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Investigation
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July 20, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Countervailing Duty Investigation of Certain Cold-Rolled Steel
Flat Products from the Russian Federation: Issues and Decision
Memorandum for the Final Determination

I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain cold-rolled steel flat products (cold-rolled steel) from the Russian Federation (Russia), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Additionally, the Department determines that critical circumstances do not exist with regard to cold-rolled steel from Russia. Below is a complete list of the issues in this investigation for which we received comments from interested parties.

ISSUES:

Provision of Natural Gas for Less Than Adequate Remuneration (LTAR)

- Comment 1:** Whether Gazprom Is a Government Authority
- Comment 2:** Whether the Provision of Natural Gas for LTAR Is *De Facto* Specific
- Comment 3:** Whether the Natural Gas Market in Russia Is Distorted
- Comment 4:** Standard Applied to Select a Tier Two Benchmark
- Comment 5:** Availability of Tier Two Natural Gas Prices to Purchasers in Russia
- Comment 6:** Comparability Adjustments to a Tier Two Benchmark
- Comment 7:** Whether the Department Should Use a Tier Three Benchmark
- Comment 8:** Whether to Adjust the Natural Gas Benchmark to Reflect Revised Data

Provision of Mining Rights for LTAR

- Comment 9:** Whether the NLMK Companies Benefited from the Provision of Mining Rights
- Comment 10:** Whether Timing of the Post-Preliminary Decision Memorandum Violated Interested Parties Due Process Rights



- Comment 11:** Whether the Government of Russia’s (GOR) Provision of Mining Rights Constitutes General Infrastructure that Is Not Countervailable
- Comment 12:** Whether the GOR Acted to the Best of Its Ability With Regard to Usage Data Provided in Connection with the Provision of Mining Rights for LTAR Program
- Comment 13:** Whether the Provision of Mining Rights is Specific
- Comment 14:** Whether the Mining Rights for LTAR Program Confers Recurring Benefits
- Comment 15:** Use of Mining Rights – Not Coal – to Measure the Benefit
- Comment 16:** Whether to Deduct Costs from the Coal Benchmark Rather than Adding Costs to the Extraction Price Paid by the Severstal Companies
- Comment 17:** Revisions to Coal Benchmark Price Calculated in Post-Preliminary Decision Memorandum

Tax Programs

- Comment 18:** Whether to Countervail the Severstal Companies’ Tax Debt Write-Offs
- Comment 19:** Reduction in Extraction Payments Program
- Comment 20:** Whether the Tax Deduction for Exploration Expenses Is Specific
- Comment 21:** Whether to Apply Adverse Facts Available (AFA) With Regard to the Benefit the Severstal Companies Received Under the Tax Deduction for Exploration Expenses Program

De Minimis Standard

- Comment 22:** Applicable *De Minimis* Rate for Russian Countervailing Duty (CVD) Proceedings

Sales Denominators

- Comment 23:** Use of the NLMK Companies’ Verified Sales Data
- Comment 24:** Calculation of the Severstal Companies’ Sales Denominator

II. BACKGROUND

A. Case History

The selected mandatory company respondents in this investigation are Novolipetsk Steel OJSC (NLMK), Novex Trading (Swiss) S.A. (Novex Trading), Altai-Koks OJSC, Dolomite OJSC, Stoilensky OJSC, Studenovskaya (Stagdok) OJSC, Trading House LLC, Vtorchermet NLMK LLC, Vtorchermet OJSC, and Vtorchermet NLMK Center LLC (collectively, the NLMK Companies) and PAO Severstal, Severstal Export GmbH, JSC Karelsky Okatysh, AO OLKON, AO Vorkutaugol, and JSC Vtorchermet (collectively, the Severstal Companies). On December 22, 2015, the Department published the *Preliminary Determination* and aligned this final CVD determination with the final antidumping duty (AD) determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i).¹ We preliminarily calculated a rate for the NLMK Companies, which was applied as the all others rate, and preliminarily calculated a *de*

¹ See *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 80 FR 79564 (December 22, 2015) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

minimis rate for the Severstal Companies.²

Included in this investigation is the Department's examination of whether the GOR sold coal mining rights for LTAR.³ The NLMK Companies reported that they did not use the provision of coal mining rights for LTAR program during the period of investigation (POI). With respect to the Severstal Companies, they reported that their member companies acquired licenses for coal mining rights from the GOR during the period 1993 through 2013.⁴ All of the licenses being investigated were sold to the Severstal Companies through a government-run auction.

In the Preliminary Decision Memorandum, the Department found that although the GOR's sale of coal mining rights to the Severstal Companies constitutes a financial contribution in the form of a provision of a good under section 771(5)(D)(iii) of the Act, it required additional analysis and information concerning specificity and benefit, as described under sections 771(5A)(D) and 771(5)(E) of the Act with respect to the provision of coal mining rights for LTAR. The Department therefore stated that it would issue a post-preliminary determination addressing these two subsidy criteria.⁵

On February 11, 2016, we issued a post-preliminary questionnaire to the GOR, and to the Severstal Companies.⁶ The GOR submitted its response on February 25, 2016.⁷ The Severstal Companies submitted their responses on March 4, and March 7, 2016.⁸ On March 15, 2016, we issued a second post-preliminary questionnaire to the GOR⁹ to which the GOR responded on March 25, 2016.¹⁰ On March 17, 2016, we issued a second post-preliminary supplemental questionnaire to the Severstal Companies¹¹ to which they responded on March 30, 2016, and April 4, 2016.¹²

On March 21, 2016, the Department placed Global Trade Atlas (GTA) data for world coal

² See *Preliminary Determination*, 80 FR at 79565-79566.

³ See *Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Initiation of Countervailing Duty Investigations*, 80 FR 51206 (August 24, 2015) (*Initiation*) and accompany Initiation Checklist at 14-16.

⁴ As explained below, we determined to limit our subsidy analysis to those mining licenses the GOR issued to the Severstal Companies after April 1, 2002, which is the date the Department recognized that the Russian Federation made the transition to a market economy for purpose of the AD and CVD laws.

⁵ See Preliminary Decision Memorandum at 22-23.

⁶ See the Department's Post-Preliminary Questionnaire to the GOR (GOR PPQ), dated February 11, 2016, and the Severstal Companies (Severstal Companies PPQ), dated February 11, 2016.

⁷ See GOR's Post-Preliminary Questionnaire Response (GOR PPQR), dated February 25, 2016.

⁸ See Severstal Companies First Supplemental Post-Preliminary Questionnaire Response Part 1 (Severstal Companies First PPQR Part 1), dated March 4, 2016, and Severstal Companies First Supplemental Post-Preliminary Questionnaire Response Part 2 (Severstal Companies First Supplemental PPQR Part 2), dated March 7, 2016.

⁹ See the Department's Second Post-Preliminary Questionnaire to the GOR (Second GOR PPQ).

¹⁰ See GOR's Second Post-Preliminary Questionnaire Response (GOR Second PPQR), dated March 25, 2016.

¹¹ See the Department's Second Post-Preliminary Questionnaire to the Severstal Companies (Second Severstal Companies PPQ), dated March 17, 2016.

¹² See Severstal Companies Second Post-Preliminary Questionnaire Response Part 1 (Severstal Companies Second PPQR Part 1), dated March 30, 2016, and Severstal Companies Second Post-Preliminary Questionnaire Response Part 2 (Severstal Companies Second PPQR Part 2), dated April 4, 2016.

exports for 2014, on the record and invited interested parties to comment.¹³ On March 31, 2016, the GOR¹⁴ and Severstal Companies¹⁵ provided comments on the GTA data.

Between February 29, 2016, and April 11, 2016, we issued verification outlines to the GOR, the NLMK Companies, and the Severstal Companies.¹⁶ From April 18, 2016, through April 29, 2016, we conducted verification of the questionnaire responses submitted by the GOR, the NLMK Companies, and the Severstal Companies. We released the verification reports on May 11, 2016 (the NLMK Companies), May 16, 2016 (the GOR) and May 26, 2016 (the Severstal Companies).¹⁷

On June 2, 2016, ArcelorMittal USA LLC (Petitioners), the GOR, the NLMK Companies, and the Severstal Companies submitted timely case briefs on issues regarding all programs and other case-related issues, with the exception of the Provision of Mining Rights for LTAR.¹⁸ Petitioners, the NLMK Companies, and the Severstal Companies submitted timely rebuttal briefs on June 10, 2016.¹⁹

On July 1, 2016, the Department issued a Post-Preliminary Decision Memorandum with respect to the provision of mining rights for LTAR.²⁰ We preliminarily calculated a rate of 2.71 percent for the Severstal Companies under the provision of mining rights for LTAR program.²¹

¹³ See the Memorandum to the File from Stephanie Moore, Case Analysts, AD/CVD Office III, “Placement of Global Trade Atlas (GTA) Data on Record” (GTA Coal Data Memorandum), dated March 21, 2016.

¹⁴ See GOR Coal Benchmark Submission (GOR Coal Benchmark Submission), dated March 31, 2016.

¹⁵ See Severstal Companies Coal Benchmark Submission (Severstal Companies Coal Benchmark Submission), dated March 31, 2016.

¹⁶ See Department’s Verification Outline for the GOR (GOR Verification Outline Part 1), dated February 29, 2016; the Department’s Verification Outline for the NLMK Companies (NLMK Companies Verification Outline), dated March 28, 2016; the Department’s Verification Outline for GOR (GOR Verification Outline Part 2), dated April 4, 2016; and Department’s Verification Outline for the Severstal Companies (Severstal Companies Verification Outline), dated April 11, 2016.

¹⁷ See Department Memorandum regarding “Verification of the Questionnaire Responses of the NLMK Companies” (NLMK Companies Verification Report), dated May 11, 2016; Department Memorandum regarding “Verification of the Questionnaire Responses of the Government of the Russian Federation” (GOR Verification Report), dated May 16, 2016; and Department Memorandum regarding “Verification of PAO Severstal and cross-owned affiliates” (Severstal Companies Verification Report), dated May 26, 2016.

¹⁸ See Letter from Petitioners regarding “Case Brief” (Petitioners Case Brief), dated June 2, 2016; Letter from the NLMK Companies regarding “Case Brief” (NLMK Companies Case Brief), dated June 2, 2016; and Letter from the Severstal Companies regarding “Case Brief” (Severstal Companies Case Brief), dated June 2, 2016. With regard to the GOR’s June 2, 2016, case brief, the Department rejected it because it contained untimely new factual information. See Department Letter to the GOR regarding “Rejection of Case Brief with Untimely Filed Information,” dated June 9, 2016). On June 10, 2016, the GOR refiled its case brief excluding the new factual information. See Letter from the GOR regarding “Case Brief” (GOR Case Brief), dated June 10, 2016.

¹⁹ See Letter from Petitioners regarding “Rebuttal Brief” (Petitioners Rebuttal Brief), dated June 10, 2016; Letter from the NLMK Companies regarding “Rebuttal Brief” (NLMK Companies Rebuttal Brief), dated June 10, 2016; and Letter from the Severstal Companies regarding “Rebuttal Brief” (Severstal Companies Rebuttal Brief), dated June 10, 2016.

²⁰ See Memorandum To Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, titled “Decision Memorandum for the Post-Preliminary Analysis of Program Which Required More Information at the Preliminary Determination: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation (Post-Preliminary Decision Memorandum),” dated July 1, 2016.

²¹ See Memorandum to File Through Eric Greynolds, Program Manager, AD/CVD Operations, Office III from

On July 8, 2016, Petitioners, the Severstal Companies, the NLMK Companies, and the GOR filed case briefs concerning the Post-Preliminary Decision Memorandum.²² Petitioners and the Severstal Companies filed rebuttal briefs on the Post-Preliminary Decision Memorandum on July 12, 2016.²³

B. Period of Investigation

The POI is January 1, 2014, through December 31, 2014.

III. FINAL DETERMINATION OF CRITICAL CIRCUMSTANCES

As discussed in the *Preliminary Determination*, on October 30, 2015, Petitioners filed allegations that critical circumstances exist with respect to imports of subject merchandise from Russia.²⁴ Pursuant to section 705(a)(2)(A) of the Act, an affirmative critical circumstances determination in a CVD proceeding is contingent upon respondents' use of benefits under a prohibited subsidy program. No party to this investigation submitted comments on the Department's preliminary determination regarding critical circumstances. Therefore, consistent with the *Preliminary Determination*,²⁵ we continue to determine that the NLMK Companies and the Severstal Companies did not use, or receive benefits from, a prohibited subsidy (*e.g.*, a program subsidy program that was contingent upon export performance as described under section 771(5A)(B) of the Act). Therefore, we conclude that critical circumstances do not exist for the NLMK Companies, the Severstal Companies, and all other producers/exporters of the subject merchandise in Russia.

IV. SCOPE OF THE INVESTIGATION

The products covered by this investigation are certain cold-rolled (cold-reduced), flat-rolled steel products, whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement ("width") of 12.7 mm or greater, regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, etc.). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness less than 4.75 mm and a width that is 12.7 mm or greater and that

Stephanie Moore, Case Analyst, titled "Post-Preliminary Determination Calculations: Severstal Companies" (Post-Preliminary Calculation Memorandum), dated July 1, 2016.

²² See Letter from Petitioners regarding "Provision of Mining Rights for LTAR Case Brief" (Petitioners Mining Rights Case Brief), dated July 8, 2016; *see also* Letter from Severstal Companies regarding "Provision of Mining Rights for LTAR Case Brief" (Severstal Companies Mining Rights Case Brief), dated July 8, 2016; Letter from the GOR "Provision of Mining Rights" (GOR Mining Rights Case Brief), dated July 8, 2016; and Letter from the NLMK Companies regarding "Case Brief" (NLMK Companies Mining Rights Case Brief), dated July 8, 2016.

²³ See Letter from Petitioners regarding "Provision of Mining Rights for LTAR Rebuttal Brief" (Petitioner's Mining Rights Rebuttal Brief), dated July 12, 2016; Letter from Severstal Companies regarding "Provision of Mining Rights for LTAR Rebuttal Brief" (Severstal Companies Mining Rights Rebuttal Brief), dated July 12, 2016; and Letter from NLMK Companies regarding "Rebuttal Brief" (NLMK Companies Mining Rights Rebuttal Brief), dated July 12, 2016.

²⁴ See *Preliminary Determination*, 80 FR at 79565.

²⁵ *Id.*

measures at least 10 times the thickness. The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of 4.75 mm or more and a width exceeding 150 mm and measuring at least twice the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

(1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above, and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this investigation are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten (also called wolfram), or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium (also called columbium), or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Motor lamination steels contain micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile

strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes cold-rolled steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the cold-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this investigation unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this investigation:

- Ball bearing steels;²⁶
- Tool steels;²⁷
- Silico-manganese steel;²⁸
- Grain-oriented electrical steels (GOES) as defined in the final determination of the U.S. Department of Commerce in *Grain-Oriented Electrical Steel From Germany, Japan, and Poland*.²⁹
- Non-Oriented Electrical Steels (NOES), as defined in the antidumping orders issued by the U.S. Department of Commerce in *Non-Oriented Electrical Steel From the People's Republic of China, Germany, Japan, the Republic of Korea, Sweden, and Taiwan*.³⁰

²⁶ Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

²⁷ Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

²⁸ Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

²⁹ See *Grain-Oriented Electrical Steel from Germany, Japan, and Poland: Final Determinations of Sales at Less Than Fair Value and Certain Final Affirmative Determination of Critical Circumstances*, 79 FR 42501, 42503 (July 22, 2014). This determination defines grain-oriented electrical steel as “a flat-rolled alloy steel product containing by weight at least 0.6 percent but not more than 6 percent of silicon, not more than 0.08 percent of carbon, not more than 1.0 percent of aluminum, and no other element in an amount that would give the steel the characteristics of another alloy steel, in coils or in straight lengths.”

³⁰ See *Non-Oriented Electrical Steel from the People's Republic of China, Germany, Japan, the Republic of Korea, Sweden, and Taiwan: Antidumping Duty Orders*, 79 FR 71741, 71741-42 (December 3, 2014). The orders define NOES as “cold-rolled, flat-rolled, alloy steel products, whether or not in coils, regardless of width, having an actual thickness of 0.20 mm or more, in which the core loss is substantially equal in any direction of magnetization in the

The products subject to this investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7209.15.0000, 7209.16.0030, 7209.16.0060, 7209.16.0070, 7209.16.0091, 7209.17.0030, 7209.17.0060, 7209.17.0070, 7209.17.0091, 7209.18.1530, 7209.18.1560, 7209.18.2510, 7209.18.2520, 7209.18.2580, 7209.18.6020, 7209.18.6090, 7209.25.0000, 7209.26.0000, 7209.27.0000, 7209.28.0000, 7209.90.0000, 7210.70.3000, 7211.23.1500, 7211.23.2000, 7211.23.3000, 7211.23.4500, 7211.23.6030, 7211.23.6060, 7211.23.6090, 7211.29.2030, 7211.29.2090, 7211.29.4500, 7211.29.6030, 7211.29.6080, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7225.50.6000, 7225.50.8080, 7225.99.0090, 7226.92.5000, 7226.92.7050, and 7226.92.8050.

The products subject to the investigation may also enter under the following HTSUS numbers: 7210.90.9000, 7212.50.0000, 7215.10.0010, 7215.10.0080, 7215.50.0016, 7215.50.0018, 7215.50.0020, 7215.50.0061, 7215.50.0063, 7215.50.0065, 7215.50.0090, 7215.90.5000, 7217.10.1000, 7217.10.2000, 7217.10.3000, 7217.10.7000, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090, 7225.19.0000, 7226.19.1000, 7226.19.9000, 7226.99.0180, 7228.50.5015, 7228.50.5040, 7228.50.5070, 7228.60.8000, and 7229.90.1000.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the investigation is dispositive.

V. SUBSIDIES VALUATION

A. Allocation Period

The Department normally allocates the benefits from non-recurring subsidies over the average useful life (AUL) of renewable physical assets used in the production of subject merchandise.³¹ For cold-rolled steel, the AUL is 15 years as listed under Asset Class 33.4 of the U.S. Internal Revenue Service's Depreciation Range System.³² However, the Department recognized that Russia made the transition to a market economy for purposes of the AD and CVD laws effective April 1, 2002.³³ Therefore, we investigated alleged "non-recurring" subsidies provided to the companies under investigation over the period April 1, 2002, through December 31, 2014. No party in this proceeding disputed this allocation period.

Further, for non-recurring subsidies, we applied the "0.5 percent test," as described in 19 CFR 351.524(b)(2). Under this test, we divide the amount of subsidies approved under a given

plane of the material. The term 'substantially equal' means that the cross grain direction of core loss is no more than 1.5 times the straight grain direction (*i.e.*, the rolling direction) of core loss. NOES has a magnetic permeability that does not exceed 1.65 Tesla when tested at a field of 800 A/m (equivalent to 10 Oersteds) along (*i.e.*, parallel to) the rolling direction of the sheet (*i.e.*, B800 value). NOES contains by weight more than 1.00 percent of silicon but less than 3.5 percent of silicon, not more than 0.08 percent of carbon, and not more than 1.5 percent of aluminum. NOES has a surface oxide coating, to which an insulation coating may be applied."

³¹ See 19 CFR 351.524(b) and 351.524(d)(2)(i).

³² See Petition for the Imposition of Countervailing Duties on Imports of Certain Cold-Rolled Steel Flat Products from Russia (July 28, 2015) (Petition) at Volume XIII, Exhibit XII-10.

³³ See Department Memorandum regarding "Market Economy Status for the Russian Federation," dated September 14, 2015.

program in a particular year by the relevant sales value (*e.g.*, total sales or export sales) for the same year. If the amount of the subsidies is less than 0.5 percent of the relevant sales value, then the benefits are allocated to the year of receipt rather than across the AUL.

B. Attribution of Subsidies

In accordance with 19 CFR 351.525(b)(6)(i), the Department normally attributes a subsidy to the products produced by the company that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent. Further, 19 CFR 351.525(c) provides that benefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm producing the subject merchandise that is sold through the trading company, regardless of affiliation.

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 regulation 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 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.³⁴

1. The NLMK Companies

Based on the criteria enumerated under 19 CFR 351.525(b)(6), the NLMK Companies submitted responses on behalf of NLMK, the producer of cold-rolled steel, Novex Trading (a Swiss-based trading company that handles NLMK's export sales), Altai-Koks OJSC (an input provider of coke), Dolomite OJSC (an input provider of dolomite), Stoilensky OJSC (an input provider of iron ore), Studenovskaya (Stagdok) OJSC (an input provider of limestone), Trading House LLC (an input provider of such steel making inputs as alloying elements), Vtorchermet NLMK LLC (parent company of input providers of scrap), Vtorchermet OJSC (an input provider of scrap), and Vtorchermet NLMK Center LLC (an input provider of scrap).³⁵ The submissions of the NLMK Companies indicate that NLMK is the sole or majority owner of the aforementioned companies and, thus, we continue to find that the NLMK Companies mentioned above are cross-

³⁴ See *Fabrique de Fer de Charleroi SA v. United States*, 166 F. Supp. 2d 593, 603 (CIT 2001).

³⁵ See NLMK Companies' submission, "Affiliation Response of Novolipetsk Steel OJSC (NLMK)" (NLMK Companies Affiliation Response), dated September 28, 2015, at 6-7 and Exhibit 1; see also NLMK Companies' Primary Questionnaire Response, "NLMK's Response to the Department's Initial CVD Questionnaire" (NLMK Companies PQR), dated October 26, 2015 at 1-2.

owned with one another within the meaning of 19 CFR 351.525(b)(6)(vi).³⁶

2. The Severstal Companies

Based on the criteria enumerated under 19 CFR 351.525(b)(6), the Severstal Companies submitted responses on behalf of Severstal, a producer of cold-rolled steel and parent company, Severstal Export (a Swiss-based company responsible for export sales), JSC Karelsky Okatysh (a provider of iron ore pellets), AO OLKON (a provider of iron ore concentrate), AO Vorkutaugol (a provider of coking coal concentrate), and JSC Vtorchermet (a provider of scrap).³⁷ The submissions of the Severstal Companies indicate that Severstal is the sole or majority owner of the aforementioned companies and, thus, we continue to find that the Severstal Companies mentioned above are cross-owned with one another within the meaning of 19 CFR 351.525(b)(6)(vi).³⁸

C. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondents' receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondents' export sales (where the program is determined to be countervailable as an export subsidy) or total sales (where the program is determined to be countervailable as a domestic subsidy). Because neither respondent used or benefitted from an export subsidy during the POI, or over the AUL, we used total sales denominators to calculate the countervailable subsidy rates for the various programs in this determination as discussed below. For more information, *see* Final Calculation Memoranda prepared for this investigation.³⁹

1. The NLMK Companies

As indicated above, NLMK is a producer of subject merchandise and also a parent company of the firms that comprise the NLMK Companies. Therefore, pursuant to 19 CFR 351.525(b)(6)(iii) and the Department's practice,⁴⁰ we attributed any subsidies received by NLMK to the total consolidated sales of the NLMK Companies, net of intra-company sales. Because we find Altai-Koks OJSC, Dolomite OJSC, Stoilensky OJSC, Studenovskaya (Stagdok)

³⁶ *See* Preliminary Decision Memorandum at 10.

³⁷ *See* Severstal Companies' submission, "Severstal's Initiation Countervailing Duty Questionnaire Response" (Severstal Companies Affiliation Response), dated September 28, 2015 at 5; *see also* Severstal Companies' Primary Questionnaire Response, "Severstal's Response to Section III of the Department's Countervailing Duty Questionnaire" (Severstal Companies PQR), dated October 27, 2015 at 1.

³⁸ *See* Preliminary Decision Memorandum at 10.

³⁹ For the NLMK Companies, *see* Department Memorandum, "Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination, Calculation Memorandum for the NLMK Companies," dated concurrently with this Final Decision Memorandum (NLMK Companies Final Calculation Memorandum). For the Severstal Companies, *see* Department Memorandum, "Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination, Calculation Memorandum for the Severstal Companies," dated concurrently with this Final Decision Memorandum (Severstal Companies Final Calculation Memorandum).

⁴⁰ *See, e.g., Citric Acid and Certain Nitrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014), and accompanying Issues and Decision Memorandum at 10.

OJSC, Trading House LLC, Vtorchermet NLMK LLC, Vtorchermet OJSC, and Vtorchermet NLMK Center LLC to be cross-owned input producers, we find, pursuant to 19 CFR 351.525(b)(6)(iv), that any subsidies received by these firms are attributable to the respective firm's total sales and the sales of the NLMK Companies, net of intra-company sales.

We verified that Novex Trading handles all of NLMK's sales of subject merchandise to the United States in back-to-back transactions with NLMK, and is the party responsible for invoicing the U.S. customer.⁴¹ We also confirmed that the invoice and the entered value of the merchandise reflect a mark-up over the invoice value of the product as sold to Novex Trading by NLMK.⁴²

The Department has a practice of making an adjustment to the calculated subsidy rate when the sales value used to calculate that subsidy rate does not match the entered value of the merchandise, *e.g.*, where subject merchandise is exported to the United States with a mark-up from an affiliated company, and where the respondent can provide data to demonstrate that the required criteria are met.⁴³ In the instant case, we verified that the evidence submitted by the NLMK Companies supports their claim and the information also permits an accurate calculation of the adjustment.⁴⁴ Therefore, consistent with the *Preliminary Determination*, we made the adjustment for this final determination.⁴⁵

2. The Severstal Companies

As indicated above, PAO Severstal is a producer of subject merchandise as well as a parent company. Accordingly, pursuant to 19 CFR 351.525(b)(6)(iii), we attributed any subsidies received by the Severstal Companies to the total, consolidated sales of the Severstal Companies.⁴⁶ Accordingly, because we find JSC Karelsky Okatysh, AO OLKON, AO Vorkutaugol, and JSC Vtorchermet to be cross-owned input producers pursuant to 19 CFR 351.525(b)(6)(iv), we attributed any subsidies received by these firms to the consolidated sales of the Severstal Companies, net of intra-company sales, and distribution expenses (*i.e.*, freight).

⁴¹ See NLMK Companies Verification Report at "Sales and Export Information – C. Entered Value Adjustment." See also NLMK Companies Affiliation Response at 1, NLMK Companies PQR at 12, and NLMK Companies' submission, "NLMK Companies' First Supplemental Subsidy Questionnaire Response" (NLMK Companies First Supplemental PQR), dated November 17, 2015 at 4.

⁴² See NLMK Companies Verification Report at "Sales and Export Information – C. Entered Value Adjustment." See also NLMK Companies PQR at 12 and Exhibit GQ-8, and NLMK Companies First Supplemental PQR at 4-6 and Exhibit S-5.

⁴³ See, *e.g.*, *Multilayered Wood Flooring from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 64313 (October 18, 2011), and accompanying Issues and Decision Memorandum at 7-8. The six criteria are: 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; 2) the exporters and the party that invoices the customer are affiliated; 3) the U.S. invoice establishes the customs value to which countervailing duties are applied; 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; 5) the merchandise is shipped directly to the United States; and 6) the invoices can be tracked as back-to-back invoices that are identical except for price.

⁴⁴ See NLMK Companies Verification Report at "Sales and Export Information – C. Entered Value Adjustment."

⁴⁵ See NLMK Companies Final Calculation Memorandum; see also Preliminary Decision Memorandum at 11-12.

⁴⁶ See Comment 24 below for further discussion.

Concerning Severstal Export, it operates a Swiss-based trading company that handles sales to non-Commonwealth of Independent States (CIS) countries.⁴⁷ Additionally, the Severstal Companies did not submit any information concerning mark-ups on sales that Severstal Export transacts on behalf of the Severstal Companies. Thus, consistent with the *Preliminary Determination*, we have not included sales by Severstal Export in the sales denominators used in our subsidy rate calculations for the Severstal Companies.⁴⁸

VI. BENCHMARKS AND DISCOUNT RATES

Section 771(5)(E)(ii) of the Act states 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.” In addition, 19 CFR 351.505(a)(3)(i) stipulates that when selecting a comparable commercial loan that the recipient “could actually obtain on the market” the Department will normally rely on actual loans obtained by the firm. However, when there are no comparable commercial loans, the Department “may use a national average interest rate for comparable commercial loans,” pursuant to 19 CFR 351.505(a)(3)(ii). Further, pursuant to 19 CFR 351.524(d)(3), when allocating non-recurring benefits over time, the Department will utilize a long-term discount rate based upon data for the year in which the government agreed to provide the subsidy.

VII. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply “facts otherwise available” if: (1) necessary information is not on the record; or (2) 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.

Section 782(c)(1) of the Act provides that, if an interested party, “promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner,” then the Department shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

In accordance with Section 782(d) of the Act, if we determine that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all

⁴⁷ See Severstal Companies Affiliation Response at 6-7 and Exhibit 1.

⁴⁸ See Preliminary Decision Memorandum at 12.

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 that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority 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.

On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (TPEA), which made numerous amendments to the AD and CVD law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act.⁴⁹ The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this investigation.⁵⁰

Section 776(b) of the Act provides that the Department may use an adverse inference in selecting among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the TPEA, the Department is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.⁵¹ Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the CVD investigation, a previous administrative review, or other information placed on the record. When selecting from an adverse facts available (AFA) rate from among the possible sources of information, the Department's practice is to ensure that the rate 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."⁵² 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."⁵³ Further, affirmative evidence of bad faith on the part of a respondent is not required before the

⁴⁹ See Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*). The text of the TPEA may be found at <https://www.congress.gov/bill/114thcongress/house-bill/1295/text/pl>.

⁵⁰ See *Applicability Notice*, 80 FR at 46794-95.

⁵¹ See section 776(b)(1)(B) of the Act.

⁵² See, e.g., *Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011), and accompanying Issues and Decision Memorandum at "V. Use of Facts Otherwise Available and Adverse Inferences;" *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).

⁵³ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I at 870 (1994), *reprinted at* 1994 U.S.C.C.A.N. 4040, 4199 (SAA).

Department may make an adverse inference.⁵⁴

Section 776(c) of the Act provides that, in general, when the Department relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as “information 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.”⁵⁵ It is the Department’s practice to consider information to be corroborated if it has probative value.⁵⁶ In analyzing whether information has probative value, it is the Department’s practice to examine the reliability and relevance of the information to be used.⁵⁷ However, the SAA emphasizes that the Department need not prove that the selected facts available are the best alternative information.⁵⁸

Finally, under the new section 776(d) of the Act, when applying an adverse inference, the Department may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the Department considers reasonable to use, including the highest of such rates.⁵⁹ The TPEA also makes clear that, when selecting facts available with an adverse inference an AFA rate, the Department is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.⁶⁰

As discussed below in the “Provision of Natural Gas for LTAR” section and “Comment 2,” we determine that the application of facts available with an adverse inference is warranted with respect to the specificity of Provision of Natural Gas for LTAR program.

Further, as discussed below in the “Provision of Mining Rights for LTAR” section and Comment 12, we determine that the application of facts available with an adverse inference is warranted with respect to the specificity of the Provision of Mining Rights for LTAR program.

Additionally, as discussed below in the “Tax Deduction for Exploration Expenses” section and Comment 21, we determine that the application of facts available with an adverse inference is warranted with respect to the benefit the Severstal Companies received under the Tax Deduction for Exploration Expenses program. The Department has developed a hierarchy when selecting

⁵⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003).

⁵⁵ See SAA at 870.

⁵⁶ See SAA at 870.

⁵⁷ *Id.*, at 869.

⁵⁸ *Id.*, at 869-870.

⁵⁹ See section 776(d)(1)-(2) of the Act.

⁶⁰ See section 776(d)(3) of the Act.

the subsidy rate to be applied pursuant to AFA. For CVD investigations the first level of the CVD AFA hierarchy examines whether, in the context of the instant investigation, there is a calculated program subsidy rate for the identical program at issue. If so, the Department will use the calculated program rate for that particular program as the basis of the AFA rate.⁶¹ As discussed below, and consistent with the CVD AFA hierarchy for investigations, for purposes of assigning an AFA rate to the Severstal Companies under the Tax Deduction for Exploration Expense program, we have utilized the subsidy calculated for the NLMK Companies under the same program, which is 0.03 percent *ad valorem*. Because we are applying an AFA rate that is based on the net subsidy rate calculated for the NLMK Companies under the identical program in this investigation and not on secondary information, we find that corroboration requirement of section 776(c) of the Act does not apply.

VIII. ANALYSIS OF PROGRAMS

Based upon our analysis of the record, we determine the following.

A. Programs Determined To Be Countervailable

1. Provision of Natural Gas for LTAR

The Department is investigating whether Russian producers of cold-rolled steel received countervailable subsidies by purchasing natural gas from Public Joint Stock Company Gazprom (Gazprom) for LTAR during the POI. The NLMK Companies reported that NLMK and other members of the NLMK Companies purchased natural gas from Gazprom and its regional affiliates during the POI.⁶² We verified the NLMK Companies' purchases and found no discrepancies.⁶³ The Severstal Companies reported that none of their companies purchased natural gas from Gazprom or its affiliates during the POI.⁶⁴

Petitioners, the NLMK Companies, and the GOR provided comments on the Department's preliminary finding that Gazprom is a government authority that provides a financial contribution. *See* Comment 1. We considered the parties' comments and, for the reasons discussed below in the Department's Position to Comment 1, we continue to find that Gazprom is a government authority, pursuant to section 771(5)(B) of the Act, that provides a financial contribution within the meaning section 771(5)(D)(iii) of the Act.

With regard to specificity, we were unable to verify the accuracy and completeness of Gazprom's annual domestic sales of natural gas by consumer group – the data the GOR provided⁶⁵ and the Department relied on in *Preliminary Determination*.⁶⁶ *See* Comment 2

⁶¹ *See, e.g., Non-Oriented Electrical Steel From Taiwan: Final Affirmative Countervailing Duty Determination*, 79 FR 61602 (October 14, 2014) and accompanying Issues and Decision Memorandum at 10.

⁶² *See* NLMK Companies' submission, "Request for Acceptance of Corrected Exhibit to NLMK's CVD Questionnaire Response" (NLMK Companies Revised Section F PQR), dated November 5, 2015.

⁶³ *See* NLMK Companies Verification Report at "Provision of Natural Gas for LTAR."

⁶⁴ *See* Severstal Companies PQR at 27-28.

⁶⁵ *See* GOR PQR at 30 and Exhibit III-38 (Gazprom 2014 Annual Report), page 79.

⁶⁶ *See* Preliminary Decision Memorandum at 14-15.

below. Because the GOR refused to allow the verifiers to examine the underlying quarterly sales records from which Gazprom's annual data and percentages were derived, we determine that the GOR provided information that could not be verified and that necessary information is not on the record, within the meaning of section 776(a)(2)(D) and (a)(1) of the Act, respectively.

Consequently, we determine that the application of facts available is warranted. Furthermore, because the GOR failed to provide those quarterly sales records during verification, we find that the GOR failed to cooperate to the best of its ability to comply with our request for information, such that an adverse inference is warranted on the issue of whether this program is *de facto* specific, pursuant to section 776(b) of the Act. In drawing an adverse inference, we find that the metallurgy sector (which includes the steel industry) is a predominant user of natural gas provided by Gazprom for LTAR within the meaning of section 771(5A)(D)(iii)(II) of the Act and, therefore, the Provision of Natural Gas for LTAR is *de facto* specific. Our basis for applying AFA is discussed in further detail in Comment 2 below.

In order to determine the existence and amount of any benefit conferred by Gazprom's provision of natural gas to the NLMK Companies, pursuant to section 771(5)(E)(iv) of the Act, we followed the methodology described in 19 CFR 351.511(a)(2) to identify a suitable benchmark for natural gas. Under 19 CFR 351.511(a)(2), the Department sets forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As provided in our regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation. This is because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation.

Based on the hierarchy, we must first determine whether there are market prices from actual sales transactions that can be used to determine whether Gazprom sold natural gas to the NLMK Companies for LTAR. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where the Department has found that the government provides the majority, or a substantial portion of, the market for a good or service, it has considered prices for such goods and services in the country to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit. This is because where the government's role as provider of the good or service is so predominant, it in effect determines the prices for private sellers of the same or similar goods or services such that comparing the government prices to those or private prices would amount to comparing the financial contribution to itself.⁶⁷

⁶⁷ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65377 (November 25, 1998) (*CVD Preamble*); see also *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*) and accompanying Issues and Decision Memorandum at 38-39.

Petitioner, the NLMK Companies, and the GOR provided comments on the Department's preliminary determination that the Russian market for natural gas is distorted. *See* Comment 3. We considered the parties' comments. However, for the reasons discussed below in the Department's Position to Comment 3, we continue to find that the natural gas market is distorted through the GOR's predominant role in the market via Gazprom, and through other interventions in the market. Further, because of Gazprom's predominant role as a supplier of natural gas, we continue to find that Gazprom has sufficient market power to effectively determine the prices of private suppliers of natural gas in Russia and, therefore, domestic private prices for natural gas cannot be used as a tier one benchmark pursuant to 19 CFR 351.511(a)(2)(i).

Because there is no viable tier one benchmark for our analysis, we next examined whether there are any prices on the record that are suitable for use under tier two of the hierarchy. Under 19 CFR 351.511(a)(2)(ii), if there is no useable market-determined price under which to make the comparison under tier one, the government price is compared to a world market price where it is reasonable to conclude that such price is available to purchasers in the country in question. Petitioners, the NLMK Companies, and the GOR submitted comments on the Department's preliminary finding that there is a tier two benchmark price. *See* Comment 5. Based on those comments and the verified record, we conclude that the European and Asian natural gas export prices used by the Department to derive the tier two benchmark prices used in the *Preliminary Determination* do not reflect prices available to Russian purchasers. Therefore, those market prices do not meet the standard set by 19 CFR 351.511(a)(2)(ii), which states that the adequacy of remuneration will be measured by comparing the government price to a world market price where it would be reasonable to conclude that such price would be available to purchasers in the country in question.

The final alternative in the benchmark hierarchy, set forth under 19 CFR 351.511(a)(2)(iii) is to determine whether the government price is consistent with market principles.⁶⁸ Under a tier three analysis, the Department will assess whether the prices charged by the government are set in accordance with market principles through an analysis of such factors as price-setting methods, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. These factors are not in any hierarchy, and the Department may rely on one or more of the factors in a case.⁶⁹ A tier three analysis is the most complicated under the benchmark hierarchy because the Department is no longer solely examining prices, but assessing how the government sets its prices and whether the mechanism by which it

⁶⁸ *See CVD Preamble*, 63 FR at 65378 ("Paragraph (a)(2)(iii) provides that, in situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where 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. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In 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., Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992); *Final Affirmative Countervailing Duty Determination: Venezuelan Wire Rod*, 62 FR 55014, 55021-22 (October 22, 1997).

⁶⁹ *Id.*

determines its prices is consistent with market principles.⁷⁰

As discussed in detail below in the Department's Position to Comment 7, we determine that sufficient evidence exists to conclude that Gazprom's prices are not set in a manner that is consistent with market principles. Based on the record evidence, and also as discussed below, we find that the most appropriate proxy for a market-based natural gas benchmark to apply under tier three is a regional European natural gas price. On the record are European export prices sourced from Global Trade Information Services, Inc. (GTIS), which the Department and Petitioners placed on the record.⁷¹ Where there is more than one commercially available market price to construct a benchmark price, it is the Department's practice to average the prices.⁷² Because the GTIS pricing data being relied on to construct a tier three benchmark contain volume and value information, we derived weighted-average monthly prices using the selected European export market prices.

Additionally, in determining the benchmark price for Russian natural gas, we adjusted the monthly average prices by adding delivery charges for the transmission and distribution of natural gas in Russia, surcharges, and taxes. The GOR reported that the purchase of natural gas is subject to an 18 percent value added tax (VAT).⁷³ Therefore, we added the VAT to the monthly benchmark prices.

Concerning delivery charges, because the benchmark prices do not include transmission/distribution charges within the borders of the purchasing countries,⁷⁴ we relied on the rates charged by Gazprom in Russia, which constitute the only information on the record with regard to such costs, to derive delivered benchmark prices. We verified that the prices charged by Gazprom consist of a wholesale gas price and the following three surcharges: (1) transportation surcharge; (2) surcharge for supply and sale (distribution) services; and (3) special extra surcharge for gas transportation services (for regional gasification programs).⁷⁵ Therefore,

⁷⁰ See *Melamine from Trinidad and Tobago: Final Affirmative Countervailing Duty Determination*, 80 FR 68849 (November 6, 2015) (*Melamine from Trinidad and Tobago*), and accompanying Issues and Decision Memorandum at 10.

⁷¹ See the Memorandum to the File from Kristen Johnson, International Trade Compliance Analyst, "Placing GITS Data on the Record" (GTIS Data Memorandum), dated November 6, 2015; and Petitioners' submission, "Petitioners' Submission of Factual Information on Regarding Adequacy of Remuneration; Submission of Excel Workbook Containing European Gas Pricing Information" (Petitioners Factual Filing), dated November 19, 2015.

⁷² See *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014) (*Rebar from Turkey*), and accompanying Issues and Decision Memorandum at "Provision of Natural Gas for LTAR."

⁷³ See GOR's Primary Questionnaire Response, "Certain Cold-Rolled Steel Flat Products from Russia" (GOR PQR), dated October 26, 2015 at 28. In its response, the GOR also reported a five percent import duty on natural gas. We thus added a five percent import duty to construct the monthly benchmark prices used in the *Preliminary Determination*. We subsequently verified that there is a zero percent import duty on "gaseous natural gas." See GOR Verification Report at "Value Added Tax and Import Duty Rate." We therefore did not add any import duty to the benchmark prices applied in the final calculations. See NLMK Companies Final Calculation Memorandum.

⁷⁴ See GTIS Data Memorandum and Petitioners Factual Filing.

⁷⁵ See GOR Verification Report at "Natural Gas Pricing" and "Natural Gas Tariff Schedules." See also GOR's submission, "Response to First Supplementary Questionnaire" (GOR First Supplemental PQR), dated November 19, 2015 at 14-16; NLMK Companies Section F PQR at 3; and NLMK Companies' submission, "NLMK's First Supplemental Subsidy Questionnaire Response" (NLMK Companies First Supplemental PQR), dated November 17,

in order to ensure that the monthly benchmark prices reflect delivery charges in Russia, we added the per-unit transmission and distribution fees and other surcharges charged by Gazprom to the monthly weighted-average benchmark prices (inclusive of VAT), which are expressed in rubles per thousand cubic meters to match the basis on which the NLMK Companies purchased natural gas from Gazprom. Because the NLMK Companies are located in various regions of Russia, and such fees differ across those regions,⁷⁶ we constructed regional-specific weighted-average benchmark prices. To construct those prices, we used the verified regional natural gas tariff schedules and the corrected tariff classifications presented by the NLMK Companies at verification.⁷⁷

To calculate the program benefit, we compared the corresponding monthly benchmark unit prices to the unit prices that the NLMK Companies paid Gazprom, including delivery charges, surcharges, and taxes during the POI. In instances where the benchmark unit price was greater than the price paid to Gazprom, we multiplied the difference by the quantity of natural gas purchased from Gazprom to arrive at the benefit. For several transactions, we found that a benefit was provided in accordance with section 771(5)(E)(iv) of the Act because Gazprom provided natural gas for less than adequate remuneration. We next summed the benefits for the NLMK Companies and divided that amount by NLMK's total consolidated sales during 2014, in accordance with 19 CFR 351.525(b)(6). On this basis, we calculated a net countervailable subsidy rate of 6.92 percent *ad valorem* for the NLMK Companies under this program.

