Rod from Poland, 49 FR 19374, 19376 ("[b]ecause the

[16] See e.g. Georgetown Steel Applicability Memorandum.
[17] See e.g. Rust v. Sullivan, 500 U.S. 173, 187.

notion of subsidy is, by definition, a market phenomenon, it does not apply in a non-market setting."), and Potassium Chloride from the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984) ("In light of our determination that, ..., as a matter of law, [subsidies] cannot be found in NMEs ..."); the General Issues Appendix in Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37261 (July 9, 1993) ("the CVD law is not applicable to non-market economies because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy . . . in a non-market economy, it is impossible to say that a producer has received a subsidy in the first place."); and Countervailing Duties; Final Rule, 63 FR 65348, 65630 (November 25, 1998) (CVD Final Rule) ("… 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). … We intend to continue to follow this practice.") The GOC argues that the CVD Final Rule, as well its previous incarnations in 1984 and 1993, is the Department's definitive interpretation of the statute.

Accordingly, any change in that definitive interpretation requires that the Department engage in notice and comment rulemaking pursuant to the APA, asserts the GOC, citing to Mercy Medical Skilled Nursing v. Thompson, 2004 WL 3541332 (D.D.C. 2004), where the court found that Health and Human Services had violated the APA by changing its 20-year long-standing practice of calculating reimbursements for services without a notice and comment period. The GOC, therefore, argues that since the Department failed to follow the required procedures, its actions in initiating this and other CVD investigations on Chinese products were unlawful and should be revoked.

Petitioner disputes the GOC's statements that the Department's prior non-application of the CVD law to NMEs is a rule. The Department's non-application of the CVD law is a practice, not a rule, because no rulemaking procedures were employed in adopting the practice, according to petitioner. At most, petitioner claims, the Department's non-application of the CVD law to NMEs is a non-binding interpretative rule. Such a rule advises "the public of the agency's construction of the statutes and rules which it administers,"[18] and, therefore, is exempt from the APA's formal rulemaking requirements.[19] Petitioner further argues that all relevant authorities (CVD statute, Congressional enactments, and Georgetown Steel) establish that the application of CVD law against China is fully within the Department's discretion. This discretion, according to petitioner, allows the Department to depart from its prior practice of not applying the CVD law against Soviet-style NMEs to apply the CVD law in cases involving China. Further, petitioner discusses that the Department addressed and rejected the GOC's arguments in the CFS China Final and nothing has changed since that decision. See CFS Determination Memorandum at Comment 2.

Department's Position: 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). Nevertheless, the GOC

[18] See Chrysler Corp. v. Brown, 441 U.S. 281, 302 n. 31 (1979) (quoting *Attorney General's Manual on the Administrative Procedure Act,* at 30 n. 3 (1947)).

[19] See 5 U.S.C. § 553(b)(3)(A) (The APA's notice-and-comment requirements do not apply "to interpretative rules, general statements of policy or procedure, or practice.").

incorrectly claims that the Department has changed an allegedly binding rule regarding the application of the CVD law to NMEs without employing adequate process under the APA. The Department has never promulgated a rule pursuant to the APA regarding the application of the CVD law to NMEs.

The APA's notice-and-comment requirements do not apply "to interpretative rules, general statements of policy or procedure, or practice." See 5 U.S.C. § 553(b)(3)(A). As explained in more detail below, the decision as to whether to apply the CVD law to NMEs involves the Department's practice or policy, not a promulgated rule, and is, therefore, not subject to the APA. An agency has broad discretion to determine whether notice-and-comment rulemaking or case-by-case adjudication is the more appropriate procedure for changing a policy or a practice. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (Chenery Corp.) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). Here, the decision of whether a subsidy can be calculated in an NME hinges on the facts of the case, and should be made exercising the Department's "informed discretion." 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 China v. U.S., 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"); Sonco Steel Tube Div. v. United States, 694 F. Supp. 959, 966 (CIT 1988) (finding that formal rulemaking procedures were not required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price). This is because it is necessary for the Department to have the flexibility to observe the actual operation of its policy through the administrative process and as opposed to formalized rulemaking. See Ceramica Regiomontana, S.A. v. United States, 10 CIT 399, 404-05, aff'd, 810 F.2d 1137 (Fed. Cir. 1987). The Department provided a fully reasoned analysis for its change of practice in this case. See Georgetown Steel Applicability Memorandum.

