



March 19, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Antidumping Duty Investigation of Galvanized Steel Wire from
the People's Republic of China: Issues and Decision
Memorandum for the Final Determination

SUMMARY

We have analyzed the comments submitted in the investigation of galvanized steel wire from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the Galvanized Steel Wire From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68407 (November 4, 2011) ("Preliminary Determination") and Galvanized Steel Wire From the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value, 76 FR 73589 (November 29, 2011) ("Amended Preliminary Determination").

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum.

DISCUSSION OF THE ISSUES

Comment 1: The Department's Preliminary Determination With Respect to Tianjin Huayuan Metal Wire Products Co., Ltd. ("Huayuan")¹

A. Whether the Department Incorrectly Determined Huayuan's Eligibility for a Separate Rate

Huayuan's Case Brief

- The Department of Commerce's ("Department") findings regarding state control of Huayuan are incorrect both legally and factually. The document² placed on the record by Petitioners³

¹ In this case, Huayuan refers to the collective group of affiliated companies comprised of Tianjin Huayuan Metal Wire Products Co., Ltd., Tianjin Tianxin Metal Products, Co., Ltd., Tianjin Huayuan Times Metal Products Co., Ltd., and Tianjin Meijiahua Trade Co., Ltd.



and used by the Department as evidence of government control in the Preliminary Determination is not accurate, official, or authenticated.

- Moreover, the Department's additional reliance on the link between the key individual⁴ and Company X⁵ is insignificant in the de jure and de facto analysis for a separate rate determination.
- The Department did not provide adequate citation to practice or precedent supporting its determination to deny Huayuan a separate rate.
- Huayuan has also argued that even if the key individual played a role within the local government, this does not equate to de jure government control.
- The Department's Preliminary Determination is not consistent with the current policy on separate rates, where the Department has made clear that "the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level."⁶ As further evidence on inconsistency, Huayuan cites the Department's recent request for comments on its separate rates methodology in the context of the TLEI, where it stated that it "is not revisiting the de jure criteria currently examined for purposes of establishing a company's separate rate."⁷ Continuing to cite from the same request for comments, Huayuan also notes the Department's statement that its "current practice focuses on direct government involvement in a firm's export activities and, to that extent, it may not take sufficient account of the government's role in the NME and how that role may impact an exporter's behavior with regard to its export activities and setting prices."⁸
- Citing to Qingdao Taifa 2009, Huayuan argues that the U.S. Court of International Trade ("CIT") found that ownership by a local government alone is not sufficient to establish government control. Huayuan further notes that the CIT stated that "mere evidence that a town government owns shares in Taifa...is insufficient to support Commerce's application of

² The specific details of this document are business proprietary information. However, the Department discussed this information in full in the "Memorandum to Catherine Bertrand, Program Manager, Office 9, from Irene Gorelik, Senior International Trade Analyst, Office 9: Antidumping Duty Investigation of Galvanized Steel Wire from the People's Republic of China: Preliminary Affiliation and Single Entity Determinations for Tianjin Huayuan Metal Wire Products Co., Ltd.," dated October 27, 2011 ("Huayuan Affiliation Memo"); and "Memorandum to the File from Irene Gorelik, Senior Case Analyst: Program Analysis for the Preliminary Determination of Antidumping Duty Investigation of Galvanized Steel Wire from the People's Republic of China: Tianjin Huayuan Metal Wire Products Co., Ltd.," dated October 27, 2011 ("Huayuan Prelim Analysis Memo").

³ Petitioners are Davis Wire Corporation, Johnstown Wire Technologies, Inc., Mid-South Wire Company, Inc., National Standard, LLC and Oklahoma Steel & Wire Company, Inc.

⁴ The name of this individual is business proprietary information and cannot be revealed publicly. For details regarding the key individual's roles which led to our determination of separate rate ineligibility, see Huayuan Affiliation Memo; and Huayuan Prelim Analysis Memo.

⁵ Because Company X's identity and its link with the key individual is business proprietary information, see Huayuan Prelim Analysis Memo, adopted herein for the final determination, for specific information regarding Company X's relationship to Huayuan and the key individual. Further, while we did not collapse Company X (another Huayuan affiliate) with Huayuan, the record shows that Company X also has intertwined operations with Huayuan and is simulatenously affiliated with the local government entity and Huayuan, pursuant to 19 CFR 351.401(f). See HYW's questionnaire response dated August 9, 2011, at 11; see also TMJH's Supplemental Questionnaire Response dated September 29, 2011, at 11.

⁶ See Import Administration Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (April 5, 2005) at 1 ("Separate Rate Bulletin").

⁷ See De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Countries, 75 FR 78676 (December 16, 2010) ("TLEI").

⁸ See id., 75 FR at 78677.

the PRC-wide rate. Although local government ownership is of some limited relevance to the analysis, government ownership is not tantamount to government control.”⁹

- Any presumption of government control is badly outdated based on current PRC laws.

Petitioners’ Rebuttal Brief

- The Department correctly determined that the record evidence in this investigation shows that Huayuan is not entitled to a separate rate and that the Department properly assigned the PRC-wide rate to Huayuan.
- All of the information submitted by Huayuan, as well as additional information provided by Petitioners, is highly relevant to the Department’s separate rate analysis in this investigation and supports the denial of a separate rate to Huayuan. According to the Department’s policy bulletin, the separate rate test “focuses on controls over the decision-making process on export-related investments, pricing, and output decisions at the individual firm level.”¹⁰
- The Department previously analyzed the Organic Law on the Village Committee of the PRC (“VCL”) and found that the law “indicates that a Village Committee is not an independent entity but operates under the leadership of the Chinese Communist Party. The party branch is in effect the core of the village power structure.”¹¹

Department’s Position:

First, the Department disagrees with Huayuan with respect to the argument that our Preliminary Determination regarding Huayuan’s separate rate eligibility was incorrect both legally and factually. The Department’s determination with respect to Huayuan and its eligibility for a separate rate was based on multiple factors presented to the Department over the course of the investigation, that, when considered in total, resulted in the finding that Huayuan has not overcome the presumption of government control. Specifically, the Department relied on the following evidence on the record in making our determination: 1) the key individual within the single entity¹² (comprised of Huayuan and its collapsed affiliates) has the potential to control pricing and export of the merchandise under consideration; and 2) a document on the record of this investigation shows that this key individual also played a role in the local government entity while simultaneously involved in the export and pricing of Huayuan’s exports to the United States.