2. Tax Deduction for Exploration Expenses

Expenses for the development of natural resources under Article 253 of the Tax Code of the Russian Federation (TCRF) are considered expenses associated with production and sales which are deductible from taxable income. Under Article 261 of the TCRF, the GOR permits income tax deductions for expenses related to the development of natural resources, including outlays for geological studies of subsoil resources, prospecting for commercial minerals, and performance of work of a preparatory nature.⁷⁸ The NLMK Companies reported deducting exploration expenses defined in Article 261 in the 2013 income tax return, which was filed with the tax authorities during the POI.⁷⁹ We verified use of this tax deduction by the NLMK Companies during the POI and found no discrepancies.⁸⁰

The GOR reported that the TCRF does not set eligibility requirements that a company must meet to claim an exploration expense deduction, *i.e.*, there is no export contingency, domestic content requirement, sector-specific or geographical-specific requirement.⁸¹ We examined Article 261 and determine that the tax deduction for exploration expenses is not *de jure* specific pursuant to

2015 at 11.

⁷⁶ See NLMK Section F PQR at 6-7, and Exhibit F-5 (tariff schedules).

⁷⁷ See GOR Verification Report at "Natural Gas Tariff Schedules;" NLMK Companies Verification Report at "Corrections To Responses" and "Provision of Natural Gas for LTAR," and Comment 8, below.

⁷⁸ See GOR PQR at 12 and Exhibit II-1; *see also* NLMK Companies First Supplemental PQR at Exhibit S-6.

⁷⁹ See NLMK Companies PQR at 17 and 23-24.

⁸⁰ See NLMK Companies Verification Report at "Tax Deduction for Exploration Expenses and Tax Deduction for Research and Development (R&D) Expenses."

⁸¹ See GOR PQR at 15-16.

section 771(5A)(D)(i) of the Act, as the law does not appear to limit access to an enterprise, industry, group of industries, or region. Further, the GOR reported that a taxpayer deducts exploration expenses automatically, provided there is evidence that such expenses are economically justified and well documented in the taxpayer's records.⁸²

The Department's initial questionnaire instructed the GOR to provide usage information for this tax deduction, *e.g.*, the number of recipient companies and industries and the amount of annual assistance approved under the program.⁸³ In its initial response, the GOR reported that statistics on the use of "exploration expenses is not kept by the Russian authorities."⁸⁴ In the first supplemental questionnaire, we again requested the GOR to submit usage data for the tax deduction for exploration expenses.⁸⁵ We also stated that:

If the GOR is unable to provide the requested information in the form and manner specified, please explain and provide the information based on the format in which you maintain such data, or suggest *alternative approaches* for providing the requested information.⁸⁶

In its response, the GOR provided alternate data on the use of the reduced mineral extraction tax, about which the Federal Tax Service of the Russian Federation maintains statistics on an aggregate basis.⁸⁷ The GOR explained that under the mineral extraction tax program, a taxpayer who incurred expenses for research and exploration of mineral resources, or reimbursed the government for such costs incurred, are allowed to pay the mineral extraction tax at the reduced rate of 70 percent (a coefficient of 0.7), with respect to the minerals extracted on the corresponding plot.⁸⁸ The NLMK Companies reported that they did not use this program during the POI.⁸⁹

The GOR provided annual extraction tax data provided for the period 2010 – 2014, which included the "quantity of taxpayers who used the right to apply the coefficient 0.7."⁹⁰ The total number of taxpayers who benefitted from the reduced tax rate was 64, 60, 62, 53, and 47 for 2010, 2011, 2012, 2013, and 2014, respectively.⁹¹ At verification, we traced this usage data to the corresponding documents.⁹² Both the NLMK Companies and the GOR submitted comments on the Department's reliance on the extraction tax usage data to conduct its *de facto* specificity analysis of the Tax Deduction for Exploration Expenses. *See* Comment 20. We considered the comments raised by the parties, and for the reasons outlined in the Department's Position to

⁸² *Id.*, at 13-14.

⁸³ *See* Letter from the Department to the GOR, "Countervailing Duty Questionnaire" (Primary Questionnaire), dated September 14, 2015 at Section II – Standard Questions Appendix (section L.2. (a-e)).

⁸⁴ *See* GOR PQR at 19.

⁸⁵ *See* Letter from the Department to the GOR, "First Supplemental Questionnaire" (GOR First Supplemental Questionnaire), dated November 12, 2015 at Tax Incentives for Mining Rights (question 2).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *See* GOR First Supplemental PQR at 2-3.

⁸⁸ *See* GOR PQR at 12.

⁸⁹ *See* NLMK Companies PQR at 17.

⁹⁰ *See* GOR First Supplemental PQR at 2-3.

⁹¹ *Id.*, at 2-3.

⁹² *See* GOR Verification Report at 8-9 and Exhibit VE-C.5.

Comment 20, we continue to rely on the extraction tax usage data to analyze this program.

Accordingly, we determine that the tax deduction for exploration expenses provides a financial contribution under section 771(5)(D)(ii) of the Act in the form of foregone revenue that is otherwise due to the government. Further, based on the extraction tax usage data, which we are relying on as proxy usage data under this program, we determine that the taxpayers who used the exploration tax incentive are limited in number and that this program is therefore *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. Concerning the NLMK Companies, we determine that the benefit conferred is the difference between the amount of taxes the companies paid and the amount of taxes that the companies would have paid in the absence of this program, as described in 19 CFR 351.509(a), *i.e.*, the amount of the tax deduction claimed.

To calculate the subsidy rate, we divided the amount of the tax savings received by the NLMK Companies' total consolidated sales for 2014, in accordance with 19 CFR 351.525(b)(6). On this basis, we determine that the NLMK Companies received a countervailable subsidy rate of 0.03 percent *ad valorem* under this program.

Concerning the Severstal Companies, as noted above, we find that the application of AFA is warranted with regard to the benefit received by the companies under the Tax Deduction for Exploration Expenses program. As explained in greater detail in Comment 21 below, we find that the Severstal Companies failed to disclose the exploration deductions they claimed on the income tax return filed during the POI and, therefore, that the application of facts available, as described under section 776(a)(2)(A), (C) and (D) of the Act applies. Further, we find that in failing to disclose the exploration deductions recorded in their income tax return, the Severstal Companies failed to act to the best of their ability and, thus, when applying facts available under section 776(a) of the Act, the application of adverse inferences, as described under section 776(b) of the Act is warranted when determining the benefit received by the Severstal Companies. Thus, in accordance with section 776(b) of the Act, we have relied on the use of our CVD AFA hierarchy when assigning the net subsidy rate attributed to the Severstal Companies under the Tax Deductions for Exploration Expenses program. Specifically, for purposes of assigning an AFA rate to the Severstal Companies under the Tax Deduction for Exploration Expense program, we have utilized the subsidy calculated for the NLMK Companies under the same program, which is 0.03 percent *ad valorem*.

3. Reduction in Extraction Taxes

Pursuant to Article 342 of the TCRF, companies that have used their own resources to explore and extract minerals pay only 70 percent of the extraction tax due to the GOR.⁹³ The Severstal Companies reported paying the reduced extraction rate during the POI.⁹⁴ The NLMK Companies did not use this program during the POI.⁹⁵

We find that the reductions in extraction tax payments afforded under this program constitute a

⁹³ See Severstal Companies PQR at 21.

⁹⁴ *Id.* at 23-24.

⁹⁵ See NLMK Companies Verification Report at 14.

financial contribution in the form of revenue forgone as described under section 771(5)(D)(ii) of the Act. Concerning specificity, the GOR provided annual extraction tax data for the period 2010 – 2014, which included the “quantity of taxpayers who used the right to apply the coefficient 0.7.”⁹⁶ The number of taxpayers who benefitted from the reduced tax rate was 64, 60, 62, 53, and 47 for 2010, 2011, 2012, 2013, and 2014, respectively.⁹⁷ At verification, we traced this usage data to the corresponding documents.⁹⁸ Based on this information, we determine that the tax deduction for exploration expenses program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act because the recipients of the subsidy are limited in number.

We also find that the reductions in extraction taxes conferred a benefit as described under section 771(5)(E) of the Act and 19 CFR 351.509(a). In the *Preliminary Determination*, we treated the extraction tax reductions received by the Severstal Companies as an income tax deduction.⁹⁹ However, at verification, we learned that extraction taxes are paid on a monthly basis and, thus, are akin to excise taxes.¹⁰⁰ As such, firms do not treat the reductions in the extraction taxes as deductions to taxable income. Thus, rather than treating the extraction tax reduction as an income tax deduction program, in which the benefit is calculated by multiplying the amount of the tax reduction by Russia’s corporate tax rate, we have instead treated the entire amount of the extraction tax reduction received during the POI as revenue foregone and thus the full amount of the extraction tax deduction as the benefit, consistent with 19 CFR 351.509(a).

As indicated above, in this final determination, for mining licenses that the Severstal Companies acquired after the April 1, 2002, “cut-off” date,¹⁰¹ the Department has calculated the benefit under the Provision of Mining Rights for LTAR program by comparing the price the Severstal Companies paid to extract coal from GOR mines during the POI to a market-based benchmark price for coal. Under this approach, we have taken into account the extraction rate for coal that the GOR charged to the Severstal Companies during the POI. As such, the benefit calculations performed in the context of the Provision of Mining Rights for LTAR program already take into account the 30 percent price discount that the GOR provided to the Severstal Companies on coal they extracted during the POI. Thus, for those licenses countervailed under the Mining Rights for LTAR Program, we would be overstating the benefit attributable to the Severstal Companies if we also countervailed the 30 percent price discount under the Reduction in Extraction Payments Program. Accordingly, we have not calculated a benefit under the Reduction in Extraction Tax Program for those licenses addressed in the context of the Provision of Mining Rights program.

For the final determination we have thus calculated a benefit for all other mining rights licenses (*e.g.*, those licenses not included in the Provision of Mining Rights for LTAR program) for which the Severstal Companies extracted coal and received extraction tax reductions during the

⁹⁶ See GOR First Supplemental PQR at 2-3.

⁹⁷ *Id.*, at 2-3.

⁹⁸ See GOR Verification Report at 8-9 and Exhibit VE-C.5.

⁹⁹ See the Memorandum to the File from Stephanie Moore, Case Analyst, AD/CVD Operations, Office III, “Preliminary Determination Calculations: Severstal Companies,” (Severstal Companies Preliminary Calculations Memorandum).

¹⁰⁰ See GOR Verification Report at 8.

¹⁰¹ See “Allocation Period” section above.

POI. For these licenses, we calculated the benefit by summing the amount of extraction tax deductions received during the POI. To calculate the net subsidy rate, we divided the total benefit by the Severstal Companies total consolidated sales in 2014. On this basis, we calculated a net subsidy rate of 0.02 percent *ad valorem* for the Severstal Companies.

4. Provision of Mining Rights for LTAR

Pursuant to Article 1.2 of the Law of the Russian Federation N. 2395-1 of February 21, 1992 “On Subsoil Resources,” subsoil resources in the territory of the Russian Federation are the property of the State, and the Russian Federation exercises its sovereign rights over the subsoil resources.¹⁰² According to the GOR, “the issues of the ownership, use and disposal of subsoil resources are in joint competence of the Russian Federation and sub-federal regions of the Russian Federation.”¹⁰³ The right of non-government entities for using subsoil resources is provided with special government permission in the form of a license. Specifically, the licenses for mining rights of subsoil resources can be granted upon (i) decision of the Federal Subsoil Management Agency or its territorial agencies based on the results of public tender auctions (*e.g.*, auctions where no counter-bids are permitted); and (ii) decision of the GOR and relevant regional executive authorities of the GOR based on the results of the public auctions (*e.g.*, auctions where counter-bids are permitted) or (iii) the results of consideration of certain applications (for subsoil areas of regional importance).¹⁰⁴

The NLMK Companies reported that they acquired coal mining rights but that the deposits were not developed beyond geological surveys and exploration at the sites and thus no coal was extracted from the deposits by the NLMK Companies during the POI.¹⁰⁵ Additionally, the NLMK Companies reported that in 2013, the mining rights were transferred to affiliated companies, which have no reporting obligation in this investigation.¹⁰⁶ Therefore, we determine that the NLMK Companies did not use this program during the POI because, in accordance with 19 CFR 351.525(b)(6)(v), the Department attributes subsidies to products sold by the recipient of the transferred subsidy and none of the recipients of the mining rights are responding companies subject to this investigation.

The Severstal Companies reported that member companies acquired coal mining licenses, also referred to as mining rights, from the GOR for several mining areas during the period 1993 through 2013.¹⁰⁷

As discussed below, we determine that the GOR’s provision of coal mining rights licenses to the Severstal Companies constitutes a financial contribution in the form of a provision of a good, and that this program results in a subsidy that is specific. As is also explained in detail below, for purposes of benefit, the Department determines that a benefit exists because the GOR’s provision

¹⁰² See GOR PQR at 61 and Exhibit IV-1.

¹⁰³ *Id.*, at 61 and Exhibit IV-1.

¹⁰⁴ *Id.*, at 62.

¹⁰⁵ See NLMK PQR at 26.

¹⁰⁶ *Id.* In other words, the rights were transferred to cross-owned affiliates that do not meet the criteria requiring the submission of a CVD questionnaire response.

¹⁰⁷ See Severstal Companies First Supplemental PPQR Part 2 at Exhibits 2S-1 and 2S-2.

of coal mining rights was not “consistent with market principles.”¹⁰⁸

For purposes of our determination, we limited our subsidy analysis to “active licenses,” *i.e.*, those mining right licenses under which the Severstal Companies extracted coal during the POI. Further, we determine that those licenses initially issued to the Severstal Companies prior to April 1, 2002, are not countervailable because the financial contribution, *i.e.*, the issuance of the coal mining licenses, occurred prior to the “cut-off” date.¹⁰⁹

One of the Severstal Companies’ active licenses was initially issued prior to 2002 and subsequently re-issued five times by the GOR with several of the re-issuances occurring after the 2002 “cut-off” date.¹¹⁰ In prior CVD proceedings involving loan and land for LTAR programs, the Department treated the re-issue date of loan and land contracts as the date of receipt of the subsidy in instances in which the re-issued contracts or agreements changed the terms of sale or terms of the loan.¹¹¹ In this case, we determine that we lack definitive information indicating that the terms of sale of the license in question changed as a result of the reissuances. Rather, the record merely indicates when the GOR initially issued the license to the Severstal Companies and the subsequent re-issue dates of the license.¹¹² Thus, for this particular license, we determine to treat the initial issue date as the date of receipt and, as a result, we find that the GOR provided this license to the Severstal Companies prior to Russia’s 2002 subsidy “cut-off” date. Should this investigation result in a countervailing duty order, we intend to continue to examine the terms and conditions surrounding the re-issuance of the Severstal Companies’ coal mining licenses in any subsequent administrative reviews.

As described above, the GOR has sovereign rights over subsoil resources in Russia and it provides mining rights to access these resources. On this basis, we determine that the GOR’s sale of mining rights to the Severstal Companies constitutes a financial contribution in the form of a provision of a good within the meaning of section 771(5)(D)(iii) of the Act.¹¹³

With regard to specificity, we determine that there is no evidence on the record indicating that the GOR’s provision of coal mining rights licenses to subsoil users in the steel industry is *de jure* specific, as described under section 771(5A)(D)(i) of the Act. Thus, we next examine whether the GOR’s provision of coal mining rights were otherwise *de facto* specific as described under section 771(5A)(D)(iii) of the Act.

¹⁰⁸ See 19 CFR 351.511(a)(2)(iii).

¹⁰⁹ April 1, 2002, is the date the Department recognized that the Russian Federation made the transition to a market economy for purpose of the AD and CVD laws, (hereinafter referred to as the “cut-off” date). See Department Memorandum regarding “Market Economy Status for the Russian Federation,” dated September 14, 2015.

¹¹⁰ See Severstal Companies First Supplemental PPQR Part 2 at 2S-1.

¹¹¹ See *Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy*, 63 FR 40474, 40486 (July 29, 1998).

¹¹² See Severstal Companies First Supplemental PPQR Part 2 at Exhibit 2S-1.

¹¹³ See, e.g., *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*HRS from India*), and accompanying Issues and Decision Memorandum (*HRS from India Decision Memorandum*) at page 19-20.; see also *Countervailing Duty Investigation of 1,1,1,2 Tetrafluoroethane From the People’s Republic of China: Final Affirmative Countervailing Duty Determination (Tetra from the PRC)*, 79 FR 62594 (October 20, 2014), and accompanying Issues and Decision Memorandum at 25.

We requested that the GOR respond to the *Standard Questions Appendix* for the mining rights provided by the GOR to respondents to extract coal.¹¹⁴ Specifically, in question L.2., we requested that the GOR provide information regarding the number of recipient companies and industries and the amount of assistance approved under the mining rights program for the year in which any mandatory respondent company was approved for assistance, as well as each of the preceding three years. In its Initial Questionnaire Response, the GOR responded that the mandatory respondents to this investigation did not apply for this program during the POI.¹¹⁵ On November 12, 2015, the Department requested that the GOR respond to the following:¹¹⁶

1. Provide a detailed description, including copies of submitted bids, of the entities approved to bid in each of the auctions referenced above and the actual number of participants at each auction.
2. What is the total number of mining rights licenses issued per year between 2005 and 2013, what are the classification of the licenses, and how many of them are currently in effect or have been were terminated?

In its First Supplemental Questionnaire Response, the GOR submitted aggregate data indicating that it conducted 270 public auctions and 37 tenders for subsoil exploration and extraction in the period between 2005 and 2013.¹¹⁷ However, the GOR stated that:

... during the period between 2005 and 2013 the Federal Agency for Subsoil Use of the Russian Federation and its territorial bodies had no electronic databases. Therefore, detailed description and copies of submitted paper bids of the entities for each auction and tender procedure that were archived cannot be provided.”¹¹⁸

In its response, the GOR also stated that between 2005 and 2013, it issued 759 licenses for mining rights for coal, 387 of them were revoked, nine were suspended and 363 were in effect as of November 17, 2015.¹¹⁹

On February 11, 2016, we asked the GOR how many different unrelated companies participated each year in the auctions and tender procedures held between 2005 and 2013.¹²⁰ We also asked how many different unrelated companies participated in the process each year, between 2005 and 2013, and how many of those companies received licenses each year between 2005 and 2013.¹²¹ The GOR responded that it does not maintain statistics showing whether companies participating in auctions and tender procedures are related or unrelated.¹²²

¹¹⁴ See Primary Questionnaire at 24.

¹¹⁵ See GOR PQR at page 68.

¹¹⁶ See GOR First Supplemental Questionnaire at 7- 8.

¹¹⁷ See GOR PPQR at 21.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 22.

¹²⁰ See GOR PQR at page 3.

¹²¹ *Id.*

¹²² See GOR PPQR at page 3.

In a supplemental questionnaire, we asked the GOR to indicate the annual number of companies that participated in auction and tender procedures during the period 2005 through 2013, as well as the number of companies that received such licenses each year.¹²³ In its response, the GOR provided the total number of companies that participated in auctions and tender procedures during the period 2005 through 2013, as well as the number of firms receiving mining licenses.¹²⁴ However, despite the Department's requests, as noted above, the charts submitted by the GOR did not list the entities or the industry sectors. In a supplemental questionnaire, we also asked the GOR for the source of its statistics indicating that the GOR issued 759 licenses for coal mining rights between 2005 and 2013.¹²⁵ The GOR responded that "the Russian Federal Geological Fund (Rosgeolfond) collects data on companies without distinction depending on their industrial belonging. Therefore, the information on industries that received mining rights in the specified years cannot be provided."¹²⁶ Additionally, the GOR provided a list of companies that received mining rights for coal in 2006, 2009, 2011 and 2013.¹²⁷ The list did not indicate the industry sectors to which the companies belonged or whether the companies were individual companies or part of an affiliated group of companies.

In advance of verification, we instructed the GOR to be prepared to discuss and document the following:

Be prepared to discuss and document how the Ministry of Energy of the Russian Federation compiled the information that as of 2014 the total number of producers operating in the coal-mining sector was 193. Have available the source documents for examination.

Be prepared to discuss and document how the GOR compiled the information on the number of companies, which participated in auctions and tender procedures, as well as the number of winners between 2005 and 2013.

Be prepared to discuss and document how the Russian Federal Geological Fund (Rosgeolfond) compiled the information that between 2005 and 2013 there were 759 licenses issued for mining rights for coal, and that 363 were in effect as of November 17, 2015. Also, be prepared to discuss the list of companies that received mining rights for coal in 2006, 2009, 2011, and 2013 in Exhibit IV-3. Have available the source documents for examination.

Please be prepared to discuss and document how Rosnedra derived the list of companies from "the information about the held competitions and auctions for the right to use subsoil containing coal for the period of 2005 - 2013 in Russia."¹²⁸

¹²³ See GOR Second PPQ at pages 3-4.

¹²⁴ See GOR Second PPQR at 5 - 6.

¹²⁵ See GOR Second PPQ at page 4.

¹²⁶ See GOR Second PPQR at page 7.

¹²⁷ *Id.*, and Exhibit IV-3, dated March 31, 2016 (English translation).

¹²⁸ See GOR Verification Outline Part 2 at page 5.

However, at verification the GOR was unable to provide source documents to substantiate the statements made in its questionnaire responses regarding the total number of mining licenses issued for coal (759) and the total number of licenses that were in effect (363) as of November 17, 2015. The GOR stated that the data regarding the number of companies which participated in auctions and tender procedures as well as the total number of winners of auctions and tenders during the period 2005 through 2013 was compiled by Rosgeolfond from data submitted by regional authorities. GOR officials further explained that this particular set of data operates off a paper-based system. Moreover, the GOR officials stated that the source documents were placed back into storage and, thus, they were not available for examination at verification.¹²⁹ Likewise, source documents for the list of companies that received mining rights for coal in 2006, 2009, 2011, and 2013, and the list of companies from “the information about the held competitions and auctions for the right to use subsoil containing coal for the period 2005-2013 in Russia,” were also unavailable for verification.¹³⁰ GOR officials explained that, same as above, the underlying data were not available in electronic format and that the hard-copy data points were not available for review at verification.¹³¹

Section 776(a) of the Act provides that the Department will apply “facts otherwise available” if, *inter alia*, necessary information is not available on the record or an interested party: (1) withholds information that has been requested by the Department; (2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified. Additionally, section 776(b) of the Act provides that if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available.

As indicated above, at verification the GOR was unable to substantiate the usage information it provided in its questionnaire response concerning the number of mining licenses issued, the number of mining licenses in effect during the POI, and the identities of the firms that received mining licenses from the GOR. Further, despite being able to provide a list of firms that received mining licenses from the GOR for various years, the GOR indicated that it was unable to identify the industry to which these firms belonged.¹³²

The manner in which an authority distributes a good or service under a particular program, and substantiating such distribution at verification, is essential in determining whether the authority has provided the financial contribution in a manner that is limited to a particular enterprise or otherwise results in an enterprise or industry being a predominant user or a disproportionately larger recipient, as provided under sections 771(5A)(D)(iii)(I)-(III) of the Act. Despite the Department’s instructions in the verification outline, the GOR failed to substantiate its usage data at verification. Accordingly, we determine that necessary information is not on the record and certain information provided by the GOR cannot be verified. Accordingly, it is necessary to rely

¹²⁹ See GOR Verification Report at pages 10 - 11.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See GOR Verification Report at page 10.

on the use of facts otherwise available with regard to the issue of specificity pursuant to sections 776(a)(1) and (a) (D) of the Act. Further, pursuant to section 776(b) of the Act, because the GOR did not provide the requested information at verification that was in its possession, we find that the GOR failed to cooperate to the best of its ability, and thus, adverse inferences are warranted. Therefore, as adverse facts available, we determine that the GOR's provision of mining rights to the Severstal Companies during the period 2006 through 2013 was *de facto* specific within the meaning of sections 771(5A)(D)(iii)(I)-(III) of the Act.

Notwithstanding the GOR's inability to substantiate data in its questionnaire responses with verifiable information, as noted above, record information states that there were 759 coal mining licenses granted from 2005 to 2013.¹³³ We find that 759 recipients of coal mining rights are limited in number within the meaning of section 771(5A)(D)(iii)(I) of the Act, and this program is thus *de facto* specific.¹³⁴

In order to determine the existence and amount of any benefit conferred by the GOR to the Severstal Companies pursuant to section 771(5)(E)(iv) of the Act, we followed the hierarchy described in 19 CFR 351.511(a)(2), to identify a suitable benchmark for mining rights. Based on the hierarchy, we first determine whether there were tier one benchmark prices (*e.g.*, market-determined prices for mining licenses resulting from actual transactions in Russia) as described under 19 CFR 351.511(a)(2)(i). Because the GOR is the sole issuer of such mining rights licenses, we find that there are no private, market-determined prices for mining rights in Russia on the record of the proceeding that would satisfy the requirements of the Department's regulations.¹³⁵

The GOR nevertheless contends that the Department should consider using prices stemming from actual transactions resulting from competitively run government mining rights auctions as provided under 19 CFR 351.511(a)(2)(i). Pursuant to 19 CFR 351.511(a)(2)(i), and as further discussed in the *CVD Preamble*, government-run auction prices may serve as suitable, tier one prices provided that, among other things, the Department is able to confirm that the auction is competitive, open to all, and based solely on price.¹³⁶

As an initial matter, despite the GOR's request that the Department utilize prices stemming from its mining rights auctions as the basis for a tier one benchmark, the GOR did not provide any auction price data on the record of this proceeding. Further, as noted above in the section discussing specificity, the GOR claimed that it was unable to provide (1) copies or detailed descriptions of submitted bids and tenders, (2) the entities approved to bid in each of the auctions, and (3) the actual number of participants at each auction. Specifically, the GOR stated that detailed descriptions and copies of submitted paper bids of the entities for each auction and

¹³³ See GOR First Supplemental PQR at 22.

¹³⁴ See *Welded Line Pipe From the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015), and accompanying Issues and Decision Memorandum for the Final Negative Determination at page 13.

¹³⁵ The Severstal Companies agree that tier one benchmarks are not suitable for this benefit analysis. See Severstal Companies First PPQR Part 1 at 7.

¹³⁶ See *CVD Preamble*, 63 FR at 65377.

tender procedure were archived and could not be provided.¹³⁷ Additionally, as noted above, the GOR was unable to substantiate at verification the number and make-up of firms that won mining rights auctions in each year.¹³⁸ As a result, we lack necessary auction price data and other relevant information to evaluate whether the GOR's mining rights auction system is competitively run, open to all, and based solely on price, as prescribed under 19 CFR 351.511(a)(2)(i) and further explained in the *CVD Preamble*.¹³⁹ For this reason, we determine that no tier one benchmark prices stem from GOR-run auctions. Accordingly, and as established above, we find that a tier one benchmark for mining rights is not available on the record and, thus, examining the suitability of a tier two mining rights benchmark is required.

Concerning tier two, the Severstal Companies submitted on the record prices for mining licenses acquired in the United States for each year in which they purchased mining rights from the GOR.¹⁴⁰ We find that mining licenses, like standing timber, are goods that do not lend themselves to comparison to a world market price because it is not reasonable to conclude that such prices would be available to purchasers in Russia.¹⁴¹ As such, we determine that the prices for mining licenses in the United States would not constitute suitable tier two benchmark prices in a manner consistent with the Department's regulations under 19 CFR 351.511(a)(2)(ii). No other interested party submitted information regarding world market prices for mining rights.

In the absence of a viable benchmark under the first two tiers, we move to the third tier under 19 CFR 351.511(a)(2)(iii), in which we assess whether the GOR's provision of coal mining licenses is consistent with market principles. According to the Severstal Companies, the Department should base its tier three analysis on the manner in which the GOR sets its auction prices, or, alternatively, it should determine whether the GOR's prices for coal mining rights sold to the Severstal Companies are consistent with market principles by using U.S. coal mining rights leases to measure the adequacy of remuneration that the Severstal Companies paid for their coal mining rights.¹⁴² As explained above, due to the GOR's inability to provide copies of the competing bids made under its coal license auction system, we are unable to determine whether the GOR operated the auctions in a competitive manner. The same lack of information

¹³⁷ See GOR First Supplemental PQR at 21. See also GOR Verification Report at page 10.

¹³⁸ *Id.*, GOR Verification Report at page 10.

¹³⁹ See *CVD Preamble*, 63 FR at 65377.

¹⁴⁰ See Severstal's Benchmark Data, dated November 16, 2015 and March 31, 2016.

¹⁴¹ See, e.g., *CVD Preamble*, 65 FR at 65377; see also *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 FR 75917 (December 20, 2004) (*Softwood Lumber from Canada Review*), and accompanying Issues and Decision Memorandum at 13-14 ("In considering the second tier regulatory hierarchy, we are cognizant of the fact that the NAFTA Panel considering the *Lumber IV* {determination} found that standing timber is not a good that is commonly traded across borders. As a consequence, according to the Panel, there is no world market price for timber that satisfies U.S. statutory or regulatory requirements"); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (September 27, 2010) and accompanying Issues and Decision Memorandum at 8 ("There are no world market prices for stumpage that we could use because standing timber cannot be traded across borders; only the logs produced from the standing timber can be traded. The record of this case does not provide us with external stumpage rates that would be available to purchasers in Indonesia. As such, we cannot apply a 'second tier' benchmark").

¹⁴² See Severstal's November 16, 2015, and March 31, 2016, factual filings.

concerning the bidding process also prevents us from conducting a market principles analysis under tier three that is based on information from the GOR's coal mining auction system. Concerning the use of U.S. coal mining rights leases as a tier three benchmark, as explained above we find that the prices for mining licenses in the United States do not reflect prevailing market conditions in Russia and, thus, would not be consistent with market principles as prescribed by the Department's regulations. We, therefore, determine that such prices do not relate to prevailing market conditions in Russia and are not suitable for a tier three, market principles analysis under 19 CFR 351.511(a)(2)(iii).

Due to the lack of suitable prices for mining rights under a tier one or tier two analysis, we have determined to conduct a tier three analysis examining whether the value of the acquired resource with the mining rights, coal, is market-based. This is consistent with the approach adopted by the Department in *HRS from India* and *Tetra from the PRC*, where we also investigated the provision of mining rights for LTAR, but found it appropriate to conduct a benefit analysis based not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights.¹⁴³

There are several possible sources of coal price data available for use as a tier three benchmark: concentrated coal prices (*e.g.*, processed coking coal prices that the Severstal Companies paid to private suppliers), aggregate coal price data from the GOR covering various coal grades, and world market coal price data covering various grades placed on the record by the Department and by Petitioners. At verification we confirmed the accuracy of GOR data indicating that state-owned firms did not account for a significant volume of the coal produced during the POI.¹⁴⁴ Thus, we determine that the domestic market for coal is not distorted by government involvement and, as a result, it is appropriate to consider the use of an in-country coal price as a market determined benchmark in the LTAR benefit calculation in this investigation.

In selecting from among these in-country prices, we have determined not to use the concentrated coal prices reported by the Severstal Companies because these prices do not represent the price of the good that was extracted in connection with the mining licenses provided by the GOR (coking coal) and because concentrated coal reflects a further processed product. Rather, we determine to use the aggregate coal price data (specifically, the coking coal price data) from the GOR as an in-country, tier three, benchmark. Concerning these prices, we were able to confirm at the GOR and the Severstal Companies' verifications that the government coal data reflect actual coal prices in Russia.¹⁴⁵ Thus, because these prices constitute actual market prices available in Russia, we have used them as the sole basis of our tier three coal price benchmark and have not incorporated the other world market prices for coal that the Department and Petitioners placed on the record.

In the Post-Preliminary Decision Memorandum we added to the coal benchmark the inland freight rates that the Severstal Companies paid to private suppliers for purchases of concentrated

¹⁴³ See *HRS from India*, and accompanying Issues and Decision Memorandum at 19, 65-66 (Comment 26); see also *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25-27.

¹⁴⁴ See GOR Verification Report at page 12.

¹⁴⁵ *Id.*, see also Severstal Companies' Verification Report at pages 7 – 8.

coal on the grounds that the prices served as a suitable proxy for the inland freight that would have been paid for purchases of coking coal.¹⁴⁶ However, for the reasons discussed in Comment 17 below, we have determined to remove freight entirely from the benefit calculation.

In constructing a coal price under tier three on the government side of the equation, *i.e.*, the coal prices the Severstal Companies paid to the GOR, we calculated a per-unit price for the coal based on the costs the Severstal Companies incurred, which includes the up-front initial fee that the Severstal Companies paid to the GOR when it acquired the mining license (allocated to the POI based on the number of years the company holds the license), the extraction tax paid to the GOR during the POI, any additional costs reported by the Severstal Companies, and profit.¹⁴⁷ The Severstal Companies advocate adding, as a proxy, the profit rate from an Indian coal producer to the benchmark. The Department included profit in a prior proceeding involving mining rights for LTAR programs on the government price side of the calculation.¹⁴⁸ Thus, in keeping with the Department's prior approach, we have incorporated the Indian profit rate supplied by the Severstal Companies into the extracted coal price they paid to the GOR.¹⁴⁹

To calculate the benefit, we subtracted the monthly unit price the Severstal Companies paid to extract coking coal from the GOR's mines (inclusive of the profit component discussed above) from the monthly tier three coking coal benchmark unit price to arrive at the monthly unit benefit. To calculate the total monthly benefit, we multiplied the unit benefit for each month by the volume of coking coal the Severstal Companies extracted from the government mine during that month. We then summed the total monthly benefits to arrive at the annual benefit attributable to each mine. We then summed the annual benefit for each to arrive at the total benefit the Severstal companies received.

To calculate the net subsidy rate, we divided the total benefit by the Severstal Companies' total consolidated sales during the POI. On this basis, we calculated a total net subsidy rate of 0.57 percent *ad valorem*.

B. Programs Determined Not To Confer a Benefit During the POI

1. Tax Deduction for Research and Development (R&D) Expenses

Under Article 262 of the TCRF, the NLMK Companies and the Severstal Companies claimed a tax deduction for R&D expenses on their income tax return filed during the POI.¹⁵⁰ We verified use of the program during the POI by the respondents.¹⁵¹ We continue to determine that the benefit (*i.e.*, tax savings) that the NLMK Companies and the Severstal Companies received under this program is less than 0.005 percent. Therefore, consistent with the Department's

¹⁴⁶ See Post-Preliminary Decision Memorandum at 10.

¹⁴⁷ See Severstal Companies PPQ at question I. 1. Mining Rights for LTAR and Second Severstal Companies PPQ at question I. 2. Mining Rights for LTAR.

¹⁴⁸ See, *e.g.*, *HRS from India*, and accompanying Issues and Decision Memorandum at 66 (Comment 26).

¹⁴⁹ *Id.*

¹⁵⁰ See NLMK Companies PQR at 17 and 23-24; see also Severstal Companies PQR at 17.

¹⁵¹ See NLMK Companies Verification Report at "Tax Deduction for Exploration Expenses and Tax Deduction for Research and Development (R&D) Expenses," and Severstal Companies Verification Report at 6.

practice,¹⁵² we determine that this program did not confer a benefit to the NLMK Companies and the Severstal Companies during the POI.

2. Forgiveness of Tax Fees and Penalties Under Decision 672

In June 2003, the Severstal Companies acquired two government-owned coal mining companies (OAO Vorkutaugol and OAO Mine Vorgashorskaya) that had federal tax payments in arrears.¹⁵³ The unpaid taxes consisted of the tax amounts initially incurred (*e.g.*, the original tax principal) as well as unpaid tax fees, and penalty payments. After the *Preliminary Determination*, but prior to verification, we found that the Severstal Companies signed an agreement with the GOR in 2005 whereby the Severstal Companies paid the underlying tax due in installments in exchange for the GOR waiving the accompanying fines and penalty payments.¹⁵⁴ The Severstal Companies restructured their tax liabilities pursuant to GOR Decision No. 672 (November 9, 2005) by which coal-mining organizations owing federal taxes (specifically defined as joint-stock companies, with more than 25 percent government ownership as of June 1, 2003) could restructure tax debts if the organization was formed as of July 1, 2003.¹⁵⁵ Under the agreement, the Severstal Companies would make scheduled repayments (in the form of multiple tranches) of all the original tax principal. Similarly, under the agreement the Severstal Companies agreed to make scheduled repayments (in multiple tranches) of 15 percent of the fees and penalties that had accumulated during the period in which the original tax principal was in arrears. The Severstal Companies recognized the tax write-off in their 2005 and 2006 financial statements.¹⁵⁶ However, pursuant to the tax restructuring agreement and schedule, the Severstal Companies continued to make payments on the original tax principal, fees, and penalties for several years after 2006.¹⁵⁷ Further, as discussed below in Comment 18, record evidence indicates that the GOR did not formally waive the debt associated with a given tranche until the Severstal Companies had completed the scheduled payments associated with that tranche.¹⁵⁸

We find that the GOR's decision to waive a portion of the tax fees and tax penalties that had accumulated during the period when the original tax principal was in arrears constitutes a financial contribution in the form of debt forgiveness, as described under 19 CFR 351.508(a) and section 771(5)(D)(ii) of the Act. Further, for the reasons explained below in Comment 18, we find that the waivers provided to the Severstal Companies under Decision 672 were limited to a subset of coal mining companies (*e.g.*, coal mining companies that were at least 25 percent government-owned as of June 1, 2003) and, thus, were *de jure* specific under section

¹⁵² See, *e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013), and accompanying Issues and Decision Memorandum at "Grants Under the Guangdong Province Coast Region Fisherman's Job Transferring Bill Fishery Industry Development Project Fund."

¹⁵³ See Severstal Companies First PPQR at 19-26 and Exhibits 2S-7, 2S-8, and 2S-9.

¹⁵⁴ *Id.*

¹⁵⁵ See, *e.g.*, GOR Verification Report at 12-13.

¹⁵⁶ See Severstal Companies' submission, "Severstal's Response to the Department's Second Supplemental Questionnaire," December 8, 2015 (Severstal Second Supplemental PQR) at Attachment 2 (2006 Annual Report at 88).

¹⁵⁷ See Severstal Companies First PPQR at Exhibit 2S-7.

¹⁵⁸ See Severstal Companies Verification Report at 7 and VE-8, which discusses the waiver letters the Severstal Companies received from the GOR upon their completion of payments associated with two of its tranches.

771(5A)(D)(i) of the Act.

We also find that the GOR's waiver of 85 percent of the Severstal Companies' fines and penalties conferred a benefit under section 771(5)(E) of the Act and 19 CFR 351.508(a). Under 19 CFR 351.508(b), in the case of debt forgiveness the Department will normally consider the benefit as having been received as of the date on which the debt or interest was assumed or forgiven. As noted above, evidence examined at verification indicates that the GOR did not formally waive the debt associated with a given set of scheduled repayments (or tranches) until the Severstal Companies had completed the payments associated with that particular tranche.¹⁵⁹ Thus, we disagree with the Severstal Companies that the date of receipt should correspond to 2005 and 2006, the years in which the Severstal Companies recognized the forgiveness of the penalties and fees in their annual reports. Rather, we have used as the date of receipt the year in which the Severstal Companies were scheduled to complete their payment of the penalties and fees due for a given tranche.¹⁶⁰ However, we have taken an exception to this approach with regard to two tranches. For these two tranches, information examined at verification indicates the Severstal Companies completed their fines and penalties payments in 2009 and 2010, as evidenced by letters issued by the GOR attesting to the companies' early repayment.¹⁶¹ Thus, for these two tranches, we have used the years in which the GOR issued the waiver letters (2009 and 2010, respectively) as the year of receipt.

Next, we summed the amount of forgiven debt the Severstal Companies received in each year and, for each year, we performed the "0.5 Percent Test," as described under 19 CFR 351.524(b)(2). Based on the results of the "0.5 Percent Test," we find that all of the debt forgiveness received by the Severstal Companies under this program was expensed in the year of receipt. Further, because we find that the dates of receipt of the Severstal Companies' debt forgiveness occurred prior to the POI, all benefits received under this program were fully expensed prior to the POI.¹⁶²

C. Programs Determined To Be Not Used

1. Grants for "Technical Retooling" and Modernization
2. Grants for Export Credit Interest for "Highly Processed" Industrial Goods
3. State Program to Develop Industry and Increase Competitiveness
4. Tax Incentives in Special Economic Zones (SEZs)
5. Eximbank Financing
6. Incentives in Lipetsk's Regional SEZs
7. Income Tax Reductions and Property Tax Exemptions for Key Sectors in the Republic of Karelia

¹⁵⁹ See Severstal Companies Verification Report at 7 and VE-8.

¹⁶⁰ See Severstal Companies First PPQR at Exhibit 2S-7.

¹⁶¹ See Severstal Companies Verification Report at 7 and VE-8.

¹⁶² See Severstal Companies Final Calculation Memorandum

IX. ANALYSIS OF COMMENTS

Comment 1: Whether Gazprom Is a Government Authority

Petitioners' Case Brief

- Information verified by the Department confirms the preliminary finding that Gazprom is a government authority providing a financial contribution, pursuant to section 771(5)(D)(iii) of the Act.¹⁶³

NLMK Companies' Rebuttal Brief

- Contrary to the Department's preliminary finding, government ownership and control do not establish the existence of a government authority. Rather, it must be shown that an entity is vested with authority from the government to perform government functions. However, both Petitioners and the Department fail to address the applicable standard, focusing on the GOR's majority ownership in Gazprom and that the GOR exercises its shareholder rights in the company.
- The presence of current or former government officials within Gazprom simply indicates that the GOR exercises its influence on Gazprom in proportion to its shareholder rights under the law and that the GOR chooses to appoint managers who can maximize returns for Gazprom.
- Although it is undisputed that the GOR is a majority owner of Gazprom, Gazprom is organized under the same corporate laws as any commercial enterprise and has the same fiduciary responsibilities to shareholders as any other Russian company.
- The Department and Petitioners do not point to any evidence that Gazprom is in fact exercising government functions.

NLMK Companies' and GOR's Case Briefs

- Although the Russian government owns 50.23 percent of Gazprom, the existence of government ownership does not confer to Gazprom the characteristics of a public body. According to the WTO Appellate Body, government ownership, in itself, is an insufficient basis for finding an entity to be a public body capable of providing a financial contribution.¹⁶⁴ Though the GOR exercises its shareholder interests in the company, in particular with regard to the Board of Directors, and that the GOR as shareholder is guided by the strategic interest of the State and protection of the lawful interest of its citizens, that does not establish the existence of a government authority. As verified, "the board of directors focuses on strategic, global management decisions for the company and is not involved in setting natural gas prices."¹⁶⁵ Further, Gazprom's Management Committee "is responsible for daily management issues," "consisted of Gazprom management," and "there were no government officials on the committee."¹⁶⁶

¹⁶³ See GOR Verification Report at 2-4 (and referenced exhibits therein).

¹⁶⁴ See Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 22, 2011), at para. 346 (*US – Anti-Dumping and Countervailing Duties (China)*).

¹⁶⁵ See GOR Verification Report at 3.

¹⁶⁶ *Id.*, at 4.

- The Department must establish that the GOR has “meaningful control” of Gazprom as well as whether that meaningful control reflects a vesting of governmental authority in Gazprom.
- As explained by the WTO Appellate Body, “the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of government authority.”¹⁶⁷
- None of the above facts establish such “meaningful control.” The Department has not demonstrated that the strategic interests of the State and the protection of the lawful interests of its citizens – factors that may guide the GOR as Gazprom’s shareholder – are distinct or conflict with the interests of the other 49.77 percent of Gazprom’s voting shares.
- Just because the GOR has majority ownership of Gazprom does not mean that it is able to control decisions at the General Shareholders Meeting which elects the Board of Directors. As a public joint stock company, organized under the corporate legislation applicable to all joint stock companies,¹⁶⁸ Gazprom complies with the provisions to secure the rights of all shareholders. Therefore, the GOR, as an owner of Gazprom shares, only exercises its corporate rights as all other shareholders.
- Just because a former government official holds the position of Chairman of the Board does not prove meaningful control because such person could not exercise any functions vested on him by the government. Additionally, the GOR argues that the presence of government officials in the Audit Commission also does not prove meaningful control as its main function is inspection of Gazprom’s financial activities and not managerial decisions.
- The WTO Appellate Body has made clear that any concept of “government authority” that includes an “entity controlled by the government such that the government can use the entity’s resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform government functions” is without merit.¹⁶⁹
- The record indicates that Gazprom functions as a profit-seeking entity guided by commercially-oriented corporate governance rules.¹⁷⁰ And, as a publicly traded company, the market will discipline any GOR interference in Gazprom’s operations, such as those related to pricing. Moreover, the GOR reported that there were no cases where Gazprom acted on behalf of the government and fulfilled state obligations or provided state services,¹⁷¹ and, at verification, the Department discovered no evidence to the contrary.
- Further, the Department’s analysis must address the legal and economic environment in which Gazprom operates. Gazprom is a natural monopoly, controlling the infrastructure needed to transport and deliver natural gas, which is consumed throughout Russia, as well as

¹⁶⁷ See *US – Anti-Dumping and Countervailing Duties (China)*, at para. 318.