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

nature.")). Unquestionably, these cases demonstrate 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 AD and CVD proceedings.

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. As discussed above, the GOC's argument premised on these determinations is incorrect because 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.

For example, the GOC cites to Wire Rod from Poland arguing that, through that case, the Department created a binding rule that the CVD law cannot apply to NMEs such as China. In that case (as well as the Czech Wire Rod case) which 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. [20]

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 CVD law, cannot be found in an NME."[21] 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. Indeed, the Department's subsequent actions demonstrate that it did not create a rule against the application of the 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.[22]

The GOC references a statement in the General Issues Appendix to the 1993 steel cases, again claiming that a reference to the Department's practice 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." See 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

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[20] See Wire Rod from Poland, 49 FR 19374.

[21] Id.; see also Czech Wire Rod.

[22] See Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, 57 FR 877 (Jan. 9, 1992) (Lug Nuts from the PRC). The Department ultimately rescinded the CVD investigation on the bases of the AD investigation, the litigation, and a subsequent remand determination, concluding that it was not a market-oriented industry. See 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).

was not appropriate for this type of decision. Contrary to the GOC's claims, the Department reiterated its position that the decision not to 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).[23]

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*." See Sulfanilic Acid from Hungary at 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.

Comment 3: Specificity of Tax Programs to FIEs

The GOC objects to the Department's treatment of FIEs as a specific "enterprise or industry" within the meaning of section 771(5A)(D)(i) of the Act. In the GOC's view, the Department's finding ignores the "rule of reason" dictated by the SAA to avoid countervailing subsidies spread throughout an economy. See SAA at 930, 931. The GOC contends that the Department's FIE analysis is incorrect because it confuses a "common characteristic" eligibility requirement with a limitation to an "enterprise or industry." While there is a requirement for participation in the program (i.e., foreign investment), the program involves numerous types of enterprises (i.e., numerous corporate forms, such as equity joint ventures, contractual joint ventures, and wholly owned foreign enterprises) and virtually all industries, according to the GOC. Therefore, the GOC asserts that with no limitation on the number, form of enterprise, or type of industry, the tax programs cannot be specific within the meaning of the statute.

The GOC further discusses that the CVD Final Rule mandates that: "The purpose of the specificity test is simply to ensure that subsidies that are distributed very widely throughout an economy are not countervailed." See CVD Final Rule, at 65357. The GOC adds that the court has affirmed the Department's position that a program limited in availability to industries with a certain level of foreign debt was not specific. In PPG Industries, Inc. v. United States, 978 F.2d 1232, 1240-41 (Fed. Cir. 1992) (PPG II), the court explained: "Because eligibility requirements always serve to limit participation in any given program and may do so indiscriminately, something more must be shown to prove that the program benefits only a specific industry or group of industries. Similarly, although the actual number of eligible firms must be considered, it is not controlling. Instead, the actual make-up of the eligible firms must be evaluated. The analysis determines whether those firms comprise a specific industry or group of industries."

As in the example of PPG II, the GOC asserts there are numerous enterprises (over 200,000) that can receive the alleged benefits with no limitation on the type or number of industries. The GOC adds that while participation in these tax programs is restricted by a certain characteristic, i.e., foreign investment (or foreign debt in the case of PPG II), both PPG II and

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

the CVD Final Rule make clear that the focus of section 771(5A)(D)(i) of the Act is not the commonality of a certain characteristic, but rather the limitation to a certain enterprise, industry or group of industries. Concerning the FIE tax programs, the GOC asserts that there is no limitation to a certain enterprise, industry, or group of industries, but instead a minor common characteristic (i.e., foreign investment) that cannot be the basis for specificity. The GOC contends that nowhere has the Department explained how a category that encompasses FIEs, or even a subset such as productive or export-oriented FIEs, is sufficiently limited in number to satisfy the Department's requirements for specificity. The GOC, therefore, requests that the Department revise its AFA rate to exclude the 33 percent rate for the income tax programs.