⁹ See Qingdao Taifa Group Co., Ltd., v. United States, 637 F. Supp. 2d 1231; 31 Int’l Trade Rep. (BNA) 1846; 2009 Ct. Intl. Trade LEXIS 91; SLIP OP. 2009-83 (“Qingdao Taifa 2009”).

¹⁰ See Separate Rate Bulletin at 1.

¹¹ See Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937 (November 18, 2005) and accompanying Issues and Decision Memorandum at Comment 7 (“Brake Rotors 2005”).

¹² In the Preliminary Determination, the Department found that “{Tianjin} Huayuan is affiliated with TTM, TMJH, and THTM, pursuant to section 771(33)(F) of the Act, based on ownership and common control. In addition to being affiliated, they have production facilities for similar or identical products that would not require substantial retooling and there is a significant potential for manipulation of production based on the level of common ownership and control, shared management, and an intertwining of business operations. Accordingly, because {Tianjin} Huayuan reported that all four companies operations’ are intertwined, as defined under 19 CFR 351.401(f), we preliminarily determine that {Tianjin} Huayuan, TTM, THTM, and TMJH should be treated as a single entity...” See Preliminary Determination, 76 FR at 68413; see also Huayuan Affiliation Memo and Huayuan Prelim Analysis Memo.

As the facts on the record have not changed since the Preliminary Determination¹³ with respect to the key individual's roles within the single entity comprised of Huayuan and affiliates, we continue to determine that the key individual has the potential to manipulate export and pricing of Huayuan's exports of the merchandise under consideration.

Further, we disagree with Huayuan's argument that the document showing evidence of the key individual's role in the local government is inaccurate, unofficial, or unauthenticated. The document was obtained from a disinterested third-party and serves as a dated attestation to the key individual's role within the local government entity. Additionally, the Department conducted an independent search for this document and was able to authenticate its source and the information contained therein.¹⁴ However, rather than providing substantive evidence to refute this document, such as an affidavit from the key individual or a listing of all the members, officers, and legal representatives of the local government, contradicting the information contained within the document, Huayuan provided only assertions attacking the veracity of the source.¹⁵ Thus, we continue to find for the final determination that the document on the record showing the key individual's role in the local government entity while simultaneously holding active roles with Huayuan is accurate and warrants the Department's denial of a separate rate to Huayuan.¹⁶

Second, the Department also disagrees with Huayuan regarding its argument that the key individual's role within Company X played a significant part in the Department's Preliminary Determination regarding Huayuan's separate rate eligibility. The Department did not rely solely on the relationship between Company X and the key individual. In fact, even without the existence of this company, the evidence on the record shows that the key individual's simultaneous roles within the local government and within Huayuan was sufficient in making our determination on those points alone. The existence of Company X, or the key individual's role therein, or its reported intertwined operations with Huayuan,¹⁷ were secondary tiers of information that merely bolstered our Preliminary Determination, rather than serve as foundational support. Contrary to Huayuan's argument, the Department has not conflated the statute defining affiliation/collapsing and the separate rates test. The Department preliminarily conducted both tests, as required, separately in the Preliminary Determination.

Third, the Department also disagrees with Huayuan's argument that we did not provide: 1) adequate citation to practice or precedent supporting its determination to deny Huayuan a separate rate, nor; 2) adequate explanation of the de jure or de facto basis of our decision. On the contrary, the Department's Preliminary Determination provided clear support for Huayuan's separate rate determination as we provided numerous cites supporting the Department's practice

¹³ See Preliminary Determination, 76 FR at 68413; see also Huayuan Affiliation Memo and Huayuan Prelim Analysis Memo.

¹⁴ See Huayuan Prelim Analysis Memo at Exhibit 1.

¹⁵ See, e.g., Huayuan's, TTM's, THTM's and TMJH's separate rate applications dated September 29, 2011.

¹⁶ Based on Huayuan's questionnaire responses, the Department preliminarily determined that the key individual is a primary decision-maker for production and sales operations for exporters of the merchandise under consideration. See Huayuan Prelim Analysis Memo and Huayuan Affiliation Memo.

¹⁷ See Huayuan's supplemental questionnaire response dated August 9, 2011, at 11, where Huayuan, itself, reported that the single entity and Company X, have intertwined operations within the meaning of 19 CFR 351.401(f). Because of these intertwined operations and the key individual's roles among these companies, we preliminarily found that the key individual was in a position to manipulate exports and pricing of the merchandise under consideration. Huayuan also reported that the key individual is the "primary decision-maker" within the single entity. See, e.g., Huayuan's supplemental questionnaire response dated August 9, 2011, at 15.

in making separate rate eligibility determinations along with cites to the history of CIT cases affirming this practice. Specifically, the Department cited to Huanri 2007.¹⁸ In Huanri 2007, the CIT addressed both de jure and de facto criteria applied by the Department in Brake Rotors 2005,¹⁹ where the circumstances were similar enough with respect to the separate rate ineligibility determination to effectuate a similar determination here.