¹⁶⁸ Specifically, the Federal Law “On Joint Stock Companies” No. 208-FZ of December 26, 1995.

¹⁶⁹ See Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (December 8, 2014) (DS436) at paras. 4.27-4.28. The NLMK Companies also states that the Appellate Body clarified that “the question of whether the conduct of an entity is that of a {government authority} must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.” *Id.*, at para. 4.43. In their argument, the NLMK Companies also make reference to DS379 at para. 318.

¹⁷⁰ See GOR PQR at 37-54, and Exhibit III-44 (Gazprom Articles of Association), para. 3.1.

¹⁷¹ *Id.*, at 48.

the largest gas producer.¹⁷² As such, natural gas is a heavily regulated sector and Gazprom is subject to additional legal and institutional controls— such as, the Federal Law “On Gas Supply in the Russian Federation” and Federal Law “On Natural Monopolies” and provisions of national legislation that provide to the Federal Tariff Service (FTS)/Federal Antimonopoly Service (FAS)¹⁷³ the authority to set and regulate the natural gas prices and tariffs for transportation of the gas sold by Gazprom.

- The environment in which Gazprom operates consists of market actors (such as Gazprom, Novatek, and other gas suppliers) and government regulators, overseeing access and price.
- In the *Preliminary Determination*, the Department ignored this distinction and instead conflated Gazprom’s characteristics and functions with that of market regulators, such as FAS that sets the natural gas tariffs. This distinction is relevant when considering whether Gazprom is vested with governmental authority. Specifically, one must question why separate governmental agencies would be established for the purpose of exercising pricing authority over Gazprom, if Gazprom were in fact vested with governmental authority.

Petitioners’ Rebuttal Brief

- The NLMK Companies and the GOR cannot contradict the facts on the record: (1) the GOR, as Gazprom’s largest shareholder, has the most voting rights with which to determine the composition of the Board of Directors and Audit Commission, the latter of which is responsible for financial, accounting, and control issues of the company and is comprised of five government officials and at least one former government official); (2) the Board of Directors appoints the Management Committee, which is in charge of Gazprom’s daily operations; and (3) as the majority owner, the GOR is able to influence Gazprom’s corporate strategy (via the Board of Directors), and control all financial and operational decisions made by the company (via the Audit Commission and Management Committee).
- Additionally, Gazprom’s designation as a “strategic enterprise” confirms the GOR’s need for operational control over Gazprom.¹⁷⁴ The GOR reported that “strategic enterprises” hold “strategic importance for ensuring state security and defense of the country.”¹⁷⁵ The GOR retained Gazprom’s “strategic enterprise” designation in 2014 despite its determination to exclude or delete a majority of entities from this special classification prior to the POI. Given that the GOR considers Gazprom to play a critical strategic role, it would not cede the ability to control the company and its operations. Therefore, the Department should continue to find that the GOR exerts meaningful control over Gazprom through the election/appointment of officials on all the company’s executive bodies.
- The respondents’ point that the presence of other governmental actors (*e.g.*, FTS/FAS which sets/regulations Gazprom’s natural gas tariffs) in the gas market precludes Gazprom from being vested with governmental authority is misguided. Nothing in the statute requires a

¹⁷² See GOR PQR at 30 and Exhibit III-38 (Gazprom 2014 Annual Report), page 1; and GOR First Supplemental PQR at 8 and 16.

¹⁷³ During the POI, FTS was the federal agency empowered to set and regulate Gazprom’s prices for natural gas. In July 2015, FTS was dissolved and the responsibility for setting the prices for natural gas produced and supplied by Gazprom and its affiliates was delegated to FAS, another federal agency, in 2015. See GOR PQR at 27 and 34; see also GOR Verification Report at 4.

¹⁷⁴ See GOR First Supplemental PQR at 10.

¹⁷⁵ *Id.*

government authority to be the only government authority involved in bestowing a financial contribution.¹⁷⁶ Rather, subsidy programs frequently involve several government ministries, or other public entities, to implement government assistance. Both Gazprom and FTS/FAS are vested and act with government authority and coordinate to provide natural gas for LTAR and execute the GOR's energy policy.

- Further, Gazprom's annual reports demonstrate that the company is vested with authority by the GOR to develop and implement national policy directives. For example, Gazprom's 2012 Annual Report indicates that one of the company's "priority areas" involved consideration of "Proposals for government support measures for gas sector enterprises, including taxation and pricing approaches to ensure conditions for cost-effective operations to supply gas to consumers in the Russian Federation."¹⁷⁷
- Under "Information on the Annual Results of Execution of Orders and Directions of the President of the Russian Federation and Orders of the Government of the Russian Federation," Gazprom's 2012 Annual Report details the company's implementation of 16 distinct GOR directives.¹⁷⁸ One of these actions required Gazprom to assess the proposals of the Ministry of Energy and Ministry of Finance on the mineral extraction tax rates for natural gas and to prepare the company's own proposal for "improvement" of the same.¹⁷⁹
- Additionally, Gazprom's 2014 Annual Report states "pursuant to the Russian Government directives, OAO Gazprom's Long-Term Development Programme was also approved by OAO Gazprom's Board of Directors."¹⁸⁰ As part of this long-term plan, Gazprom notes progress on "the Power of Siberia pipeline," a critical component for gas supply in eastern Russia that also provides "a huge boost to the social and economic development of Russia's eastern regions ... and create {sic} thousands of new jobs."¹⁸¹ In addition, the 2014 Annual Report contains a list of Gazprom's "Implementation of Presidential and Governmental Directives and Instructions" and one of the measures covered "Regulating wholesale gas prices," which required Gazprom to prepare "proposals on long-term energy pricing policies" for wholesale gas prices and gas price range targets until 2020."¹⁸²
- Thus, by Gazprom's own admission, the company plays an integral part in the establishment and implementation of government policy and, therefore, Petitioners assert that Gazprom is a government authority and provides a financial contribution through the provision of natural gas.

Department's Position: We continue to find Gazprom to be a government authority under section 771(5)(B) of the Act. Contrary to arguments made by the NLMK Companies and the GOR, the Department's determination is not solely based on the GOR's majority-ownership in Gazprom. Rather, the totality of the record evidence demonstrates that the GOR has meaningful control of Gazprom and that the company pursues government policy objectives through

¹⁷⁶ See section 771(5)(B) of the Act.

¹⁷⁷ See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report), page 37.

¹⁷⁸ *Id.*, at Exhibit III-17, pages 180-85.

¹⁷⁹ *Id.*, at Exhibit III-17, page 180. Gazprom's development of Russian tax policy concluded with proposals (delivered to the Ministry of Energy, the Ministry of Economic Development and Trade, and the Ministry of Finance) on possible tax breaks for deposits in Eastern Siberia, the Far East, and Yamal Peninsula. *Id.*

¹⁸⁰ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 19.

¹⁸¹ *Id.*, at Exhibit III-38, page 4.

¹⁸² *Id.*, at Exhibit III-38, pages 155-160.

Gazprom's business and operations; thus, Gazprom possesses, exercises, and is vested with governmental authority.

According to the GOR, historically Gazprom was created on the basis of the Ministry of the Gas Industry. In accordance with the Resolution of the Council of Ministers of the USSR adopted in 1989, the Ministry of Gas Industry was reorganized into the State Gas Monopolistic Enterprise "Gazprom" that afterwards in 1992, was reorganized into the Joint Stock Company (JSC) "Gazprom." The ownership structure of the JSC "Gazprom" is determined by the balance between commercial interests of the gas producer and strategic goal of ensuring the reliable supply of natural gas within the country.¹⁸³

We verified that Gazprom is majority-owned by the GOR, with the Federal Agency for State Property Management (FASPM) holding 50.23 percent of Gazprom's shares.¹⁸⁴ Through a government resolution, FASPM is mandated to represent the interests of the Russian Federation in its ownership of Gazprom's shares.¹⁸⁵ The importance of Gazprom to the GOR and the significance of the GOR's ownership in Gazprom is expressly stated in the Decree of the President of the Russian Federation N 1009 of August 4, 2004:

On approval of the list of *strategic enterprises* and strategic joint companies, the PJSC Gazprom is included in the list of the joint stock companies, the *shares of which are in the federal ownership and the participation of the Russian Federation in the management of which guarantees the strategic interest of the state and protection of the lawful interest of its citizens.*¹⁸⁶

The GOR reported that "strategic enterprises" hold "strategic importance for ensuring state security and defense of the country."¹⁸⁷ Gazprom's designation as a "strategic enterprise" demonstrates that it plays a critical strategic role in Russia. The fact that the GOR "guarantees the strategic interest of the state" through its ownership and participation "in the management" of Gazprom demonstrates meaningful, operational control over Gazprom by the government.¹⁸⁸

Moreover, the GOR effectively decides the composition and focus of Gazprom's Board of Directors through its majority shareholder voting rights. The GOR reported that, pursuant to Resolution of the Government of the Russian Federation N 738 of December 3, 2004:¹⁸⁹

¹⁸³ See GOR POR at 30.

¹⁸⁴ The GOR holds 38.37 percent of Gazprom's shares directly, and 11.96 percent indirectly through the FASPM's ownership of PJSC Rosneftegaz (Rosneftegaz) and Rosneftegaz's majority-ownership of PJSC Rosgazifikazia (Rosgazifikazia). During the POI, Rosneftegaz owned 10.97 percent of Gazprom's shares and Rosgazifikazia owned 0.89 percent of Gazprom's shares. See GOR Verification Report at "Gazprom Ownership & Corporate Governance." The remaining shareholders (*i.e.*, American Depository Receipt Holders and other registered persons) individually hold less than five percent of Gazprom). See GOR PQR at 40.

¹⁸⁵ *Id.*, and at VE-B.2. (paragraph 5.28).

¹⁸⁶ See GOR PQR at 30 and Exhibit III-18 (emphasis added).

¹⁸⁷ See GOR First Supplemental PQR at 10.

¹⁸⁸ See GOR PQR at 30 and Exhibit III-18 (emphasis added).

¹⁸⁹ *Id.* at 30-31 and Exhibit III-19.

the persons elected to the Board of Directors from the candidates nominated by the Russian Federation being the shareholder, represent the interests of the Russian Federation. Representatives of the interest of the Russian Federation in the Board of Directors shall vote on the agenda of the meeting of the Board of Directors *in accordance with the written directives issued by the Federal Agency for State Property Management.*¹⁹⁰

We verified that, because it has the most voting rights, the GOR is able to control decisions at the meeting of General Shareholders, which elects the Board of Directors.¹⁹¹ As confirmed at verification, Gazprom shareholders holding in aggregate not less than two percent of the shares are entitled to add items for discussion on the agenda of the annual General Shareholders meeting and nominate and appoint candidates to the (i) Board of Directors, which consists of 11 members, and (ii) the Audit Commission, which consists of nine members.¹⁹² The individuals appointed to the Board of Directors and Audit Commission, by the Russian government, have the ability to influence Gazprom's corporate strategy as well as financial and operational decisions.

We also verified that Gazprom's Chairman of the Board of Directors, Viktor Zubkov, is a former Prime Minister and a former First Deputy Prime Minister of the Russian Federation, and currently holds the position of Special Representative of the President of the Russian Federation to the Forum of Gas Exporting Countries.¹⁹³ To the GOR's assertion that a former government official holding the position of the Chairman of the Board does not prove meaningful control because Mr. Zubkov cannot exercise any functions vested on him by the government, we disagree. First, Mr. Zubkov is not simply a former "government official" but a prior Prime Minister and prior First Deputy Prime Minister, who served under Russia's current president. Second, Mr. Zubkov currently serves at the discretion of the Russian president as the country's representative to a forum composed of gas exporting countries, where he represents the interests of the GOR.¹⁹⁴ Additionally, we verified that five of the nine members of the Audit Commission were government officials during 2014.¹⁹⁵ In this regard, we find that the Audit Commission is a significant elective body within the organizational structure of Gazprom, because it handles functions in line with national legislation and the decisions of the General Shareholders. These functions, along with the composition of this body as noted above, is further probative evidence of the GOR's meaningful control of Gazprom.¹⁹⁶

We agree with the NLMK Companies that Gazprom is a natural monopoly that is subject to "institutional controls."¹⁹⁷ Those controls are displayed in the GOR's setting of Gazprom's

¹⁹⁰ *Id.* at 53 (emphasis added).

¹⁹¹ *Id.* at 42-43 and Article 6 at Exhibit III-44. Under Gazprom's Articles of Association, shareholders are authorized to vote, commensurate with their shareholding. *See also* GOR Verification Report at "Gazprom Ownership & Corporate Governance."

¹⁹² *Id.*; *see also* GOR Verification Report at "Gazprom Ownership & Corporate Governance."

¹⁹³ *See* GOR Verification Report at "Gazprom Ownership & Corporate Governance."

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See* GOR PQR at 45.

¹⁹⁷ *See* NLMK Companies Case Brief at 12.

natural gas prices. We verified that the GOR, through the FAS (formerly, FTS),¹⁹⁸ a government agency, sets the prices for the natural gas produced and supplied by Gazprom and its affiliates for all consumers in the domestic market.¹⁹⁹ By directly controlling and setting Gazprom's natural gas prices, the GOR indisputably has meaningful control over Gazprom. Further, we find no merit to the NLMK Companies' argument that Gazprom could not be vested with government authority since the FAS, as a separate government agency, sets the natural gas prices for Gazprom. The fact that certain governmental functions are performed by separate entities is not a basis to conclude that an entity that is meaningfully controlled by the government cannot be vested with government authority. Indeed, whether an entity that is meaningfully controlled by the government sets its prices in accordance with governmental directives or whether those prices are set for it by a separate governmental agency is not necessarily dispositive. In either case the entity can be found to be vested with government authority. As explained below, the record facts in this investigation strongly support such a conclusion with respect to Gazprom. To conclude otherwise would elevate form over substance and, thus, significantly undermine the disciplines of the CVD law. It is also noteworthy that subsidy programs may involve several government agencies/entities to implement government assistance. The record of this investigation clearly demonstrates that fact. For example, the GOR reported that the Ministry of Finance and the Federal Tax Agency of Russia coordinate with regard to the tax incentives for mining operations under examination in this investigation.²⁰⁰ Therefore, the fact that Gazprom and the FAS work together to provide natural gas for LTAR does not diminish the "government authority" vested in each of those entities.

Concerning whether the GOR's meaningful control of Gazprom reflects a vesting of government authority in Gazprom, we note that, by Gazprom's own admission, the company plays an integral part in the establishment and implementation of government policy. Gazprom's annual reports contain an itemization of the government mandates that Gazprom has or is working to fulfill.

For example, Gazprom's annual reports indicate the following:

- One of Gazprom's "priority areas" involved the Board of Directors' consideration of "proposals for government support measures for gas sector enterprises, including taxation and pricing approaches to ensure conditions for cost-effective operations to supply gas to consumers in the Russian Federation."²⁰¹
- Under "Information on the Actual Results of Execution of Orders and Directions of the President of the Russian Federation and Orders of the Government of the Russian Federation," Gazprom implemented 15 distinct directives.²⁰² One of the directives required

¹⁹⁸ During the POI, the FTS was the federal agency empowered to set and regulate Gazprom's prices for natural gas. In July 2015, FTS was dissolved and the responsibility for setting the prices for natural gas produced and supplied by Gazprom and its affiliates was delegated to FAS, another federal agency, in 2015. See GOR PQR at 27 and 34; see also GOR Verification Report at 4.

¹⁹⁹ *Id.* at "Natural Gas Pricing." See also GOR PQR at 27 and 34-35, and GOR First Supplemental PQR at 7-8.

²⁰⁰ The GOR stated that the Ministry of Finance "is the federal authority, which is responsible for policy-making in the tax regulation," and the Federal Tax Agency of Russia "is the federal authority responsible for administering the program." See GOR PQR at 12.

²⁰¹ See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report) (page 37).

²⁰² *Id.*, at Exhibit III-17 (pages 180-185).

Gazprom to assess proposals of the Ministry of Energy and the Ministry of Finance on the mineral extraction tax rate calculations for natural gas and to prepare the company's own proposal.²⁰³ Additionally, under this directive, Gazprom "prepared and delivered to {the} Ministry of Energy, the Ministry of Economic Development and Trade and the Ministry of Finance of Russia its proposals on possible tax breaks for deposits in Eastern Siberia, the Far East and Yamal Peninsula."²⁰⁴

- In 2014, pursuant to GOR directives, Gazprom's "Long-Term Development Programme" was approved by the Board of Directors."²⁰⁵ The Chairman's statement to shareholders referenced Gazprom's long-term plans, which included the "Power of Siberia pipeline, a key element of the gas supply system in Russia's east" The Chairman noted that this project provides "a huge boost to the social and economic development of Russia's eastern regions ... and create {sic} thousands of new jobs."²⁰⁶
- In 2014, Gazprom's "Implementation of Presidential and Governmental Directives and Instructions"²⁰⁷ included "regulating wholesale gas prices," which required Gazprom to prepare "proposals on long-term energy pricing policies" for wholesale gas prices and gas price range targets until 2020."²⁰⁸

These announcements contained within its annual reports demonstrate that Gazprom acts on behalf of the government as well as fulfills state obligations and provides services on behalf of the state and its objectives.

In response to arguments made by the NLMK Companies and the GOR that Gazprom functions as a commercially-oriented, profit-seeking entity, a firm's commercial behavior is not dispositive in determining whether that firm is a government "authority:"

²⁰³ *Id.*, at Exhibit III-17 (page 180).

²⁰⁴ *Id.*

²⁰⁵ *See* GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report) (page 19).

²⁰⁶ *Id.*, at Exhibit III-38 (page 4).

²⁰⁷ *Id.*, at Exhibit III-38 (pages 155-160).

²⁰⁸ *Id.*, at 159.

It has been argued that government-owned firms may act in a commercial manner. We do not dispute this. Indeed, the Department's own regulations recognize this in the case of government-owned banks by stating that loans from government-owned banks may serve as benchmarks in determining whether loans given under government programs confer a benefit. However, this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.' If firms with majority government ownership provide loans or goods or services at commercial prices, *i.e.*, act in a commercial manner, then the borrower or purchaser of the good or service receives no benefit. Nonetheless, the loans or goods or service is still being provided by an authority and, thus, constitutes a financial contribution within the meaning of the Act.²⁰⁹

Thus, as the Department explained in *Welded Line Pipe from Turkey* and *Kitchen Racks from the PRC* with regard to similar arguments made in those proceedings, the respondents' arguments concerning Gazprom's financial performance here are not relevant to whether Gazprom is a government authority within the meaning of section 771(5)(B) of the Act. Rather, the NLMK Companies and the GOR erroneously conflate the issues of "financial contribution" with "benefit." Moreover, as the discussion under the Department's Position to Comment 3, below, makes clear, by Gazprom's own admission in its annual reports, in carrying out certain governmental mandates, Gazprom's ability to act in a commercial manner has been seriously impaired.

Based on our analysis of the record facts as a whole, we conclude that the GOR exercises meaningful control over Gazprom and uses Gazprom to effectuate government functions. Consequently, we continue to find Gazprom to be a government authority that provides a financial contribution in the form of a governmental provision of a good under section 771(5)(D)(iii) of the Act.

The record information thus satisfies the standard for finding an entity to be an authority within the meaning of section 771(5)(B) of the Act. As such, this final determination is consistent with U.S. law.

Comment 2: Whether the Provision of Natural Gas for LTAR Is *De Facto* Specific

Petitioners' Case Brief

- Information verified by the Department confirms the preliminary finding that the GOR's provision of natural gas for LTAR is *de facto* specific to the Russian steel industry, including the subject merchandise, as a predominant user of the program, pursuant to section 771(5A)(D)(iii)(II) of the Act.²¹⁰

²⁰⁹ See *Welded Line Pipe From the Republic of Turkey: Final Affirmative Countervailing Duty Determination (Welded Line Pipe from Turkey)*, 80 FR 61371 (October 13, 2015), and accompanying Issues and Decision Memorandum at 35-36 (Comment 2) (quoting *Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) (*Kitchen Racks from the PRC*), and accompanying Issues and Decision Memorandum at Comment 4).

²¹⁰ See GOR Verification Report at 7 (and referenced exhibits therein).

NLMK Companies' Rebuttal Brief

- A *de facto* specificity finding only succeeds if one ignores the data on record, draws arbitrary distinctions among consumer categories, ignores past case precedent, and defies judicial precedent on the limits of consumption patterns in terms of establishing *de facto* specificity.
- The only new element presented by Petitioners for a *de facto* specificity finding is that the GOR is hiding evidence. That is, Petitioners note that Gazprom declined, at verification, to show completed quarterly data collection forms, detailing Gazprom's domestic sales in 2012, 2013, and 2014. Petitioners' statement is inapt since the annual compilations of the data are presented in the Gazprom annual reports,²¹¹ and the structure of the data collection, including the categories, is reflected in the blank form that was collected at verification.²¹² The NLMK Companies assert that there is nothing nefarious about Gazprom not showing quarterly data, nor are such data necessary to the Department's analysis.

NLMK Companies' and GOR's Case Briefs

- The Department preliminarily found the provision of natural gas to be *de facto* specific based on a flawed theory of predominant use.²¹³ The Department's assertion that Gazprom's 2014 Annual Report indicates that metallurgy was in the top five natural gas consuming groups for 2014 is false. Gazprom's 2014 Annual Report lists seven consumer categories; metallurgy is not among the top five, but is sixth out of seven, and accounted for only four percent of the total amount of domestic natural gas sales.²¹⁴ The data in Gazprom's 2014 Annual Report indicate the metallurgy sector, which includes not only steel, but also non-ferrous (aluminum, nickel, copper, etc.) products, to be a small consumer of natural gas, *i.e.*, four percent.²¹⁵
- "Predominant use" of a subsidy program by certain enterprises is the situation where the program is used "mainly, or for the most part" by certain enterprises.²¹⁶
- The Department distorted the facts to support a preliminary finding of predominant use where metallurgy was combined with agro-chemistry and cement, and considered as a group of industries that accounted for 15 percent of natural gas consumed, and where two larger groups of consumers, *i.e.*, households and power supply/heating were excluded from consideration.²¹⁷
- A *de facto* specificity finding cannot be sustained because: (1) it makes an artificial distinction between manufacturing and non-manufacturing sectors; (2) it looks behind the composition of a third "other" consumer category in finding a grouping of three other categories to be the predominant user; (3) no legitimate grouping of consumer categories that includes metallurgy can demonstrate *de facto* specificity; and (4) it is based on consumption rates that form an insufficient basis for a *de facto* finding.

²¹¹ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 79.

²¹² See GOR Verification Report at VE-B-14 (Gazprom Sales Form).

²¹³ See Preliminary Decision Memorandum at 14-15 ("Provision of Natural Gas for LTAR").

²¹⁴ The following "consumer group" and "percentage of natural gas consumed" data is sourced from Gazprom's 2014 Annual Report at 79: (1) Power and Heat Generation with 24%; (2) Households with 23%; (3) Other with 23%; (4) Housing and Utilities with 15%; (5) Agro-Chemistry with 8%; (6) Metallurgy with 4%; and (5) Cement Industry with 3%. See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 79.

²¹⁵ *Id.*

²¹⁶ The GOR cites to Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R (June 30, 201) (DS316) at para. 7.974 (*EC – Large Civil Aircraft*).

²¹⁷ See Preliminary Decision Memorandum at 14-15 (Provision of Natural Gas for LTAR).

- To point one, it was unreasonable for the Department to exclude, in its analysis, data on consumption by households, housing/utilities, and power generation/heating – the “non-manufacturing sectors.” Nothing in the statute or regulations directs the Department to look at use only by enterprises or industries, or even more specifically at only manufacturing enterprises or industries.²¹⁸
- The notion that *all use* should be examined to determine specificity, regardless of user category, is set out in the SAA, which states “the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread *throughout an economy*.”²¹⁹ There is no dispute that natural gas is used throughout the Russian economy and, thus, at issue is only whether the steel industry is a predominant user of natural gas either individually or as part of a reasonable grouping of enterprises or industries.²²⁰
- By eliminating the non-manufacturing sectors from its analysis, the Department acted contrary to statutory intent since it meant the agency was not considering natural gas consumption “throughout an economy.” Further, significant distortion was caused to the analysis when the non-manufacturing sectors, which comprised 62 percent of total gas consumption, were excluded.
- The emphasis on manufacturing versus non-manufacturing is contrary to the Department’s practice. In *OCTG from Turkey*, the Department found that the provision of natural gas for LTAR was specific to Turkey’s power industry (as opposed to steel) because the power industry, which consumed 47.5 percent of the natural gas, was the predominant user.²²¹
- By this same logic, the Department should find that the power and heat generation sector in Russia, which consumed 24 percent of the natural gas, is the predominant user and not the metallurgy industry, which only consumed four percent.
- Lastly, the Department justifies its manufacturing distinction on the basis of different rate regulations applicable to the three excluded categories. That argument is baseless.
- The Department’s justification appears directed only at the households and housing/utilities categories and does not address the power/heating generation category, which is an industrial category of consumers and is not subject to different rate regulations from those covering the metallurgy, agro-chemical, or cement categories.
- As the record reflects, gas prices in Russia differ based on whether the consumer is (1) a household consumer or (2) an industrial consumer.²²² Accordingly, the power and heat generation industry falls within the industrial consumer category that also includes metallurgy, agro-chemical, and cement categories.

²¹⁸ See section 771(5A) of the Act, and 19 CFR 351.502.

²¹⁹ See SAA at 930 (emphasis added).

²²⁰ See section 771(5A)(D)(iii) of the Act.

²²¹ See *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014) (*OCTG from Turkey*), and accompanying Issues and Decision Memorandum at 30-31 (“Provision of HRS for LTAR”).

²²² See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), pages 79-80, and Exhibit III-1 (Federal Law No. 69 “On Gas Supply in the Russian Federation (as amended)), page 2 (a gas consumer is a “person getting gas for own household needs, and also own industrial or other economic needs”).

- The Department made no effort to explain why it concludes that the housing/utilities category is a household consumer category, when record evidence indicates that it is not.²²³ Even assuming the Department’s grouping is reasonable, the consumption data indicate that the grouping is not the predominant user of natural gas, but is tied with the “housing and utilities” category for the smallest consumer of natural gas at 15 percent, which is behind three other categories that each consume substantially more natural gas between 23 percent and 24 percent each.
- To point two, the Department dismissed the “other” user category which accounted for 23 percent of Gazprom’s 2014 sales, explaining that this action was based on a GOR statement that “the ‘other’ category includes gas consumers from all industries and sectors, and because the proportion of consumption for each group is insignificant more detailed information is not provided in Gazprom’s annual report.”²²⁴ The Department’s approach reflects a biased comparison, whereby it chose to look behind a category’s composition to dismiss one category, but declined to perform the same exercise with other categories, in particular the metallurgy category of which steel is just one component.
- Looking behind a statistical category is contrary to the Department’s practice, which is to accept statistical categories used in the everyday course of business.²²⁵ In the instant case, categories appearing in Gazprom’s annual reports reflect categories used in the ordinary course of business and were not assembled for purposes of the investigation. This is clear from their appearance in Gazprom’s annual reports, which were verified, and from the internal statistical form used by Gazprom to compile the data, which reflects the same categories and was verified.²²⁶
- When analyzing predominant use, the Department must take into account the “other” category which is larger than its own grouping (*i.e.*, 23 percent versus 15 percent).
- To point three, the Department’s discretion to group enterprises or industries when considering *de facto* specificity must be governed by a “rule of reason.”²²⁷ The Department’s grouping of metallurgy with agro-chemistry and cement is based on a rationale that they all comprise “manufacturing” categories.
- However, the grouping of manufacturing categories with a combined use rate of just 15 percent, does not show predominant use as the “non-manufacturing” categories account for the remaining 85 percent.

²²³ “Housing/utilities” is a separate consumer category from the “households” consumer category, as indicated in Gazprom’s reporting of the consumer categories and in the tariffs schedules established by the FAS (formerly FTS). In both, “households” is a distinct group of consumers. *See, e.g.*, GOR Verification Report at VE-B-14 (Gazprom Sales Form) and VE-B-9 (Lipetsk Tariff Schedule); GOR Exhibit III-38 (Gazprom 2014 Annual Report), page 79.

²²⁴ *See Preliminary Determination*, and accompanying Decision Memorandum at “Provision of Natural Gas for LTAR.”

²²⁵ The NLMK Companies cite to *Live Swine from Canada*, where the Department examined the hog data on its own (which was separated from cattle data). The NLMK Companies state that a key consideration noted by the Department was that the types of category breakdowns presented by the Government of Canada in reporting usage data were used in the everyday course of business and were not created for purposes of the investigation. *See Final Negative Countervailing Duty Determination: Live Swine from Canada*, 70 FR 12186 (March 11, 2005), and accompanying Issues and Decision Memorandum at “Comment 1: Specificity.”

²²⁶ *See* GOR Verification Report at 7 and VE-B-14 (Gazprom Sales Form).

²²⁷ *See* SAA at 930.

- Even if the Department included within its grouping the “other” category, under an assumption that it includes manufacturing, that addition only increases the combined usage rate to 38 percent, which is still smaller than the remainder. Even if the Department excludes households from the analysis, the power generation and housing/utilities categories as a combined “non-manufacturing” category is still larger at 39 percent.
- Even if the Department were to consider “industry” versus “non-industry” the same constraints exist and the Department’s grouping would be comprised of much larger and much smaller categories to push the predominant use number up – an approach which the Department rejected in prior cases.²²⁸
- The metallurgy sector consumes only four percent of the natural gas. Any combination of metallurgy with other categories to generate a finding of predominant use by a “group” requires combining metallurgy’s small share with other categories that consume five to six times as much natural gas. Such an approach, the NLMK Companies submit, would be contrary to the statute.
- To point four, the Department’s examination of the level of natural gas consumption by certain user categories cannot sustain a finding of *de facto* specificity, citing to *Bethlehem Steel Corp. v. United States*, where the CIT stated that “the mere fact that {an industry} received a greater monetary benefit from the program than did other participants is not determinative of whether that industry was ‘dominant’ or receiving ‘disproportionate’ benefits.”²²⁹
- In recent cases the Department has espoused that “a subsidy program would be found to be *de facto* specific when the subsidy is *not* broadly available and used throughout an economy.”²³⁰ Conversely, where a subsidy is broadly available and widely used throughout

²²⁸ The NLMK Companies cite to *Antifriction Bearings from Singapore*, where the petitioner argued, but the Department rejected, that three industry sectors (electronics, fabricated metal products (which included antifriction bearings), and non-electrical machinery) were predominant users of a subsidy because they received 71 percent of program benefits. The Department rejected such an aggregation, noting the significant disparity in usage rates among the categories of the proposed grouping. The category of which anti-friction bearings was a part received just 6.3 percent of program benefits, while the two other categories received the remainder of the 71 percent of benefits of the proposed “group.” See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof (AFBs) from Singapore: Final Results of Countervailing Duty Administrative Reviews*, 60 FR 52377, 52379 (October 6, 1995) (*Antifriction Bearings from Singapore*). The NLMK Companies also cite to *Live Swine from Canada*, where the Department declined to combine the swine sector with other categories because the swine sector received a comparatively small percentage of benefits. See *Live Swine from Canada*, and accompanying Issues and Decision Memorandum at “Comment 1: Specificity.”

²²⁹ The NLMK Companies cite to *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1368-69 (CIT 2001). The NLMK Companies add that the Court also noted that “in virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group.” It concluded that “to impose countervailing duties on an industry where disparity alone is demonstrated, but no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws.” The NLMK Companies further note that the steel industry that was the subject of investigation received over 51 percent of the program benefits but the Court agreed that nothing on the record suggested that this should be considered unusual. Rather, it agreed with the Department that it merely “reflects the commercial realities of the industry in question.” *Id.* The NLMK Companies also cite to *Samsung Electronics Co. v. United States*, 973 F. Supp. 2d 1321, 1327-28 (CIT 2014).

²³⁰ See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, regarding “Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People’s Republic of

an economy it cannot be found *de facto* specific. There is no dispute that natural gas is broadly available and used throughout the Russian economy. Further, it is a commercial reality that the steel industry consumes natural gas and that it will consume more gas than some industries and less gas than others.

- In sum, the Department’s approach to specificity under this program is inconsistent with section 771(5A)(D)(iii) of the Act and Article 2.1(c) of the SCM Agreement.

Petitioners’ Rebuttal Brief

- The NLMK Companies and the GOR ignore the limitations on the record concerning industrial usage of natural gas, which are the results of the GOR’s failure to provide complete information as well as to allow verification of the data.
- Of note are the following facts: (1) in response to the Department’s request for volume and value data on natural gas purchased by Russian industries, the GOR claimed that such data were not maintained;²³¹ (2) in response to the Department’s inquiry into data presented in Gazprom’s annual reports, the GOR reported that a further breakdown of the “other” consumer classification, as each of these consumer groups was “insignificant;”²³² (3) at verification, Gazprom officials confirmed “consumers not specifically mentioned do not have a significant consumption of natural gas;”²³³ and (4) at verification the Gazprom officials refused to allow the Department to review the data contained in the company’s quarterly sales reports for 2012, 2013, and 2014.²³⁴
- By refusing to allow the Department to verify the accuracy of Gazprom’s industrial usage statistics, the GOR hindered the investigation, warranting the application of AFA.²³⁵ They add that, despite the appropriateness of AFA, even under a facts available analysis without AFA, the Department should continue to find this subsidy *de facto* specific to metallurgy.
- With regard to the facts available, Petitioners state that the Department’s exclusion of the gas consumption by the “non-manufacturing” (or households/housing) sector is consistent with the statutory language on predominant use, under which the Department is to determine whether a domestic subsidy is specific, in law or fact, “to an enterprise or industry within the jurisdiction.”²³⁶ Individuals or households are outside of the Department’s analysis.
- Further, contrary to the respondents’ contentions that the Department’s consideration of the “other” category and grouping of industries is unfair, the Department made a reasonable interpretation of the facts as presented by Gazprom.²³⁷ As the Department verified, Gazprom

China (WTO/DS437): Input Specificity - Preliminary Analysis of the Diversification of Economic Activities and Length of Time” (December 31, 2015) at 3 (emphasis added).

²³¹ See GOR PQR at 29.

²³² See GOR First Supplemental PQR at 13-14.

²³³ See GOR Verification Report at 7 (“The Gazprom representatives replied that the forms are confidential and cannot be examined.”)

²³⁴ *Id.*

²³⁵ Petitioners state that recent amendments to the statute reinforce the Department’s authority to apply AFA. The TPEA added a new section to the “adverse inferences” provision, explaining that the Department “is not required to determine, or make any adjustments to, a countervailable subsidy rate ... based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.” See TPEA, Pub. L. No. 114-27, 129 Stat. 362, 384 (2015) at section 502(1).

²³⁶ See section 771(5A)(D) of the Act (emphasis added).

²³⁷ Petitioners add the Court of Appeals for the Federal Circuit has affirmed that the Department’s specificity analysis should be conducted in light of the facts and circumstances of that particular case, explaining

historically has tracked sales only to select sectors (*i.e.*, power and heat generation, housing, metallurgy, agro-chemistry, and cement), considering all other groups to be insignificant consumers.²³⁸

- As stated in Gazprom’s 2012 Annual Report, “[t]he key consumers {of natural gas} are power generation, metals industry and agricultural chemistry. These industries take up to 50% of the total gas volume.”²³⁹ Thus, the information on the record is a result of Gazprom’s (and not the Department’s) “grouping” of these industrial sectors in terms of predominant use.
- The facts available demonstrate that the metallurgical industry is a predominant user of Gazprom’s natural gas. Even if the evidence was unclear, based on AFA, the Department should continue to find metallurgy a predominant beneficiary of the subsidy due to Gazprom’s refusal to allow the Department to verify the reported data.

Department’s Position: We determine that the application of AFA is warranted in determining that the Provision of Natural Gas for LTAR is *de facto* specific. Although the GOR responded to the Department’s questionnaires regarding this program, the GOR’s refusal to cooperate and allow the Department to verify Gazprom’s annual sales data is the basis for our AFA decision. In its initial questionnaire response, the GOR reported that it does not maintain statistics on industrial consumers that purchase natural gas.²⁴⁰ In the first supplemental questionnaire, we requested the GOR to submit alternative data which could be used to evaluate natural gas purchases based on the statistics that the GOR does maintain.²⁴¹ In its supplemental response, the GOR referred us to Gazprom’s 2014 annual report, which includes information on Gazprom’s domestic natural gas sales, as an alternate data source.²⁴²

We analyzed the data contained in Gazprom’s 2014 annual report and concluded that the predominant user of natural gas is a group of industries composed of agro-chemistry, cement, and metallurgy (which includes the steel industry).²⁴³ Thus, we preliminarily determined that the provision of natural gas by Gazprom is specific under section 771(5A)(D)(iii)(II) of the Act.²⁴⁴ In the *Preliminary Determination*, we also stated that we would “continue to examine the record data concerning specificity during the course of this investigation, including at verification.”²⁴⁵

In the verification agenda for the Provision of Natural Gas for LTAR, we notified the GOR that part of the Department’s verification of this program included an examination of Gazprom’s

“[d]eterminations of disproportionality and dominant use are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case.” See *AK Steel v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999) (citing *Proposed Regulations: Countervailable Subsidies*, 54 FR 23366, 23368 (May 31, 1989; *PPG Indus. v. United States*, 928 F.2d 1568, 1576 (Fed. Cir. 1999)).

²³⁸ See GOR Verification Report at 7.

²³⁹ See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report), page 74.

²⁴⁰ See GOR PQR at 29.

²⁴¹ See Department’s Letter to the GOR, “First Supplemental Questionnaire to GOR,” dated November 12, 2015, at Provision of Natural Gas for LTAR (question 9) (GOR First Supplemental PQR).

²⁴² See GOR First Supplemental PQR at 7.

²⁴³ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 79.

²⁴⁴ See Preliminary Decision Memorandum at 15.

²⁴⁵ *Id.*, at 15 & n.75.

domestic sales data for 2012, 2013, and 2014.²⁴⁶ We clearly indicated the types of information that we requested to examine to verify the accuracy and completeness of Gazprom's yearly sales data. Specifically, in the verification agenda, we stated:

Within Gazprom's annual reports for 2012, 2013, and 2014, the structure of Gazprom's domestic sales of gas by consumer group is reported. Have available the supporting records (such as, print-outs from Gazprom's database or sales reports) which were used to build-up the annual sales data and to compute the percentages reported on page 75 of the 2012 annual report, page 67 of the 2013 annual report, and page 79 of the 2014 annual report.²⁴⁷

Also, in the GOR Verification Outline Part 1, we instructed the GOR to "contact us immediately" if "any of the verification procedures cannot be performed."²⁴⁸ The verification agenda was issued to the GOR several weeks prior to the commencement of verification.²⁴⁹ The GOR, however, did not notify the Department prior to or at the outset of verification of any concerns with the clear request stated in the verification outline. In fact, there was no objection to the verification agenda item until the moment that the Department verifiers requested to examine the completed quarterly domestic sales forms maintained by Gazprom. Specifically, at verification, we asked the Gazprom officials to provide data to support the composition of the domestic natural gas sales reported in the 2012, 2013, and 2014 annual reports.²⁵⁰ In response, they provided a blank copy of an internal form that each sales department completes quarterly.²⁵¹ We then asked to examine the completed quarterly forms for 2012, 2013, and 2014. The Gazprom officials replied that "the forms are confidential and cannot be examined."²⁵²

In its rebuttal brief, the NLMK Companies state that the annual compilations of the data are presented in Gazprom's annual reports, and the structure of the data collection, including the categories, is reflected in the blank form that was collected at verification. The NLMK Companies thus argue that the quarterly data, which the verifiers were not permitted to examine, are not necessary to the Department's analysis. The NLMK Companies however misunderstand the purpose of verification. In accordance with section 782(i)(1) of the Act, the Department is required to verify the information relied upon in making a final determination. That statutory obligation means the Department must be able to confirm the accuracy, completeness, and reliability of the data reported to and relied on by the Department in its analyses.²⁵³ The GOR

²⁴⁶ See GOR Verification Outline Part 1.

²⁴⁷ *Id.*, at II.10.

²⁴⁸ *Id.*, at Cover Letter (page 3).

²⁴⁹ The Natural Gas Verification Agenda was issued on February 29, 2016, and the verification of natural gas with the GOR commenced on April 18, 2016.

²⁵⁰ See GOR Verification Report at "Composition of Gazprom Domestic Sales."

²⁵¹ *Id.*, at VE-B-14 (Gazprom Sales Form).

²⁵² *Id.*, at "Composition of Gazprom Domestic Sales."

²⁵³ See *Micron Tech. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (quoting *Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (CIT 1990)): "Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally, an audit entails selective examination rather than testing of an entire universe."

however refused to allow the Department to examine underlying records to verify Gazprom's annual domestic sales of natural gas by consumer group.²⁵⁴

Further, it is the Department's practice to verify data and values placed on the record by a government and respondent company regardless of the source of that information, *i.e.*, loan documents, database query, or audited financial statements and published annual reports. For example, in the instant investigation, we instructed the respondent companies to show the verifiers the accuracy of their reported sales values by reconciling those amounts to the accounting systems despite the fact that the sales values are presented in audited financial statements.²⁵⁵ Further, as a matter of practice, the Department requests that governments break out usage data presented on the record for a *de facto* specificity analysis. For example, in *Citric Acid from the PRC*, the Government of China provided to the Department a breakdown of the subcategories of the three major industrial groups reported to use sulfuric acid.²⁵⁶ The request made by the Department to the GOR for verification of Gazprom's sales data was representative of the Department's practice for confirming the accuracy and completeness of data submitted on the record.

Pursuant to section 776(a)(2)(D) of the Act, when an interested party provides information that cannot be verified, the Department shall, subject to section 782(d) of the Act, use the facts otherwise available. Further, section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the TPEA, the Department is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.²⁵⁷

Because the GOR refused to allow the Department to view the records and thereby verify the information reported for purposes of the Department's specificity analysis failed to provide alternative methods, we conclude that the GOR failed to cooperate by not acting to the best of its ability. Consequently, we determine that an adverse inference is warranted in the application of facts available. In drawing an adverse inference, we find that the metallurgy sector (which includes the steel industry) is a predominant user of natural gas provided by Gazprom for LTAR within the meaning of section 771(5A)(D)(iii)(II) of the Act and, therefore, the Provision of Natural Gas for LTAR is *de facto* specific.

Lastly, because the Department determines, based on AFA, that the Provision of Natural Gas for

²⁵⁴ See, e.g., *53-Foot Domestic Dry Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 21209 (April 17, 2015), and accompanying Issues and Decision Memorandum at 13-14, 66-70 (applying AFA because the government refused to allow Department to examine or query electronic databases regarding recipients under certain program for non-use, such that non-use could not be verified).

²⁵⁵ See, e.g., NLMK Companies Verification Report at "Sales and Export Information."

²⁵⁶ See *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011) (*Citric Acid from the PRC*), and accompanying Issues and Decision Memorandum at Comment 7.