Petitioner asserts that the GOC's argument that the tax programs for FIEs are too broadly available to be countervailable assumes facts that are not on the record, e.g., that "there are numerous enterprises (over 200,000) that can receive the alleged benefits with no limitation on the type or number of industries."[24] Petitioner contends that the information on the record is counter to the GOC's claims. Petitioner notes that each of the five tax programs is limited to a particular subset of FIEs: productive FIEs, export-oriented FIEs, FIEs located in specific geographical areas, new high-technology FIEs, and technology and knowledge intensive FIEs. Petitioner adds that neither the GOC nor the mandatory respondents provided information about these programs in this investigation. Therefore, in the absence of evidence to the contrary, and given the lack of cooperation from the respondents, petitioner argues that the Department's policy requires it to make the adverse inference, based on the facts available, that access to each program is specific and countervailable.

Petitioner further argues that, contrary to the GOC's assertion, PPG II is consistent with the Department's finding that the FIE tax programs are countervailable. Specifically, in PPG II, the court upheld the Department's determination that a program available for "all Mexican firms" to refinance long-term foreign debt was not countervailable because its limitation to "companies with long-term foreign debt incurred before December 20, 1982" was merely an "eligibility requirement" rather that a limitation to a specific group of industries. See PPG II, at 1240. Petitioner states that, by contrast, the tax programs found to be countervailable in this investigation are not made available without limitation to all Chinese firms that pay taxes. Instead, access to the programs is restricted to particular groups of enterprises: qualified FIEs that must meet certain foreign-ownership requirements in addition to other criteria, such as qualifying as "productive" FIEs, export oriented FIEs, etc. Petitioner asserts that this is precisely the type of "expressly limit{ed} access" that is required to establish *de jure* specificity under section 771(5A)(D)(i) of the Act.

Finally, petitioner asserts that the GOC misunderstands the Department's response to comments on determining a "group" in the CVD Final Rule. Petitioner contends that the Department states there is "no requirement that the members of a group share similar characteristics" and there is "no basis" for adding such a requirement. See CVD Final Rule, at 65358. Addressing the PPG II holding in the CVD Final Rule, the Department states that there is no basis in that case or in the statute for concluding there is a requirement that limited users must share "similar characteristics" to constitute a group under the specificity provision. See CVD Final Rule, at 65358.

Department's Position: As explained earlier, the Department is calculating a combined rate of 33 percent for all income tax programs for Cixi and Polyflex as AFA pursuant to section 776(b)

[24] See GOC Case Brief at 24.

of the Act. We also note that we have already found certain of these individual income tax programs to be countervailable. In the CFS China Final, we found FIE income tax programs to be de jure specific under section 771(5A)(D)(i) of the Act. See CFS Decision Memorandum at "Two Free/Three Half" program and "Local Income Tax Exemption and Reduction Program for Productive FIEs." The arguments raised by the GOC address de facto specificity and are not relevant to the de jure specificity determination.

Further, the GOC has not explained why the AFA rate applied to all of the income tax programs is inconsistent with the statute. The GOC has also failed to explain why income tax benefits provided to designated FIEs, to FIEs that export, to FIEs located in specified regions of China would not be specific under the Act.

Comment 4: Countervailability of VAT Export Rebates

The GOC argues that the Department should not apply an AFA rate for the program VAT Rebates for Export in the final determination as that program has been found to be not countervailable in other investigations. See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 63875, 63884 (November 13, 2007) ("CWP Preliminary Determination"); and New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 71360, 71375 (December 17, 2007) ("OTR Tires Preliminary Determination"). In OTR Tires Preliminary Determination, the Department found that "because the VAT rebate applicable to exported OTR tires during the POI (13 percent) was less than the VAT levied on domestic sales of OTR tires during the POI (17 percent), the Department preliminarily determines that, for the purposes of this investigation, the VAT refund received upon the export of OTR tires does not confer a countervailable benefit." See OTR Tires Preliminary Determination, 72 FR 71375. In the instant investigation, the GOC states that it reported in its initial questionnaire response that the VAT rate for RFM is 17 percent and the refund rate is 13 percent. See GOC Initial Questionnaire Response at 26 (December 14, 2007). The GOC states that these percentages are identical to the percentages in both OTR Tires Preliminary Determination and CWP Preliminary Determination and, therefore, the Department should find the program to be not countervailable for the RFM industry in this final determination.