As outlined in Huanri 2007, the Department examined analogous facts in determining whether Huayuan was free from de facto government control. As in Brake Rotors 2005, in investigating Huayuan's eligibility for a separate rate, the Department issued numerous questionnaires in which we asked the respondents to "describe and explain" who "owns" and "controls" the company, including the "company's relationship with the national, provincial, and local governments, including ministries or offices of those governments."²⁰ Here, Huayuan and its affiliates reported that they "have no relationship with the national, provincial, and local governments, including ministries or offices of those governments."²¹ In fact, Huayuan has reported that the key individual is involved in the local legislature, while simultaneously disingenuously arguing that membership in county legislature is not considered "government" work under PRC law.²² Nevertheless, this broad narrative claim is not supported by the information submitted by Huayuan itself and Petitioners. Furthermore, in Brake Rotors 2005, the Department stated that "the link between even one shareholder and the Village Committee, given the past history of the relationship...should be sufficient to deny...a separate rate in this review." Here, as indicated in Huayuan's Prelim Analysis Memo and in Huayuan Affiliation Memo, the key individual's roles within Huayuan and the local government was more than acting as mere shareholder. Furthermore, Huayuan provided certain information²³ regarding the local government entity that shows evidence of this government entity's directives and works for the public welfare, which the CIT has previously affirmed as actions befitting a form of government in the PRC. As in Huanri 2007, here, the Department also considered the VCL submitted by Huayuan.²⁴ The Department's examination of this VCL indicated that the interests and affairs of this local government entity were not dissimilar to those identified in Huanri 2007.²⁵ Further, as in Brake Rotors 2005,²⁶ here, the Department stated that this local government entity is "a form of government in the PRC" and that Huayuan is ineligible for a separate rate because the key individual also played a significant role in the government entity.²⁷ Thus, consistent with Brake Rotors 2005, and as affirmed by Huanri 2007, in such a circumstance, there is no autonomy from a government entity, under the de jure prong of the

¹⁸ See Shandong Huanri (Group) General Co. v. United States, 493 F. Supp. 2d 1353 (CIT 2007) ("Huanri 2007"); see also Huayuan Prelim Analysis Memo at 5-6.

¹⁹ See Brake Rotors 2005 at Comment 7.

²⁰ See, e.g., Huayuan's Section A questionnaire response dated July 7, 2011; Huayuan's questionnaire response dated August 9, 2011; TMJH Separate Rate Application dated June 27, 2011; Huayuan's questionnaire response dated September 29, 2011; Huayuan's questionnaire response dated October 17, 2011, at Exhibit SA3-1.

²¹ See, e.g., Huayuan's Section A questionnaire response dated July 7, 2011; TMJH Separate Rate Application dated June 27, 2011; TTM Separate Rate Application dated June 27, 2011, and THTM Separate Rate Application dated June 27, 2011.

²² See TMJH's supplemental questionnaire response dated September 29, 2011, at 4.

²³ See Huayuan's questionnaire response dated October 17, 2011, at Exhibit SA3-1.

²⁴ See *id.*

²⁵ As this information is business proprietary information, the details of the local government entity's interests and activities cannot be revealed publicly. See Huayuan's questionnaire response dated October 17, 2011, at Exhibit SA3-1 and Huayuan Prelim Analysis Memo for details regarding the local government entity's activities which led to our determination of separate rate ineligibility for Huayuan.

²⁶ See Brake Rotors 2005 at Comment 7.

²⁷ See Huayuan Prelim Analysis Memo at 6-7.

separate rate analysis. As the primary decision-maker of Huayuan, holding a simultaneous role within the local government, the key individual is the primary link between Huayuan and the local government, defining de jure control.

The Department also cited to CWP 2008,²⁸ where we denied a separate rate to a company that was “established and is completely owned by the Fushan Village Committee (“Fushan Committee”), and the Fushan Committee operates under the Village Committee Law.”²⁹ While the record does not indicate that Huayuan is either wholly owned or established by the local government entity, the nature of the key individual’s role within the single entity comprised of Huayuan and its affiliates while simultaneously situated within the local government entity presents an example of a type of government control as defined by the Department’s de jure and de facto criteria observed in Sparklers and Silicon Carbide.

Fourth, the Department disagrees with Huayuan’s argument that our Preliminary Determination was not consistent with our separate rates practice. In the Preliminary Determination, the Department stated, as in every Federal Register notice for cases involving non-market economies (“NMEs”):

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department’s policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both de jure and de facto governmental control over export activities. The Department analyzes each entity exporting galvanized steel wire under a test arising from the Final Determination of Sales at Less Than Fair Value: Sparklers From the People’s Republic of China, 56 FR 20588 (May 6, 1991) (“Sparklers”), as further developed in Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People’s Republic of China, 59 FR 22585 (May 2, 1994) (“Silicon Carbide”).³⁰

In Sigma, the Court of Appeals for the Federal Circuit (“CAFC”) affirmed the Department’s separate rates test as reasonable, stating that the statute recognizes a close correlation between an NME and government control of prices, output decisions, and the allocation of resources. The CAFC also stated that it was within the Department’s authority to employ a presumption of state control for exporters in an NME, and to place the burden on the exporters to demonstrate an absence of central government control:

It is within Commerce’s authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to

²⁸ See Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 2445 (January 15, 2008) (unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China, 73 FR 31970, 31971-2 (June 5, 2008)) (“CWP 2008”); see also Huayuan Prelim Analysis Memo at 6.

²⁹ See CWP 2008, 73 FR at 2445, 2450.