²⁵⁷ See section 776(b)(1)(B) of the Act.

LTAR is *de facto* specific, we need not address the affirmative arguments on specificity raised by the NLMK Companies and the GOR in their case briefs.

Comment 3: Whether the Natural Gas Market in Russia Is Distorted

Petitioners' Case Brief

- Information verified by the Department confirms the preliminary finding that the Russian natural gas market is distorted and, thus, a tier one benchmark is not appropriate.²⁵⁸

NLMK Companies' and GOR's Case Briefs

- The facts upon which the Department relies to conclude that prices in the Russian natural gas market are distorted are insufficient to rule out a tier one benchmark.
- The majority presence of government suppliers is insufficient for a distortion finding even where government suppliers exceed 90 percent of the market.²⁵⁹ Article 14(d) of the SCM Agreement pertaining to benchmarks and the provision of goods or services does “not qualify in any way the ‘market’ conditions which are to be used as the benchmark . . . {a} such, the text does not explicitly refer to a ‘pure’ market, to a market ‘undistorted by government intervention,’ or to a ‘fair market value.’”²⁶⁰
- The Department improperly concluded that Gazprom supplied 77 to 82 percent of the natural gas consumed in Russia between 2012 and 2014. The data the GOR reported represents total volume of domestic production by companies in which the government maintains direct or indirect ownership/management interest – not only Gazprom. Also, the GOR states that the data on domestic production accounts for both gas supplied for internal consumption and exported gas. As such, the Department, in its assessment of Gazprom’s role in the domestic market should consider the “regulated” segment of the market which accounts for 65 percent. On the basis of that figure, it is not possible to conclude that the government has a predominant role in the market via Gazprom.
- Further, the pricing data for the remaining 35 percent of the gas market (*i.e.*, the unregulated market) is representative of the prevailing market conditions of the Russian gas market and prices in that market should be used as the benchmark.
- With regard to the Department’s preliminary finding of the GOR’s “other interventions in the market, in particular controls on imports and exports of natural gas,”²⁶¹ the Department does not explain how import controls could have an impact on domestic market prices, when Russia has a natural gas surplus and there is no incentive for imports and, thus, no need to “control” such imports to affect prices. The Department also does not address the physical reality that import opportunities do not exist given the lack of infrastructure necessary to import gas.

²⁵⁸ See GOR Verification Report at 4-6 (and referenced exhibits therein).

²⁵⁹ See Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, *Softwood Lumber*, WT/DS257/AB/R (January 19, 2004), fn. 103 (*US – Softwood Lumber IV*).

²⁶⁰ *Id.*, at para. 87.

²⁶¹ See *Preliminary Determination*, and accompanying Decision Memorandum at 16 (Provision of Natural Gas for LTAR).

- Regarding export controls, the Department fails to point to any evidence that the GOR is responsible for any restraints on natural gas exports. In fact, Gazprom is involved in expanding its capacity to serve export markets, rather than inhibiting that capacity.²⁶² Furthermore, even if Gazprom's prices are competitive, government energy security and diversification policies in place in key export markets dictate diversification of supply away from dependence on Gazprom. These are not policies within the GOR's discretion but are completely external.
- Given the absence of market distortion, the Department should find that tier one prices are on the record in the form of quarterly prices published by Novatek, a wholly-private supplier, as well as from the Russian commodities exchange.²⁶³

Petitioners' Rebuttal Brief

- The Department's preliminary finding of distortion was not based on a *per se* rule, but was based on the existing conditions within the Russian natural gas market, including Gazprom's supply of the majority of the domestic natural gas, lack of natural gas imports into Russia, and the GOR's restriction on exports.
- The GOR establishes Gazprom's natural gas prices in the domestic market. The GOR's 65 percent share of the domestic market demonstrates distortion, consistent with the Department's regulation and practice.²⁶⁴
- With regard to the other market conditions, the Department verified that "Gazprom has the exclusive right to export natural gas in gaseous state."²⁶⁵ This fact alone should prevent the Department from using the non-regulated Russian market prices, as the independent companies are not allowed to export natural gas to competitively-priced markets (such as Europe) and, thus, are essentially forced to sell at below-market prices within Russia.
- Even with less rigid export restrictions, which were considered in another investigation (such as export tariffs and licensing requirements), the Department has concluded that "{s}uch export restraints can discourage exports and increase the supply ... in the domestic market, with the result that the domestic prices are lower than they otherwise would be."²⁶⁶

Department's Position: Based on the record evidence, we continue to find the domestic natural gas market to be distorted because of the predominant role played by the GOR in the Russian

²⁶² See, e.g., GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 13 and 21 (map depicting the ongoing development of Gazprom's export transportation routes for natural gas).

²⁶³ See NLMK Companies Factual Filing, dated November 16, 2015 (NLMK Companies Factual Filing) at Exhibit 9 (Novatek Realized Natural Gas Prices), page 2 and 4.

²⁶⁴ Petitioners note that the Department has stated "While we recognize that governmental involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government constitutes a majority or, in certain circumstances, a substantial portion of the market." See *CVD Preamble*, 63 FR at 65377. Further, Petitioners state that Gazprom's market share exceeds the percentage of governmental market control in other CVD cases where the Department found significant market distortion. See, e.g., *Kitchen Racks from the PRC*, and accompanying Issues and Decision Memorandum at 15 ("Provision of Wire Rod for LTAR") (where the Department rejected use of a tier one benchmark due to the Chinese government's ownership of 47.97 percent of the domestic wire rod market, in addition to certain market factors related to imports and exports).

²⁶⁵ See GOR Verification Report at 6.

²⁶⁶ See *Kitchen Racks from the PRC*, and accompanying Issues and Decision Memorandum at 15 ("Provision of Wire Rod for LTAR").

natural gas market through the significant portion of the market supplied by Gazprom, a government authority, and because of other interventions in the natural gas market by the GOR, as described in further detail below.

As an initial matter, we verified the natural gas market data the GOR placed on the record, in particular Gazprom's volume of natural gas production and the total volume of natural gas production in Russia.²⁶⁷ The data indicate that Gazprom's share of the total domestic production was 81.2 percent, 78.97 percent, and 77.96 percent, for 2012, 2013, and 2014, respectively.²⁶⁸ Therefore, it is reasonable to conclude that Gazprom accounts for "a substantial portion of the market"²⁶⁹ and that the domestic market for natural gas in Russia is distorted. In a situation like this, when the supply of a good by a single government authority is so predominant, it can effectively determine the prices set by other, private entities in the market such that a comparison of the government price to private prices would become circular. This conclusion is further supported by the structure of the natural gas market in Russia. Notably, this market is characterized by presence of a single, predominant supplier of natural gas – Gazprom -- whose prices are administratively set by a governmental agency. In addition, and as discussed above in Comment 2, Gazprom has been vested with government authority to carry out mandates in pursuit of governmental policy objectives that are divorced from market outcomes, which is further indication that the natural gas market in Russia is distorted by government intervention.

Gazprom's own statements within its 2014 Annual Report describe the GOR's significant interventions in the natural gas market, which have created a distorted market. Specifically, Gazprom states:

- The existing gas market model has a number of fundamental flaws that prevent further competition, including a high share of the regulated segment in the gas market, unsustainable wholesale prices, and interregional cross-subsidies affecting regional gas pricing. However, a real competition for consumers that benefits consumers can only be possible if equal opportunities are offered to all market players, with a simultaneous launch of an organised {sic} gas trading platform in Russia and introduction of a commercial gas balancing system.²⁷⁰
- The meeting emphasised {sic} that Gazprom, being the biggest gas supplier to the Russian market, sold the bulk of its gas supplies at regulated prices, which were set at below the sustainable level to bolster the national economy. However, the artificially low regulated prices prevent Gazprom from generating enough revenue to build its own funding sources to finance investments into new gas production, transportation and storage projects or maintaining the existing ones for the benefit of Russian consumers.²⁷¹

²⁶⁷ See GOR Verification Report at "Natural Gas Market Data."

²⁶⁸ See Department Memorandum, "Natural Gas Market – Russia," dated concurrently with this memorandum (Natural Gas Memorandum).

²⁶⁹ See *CVD Preamble*, 63 FR at 65377.

²⁷⁰ See GOR PQR at Exhibit III-38 (Gazprom's 2014 Annual Report), at "Competition in the Russian gas market" (page 44).

²⁷¹ *Id.*, at "Pricing prospects in the domestic market, including cross-subsidies between different regions and

Further, the annual reports demonstrate that Gazprom plays a role in the government's energy policy, which influences not only Gazprom's business decisions but also the operations of the natural gas market in general. For example, the annual reports indicate that Gazprom has or is working to fulfill government mandates, such as:

- One of Gazprom's "priority areas" involved the Board of Directors' consideration of "proposals for government support measures for gas sector enterprises, including taxation and pricing approaches to ensure conditions for cost-effective operations to supply gas to consumers in the Russian Federation."²⁷²
- In 2014, Gazprom's "Implementation of Presidential and Governmental Directives and Instructions"²⁷³ included "regulating wholesale gas prices," which required Gazprom to prepare "proposals on long-term energy pricing policies" for wholesale gas prices and gas price range targets until 2020."²⁷⁴

Moreover, in accordance with the Federal Law "Supply of Gas in the Russian Federation," Gazprom and its subsidiaries "still bear the responsibility for uninterrupted and accident-free supply to all Russian consumers, regardless of their geographic location and industry affiliation."²⁷⁵ According to Gazprom's annual report, Gazprom owns Russia's "Unified Gas Supply System" and it "provides independent suppliers with non-discriminatory access to its gas pipelines, provided that there is available capacity and that the company applying for gas transportation has a gas production license and a gas take or pay agreement in place."²⁷⁶ The GOR also sets prices with respect to services for transportation of gas produced by privately owned companies through the pipeline owned by Gazprom.²⁷⁷

In its case brief, the GOR argues that the Department, in its assessment of Gazprom's role in the domestic market, should consider the "regulated" segment of the market which accounts for 65 percent. The GOR asserts that, on the basis of that figure, it is not possible to conclude that the government has a predominant role in the market via Gazprom. We disagree. The GOR reported that the domestic natural gas market is divided into a 65 percent "regulated" market and a 35 percent "unregulated" market and that only Gazprom operates in the regulated market.²⁷⁸ We verified that the GOR through the FAS (formerly, FTS), a government agency, sets the prices for the natural gas produced and supplied by Gazprom and its affiliates for all consumers in the regulated domestic market.²⁷⁹ In other words, the GOR sets prices for 65 percent of the natural gas market in Russia. Therefore, we find that the fact that the regulated segment of the market is subject to governmental price controls constitutes further evidence of the significant role the government has in the natural gas market.

consumer groups" (page 45).

²⁷² See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report) (page 37).

²⁷³ *Id.*, at Exhibit III-38, (pages 155-160).

²⁷⁴ *Id.*, at 159.

²⁷⁵ See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report) (page 74).

²⁷⁶ *Id.*, Exhibit III-38 at 64 (Gazprom's 2014 Annual Report).

²⁷⁷ *Id.* at 23.

²⁷⁸ *Id.*

²⁷⁹ See GOR Verification Report at "Natural Gas Pricing." See also GOR PQR at 27 and 34-35, and GOR First Supplemental PQR at 7-8.

The NLMK Companies argue there is no evidence that the GOR is responsible for any restraints on natural gas exports. However, the record emphatically shows that the GOR maintains rigid export restrictions. First, the GOR imposes a 30 percent export customs duty on natural gas.²⁸⁰ Second, the GOR has granted to Gazprom the exclusive right to export natural gas in gaseous state.²⁸¹ As other companies are not allowed to export natural gas, including those in the unregulated market, they are essentially forced to sell their supply in the domestic market. In doing so, export restraints artificially increase the supply in the domestic market, resulting in domestic prices that are lower than they otherwise would be. This situation amplifies the distortion of domestic prices caused by the predominant government supplier, Gazprom, described above and supports the conclusion that the domestic market for natural gas is distorted by governmental intervention.

Further, with regard to export controls, the NLMK Companies state that even if Gazprom's prices are not competitive, government energy security and diversification policies in key export markets dictate diversification of supply away from dependence on Gazprom, which are policies not within the GOR's discretion. We find that if there is a mechanism in place that curtails Gazprom's exports, then that is additional evidence that the domestic market is distorted by an over-supply of natural gas, regardless of the underlying policy.

Concerning import controls, in the *Preliminary Determination*,²⁸² we also stated that the GOR intervenes in the market by imposing import controls of natural gas into Russia. Based on our verification findings that Russia's gas pipelines do not allow for an inflow of imported natural gas into the country,²⁸³ we acknowledge that import controls on natural gas do not exist. However, this does not affect our finding otherwise that the domestic market in Russia for natural gas are distorted.

Given the totality of these record facts, we conclude that the level of government involvement in the domestic natural gas market is such that prices are significantly distorted and, thus, they cannot be used as a tier one benchmark pursuant to 19 CFR 351.511(a)(2)(i), because use of such private prices would be akin to comparing the government price to itself.²⁸⁴ Accordingly, we find that actual transaction prices in Russia are not appropriate to use as a benchmark for the natural gas purchased by the NLMK Companies during the POI because they reflect significant distortion resulting from the government's presence and involvement in the market. As we explained in *Softwood Lumber from Canada*:

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

²⁸⁰ *Id.*, at 28.

²⁸¹ See GOR Verification Report at "Export License;" see also Article 3 of the Federal Law N 117-FZ of July 18, 2006, "On Export of Gas," which states that an exclusive right for export of natural gas via pipeline is provided for Gazprom. See GOR PQR at 28-29.

²⁸² See Preliminary Decision Memorandum at "Provision of Natural Gas for LTAR."

²⁸³ See GOR Verification Report at "Gas Pipelines."

²⁸⁴ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at "Provision of Natural Gas for LTAR;" *OCTG from Turkey*, and accompanying Issues and Decision Memorandum at "Provision of HRS for LTAR."

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.²⁸⁵

For these reasons, we find that natural gas prices stemming from actual transactions within Russia – domestic purchases within the unregulated market either direct from a private supplier (such as Novatek, a private Russian natural gas company²⁸⁶) or *via* the St. Petersburg International Commodity Exchange²⁸⁷ (*i.e.*, tier one prices)²⁸⁸ – cannot be considered to be independent of the government price. Therefore, use of these prices does not meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration.

Comment 4: Standard Applied to Select a Tier Two Benchmark

NLMK Companies' Case Brief

- Because the Department failed to apply the appropriate standard for selecting a benchmark, it wrongly determined that it could use a tier two benchmark for natural gas. Under 19 CFR 351.511(a)(2) it must be “*reasonable to conclude* that such price *would be available* to purchasers in the country in question” (emphasis added). However, in the *Preliminary Determination*, the Department applied a different standard of whether such prices “*would be potentially available* to purchasers of natural gas in Russia.”²⁸⁹
- Such an approach is in contrast to other cases where the Department was clear that the meaning of “would be” is a price that is available to purchasers in the country under investigation, citing to *Rebar from Turkey*²⁹⁰ and *Melamine from Trinidad and Tobago*.²⁹¹
- In *Rebar from Turkey*, the Department asserted that natural gas export prices from markets in North America, South America, Africa, and Australia were not usable – as they “would not be available to purchasers in Russia.”²⁹² The Department elaborated on this interpretation, noting that in tier two “we will turn to world market prices that would be available to the

²⁸⁵ 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*), and accompanying Issues and Decision Memorandum at “There are no market-based internal Canadian benchmarks;” see also *Certain Uncoated Paper From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 81 FR 3110 (January 20, 2016), and accompanying Issues and Decision Memorandum at 25 (“Provision of Calcium Carbonate for LTAR”).

²⁸⁶ See NLMK Factual Filing at Exhibits 9 and 10.

²⁸⁷ We further note that the exchange did not commence operations until October 2014, two months before the end of the POI. See GOR PQR at 26, and NLMK Section F PQR at 2.

²⁸⁸ There were no imports of natural gas into Russia during the POI. See GOR Verification Report at “Gas Pipelines.”

²⁸⁹ See *Preliminary Determination*, and accompanying Decision Memorandum at 18 (emphasis added).

²⁹⁰ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at “Provision of Natural Gas for LTAR.”

²⁹¹ See *Melamine from Trinidad and Tobago*, and accompanying Issues and Decision Memorandum at 8-9 (“Provision of Natural Gas for LTAR”).

²⁹² See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at “Provision of Natural Gas for LTAR.”

purchaser. We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market.”²⁹³ Thus, the Department’s benchmark inquiry focuses first on whether there is the practical capacity to deliver a good or service to the market under investigation.

- In *Melamine from Trinidad and Tobago*, the Department stated that in determining whether natural gas is provided for LTAR under 19 CFR 351.511(a)(2), it compares, “in order of preference . . . (ii) the government price to a world market price where it would be reasonable to conclude that such a world market *price is available* to natural gas consumers in the country in question (Tier 2)”²⁹⁴ The Department further stated that it will only use world market prices “if the good or service *is actually available* to the purchaser in the country under investigation.”²⁹⁵

Petitioners’ Rebuttal Brief

- In *Rebar from Turkey*, to construct the benchmark, the Department relied on data sets of European and Russian prices of natural gas that *would be potentially available* to purchasers in Turkey.²⁹⁶

Department’s Position: As discussed below in the Department’s Position to Comment 5, we determine that there are no tier two natural gas prices available to purchasers in Russia. Because we are not applying a tier two benchmark to calculate the benefit from the provision of natural gas by Gazprom in the final calculations, the arguments made by the NLMK Companies regarding the appropriate standard for selecting a tier two benchmark are moot.

Comment 5: Availability of Tier Two Prices to Natural Gas Purchasers in Russia

Petitioners’ Case Brief

- Although the Department confirmed at verification that Russia’s natural gas pipelines are not capable of facilitating the importation of natural gas into Russia,²⁹⁷ natural gas export prices (from European and Asian markets (excluding Russia)), as a tier two benchmark, remain the most appropriate benchmark.
- Even though Russia’s current pipelines are not bi-directional, the inability to facilitate the importation of natural gas is due to the lack of compressors that would allow the inflow of natural gas from Europe to Asia.²⁹⁸ With the addition of compressors, Russia could import natural gas and, therefore, natural gas from Europe and Asia is potentially available in Russia.
- The Department’s use of a regional benchmark is consistent with its past practice, citing to *Rebar from Turkey*. In that investigation, the Department rejected U.S. natural gas prices to assess the adequacy of remuneration because such prices would not be available to

²⁹³ *Id.*

²⁹⁴ See *Melamine from Trinidad and Tobago*, and accompanying Issues and Decision Memorandum at “Provision of Natural Gas for LTAR” (emphasis added).

²⁹⁵ *Id.* (emphasis added).

²⁹⁶ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at “Provision of Natural Gas for LTAR” (page 11) (emphasis added).

²⁹⁷ See GOR Verification Report at 6.

²⁹⁸ *Id.*

purchasers in Turkey and instead relied on data sets of European and Russian prices of natural gas that *would be potentially available* to purchasers in Turkey because the pipelines in Europe and Russia were interconnected.²⁹⁹

NLMK Companies' Rebuttal Brief

- Petitioners concede that Russia's pipelines connecting the country with Europe and Asia are not bi-directional, and therefore the delivery of natural gas from European and Asian markets is a factual impossibility. As a matter of Department regulation and practice, this means that tier two benchmarks may not be used to measure any alleged benefit from Gazprom's provision of natural gas. Therefore, the Department must use available tier one benchmarks, or resort to a tier three benchmark analysis.
- Under 19 CFR 351.511(a)(2) it must be "reasonable to conclude that such price *would be* available to purchasers in the country in question" (emphasis added). Therefore, the inquiry and determining factor for tier two benchmarks focuses first on whether there is the practical capacity to deliver a good or service to the market under investigation.
- Petitioners' assertions that, with the addition of compressors, natural gas from Europe and Asia is potentially available in Russia, is an argument with no end. Petitioners' argument implies facts that are not on the record regarding the monetary investments required to make natural gas pipelines bi-directional. Moreover, the standard does not involve measuring "feasibility" or "potential" in terms of what it would cost to make prices available to purchasers within the country under investigation. Rather, the standard requires that it be "reasonable to conclude that such price *would be* available to purchasers in the country in question."³⁰⁰
- Finally, Petitioners mischaracterize the Department's decision in *Rebar from Turkey*. In that case, the Department rejected U.S. natural gas prices to assess the adequacy of remuneration, finding that U.S. prices "are not useable for benchmark purposes under tier two of the hierarchy as they represent prices for natural gas that would not be available to purchasers in Turkey."³⁰¹ The Department's approach reflects proper application of the Department's regulation and practice – there is no pipeline from North America to Turkey. Further, the evidence indicated that imports of natural gas constituted 7.86 percent of total natural gas consumption in Turkey,³⁰² demonstrating that the infrastructure existed to deliver imported natural gas to purchasers in Turkey – unlike the record in this case.
- To the Department's phrasing in *Rebar from Turkey* that the "data sets of the European and Russian prices placed on the record by Petitioners represent prices of natural gas that *would be potentially available* to purchasers in Turkey,"³⁰³ it is unfortunate phrasing, which neither reflects the Department's regulations nor its practice.

²⁹⁹ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at 11 ("Provision of Natural Gas for LTAR") (emphasis added).

³⁰⁰ See 19 CFR 351.511(a)(2) (emphasis added).

³⁰¹ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at 11 ("Provision of Natural Gas for LTAR").

³⁰² *Id.*, at 10.

³⁰³ *Id.*, at 17 (emphasis added).

NLMK Companies' and GOR's Case Briefs

- The record demonstrates that the European and Asian export prices used by the Department to derive tier two benchmark prices do not reflect prices available to Russian purchasers and, therefore, do not meet the standard set by 19 CFR 351.511(a)(2)(i). There is no “world market for natural gas” because physical capacity, transportation, and infrastructure constrain how markets operate.
- First, with respect to liquid natural gas (LNG), Russia possesses no regasification terminals to receive imported natural gas, but operates a single liquefaction terminal for export.³⁰⁴ As verified, Russia has an abundant gas supply and has no need to import LNG.³⁰⁵ These facts are relevant in the context of the Asian prices used by the Department since gas flows in Asia are dominated by LNG, with only limited capacity to move natural gas by pipeline within Southeast Asian markets, but not beyond such markets.³⁰⁶ Further, Petitioners offer no evidence regarding the availability of Asian prices in Russia, given that there is no pipeline infrastructure necessary to carry natural gas to Russia.
- Second, Russia’s natural gas pipeline network is not built to receive imported natural gas, in particular from Europe. “Most existing infrastructure in the region {Europe} was built with the purpose of delivering Soviet gas to {Europe}. Not surprisingly, existing interconnection points between individual European countries’ gas networks only allowed for uni-directional (westward) flow.”³⁰⁷ As verified, the direction of gas streams in the Unified Gas Supply System (UGSS) of Gazprom excludes the possibility of gas supply from Europe, and there are no transborder gas pipelines in the Eastern part of Russia.
- Bi-directional flow requires metering and compressor system modification, which is costly. Because Russia has a large surplus of natural gas and European markets are in deficit,³⁰⁸ As confirmed at verification, there is no impetus or need to modify pipelines from Russia to receive natural gas from Europe or elsewhere.³⁰⁹
- Petitioners’ argument relies only on a map of a “Eurasian Gas Transportation System” which does not indicate any capacity to transport gas from Europe into Russia.
- Petitioners also offer no explanation or evidence regarding the availability of Asian prices in Russia. The NLMK Companies’ evidence indicates that there is not even a recognizable natural gas market that associates Russia with Asia, but, rather, Russia is considered part of a market with Europe and North Africa and that market is characterized by practical supply restrictions with respect to flow into Russia from Europe. Tier two benchmarks from India, Indonesia, Singapore, Thailand or China are “pure fantasy” because there is no pipeline infrastructure necessary to carry natural gas to Russia.
- The only inflows of natural gas are from the pipeline systems of Azerbaijan and the Central Asian countries of Kazakhstan, Uzbekistan, and Turkmenistan. But, as verified, the

³⁰⁴ See NLMK Companies Factual Filing at Exhibit 5 (World’s LNG Liquefaction and Regasification Terminals, GlobalInsightInfo.com (November 2015)).

³⁰⁵ See GOR Verification Report at 6 and VE-B-15 (Pipeline Schematics), page 5.

³⁰⁶ See NLMK Companies Factual Filing at Exhibit 2 (BP Statistical Review of World Energy – Natural Gas (June 2015), page 29.

³⁰⁷ *Id.*, at Exhibit 8 (Reducing European Dependence on Russian Gas: Distinguishing Natural Gas Security from Geopolitics (October 2014)), page 34 and 35.

³⁰⁸ *Id.*, at Exhibit 2 (BP Statistical Review of World Energy – Natural Gas (June 2015)), page 22 and 23.

³⁰⁹ See GOR Verification Report at 6 and VE-B-15 (Pipeline Schematics).

“imports” from these regions are “actually natural gas that traveled through Russia on route to a third country that imported the natural gas.”³¹⁰

- Although such pipelines are connected with the UGSS, technically the gas from these countries can only be transmitted from Central Asia directly to Europe. A viable commercial supply of natural gas from these countries is not possible. Thus, contrary to Petitioners’ statement that tier two benchmarks can be used, the record evidence demonstrates that the NLMK Companies do not have a technical ability to consume gas from either Europe or Asia and, consequently, export prices from those markets are not available to Russian purchasers.
- The record for natural gas reflects a situation not unlike electricity, where the Department has consistently concluded that, given the nature of production and supply, there is no world market price for electricity available to an in-county purchaser.³¹¹ Given the unique conditions of natural gas, should the Department decline to use a tier one benchmark, then it should also conclude that there are no tier two prices available to Russian purchasers.

Petitioners’ Rebuttal Brief

- Putting aside the question of the investment necessary to make Russia’s pipelines bi-directional, evidence indicates extensive interconnections between natural gas markets in Russia and Europe. A Massachusetts Institute of Technology (MIT) natural gas report placed on the record by NLMK, states that Europe (including Russia and North Africa) is one of the three distinct regional gas markets.³¹²
- Moreover, Gazprom acknowledges the company’s interconnectivity with Europe, stating “Europe remains the key market for Russian export gas supplies,”³¹³ and accounted for 78.8 percent of Russia’s total pipeline trade in 2014.³¹⁴
- Market-determined prices in Europe, therefore, would reflect the alternate values at which Gazprom would be able to sell natural gas, if not for the FAS-established tariff rates in Russia. As such, European natural gas prices provide a reasonable external benchmark with which to measure the adequacy of remuneration.
- Further, the Department’s use of a regional benchmark, generally, and European natural gas prices, in particular, is consistent with past practice, citing to *Rebar from Turkey*.³¹⁵

Department’s Position: At verification, we met with Gazprom officials to verify the UGSS, which is the gas transmission system owned by Gazprom.³¹⁶ We confirmed, through an examination of pipeline schematics, which illustrate the direction of gas streams, that none of the pipelines are bi-directional.³¹⁷ The pipelines are not fitted with the necessary compressors to allow an inflow of gas from Europe or Asia.³¹⁸ The schematics also indicate that the direction of

³¹⁰ *Id.*, at 5-6.

³¹¹ See *CVD Preamble*, 63 FR at 65377.

³¹² See NLMK Companies Factual Filing at Exhibit 1 (Natural Gas: An Interdisciplinary MIT Study (2011)), page 147.

³¹³ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 22.

³¹⁴ See NLMK Companies Factual Filing at Exhibit 2 (BP Statistical Review of World Energy – Natural Gas (June 2015)).

³¹⁵ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at 11.

³¹⁶ See GOR Verification Report at “Gas Pipelines.”

³¹⁷ *Id.*, at VE-B.15.

³¹⁸ *Id.*, at VE-B.15 and “Gas Pipelines.”

the pipelines exclude the possibility of gas supply from Central and Western parts of Europe, the Middle East, and the East/Asian-Pacific region.³¹⁹ Though, as Petitioners argue, Gazprom could invest in compressors to make the pipelines bi-directional, the fact is, there are no compressors within the UGSS for the inflow of natural gas from Europe and Asia to Russia.

We also verified that the “imports” of natural gas reported by the GOR³²⁰ were actually natural gas that traveled from Kazakhstan and Azerbaijan through Russia on route to a third country that imported the natural gas.³²¹ The pipelines were constructed by the former Soviet Union for the purpose of transporting natural gas from those former Soviet republics to western markets and are not interconnected with the UGSS.³²²

On the basis of the verified record, we conclude that the European and Asian natural gas export prices used by the Department to derive the tier two benchmark prices used in the *Preliminary Determination* do not reflect prices available to Russian purchasers. Therefore, those market prices do not meet the standard set by 19 CFR 351.511(a)(2)(ii), which states that the adequacy of remuneration will be measured by comparing the government price to a world market price where it would be reasonable to conclude that such price would be available to purchasers in the country in question.³²³ The Department’s conclusion is consistent with past cases. In *Rebar from Turkey*, for example, we determined that “the U.S. prices are not useable for benchmark purposes under tier two of the hierarchy as they represent prices for natural gas that would not be available to purchasers in Turkey.”³²⁴ Similarly, in *Melamine from Trinidad and Tobago*, because there are no pipelines from the United States for the transport of natural gas to Trinidad and Tobago, we determined that “the U.S. natural gas prices are not useable for benchmark purposes under tier two of the hierarchy, as they represent prices for natural gas that would not be available to purchasers in Trinidad and Tobago.”³²⁵ Accordingly, the Department is not using a tier two benchmark in this final determination to evaluate whether there is, and the extent of any, benefit conferred by Gazprom’s provision of natural gas to the NLMK Companies.

Comment 6: Comparability Adjustments to a Tier Two Benchmark

NLMK Companies’ and GOR’s Case Briefs

- The statute compels the Department to determine adequacy of remuneration in relation to prevailing market conditions for the good or service being provided, which includes “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.”³²⁶ Thus, it is not enough to conclude that natural gas, in terms of physical properties,

³¹⁹ *Id.*

³²⁰ See GOR First Supplemental PQR at 17.

³²¹ See GOR Verification Report at 5-6.

³²² *Id.*

³²³ See *CVD Preamble*, 63 FR at 65377 (“{w}e will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market”).

³²⁴ See *Rebar from Turkey*, and accompanying Issues and Decision Memorandum at 11 (“Provision of Natural Gas for LTAR”).

³²⁵ See *Melamine from Trinidad and Tobago*, and accompanying Issues and Decision Memorandum at 9 (“Provision of Natural Gas for LTAR”).

³²⁶ See section 771(5)(E)(iv) of the Act. The NLMK Companies state that this statutory requirement is drawn from

is the same in every market. The Department must show how the tier two benchmark selected is related to conditions *in the Russian market*, and what adjustments are necessary (emphasis added).

- However, despite the statute and U.S. WTO obligations, the Department did not consider adjustments to the natural gas benchmark to reflect market conditions in Russia.
- The most fundamental adjustment factor to be considered is that the “world market price,” derived from numerous export prices from markets in Europe and Asia, are driven by very different supply and demand conditions relative to Russia. In particular, the prices relied upon by the Department reflect export transactions among nations where natural gas demand greatly exceeds supply – a condition that generates higher market prices over markets where natural gas is abundant. For example, in 2014 the European/Eurasia market, excluding Russia, produced 423.7 billion cubic meters of natural gas, while consuming 600.4 million³²⁷ cubic meters of natural gas, for a supply deficit of nearly 30 percent. By contrast, Russia produced 578.7 billion cubic meters in 2014 but consumed just 409.2 billion cubic meters. Russia’s proven natural gas reserves also dwarf any other European or Asian market and are only slightly smaller than the proven reserves of all Asia-Pacific and European/Eurasia markets. Thus, it is not surprising that Russian natural gas supply trends are very different from Europe or Asia.
- The Department is facing a comparative advantage problem identified by the WTO Appellate Body. Russia possesses natural resource reserves, including natural gas, which makes market conditions there unique. Under the statute and U.S. WTO obligations, both the NLMK Companies and the GOR assert that the Department must make an adjustment to its benchmark to account for this market condition. Otherwise, it is committing the error that the WTO Appellate Body warned must be avoided – using countervailing duties to offset differences in comparative advantages between countries.³²⁸
- The Department ignores the impact that energy security and diversification policies have on the benchmark, which are not relevant to Russia. This is especially true for European pricing, given Europe’s limited indigenous supply, “diversification of supply is a high priority.”³²⁹ To meet the shortfall while keeping diversification and security interests in mind, Europe directs acquisition of more expensive natural gas supply {sourced from Norway and the Netherlands} rather than concentrate supply from Russia.³³⁰
- The prices reflect the impact of these policies. The Department’s approach assumes that these prices reflect simple demand/supply dynamics, but they do not. The prices also reflect choices among European countries to diversify supply regardless of prices.
- Lastly, the Department must take into account the significant amount of LNG that is consumed in the regions from which the benchmark price are derived. Record evidence

Article 14 of the WTO SCM Agreement to which the U.S. Government agreed to conform. The NLMK Companies also cite to how the WTO Appellate Body has characterized this obligation, in Appellate Body Report, *US – Softwood Lumber IV*, at paras. 108 and 109.

³²⁷ The Department presumes from the NLMK Companies’ arguments that they intended to state 600.4 billion cubic meters of natural gas were consumed in the European/Eurasia market.

³²⁸ See Appellate Body Report, *US – Softwood Lumber IV*, at paras. 108 and 109.

³²⁹ See NLMK Companies Factual Filing at Exhibit 1 (Natural Gas: An Interdisciplinary MIT Study (2011)), page 152.

³³⁰ *Id.*, at Exhibit 8 (Reducing European Dependence on Russian Gas: Distinguishing Natural Gas Security from Geopolitics (October 2014)).

indicates that: “With limited indigenous conventional natural gas resources, industrialized Asia and the emerging economies in that region are almost totally dependent on imported LNG from Southeast Asia, Australia and the Middle East,”³³¹ and “LNG also supplies parts of Europe and is especially important to Spain and Portugal, which are on the far end of the Russian pipeline system.”³³² LNG, however, is not material to the Russian market.³³³ This is important to the benchmark analysis because LNG prices are above conventional natural gas prices and this divergence in price affects the benchmark, and the Department has no basis to distinguish between the component of the price derived from LNG and the component derived from conventional natural gas.

- It makes no difference whether the Department can substantiate the physical capacity to export natural gas to Russia, because it cannot demonstrate that the prices associated with such exports relate to, or are connected with, market conditions prevailing in Russia.
- Because Petitioners offers no basis to make such adjustments, that failure should disqualify use of a tier two benchmark.

Petitioners’ Rebuttal Brief

- An MIT natural gas report placed on the record by NLMK, states that Europe (including Russia and North Africa) is one of the three distinct regional gas markets.³³⁴ Petitioners note that the report states that each regional market sets “natural gas prices in a different way,” indicating the comparability of prices within a region, in this instance Europe (including Russia).³³⁵
- Petitioners also note that Gazprom’s own information contradicts NLMK’s assertions that Russia’s natural gas prices are a result of the country’s comparative advantage. Under “Competition in the Russian gas market,” Gazprom’s 2014 Annual Report states: “The existing gas market model has a number of fundamental flaws that prevent further competition, including high share of the regulated segment in the natural gas market, unsustainable wholesale prices, and interregional cross-subsidies affecting regional gas pricing.”³³⁶

Department’s Position: As discussed above in the Department’s Position to Comment 5, we determine that there are no tier two natural gas prices available to purchasers in Russia. Because we are not applying a tier two benchmark to calculate the benefit from the provision of natural gas by Gazprom in the final calculations, the arguments made by the NLMK Companies regarding the necessity to make adjustments to a tier two benchmark are moot. We, however, address the NLMK Companies’ and Petitioners’ comparability adjustment arguments in the context of deriving a tier three benchmark in the Department’s Position to Comment 7.

³³¹ *Id.*, at Exhibit 1 (Natural Gas: An Interdisciplinary MIT Study (2011)), page 152.

³³² *Id.*

³³³ Russia possesses neither liquefaction nor regasification terminals to produce or handle LNG, and has no need to liquefy natural gas in the domestic market given its pipeline network. *See* NLMK Companies Factual Filing at Exhibit 1 (Natural Gas: An Interdisciplinary MIT Study (2011)), page 152.

³³⁴ *Id.*, at page 147.

³³⁵ *Id.*

³³⁶ *See* GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 44.

Comment 7: Whether the Department Should Use a Tier Three Benchmark

NLMK Companies' and GOR's Case Briefs

- If the Department wrongly rejects tier one benchmarks, based on the reality that there are no viable tier two benchmarks, the Department must resort to tier three benchmarks, consistent with its regulations. Relying on tier three requires some adaptation of Russian prices, consistent with the Department's practice.
- Under tier three, in determining consistency with market principles, the question is whether these regulated prices allow the system to recover full economic costs to sustain continuing operations.³³⁷ Thus, one would look to a price regulating philosophy that accounts for cost recovery, investment, and profit.
- The legal acts establishing the methodology for setting the regulated natural gas prices in Russia adhere to market principles, including cost recovery, investment, and profit objectives.³³⁸ The GOR explains that the process of price setting involves the submission of information on costs of Gazprom to FAS and subsequent consideration by FAS of this information for reasonableness of costs to arrive at the prices and tariffs in order to prevent monopolistic behavior.
- The Department can test the laws by looking at the performance of unregulated suppliers in Russia, such as Novatek, which price below regulated prices and realize profits.³³⁹ Such a test proves the GOR regulated prices allow for adequate remuneration through the application of market principles. Prices for natural gas supplied by other companies except Gazprom are generally below regulated prices.
- In cases where the Department did not apply a tier one or tier two benchmark, and was unable to conclude that the government's pricing philosophy was consistent with market principles in the context of tier three, it still resorted to in-country benchmarks (*e.g.*, the Provision of Electricity for LTAR in China CVD proceedings).³⁴⁰ Specifically, in *Tires from the PRC*, the Department resorted to the highest price charged, within the country under investigation, in the rate category under which the respondent was classified.³⁴¹

³³⁷ See *CVD Preamble*, 63 FR at 65378.

³³⁸ See GOR POR at 35-36, Exhibit III-3 (Government Resolution No. 1021 (December 29, 2000, as amended), Part IV, paras. 13, 14, and Exhibit III-13 (Energy Strategy of the Russian Federation for the period until 2030, approved by the Resolution of the Government of the Russian Federation No. 1715-r of November 13, 2009) at 14 ("Strategic target of the state {energy} policy {is the p}erfection of the state price (tariff) regulation in sphere of the natural monopolies, considering objective growth of costs of extraction, manufacture and transportation of energy carriers in home market, requirement for investment resources for development of infrastructural objects.") See also GOR Verification Report at 4 ("the process for the price setting begins with Gazprom submitting to FAS its cost information (including *inter alia*, data on gas extraction and transportation costs, etc.) and then FAS considers that information for reasonableness of costs to arrive at the prices and tariffs.), and GOR First Supplemental PQR at 8.

³³⁹ See NLMK Factual Filing at Exhibit 10 (Novatek Fourth Quarter and Full Year 2014 Financial Results).

³⁴⁰ See, *e.g.*, *Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 80 FR 34888 (June 18, 2015) (*Tires from the PRC*), and accompanying Issues and Decision Memorandum at 28-29 ("Provision of Electricity for LTAR").

³⁴¹ *Id.*

- This practice reflects AFA based on non-cooperation,³⁴² which cannot be applied in this case. Therefore, to mitigate this problem, Department should average the natural gas rates across all regions and apply the average as the benchmark.
- The record contains the necessary information to perform the average rate calculation, and a spreadsheet included in the NLMK Companies' Case Brief calculates the average end-price across all regions of Russia, per tariff group.
- The calculation exercise contained in that attachment to the NLMK Companies' Case Brief demonstrates that the NLMK Companies are subject to higher-than-average end prices of natural gas, because the regions where the NLMK Companies purchase natural gas are significantly higher than the average prices across Russia.

Petitioners' Rebuttal Brief

- Gazprom's own information contradicts NLMK's assertions that Russia's natural gas prices are a result of market-based principles. Under "Competition in the Russian gas market," Gazprom's 2014 Annual Report states, *inter alia*, that: "... Gazprom, being the biggest gas supplier to the Russian market, sold the bulk of its gas supplies at regulated prices, which were set at below the sustainable level to bolster the national economy," and "... the progress towards fair gas pricing and similar margins in the international and domestic markets has been stalled due to decision taken by executive authorities."³⁴³
- Thus, by Gazprom's own admission, the GOR's natural gas tariffs are not consistent with market principles, but are based on the government's social and economic development goals.
- These inconsistencies with market principles also impact the unregulated suppliers of natural gas, such as Novatek. Further, in accordance with the Federal Law "On Supply of Gas in the Russian Federation," Gazprom and its subsidiaries "still bear the responsibility for uninterrupted and accident-free supply to all Russian consumers, regardless of their geographic location and industry affiliation."³⁴⁴ Thus, unregulated suppliers still rely on Gazprom for the distribution of natural gas and, therefore, are not truly "independent" from the company.
- To the NLMK Companies' suggestion that the Department calculate an average from the reported tariff rates, such an approach would not provide a market benchmark consistent with either the statute, the regulations, or the Department's practice. As noted, the tariff rates set by FAS are "artificially low" and "below the sustainable level,"³⁴⁵ and therefore, Petitioners assert that these non-market prices do not meet the statutory or regulatory criteria to measure adequacy of remuneration.
- Moreover, contrary to the NLMK Companies' assertions, the Department's treatment of the provision of electricity in China cases is not the best example of a tier three analysis. Petitioners discuss that, in the case cited by the NLMK Companies,³⁴⁶ the Department's selected benchmark was not based on an affirmative finding that electricity prices in the PRC

³⁴² *Id.*

³⁴³ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 45.

³⁴⁴ *Id.*, at Exhibit III-17 (Gazprom 2012 Annual Report), page 74.

³⁴⁵ *Id.*, at Exhibit III-38, page 45.

³⁴⁶ See *Tires from the PRC*, and accompanying Issues and Decision Memorandum at 17 ("Provision of Electricity for LTAR").

are inconsistent with market principles. Rather, the Government of China (GOC) refused to provide the requested information and therefore the Department was unable to determine whether electricity prices are consistent with market principles. As such, Petitioners state the Department's practice regarding the GOC's provision of electricity for LTAR is not dispositive.

- Instead, the GOR's provision of natural gas for LTAR mirrors the Department's analysis of the provision of land for LTAR in China. As detailed in *Woven Sacks from the PRC*, all land in China is owned by the government, with land-use rights being extended to commercial enterprises by government entities.³⁴⁷ Given the GOC's control over the supply of land-use rights, the Department rejected the use of tier one benchmarks.³⁴⁸
- Further, the Department found tier two benchmarks to be inappropriate, as land is not a tradeable good available on the world market.³⁴⁹ In assessing the tier three benchmark, the Department concluded that the prices maintained by the GOC were not consistent with the market principles and, therefore, could not be used for assessing the adequacy of remuneration.³⁵⁰ Thus, the Department decided to use market-determined prices from a country at a comparable level of economic development that is in reasonable proximity to China.³⁵¹
- Through the application of this same analysis, the Department should continue to use regional prices for natural gas as the most appropriate external benchmark to measure the adequacy of remuneration.

Department's Position: As discussed above in Comments 3 and 5, we determine that there are no tier one (domestic prices for natural gas that are market-based) or tier two (world market prices for natural gas that are available to purchasers in Russia) prices that can serve as the benchmark for measuring the adequacy of remuneration for the natural gas that Gazprom sold to the NLMK Companies during the POR. The final alternative in the benchmark hierarchy, set forth under 19 CFR 351.511(a)(2)(iii), is to determine whether Gazprom's price is consistent with market principles.³⁵² Under a tier three analysis, the Department's

³⁴⁷ See *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) (*Woven Sacks from the PRC*), and accompanying Issues and Decision Memorandum at 15 ("Government Provision of Land for LTAR").