In its rebuttal brief, petitioner states that the GOC's questionnaire responses were not verified in this investigation, as required under section 782(i) of the Act, and, therefore, the Department may not rely upon that information in the final determination. Petitioner stresses that the Department has no information as to whether or not any VAT rebates received under the program by the respondents did or did not exceed the VAT levied on domestic sales of the RFM. Because of the lack of verified information in this investigation, petitioner contends that there is no evidence on the record to support the GOC's claims that the VAT Rebates for Export program, as applied to RFM producers, fails to meet the requirements of 19 CFR 351.517(a). As such, petitioner argues that the Department must employ an adverse inference based upon information available in the petition and determine that the VAT Rebates for Export program is countervailable.

Department's Position: In the final determination of the CVD investigation on circular welded carbon quality steel pipe from the PRC, the Department found VAT Rebates to be not

countervailable. See CWP Decision Memorandum at "VAT Rebates (originally referred to as "Export Incentive Payments Characterized as VAT Rebates). In reaching that determination, we examined company-specific data regarding the use of the program. See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 FR 63875, 63884 (November 13, 2007). Specifically, we examined information provided in company questionnaire responses that demonstrated the amount of VAT paid on inputs and the receipt of VAT refunds on export sales. Id. Similarly, we examined company-specific data regarding VAT rebates in the CVD investigation on light-walled rectangular pipe and tube from China and found the VAT Rebate program to be not countervailable. See Light-Walled China Final and accompanying Issues and Decision Memorandum at "VAT Rebates (originally referred to as "Export Incentive Payments Characterized as VAT Rebates); and Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 FR 67703, 67709.

In the instant investigation, we do not have company-specific data on VAT rebates. As discussed above, Cixi failed to respond to the Department's questionnaires and Polyflex withdrew from the investigation rendering the information that it submitted to the Department on VAT rebates unverifiable. Therefore, we are unable to determine whether a benefit, as described in 19 CFR 351.517(a), was provided. Without company-specific usage data for VAT export rebates, we are unable to analyze whether the amount of VAT exempted during the POI exceeded the amount levied with respect to the production and distribution of like products when sold for domestic consumption. As such, for this final determination, we find that the VAT Export Rebate program is countervailable and are assigning an AFA rate of 1.51 percent ad valorem for the program.

Comment 5: VAT and Import Duty Exemptions on Imported Equipment Are One Program

The GOC contends that the Department erred in preliminarily applying an AFA rate to "Import Duty Exemptions on Imported Equipment" and to "VAT Exemptions on Imported Equipment." The GOC observes that this program has been treated as one program consistently in other investigations with each respondent receiving one ad valorem rate, not two. See, e.g., Lightweight Thermal Paper from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 73 FR 13850 (March 14, 2008), where the Department stated, "For GG, the total amount of exempted VAT and tariff exemptions exceeded 0.5 percent of the company's sales for one year." As such, the GOC asserts that the Department should only apply one rate to the program "VAT and Tariff Exemptions on Imported Equipment" rather than a separate rate for each portion of the program.

Petitioner argues that the GOC's argument is baseless because, unlike in the cases cited by the GOC, in this instant investigation the mandatory respondents did not cooperate. Petitioner adds that there is not information on the record, as well as no verified information from the GOC, that would support the GOC's argument that these programs must be analyzed together. Therefore, petitioner argues that the Department must base its determination upon facts available, making adverse inferences against the respondents to reflect their lack of cooperation.

Petitioner discusses that the only usable information on the record is in the petition, which clearly identifies the "Import Duty Exemption for Equipment" as a separate subsidy from the "VAT Exemptions on Imported Equipment."[25]

Department's Position: In the CFS China Final, the Department found "Import Duty Exemptions on Imported Equipment" and "VAT Exemptions on Imported Equipment," to be one program, entitled "VAT and Tariff Exemptions on Imported Equipment." See CFS Decision Memorandum at "VAT and Tariff Exemptions on Imported Equipment." Therefore, to be consistent with the Department's earlier finding that one program, and not two separate programs, provide import duty and VAT exemptions on imported equipment, for this final determination, the Department is assigning only one AFA rate (i.e., 1.51 percent ad valorem) to the program "VAT and Tariff Exemptions on Imported Equipment."