³⁰ See Preliminary Determination, 76 FR at 68413.

demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. 19 U.S.C.S. § 1677(18)(B)(iv), (v). Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control.³¹

Furthermore, the CIT has also found the Department's separate rates test to be reasonable, explaining that the essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is closely tied to the communist government as to be shielded from the vagaries of the free market.³²

Fifth, the Department disagrees with Huayuan's argument that Qingdao Taifa 2009, is instructive and relevant to the case here. Specifically, Huayuan has argued that, in Qingdao Taifa 2009, the CIT found that ownership by a local government alone is not sufficient to establish government control. Huayuan noted that the CIT stated that "mere evidence that a town government owns shares in Taifa...is insufficient to support Commerce's application of the PRC-wide rate. Although local government ownership is of some limited relevance to the analysis, government ownership is not tantamount to government control..."³³ However, in Qingdao Taifa 2009, citing to Huanri 2007, the CIT also stated, importantly, that "Commerce may apply the PRC-wide rate where it finds that a town or other local government exercises nonmarket control over a respondent's business activities, and where a promulgation of the PRC's central government such as the Village Committee Law authorizes the local government to exercise that type of control over the respondent."³⁴ Moreover the facts of the case litigated in Qingdao Taifa 2009 are distinct from the facts on the record here. For example, in Qingdao Taifa 2009, the respondent, Taifa, claimed that "the collective, not the government, owned the interest in Taifa, and the references to the Yin Zhu Town Government were due to drafting errors in some of the documents and in others, because the government acted on behalf of the collective."³⁵ Those facts are clearly distinguishable from the factual information regarding shareholder/ownership percentages and the roles played by the key individual, as reported by Huayuan and the affiliates. Again, while that information cannot be summarized publicly here, the nature of the relationships is fully discussed in the Huayuan Prelim Analysis Memo and the Huayuan Affiliation Memo, which has been adopted for the final determination.³⁶ Furthermore, unlike the circumstances outlined in the subsequent litigation in that case, where the CIT stated that "Commerce may not apply the People's Republic of China (PRC)-wide rate if substantial evidence does not support the finding that a government entity exercised nonmarket control over the respondent, and if there is no ultimate link between the respondent and the central PRC government,"³⁷ here, we find that the key individual noted above is the "ultimate link" between the respondent and the local government entity.

³¹ See Sigma Corp. v. United States, 117 F. 3d 1401, 1405-06. (CAFC 1997) ("Sigma").

³² See, e.g., Fujian Machinery and Equipment Import and Export Corp. v. United States, 178 F. Supp. 2d 1305, 1331 (CIT 2001).

³³ See Qingdao Taifa 2009, 637 F. Supp. 2d 1231.

³⁴ See Qingdao Taifa 2009, 637 F. Supp. 2d 1231, 1242, citing Huanri 2007, 493 F. Supp. 2d at 1360-64.

³⁵ See id., 637 F. Supp. 2d, at 1241.

³⁶ See Huayuan Prelim Analysis Memo for details regarding the local government entity's activities which led to our determination of separate rate ineligibility for Huayuan.

³⁷ See Qingdao Taifa Group Co. v. United States, 760 F. Supp. 2d 1379, 1383 (CIT 2010).

Finally, we disagree with Huayuan that the Department's interpretation of government control is outdated based on current PRC laws. The Department discusses this issue in greater detail in Comment 6 below.

B. Whether the Department Should Have Applied Adverse Facts Available ("AFA") to Huayuan

Huayuan's Case Brief

- The Department placed Huayuan into the PRC-wide entity, and then applied the AFA rate to the PRC-wide entity. However, the record did not contain the necessary information to warrant the use of AFA for Huayuan.
- In the absence of such necessary information, the final determination must be based on the use of facts available.

No other interested parties commented on this issue.

Department's Position:

The Department disagrees with Huayuan's interpretation of the assignment of the PRC-wide entity rate to Huayuan. Because the Department begins with the presumption that all companies within an NME country are subject to government control, and because only the separate rate recipients have overcome that presumption, the Department is applying the PRC-wide entity rate to those entities that have not overcome the presumption of government control, *i.e.*, the PRC-wide entity, which includes Huayuan.

As described above, we continue to find that Huayuan, is not eligible for a separate rate because it did not overcome the presumption of *de jure* and *de facto* control from the PRC government. Therefore, we assigned to Huayuan the rate assigned to the PRC-wide entity. This is consistent with our long-standing practice of assigning a country-wide rate to NME companies that do not qualify for a separate rate, and has been repeatedly affirmed by the courts.³⁸

As to the PRC-wide entity rate, in the Preliminary Determination, we stated that:

{i}nformation on the record of this investigation indicates that there were more exporters of galvanized steel wire from the PRC than those indicated in the response to our request for Q&V information during the POI. As stated above, we issued our request for Q&V information to 28 potential PRC producers/exporters of galvanized steel wire. While information on the record of this investigation indicates that there are other producers/exporters of galvanized steel wire in the PRC, we received only ten timely-filed solicited Q&V responses.³⁹

We also noted that, after having been selected as a mandatory respondent, "Tianjin Jinghai filed a letter stating that it would not participate as a mandatory respondent in this investigation."⁴⁰

³⁸ See Transcom, Inc. v. United States, 182 F. 3d, 876, 883 (CAFC 1999), citing Sigma.

³⁹ See Preliminary Determination, 76 FR at 68415.

⁴⁰ See id., 76 FR at 68409.

Therefore, in the Preliminary Determination, the Department determined that there were: 1) exporters/producers of the merchandise subject to the investigation during the POI from the PRC that did not respond to the Department's request for information; 2) exporters that withdrew from participation from the review, and 3) exporters that did not overcome the presumption of government control (including Huayuan⁴¹). Consequently, we determined that, pursuant to sections 776(a)(2)(A) and 776(b) of the Act, the use of facts available with adverse inferences was warranted.