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*, at 16.

³⁵¹ *Id.*, at 17.

³⁵² See *CVD Preamble*, 63 FR at 65378 (Paragraph (a)(2)(iii) provides that, in situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where 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. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In 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") (citing, e.g., *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992); *Final Affirmative Countervailing Duty Determination: Venezuelan Wire Rod*, 62 FR 55014, 55021-22 (October 22, 1997)).

regulations suggest that it will normally assess whether the prices charged by the government are set in accordance with market principles through an analysis of such factors as the government's price-setting methods, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.³⁵³ Although the *CVD Preamble* suggests that such an analysis might entail looking at those factors, the regulations do not prescribe any particular analysis under this prong.³⁵⁴ Rather, by its nature, the analysis depends upon available information concerning the market sector at issue and, therefore, must be developed on a case-by-case basis.

The respondents submit that the Department can test the laws that provide for cost recovery, investment, and profit for natural gas by looking at the performance of unregulated suppliers in Russia, such as Novatek, which, they claim, price below regulated prices and realize profits. They assert that such a test will prove that the GOR regulated prices allow for adequate remuneration through the application of market principles. However, we find that such a test is not possible. First as discussed above in Comment 3, given that the Russian natural gas market is distorted, the prices charged by unregulated suppliers do not move independently from Gazprom's price, and thus cannot provide a basis for determining whether Gazprom's prices are market-based. Therefore, we find that the Novatek prices on the record are not informative to our analysis. We further note that the natural gas prices on the record are not comparable. We conduct our analysis using monthly prices. The NLMK Companies reported their purchases of natural gas from Gazprom on a monthly basis.³⁵⁵ The Novatek prices on the record are quarterly and annual prices.³⁵⁶

Further, notwithstanding the GOR's statements on the record regarding laws that provide for cost recovery, investment, and profit, Gazprom's own documents present compelling contrary evidence. After evaluating Gazprom's annual reports, we determine that, notwithstanding the statements made in the GOR's laws, significant evidence exists to conclude that Gazprom's prices are not set in a manner that is consistent with market principles. We find that information contained within Gazprom's 2014 Annual Report reveals the Gazprom prices are not market-based.. Specifically, in the 2014 report, Gazprom makes the following statements:

- The existing gas market model has a number of fundamental flaws that prevent further competition, including high share of the regulated segment in the gas market, unsustainable wholesale prices, and interregional cross-subsidies affecting regional gas pricing. However, a real competition for consumers that benefits consumers can only be possible if equal opportunities are offered to all market players, with a simultaneous launch of an organised {sic} gas trading platform in Russia and introduction of a commercial gas balancing system.³⁵⁷
- The meeting emphasized {sic} that Gazprom, being the biggest gas supplier to the

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ See NLMK Companies "Corrected Exhibit to CVD Questionnaire Response" (November 5, 2015) at Exhibit F-1.

³⁵⁶ See NLMK Companies Factual Filing at Exhibit 10 (Novatek Fourth Quarter and Full Year 2014 Financial Results).

³⁵⁷ See GOR PQR at Exhibit III-38 (Gazprom's 2014 Annual Report), at "Competition in the Russian gas market" (page 44).

Russian market, sold the bulk of its gas supplies at regulated prices, which were set at below the sustainable level to bolster the national economy. However, the artificially low regulated prices prevent Gazprom from generating enough revenue to build its own funding sources to finance investments into new gas production, transportation and storage projects or maintaining the existing ones for the benefit of Russian consumers. In recent years, the Company has made incremental increases to bring the regulated wholesale prices for industrial consumers to the levels offering the same margins as export supplies. However, the progress towards fair gas pricing and similar margins in the international and domestic markets has been stalled due to decisions taken by executive authorities.³⁵⁸

These announcements which reference “fundamental flaws” and a lack of competition in the market, in addition to “artificially low regulated prices” and stalled “progress towards fair gas pricing” that prevent Gazprom from generating sufficient revenue and margins demonstrate that Gazprom’s prices are not set in a manner that is consistent with market principles. Further, these admissions by Gazprom which disclose that prices are “set at below the sustainable level to bolster the national economy” further demonstrate that the natural gas prices are not based on market principles, but rather on the government’s social and economic development goals. And, the significance of those government’s goals is indicated in Gazprom’s annual reports which record the level of the GOR’s involvement in Gazprom’s operations, which in turn influences the workings of the Russian natural gas market. The reports disclose a multitude of government orders and directives that Gazprom either completed or was in the process of fulfilling with regard to natural gas pricing, investment, development, taxation, and overall energy policy. Specifically, Gazprom’s annual reports disclose the following:

- One of Gazprom’s “priority areas” involved the Board of Directors’ consideration of “proposals for government support measures for gas sector enterprises, including taxation and pricing approaches to ensure conditions for cost-effective operations to supply gas to consumers in the Russian Federation.”³⁵⁹
- Under “Information on the Actual Results of Execution of Orders and Directions of the President of the Russian Federation and Orders of the Government of the Russian Federation,” Gazprom implemented 15 distinct directives.³⁶⁰ One of the directives required Gazprom to assess the proposals of the Ministry of Energy and the Ministry of Finance on the mineral extraction tax rate calculations for natural gas and to prepare the company’s own proposal.³⁶¹ Additionally, under this directive, Gazprom “prepared and delivered to {the} Ministry of Energy, the Ministry of Economic Development and Trade and the Ministry of Finance of Russia its proposals on possible tax breaks for deposits in Eastern Siberia, the Far East and Yamal Peninsula.”³⁶²

³⁵⁸ *Id.*, at “Pricing prospects in the domestic market, including cross-subsidies between different regions and consumer groups” (page 45).

³⁵⁹ *See* GOR PQR, Exhibit III-17 at 37 (Gazprom 2012 Annual Report).

³⁶⁰ *Id.*, Exhibit III-17 at 180-185.

³⁶¹ *Id.*, Exhibit III-17 at 180.

³⁶² *Id.*

- In 2014, pursuant to GOR directives, Gazprom’s “Long-Term Development Programme” was approved by the Board of Directors.”³⁶³ The Chairman’s statement to shareholders referenced Gazprom’s long-term plans, which included the “Power of Siberia pipeline, a key element of the gas supply system in Russia’s east . . .” The Chairman notes that this project provides “a huge boost to the social and economic development of Russia’s eastern regions . . . and create {sic} thousands of new jobs.”³⁶⁴
- In 2014, Gazprom’s “Implementation of Presidential and Governmental Directives and Instructions”³⁶⁵ included “regulating wholesale gas prices,” which required Gazprom to prepare “proposals on long-term energy pricing policies” for wholesale gas prices and gas price range targets until 2020.”³⁶⁶

On the basis of the evidence contained within Gazprom’s annual reports, and the fact that Gazprom’s prices are administratively set, we cannot conclude that the government natural gas prices are reflective of market principles. Because the government price is not set in accordance with market principles, we must look for an appropriate proxy to determine a market-based natural gas benchmark. This approach is consistent with the Department’s practice.³⁶⁷

In its case brief, the NLMK Companies state that, based on past practice, where the Department cannot apply a tier one or tier two benchmark, and cannot conclude that the government’s pricing philosophy is consistent with market principles under tier three, it can still rely on in-country benchmarks.³⁶⁸ The NLMK Companies, therefore, suggest that the Department should average the natural gas rates across all regions of Russia and apply the average as the benchmark. We disagree. In light of the evidence contained within Gazprom’s annual reports discussed above,³⁶⁹ we determine that the government-set natural gas prices published in the tariff schedules for all regions of Russia are not market-based prices and, thus, cannot be used as a benchmark under tier three.

For consideration of a benchmark under tier three, we are not limited to identifying market prices that would be available to purchasers in Russia. Indeed, “{t}he regulations do not specify how the Department is to conduct a market principles analysis.”³⁷⁰ Thus, consistent with our prior practice, it is possible to consider the world market prices on the record as potential benchmark

³⁶³ *Id.*, Exhibit III-38 at 19 (Gazprom 2014 Annual Report).

³⁶⁴ *Id.*, Exhibit III-38 at 4.

³⁶⁵ *Id.*, Exhibit III-38 at 155-160.

³⁶⁶ *Id.*, at 159.

³⁶⁷ See *Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3104 (January 20, 2016) (*Uncoated Paper from Indonesia*), and accompanying Issues and Decision Memorandum at 15-16 (“Provision of Standing Timber for Less Than Adequate Remuneration”) (where the Department found that the government price was not set in accordance with market principles, and thus sought a proxy to determine a market-based stumpage benchmark).

³⁶⁸ The NLMK Companies cite, *e.g.*, *Tires from the PRC*, and accompanying Issues and Decision Memorandum at “Provision of Electricity for LTAR.”)

³⁶⁹ See GOR PQR at Exhibit III-17 (Gazprom 2012 Annual Report) and Exhibit III-38 (Gazprom 2014 Annual Report).

³⁷⁰ See *Uncoated Paper from Indonesia* and accompanying Issues and Decision Memorandum at 15.

prices in a tier three analysis.³⁷¹ On the record of this proceeding are the following natural gas pricing datasets: (1) world natural gas export prices (including Europe) sourced from GTIS, placed on the record by the Department; (2) certain European natural gas export prices sourced from GTIS, placed on the record by Petitioners, and (3) natural gas export prices for Azerbaijan and Kazakhstan, sourced from the United Nations Comtrade, placed on the record by the NLMK Companies.³⁷² The NLMK Companies and the GOR submitted comments against the use of such pricing data in the context of a tier two analysis, especially with regard to prevailing market conditions and comparability adjustments. *See* Comment 6 above.

To identify an appropriate natural gas benchmark under tier three, we examined the factual information that the parties placed on the record with regard to existence of functioning natural gas markets. In its November 16, 2015, factual information filing, the NLMK Companies submitted to the Department a natural gas study authored by MIT.³⁷³ That study, at Chapter 7, states there is no global market for natural gas, but

three distinct regional gas markets – North America, Europe (including Russia and North Africa), and Asia with links to the Persian Gulf. Each has a different market structure resulting from the degree of market maturity, the sources of supply, the dependence on imports and other geographical and political factors. Importantly, these regional markets set natural prices in different ways.³⁷⁴

On the basis of MIT’s independent study, we conclude that regional European natural gas pricing can serve as the appropriate natural gas benchmark price under our tier three analysis. As indicated in the study, Russia is part of the European gas market. Further, Gazprom acknowledges the company’s interconnectivity with Europe, stating “Europe remains the key market for Russian export gas supplies.”³⁷⁵ In addition, the NLMK Companies explain in their case brief that “[a]t best, trade in natural gas is centered in three distinct regional gas markets – North America, Europe (including Russia and North Africa) and Asia with links to the Persian Gulf.”³⁷⁶ Therefore, given the information on the record, we find the prices in Europe to provide the most appropriate tier iii benchmark because they are market-determined in the regional market to which Russia belongs.

As noted above, there are European natural gas export prices sourced from GTIS on the record. We examined the GTIS pricing data for Europe and conclude that the prices are comparable to those in Russia in terms of contemporaneity and grade.³⁷⁷ We also conclude that relying on a regional European benchmark price rebuts the NLMK Companies’ arguments on prevailing market conditions and the need to make comparability adjustments (*see* Comment 6). As noted above, the MIT study indicates that, within each market, there is consistency in market structure, maturity, and sources of supply, which signals the comparability of prices within a region, in this

³⁷¹ *Id.*

³⁷² *See* GTIS Data Memorandum; Petitioners Factual Filing; and NLMK Companies Factual Filing.

³⁷³ *See* NLMK Companies Factual Filing at Exhibit 1.

³⁷⁴ *Id.*, at Chapter 7, page 147.

³⁷⁵ *See* GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), page 22.

³⁷⁶ *See* NLMK Companies’ Case Brief at 34.

³⁷⁷ *See* GTIS Data Memorandum and Petitioners Factual Filing.

instance Europe (including Russia).³⁷⁸

The NLMK Companies also argue that Europe’s energy security and diversification policies impact the benchmark because the GTIS prices reflect choices among European countries to diversify supply regardless of prices and, thus, an adjustment to the benchmark is necessary. We disagree. It is the Department’s practice to adjust benchmark prices to ensure comparability to the extent feasible.³⁷⁹ Further, to require the Department to adjust benchmarks to not only account for any and all physical differences and, additionally, intangible or abstract differences (e.g., energy security and diversification policies undertaken by other European countries) would create requirements that “would likely disqualify most, if not all, potential benchmarks under consideration in a LTAR analysis.”³⁸⁰ In addition, although the NLMK Companies argue the merits of such an adjustment, they did not suggest any means for how to adjust the benchmark. We also carefully examined the GTIS data, which include export prices for various European countries, and found that the data do not support the security/diversification issues raised by the NLMK Companies in their case brief. Specifically, the GTIS pricing data do not show the majority of European countries sourcing expensive natural gas from the top European producing countries, which are Norway and the Netherlands (after Russia).³⁸¹ The GTIS data contain Norway export prices to only five European countries (Belgium, Denmark, France, Germany, and the United Kingdom), and the GTIS data have no pricing information on the Netherlands exports.³⁸² The NLMK Companies had the opportunity, in their factual information filing, to submit such data to illustrate such pricing/sourcing trends about which they argues in their case brief, and provide information that would permit the Department to quantify the impact of those factors; however, the NLMK Companies failed to provide such information on the record.³⁸³

In their case brief, the NLMK Companies also submit that, in constructing the benchmark, the Department must account for Russia’s comparative advantage in natural gas. We disagree. While Russia has large deposits of natural gas, in this memorandum we also demonstrate that the GOR undertakes certain policies (i.e., prohibiting firms other than Gazprom from exporting natural gas) that contribute to the distortion of the natural gas market in Russia. Additionally, even Gazprom acknowledges that Russia’s “... existing gas market model has a number of fundamental flaws that prevent further competition...,”³⁸⁴ which have nothing to do with

³⁷⁸ See NLMK Companies Factual Filing at Exhibit 1 (page 147).

³⁷⁹ See, e.g., *OCTG from Turkey*, and accompanying Issues and Decision Memorandum at 58 (quoting *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 74 FR 20923 (May 6, 2009) (*HRS from India*), and accompanying Issues and Decision Memorandum at Comment 12),” and *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Softwood Lumber from Canada Review*, and accompanying Issues and Decision Memorandum at “U.S. Log Prices are a More Appropriate Benchmark” and “Benefit Calculations - Adjustments.”

³⁸⁰ See *OCTG from Turkey* and accompanying Issues and Decision Memorandum at 58 (quoting *HRS from India* and accompanying Issues and Decision Memorandum at 52 (Comment 12)).

³⁸¹ See GTIS Data Memorandum; and Petitioners Factual Filing.

³⁸² *Id.*

³⁸³ The burden of building an adequate record rests with parties to the proceeding, and not with the Department. See *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011).

³⁸⁴ See GOR PQR at Exhibit III-38 (Gazprom 2014 Annual Report), at “Competition in the Russian gas market” (page 44).

comparative advantage. Further, the NLMK Companies provide no means by which the Department may quantify the purported comparative advantage when performing the benefit calculation. Therefore, we have not adjusted the benefit calculation to account for comparative advantage, as argued by the NLMK Companies.

The NLMK Companies additionally argue that the Department must take into account the significant amount of LNG that is consumed in the regions from which the benchmark prices are derived, noting that LNG is heavily used in Spain and Portugal. We agree with the NLMK Companies that the importance of LNG in certain countries should be accounted for given the divergence in LNG and natural gas and the effect that may have on a regional European benchmark price. Because, as the NLMK Companies note, the Department has no basis to distinguish between the component of the price derived from LNG and the component derived from conventional natural gas, we have determined to remove from the construction of the benchmark price the export prices reported for Spain and Portugal which are included in the GTIS pricing data.³⁸⁵

For information on the derivation of the monthly European natural gas benchmark prices used to calculate the benefit from the Provision of Natural Gas for LTAR program in the final calculations for the NLMK Companies, *see* “Provision of Natural Gas for LTAR,” above and the final calculations memorandum.

Comment 8: Whether to Adjust the Natural Gas Benchmark to Reflect Revised Data

Petitioners’ Case Brief

- At verification, the NLMK Companies reported that certain tariff group classifications were initially misreported and presented the correct classifications for natural gas distribution fees and surcharges, which the Department accepted as a minor correction.³⁸⁶
- Pursuant to 19 CFR 351.511(a)(2)(iv) and section 771(5)(E)(iv) of the Act, the Department will include delivery charges in assessing the adequacy of remuneration as indicative of the prevailing market conditions for the good being provided.
- For the final determination, the Department should adjust the natural gas benchmark to reflect the changes in distribution fees and delivery surcharges.

Department’s Position: We agree with Petitioners that we should rely on the verified data for this final determination. Accordingly, in the final calculations, we relied on the NLMK Companies’ verified, corrected tariff classifications to derive the natural gas benchmark prices used to calculate the benefit that the companies received under the Provision of Natural Gas for LTAR in our tier three analysis.³⁸⁷

³⁸⁵ *See* NLMK Companies Final Calculation Memorandum.

³⁸⁶ *See* NLMK Companies Verification Report at 2.

³⁸⁷ *See* NLMK Companies Final Calculation Memorandum.

Comment 9: Whether the NLMK Companies Benefited from the Provision of Mining Rights

NLMK Companies' Mining Rights Case Brief

- Per 19 CFR 351.525(b)(6)(v), where an alleged subsidy is transferred, the Department attributes the subsidies to the products sold by the recipient of the transferred subsidy.
- The verified record demonstrates that the coal mining rights acquired by the NLMK Companies never proceeded beyond geological surveys and exploration and that in 2013 the rights at issue were transferred to affiliates with no reporting obligation for this investigation as provided under the Department's attribution regulations.³⁸⁸
- Thus, the Department should continue to find that the NLMK Companies did not use or benefit from this alleged subsidy program.

Petitioners' Mining Rights Case Brief

- Though the NLMK Companies transferred their mining rights licenses to affiliates prior to the POI, those rights remain under the NLMK Companies' control for future use, pursuant to 19 CFR 351.525(b)(6)(vi), because the NLMK Companies are cross-owned with the affiliates, *i.e.*, Usinsky and Zhernovsky.
- The regulation cited by the Department to support its preliminary finding is inapposite in the current investigation. As stated in 19 CFR 351.525(b)(6)(v), if a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership, the Department will attribute the subsidy to products sold by the recipient of the transferred subsidy.
- NLMK, the subject producer, was the recipient of the subsidy at time of bestowal, and the subsidy was not transferred because of NLMK's relationship with Usinsky and Zhernovsky.
- While Usinsky and Zhernovsky may not currently be extracting coal, any future provision of coal would benefit NLMK's steel production. Therefore, exclusion of these cross-owned affiliates would create a loophole in the attribution rules.
- Additionally, pursuant to 19 CFR 351.511(b), the Department normally will consider a benefit as having been received as of the date on which the firm pays for the government-provided good or service. Thus, the NLMK Companies received a countervailable benefit at the time of purchase of mining rights, and the fact that the NLMK Companies chose not to develop the sites should not mean that it avoids the subsidy benefit.
- The Department should use its discretion and select a tier three benchmark to assess the adequacy of remuneration from the provision of mining rights to the NLMK Companies for LTAR in the final.
- Consistent with the *Softwood Lumber from Canada Second Review*,³⁸⁹ the Department should find U.S. coal mining right licenses serve as an appropriate, market-based benchmark with which to measure the adequacy of remuneration for the NLMK Companies' mining rights, and calculate the NLMK Companies' allocable benefit in the POI from the difference

³⁸⁸ See NLMK Companies Verification Report at 15-16.

³⁸⁹ See *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (December 12, 2005) (*Softwood Lumber from Canada Second Review*), and accompanying Issues and Decision Memorandum at Comment 27.

between the amount the company paid for the mining rights and the U.S. dollar price for comparable rights (*see* 19 CFR 351.524(b) and (d)).

NLMK Companies' Mining Rights Rebuttal Brief

- Petitioners misinterpret the Department's attribution rules and practice in arguing that the NLMK Companies were the recipient of countervailable subsidy benefits during the POI from mining rights the companies transferred prior to the POI.
- The Department correctly applied 19 CFR 351.525(b)(6)(v), which expressly refers to "corporations with cross-ownership." Further, accepting Petitioners' interpretation would mean that the Department could never use the transfer rule where the original recipient of the subsidy was not at least a "producer" of something, and the Department has avoided that approach.³⁹⁰
- Petitioners do not dispute the validity of the Department's benefit analysis approach with regard to the Severstal Companies, but do for the NLMK Companies, because the NLMK Companies did not extract coal. Petitioners' argument is results-oriented and must be rejected.
- However, as verified, the deposits associated with the mining rights were not developed beyond geological surveys and exploration and thus no coal has ever been extracted during the POI or the AUL period.
- Even if one could construe that a benefit stream is somehow linked to the NLMK Companies through their prior acquisition of mining rights transferred prior to the POI, no benefit accrued to the NLMK Companies during the POI because no coal was extracted, which is consistent with the Department's benefit analysis applied to the Severstal Companies.

Petitioners' Mining Rights Rebuttal Brief

- The NLMK Companies' arguments are misplaced and should be rejected by the Department.
- For the reasons set forth in Petitioners' Mining Rights Rebuttal Brief, the Department should calculate the NLMK Companies' allocable benefit in the POI from the difference between the amount the company paid for the mining rights and the U.S. dollar price for comparable rights.

Department's Position: We inadvertently stated that Usinsky and Zhernovsky are not cross-owned affiliates with NLMK in the Post-Preliminary Decision Memorandum.³⁹¹ We verified that Usinsky and Zhernovsky are, in fact, cross-owned affiliates of NLMK.³⁹² Our misstatement in the Post-Preliminary Decision Memorandum, however, does not change the facts on the record. Specifically, we verified that the NLMK Companies transferred their coal mining rights licenses to Usinsky and Zhernovsky prior to the POI.³⁹³ We also verified that Usinsky and

³⁹⁰ *See, e.g., Certain Oil Country Tubular Goods from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination*, 74 FR 47210, 47215 (September 15, 2009) (applying the transfer rule to cross-owned affiliated trading company with no production operations that supplied inputs subject to LTAR allegations).

³⁹¹ *See* Post-Preliminary Decision Memorandum at 2-3.

³⁹² *See* NLMK Companies Verification Report at "Company History, Affiliations, Cross-Ownership and Corporate Structure" and "Provision of Mining Rights for LTAR."

³⁹³ *Id.*, at "Provision of Mining Rights for LTAR."

Zhernovsky do not produce subject merchandise or meet the other cross-ownership criteria.³⁹⁴ Therefore, Usinsky and Zhernovsky do not have a reporting obligation in this investigation. Further, we verified that none of the NLMK Companies extracted coal during the POI.³⁹⁵

We disagree with Petitioners' interpretation of 19 CFR 351.525(b)(6)(v). The attribution regulation clearly states that where an alleged subsidy is transferred, the Department attributes the subsidy to the *products sold by the recipient of the transferred subsidy* (emphasis added). As verified, Usinsky and Zhernovsky are the recipients of the transferred subsidy (*i.e.*, the mining rights licenses) and are not respondents in this investigation. We note that this is counter-factual to a situation in which a company with no reporting obligation transfers a subsidy to a company with a reporting obligation under the Department's rules – a scenario that could confer the subsidy on the recipient under 19 CFR 351.525(b)(6)(v). The Petitioners have not provided a reason that convinces the Department to abandon its rule. Contrary to the arguments raised by Petitioners, we correctly applied 19 CFR 351.525(b)(6)(v) concerning the transfer of subsidies among corporations with cross-ownership in the Post-Preliminary Decision Memorandum. As such, we continue to find that the NLMK Companies were not recipients of any benefits under the Provision of Mining Rights for LTAR during the POI.

We also disagree with Petitioners that the Department should account for the future use of the Provision of Mining Rights for LTAR program by Usinsky and Zhernovsky and that the failure to do so would create a loophole that favors the NLMK Companies. The Department's decision to find that the NLMK Companies did not use this program during the POI does not preclude it from examining whether the NLMK Companies used the program in any subsequent administrative review of the order if one were to be issued. Thus, we disagree that our decision to find that the NLMK Companies' did not use the program during the POI creates a loophole in regards to their use of this program in any future segments of this proceeding.

As explained in Comment 14 below, we have based our benefit analysis for the Provision of Mining Rights for LTAR program on whether the price paid during the POI by the respondent for the underlying resources acquired through the mining rights was "consistent with market principles."³⁹⁶ This analysis mirrors the approach adopted by the Department in *HRS from India* and *Tetra from the PRC*, where we also investigated the provision of mining rights for LTAR. Under this tier three approach, we based our benchmark on the value of the underlying good conveyed via mining rights.³⁹⁷ As a result of this approach, our benefit analysis has necessarily focused on the volume of coal the respondent extracted during the POI, and in this regard, mirrors the recurring benefit analysis specified for LTAR programs under 19 CFR 351.511(b) and 19 CFR 351.524(c). For this reason, we have not adopted an approach that equates the timing of receipt of the benefit to the year in which the respondent acquired mining rights from the GOR.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ See 19 CFR 351.511(a)(2)(iii)

³⁹⁷ See *HRS from India*, and accompanying Issues and Decision Memorandum at 19 and 65-66 (Comment 26); see also *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25-27.

Comment 10: Whether Timing of the Post-Preliminary Decision Memorandum Violated Interested Parties' Due Process Rights

Severstal Companies' Mining Rights Case Brief

- By not addressing the Provision of Mining Rights for LTAR program in the *Preliminary Determination*, issuing a post-preliminary analysis five months after the *Preliminary Determination* on the eve of the Fourth of July without warning and only three weeks before the final determination, releasing the proprietary disclosure calculation memorandum four days after the issuance of the post-preliminary analysis, and providing a shortened briefing schedule for this program, the Severstal Companies received inadequate notice and were not able to meaningfully be heard, participate, and brief this program before the final determination.
- The Fifth Amendment of the U.S. Constitution provides that interested parties in CVD investigations have a procedural due process right to notice of, and the opportunity to be heard and to participate in, the proceedings.³⁹⁸
- After the Severstal Companies requested a one-week extension to brief this program to address the multitude of issues and decisions contained in the post-preliminary analysis and disclosure calculation memorandum, the Department granted only a partial extension of one day.
- By not issuing a preliminary determination regarding the Provision of Mining Rights for LTAR program, the Severstal Companies did not have the opportunity to meaningfully be heard and participate in the Department's investigation of this program by providing information the Department deems relevant to this program.
- For these reasons, the Department should be precluded from including the Mining Rights for LTAR program in the final determination.

Petitioners' Mining Rights Rebuttal Brief

- The Severstal Companies fail to cite a single authority that would support a determination that the Department's process for completing and issuing its Post-Preliminary Decision Memorandum concerning the Provision of Mining Rights for LTAR has in any way diminished the companies' due process rights.
- Thus, the Severstal Companies' claim that the Department is precluded from addressing the GOR's Provision of Mining Rights for LTAR is baseless.
- Contrary to the Severstal Companies' assertions that it did not have an opportunity to provide information the Department deemed necessary to this program, the Department requested extensive information concerning the Severstal Companies with regard to their coal mining operations.
- Further, the Department provided interested parties with an opportunity to submit factual information concerning the Provision of Mining Rights for LTAR program under examination in the investigation.
- It is disingenuous to argue that the Department somehow surprised interested parties with its Post-Preliminary Decision Memorandum. In the *Preliminary Determination*, the Department

³⁹⁸ See *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428, 436 (CIT 1992); *NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998).

explicitly informed interested parties that it would address the Provision of Mining Rights for LTAR program in the form of a post-preliminary decision. Thus, the Severstal Companies, like all interested parties to the investigation, were on notice that the Department would conduct an analysis of the Provision of Mining Rights for LTAR program and that the Department would solicit case and rebuttal briefs on this topic.

- Further, the submission of a lengthy case brief in response to the Post-Preliminary Decision Memorandum belies the Severstal Companies' claim that it was unable to adequately analyze the Department's preliminary findings. Additionally, the Department, at the Severstal Companies' request, extended the amount of time afforded to interested parties to brief the Department's Post-Preliminary Decision Memorandum concerning the Provision of Mining Rights for LTAR program.
- It is telling that the Severstal Companies are the only party to raise such due process claims.
- The briefing schedule established for the Provision of Mining Rights for LTAR program is very similar to the Department's well-established practice of establishing a deadline for the submission of case briefs one week from the release of the last verification report.
- Thus, the Department should reject the Severstal Companies' arguments and continue to analyze the Provision of Mining Rights for LTAR program in the final determination.

Department's Position: We disagree with the argument that the manner in which the Department issued the Post-Preliminary Decision Memorandum violated the Severstal Companies' due process rights under the Fifth Amendment to the U.S. Constitution. As an initial matter, in the *Preliminary Determination*, we explained that concerning specificity and benefit regarding this program, "{w}e will issue a post-preliminary determination addressing these two subsidy criteria."³⁹⁹ Consequently, the Severstal Companies were fully on notice that the Department intended to issue the Post-Preliminary Decision Memorandum subsequent to the *Preliminary Determination*. The Department issued the Post-Preliminary Decision Memorandum on July 1, 2016.⁴⁰⁰ Thus, the Severstal Companies' claim that the Department actually issued the Post-Preliminary Decision Memorandum on the "eve of the Fourth of July" (*i.e.*, on July 3rd) is incorrect.⁴⁰¹ That interested parties may have been inconvenienced by the fact that the Post-Preliminary Decision Memorandum was issued three days prior to a federal holiday does not amount to a due process violation. Furthermore, although the proprietary calculations were issued subsequent to the Post-Preliminary Decision Memorandum, the Department initially provided parties with six calendar days to submit case briefs and three and one-half days to submit rebuttal briefs regarding the Mining Rights for LTAR program.⁴⁰² The Department then partially granted the Severstal Companies' extension request and extended the briefing schedule to 10:00 a.m. July 8, 2016, for case briefs and close of business, July 12, 2016, for rebuttal briefs.⁴⁰³ Thus, dating from the July 1, 2016, issuance of the Post-Preliminary

³⁹⁹ See Preliminary Decision Memorandum at 22-23.

⁴⁰⁰ The Federal Circuit has upheld the Department's authority to issue post-preliminary analyses. See *JBF RAK LLC v. United States*, 790 F.3d 1358, 1367 (Fed. Cir. 2015).

⁴⁰¹ In any event, the Severstal Companies appear to acknowledge this fact. See Severstal Companies Mining Rights Case Brief at 1.

⁴⁰² See Memorandum to the File from Eric B. Greynolds, Program Manager, AD/CVD Operations Office III, "Briefing Schedule for Post-Preliminary Determination," (July 1, 2016).

⁴⁰³ See Memorandum to the File from Eric B. Greynolds, Program Manager, AD/CVD Operations Office III, "Extension of Briefing Schedule for Post-Preliminary Determination," (July 6, 2016).

Decision Memorandum, the Department ultimately afforded interested parties a total of seven days to submit case briefs and four days beyond that to submit rebuttal briefs concerning the Provision of Mining Rights for LTAR program. In light of the statutory deadlines in this investigation, additional time for comments could not be granted to the parties.

Meanwhile, concerning the initial case brief schedule the Department, counting from the date on which it issued the remaining verification report (which was the Severstal Companies' Verification Report), provided interested parties seven days to submit case briefs and five days beyond that to submit rebuttal briefs.⁴⁰⁴ Further, the initial case brief round covered *all* aspects of the investigation, save the Provision of Mining Rights for LTAR program, whereas the second case brief round was limited exclusively to a single program: the Provision of Mining Rights for LTAR program. Thus, the Department granted interested parties nearly the same amount of time to address the Post-Preliminary Decision Memorandum on one program as it did for the *Preliminary Determination* and verification reports. In light of these facts, we disagree that the Department failed to provide parties with sufficient time to submit comments regarding the Post-Preliminary Decision Memorandum.

Lastly, we disagree that the Department did not afford the Severstal Companies the opportunity to meaningfully be heard and participate in the Department's investigation of this program by providing information the Department deems relevant to this program. For example, the Severstal Companies submitted comments prior to the verification in which it commented on whether and how the Department should conduct a benefit analysis utilizing a mining rights benchmark and coal-based benchmark.⁴⁰⁵ Additionally, as noted above, the Department issued multiple rounds of questionnaires concerning the manner in which the Severstal Companies extracted coal from GOR mines during the POI and the costs associated with such operations. Thus, it is incorrect to argue that the Severstal Companies were precluded from submitting information regarding the Mining Rights for LTAR program.

Comment 11: Whether the GOR's Provision of Mining Rights Constitutes General Infrastructure that Is Not Countervailable

Severstal Companies' Mining Rights Case Brief

- Under 19 CFR 351.511(d), a “financial contribution does not exist in the case of the government provision of general infrastructure,” which is defined as “infrastructure that is created for the broad societal welfare of a country, region, state, or municipality.”⁴⁰⁶
- The *CVD Preamble* further states that general infrastructure is “not subject to any specificity analysis.”⁴⁰⁷ It also lists “interstate highways, schools, health care facilities, sewage systems, or police protection” as examples of general infrastructure provided that such projects were “provided for the good of the public available to all citizens.” Further, the *CVD Preamble*

⁴⁰⁴ See Memorandum to the File from Eric B. Greynolds, Acting Director, AD/CVD Office III, “Briefing Schedule,” (May 26, 2016).

⁴⁰⁵ See Severstal Companies Coal Benchmark Submission at Exhibit IV-1.

⁴⁰⁶ See also section 771(5)(D)(iii) of the Act.

⁴⁰⁷ See *CVD Preamble*, 63 FR at 65378.

explains that “key issue” for defining general infrastructure is “whether the infrastructure is developed for the benefit of society as a whole.”⁴⁰⁸

- It is imperative to this analysis that the Department focus on the government provision of mining rights—not the provision of coal. Unlike, for example, the provision of electricity,⁴⁰⁹ mineral resource development is an inherently sovereign power because mining rights policies and laws must balance public and private interests.
- The GOR has demonstrated that it evaluates mining rights bids based on such criteria as socio-economic impact, environmental concerns, well-being of nearby communities, and national defense and state security interests.⁴¹⁰
- These criteria demonstrate that mining rights constitute general infrastructure created for broad societal welfare pursuant to 19 CFR 351.511(d).
- Countervailing this program has policy implications for the U.S. mining rights regime which could expose many exporting, vertically-integrated U.S. manufacturers to CVD investigations abroad.

GOR’s Mining Rights Case Brief

- In *EC – Large Civil Aircraft*, the panel developed an interpretation of the concept of “general infrastructure” and emphasized the need for a case-by-case analysis taking into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities.
- Article 15 of Law No. 2395-1 dated February 21, 1992 “On Subsoil” stipulates that the state system of licensing is aimed at the contribution to socio-economic development programs, ensuring social, economic, environmental and other interests of the population living in the subsoil area, and all citizens of the Russian Federation; providing equal opportunities for citizens and legal entities to obtain licenses; the protection of the rights for subsoil use as well as protection of the Russian Federation's national security interests. Thus, Article 15 clearly demonstrates that provision of mining rights constitutes general infrastructure created for broad societal welfare and falls under the exclusion of Article 1(l)(a)(l)(iii) of the SCM Agreement.
- The GOR’s provision of coal mining rights is entirely within the expected functions of a government and is not countervailable. That is why the Department failed to determine world market prices as a benchmark for mining rights based on tier two under 19 CFR 351.511(a)(2)(ii).
- The United States has a similar program of providing for mining rights.

⁴⁰⁸ *Id.*

⁴⁰⁹ See, e.g. *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 10; *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 FR 50412 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comments 13, 14.

⁴¹⁰ See GOR First Supplemental PQR at 22; see also GOR PRQ at Exhibit IV-1.

Petitioners' Mining Rights Rebuttal Brief

- Neither the Severstal Companies nor the GOR identifies any agency precedent that would support the argument that the provision of mining rights constitutes general infrastructure that is not countervailable.
- Although the GOR cites to *EC – Large Civil Aircraft*, the GOR does not argue that a finding by the Department in this investigation that the GOR's provision of coal mining rights for LTAR is countervailable would be inconsistent with that panel report.
- The facts on the record demonstrate that the provision of mining rights do not meet the definition of general infrastructure provided in the *CVD Preamble* or 19 CFR 351.511(d).
- Mining rights benefit specific companies and industry sector and, thus, do not constitute general infrastructure.
- The Department has previously countervailed the provision of mining rights for LTAR.⁴¹¹ This fact belies the Severstal Companies' claims that the provision of mining rights constitutes general infrastructure that is not countervailable.
- The GOR's claims concerning its sale of mining rights indicates that it may use the revenue generated from the sale of such rights to pursue broad societal goals. However, the fact remains that the provision of such rights is limited to a number of eligible companies.
- Mining rights are different from roads or schools because they are provided to a single entity that then has an opportunity to exclusively exploit those rights.
- Although the general infrastructure provision has been raised previously in connection with the provision of electricity in other cases, the Department has repeatedly found that the provision of electricity is not a provision of general infrastructure.⁴¹²

Department's Position: We disagree with respondents' arguments that the GOR's provision of mining rights constitutes general infrastructure that does not constitute a financial contribution. As noted by Petitioners, respondents do not provide any case precedent to support their claim that the provision of mining rights meets the definition of general infrastructure as defined under section 771(5)(D)(iii) of the Act and 19 CFR 351.511(d). Additionally, the description of general infrastructure in 19 CFR 351.511(d) and the *CVD Preamble* provides no basis to conclude that mining rights should be treated as general infrastructure. Rather, the regulation and the *CVD Preamble* describe general infrastructure as highways, schools, health care facilities, sewage systems, and police protection.⁴¹³ In other words, general infrastructure is defined as infrastructure that is generally available to the public.

The mining rights auctioned by the GOR are not available to the general public. Rather, such mining rights are utilized exclusively by the party that submitted the winning bid. As such, the mining rights at issue do not meet the definition of general infrastructure described in 19 CFR 351.511(d) and the *CVD Preamble*. That mining rights do not constitute general infrastructure is consistent with our practice in the context of investigating mining rights programs in other

⁴¹¹ See, e.g., *HRS from India*, and accompanying Issues and Decision Memorandum at page 19, 65-66.

⁴¹² See, e.g., *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016), and accompanying Issues and Decision Memorandum at 22-23 (Comment 4).

⁴¹³ See *CVD Preamble*, 63 FR at 65378.

cases,⁴¹⁴ and with the Department's treatment of the provision of natural resources.⁴¹⁵

Comment 12: Whether the GOR Acted to the Best of Its Ability With Regard to Usage Data Provided in Connection with the Provision of Mining Rights for LTAR Program

GOR's Case Brief

- The Russian Federal Geological Fund (Rosgeofond) collects data on mining rights in accordance with the statistical form approved by the Ministry of Natural Resources. The system of collecting the data is based on the paper documents that are submitted to the Rosgeofond by 85 regional departments of Federal Subsoil Management Agency (Rosnedra).
- Rosgeofond has never accumulated some types of data requested by the Department. The information supplied by the GOR, via Rosgeofond, was compiled manually.
- At verification, the GOR provided to the Department a copy of the order of the Ministry of Natural Resources of the Russian Federation that contained a statistic form and the official letters signed by the Director of the Rosgeofond with a stamp containing the data at issue.
- The GOR strongly objects to the Department's statement that "the GOR failed to cooperate to the best of its ability." When verifying the other data, the Department did not request to check the numerous forms filed by respondents. For example, customs declarations were not requested to be verified in order to justify the value and the quantity of imported or exported goods.
- As to the statistic on related or unrelated companies participating in auction or a tender procedure, based on anti-monopoly legislation, the Federal Anti-Monopoly Service of the Russian Federation may examine the results of auction or tender procedures upon the application submitted by an applicant or its representative.
- The GOR does not keep statistics on provision of mining rights in the context of industry groups because it makes no sense to maintain such information due to non-discriminative access to this program.

Severstal Companies' Mining Rights Case Brief

- In the Post-Preliminary Decision Memorandum, the Department found as AFA that the GOR's provision of mining rights to the Severstal Companies during the period 2006 through 2013 was *de facto* specific within the meaning of sections 771(5A)(D)(iii)(I)-(III) of the Act. Its determination in this regard was wrong.
- In making its AFA determination, the Department pointed to no record facts in its application of AFA to support a finding of *de facto* specificity.
- The GOR cooperated to the best of its ability and provided information to the Department that was verified.
- The Department verified that the usage information was first obtained and compiled by regional authorities that submit the information to the Russian Federal Geological Fund

⁴¹⁴ See *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25 ("Provision of fluorospar mining rights constitutes a financial contribution under section 771(5)(D)(iii) of the Act").

⁴¹⁵ See, e.g., *Softwood Lumber from Canada*, and accompanying Issues and Decision Memorandum at "Provincial Stumpage Programs Determined To Confer Subsidies" (in which the Department found that the Government of Canada's provision of stumpage to lumber producers constitutes a financial contribution in the form of a good).

(Rosgeolfond), which compiles the voluminous paper-based documents before archiving them in storage.⁴¹⁶

- At verification the GOR provided summaries of the data along with signed letters attesting to the accuracy of the data.⁴¹⁷
- Thus, the GOR made every effort to cooperate and provide the information requested by the Department. The GOR should not be penalized for the fact that the paper documents are located in the archives of multiple regional offices.
- Further, the Department never requested specificity information from the Severstal Companies despite the fact that they fully cooperated with the Department during the investigation. Thus, the Department did not satisfy the notice and remedial requirements of section 782(d) of the Act regarding specificity pertaining to the Severstal Companies.
- The negative impact of the Department's AFA determination is limited to the Severstal Companies. Such an outcome is contrary to law because it results in adverse inferences being applied to a cooperative party.
- Deterrence is not relevant here, where the application of AFA only impacts the Severstal Companies, a fully cooperative respondent.⁴¹⁸
- Substantial record evidence demonstrates that the mining rights program is not specific. Thus, it is unreasonable to conclude, pursuant to AFA, that the program is *de facto* specific.

Petitioners' Mining Rights Case Brief

- The Department's ability to analyze the *de facto* specificity of the provision of mining rights for LTAR was hindered by the GOR's failure to cooperate to the best of its ability. In particular, GOR repeatedly refused to provide any aggregate data on the receipt of coal mining licenses, classified by industry, despite a limited number of auctions/tender proceedings that occurred in any given year.
- The GOR failed to provide the necessary supporting documentation to allow the Department to confirm the accuracy of any of the license information submitted for the record - thereby frustrating the very purpose of verification.
- The GOR's abject noncompliance left the Department with no other option than to rely on AFA.

Petitioners' Mining Rights Rebuttal Brief

- At most, the GOR's laws show a lack of *de jure* specificity. But this is not relevant to the Department's finding that the GOR's provision of mining rights for LTAR is *de facto* specific, as a result of the GOR's failure to submit verifiable information concerning usage of the GOR's program.
- The Severstal Companies' claim that in the Post-Preliminary Decision Memorandum the Department pointed to no record facts in its application of AFA to support a finding of *de facto* specificity with regard to the Provision of Mining Rights for LTAR program is specious.

⁴¹⁶ See GOR Verification Report at 10-11.

⁴¹⁷ *Id.*

⁴¹⁸ See *Changzhou Wujin Fine Chem. Factory v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012).