Comment 6: AFA Rates for Provincial Programs

The GOC contests that the Department applied AFA rates to each respondent for provincial programs in provinces where the companies are not located. The GOC argues that this AFA application was in contravention to the information on the record and the Department's mandate that the AFA rate bear a rational relationship to the company. The GOC observes that the Court, in Shandong Huarong Gen. Group Corp., stated "{a}n AFA rate must be both reliable and bear a rational relationship to the respondent."[26] The GOC discusses that in the preliminary determination the total AFA rate include AFA rates for four provincial specific programs, two in Guangdong Province (i.e., Preferential Loan Programs and Interest Rates and Local Direct Grants) and two in Zhejiang Province (i.e., Local Direct Grants and Provision of Goods for Less Than Adequate Remuneration). The GOC asserts that Cixi is located in Ningbo, which is in Zhejiang Province and that the Department's service list confirms this fact. Concerning Polyflex, the GOC states that the information on the record clearly indicates that Polyflex is located in Hong Kong and the company's only Chinese facility is in Guangdong Province. The GOC discusses that despite these facts the Department applied Zhejiang province specific programs to Polyflex and Guangdong province specific programs to Cixi. The GOC therefore insists that the Department violated its mandate that the AFA rate have some rational relationship to the specific company. As such, the Department should revise its total AFA rate for Cixi and Polyflex to remove, from the total calculated rate, AFA rates for programs administered by a province in which the companies are not located.

Petitioner states that no information on the record of this investigation has been verified and, therefore, none of it may be relied upon by the Department in the final determination. Petitioner discusses that the petition and service list merely identify one location as contact information for Cixi and neither purports to include a comprehensive list of all the company's locations. Petitioner adds that no information on the record establishes that Cixi does not have operations located in Guangdong or any other province. Concerning Polyflex, petitioner states that the GOC's questionnaire response was not verified and, therefore, may not be relied upon. Petitioner adds that no information on the record establishes that Polyflex does not have operations in Zhejiang or any other province. Therefore, in the absence of contrary information on the record, and given the lack of cooperation of the mandatory respondents, petitioner asserts

[25] See Petition at Volume II, page 29-31.
[26] Shandong Huarong Gen. Group Corp., 2007 Ct. Intl. Trade, Lexis 3, Slip Op. 07-4 at 9.

that the Department has properly applied an AFA rate to each of the respondents for all subsidies investigated and found to be countervailable.

Department's Position: In its December 14, 2007, questionnaire response, the GOC made general statements that Polyflex is not located in particular provinces but did not provide information on the location of Polyflex and its operations. See GOC's initial questionnaire response at 37 - 38. The Department, however, cannot rely on such limited information. Specifically, the Department cannot rely on the GOC's statements because the GOC is not in a position to know all of the company's affiliates and their respective locations.

Concerning Cixi, the GOC stated "since China Ningho Cixi Import and Export Corporation will not respond to the questionnaire, the relevant questions are not applicable" and, thus, did not provide any information about Cixi in response to the questions asked in the initial questionnaire. Id. at 45.

More importantly, in this investigation, there are no participating mandatory respondents and, therefore, no verified information on the record regarding a company's headquarters and facilities. Cixi did not respond to the Department's questionnaire, which asked for the addresses of the company's headquarters and manufacturing/export facilities. See October 25, 2007, Initial Questionnaire at Section III "Questionnaire for Producers/Exporters of RFM from the People's Republic of China," question one under "General Questions." On February 12, 2008, Polyflex submitted a letter stating that it would no longer participate in the investigation and, therefore, the information that Polyflex had submitted to the Department on the location of its headquarters and facilities became unverifiable. Thus, the mandatory respondents did not provide information to demonstrate their own non-use of each program. They did not participate fully or were deemed not to have cooperated to the best of their ability in this investigation such that adverse inferences are warranted.

The statute requires that the Department 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 location of Cixi's and Polyflex's facilities. 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 Cixi and Polyflex, we determine that it is appropriate to apply an AFA rate to each of the provincial programs[27] and assign those rates to both Cixi and Polyflex.

[27] Guangdong Provincial programs: (a) Preferential Loan Programs and Interest Rates and (b) Local Direct Grants. Zhejiang Provincial programs: (a) Local Direct Grants and (b) Provision of Goods for Less Than Adequate Remuneration.

VI. Recommendation

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

_____ Agree _____ Disagree

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date