The Department notes that no interested parties have challenged the Department's preliminary application of AFA to the PRC-wide entity. Thus, the Department continues to determine that, because the PRC-wide entity (which also includes Huayuan) did not respond to our request for information, the PRC-wide entity has failed to cooperate to the best of its ability. Therefore, pursuant to section 776(b) of the Act, the Department finds that, in selecting from among the facts available, an adverse inference is appropriate for the PRC-wide entity. As AFA, the Department is applying the AFA rate of 235.00 percent to the PRC-wide entity, which is the highest rate alleged in the Petition⁴² as adjusted by the Department for the initiation.⁴³ This rate has been corroborated within the meaning of section 776(c) of the Act, as fully discussed in the Federal Register notice.

The Department agrees with Huayuan that we did not assign AFA with respect to Huayuan individually. In the Preliminary Determination, the Department found Huayuan to be part of the PRC-wide entity.⁴⁴ Thus, the Department did not assign Huayuan an individual separate rate that was based on AFA. Rather, the Department applied AFA to the entire PRC-wide entity, which includes Huayuan. We find the CIT's opinion on this issue instructive. As articulated by the CIT:

there is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company. It is not directly analogous to the process used in a market economy, where there is no countrywide rate. Here, the rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.⁴⁵

The CIT further stated that the respondent, CPZ, "was not assigned an AFA rate specific to the company itself; it was assigned the PRC-wide entity rate {which was} based on total AFA."⁴⁶ Lastly, the CIT noted that "it is not necessary to corroborate the PRC-wide entity rate as to an individual company. The rate must only be generally corroborated as to the PRC-wide entity."⁴⁷

Consequently, by virtue of being a part of the PRC-wide entity, Huayuan and its affiliates are also subject to the rate that the PRC-wide entity has merited. In this case, the Department found

⁴¹ See Comment 1A above; see also Preliminary Determination, 76 FR at 68413.

⁴² See Petitions for the Imposition of Antidumping Duties on Galvanized Steel Wire from Mexico and Antidumping and Countervailing Duties on Galvanized Steel Wire from the People's Republic of China filed on March 31, 2011 (the "Petition").

⁴³ See Galvanized Steel Wire from the People's Republic of China and Mexico: Initiation of Antidumping Duty Investigations, 76 FR 23548, 23552 (April 27, 2011) ("Initiation Notice").

⁴⁴ See Preliminary Determination, 76 FR at 68413.

⁴⁵ See Peer Bearing Company - Changshan v. United States, 587 F. Supp. 2d 1319 (CIT 2008).

⁴⁶ See id., 587 F. Supp. 2d 1319, at 1327-1328(emphasis added).

⁴⁷ See id.

it appropriate to assign to the PRC-wide entity a rate based entirely on AFA. Thus, Huayuan and its affiliates, as part of the PRC-wide entity, also received this rate, which is based on AFA.

C. Whether the Department Failed to Meet the Statutory Obligation to Verify Huayuan

Huayuan's Case Brief

- Both the statute and the Department's regulations direct the Department to verify the information on the record of the case before issuing a final determination in an investigation. Here, the Department refused to meet its obligations in refusing to verify the Huayuan companies.
- No exceptions are provided in the statute for the requirement of verifying all such information in an investigation. Furthermore, the Department's regulations, in 19 CFR 351.307(b)(i) also states that the Department shall verify all information that it relies on for the final determination, without exception.

No other interested parties commented on this issue.

Department's Position:

While the Department does not dispute the statute directing the Department to verify information relied upon in an investigation, we disagree with Huayuan's argument that the Department was required to verify a company we had determined to be part of the PRC-wide entity to which we applied AFA.

Section 782(i) of the Act directs the Department to verify:

all information relied upon in making (1) a final determination in an investigation, (2) a revocation under section 751(d), and (3) a final determination in a review under section 751(a), if (A) verification is timely requested by an interested party as defined in section 771(9)(C), (D), (E), (F), or (G), and (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 751(a) of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.⁴⁸

The decision not to verify was not specific to a single company in the PRC-wide entity. The decision not to verify is based on the failure of the PRC-wide entity, as a whole, to cooperate, and to submit and permit verification of complete questionnaire responses for all of its U.S. sales and production of the subject merchandise. The Department did not verify and is not required to verify Huayuan's data because Huayuan has been found to be a part of the PRC-wide entity, an uncooperative party whose rate is based on total AFA. As noted above, we applied AFA to the PRC-wide entity because it: withdrew participation from the proceeding, was unresponsive to the Department's request for information, and refused to allow verification of some of the submitted information. In order for the Department to conduct verification, the PRC-wide entity had to have been able to provide a complete response for all of its production and sales and, here, there were many companies that were found to be part of the PRC entity that either: withdrew from participation, did not respond altogether to our request for information, or refused verification. The Department is not required to verify the scant amount of information provided

⁴⁸ See section 782(i) of the Act.

by the PRC-wide entity because the PRC-wide entity's response was so deficient that it warranted a rate based entirely on facts available.