- It was the GOR’s failure to cooperate to the best of its ability in providing the Department with verifiable information with regard to the companies that acquired mining rights that necessitated the Department’s make a specificity determination on the basis of AFA.
- In the Post-Preliminary Decision Memorandum the Department addresses in detail its repeated requests of the GOR for the relevant usage information. The GOR’s failure to provide the requested information as well as its failure to substantiate record evidence at verification made it appropriate for the Department to apply AFA with regard to specificity.
- The GOR indicated at verification that the relevant source documents used to compile the usage data was removed from storage in order to respond to the Department’s questionnaire responses, that the source documents were subsequently placed back into storage, and, thus, were not available for examination during the GOR’s verification.⁴¹⁹ These statements demonstrate that the relevant information was in the possession of the GOR and could have been provided to the Department at verification.
- The Department should reject the Severstal Companies’ claims that the Department’s application of AFA concerning specificity with regard to the Severstal Companies did not satisfy the notice and remedial requirements set forth in the statute.
- The Severstal Companies did not have possession of the usage data solicited by the Department and, thus, there was no reason for the Department to request such data from the companies. Rather, the relevant information was in the possession of the GOR, and the Department properly focused its efforts in obtaining the information from the GOR.
- Indeed, the statute, at section 782(d) of the Act, explicitly states that the party submitting the response (in this case the GOR) is the party that will be provided an opportunity to remedy any deficiencies. The statute imposes no obligation to notify the Severstal Companies of a deficiency in the GOR’s questionnaire response and an opportunity to remedy it.
- The Department’s application of AFA in the Post-Preliminary Decision Memorandum with regard to the GOR is consistent with its practice.⁴²⁰
- The courts have affirmed the Department’s application of AFA against an otherwise cooperating company where a foreign government has failed to act to the best of its ability.⁴²¹

Department’s Position: We continue to find that the GOR failed to substantiate its usage data regarding the Provision of Mining Rights for LTAR program at verification. As detailed in the Post-Preliminary Decision Memorandum, the Department issued a series of questionnaires to the GOR regarding the number of companies/industries that participated in its mining rights auctions as well as the total number of companies/industries that submitted winning bids. In response, the GOR provided usage data.⁴²²

In advance of verification, the Department instructed the GOR to be prepared to discuss and

⁴¹⁹ See Post-Preliminary Decision Memorandum; *see also* GOR Verification Report at 10-11.

⁴²⁰ See, e.g., *Final Affirmative Countervailing Duty Determination: Certain Magnesia Carbon Bricks from the People’s Republic of China*, 75 FR 45472 (August 2, 2010) (*Magnesia Bricks from the PRC*), and accompanying Decision Memorandum at 41-45 (Comment 6).

⁴²¹ See, e.g., *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1371-74 (Fed. Cir. 2014); *RZBC Group Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1299-1301 (CIT 2015).

⁴²² See Post-Preliminary Decision Memorandum at 4-6 for a summary of the questions and answers submitted on this issue.

document the following:

Be prepared to discuss and document how the Ministry of Energy of the Russian Federation compiled the information that as of 2014 the total number of producers operating in the coal-mining sector was 193. Have available the source documents for examination.

Be prepared to discuss and document how the GOR compiled the information on the number of companies, which participated in auctions and tender procedures, as well as the number of winners between 2005 and 2013.

Be prepared to discuss and document how the Russian Federal Geological Fund (Rosgeolfond) compiled the information that between 2005 and 2013 there were 759 licenses issued for mining rights for coal, and that 363 were in effect as of November 17, 2015. Also, be prepared to discuss the list of companies that received mining rights for coal in 2006, 2009, 2011, and 2013 in Exhibit IV-3. Have available the source documents for examination.

Please be prepared to discuss and document how Rosnedra derived the list of companies from “the information about the held competitions and auctions for the right to use subsoil containing coal for the period of 2005 - 2013 in Russia.”⁴²³

However, at verification the GOR was unable to provide source documents to substantiate the statements made in its questionnaire responses regarding the total number of mining licenses issued for coal (759) and the total number of licenses that were in effect (363) as of November 17, 2015.⁴²⁴ Specifically, the GOR explained that it removed from storage the relevant source documents used to compile the usage data reported to the Department and subsequently placed the source documents back into storage and, as a result, the documents were not available for examination during the GOR’s verification.⁴²⁵

The Department’s verification outline provided the GOR advance notice of the Department’s intent to review the source documents the GOR used to compile the usage data in question.⁴²⁶ Further, the GOR’s statements at verification demonstrate that the source documents in question were in the possession and control of the GOR.⁴²⁷

The manner in which an authority distributes a good or service under a particular program, and substantiating such distribution at verification, is essential in determining whether the authority has provided the financial contribution in a manner that is limited to a particular enterprise or otherwise results in an enterprise or industry being a predominant user or a disproportionately larger recipient, as provided under sections 771(5A)(D)(iii)(I)-(III) of the Act. Despite the

⁴²³ See GOR Verification Outline Part 2 at 5.

⁴²⁴ See GOR Verification Report at 10-11.

⁴²⁵ *Id.* at 10-11.

⁴²⁶ See GOR Verification Outline Part 2 at 8.

⁴²⁷ See GOR Verification Report at 10-11 in which GOR officials discussed how they placed the source documents used to compile their usage data back into storage prior to verification.

Department's instructions in the verification outline, the GOR failed to substantiate its usage data at verification. Accordingly, we continue to determine that necessary information is not on the record and certain information provided by the GOR cannot be verified. Accordingly, it is necessary to rely on the use of facts otherwise available with regard to the issue of specificity pursuant to sections 776(a)(1) and (a)(2)(D) of the Act. Further, pursuant to section 776(b) of the Act, because the GOR did not provide the requested information at verification that was in its possession, we find that the GOR failed to cooperate to the best of its ability, and thus, adverse inferences are warranted. Therefore, as adverse facts available, we continue to determine that the GOR's provision of mining rights to the Severstal Companies during the period 2006 through 2013 was *de facto* specific within the meaning of sections 771(5A)(D)(iii)(I)-(III) of the Act.

We also disagree with the Severstal Companies' arguments that the Department should somehow have notified the Severstal Companies of the GOR's deficiencies in reporting and supporting usage figures, pursuant to section 782(d) of the Act. As an initial matter, we agree with Petitioners that section 782(d) of the Act explicitly states that the party submitting the response (*i.e.*, the GOR here) is the party that will be provided an opportunity to remedy any deficiencies. In any event, in CVD proceedings, the Department conducts its *de facto* specificity analysis based on usage data obtained from the government authority that administers the subsidy program in question.⁴²⁸ It is the government authority that is in possession of usage data for all participating enterprises and industries that is required in order for the Department to conduct the *de facto* specificity analysis described under sections 771(5A)(D)(iii)(I)-(III) of the Act. For this reason, the Department solicits usage data from foreign governments and not respondent firms.

Further, while we applied AFA with regard to the issue of *de facto* specificity, an aspect of our subsidy analysis that relies on information from the foreign government, we did not rely on AFA with regard to our analysis of the benefit. Rather, in calculating the benefit under the Provision of Mining Rights for LTAR program, we relied on company-specific data supplied by the Severstal Companies.⁴²⁹ Thus, we disagree with the Severstal Companies' claim that the Department's decision to apply AFA with regard to the issue of *de facto* specificity was unfairly applied against the Severstal Companies. Rather, the Department applied AFA due to the GOR's failure to submit usage data on the record in a manner that could be verified. The Federal Circuit has sustained the application of AFA on the question of specificity where the relevant government did not cooperate to the best of its ability, even where it collaterally affects a respondent firm.⁴³⁰

⁴²⁸ See, e.g., *Certain Frozen Warmwater Shrimp From Malaysia: Final Affirmative Countervailing Duty Determination*, 78 FR 50381 (August 19, 2013) and accompanying Issues and Decision Memorandum at Comment 5; *Certain Pasta From Italy: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 11172 (March 2, 2015), and accompanying Issues and Decision Memorandum at "A. Application of AFA: Social Security Reductions and Exemptions 1089/68 (Unico) and Subsequent Laws – Sgravi" ("While we would normally rely on information from the government to determine whether subsidies under the Sgravi programs are specific within the meaning of section 771(5A) of the Act, n19 the GOI elected not to respond to our questions regarding usage of these benefits")

⁴²⁹ See *Severstal Companies Final Calculation Memorandum*.

⁴³⁰ See *Fine Furniture*, 748 F.3d at 1372-73 ("a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper . . . In the present case, *Fine Furniture* is a company within the country of China, benefitting directly from subsidies the government of China may be providing, even if not intending to use such subsidy for anticompetitive purposes. Therefore, a remedy that

In arguing against the Department's application of AFA, the GOR notes that the relevant government agency, Rosgeofond, never accumulated some types of data requested by the Department and also argues that other information supplied by Rosgeofond was compiled manually. On this point, we note that our decision to apply AFA with regard to specificity is not based on what Rosgeofond did not supply in its questionnaire response. Rather, as indicated above, we are applying AFA because at verification the GOR failed to make available the source documents it used to compile the usage data submitted to the Department in its questionnaire response.

Despite its failure to make the relevant source documents available at verification, the GOR nonetheless argues that the Department should have instead relied upon a signed letter from a GOR official attesting to the accuracy of the data. The Department has previously explained that

. . . where the foreign government can “demonstrate through complete, verifiable, positive evidence” that a non-cooperating mandatory respondent (including all facilities and cross-owned affiliates) is not located in particular provinces whose subsidies are being investigated, we will not include those provincial programs in determining the countervailable subsidy rate for those companies. Thus, we will, in certain situations, consider certain types of information from a foreign government for purposes of determining the extent to which a non-cooperating mandatory respondent used investigated subsidy programs in a given proceeding.⁴³¹

Yet, the Department has determined that the mere submission of a letter by a foreign government attesting to a respondent's non-use of a particular program does not constitute verifiable information.⁴³² Thus, consistent with the Department's practice we find that the letter in question from the GOR does constitute verifiable information.

Lastly, we disagree that the Department's decision to apply AFA is flawed because it has pointed to no record evidence to affirmatively demonstrate that the program is specific. In reaching its specificity determination, the Department relies on information supplied by the government authority that administers the program. As noted above, at verification the GOR failed to provide the necessary source documents that would enable the Department to verify the GOR's usage data. Thus, in the absence of verifiable data, the Department, pursuant to sections 776(a)

collaterally reaches Fine Furniture has the potential to encourage the government of China to cooperate so as not to hurt its overall industry”).

⁴³¹ See *Certain Lined Paper Products From India: Final Results of Countervailing Duty Administrative Review; Calendar Year 2012*, 80 FR 19637 (April 13, 2015) (*Lined Paper from India 2012 Review*) and accompanying Issues and Decision Memorandum (Lined Paper from India 2012 Review Decision Memorandum) at 6.

⁴³² See *Certain Lined Paper Products From India: Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2012*, 79 FR 60447 (October 7, 2014) and accompanying Issues and Decision Memorandum at 17: “. . . we preliminarily determine that a mere assertion by the SGOM's Directorate of Industries that AR Printing is not located in Maharashtra, without providing documentation or a summary of the information or records reviewed that supports such assertion, is insufficient for purposes of demonstrating non-use by AR Printing,” unchanged in Lined Paper from India 2012 Review Decision Memorandum at 5.

and (b) of the Act, has made an adverse inference that the program is *de facto* specific under section 771(5A)(D)(iii) of the Act.

Comment 13: Whether the Provision of Mining Rights is Specific

Severstal Companies' Mining Rights Case Brief

- There is no basis to conclude that the mining rights program is *de jure* specific, as the Department correctly noted in the Post-Preliminary Decision Memorandum.⁴³³
- Further, the Department wrongly concluded in the Post-Preliminary Decision Memorandum that mining rights are *de facto* specific.
- In the Post-Preliminary Decision Memorandum, the Department stated that the provision of 759 coal mining licenses during the period 2005 through 2013 constitutes a limited number of recipients within the meaning of section 771(5A)(D)(iii)(I) of the Act.⁴³⁴
- However, the Department instead should have focused its analysis on the POI.
- Further, the Department did not adequately explain how 759 recipients of the alleged subsidy constitute a limited number of firms. Record evidence demonstrates that the provision of mining rights is not specific to Russia's steel industry. Article 337 of the TCRF provides for a mineral mining rights and tax program for all subsoil resources, including oil, gas, ores, coal, stones, and water.
- The GOR's mining rights program is not even specific to the coal industry.
- At the GOR verification, the Department collected the GOR's Annual Report on Tax Base and Extraction Tax Structure that contains a list of all Russian taxpayers of the Mineral Resource Extraction Tax (MRET). This information indicates that the share of total MRET taxes paid by coal taxpayers is less than four percent.⁴³⁵ Further, integrated steel producers comprise a small sub-set of firms that pay the MRET.
- Further, at verification, the Department confirmed the following: the number of producers operating in the coal sector during the POI was 193,⁴³⁶ the number of companies that participated in auctions and tender procedures, the total number of winners of auctions and tenders during the 2005 through 2013 period, the number of mining licenses issued (759), the total number of mining licenses in effect during the POI (363), the list of companies that received coal mining rights in the years 2006, 2009, 2011, and 2013, and the winners of subsoil auctions during the 2005 through 2013 period.⁴³⁷ Additionally, record evidence indicates that Russian cold-rolled steel companies accounted for less than five percent of mining rights acquisitions during the period 2005 through 2014.⁴³⁸

GOR's Mining Rights Case Brief

- The subsoil legislation of the Russian Federation concerning the provision of mining rights submitted to the Department clearly demonstrates that any bidder may receive mining rights licenses on the basis of an auction or a tender procedure as stipulated in Article 13 of the law.

⁴³³ See Post-Preliminary Decision Memorandum at 4.

⁴³⁴ See Preliminary Decision Memorandum at 7-8.

⁴³⁵ See GOR Verification Report at Exhibit VE-C.5 at lines 10010 and 10016.

⁴³⁶ *Id.*, at 10 and Exhibits VE-C.8 and VE-C.13).

⁴³⁷ *Id.*, at 10-11 and Exhibits VE-C.10 and VE-C.11.

⁴³⁸ See GOR First Supplemental PQR at Exhibit IV-2.

- In order to arrive at the specificity determination, the Department decided not to consider the provision of mining rights in the Russian Federation as a whole. A “provision of *coal* mining rights” program has *never* existed in the Russian Federation.
- The Report on Tax Base, Extraction Tax Structure contains the quantity of the taxpayers of the MRET in general and in respect of coal (line 10010 and line 10016).⁴³⁹ A simple comparison indicates that the quantity of taxpayers of the MRET with respect to extracted coal is much less than the general quantity of taxpayers of the MRET in Russia. This proves that the provision of mining rights in the Russian Federation is not limited in number and coal subsoil users are not predominant users of this program.
- The methodology applied by the Department is results-oriented and erroneous. The Department’s approach to specificity applied in Post Preliminary Decision Memorandum is inconsistent with section 771(5A)(D)(iii)(I) of the Act and Article 2.1(c) of WTO ASCM as the provision of mining rights is not specific by nature.

Petitioners’ Mining Rights Case Brief

- If the Department does not apply AFA with regard to the issue of specificity for the Provision of Mining Rights program, then it should, nonetheless, find the program to be *de facto* specific under section 771(5A)(D)(iii) of the Act.
- Although not addressed specifically in the Department’s analysis, steel companies likely were either the predominant users or received a disproportionately large share of the benefit from coal mining, based on their industrial needs. Accordingly, the Department’s post-preliminary finding on specificity should be affirmed in the final determination.

Petitioners’ Mining Rights Rebuttal Brief

- The Severstal Companies’ arguments concerning Article 337 of the TCRF and the GOR’s arguments concerning Article 13 of the subsoil law relate to whether the applicable laws are *de jure* specific. However, the Department based its preliminary specificity findings regarding the Provision of Mining Rights for LTAR program on a determination that the program was, pursuant to section 776(b) of the Act, *de facto* specific as a result of the GOR’s failure to submit verifiable usage data.
- Because the Department based its finding on *de facto* specificity, the arguments from the Severstal Companies and the GOR regarding *de jure* specificity are irrelevant to the Department’s analysis.
- The Department initiated on the provision of coal mining rights for LTAR. Thus, the Department should not base its specificity analysis on the GOR’s provision of mining rights to all industries. To do so would change the framework of the Department’s examination of this program that has been in place since the outset of the investigation.
- The GOR and the Severstal Companies mischaracterize the Department’s verification findings. Contrary to their claims, the Department was not able to corroborate the GOR’s usage data at verification.
- Further, the number of mining licenses issued, which the GOR granted between 2005 and 2013. Further, the data referenced by the Severstal Companies makes no apparent adjustment for any licenses that may have been reissued.

⁴³⁹ See GOR’s Verification Report at Exhibit VE-C-5.

- The Severstal Companies claim that there were 193 producers operating in the coal sector during the POI. However information from the GOR indicates that this number is overstated and unreliable.⁴⁴⁰
- Even if the Department determines to rely on the usage data supplied by the GOR, the number of users reported is less than the number of users that the Department has found to be limited in prior CVD proceedings.⁴⁴¹
- The Severstal Companies claim that the GOR sold less than five percent of its mining rights licenses to steel companies. However, the Severstal Companies' claim is based solely on mining licenses acquired by themselves and the NLMK Companies, thereby failing to account for any acquisitions made by other members of the Russian steel sector.

Severstal Companies' Mining Rights Rebuttal Brief

- Substantial record evidence demonstrates that the Russian cold-rolled steel industry is neither a predominant user nor receives a disproportionately large amount of any subsidy conferred by the GOR's mining rights program. Thus, there is no factual support for Petitioners' claim that steel companies were either predominant users or received a disproportionately large share of the benefit from coal mining, based on their industrial needs.
- Integrated steel producers comprise a small subset of total coal taxpayers that largely comprise energy and power companies. Accordingly, the provision of coal mining rights is not *de facto* specific to the cold-rolled steel industry within the meaning of section 771(5A)(D)(iii) of the Act.

Department's Position: As explained above, we find that the GOR failed to act to the best of its ability to provide necessary usage information and to permit such usage information to be sufficiently verified. As a result, pursuant to sections 776(a) and (b) of the Act, we find that the GOR's provision of mining rights to the Severstal Companies during the period 2006 through 2013 was *de facto* specific within the meaning of sections 771(5A)(D)(iii)(I)-(III) of the Act. In light of this finding, most of the interested parties' comments as to whether the usage data at issue support a conclusion of *de facto* specificity absent an AFA determination are moot. However, the Department comments on two specific issues raised by the Severstal Companies and the GOR.

First, the Department conducts its specificity analysis based on usage data immediately prior to and during the POI.⁴⁴² Second, the GOR failed to substantiate all of its usage data, including the data corresponding to the POI (*i.e.*, 2014).⁴⁴³ Third, to the extent the Severstal Companies and the GOR argue that the provision of coal mining rights for LTAR cannot be *de facto* specific because Article 337 of the TCRF provides for a mineral mining rights and tax program for all subsoil resources, including oil, gas, ores, coal, stones, and water, or that the GOR has never had a *coal* mining rights program, this misconstrues what the Department is investigating in this

⁴⁴⁰ See GOR Second PPQR at 4.

⁴⁴¹ See, e.g., *Preliminary Determination of Countervailing Duty Investigation: Non-Oriented Electric Steel from the Republic of Korea*, 79 FR 16295 (March 25, 2014) and accompanying Decision Memorandum at 14 (1333 users of a tax credit program in 2010, 803 in 2011, and 895 in 2012).

⁴⁴² See Primary Questionnaire at 13 in which the Department solicited usage data for the period 2010 through 2014.

⁴⁴³ See GOR Verification Report at 10-11.

CVD investigation. Although the petition alleged that the provision of mining rights for LTAR was a countervailable subsidy upon which the Department should initiate a CVD investigation, in actuality, the Department decided at initiation that “adequate evidence for initiation was submitted for the provision of mining rights for coal” but that there was insufficient evidence to justify initiating on this alleged program as it pertained to iron ore licenses.⁴⁴⁴ In other words, the program that the Department initiated on, investigated, and is ultimately countervailing in this final determination, is the provision of mining rights for LTAR as it pertains to coal. In effect, the respondents’ arguments request that the Department consider the provision of *all* mining rights, which goes well beyond the scope of the program that the Department is investigating in the first place.

Respondents argue that the share of total MRET taxes paid by coal taxpayers is less than four percent, thereby indicating that the provision of mining rights to coal producers is not specific. This argument is flawed. Our specificity analysis sought information concerning the number of mining rights licenses issued to enterprises and industries in a given year. The payment of MRET taxes in a given year is dependent on whether a firm extracted minerals from a government mine during the year. As such, the payment of MRET taxes does not necessarily line up with the number of mining rights licenses issued in a given year.

Additionally, we disagree with the Severstal Companies’ claim that the GOR sold less than five percent of its mining rights to cold-rolled steel producers. As Petitioners note, the Severstal Companies’ claim is based solely on mining licenses acquired by themselves and the NLMK Companies, thereby failing to account for any acquisitions made by other members of the Russian steel sector.⁴⁴⁵

Comment 14: Whether the Mining Rights for LTAR Program Confers Recurring Benefits

Severstal Companies’ Mining Rights Case Brief

- If the Department finds that the GOR’s mineral allocation policies and laws are countervailable, then the Department’s regulations specify that mining rights confer recurring benefits.⁴⁴⁶ The Department allocates (or expenses) a recurring benefit to the year in which the benefit is received.⁴⁴⁷ The Department found that the GOR’s provision of mining rights constituted a financial contribution that occurred when it issued the mining rights to the Severstal Companies.⁴⁴⁸ The GOR did not issue the Severstal Companies any mining licenses during the POI. Thus, given that the Department treats LTAR programs as recurring subsidies that are expensed in the year of the receipt and given that the Severstal Companies acquired no mining licenses during the POI, the Department must conclude that the Severstal Companies did not receive any countervailable benefit from this program during the POI.
- If, however, the Department determines to treat benefits received under this program as non-recurring, then it must allocate any non-recurring benefits over the 15-year AUL.

⁴⁴⁴ See Initiation Checklist at 14-15.

⁴⁴⁵ See Petitioners Mining Rights Case Brief at 16.

⁴⁴⁶ See 19 CFR 351.524(c)(1) and (2).

⁴⁴⁷ See 19 CFR 351.524(a).

⁴⁴⁸ See Post-Preliminary Decision Memorandum at 3.

GOR's Case Brief

- The provision of mining rights for mineral exploration is carried out on the basis of an auction or a tender procedure; the program is not exceptional as a subsoil user may participate in an auction or a tender procedure without limitation. Besides the provision of mining rights is not provided for, or tied to, the capital structure or capital assets of a company.
- The provision of goods or services for LTAR is in the non-binding list of recurring benefits under 19 CR 351.524.

Petitioners' Rebuttal Brief

- Although the provision of coal mining rights is not specifically enumerated in the non-binding illustrative lists of recurring and non-recurring subsidies under 19 CFR 351.524(c)(1), the provision of mining rights is akin to the provision of plant and equipment – a non-recurring subsidy according to the Department's regulations.
- The Severstal Companies concede that each acquisition requires express approval from the GOR and, thus, is not automatic. As such, each acquisition of mining rights is a unique action, with a benefit bestowed when the license is awarded. As such, the benefits bestowed as a result of the provision of the licenses should be treated as non-recurring.
- The Severstal Companies' argument concerning the use of a 15-year AUL to allocate benefits conferred under the Provision of Mining Rights for LTAR program is misplaced.
- The Department did not allocate benefits under the Provision of Mining Rights for LTAR program over an AUL period in the Post-Preliminary Decision Memorandum. Rather, the only allocation utilized by the Department in its preliminary analysis related to the allocation of a portion of the up-front payments associated with each license.

Department's Position: As explained here and in the Post-Preliminary Decision Memorandum, the Department lacks viable tier one price data for mining rights that it could use as a benchmark for purposes of determining whether the GOR sold coal mining rights to the Severstal Companies for LTAR. Additionally, as explained in this memorandum and in the Post-Preliminary Memorandum, the Department finds that that mining licenses, like standing timber, are goods that do not lend themselves to comparison to a world market price under tier two of the LTAR benchmark hierarchy because it is not reasonable to conclude that such prices would be available to purchasers in Russia.⁴⁴⁹

Thus, because we find there are no suitable tier one or two benchmarks prices for mining rights on the record of the investigation, we conducted our benefit analysis under tier three.⁴⁵⁰ The regulations do not specify how the Department should conduct its tier three analysis when determining whether a government's sale of a good or service is consistent with market principles.⁴⁵¹ Thus, we find that the Department has discretion in how it conducts a benefit analysis pursuant to tier three of the benefit hierarchy.

⁴⁴⁹ See, e.g., *CVD Preamble*, 65 FR at 65377; see also *Softwood Lumber from Canada Review*, and accompanying Issues and Decision Memorandum at 13-14.

⁴⁵⁰ See 19 CFR 351.511(a)(2)(iii).

⁴⁵¹ See *Uncoated Paper from Indonesia*, and accompanying Issues and Decision Memorandum at 15.

Accordingly, we have based our analysis on whether the price paid during the POI by the Severstal Companies for the underlying resources acquired through the mining rights, coal, was “consistent with market principles.”⁴⁵² This analysis mirrors the approach adopted by the Department in *HRS from India* and *Tetra from the PRC*, where we also investigated the provision of mining rights for LTAR. Under this tier three approach, we based our benchmark on the value of the underlying good conveyed via mining rights.⁴⁵³ As a result of this approach, our benefit analysis has necessarily focused on the volume of coal Severstal Companies extracted during the POI. Further despite the fact that the mining licenses were granted before the POI, the Severstal Companies reported that they made extraction payments to GOR during the POI.⁴⁵⁴ Our approach here mirrors recurring benefit analysis specified for loan programs in China CVD cases.⁴⁵⁵

For this reason, we disagree with respondents’ argument that the Department should link the timing of the receipt of the benefit to the year in which the GOR issued the mining license, thereby resulting in all benefits conferred under the program to be expensed prior to the POI.

Comment 15: Use of Mining Rights – Not Coal – to Measure the Benefit

Severstal Companies’ Case Brief

- Concerning the Mining Rights for LTAR Program, the Department’s Post-Preliminary Decision Memorandum improperly constructs a benchmark based on coal prices rather than on mining rights prices. The Department’s decision in this regard is in direct conflict with record evidence.
- The statute requires the Department to determine adequacy of remuneration based on the “good or service being provided.”⁴⁵⁶ Further, the Department’s regulations require that its benefit analysis utilize a “government price.”⁴⁵⁷
- Petitioners did not allege and the Department did not initiate an investigation into the GOR’s alleged provision of coal for LTAR. Rather, the Department initiated an investigation into the GOR’s alleged provision of mining rights for LTAR.⁴⁵⁸ Thus, the appropriate comparison should be based on the provision of mining licenses for coal.
- The result of the benefit calculation performed in the Post-Preliminary Decision Memorandum reflects the profit of sold coal and expressly does not reflect any benefit associated with the provision of mining rights.
- It defies logic to determine whether coal mining rights are provided for LTAR by comparing a benchmark price of coal to PAO Severstal’s affiliate’s cost of manufacturing coal (which

⁴⁵² See 19 CFR 351.511(a)(2)(iii).

⁴⁵³ See *HRS from India*, and accompanying Issues and Decision Memorandum at 19 and 65-66 (Comment 26); see also *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25-27.

⁴⁵⁴ See Severstal Companies PPQ at question I. 1. Mining Rights for LTAR and Second Severstal Companies PPQ at question I. 2. Mining Rights for LTAR.

⁴⁵⁵ See *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China, Final Affirmative Countervailing Duty Determination*, 73 FR 70961, (November 17, 2008), and accompanying Issues and Decision Memorandum at 26-27, 29.

⁴⁵⁶ See section 771(5)(E) of the Act.

⁴⁵⁷ See 19 CFR 351.511(a)(2).

⁴⁵⁸ See Initiation Checklist at 14-16.

includes the purchase of all coal mining rights, extraction taxes, extraction and processing costs, and freight). The result of such a comparison is not reflective of selling mining rights for LTAR; rather it reflects the profit of the coal.

- The significant additional costs that the Severstal Companies incur for obtaining coal beyond buying mining rights demonstrates the flaws of the methodology employed in the Post-Preliminary Decision Memorandum.
- The record contains reliable and market-based data, namely the prices for U.S. mining rights, which may serve as a tier three benchmark.⁴⁵⁹
- The Severstal Companies acknowledge that mining rights prices from the United States may not serve as a viable tier one or two benchmark. However, they may nonetheless serve as viable tier three benchmarks.
- In the Post-Preliminary Decision Memorandum, the Department improperly dismissed the U.S. mining rights prices from consideration. The Department's preliminary findings on this point are flawed. The Department claims that the GOR's auction prices are not suitable for benchmark purposes because it was unable to determine whether the GOR operated its auctions in a competitive manner and the prices for mining rights in the United States do not reflect market conditions in Russia.
- These two findings contradict each other. If the Department was truly unable to determine whether the GOR operated its auctions in a competitive manner, then how could it determine the prevailing market conditions in Russia (to find that the U.S. mining licenses do not reflect such conditions)?
- The substantial evidence submitted by the Severstal Companies indicates that the GOR operates its sales of mining licenses in a competitive manner. The Severstal Companies provided the Department with a complete package of its mining licenses annexes. These documents illustrate the application and approval process as well as the process for extracting and paying for the coal.
- Also, a comparison of the coal concentrate that the Severstal Companies acquired from their affiliate Vorkutaugol (that was produced from coking coal extracted under the mining licenses in question) and the coal concentrate that the Severstal Companies acquired from private suppliers demonstrates that the GOR's auctions operate in a competitive manner. Specifically, the weighted-average price of the coal concentrate the Severstal Companies acquired from Vorkutaugol exceeds the weighted-average price charged by the Severstal Companies' private suppliers.
- Likewise, the GOR provided detailed explanations and supporting documents regarding the laws governing the operation of its mining rights auction and tender process.
- The information from the Severstal Companies and the GOR indicate that the GOR followed its standard pricing mechanism for sales of coal mining rights to the Severstal Companies.
- The Department has failed to substantiate its preliminary finding the U.S. mining rights prices do not reflect prevailing market conditions in Russia. In fact, record evidence contradicts the Department's conclusion in this regard as evidenced by the fact that the prices for U.S. mining rights licenses are the same as mining rights prices the GOR charged to the

⁴⁵⁹ See Severstal Companies Benchmark Submission, dated November 16, 2015, (Severstal Companies Factual Filing) at Exhibits 5-10 and 13-23.

Severstal Companies.⁴⁶⁰ And the prices that the U.S. Government sold U.S. coal mining rights leases were determined by competitive auctions and thus are consistent with market principles.

- Additionally, the GOR's costs of providing mining rights are nominal and the purchase prices paid for such mining rights cover the GOR's cost plus a significant profit margin. These facts demonstrate that the GOR operates its mining rights auction and tender sales process in line with market principals as described under 19 CFR 351.511(a)(2)(iii).

GOR's Mining Rights Case Brief

- The conclusion drawn in the Department's Post-Preliminary Decision Memorandum that there are no suitable tier-one benchmark prices because the GOR-run auction "lacks necessary auction price data and other relevant information to evaluate whether the GOR mining rights auction system is competitively run, open to all and based solely on price" is based merely on allegations and speculations but not on the objective evidence such as mining rights regulations.
- Russian law clearly stipulates that the provision of mining rights is provided on the basis of an auction or a tender procedure.
- The GOR strongly objects to the proposal to conduct a tier three benefit analysis under 19 CFR 351.511(a)(2)(iii) based not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights.
- By using coal prices for calculating the benefits received from the mining rights' provision, the Department expands the scope of the investigation without due diligence.
- Prices for coal cannot be compared to money paid for obtaining licenses for coal extraction. Coal is a product of the coal mining industry, while licenses represent only a factor of coal production - indispensable, but not exclusive. Other factors and costs are associated with the acquisition of mining rights, such as the payment of charges for participation in a public auction (a tender procedure), one-time payment for exploration of subsoil area, extraction tax, and other taxes and payments, including those that are stipulated in a license agreement.
- There are different types and grades of coal usually extracted from one mine. The prices are differentiated significantly depending on the type and grade of coal. Not all extracted coal is suitable for coking and it may be utilized in completely different industries and for other purposes.
- Market prices for coal account for a significant amount of expenses related to production, transportation, administrative, selling and other expenses while expenses for obtaining mining rights represents only a certain part of total expenses that occur between obtaining the right for exploration and coal extraction.
- The market prices cannot be unified since they also depend on difficulties of coal extraction, and specific features of the mining fields. Therefore, prices for coal cannot be compared to payments and any other fees incurred by an owner of a license for coal mining.
- As to the methodology, to calculate a per-unit price for the coal based on the costs Severstal Companies incurred, the Department should explain what it understood regarding "any

⁴⁶⁰ See Severstal Companies Mining Rights Case Brief at 29-31 where they compare the per-acre price charged by the GOR to a per-acre price charged on U.S. sales of mining rights.

additional costs reported by Severstal Companies,” as there may be expenses incurred due to coal extractions or coal enrichment that are out of the scope of the investigation.

- The comparison of a constructed unit price for the Severstal Companies and the prices for coking coal submitted by the GOR is inappropriate and out of the scope of the investigation. Thus, the Department should base the final determination on the mining rights system in the Russian Federation on the basis of the legislation submitted by the GOR using the tier one benchmark under 19 CFR 351.511 (a)(2)(i).
- No interested party submitted on the record of this investigation any information regarding violations in the application of the legislation when the mining rights were provided.
- Focusing on the provision of the mining licenses, and not the price of the coal extracted under the licenses, results in no benefit being conferred upon the Severstal Companies. This is evidenced by the fact that the initial one-time payment made by the Severstal Companies exceeds the size of the minimal initial one-time payment.

Petitioners’ Mining Rights Case Brief

- The Department appropriately declined to rely on prices submitted by the Severstal Companies for mining licenses in the United States as a tier-two benchmark, finding “that mining licenses, like standing timber, are goods that do not lend themselves to comparison to a world market price because it is not reasonable to conclude that such prices would reflect prevailing market conditions in Russia.”
- Despite the Department’s treatment of the Severstal Companies’ countervailable benefit, the Department has wide discretion in its assessment of the adequacy of remuneration when finding that the government’s price is inconsistent with market principles under 19 CFR 351.511(a)(2)(iii).⁴⁶¹
- In selecting the appropriate methodology to measure the adequacy of remuneration based on a tier-three analysis, the Department has utilized a case-by-case approach, including a variety of both internal and external benchmarks.⁴⁶²
- The Department should use its discretion and select a tier-three market based external benchmark to assess the adequacy of remuneration from the provision of mining rights in the final determination.
- Further, the criteria the GOR uses to select the winners of its mining rights auctions (*i.e.*, the scientific and technological level of geopolitical study and use of subsoil areas; the completeness of extraction of mineral resources; the contribution of the socio-economic development of the territory; etc.) are not factors that would be considered by a commercial market investor.

⁴⁶¹ See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (*Coated Paper from Indonesia*) (September 27, 2010), and accompanying Issues and Decision Memorandum at 9.

⁴⁶² See *Countervailing Duty Investigation of Certain Passenger vehicle and Light Truck Tires from the People’s Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, In Part*, 80 FR 34888 (June 18, 2015) (*Passenger Tires from the PRC*), and accompanying Issues and Decision Memorandum at 10-11.

Petitioners' Mining Rights Rebuttal Brief

- The fact that Severstal Companies' one-time payments were greater than the minimal one-time payment is irrelevant to whether the companies paid adequate remuneration for the coal mining rights they acquired from the GOR.
- Further, record evidence demonstrates that the GOR's one-time payment price is not established pursuant to market principals.⁴⁶³
- The Severstal Companies' objections to the tier three benchmark utilized by the Department in the Post-Preliminary Decision Memorandum are misplaced.
- As the Department has noted in prior CVD proceedings, the regulations do not specify how the Department is to conduct a market-principles analysis under tier three and, therefore, is conducted on a case-by-case basis.⁴⁶⁴ Further, in selecting a benchmark under tier three, the Department has used, on a case-by-case basis, internal and external benchmarks.⁴⁶⁵
- The Department has relied on coal prices for purposes of determining the benefit with respect to the provision of mining rights in prior CVD proceedings.⁴⁶⁶
- The GOR questionnaire responses and the Department's observations at verification contradict respondents' claims that the GOR operates its mining rights auction in a competitive manner. Due to the GOR's inability to provide such information as the competing bids, the entities involved in the bidding, the actual number of participants and the GOR's inability at verification to substantiate the number and make-up of the firms that won mining rights precluded the Department from properly evaluating whether the GOR operates its mining rights auctions in line with market principals.
- Thus, the Department should continue to decline to rely on prices from GOR-run auctions as a tier one benchmark.
- Proprietary information submitted by the Severstal Companies supports the Department's preliminary conclusion regarding the viability of tier one prices.⁴⁶⁷
- The Severstal Companies' claims concerning the purported equilibrium between Russian and U.S. mining rights prices is undermined by record evidence indicating that, in some instances, the U.S. prices were substantially higher than the Russian prices.⁴⁶⁸
- The Severstal Companies' claims concerning the competitive nature of the GOR's mining rights auction system is contradicted by the Department's finding that it lacked the necessary information to evaluate whether the GOR operates the system in a competitive manner. Further the Severstal Companies identify no record information that would support a different conclusion.
- The Severstal Companies argue that a comparison of the coal concentrate prices that Vorkutaugol sold to PAO Severstal to the coal concentrate prices that private suppliers charged to PAO Severstal demonstrates that the GOR's sale of mining rights to the Severstal

⁴⁶³ See GOR Second PPQR at 7-9, which references proprietary information regarding how the GOR sets the one-time associated with its provision of mining rights.

⁴⁶⁴ See *Coated Paper from Indonesia*, and accompanying Issues and Decision Memorandum at 9.

⁴⁶⁵ See, e.g., *Passenger Tires from the PRC*, and accompanying Issues and Decision Memorandum at 10-11.

⁴⁶⁶ See, e.g., *HRS from India*, and accompanying Issues and Decision Memorandum at I.A.9 and Comment 26.

⁴⁶⁷ See the Severstal Companies November 24, 2015, questionnaire response at Exhibit S-18, which references proprietary information regarding one of the Severstal Companies' mining licenses.

⁴⁶⁸ See Severstal Companies Mining Rights Case Brief at 28-29.

Companies yielded no benefit. Such an analysis is irrelevant to whether the GOR provision of mining rights is competitive and market-based.

- Further, the approach suggested by the Severstal Companies would require the Department to consider the purported benefit/effect of the subsidy on Vorkutaugol's production, a benefit analysis that is specifically rejected under 19 CFR 351.503(c).
- The Severstal Companies' comparison of Russian and U.S. mining rights on a per-acre basis is misplaced. The concentration of coal deposits throughout a site will vary significantly by acre. Thus, the proper means of comparison is the price for a particular volume of coal that is extracted from a site.
- Due to errors in their calculations, the price comparisons for Russian and U.S. mining rights contained in the case brief significantly understate the resulting per unit prices.⁴⁶⁹

Severstal Companies' Rebuttal Brief

- In their brief concerning the mining rights for LTAR issue Petitioners argue that the Department should use its discretion and select a tier-three market-based external benchmark to assess the adequacy of remuneration from the provision of mining rights for the final determination.
- Elsewhere, in the context of their arguments concerning the NLMK Companies purported use of the Mining Rights for LTAR program, Petitioners acknowledge that the "good" provided is coal mining rights licenses and they urge the Department to find that U.S. coal mining right licenses serve as the most appropriate market-based benchmark prices with which to measure the adequacy of remuneration for the final determination.
- The Severstal Companies agree with Petitioners' aforementioned arguments and urge the Department to apply Petitioners' reasoning equally with regard to the Severstal Companies.
- The Department's Post-Preliminary analysis finding that it was appropriate to conduct a benefit analysis based not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights makes no sense, has no record support, and is directly contrary to the statute and the Department's regulations. Thus, if the Department finds that the GOR's provision of coal mining rights to the Severstal Companies is countervailable in the final determination, it must calculate the benefit based on underground U.S. coal mining rights prices.

Department's Position: As explained above and discussed in detail in the Post-Preliminary Decision Memorandum, the Department lacks a viable tier one benchmark price for coal mining rights in Russia.⁴⁷⁰ Because the GOR is the sole provider of mining rights in Russia, we find that there are no private, market-determined prices for mining rights in Russia on the record of the proceeding that would satisfy the requirements of the Department's regulations.⁴⁷¹

⁴⁶⁹ See Severstal Companies Mining Rights Case Brief at 31.

⁴⁷⁰ See Post-Preliminary Decision Memorandum at 8.

⁴⁷¹ The Severstal Companies agree that tier one benchmark prices are not suitable for this benefit analysis. See Severstal's Response to the Department's Post-Preliminary Determination Supplemental Questionnaire (Severstal PPQR), dated March 4, 2016 at 7 (The GOR and its regional governments are the exclusive sellers of mining rights in Russia, and coal mining rights in Russia cannot be imported from other countries, due to the unique nature of mining rights, namely that mining rights are only sold by the government that owns the rights to its territorial underground. Thus, tier one benchmarks are inappropriate).

Further, we find that mining rights prices stemming from the GOR's auction system may not serve as a tier one benchmark price. In its questionnaire responses, the GOR claimed that it was unable to provide (1) copies or detailed descriptions of submitted bids and tenders, (2) the entities approved to bid in each of the auctions, and (3) the actual number of participants at each auction. Specifically, the GOR stated that detailed description and copies of submitted paper bids of the entities for each auction and tender procedure were archived and could not be provided.⁴⁷² Additionally, the GOR was unable to substantiate at verification the number and make-up of firms that submitted winning mining rights bids in each year.⁴⁷³ As a result, we lack necessary auction price data and other relevant information to evaluate whether the GOR's mining rights auction system is competitively run, open to all, and based solely on price, as prescribed under 19 CFR 351.511(a)(2)(i) and further explained in the *CVD Preamble*.⁴⁷⁴ On this basis, we find there is no suitable tier one price for mining rights on the record.

The GOR argues that we should nonetheless rely upon the regulations that govern its auction system to find that it is competitively-run and, thus, prices stemming from its mining rights auctions may serve as a tier one benchmark. However, as noted above, in addition to the relevant legislation, we require information on the nature of the auction bids and composition of the auction participants. Absent such information we are unable to evaluate whether the GOR operates its mining rights auctions in a competitive manner.

We also disagree with the GOR that by using coal prices for calculating the benefits received from mining rights' provision, the Department improperly expands the scope of the investigation. As explained in Comment 14, our decision to rely upon coal-based prices for purposes of the benefit calculation is driven by the facts that are available on the record of this investigation. Specifically, because we find there are no suitable tier one or two benchmarks prices for mining rights on the record of the investigation, we have conducted our benefit analysis under tier three.⁴⁷⁵ The regulations do not specify how the Department should conduct its tier three analysis when determining whether a government's sale of a good or service is consistent with market principles.⁴⁷⁶ Thus, we find that the Department has discretion in how it conducts a benefit analysis pursuant to tier three of the benefit hierarchy. Accordingly, we have based our analysis on whether the price paid during the POI by the Severstal Companies for the underlying resources acquired through the mining rights, coal, was "consistent with market principles."⁴⁷⁷ As noted elsewhere in this memorandum, the Department approach with regard the calculation of the benefit under the Provision of Mining Rights for LTAR program is consistent with its treatment of mining rights for LTAR programs in prior CVD proceedings.⁴⁷⁸

Respondents argue that the Department improperly altered the parameters of the *Initiation* from an examination of the GOR's provision of mining licenses, in general, to a narrower

⁴⁷² See GOR First Supplemental PQR at 21. See also GOR Verification Report at page 10.

⁴⁷³ See GOR Verification Report at page 10.

⁴⁷⁴ See *CVD Preamble*, 63 FR at 65377.

⁴⁷⁵ See 19 CFR 351.511(a)(2)(iii).

⁴⁷⁶ See *Uncoated Paper from Indonesia*, and accompanying Issues and Decision Memorandum at 15.