The Department's verification obligations have been clarified in decisions made by the CIT, to which we have consistently cited in antidumping duty ("AD") duty proceedings.⁴⁹ Specifically, the CIT has determined that "Commerce was not required to use or verify all information it received from {the respondents}. It is enough for Commerce to receive and verify sufficient information to reasonably and properly make its determination."⁵⁰ The CIT has stated that "verification is an audit process that selectively tests the accuracy and completeness of a respondent's submission."⁵¹ The court has also explained that "{a} verification is a spot check and is not intended to be an exhaustive examination of the respondent's business. {Commerce} has considerable latitude in picking and choosing which items it will examine in detail."⁵² Similarly, in another case, the court found that "Congress has afforded Commerce a degree of latitude in implementing its verification procedures."⁵³

Thus, a prerequisite to verification in an investigation is that a selected mandatory respondent submit a substantially complete questionnaire response. If the respondent does not provide the complete questionnaire response, and the rate is based on facts available, it is clear that verification of some portion of the information required (on which the Department cannot rely) is meaningless. The Department is not required to verify the portion of the information a respondent may self-select for verification. Doing so would allow for the PRC-wide entity to potentially manipulate AD results by selectively providing data on the record and dictating what data can be verified. Finally, notwithstanding the cancelled verification of a company placed within the PRC-wide entity, Huayuan had multiple opportunities during the course of the proceeding to provide actual evidence, rather than written arguments, that there was no government control vis a vis the key individual positions within other entities while in control of Huayuan, as verification would not have been the appropriate time submit new information anyway.

Comment 2: Whether the Department Should Assign AFA to Tianjin Honbase Machinery Manufactory Co., Ltd. ("Tianjin Honbase") and to Anhui Bao Zhang Metal Products Co., Ltd. ("Baozhang")

Petitioners' Case Brief:

- Tianjin Honbase and Baozhang refused to allow verification and prevented the Department from making a determination based on information previously submitted.
- Tianjin Honbase and Baozhang impeded this investigation by failing to cooperate to the best of their ability.

⁴⁹ See, e.g., First Administrative Review of Steel Wire Garment Hangers From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 27994 (May 13, 2011) and accompanying Issues and Decision Memorandum at Comment 4E; Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of an Order in Part, 74 FR 44819 (August 31, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

⁵⁰ See Hercules, Inc. v. United States, 673 F. Supp. 454, 470 (CIT 1987).

⁵¹ See Floral Trade Council v. United States, 822 F. Supp. 766, 771 (CIT 1993) (emphasis added).

⁵² See NTN Bearing Corp. of Am. v. United States, 186 F. Supp. 2d 1257, 1296 (CIT 2002).

⁵³ See PPG Indus. Inc. v. United States, 781 F. Supp. 781, 787 (CIT 1991).

- The Department should assign the AFA rate of 235 percent, the highest rate from the Petition.
- In Circular Welded Austenitic Stainless Pressure Pipe⁵⁴ and Circular Welded Carbon Quality Steel Pipe,⁵⁵ the Department was faced with similar situations and based the respondents' margins on an adverse inference, noting that the Department selects as AFA the higher of: 1) the highest initiation margin; or 2) the highest calculated rate for a respondent.

No other interested parties commented on this issue.

Department's Position:

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act allows the Department, subject to section 782(e) of the Act, to disregard all, or part, of deficient or untimely responses from a respondent. Pursuant to 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. Section 776(b) of the Act authorizes the Department to use an adverse inference with respect to an interested party if the Department finds that the party failed to cooperate by not acting to the best of its ability to comply with a request for information.⁵⁶

On November 4, 2011, Baozhang notified the Department that it elected not to participate in the scheduled verification.⁵⁷ By withdrawing from verification, Baozhang prevented the Department from verifying the information that it had submitted and significantly impeded the proceeding. Thus, pursuant to sections 776 (a)(2)(C) and (D) of the Act, we have determined to base Baozhang's dumping margin on facts otherwise available.⁵⁸ Additionally, on November 9, 2011, Tianjin Honbase notified the Department that it would not participate in any scheduled verifications.⁵⁹ By withdrawing from verification, Baozhang and Tianjin Honbase prevented the Department from verifying the information that had been submitted and significantly impeded

⁵⁴ See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 4913, 4915 (January 28, 2009) ("Circular Welded Austenitic Stainless Pressure Pipe").

⁵⁵ See Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 14514, 14515 (March 31, 2009) ("Circular Welded Carbon Quality Steel Pipe").

⁵⁶ See, e.g., Circular Welded Austenitic Stainless Pressure Pipe and accompanying Issues and Decisions Memorandum at Comment 1; see also Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242 (CIT 2004) (approving use of AFA when the respondent refused to participate in verification).

⁵⁷ See Letter to the Department from Baozhang; Re: Letter Electing Not To Participate in Verification, dated November 4, 2011.

⁵⁸ In this case, sections 782 (d) and (e) of the Act do not require the Department to consider the information that Baozhang submitted to the Department because the information could not be verified.

⁵⁹ See Letter to the Department from Honbase; Re: Galvanized Steel Wire from the People's Republic of China, dated November 9, 2011.

the proceeding. Thus, pursuant to sections 776 (a)(2)(C) and (D) of the Act, we have determined to base Baozhang's and Tianjin Honbase's dumping margins on facts otherwise available.⁶⁰

Furthermore, by withdrawing from verification, we determine that Baozhang and Tianjin Honbase failed to act to the best of their ability to allow the Department to verify the accuracy of the information that had been submitted to the Department. Therefore, pursuant to section 776(b) of the Act, we have determined to use an adverse inference when selecting from among the facts otherwise available.

In this case, because Baozhang and Tianjin Honbase refused to allow verification of their questionnaire responses including separate rates information, as AFA we have determined that Baozhang and Tianjin Honbase are both part of the PRC-wide entity, and we have applied the AFA rate of 235 percent, the highest rate in the Initiation Notice,⁶¹ as noted above.

Comment 3: Whether Hobby Wire is Within the Scope of the Investigation

Qingdao Ant Hardware Manufacturing Company Ltd.'s ("AHM") Case Brief:

- The Petition describes galvanized steel wire as an intermediate product used to make a multitude of wire products, whereas hobby wire is an end-use product made from the intermediate product described in the Petition.
- Physical samples submitted by AHM indicate that its hobby wire is packaged in hang cards that contain directions for use and which are end-use, retail packaged goods for consumers' personal and home/garden use.
- While the hobby wire sold by AHM weighs between .08 and 1.35 kilogram ("kg"), the industrial galvanized steel wire described in the Petition weighs between 25 and 500 kg.
- While Petitioners have acknowledged that hobby wire should be excluded from the scope, limiting the scope exclusion to galvanized steel wire of 15 feet or less is arbitrary and without a logical foundation.
- The only evidence produced by Petitioners to support the contention that hobby wire produced in the United States appears to be limited to 15 feet or less was a photo of a single product packaged in lengths of 15 feet.
- A Diversified Products⁶² analysis leads to the conclusion that AHM's hobby wire should be excluded from the scope.
- The Department should exclude from the investigation "galvanized steel wire, imported for sale and sold in retail packaging, where the pre-packaged length is no more than 300 feet, regardless of the diameter or gauge of the wire."

Petitioners' Rebuttal Brief:

- The first step in making a scope determination is whether the scope language is ambiguous and open to interpretation; only then will the Department turn to the history of the proceeding, including the description of the merchandise in the Petition and the Diversified Products criteria.
- The language of the scope is unambiguous that hobby wire – which is galvanized steel wire – is subject to this investigation unless it is 15 feet or less.

⁶⁰ In this case, sections 782 (d) and (e) of the Act do not require the Department to consider the information that Tianjin Honbase submitted to the Department because the information could not be verified.

⁶¹ See Initiation Notice.

⁶² See Diversified Products Corporation v. United States, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).

Department's Position:

Sections 701 and 731 of the Act require the Department to define the scope of merchandise subject to investigation in each AD and countervailing duty ("CVD") investigation. In deciding whether to initiate an investigation and whether an order should be imposed, the statute requires the Department to make determinations with respect to a class or kind of foreign merchandise.⁶³ If the Department initiates an investigation based upon a petition, it will continue to review the scope of the merchandise described in the petition to determine the scope of the final order.⁶⁴ The Department's legal authority to determine the scope of its orders is well-established.⁶⁵

When a question arises as to whether a particular product is within the scope of an investigation, the Department determines whether the petition covers that product. If the petition is ambiguous, the Department then examines additional documentary evidence.⁶⁶ If the scope is still unclear, the Department looks to other criteria, including the Diversified Products criteria.⁶⁷ Here, the clear language of the scope of the investigation does not necessitate an analysis beyond the clear language of the scope, as it pertains to AHM's hobby wire.

AHM's hobby wire is sold in coils of solid, circular cross section, is produced in the manner described in the scope, and is sold in diameters that fall within the scope description.⁶⁸ That is, based on the record, AHM's hobby wire, in lengths of more than 15 feet, falls within the description of the merchandise covered by the scope of the investigation.⁶⁹

While AHM argues that language in the Petition precludes the inclusion of end-use products, such as its hobby wire, from the scope of this investigation, we find AHM's argument regarding consumer use irrelevant, as the galvanized wire under investigation is an intermediate product, as stated in the Petition,⁷⁰ including AHM's hobby wire. Furthermore, Petitioners have indicated that "galvanized wire... {including AHM's hobby wire} is precisely the kind of wire which Petitioners intended to be covered by these investigations."⁷¹

Consequently, we do not find AHM's arguments regarding "consumer use" warrant a departure from our Preliminary Determination, in which we stated that "the material described by AHM is subject to the scope of this investigation and constitutes a product for which Petitioners are seeking relief."⁷² Therefore, we continue to find that hobby wire, which is galvanized steel wire, in lengths of more than 15 feet are properly included in the scope of this investigation.

⁶³ See sections 701 and 731 of the Act.

⁶⁴ See 19 CFR 351.202(b)(5).

⁶⁵ See, e.g., Mitsubishi Elec. Corp. v. United States, 16 CIT 730, 802 F. Supp. 455 (1992)

⁶⁶ See Minebea Co., Ltd. v. United States, 16 CIT 20, 782 F. Supp. 117 (1992)

⁶⁷ See Diversified Products, 6 CIT 155, 162, 572 F. Supp. 883, 889.

⁶⁸ See Petition at I-6-7.

⁶⁹ See AHM Case Brief dated December 9, 2011, at Attachment 1.

⁷⁰ See Petition at I-9.

⁷¹ See Petitioners' Submission on Scope Comments, dated June 22, 2011, at 3. Specifically, Petitioners noted that "hobby wire" in lengths of 300 feet could readily be used in fencing applications, for suspending ceilings, and for other applications of a similar nature."

⁷² See Preliminary Determination, 76 FR at 68409.

Comment 4: Surrogate Country Selection

Huayuan's Case Brief:

- The Department's decision on surrogate country selection is unsupported by the record, without any explanation as to why it used Thai data.
- Based on the record evidence, the Philippine data is superior to the Thai data for calculating respondents' normal value ("NV") because it: 1) offers financial statements from companies that are identical producers of the subject merchandise; 2) allows the Department to meet its statutory obligation of utilizing prices or costs in the NV calculation for respondents' energy and other utilities consumed; and 3) the Thai wire rod data do not match respondents' reported wire rod inputs and require manipulations that ultimately result in a low carbon/high carbon wire rod price. Such low carbon/high carbon prices are at same level of detail reported by the Philippine import statistics, yet the Philippine data do not require manipulation for the data to "fit."