⁴⁷⁷ See 19 CFR 351.511(a)(2)(iii)

⁴⁷⁸ See *HRS from India*, and accompanying Issues and Decision Memorandum at 19, 65-66 (Comment 26); see also *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25-27.

investigation of the government's provision of coal mining licenses. Such arguments are misplaced. In the *Initiation*, the Department clearly stated that Petitioners submitted adequate evidence for an investigation into whether the GOR provided coal mining rights for LTAR.⁴⁷⁹

The Severstal Companies argue that the Department should evaluate whether the GOR operates competitive, market-based auctions by relying upon the companies' own application and approval documents. However, those documents merely represent the experience of a single firm and, thus, do not provide sufficient information that would enable the Department to determine whether the GOR's auction system, as a whole, meets the criteria enumerated under 351.511(a)(2)(i) and the *CVD Preamble*. Further, as noted by Petitioners, proprietary information contained in the Severstal Companies' bid information casts doubt on their claims that their bids were part of a competitively-run, market-based auction system.⁴⁸⁰

We also disagree with the Severstal Companies that a comparison of the transfer prices that Vorkutaugol charged to PAO Severstal for concentrated coal to the prices that private suppliers charged to PAO Severstal for concentrated coal demonstrates that the GOR sells its mining rights for market value. Such an analysis is untenable under the CVD law because it requires the Department to trace the effect of the subsidy on Vorkutaugol's production operation. Such an approach is neither contemplated nor required under 19 CFR 351.503(c), and is inconsistent with the Department's practice not to trace the effect of subsidies.⁴⁸¹

Further, the Department finds that mining licenses, like standing timber, are goods that do not lend themselves to comparison to a world market price under tier two of the LTAR benchmark hierarchy because it is not reasonable to conclude that such prices would be available to purchasers in Russia.⁴⁸² As a result, we find that the U.S. prices for mining rights may not serve as a tier two benchmark. For the same reason, we find that U.S. prices may not serve as a tier three benchmark.

Further, we disagree with the Severstal Companies that the purported equilibrium between Russian mining rights prices and U.S. mining rights prices demonstrates that the GOR's auction system generates market-based prices for mining rights.⁴⁸³ As Petitioners note, the price

⁴⁷⁹ See *Initiation Checklist* at 15.

⁴⁸⁰ See Severstal Companies November 24, 2015, questionnaire response at Exhibit S-18, which references proprietary information.

⁴⁸¹ See *Certain Steel Nails From the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015) (*Nails from Oman*), and accompanying Issues and Decision Memorandum at 15 (declining to "consider whether Oman Fasteners used or did not use the imported equipment for the production of subject merchandise. To do so would require the Department to trace the use of Oman Fasteners' tariff exemptions to determine whether the company used the subsidies as intended; this would violate the statute, Department's regulations, and the well-established practice of not considering the use and effect of subsidies"); *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 4936 (January 28, 2009) (*ASPP from the PRC*), and accompanying Issues and Decision Memorandum at 18 (including certain inputs the respondent acquired for LTAR despite the fact that the respondent did not use the inputs to make subject merchandise during the POI).

⁴⁸² See, e.g., *CVD Preamble*, 65 FR at 65377; see also *Softwood Lumber from Canada Review*, and accompanying Issues and Decision Memorandum at 13.

⁴⁸³ See Severstal Companies Mining Rights Case Brief at 29-31 where it compares the per-acre price charged by the GOR to a per-acre price charged on U.S. sales of mining rights.

comparison cited by the Severstal Companies relies upon mining rights prices that are expressed on a per-acre basis and, thus, the comparison assumes that the size of the land area is necessarily related to the value of the license. However, as Petitioners further note, such an assumption fails to account for the possibility that the concentration of coal deposits throughout a site as well as from site-to-site may vary. Further, respondents do not cite to any information supporting the conclusion that the sites from which the U.S. mining prices were obtained are comparable, in terms of the concentration of available sub-surface coal.

We disagree with the Severstal Companies' argument that it is inappropriate to determine whether coal mining rights are provided for LTAR by comparing a benchmark price of coal to what the Severstal Companies pay to extract coal from GOR mines. The Department's use of a coal-based benchmark to determine whether the GOR provided coal mining rights for LTAR is consistent with the Department's approach in other CVD proceedings involving the provision of mining rights.⁴⁸⁴ Further, in the absence of viable benchmark prices for mining rights under tiers one through three, we find that, per 19 CFR 351.511(a)(2)(iii), a benefit analysis based on the value of the underlying good conveyed via mining rights is appropriate. Additionally, in order to ensure comparability, our calculations of the cost the Severstal Companies paid to extract coal from GOR mines during the POR includes such components as a profit rate as well as an allocated portion of the up-front license fee payments the companies paid in the cost the Severstal Companies incurred to extract coal during the POI.⁴⁸⁵

In a similar vein, the GOR argues that a coal benchmark inherently reflects certain costs such as exploration and extraction costs that are not reflected in the price that the Severstal Companies paid to the GOR for coal mining rights. We agree. And, for this reason, in addition to asking about the extraction payments the Severstal Companies made to the GOR during the POI, we also solicited information concerning the up-front payments and costs the Severstal Companies incurred.⁴⁸⁶ In fact, on two occasions, the Department asked the Severstal Companies to provide cost information concerning the coal extracted from GOR mines during the POI.⁴⁸⁷ However, despite our requests, the Severstal Companies did not report in their supplemental questionnaires any additional extraction costs associated with their licenses.⁴⁸⁸ Additionally, in order to ensure comparability, we have, based on comments from the Severstal Companies,⁴⁸⁹ included a profit component into the companies' extraction cost calculations.⁴⁹⁰

⁴⁸⁴ See *HRS from India*, and accompanying Issues and Decision Memorandum at 19 and Comment 26; see also *Tetra from the PRC*, and accompanying Issues and Decision Memorandum at 25-27.

⁴⁸⁵ See Severstal Companies' Final Calculation Memorandum.

⁴⁸⁶ See Severstal Companies' PPQR and attached spreadsheet tables. In particular, we highlight column "U" in Table 1 of the spreadsheet included in this questionnaire that solicited the following information, "Additional Extraction Costs Incurred by Company During the POI with Regard to this License (*add columns as necessary for each category of extraction costs*)," emphasis added.

⁴⁸⁷ See Severstal PPQR at question I. 1. Mining Rights for LTAR and Second Severstal Companies PPQ at question I. 2. Mining Rights for LTAR.

⁴⁸⁸ See Severstal Companies First PPQR Part 1 and Severstal Companies First PPQR Part 2; see also Severstal Companies Second PPQR Part 1 and Severstal Companies Second PPQR Part 2.

⁴⁸⁹ See Severstal Companies Coal Benchmark Submission in which they advocate for the incorporation of a profit component based on information contained in Attachment 5.

⁴⁹⁰ See Severstal Companies Final Calculation Memorandum.

In its Mining Rights Case Brief, the GOR appears to insinuate that the Department's questions regarding the Severstal Companies' extraction costs were unclear and requests the Department to clarify the meaning of the extraction cost questions it issued to the Severstal Companies.⁴⁹¹ Our view is that the questions posed to the Severstal Companies were clear.⁴⁹² Further, our goal in soliciting this information was to identify the costs the Severstal Companies incurred in extracting coal from GOR mines during the POR.⁴⁹³ To the extent there may have been confusion as to the nature of our questions, as the cover letter of our initial questionnaire indicates, the Severstal Companies should have asked for clarification from the Department concerning any items contained in the Department's questionnaires.⁴⁹⁴ The Severstal Companies chose not to seek any such clarification.

The GOR argues that the types of coal extracted from a mine may vary and, thus, not all extracted coal is suitable for coking. With this line of argument the GOR implies that the Department's use of a coal-based benchmark price is flawed due to the incorporation of multiple coal grades that do not match the grades acquired by the Severstal Companies from GOR mines. However, record evidence indicates that the Severstal Companies only extracted coking coal from the GOR mines during the POI.⁴⁹⁵ Further, the coal-based benchmark utilized by the Department is based exclusively on coking coal prices.⁴⁹⁶

Lastly, we disagree with the GOR's claim that the mining rights program conferred no benefit by virtue of the fact that the initial one-time payment made by the Severstal Companies exceeded the size of the minimal initial one-time payment required by the GOR. The size of the Severstal Companies' initial one-time payment has no bearing on whether the prices the GOR charged were market-based prices for mining rights. In other words, whether a respondent makes a payment for a government provided good or service that is in excess of the price charged by the government does not necessarily demonstrate the absence of a benefit. Rather, under 19 CFR 351.511(a), the Department determines whether a benefit is conferred by comparing the price paid to the government to a market-based benchmark price.

⁴⁹¹ See GOR Mining Rights Case Brief at 10.

⁴⁹² See Severstal PPQR at question I. 1. Mining Rights for LTAR. In particular, we highlight column "U" in Table 1 of the spreadsheet included in this questionnaire that solicited the following information, "Additional Extraction Costs Incurred by Company During the POI with Regard to this License (*add columns as necessary for each category of extraction costs*)," emphasis added; see also Second Severstal Companies PPQ at question I. 2. Mining Rights for LTAR, dated March 17, 2016.

⁴⁹³ See Severstal Companies' PQR and attached spreadsheet tables.

⁴⁹⁴ See Department's Letter, "Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Countervailing Duty Questionnaire," (September 14, 2015) (Initial Questionnaire) at 4 in which the Department encourages respondents to contact the Department if they require clarifications concerning the questions asked in the questionnaires.

⁴⁹⁵ See Severstal Companies' Verification Report at 8, "Company officials stated that Severstal only extracts coking coal. . ."

⁴⁹⁶ See, e.g., Severstal Companies Final Calculation Memorandum; see also GOR Verification Report at 12 and Exhibit VE-C.15., which indicates that the government prices relied upon by the Department are delineated by coal grade, which includes coking coal.

Comment 16: Whether to Deduct Costs from the Coal Benchmark Rather than Adding Costs to the Extraction Price Paid by the Severstal Companies

Severstal Companies' Mining Rights Case Brief

- If the Department declines to use a mining rights price as the benchmark, then it must construct a market-based price for coal mining rights. Namely, under such an approach, the Department must back out all expenses not attributable to mining rights license expenses from its coal price rather than build up a constructed coal price from the Severstal Companies' mining rights license expenses. For example, the Department should subtract the following from the benchmark coal price: profit and selling, general and administrative (SG&A), coal production/refining expenses, and freight.
- Subtracting profit from the benchmark coal price is appropriate because the profit rate that is on the record represents a profit rate for coal production, not profit for coal mining. The Department should adopt a similar approach with regard to SG&A.
- Concerning coal production costs, the Department should use the coal production costs contained in Vorkutaugol's 2014 annual report as a surrogate for the Russian average coal production costs and deduct those costs from the coal benchmark to calculate a coal mining rights benchmark.⁴⁹⁷

Petitioners' Mining Rights Rebuttal Brief

- The Department's approach in the Post-Preliminary Decision Memorandum was consistent with its approach in prior CVD proceedings regarding the provision of mining rights for LTAR.⁴⁹⁸ The Severstal Companies do not address the benchmark method adopted in these prior CVD proceedings or argue conceptually why their proposed method is superior to the one utilized by the Department in the Post-Preliminary Decision Memorandum.
- The Severstal Companies' proposed benchmark methodology is essentially the same as the tier three benchmark methodology the Department derived to remedy the Severstal Companies' failure to provide cost information that the Department requested but was not provided by the Severstal Companies.
- The Department should not reward the Severstal Companies' failure to submit requested information by modifying its benchmark in the final determination.

Department's Position: In the Post-Preliminary Decision Memorandum, we added a profit component to the costs the Severstal Companies incurred to extract coal from GOR mines during the POI. Based on information submitted by the Severstal Companies, we derived the profit rate from the 2014-2015 financial statement of Coal India Ltd (Coal India).⁴⁹⁹

The Severstal Companies argue that the Department should subtract this profit component from the coal benchmark rather than adding it to the costs the Severstal Companies incurred to extract coal from GOR mines during the POI because the profit component reflects profit for coal

⁴⁹⁷ See Severstal Companies November 24, 2015 Questionnaire Response at S-14; see also Severstal Companies December 8, 2015 Questionnaire Response, Attachment 2, at the Severstal Companies' 2014 Annual Report at 30.

⁴⁹⁸ See, e.g., *HRS from India*, and accompanying Issues and Decision Memorandum at 19.

⁴⁹⁹ See Severstal Companies Coal Benchmark Submission, Attachment 5 at 19.

production and not from coal mining. We find there is no information indicating that coking coal mined from the ground (such as the coking coal extracted by Vorkutaugol during the POI) is different from the coal that is sold. In both cases, there is no value added to the coal because, as confirmed at verification, coking coal constitutes mined coal in its “raw” or “unprocessed” state.⁵⁰⁰ Thus, it is not clear how the profit rate for coking coal production would be any different from the profit rate for coking coal mining.⁵⁰¹

We also disagree with the Severstal Companies’ assertion that the Department should subtract the coal production costs of Vorkutaugol, as indicated in its 2014 annual report, from the coal benchmark price.⁵⁰² Setting aside the issue of how to incorporate the Severstal Companies’ coal extraction costs into the LTAR benefit calculation (*e.g.*, whether to add them to costs the Severstal Companies incurred to mine coal from GOR mines during the POI or subtract such costs from the coal benchmark), the overarching fact remains that the Severstal Companies did not submit such costs in a timely manner. As noted above, on two occasions the Department requested the Severstal Companies to provide information concerning the costs associated with its mining activities.⁵⁰³ In both instances, the Severstal Companies did not provide the requested information.⁵⁰⁴ As such, it would not be appropriate to now rely on an alternative, unverified data source of the Severstal Companies’ choosing after the companies had failed to provide the requested information during the questionnaire and answer process of the investigation. Therefore, we have determined not to incorporate the cost data from Vorkutaugol’s 2014 annual report into our benefit calculations. For the same reasons, we have determined not to incorporate SG&A expenses into the LTAR benefit calculations.

Regarding freight, we address our treatment of such costs in the LTAR benefit calculation in the next comment.

Comment 17: Revisions to Coal Benchmark Price Calculated in Post-Preliminary Decision Memorandum

Severstal Companies’ Mining Rights Case Brief

- If the Department continues to improperly measure whether the GOR sold mining rights to the Severstal Companies for LTAR based on a coal-based price, then it must make certain revisions to its preliminary analysis.
- Vorkutaugol incurs significant costs related to mining, extracting, and transporting coal that it sells to PAO Severstal that were not included in the Department’s preliminary analysis. The Department did not include the freight expenses from the coal mines at Vorkutaugol to PAO Severstal’s steel making facilities. The Department also did not include the up-front

⁵⁰⁰ See Severstal Companies Verification Report at 8.

⁵⁰¹ See Severstal Companies Verification Report at 8.

⁵⁰² See Severstal Companies Mining Rights Case Brief at 33, referencing Severstal Companies November 24, 2015 Questionnaire Response at S-14; *see also* Severstal Companies December 8, 2015 Questionnaire Response, Attachment 2, at the Severstal Companies’ 2014 Annual Report at 30.

⁵⁰³ See Severstal PPQR at question I. 1. Mining Rights for LTAR and Second Severstal Companies PPQ at question I. 2. Mining Rights for LTAR.

⁵⁰⁴ See Severstal Companies First PPQR Part 1 and Severstal Companies First PPQR Part 2; *see also* Severstal Companies Second PPQR Part 1 and Severstal Companies Second PPQR Part 2.

and annual payments for Vorkutaugol's coal mining rights purchased from the GOR for which Vorkutaugol has not begun commercial mining/extraction activities.⁵⁰⁵

- Concerning freight, the Department's investigation is on whether the provision of coal mining rights conferred a countervailable benefit to the Severstal Companies' steel making operations, which are located in Cherepovets, Russia, not at Vorkutaugol's mines, which are located in the far north of Russia. The failure to include freight on the GOR coal price side significantly underestimated the benefit the Department calculated in the Post-Preliminary Decision Memorandum.
- Thus, for the final determination, the Department must either exclude the freight from the coal benchmark price or include the freight that the Severstal Companies incur to transport coal from Vorkutaugol to Cherepovets.
- Concerning up-front payments, the inclusion of such payments for inactive mines into the price the Severstal Companies pay to the GOR to extract coal is consistent with the Department's preliminary finding that the financial contribution occurred when the Severstal Companies purchase the mining rights.⁵⁰⁶
- The Department's preliminary analysis overstates the benefit by including coal that was used as steam coal in the numerator of the net subsidy rate calculation. The Severstal Companies do not use steam coal in their steel making operations.⁵⁰⁷ Thus, the Department should reduce any benefit it calculates by 23.4 percent (which reflects the value of steam coal produced) prior to performing the net subsidy rate calculation.
- In the Post-Preliminary Decision Memorandum, the Department allocated a portion of the Severstal Companies' up-front payments for a given mine by dividing the up-front payment by 20 years. The AUL for the Severstal Companies is 15 years. Thus, in the final determination, the Department should allocate the up-front payment by 15 years instead of 20 years.

Petitioners' Mining Rights Case Brief

- The Department's analysis mistakenly stated that the profit rate for an Indian coal company (supplied by Severstal) was "the only profit rate on the record" and, therefore, the Department incorporated this profit into the extracted coal price the company paid to the GOR.
- Severstal submitted Vorkutaugol's 2014 and 2013 audited financial statements that show the company's profits.⁵⁰⁸ Therefore, the Department should use a profit rate derived from the 2013 or 2014 financial statements of Vorkutaugol or average the two profit margins, in order to more accurately reflect Severstal's actual extracted coal price paid to the GOR for the mining rights.

⁵⁰⁵ See Severstal Companies Mining Rights Case Brief at 35 where they list the proprietary license numbers for these inactive mines.

⁵⁰⁶ See Post-Preliminary Decision Memorandum at 3.

⁵⁰⁷ See Severstal Companies Second Supplemental PRQ Attachment 2, Severstal Companies' 2014 Annual Report at 27-28.

⁵⁰⁸ See Severstal Companies PQR at Exhibit CVD-9.

- In *HRS from India* cited by the Department to support the benefit calculation methodology in this investigation, the Department used the actual profit margin - as reported by the subject producer - in its calculations.⁵⁰⁹
- Consistent with its past practice and the record evidence, the Department should modify the post-preliminary benefit calculations to reflect Vorkutaugol's actual profit margin on the mining rights provided by the GOR for LTAR in the final determination.

Petitioners' Mining Rights Rebuttal Brief

- In the Post-Preliminary Decision Memorandum the Department explained that it was limiting its subsidy analysis to "active licenses" (*i.e.*, those licenses under which the Severstal Companies extracted coal during the POI).⁵¹⁰
- Thus, the Severstal Companies' argument that the Department should incorporate the up-front payments associated with one of its non-producing mines is contrary to the Department's Post-Preliminary Decision Memorandum.
- The Department should reject the Severstal Companies' argument that the numerator should be reduced to account for the fact that PAO Severstal does not utilize all of the coking coal mined from the GOR's mines to produce subject merchandise.
- There is no evidence to establish that the Severstal Companies produce both coking and steam coal at the mines at issue.
- Further, the Department's verification report specifically states that the Severstal Companies pay an extraction rate that is specific to coking coal and that the Severstal Companies only extract coking coal.⁵¹¹
- The Department should reject the Severstal Companies' arguments urging a revision to the sale denominator and allocating the benefit over 15 years. On the first point, the sales denominator used by the Department is based on the Severstal Companies' own reported total sales information, less intercompany sales. As such, any confusion regarding the inclusion of which reporting entities in this sales figure is due to errors in the information that the Severstal Companies themselves submitted.
- Moreover, in accordance with 19 CFR 351.525(b)(6)(iii), only Vorkutaugol's sales (less intercompany sales) – and not the sales of all of the Severstal Companies' affiliates – should potentially be added to the sales denominator to reflect the benefit to the relevant input (*i.e.*, coal) and the downstream product (*i.e.*, steel).
- The countervailable benefit was not allocated over the AUL.

Severstal Companies' Mining Rights Rebuttal Brief

- If the Department continues to decline to use U.S. coal mining rights prices as the benchmark to measure the adequacy of remuneration of the GOR's provision of coal mining rights to the Severstal Companies for its final determination, and instead construct a GOR coal price, the Department must continue to use the surrogate profit rate from the Indian coal producer that was used in the post-preliminary analysis.

⁵⁰⁹ See Post-Preliminary Decision Memorandum at 9, referencing *HRS from India*, and accompanying Issues and Decision Memorandum at 20.

⁵¹⁰ See Post-Preliminary Decision Memorandum at 3.

⁵¹¹ See Severstal Companies Verification Report at 5.

- Contrary to Petitioners' claim that the Department used the actual profit margin – as reported by the subject producer – in its calculations in *HRS from India*, the Department actually used a surrogate profit rate based on the respondent's Australian supplier of coal in that case.⁵¹² Thus, the Department must reject Petitioner's argument that the Department should use Vorkutaugol's profit rate instead of the surrogate profit rate the Department used in the Post-Preliminary analysis.
- It makes no sense to use Vorkutaugol's profit rate to measure the adequacy of remuneration of either a constructed GOR coal price or a constructed coal mining right license price, given that the whole point of constructing such prices is to measure any benefit conferred to Vorkutaugol, whose profit rate would include such benefit.

Department's Position: We agree with the Severstal Companies that our treatment of freight in the Post-Preliminary Decision Memorandum created an imbalance in the benefit calculations. In the preliminary calculations, we included in the coal benchmark the freight that the Severstal Companies incurred on their purchases of concentrated coal from private suppliers. We explained that these freight costs served as a proxy for the freight that would have been incurred on private purchases of coking coal.⁵¹³ However, we did not add a freight component to the costs the Severstal Companies incurred to extract coal from GOR mines during the POI.⁵¹⁴ We find this approach was flawed.

Vorkutaugol is the member of the Severstal Companies that acquired coking coal during the POI, not PAO Severstal.⁵¹⁵ As such, any freight costs incurred by the Severstal Companies in this regard would reflect the costs that Vorkutaugol incurred to transport the extracted coking coal from the GOR mine to its facilities. In contrast, the freight costs incorporated into the coal-based benchmark in the Post-Preliminary Decision Memorandum reflected the freight rates the Severstal Companies paid to private suppliers to transport concentrated coal to PAO Severstal. Thus, the private freight rates utilized in the post-preliminary calculations do not reflect what it would cost to transport mined coal to Vorkutaugol. Therefore, we have determined not to include these freight rates in our coal-based benchmark. Further, in the absence of any other suitable freight rate data, and in order to avoid an imbalance in the benefit calculation, we have excluded freight entirely from the benefit calculation.

We disagree with the Severstal Companies' argument that the Department should incorporate into the benefit calculation the up-front mining rights payments the companies made for inactive mines. For the reasons explained above, we are basing our benchmark on the underlying good, coal, conveyed via the GOR's provision of mining rights. A logical outcome of this approach is that the Department must limit its benefit analysis to those mines from which the Severstal Companies extracted coal during the POI. In light of this approach, it would create an imbalance in the benefit calculation if the Department nonetheless included up-front payments made on licenses that were not actively mined during the POI.

⁵¹² See *HRS from India*, and accompanying Issues and Decision Memorandum at Comment 29.

⁵¹³ See Post-Preliminary Decision Memorandum at 10.

⁵¹⁴ See Severstal Companies Post-Preliminary Calculation Memorandum.

⁵¹⁵ See, e.g., Severstal Companies Verification Report at 8 and Exhibit VE-11.

We also disagree with the Severstal Companies' argument that the Department should pro-rate the numerator to account for the fact PAO Severstal does not use all of the coking coal it obtains from Vorkutaugol to produce subject merchandise. Per 19 CFR 351.503(c), the Department is not required to trace how a respondent uses a subsidy. Thus, the extent to which PAO Severstal used coking coal, as initially extracted and subsequently concentrated by Vokutaugol, is not relevant to our analysis. Further, our approach in this regard is consistent with the Department's practice.⁵¹⁶

We disagree with the Severstal Companies that the Department should allocate the Severstal Companies' up-front license payments for a given mine based on a 15-year period (which corresponds to the AUL utilized in the investigation) rather than by the duration of the particular license. The Department utilizes the AUL period as part of the formula for allocating non-recurring benefits over time.⁵¹⁷ As discussed above, we are not treating benefits received under the Provision of Mining Rights for LTAR program as non-recurring and, therefore, in performing the benefit calculation we did not utilize the allocation formula described under 19 CFR 351.524(d)(1). Rather, we properly apportioned each up-front payment over the life of the corresponding license. Further, the Severstal Companies have not explained why it is more accurate or reasonable to utilize an allocation period that fully apportions the up-front payments prior to the termination of the actual license, *e.g.*, whether and to what extent the benefits from the licenses are tied to useful life of the firms productive assets.

Lastly, for the reasons explained above, we have determined not to use information from the financial statements of the Vorkutaugol companies in our benefit calculations. Thus, we determined not to base the profit rate on Vorkutaugol's information as advocated by Petitioners.

Comment 18: Whether to Countervail the Severstal's Companies' Tax Debt Write-Offs

Petitioners' Case Brief

- While Article 105 of the Budget Code of the Russian Federation, generally, permits the restructuring of corporate debts to the federal or regional authorities, the GOR authorized the Severstal Companies' debt restructuring under Decision 672, dated November 9, 2005, which it drafted specifically for coal mining companies.
- Moreover, Decision 672 specifically covers coal mining organizations that constitute "joint stock companies, more than 25 percent of shares of as June 1, 2003, was in the federal property, and their depending joint stock companies."⁵¹⁸
- Given the narrow scope of the law, it strains credulity that the GOR would have no statistics on the number of companies that restructured tax debts pursuant to this regulation.

⁵¹⁶ See *Nails from Oman*, and accompanying Issues and Decision Memorandum at 15 (declining to "consider whether Oman Fasteners used or did not use the imported equipment for the production of subject merchandise. To do so would require the Department to trace the use of Oman Fasteners' tariff exemptions to determine whether the company used the subsidies as intended; this would violate the statute, Department's regulations, and the well-established practice of not considering the use and effect of subsidies"); *ASPP from the PRC*, and accompanying Issues and Decision Memorandum at 18 (including certain inputs the respondent acquired for LTAR despite the fact that the respondent did not use the inputs to make subject merchandise during the POI).

⁵¹⁷ See 19 CFR 351.524(d)(1).

⁵¹⁸ See GOR Verification Report at 13.

- The data presented by the GOR - and verified by Department - covered all companies under debt restructurings between 2005 and 2007, which is a much broader range of Russian tax restructuring than the agreements between the Severstal Companies and the GOR. These statistics, therefore, are completely irrelevant to the Department's analysis. Rather, record evidence demonstrates that the Severstal Companies' tax debt restructuring was limited to a select number of companies (*i.e.*, companies engaged in coal mining operations) because the restructuring was made under Decision 672, making this assistance *de jure* specific pursuant to section 771(5A)(D)(i) of the Act.
- Moreover, as the Department verified, the GOR ultimately wrote off outstanding tax liabilities, which provided a benefit to the Severstal Companies in the form of revenue foregone under section 771(5)(D)(ii) of the Act. Under 19 CFR 351.508(b) and in accordance with the Department's practice, the Department considers the benefit as received on the date when the government officially relieves the company from its debt obligation.
- However, the Department's verification report errs in discussing the Severstal Companies' restructured tax liabilities. The Department misstates the amounts of net benefits the Severstal Companies' received from the debt write-off. As the company's 2006 annual report indicates the tax restructuring gain amounts were \$174,178,000 in 2005, and \$14,669,000 in 2006.
- The Department's verification report also errs in describing the amounts as being "forgiven" in 2005 and 2006, respectively.⁵¹⁹ To the contrary, as the Severstal Companies stated in its 2006 Annual Report:

In accordance with these agreements, the principal amounts of taxes, and fines thereon and 15 percent of tax interest are payable by instalments over four years. If those are made on schedule the 85 percent of tax liability will be forgiven.⁵²⁰

- Thus, the amounts were not forgiven in 2005 and 2006 because the agreements were not fulfilled at that time.
- The Severstal Companies were officially granted debt forgiveness amounting to \$174.2 million in 2009 and \$14.7 million in 2010. Accordingly, pursuant to 19 CFR 351.524(d)(1), the Department should calculate the value of the Severstal Companies' non-recurring benefits from the GOR's debt forgiveness, allocable to the POI, commencing in 2009 and 2010, respectively.

Severstal Companies' Case Brief

- The restructured tax liability program is neither *de jure* nor *de facto* specific to the cold-rolled steel or coal industries under section 771(5A)(D)(i) or (iii) of the Act. Article 105 of the Budget Code of the Russian Federation provides that the debts of *any* company to the federal or regional budgets in the Russian Federation may be restructured (emphasis added).
- Further, there are numerous GOR regulations governing tax restructuring that apply to a wide range of companies, including, *inter alia*, agricultural companies, pension funds, and coal mining companies. Between 2005 and 2007, there were well over 300,000 Russian

⁵¹⁹ See Severstal Companies Verification Report at 7.

⁵²⁰ See the Severstal Companies' December 8, 2015, supplemental questionnaire, Attachment 2 at 88.

companies on restructured tax plans under Article 105. Thus, Russian coal mining companies are neither a predominant nor disproportionate user of tax restructuring.

- The restructured tax liabilities are not tax liabilities that originated with PAO Severstal. The purchase of Vorkutaugol and Shakhta Vorgashorskaya in 2003 by PAO Severstal (with the predecessor companies retaining no rights or assets) were at arms-length. Therefore, any subsidy attributable to an entity prior to its acquisition by PAO Severstal was extinguished at the time of purchase. A subsidy does not presumptively transfer from predecessor to successor companies.⁵²¹
- PAO Severstal purchased Vorkutaugol and Shakhta Vorgashorskaya in June 2003 with existing tax arrears that were the entire subject of the tax restructuring. Thus, the tax restructuring at issue predates the Department's POI and the applicability of U.S. CVD law to Russia and, therefore, cannot be countervailed by the Department. The Department recognized that Russia made the transition to a market economy for purposes of U.S. antidumping and CVD law effective April 1, 2002. Because PAO Severstal purchased the two companies in June 2003 with existing tax arrears that were the subject of this tax restructuring, the liabilities and penalties at issue predate the investigation period.
- The GOR received the full amount of the original taxes owed. The gain recognized by the Severstal Companies is only relief from the penalty provisions incurred by predecessor companies, not relief from the tax itself. Specifically, the Severstal Companies made prescheduled payments of half of the acquired companies' tax liabilities within two years from the date of the GOR's Decision 672 and the remaining restructured taxes and 15 percent of the fine and penalties within four years from the date of the decision as a condition of its settlement. Thus, the Severstal Companies' restructured tax liabilities do not constitute financial contributions under section 771(5)(D) of the Act.
- Should the Department countervail these restructured tax liabilities, it should treat them as non-recurring subsidies received in 2005 and 2006 in accordance with 19 CFR 351.524(c), which coincides with the years in which the Severstal Companies recognized the tax restructuring in its financial statements. Under this approach, based on the Severstal Companies' own calculation under 19 CFR 351.524(b)(2) and (d), any resulting benefit allocated to the 2014 POI would result in a 0.22 percent subsidy rate, which, on its own, is below the *de minimis* subsidy rate.

Petitioners' Rebuttal Brief

- The specificity arguments of the Severstal Companies focus on Article 105 of the Budget Code of the Russian Federation that broadly allows tax restructuring by the GOR, and not on the GOR Decision 672, pursuant to which the Severstal Companies' tax liabilities were restructured and forgiven. The Severstal Companies' specificity arguments ignore the actual provision at issue.
- While the GOR claimed there were no statistics available on the number of companies that utilized GOR Decision 672, the parameters of the decision were so narrow as to limit the potential number of beneficiaries, both in law and in fact.⁵²²

⁵²¹ See *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125 (June 23, 2003).

⁵²² See GOR Verification Report at 12.

- Accordingly, the Department should find the program to be specific under section 771(5A)(D)(i) and (iii)(I) of the Act.
- The Severstal Companies' attempt to tie the GOR's restructuring and forgiveness of debt to the period when the tax debt liabilities were incurred is an unnecessary distraction. As clearly stated in 19 CFR 351.508(b), the benefit from debt forgiveness is received as of the date on which the debt or interest was assumed or forgiven. The facts of record demonstrate that: (1) the outstanding tax liabilities were restructured in 2005, two years after PAO Severstal purchased OAO Vorkutaugol and OAO Vorgashorskaya, and three years after the applicability of the CVD law to Russia; and (2) the GOR officially forgave the Severstal Companies' debts in 2009 and 2010. Therefore, the Severstal Companies' change-in-ownership argument is moot.
- Tax fines and penalties are monies owed to a government due to a company's failure to comply with its original legal obligations. By forgiving such liabilities, therefore, the GOR waived the collection of revenue that otherwise would have been due to the government - a financial contribution within the meaning of section 771(5)(D)(ii) of the Act.
- The Severstal Companies' proposed benefit calculation in their case brief contains errors. Because the GOR formally forgave the Severstal Companies' tax debt liabilities in 2009 and 2010, these years should be the starting point for each respective countervailable benefit allocation. In addition, the total amounts forgiven in the Severstal Companies' calculations differ from the sums verified by the Department and itemized in the company's financial statements. The Department's final calculations on the countervailable benefits from the Severstal Companies' debt forgiveness should correct these mistakes.

Department's Position: Regarding specificity, we agree with the Severstal Companies that Article 105 of the Budget Code of the Russian Federation, generally, permits the restructuring of corporate debts to the federal or regional authorities.⁵²³ However, at verification, we learned that the relevant provisions of tax restructurings are stipulated in the federal law on the federal budget.⁵²⁴ According to the GOR, there are three regulations that govern tax restructurings in Russia: Regulation 1002, dated September 3, 1999, Regulation 699, dated October 1, 2001, and Decision 672, dated November 9, 2005.⁵²⁵

The Severstal Companies argue that, by virtue of Article 105 of the Budget Code, the Department should find that the tax-related waivers received by the Severstal Companies were generally available and, thus, not specific under section 771(5A)(D) of the Act. To that point, at verification we inquired why the Severstal Companies did not qualify for a tax restructuring under Regulations 1002 and 699. GOR officials explained that Regulation 1002 did not apply to government-owned companies or to debt incurred after 2000. Regarding Regulation 699, GOR officials explained that it applied to the restructuring of tax debts in extra budgetary funds (*i.e.*, pension funds) and, thus, did not apply to the tax debts owed by the Severstal Companies.⁵²⁶ Thus, GOR officials explained that the government enacted Decision 672 in order to "cover coal

⁵²³ See, e.g., GOR Verification Report at 12.

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

mining companies that were state-owned entities up to June 1, 2003.”⁵²⁷

Based on this information, we find that the applicable regulation, Decision 672, permits tax restructurings for a limited subset of coal mining companies (*e.g.*, coal mining companies that were at least 25 percent state-owned as of June 1, 2003). We further note that Article 105 is not referenced in Decision 672 or in the tax liability restructuring agreement between the GOR and the Severstal Companies. In other words, the Severstal Companies do not focus on the very decision under which the debt restructuring was concluded. Accordingly, we find that the tax penalties and fines waivers the Severstal Companies received under Decision 672 is by its terms limited to certain enterprises or an industry and, thus, is *de jure* specific under section 771(5A)(D)(i) of the Act.

Concerning the issue of the timing of receipt of the benefit, we acknowledge that, for accounting purposes, the Severstal Companies recognized the savings resulting from the restructuring of their tax liabilities in their 2005 and 2006 annual reports.⁵²⁸ However, the Severstal Companies continued to make payments pursuant to their tax restructuring agreement for several years after 2006.⁵²⁹ Further, at verification, company officials explained that the Severstal Companies had to “pay off the taxes owed” before they could “take advantage of the penalty and fines write offs.”⁵³⁰ The statements the Severstal Companies made at verification are supported by information examined at the GOR verification, in which the verifiers collected letters from the GOR regarding two debt tranches in which the GOR formally waived the debt on the tranches upon the Severstal Companies’ completion of the tranches’ repayment schedule.⁵³¹

Under 19 CFR 351.508(b) the Department “normally will consider the benefit as having been received as of the date on which the debt or interest was assumed or forgiven.” While the Severstal Companies may have realized the gains of the tax penalties and fines savings in 2005 and 2006, information at verification indicates that the repayment schedule established between the GOR and the Severstal Companies extended past 2006.⁵³² Regarding the fees and penalties, the schedule required the Severstal Companies to make partial repayments of the fees and penalty payments in 2011 and 2012.⁵³³ Further, at verification, we obtained letters from the GOR indicating that for two of the tranches, the Severstal Companies repaid the tax fee and penalty payments in 2009 and 2010.⁵³⁴ The letter from the GOR states that as a result of the payments made on the two tranches, it was formally waiving the remaining fines and penalty payments due.⁵³⁵

We find this information indicates that the GOR did not consider the outstanding fine and penalty payments to be formally forgiven until the Severstal Companies had made their required

⁵²⁷ *Id.*, at 13; *see also* Severstal Companies First PPQR at Exhibit 2S-8, which contains GOR Decision 672.

⁵²⁸ *See* Severstal Second Supplemental PQR at Attachment 2 (2006 Annual Report at 88).

⁵²⁹ *See* Severstal Companies First PPQR at Exhibit 2S-7.

⁵³⁰ *See* Severstal Companies Verification Report at 7.

⁵³¹ *Id.*, at 7 and VE-8.

⁵³² *See* Severstal Second Post-Preliminary Supplement Questionnaire Response, dated April 4, 2016 at Exhibit 3S-8.

⁵³³ *See* Severstal Companies First PPQR Part 1 at Exhibit 2S-7.

⁵³⁴ *See* Severstal Companies Verification Report at 7 and VE-8.

⁵³⁵ *Id.*

payments established under the repayment schedule. Thus, we find this information argues against using 2005 and 2006 as the date receipt of the debt forgiveness. Rather, for the two repayments that the Severstal Companies completed in 2009 and 2010, we have used the years in which the GOR issued the waiver letters (2009 and 2010, respectively) as the year of receipt of the debt forgiveness associated with those two tranches.⁵³⁶ For all other tranches, we have used the year in which the last repayment was scheduled to be made as the year in which the debt was forgiven by the GOR. Our approach in this regard is consistent with the Department's practice.⁵³⁷

Lastly, we disagree with respondent's arguments that the tax debt write offs were extinguished at the time PAO Severstal acquired OAO Vorkutaugol and OAO Mine Vorgashorskaya in 2003. Severstal's contention that a subsidy does not presumptively transfer from predecessor to successor companies is irrelevant. As noted above, the GOR did not enact the legislation, Decision 672, permitting its forgiveness of the Severstal Companies tax debt until 2005. Thus, we fail to understand how the Severstal Companies could have extinguished a benefit in 2003 in connection with a debt forgiveness program that was not enacted until 2005. Further, as noted above, the GOR did not consider the Severstal Companies' tax debts for a given tranche to be waived until the companies had completed the corresponding payment schedule.⁵³⁸ Finally, the Severstal Companies focus on the dates that the tax liabilities were incurred or when PAO Severstal purchased the two companies, but this misstates what the subsidy is. The subsidy is the subsequent forgiveness of the fines and penalties that were in arrears in 2005.

Comment 19: Reduction in Extraction Payments Program

Petitioners' Case Brief

- Due to unclear questionnaire responses submitted by the Severstal Companies, the Department issued a supplemental questionnaire that, under the heading "Exploration Costs and Reduction in the Extraction Tax," inquired whether the companies deducted any exploration expenses or took a reduction of its extraction taxes with regard to the tax return filed during the POI.⁵³⁹
- In response, the Severstal Companies reported the extraction tax payments they made pursuant to Article 343.1 of the TCRF and made no mention of the Tax Deduction for Exploration Expenses.⁵⁴⁰
- In the *Preliminary Determination*, the Department collapsed the Reduction in Extraction Tax Payments Program and the Tax Deduction for Exploration Expenses Program, into a single program, which it referred to as the "Tax Deductions for Exploration Expenses" program.

⁵³⁶ *Id.*

⁵³⁷ In prior CVD proceedings involving such contingent liabilities, the Department has linked the receipt of the benefit to the year in which the administering authority formally waived the liability. See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India*, 71 FR 45034 (August 8, 2006) and accompanying Issues and Decision Memorandum at 5.

⁵³⁸ See Severstal Companies Verification Report at 7 and VE-8.

⁵³⁹ See the Department's November 17, 2015, supplemental questionnaire.

⁵⁴⁰ See the Severstal Companies November 24, 2015, questionnaire response at S-11 and S-12.

- In this respect, the Department erred in two ways. First, it should have treated the Reduction in Extraction Tax Payments Program and the Tax Deduction for Exploration Expenses Program as separate programs. Second, the Department erred in terms of calculating the benefit the Severstal Companies received under the Reduction in Extraction Tax Payments Program.
- The Severstal Companies pay the extraction tax on a monthly basis following the company's mineral extraction.⁵⁴¹ Thus, the extraction tax is not an income tax but operates like an excise tax.
- Thus, in the *Preliminary Determination* the Department improperly treated this program as an income tax program and multiplied the amount of the extraction tax deductions by the 20 percent corporate tax rate. As a result, the Department incorrectly attributed only 20 percent of the benefits that the Severstal Companies received under the program.
- Instead, the Department should have treated the entire amount of the extraction tax reductions received during the POI as the benefit in accordance with 19 CFR 351.510(a)(1).

GOR's Case Brief

- Pursuant to Decision 902, extraction payments made under Article 342 of the TCRF may be multiplied by a coefficient-deflator. Article 342 of the TCRF permits "some taxpayers" to apply a coefficient of 0.7 to the amount of extraction taxes due, but only if certain research and development of the fields were carried out by self-financing or were partially compensated by the GOR before July 1, 2001.⁵⁴²
- The GOR's decision to provide the reduction in extraction payments was designed to compensate firms that carried out research and development expenses on their own behalf, or in conjunction with the GOR, with regard to land and subsoil areas that were owned by the GOR.
- The number of extracting companies able to receive these deductions is gradually reducing and is not specific to coal mining companies.
- The Reduction in Extraction Tax Payments Program has no relation to the Tax Deduction for Exploration Expenses. Thus, the Department should treat these programs separately when conducting its subsidy analysis.
- This tax deduction does not constitute a subsidy program under section 771(5) of the Act or under Article 1.1. of the SCM Agreement because it does not constitute a financial contribution in the form of government provisions of services or revenue that is otherwise due that is foregone, and there is no benefit under Article 14 of the SCM Agreement. In accordance with *US – Tax Treatment for Foreign Sale Corporations*, what is "otherwise due" depends on the rules of taxation that each Member, by its own choice, establishes for itself.
- Deductions from income (*i.e.*, profit tax {sic}) under Chapter 25 of the TCRF, Article 261 pertains to Tax Deduction for Exploration Expenses and is different than the Mineral Extraction Resources Tax (also referred to as the Reduction in Extraction Tax Payments program), which is covered under Chapter 26 of the TCRF. The Department improperly based its preliminary decision on the specificity of the Reduction in Extraction Tax Payments

⁵⁴¹ See GOR Verification Report at 8.

⁵⁴² See GOR Case Brief at 16-17.

program on usage data concerning Article 261, Exploration Expenses that are unrelated to the Reduction in Extraction Tax Payments program.

Severstal Companies' Case Brief

- The Department should find that the Severstal Companies' reduction in extraction taxes is not countervailable because the program is neither export-contingent nor specific.
- The reduction in extraction payments is automatic such that there is no discretion employed by the GOR in granting the tax reduction. Further, the actual users of the program are not limited in number and no enterprise is a predominant user of the program or receives a disproportionately large amount of the reduction.
- As a result, there is no basis to find the program countervailable.
- If the Department finds that the Severstal Companies' reduction in extraction taxes is countervailable, the benefit to the Severstal Companies is *de minimis*.

Petitioners' Rebuttal Brief

- The GOR reported that between 2010 and 2014 a maximum of 64 companies utilized the Reduction in Extraction Tax annually, with only 47 companies receiving benefits under this tax program during the POI.⁵⁴³
- The Department confirmed this usage data at verification.⁵⁴⁴
- Although the total number of companies operating in Russia is not on the record, the fact that there are less than 65 beneficiaries from this tax incentive clearly qualifies as "limited in number" within the meaning of section 771(5A)(D)(iii)(I) of the Act.
- The Severstal Companies' claims concerning lack of predominant or disproportionate use are moot. Under 19 CFR 351.502(a), the Department's examination of *de facto* specificity is sequential in nature, such that if a single factor enumerated under 771(5A)(D)(iii) warrants a finding of specificity, the agency will not undertake further analysis. Thus, given that beneficiaries under this program are limited in number, there is no need for the Department to consider the criteria enumerated under section 771(5A)(D)(iii)(II)-(IV) of the Act.

Department's Position: We examined Chapter 26 of the TCFR, the Mineral Resource Extraction Tax, and determine that the extraction tax deduction is not *de jure* specific pursuant to section 771(5A)(D)(i) of the Act, as the law does not appear to limit access to an enterprise, industry, group of industries, or region.

Between 2010 and 2014, a maximum of 64 companies utilized the Reduction in Extraction Tax annually, with only 47 companies receiving benefits under this tax program during the POI.⁵⁴⁵ Thus, we find that the number of firms that participated in the program from 2010 through 2014, as well as the number of firms that utilized the program during the POI was limited in number and, thus, *de facto* specific under section 771(5A)(D)(iii)(I) of the Act.⁵⁴⁶

⁵⁴³ See GOR's November 19, 2015, supplemental questionnaire response at 3.

⁵⁴⁴ See GOR Verification Report at 8-9.

⁵⁴⁵ See GOR's November 19, 2015, supplemental questionnaire response at 3.

⁵⁴⁶ We also agree with Petitioners that, as provided under 19 CFR 351.502(a), the Department's *de facto* specificity analysis is sequential and, thus, a finding of specificity pursuant to section 771(5A)(D)(iii)(I) negates the need to evaluate the additional criteria enumerated under sub-paragraphs (II) through (IV) of the Act.

Pursuant to section 771(5)(D)(ii) of the Act, we find that the Reduction in Extraction Tax Program is a financial contribution in the form of revenue forgone. Concerning the calculation of the benefit, we agree with Petitioners that the Department incorrectly treated the tax reductions as income tax deductions. As confirmed at verification, extraction taxes are paid on a monthly basis and, thus, are akin to excise taxes.⁵⁴⁷ As such, firms do not treat the reductions in the extraction taxes as deductions to taxable income. Thus, rather than treating the extraction tax reduction as an income tax deduction program, in which the benefit is calculated by multiplying the amount of the tax reduction by Russia's corporate tax rate, the Department should instead treat the entire amount of the extraction tax reduction received during the POI as the benefit.

As indicated above, in this final determination, for mining licenses that the Severstal Companies acquired after the April 1, 2002, "cut-off" date, the Department has calculated the benefit under the Provision of Mining Rights for LTAR program by comparing the price the Severstal Companies paid to extract coal from GOR mines during the POI to appropriate benchmark price for coal. Under this approach, we have taken into account the extraction rate for coal that the GOR charged to the Severstal Companies during the POI. As such, the benefit calculations performed in the context of the Provision of Mining Rights for LTAR program already take into account the 30 percent price discount that the GOR provided to the Severstal Companies on coal it extracted during the POI. Thus, for those licenses countervailed under the Mining Rights for LTAR Program, we would be overstating the benefit attributable to the Severstal Companies if also we countervailed the 30 percent price discount under the Reduction in Extraction Payments Program. Thus, we have not calculated a benefit under the Reduction in Extraction Tax Program for those licenses addressed in the context of the Provision of Mining Rights for LTAR program. However, in the final determination we have calculated a benefit for all other mining rights for which the Severstal Companies received extraction tax reductions during the POI.

Comment 20: Whether the Tax Deduction for Exploration Expenses Is Specific

Severstal Companies' Case Brief

- In general, under the TCRF, any expense incurred by a company may be deducted from the company's taxable income. The income tax deduction for exploration expenses provided for in Article 261 of the TCRF is neither *de jure* nor *de facto* specific under section 771(5A)(D) of the Act. Specifically, the eligibility for the exploration expenses deduction is automatic and the eligibility criteria or conditions are clearly set forth in Article 261 and strictly followed.
- Further, the actual users of the exploration expenses deduction are not limited in number, and no enterprise or industry is a predominant user of the exploration deductions or receives a disproportionately large amount of the exploration deductions.
- Exploration deductions are included in line 40 of Annex 02 to List 02 of Russian federal income tax returns, as are all other indirect expenses. Thus, exploration expenses are deducted from profit the same way as all other corporate expenses are to derive taxable income; the exploration expense deduction does not provide more favorable treatment (tax savings) than any other expenses included in line 40.

⁵⁴⁷ See GOR Verification Report at 8.

- Accordingly, the exploration expenses deduction is generally available to all Russian companies and industries, is generally used by many Russian companies and industries, and is no different than all other normal income tax deductions, the exploration expenses deduction is not *de facto* specific to the cold-rolled steel industry under section 771 (5A)(D)(iii) of the Act.
- Further, the Department should consider the policy implications of finding that income tax deductions for normal expenses, including exploration costs are countervailable. Such a finding would expose many exporting vertically-integrated U.S. manufacturers to countervailing duty investigations abroad.

NLMK Companies' and GOR's Case Briefs

- A *de facto* specificity finding regarding the Tax Deduction for Exploration Expenses program is neither reasonable nor supported by the evidence. To make the preliminary finding on specificity, the Department relied on usage data for a different program (*i.e.*, Reduction in the Extraction Tax (*aka*, Mineral Extraction Resources Tax (MNER)) and offered no basis for why the selected proxy is representative across distinct programs.
- Despite that the income tax and extraction tax are two distinct taxes with different regulations (*i.e.*, Profit (Income) Tax stipulated in Chapter 25 of the TCRF and the MNER stipulated in Chapter 26 of the TCRF) and the extraction tax is not related to income (but operates similar to an excise tax based on a company's monthly mineral production), the Department applied the extraction tax data as a proxy for usage of the tax deduction.
- The approach is equivalent to applying adverse facts since the GOR explained that it did not compile data on exploration expenses that would allow the presentation of data requested by the Department.⁵⁴⁸ The Department may not apply adverse facts based on a respondent's failure to provide information it does not possess.⁵⁴⁹
- Though the TCRF provides instructions that allow taxpayers to properly identify exploration expenses and claim a deduction (*i.e.*, Article 261), the provisions do not set forth any eligibility criteria (*i.e.*, there is no export contingency, domestic content requirement, sector-specific, or geographical-specific requirement).
- Further, because the program is a deduction from taxable income based on incurred expenses, the only consideration is whether the expenses fall within a "negative list" set by the TCRF (*i.e.*, Article 270). That is, the Department should assess specificity by examining the range of justified expenses that may be deducted from income in relation to expenditures that fall under one of the categories described in the negative list that may not be deducted. Based on such comparison, the deduction of exploration expenses is not specific.
- In accordance with the WTO Panel ruling *US – Tax Treatment for Foreign Sale Corporations*, a Member has the authority to tax any particular category of revenue it wants.
- No eligibility requirements are set that a company must meet to claim an exploration expense deduction. There is no export contingency, domestic content requirement, or geographical-

⁵⁴⁸ See GOR PQR at 19.

⁵⁴⁹ See *Mueller Commercial De Mexico v. United States*, 753 F.3d 1227 (Fed. Cir. 2014) (The appeal court reversed and remanded the Department's calculation of the antidumping rate for Muller, a fully cooperating respondent, based on adverse facts available pertaining to certain production cost information, which Muller did not possess).

specific requirements for taking a deduction. The only practical consideration is whether the expenses concerned fall within the negative list of TCRF Article 270.

Petitioners' Rebuttal Brief

- Contrary to the respondents' claims, tax incentives related to the development of natural resources and exploration expenses are not generally available to all industries in the Russian economy.
- While the Department preliminarily did not find the Tax Deduction for Exploration Expenses to be *de jure* specific, tax incentives related to "the development of natural resources" and "exploration expenses" are not generally available to all Russian industries, referencing Article 337, Item 2 of the TCRF that lists the types of mineral resources covered by the extraction tax provisions.⁵⁵⁰
- The GOR's classification of particular raw materials that are eligible for associated income tax deductions (and, thereby, certain industries that may be involved in the development and exploration of such raw materials) provides a basis for finding *de jure* specificity.⁵⁵¹
- However, regardless of *de jure* specificity, record information indicates that the program is *de facto* specific. In response to the Department's request for benefit data for the program, the GOR stated that such statistics are not maintained⁵⁵² and, as an alternative, presented data on the number of Russian companies that utilized the Reduction in Extraction Tax between 2010 and 2014, with 47 companies receiving benefits in the POI.⁵⁵³
- Thus, while the NLMK Companies fault the Department for use of the extraction tax data, claiming there was "no basis for why its selected proxy is representative across distinct programs,"⁵⁵⁴ the GOR itself presented this data as an alternative to the Department.
- Data on mineral extraction is a logical choice for an income tax incentive aimed at the exploration of natural resources under a facts available analysis; the extraction of minerals provides the next step in the utilization of such resources, the type of advancement encouraged through the tax deductions authorized under Articles 253 and 261 of the TCRF.

Department's Position: We evaluated the applicable articles within the TCRF which provide for the Tax Deduction for Exploration Expenses. We find that those articles do not stipulate the eligibility requirements or any limitation on eligibility (*i.e.*, there is no export contingency, domestic content requirement, or geographical-specific requirement) for use of the deduction. We therefore conclude that the Tax Deduction for Exploration Expenses is not *de jure* specific.

In making their arguments that the Tax Deduction for Exploration Expenses is not *de facto* specific, respondents ignore facts on the record, which are critical for understanding the

⁵⁵⁰ See GOR PQR at Exhibit II-1 (Tax Code of the Russian Federation), pages 1170-1171 (translation).

⁵⁵¹ In support of a *de jure* finding, Petitioners cite to *Uncoated Paper from PRC*, where the Department found an income tax reduction for the comprehensive utilization of natural resources to be *de jure* specific, because it concluded "the program is limited to certain enterprises that utilize certain raw materials specified by the government." See *Final Affirmative Countervailing Duty Determination of Certain Uncoated Paper from the People's Republic of China*, 81 FR 3110 (January 20, 2016) (*Uncoated Paper from PRC*), and accompanying Issues and Decision Memorandum at 34 ("Preferential Income Tax for Comprehensive Utilization Entitling Enterprise").

⁵⁵² See GOR PQR at 19.

⁵⁵³ See GOR First Supplemental PQR at 3.

⁵⁵⁴ See NLMK Companies Case Brief at 50.

Department's specificity finding.

In the Department's initial questionnaire, we instructed the GOR to provide usage information for the Tax Deduction for Exploration Expenses, *e.g.*, the number of recipient companies and industries and the amount of annual assistance approved under the program.⁵⁵⁵ In its initial response, the GOR reported that statistics on the use of "exploration expenses is not kept by the Russian authorities."⁵⁵⁶ Because the tax deduction program is not specific in law, we again requested the GOR to submit usage data for the Tax Deduction for Exploration Expenses in order to determine whether the tax deduction is in fact specific.⁵⁵⁷ In that supplemental questionnaire, we also stated that:

If the GOR is unable to provide the requested information in the form and manner specified, please explain and provide the information based on the format in which you maintain such data, or suggest *alternative approaches* for providing the requested information.⁵⁵⁸

In its response, the GOR provided alternate information, reporting annual usage data for the Reduced Mineral Extraction Tax because the Federal Tax Service maintains statistics for that tax program on an aggregate basis.⁵⁵⁹ The GOR, by submitting the Reduced Mineral Extraction Tax data, suggested an alternative approach to the Department for analyzing whether the Tax Deduction for Exploration Expenses is *de facto* specific. We thus find no merit to the GOR's arguments against use of the alternate information that it submitted on the record because it dislikes the Department's *de facto* specificity finding for the Tax Deduction for Exploration Expenses.

We also disagree with respondents' assertion that the Department offered no basis for why the selected proxy is representative. The explanation is clear on its face. In response to the Department's request for information on the Tax Deduction for Exploration Expenses, the GOR submitted alternate data for another tax incentive related to mining of natural resources (*i.e.*, Reduced Mineral Extraction Tax). As discussed in the *Preliminary Determination*, we found the alternate data which the GOR provided for the mineral extraction tax program to be a reasonable proxy for a tax deduction taken for expenses related to the exploration of natural resources.⁵⁶⁰

Further, the argument that the Department applied AFA because the GOR did not compile statistics on exploration expenses is simply wrong. As stated in the Department's first supplemental questionnaire, we acknowledged that the GOR might not be able to provide the requested information in the form and manner specified.⁵⁶¹ We therefore asked the GOR to

⁵⁵⁵ See Letter from the Department to the GOR, "Countervailing Duty Questionnaire," dated September 14, 2015 at Section II – Standard Questions Appendix (section L.2. (a-e)).

⁵⁵⁶ See GOR PQR at 19.

⁵⁵⁷ See Letter from the Department to the GOR, "First Supplemental Questionnaire," dated November 12, 2015 at Tax Incentives for Mining Rights (question 2).

⁵⁵⁸ *Id.* (emphasis added).

⁵⁵⁹ See GOR First Supplemental PQR at 2-3.

⁵⁶⁰ See Preliminary Decision Memorandum at "Tax Deduction for Exploration Expenses."

⁵⁶¹ See Letter from the Department to the GOR, "First Supplemental Questionnaire," dated November 12, 2015 at

provide usage information based on the format in which it maintains such data, or provide alternative approaches for providing the requested information. The GOR submitted to the Department alternate data. To conduct our specificity analysis for the Tax Deduction for Exploration Expenses, we thus relied on the facts available – facts which the GOR, itself, placed on the record.

Respondents have not made any arguments to warrant a change in the Department’s position to use the Reduced Mineral Extraction Tax data as a proxy for the Tax Deduction for Exploration Expenses to assess whether the program is *de facto* specific. Therefore, on the basis of the data provided by the GOR, we continue to determine that the taxpayers who used the Reduced Mineral Extraction Tax incentive, data which the GOR submitted as a proxy for use of the Tax Deduction for Exploration Expenses program, are limited in number under section 771(5A)(D)(iii)(I) of the Act.

Thus, relying on that tax data as proxy usage data for the Tax Deduction for Exploration Expenses, we determine that the tax deduction for exploration expenses program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act because the recipients of the subsidy are limited in number. Respondents argue that the proxy data relied on by the Department do not demonstrate that the program was, in fact, provided to a limited number of users. We disagree. The proxy data supplied by the GOR (*e.g.*, usage data regarding the extraction tax program) indicate that 47 firms received extraction tax reductions during the POI. We find that the provision of benefits to 47 firms constitutes a limited number users as described under section 771(5A)(D)(iii)(I) of the Act and is, therefore, *de facto* specific.

Comment 21: Whether to Apply AFA With Regard to the Benefit the Severstal Companies Received Under the Tax Deduction for Exploration Expenses Program

Petitioners’ Case Brief

- The Severstal Companies benefitted from the tax incentives for exploration expenses, which the company failed to disclose, a fact that was discovered by the Department at verification.
- At verification, when examining the amended income tax return the Severstal Companies filed during the POI, the Department discovered that the companies’ indirect expenses included deductible expenses covering “Expenses Related to Development of Natural Resources.”
- A breakdown of this account of this account includes the following subcategories: Geological Exploration, Expenses Related to Past Period but Recognized During Subsequent Months, Technology Services, Mapping, Road Building, and Land Reclamation.⁵⁶²
- While the Department examined these entries at verification, the verifiers correctly did not accept the corresponding value amounts as verification exhibits because they were new factual information.
- The Severstal Companies did not attempt to provide information concerning these sub-accounts during the minor correction phase of verification.

Tax Incentives for Mining Rights (question 2).

⁵⁶² See Severstal Companies Verification Report at 6.

- The Severstal Companies had at least two opportunities to inform the Department of its use of the Tax Deduction for Exploration Expenses Program. Specifically, the Severstal Companies withheld information requested by the Department in its original questionnaire.⁵⁶³ Then, in response to a direct question on this subsidy program in a supplemental questionnaire, the Severstal Companies remained silent.⁵⁶⁴
- By failing to disclose their use of this program in either of these responses, or in any of the additional supplemental questionnaire responses that they filed over the course of this investigation, the Severstal Companies significantly impeded the Department's conduct of this proceeding.
- Finally, the Severstal Companies did not cooperate to the best of their ability as the companies were aware of the amended income tax return filed during the POI, yet failed to provide it to the agency in their questionnaire response. Thus, the Department should rely on AFA with respect to the Severstal Companies' receipt of benefits under this program in the agency's final determination.
- Because there is no information on the record to establish the Severstal Companies' actual expenses that the companies deducted in connection with the exploration expenses, on the basis of AFA, the Department should treat the full amount reported on the company's income tax return for "indirect expenses" as received under the Tax Deduction for Exploration Expenses Program. Thus, to arrive at the benefit, the Department should multiply the indirect expenses deduction by 20 percent, which is the corporate income tax rate applicable to the Severstal Companies during the POI.

Severstal Companies' Rebuttal Brief

- The Severstal Companies disclosed that they used the exploration deduction in its November 25, 2015 pre-preliminary determination comments and even provided the amount of the deduction claimed under the program.
- Specifically, the Severstal Companies reported the corresponding deductions claimed on lines 054 and 060 of their income tax return filed during the POI.⁵⁶⁵
- In fact, in the *Preliminary Determination* the Department calculated a subsidy rate for the Severstal Companies with regard to the Tax Deduction for Exploration Expenses program. In fact, the entire margin that the Department calculated for the Severstal Companies in the *Preliminary Determination* was for the exploration deduction.
- Thus, based on this fact, Petitioners' claim that the Severstal Companies first disclosed use of the program at verification is without merit.
- Further, prior to verification, the Department in its verification outline and Petitioners in their pre-verification comments acknowledged that the Severstal Companies used the Tax Deduction for Exploration Expenses program.
- Information on the record supports the Severstal Companies' argument that they, in fact, disclosed their use of the Tax Deduction for Exploration Expenses program. For example, the notes to the Severstal Companies' 2013 consolidated financial statement references expenses associated with evaluation and exploration assets.⁵⁶⁶

⁵⁶³ See Severstal Companies' October 27, 2015 questionnaire response at 23.

⁵⁶⁴ See Severstal Companies' November 24, 2015, supplemental questionnaire response at S-11, S-12.

⁵⁶⁵ See Severstal Case Brief at 3.

⁵⁶⁶ See Severstal Companies' October 27, 2015, questionnaire response, Exhibit CVD-4 at 43.

- At verification, the Department confirmed that the Severstal Companies used the Tax Deduction for Exploration Expenses program. Specifically, the verifiers requested and obtained from the Severstal Companies a further breakout of the line item 040 “Expenses Related to the Development of Natural Resources,” which yield the following line items: Geological Exploration, Expenses Related to Past Period but Recognized During Subsequent Months, Technology Services, Mapping, Road Building, and Land Reclamation.⁵⁶⁷
- The Department requested and obtained a further breakout of the account “Geological Exploration” and “Expenses Related to Past Period but Recognized During Subsequent Months,” which were included in line 040.⁵⁶⁸
- The Severstal Companies do not understand why, despite all of the above evidence, Petitioners now claim that the Severstal Companies failed to cooperate to the best of their ability.
- However, if the Department determines to countervail this program it must multiply the deduction amount that the Severstal Companies previously disclosed by 20 percent, which is the corporate tax rate applicable to the Severstal Companies during the POI.
- Petitioners’ proposed AFA approach (*e.g.*, multiplying the Severstal Companies’ total indirect expenses by 20 percent) is untenable. The Severstal Companies’ indirect expenses include an array of expenses, which the Department verified include expenses that have nothing to do with exploration expenses. Thus, Petitioners’ proposed AFA approach would vastly overstate the benefit. The Severstal Companies’ reported exploration deduction is corroborated by additional substantial record evidence, including the Severstal Companies’ 2013 financial statement that demonstrates that the Severstal Companies incurred significantly less than 1.96 billion RUR in exploration expenses in 2013.
- Before resorting to facts available under section 776(a) of the Act, the Department is required to comply with the notice and remedial requirements of section 782(d) of the Act. If the Department has satisfied the notice and remedial requirements of section 782(d) of the Act and met the five enumerated requirements of section 782(e) of the Act to enable it to decline an interested party’s information, it would be permitted to rely on facts available with adverse inferences.
- The Department does not have the discretion to impose an “unjustifiably high, punitive rate” because that would be at odds with the findings of the Federal Circuit.⁵⁶⁹
- The necessary information regarding the deduction is on the record.
- Furthermore, despite issuing the Severstal Companies two post-*Preliminary Determination* supplemental questionnaires, the Department did not request any additional information regarding the Severstal Companies’ exploration deduction program between the *Preliminary Determination* and verification. Therefore, the Department failed to establish the notice and remedy requirements under the statute for using facts available under section 782(d) of the Act.
- Should the Department determine to apply AFA to the Severstal Companies in connection with the Tax Deduction for Exploration Expenses program, then it should assign the

⁵⁶⁷ See Severstal Companies Verification Report at 6.

⁵⁶⁸ *Id.*

⁵⁶⁹ See *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1033 (Fed. Cir. 2000) (*De Cecco*).

Severstal Companies a program rate of 0.03 percent *ad valorem*, which is the program rate calculated for the NLMK Companies under the same program.

Department’s Position: In the *Initiation*, the Department determined to examine Petitioners’ allegation that the GOR provides, “. . . for the deduction of R&D and exploration costs from companies’ taxable income” as well as “. . . a reduction in the extraction tax to those enterprises that fund R&D and exploration expenses through their own investments.”⁵⁷⁰ Accordingly, in the Primary Questionnaire, the Department instructed the respondent firms to respond to all questions in the *Standard Questions* and *Income Tax Program Appendices* with regard to “(a) the deduction of research and development and (b) exploration costs and reduction in the extraction tax.”⁵⁷¹ In their response, the Severstal Companies explained that the GOR permits tax deductions for exploration expenses under Article 261 of the TCRF and allows tax deductions for R&D expenses under Article 262 of the TCRF. The Severstal Companies further explained that taxpayers who have used their own resources to extract minerals pay only 70 percent of the extraction tax.⁵⁷² The Severstal Companies stated that they claimed R&D deductions under Article 262 of the TCRF for the 2013 tax return filed during the POI and that they listed the deduction amount on line 054 of their tax return.⁵⁷³ Additionally, the Severstal Companies stated that they “did not receive any benefits under the tax deduction for exploration costs.”⁵⁷⁴

In the Department’s November 17, 2015, supplemental questionnaire, the Department asked the Severstal Companies to clarify the following with regard to “Exploration Costs and Reduction in the Extraction Tax:”

Did the company deduct any exploration expenses or take a reduction of its extraction taxes on the company’s 2013 tax returns? If yes, how much exploration expenses were deducted? Also, if the company had a reduction in the extraction tax, how much was the deduction and what was the applicable tax rate? Please provide supporting documentation for your response.⁵⁷⁵

In response, the Severstal Companies provided what it characterized as the “total research and development *and* exploration costs deduction” for tax year 2013 and referred the Department, again, to line item 054 of the income tax return filed during the POI.⁵⁷⁶ Thus, in its Primary Questionnaire Response, the Severstal Companies reference line item 054 in their tax return exclusively with regard to the Tax Deductions for R&D program, whereas in their First Supplemental Questionnaire Response, the Severstal Companies referenced the deduction amount on line 054 of their tax return in the context of the R&D *and* exploration deduction

⁵⁷⁰ See Initiation Checklist at 11-12.

⁵⁷¹ See the Department’s September 14, 2015, Primary Questionnaire (Primary Questionnaire) at 38.

⁵⁷² See Severstal Companies October 27, 2015, Primary Questionnaire Response (Severstal Companies Primary Questionnaire Response) at 21-23.

⁵⁷³ See Severstal Companies Primary Questionnaire Response at 18-20.

⁵⁷⁴ See Severstal Companies Primary Questionnaire Response at 23.

⁵⁷⁵ See the Department’s November 17, 2015, Supplemental Questionnaire (Severstal Companies First Supplemental Questionnaire) at 5.

⁵⁷⁶ See Severstal Companies’ November 25, 2015, Supplemental Questionnaire Response (Severstal Companies First Supplemental Questionnaire Response) at 10 (emphasis added).

programs.

In the *Preliminary Determination*, the Department treated the deduction amount reported in the Severstal Companies First Supplemental Questionnaire Response (*e.g.*, the deductions listed in line item 054 of its 2013 income tax return) as having been received under the Tax Deduction for R&D Expenses Program and preliminarily determined that the resulting benefit amount was not numerically significant.⁵⁷⁷ Further, in the *Preliminary Determination*, we inadvertently treated the extraction tax reductions the Severstal Companies received under Article 342 of the TCRF as having been received under the Tax Deduction for Exploration Expenses program, as provided under the Article 261 of the TCRF.⁵⁷⁸

At verification, we confirmed with officials from the GOR that Article 261 of the TCRF provides for income tax deductions for exploration expenses and that Article 262 of the TCRF provides for tax deductions for R&D expenses.⁵⁷⁹ We further confirmed that firms report their indirect expenses on line item 040 of the tax return, and that among the expenses included in this line item are expenses for exploration activities *and* R&D.⁵⁸⁰ Further, during the verification of the GOR, we learned that companies provide a separate breakout of their R&D expenses on line items of the tax return that are located below line 040.⁵⁸¹

At the Severstal Companies' verification, we traced the amount of R&D expenses the companies reported on line 054 of the 2013 tax return to the Severstal Companies' questionnaire response.⁵⁸² We also observed how the items in line item 054 fed into line 040.⁵⁸³ Based on information obtained at the GOR verification indicating that exploration deductions are included in line item 040 of the tax return, we requested that the Severstal Companies provide a breakout of the values contained in line item 040 of the 2013 tax return. The breakout of line 040 contained, among other items, an item for "Expenses Related to Development of Natural Resources." We requested a breakout of this item which yielded the following sub-accounts: 1. Geological Exploration, 2. Expenses Related to Past Period but Recognized During Subsequent Months, 3. Technology Services, 4. Mapping, Road Building, and 5. Land Reclamation.⁵⁸⁴ Further, we examined these sub-accounts and confirmed that the accounts related to exploration expenses.⁵⁸⁵ The amounts listed in these five sub-accounts did not trace to any of the deduction amounts previously reported by the Severstal Companies. Thus, the verifiers did not collect the corresponding deduction amounts as verification exhibits⁵⁸⁶ because they would have constituted untimely new factual information.

In their case and rebuttal briefs, the Severstal Companies argue that they properly reported the deduction the companies' claimed under the Exploration Deductions program. However, the

⁵⁷⁷ See Preliminary Decision Memorandum at 22.

⁵⁷⁸ See Preliminary Decision Memorandum at 20-21.

⁵⁷⁹ See GOR Verification Report at 8.

⁵⁸⁰ *Id.* at 8.

⁵⁸¹ *Id.* at 8 and VE-C.1.

⁵⁸² See Severstal Companies Verification Report at 6.

⁵⁸³ *Id.* at 6.

⁵⁸⁴ *Id.*, at 6-7.

⁵⁸⁵ *Id.* at 7.

⁵⁸⁶ *Id.*

Severstal Companies' claims do not comport with the facts on the record. The Severstal Companies initially reported that they did not claim any exploration deductions on the tax return filed during the POI.⁵⁸⁷ In their first supplemental questionnaire response, the Severstal Companies, citing to line item 054 of their tax return, attributed the deductions they initially reported under the R&D deduction program to the R&D *and* Exploration deduction program.⁵⁸⁸ However, neither of these statements fit with the facts discovered at verification.

At the GOR verification, government officials indicated that line item 054 of the tax return refers to R&D deductions while line 040 (which line item 054 feeds into) encompasses R&D *and* exploration deductions.⁵⁸⁹ Further, during the Severstal Companies' Verification, the verifiers discovered previously unreported deductions contained in line item 040 that related to exploration activities. Thus, contrary to the arguments the Severstal Companies make in their case and rebuttal briefs, the evidence examined at verification demonstrates that they failed to report certain exploration deductions claimed under Article 261 of the TCRF.

In keeping with the Department's practice concerning verification findings that contradict a respondent's non-use claims,⁵⁹⁰ the verifiers did not collect as a verification exhibit the exploration deductions contained in the sub-accounts.⁵⁹¹ As a result, we find that the application of facts available, as described under section 776(a)(2)(A) and (C) of the Act applies because the Severstal Companies withheld information that had been previously requested by the Department and significantly impeded this proceeding, respectively. Further, we find that in failing to disclose the exploration deductions recorded in line item 040 of the 2013 income tax return that were discovered at verification, the Severstal Companies failed to act to the best of their ability and, thus, when applying facts available under section 776(a) of the Act, the application of adverse inferences, as described under section 776(b) of the Act, is warranted when determining the benefit received by the Severstal Companies under the Tax Deductions for Exploration Expenses Program.

We disagree with the Severstal Companies' argument that information on the record demonstrates that they, in fact, disclosed their use of the Tax Deduction for Exploration Expenses program. As noted above, the Severstal Companies stated that they did not receive any benefits under the tax deduction for exploration costs under Article 261 of the TCRF.⁵⁹² In the supplemental questionnaire, the amount that the Severstal Companies reported for "Tax Deduction for Research and Development and Exploration Costs," was equal to the amount reported only for R&D pursuant to Article 262 of the TCRF.⁵⁹³ Thus, the Severstal Companies again did not report use of the Tax Deduction for Exploration Expenses.

⁵⁸⁷ See Severstal Companies Primary Questionnaire Response at 23.

⁵⁸⁸ See Severstal Companies First Supplemental Questionnaire Response at 10.

⁵⁸⁹ See GOR Verification Report at 8.

⁵⁹⁰ See *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) and accompanying Issues and Decision Memorandum at 15-16.

⁵⁹¹ See Severstal Companies Verification Report at 7.

⁵⁹² See Severstal Companies Primary Questionnaire Response at 23.

⁵⁹³ See Severstal Companies' First Supplemental Questionnaire Response at 10.

We also find it inappropriate for the Severstal Companies, in their rebuttal brief, to point to PAO Severstal's 2013 consolidated financial statement and claim that expenses associated with evaluation and exploration assets are contained therein, and that the Department should therefore rely on this unverified information. As discussed in this comment, the time for the Severstal Companies to have reported its use of this program was during the question and answer phase of the investigation, not during briefing stage of the proceeding. Furthermore, for income tax deduction programs, we traced the benefit information to the tax return that the respondent firm filed during the POI and, thus, information from the notes of a financial statement will not necessarily equal the deductions a firm may have claimed under a given tax program. Accordingly, we sought to verify the Severstal Companies' non-use of the Tax Deduction for Exploration Expense program by examining the companies' relevant tax return.⁵⁹⁴ Therefore, we disagree that the Department should rely on information from the notes of the Severstal Companies' 2013 consolidated financial statement when determining whether the Severstal Companies used this program during the POI.

We disagree with the Severstal Companies that the Department did not abide by the notice and remedy requires under section 782(d) of the Act when it did not issue additional supplemental questionnaires to the Severstal Companies after the *Preliminary Determination* concerning the Severstal Companies' use of the Tax Deduction for Exploration Expenses program. As noted in the prior paragraph, the Department issued two supplemental questionnaires to the Severstal Companies regarding the use of this program. In the initial questionnaire response, the Severstal Companies stated that they did not use the program.⁵⁹⁵ In the supplemental questionnaire response, the amount the Severstal Companies reported for "Tax Deduction for Research and Development and Exploration Costs," was equal to the amount they initially reported under the Tax Deduction for R&D program.⁵⁹⁶ Thus, in their supplemental questionnaire response, the Severstal Companies effectively indicated that they claimed no deductions under the Tax Deduction for Exploration Expenses program. By virtue of the questions posed to the Severstal Companies regarding this program, the Department, in fact, upheld its notice and remedy requirements under 782(d) of the Act. Further, the two responses received from the Severstal Companies were definitive in nature in that they both indicated non-use of the program and, thus, from the standpoint of the Department, additional clarification of these responses prior to verification was not necessary. Lastly, we note that the issue revolves completely around information that was in the Severstal Companies' complete possession and control. And, as such, it is the Severstal Companies who are ultimately responsible for submitting accurate information to the Department in their questionnaire responses, particularly with regard to threshold questions such as whether the companies did or did not use an income tax deduction program at issue in the investigation.

Finally, we disagree with Petitioners that the Department should, pursuant to section 776(b) of the Act, calculate the Severstal Companies' benefit under the Tax Deduction for Exploration Expenses Program by multiplying the Severstal Companies' total indirect expenses (as reported on line 040 of its 2013 income tax return) by Russia's corporate tax rate of 20 percent. Such an

⁵⁹⁴ See Severstal Companies Verification Report at 6-7.

⁵⁹⁵ See Severstal Companies Primary Questionnaire Response at 23.

⁵⁹⁶ See Severstal Companies First Supplemental Questionnaire Response at 10.

approach would overstate the benefit under this program. As noted at verification, the amount listed in line item 040 of the Severstal Companies' 2013 tax return reflects the companies' total indirect expenses and, as such, includes a variety of expense categories of which exploration expenses is only a part.⁵⁹⁷

Rather, in assigning an AFA rate to the Severstal Companies for this program, we have utilized the Department's CVD AFA hierarchy. For CVD investigations the Department first examines whether in the context of the instant investigation there is a calculated program subsidy rate for the identical program at issue. If so, the Department will use the calculated program rate for that particular program as the basis of the AFA rate.⁵⁹⁸ As indicated above, the NLMK Companies used the Tax Deduction for Exploration Expenses. Thus, in keeping with our AFA hierarchy, we have, pursuant to section 776(b) of the Act, assigned the net subsidy rate the NLMK Companies received under this program, which is 0.03 percent *ad valorem*, to the Severstal Companies.

Comment 22: Applicable *De Minimis* Rate for Russian CVD Proceedings

Severstal Companies' Case Brief

- The Department should apply a two percent *de minimis* threshold in this investigation because Russia was a designated beneficiary developing country under the U.S. Generalized System of Preferences (GSP) during the POI.
- Under the statute, the Department shall disregard any countervailable subsidy on subject merchandise imported from a country designed by the U.S. Trade Representative (USTR) as a developing country if the aggregate net countervailable subsidies do not exceed two percent *ad valorem*.⁵⁹⁹
- Russia was identified by the U.S. government as a developing country during the POI.⁶⁰⁰
- Though the United States removed Russia from the list of beneficiary developing countries eligible for benefits under the GSP effective October 2014, this did not change Russia's status as a developing country. Thus, Russia continued to be a developing country throughout the POI.
- Accordingly, the Department should apply its two percent *de minimis* threshold for developing countries in this countervailing duty investigation.⁶⁰¹ At the very least, the Department should apply a 1.75 percent *de minimis* threshold for Russia, based on the eight months of the POI for which Russia was a U.S. GSP beneficiary developing country.

Petitioners' Rebuttal Brief

- The Department should reject the Severstal Companies' claim that a two percent *de minimis* threshold should be applied to Russia in this investigation.

⁵⁹⁷ See Severstal Companies Verification Report at 6-7.

⁵⁹⁸ See, e.g., *NOES from Taiwan*, and accompanying Issues and Decision Memorandum at 10.

⁵⁹⁹ See sections 705(a)(3) and 703(b)(4)(B) of the Act.

⁶⁰⁰ See *Proclamation 9188 of October 3, 2014, to Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974*, 79 FR 60945 (October 8, 2014) (*Proclamation*).

⁶⁰¹ See section 771(24)(B) of the Act.

- Pursuant to the statute, the Department will disregard *de minimis* countervailable subsidies when the aggregate of the net countervailable subsidies is less than one percent *ad valorem*.⁶⁰²
- As an exception, the Department will apply a *de minimis* threshold of two percent to any country designated as a “developing country” by the USTR for purposes of the CVD law.⁶⁰³ The term “developing country” means a country designated as a developing country by the USTR.”⁶⁰⁴
- Critically, Russia has not been designated a developing country by USTR under the CVD law and, therefore, the two percent *de minimis* threshold exception does not apply in this investigation.⁶⁰⁵
- In prior cases, the Department has relied on the USTR Developing Country Designation to determine whether a country is a developing country, such that the exception in section 703(b)(4)(B) of the Act is applicable. Contrary to the Severstal Companies’ claim, Russia’s status as a “beneficiary developing county” under the GSP is irrelevant.
- The statute and the SAA are clear that the exception applies only when USTR has issued a developing country designation for purposes of the CVD law.⁶⁰⁶ Whether a country is eligible for benefits under another provision of U.S. law does not matter.
- This is precisely why the Department has relied on the USTR Developing Country Designation in past cases to determine whether a country is a developing country for purposes of the CVD law. Indeed, the modification of Russia’s GSP status clearly applies to other provisions of U.S. law that are cited in the *Proclamation*, but not the countervailing duty law.⁶⁰⁷
- Consistent with sections 703(b)(4)(B) and 705(a)(3) of the Act, the Department should continue to find that Russia has not been designated a “developing country” by USTR under the CVD law and, therefore, Russia is not entitled to a two percent (much less a contrived 1.75 percent) *de minimis* threshold in this investigation.
- Accordingly, the Department should reject the Severstal Companies’ argument and apply a *de minimis* threshold of one percent in its final determination.

Department’s Position: Pursuant to sections 703(b)(4)(A) and 705(a)(3) of the Act, a countervailable subsidy is *de minimis* if the Department determines that the aggregate of the net countervailable subsidies is less than one percent *ad valorem* or the equivalent specific rate for the subject merchandise. As an exception, in accordance with section 703(b)(4)(B) of the Act, the Department will apply a *de minimis* threshold of two percent to a country designated by the USTR as a developing country. The statute and the SAA clarify that this exception applies only

⁶⁰² See section 703(b)(4)(A) of the Act.

⁶⁰³ See section 703(b)(4)(B) of the Act; see also section 771(36)(A) of the Act.

⁶⁰⁴ See section 771(36)(A) of the Act.

⁶⁰⁵ See *Developing and Least-Developed Country Designations under the Countervailing Duty Law*, 63 FR 29945 (Office of the U.S. Trade Rep. June 2, 1998) (*Designation List*) (codified at 15 CFR 2013.1).

⁶⁰⁶ See SAA at 940 (“{the law} makes clear that this {developing country} designation is solely for purposes of the countervailing duty law and has no force or effect for any other purpose. In other words, designation for purposes of the CVD law has no particular weight in determining which countries are developing countries under other Uruguay Round agreements or under other provisions of U.S. law”).

⁶⁰⁷ See *Proclamation*, 79 FR at 60945.

when USTR has issued a developing country designation for purposes of the CVD law.⁶⁰⁸ Specifically, the SAA states that:

section 267 of the implementing bill provides guidance for designating both least developed and developing countries for purposes of the CVD law. It makes clear that this designation is solely for purposes of the CVD law and has no force or effect for any other purpose. In other words, designation for purposes of the CVD law has no particular weight in determining which countries are developing countries under other Uruguay Round agreements or under other provisions of U.S. law. Section 267 adds a new paragraph 771(36) to the Act, authorizing USTR to designate which countries are developing and least developed countries for purposes of the CVD law.⁶⁰⁹

USTR has not designated Russia as a developing country under the CVD law pursuant to section 771(36)(A) of the Act and, therefore, the two percent *de minimis* threshold exception does not apply.⁶¹⁰

Although Russia was a designated beneficiary developing country under the GSP until October 2014, that status was granted pursuant to Sections 501(1) and (4) of the Trade Act of 1974 (the 1974 Act), which considers whether duty-free treatment would be appropriate under the GSP for furthering the economic development of a beneficiary developing country through the expansion of its exports.⁶¹¹ Therefore, the Severstal Companies' contention that Russia's status as a beneficiary developing country under the GSP is applicable to this CVD investigation is misplaced. Russia's designation under another provision of U.S. law is irrelevant to the applicable countervailable subsidy *de minimis* threshold.⁶¹²

Because Russia was not designated as a "developing country" by USTR under the CVD law, Russia is not entitled to a two percent *de minimis* threshold. Thus, in accordance with sections 705(a)(3) and 703(b)(4)(A) of the Act, the *de minimis* threshold of one percent will be used in the final determination.

Comment 23: Use of the NLMK Companies' Verified Sales Data

Petitioners' Case Brief

- At verification, the NLMK Companies presented corrected sales data, which the Department accepted as a minor correction and used to reconcile sales values in the accounting systems.
- Petitioner asserts that the verified sales data should be used in the final calculations.

⁶⁰⁸ See section 703(b)(4)(B) of the Act; SAA at 940 (“{The law} makes clear that this {developing country} designation is solely for purposes of the countervailing duty law and has no force or effect for any other purpose. In other words, designation for purposes of the CVD law has no particular weight in determining which countries are developing countries under other Uruguay Round agreements or under other provisions of U.S. law.”)

⁶⁰⁹ See SAA at 940.

⁶¹⁰ See *Designation List*, 63 FR at 29945.

⁶¹¹ See *Proclamation*, 79 FR at 60945.

⁶¹² See SAA at 939 (“{T}he bill makes the new *de minimis* standards of two and three percent applicable only in investigations involving merchandise from a Subsidies Agreement country which qualifies for one of these special *de minimis* standards under Article 21 of the Agreement and section 703(b)(4)(B) or (C) of the Act”).

No other party commented on this issue.

Department's Position: We agree with Petitioners. We relied on the NLMK Companies' verified, corrected sales data for 2014 to construct the sales denominator used in the final calculations.⁶¹³

Comment 24: Calculation of the Severstal Companies' Sales Denominator

*Petitioners' Case Brief*⁶¹⁴

- The sales denominators used in the Department's preliminary calculations should be adjusted to be consistent with the new verified information in the agency's final determination.
- Given that 19 CFR.351.525(a) establishes the Department will use FOB sales value in attributing a countervailable benefit, the Department should adjust its preliminary benefit calculations to reflect the Severstal Companies' sales denominators, excluding all distribution charges, in the final determination.

*Severstal Companies' Case Brief*⁶¹⁵

- In the *Preliminary Determination*, the Department stated that it "attributed any subsidies received by Severstal to the total, consolidated sales of Severstal" and that the Department "used total sales denominators to calculate the countervailable subsidy rate for the various programs in this preliminary determination."⁶¹⁶
- However, the Department used as the net sales denominator for calculating the Severstal Companies' subsidy rate, the 2014 sales of PAO Severstal—only one of the many companies in the Severstal consolidated group— after excluding what the Department believed were "intra-company sales."
- The Department verified that the Severstal Companies' total consolidated 2014 sales reported in the Severstal Companies' consolidated financial statement exclude intra-company sales (*i.e.*, sales to companies included in Severstal's consolidated financial statement). Therefore, in the final determination the Department should use Severstal's verified consolidated sales.

Department's Position: Under 19 CFR 351.525(b)(6)(i), the Department normally will attribute a subsidy to the products produced by the corporation that received the subsidy. However, under 19 CFR 351.525(b)(6)(iii), if the firm that received a subsidy is a holding company, including a parent company with its own operations, the Department will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries. As indicated in the "Attribution" section above, PAO Severstal is a producer of subject merchandise as well as the parent of a consolidated entity that includes the other members of the Severstal Companies that are being examined as part of this CVD investigation.⁶¹⁷ In prior CVD proceedings involving subsidy

⁶¹³ See NLMK Companies Final Calculation Memorandum.

⁶¹⁴ We note that Petitioners make similar arguments in their Mining Rights Case Brief at 15-16, and refute the Severstal Companies' arguments in Petitioners' Mining Rights Rebuttal Brief at 31.

⁶¹⁵ We note that the Severstal Companies make similar arguments in their Mining Rights Case Brief at 37-38.

⁶¹⁶ See Preliminary Decision Memorandum at 11.

⁶¹⁷ See Severstal Companies September 28, 2015, Questionnaire Response (Severstal Companies Affiliation