Petitioners' Rebuttal Brief:

- The issue of appropriate surrogate country is moot because all AD duty margins for the final determination should be based on the Petition rates, rather than rates calculated using surrogate values. However, should there be any dumping margin calculations for the final determination, the record evidence still supports the Department's selection of Thailand as the surrogate country because: 1) Thailand was an exporter of identical merchandise — i.e., galvanized steel wire — during 2010, whereas the Philippines was not; 2) the Philippine value for steel wire rod is so aberrationally low that it is unsuitable for use as surrogate data; and 3) the suitability and integrity of the Philippine surrogate data is further challenged because the Philippine wire rod value is virtually identical to the Philippine value for ferrous waste and scrap (\$0.532 per kilogram compared with \$0.523).

Department's Position:

Because all the companies originally selected for individual examination have been found to be part of the PRC-wide entity, which has received the AFA rate, we find that an additional discussion regarding the appropriate surrogate country is unnecessary because there are no calculated margins for the final determination that require surrogate values from a surrogate country.

Comment 5: Whether Double-Remedies Have Been Applied

Baozhang's Case Brief:

- The CIT has prohibited the dual imposition of AD and CVD methodologies in GPX I and GPX II.⁷³ Specifically, the CIT held that it was unreasonable for the Department to ignore the double-remedy problem due to imprecision in analyzing the problem or the lack of a statutory provision to correct the problem. Further, the Department was unable to address the CIT's concerns on remand.
- The March 2011 WTO Appellate Body decision found that the exact methodology the Department seeks to employ in this investigation is contrary to the United States' WTO obligations.

⁷³ See GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d at 1251 (CIT 2009) ("GPX I"); see also GPX Int'l Tire Corp. v. United States, 715 F. Supp. 2d 1337, 1354 (CIT 2010) ("GPX II").

- The statute specifically prohibits the application of double-remedies or double-counting. The CIT's decision in Wheatland Tube affirms the Department's finding that deducting Section 201 safeguard duties from the export price ("EP") would result in collecting a double-remedy.⁷⁴
- In U.S. Steel, the CIT determined that deducting a CVD from the U.S. price used to calculate the AD margin would result in a double-remedy for the domestic industry.⁷⁵
- GPXI, GPX II, Wheatland Tube 2007, and U.S. Steel all demonstrate that concerns related to double-counting or double-remedy can suffice as the sole basis for the Department's interpretation of the statute.
- The Department must take into account whether the application of CVD duties will result in double-counting or double-remedy, and if it does result in any level of double-remedy or double-counting that cannot be adjusted, the Department cannot reasonably apply CVD duties.
- The self-correcting mechanisms that avoid double-remedies for domestic subsidies in simultaneous AD and CVD cases against market economy ("ME") countries are not present in NME cases. Because the NME NV calculation uses subsidy-free surrogate values from a third-country NV is not reduced by the amount of the domestic subsidy.
- The Department is wrong to conclude that export subsidies always affect EPs whereas domestic subsidies rarely do.
- There is no economic justification for the Department's conclusion that a producer that benefits from domestic subsidies will always choose to keep all of the benefits rather than pass some of the benefit through to its customer in the form of lower prices. It does not make economic sense to assume zero pass-through for domestic subsidies and complete pass-through for export subsidies.
- In Uranium from France⁷⁶ the Department stated that because domestic subsidies lower prices in both the United States and the domestic market of the exporting country equally they have no effect on the measurement of any dumping that might also occur. This conclusion cannot be reconciled with the Department's statement in subsequent cases that "we find the assertion that the AD law embodies the presumption that domestic subsidies automatically lower price, pro rata, to be baseless."
- The statute requires the Department to assess a CVD "equal to the amount of the net countervailable subsidy" which, by definition, assumes complete pass-through. Therefore, the statute requires the Department to assume complete pass-through and assess the full duty. Further, the statute does not distinguish between export and domestic subsidies.
- The Department's conclusion that a double-remedy would not occur in all cases in which both NME AD and CVD duties are applied is contrary to other experts' conclusions. Specifically, the United States Government Accounting Office ("GAO") has stated that there is substantial potential for double-counting of domestic subsidies if the Department continues to apply CVD duties to the PRC while using the current NME methodology to determine AD duties.⁷⁷

⁷⁴ See Wheatland Tube Co. v. United States, 495 F.3d 1355, 1358 (CAFC 2007) ("Wheatland Tube 2007").

⁷⁵ See U.S. Steel Group v. United States, 225 F.3d 1284, 1285 (CAFC 2000) ("U.S. Steel").

⁷⁶ See Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France, 69 FR 46501 (August 3, 2004) ("Uranium from France").

⁷⁷ See U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties, GAO-05-474, at 27-28 (June 2005).

- The Department's argument in PRC Tires 2011⁷⁸ that there may be subsidies that are not captured by NME AD methodology is factually inaccurate.
- The objective of the NME AD methodology is to calculate a margin based on subsidy-free, market-determined costs of production. Additionally, CVDs are intended to offset the unfair competitive advantage producers would otherwise enjoy from export subsidies paid by their government.
- The Department must not address the same subsidies through the application of two different duties, therefore, the Department must take steps to ensure that the NME AD methodology remedy does not counter the same subsidies that the importing country offsets through the remedy of CVDs.

Petitioners' Rebuttal Brief:

- The Department has previously analyzed all of Baozhang's arguments in recent AD and countervailing duty investigations and correctly concluded that the current application of its CVD and AD methodology with respect to NME countries does not result in a double-remedy.⁷⁹
- The Department should reject Baozhang's claims of double-counting in this investigation for the same reasons articulated in previous investigations.

Department's Position:

The Department disagrees with Baozhang that concurrent application of CVD and AD NME methodologies results in a double-remedy. While the Act does not expressly address the issue of concurrent application of CVD law and AD NME methodology with respect to domestic subsidies, section 772(c)(1)(C) of the Act is instructive. Section 772(c)(1)(C) of the Act provides for an adjustment to the AD calculation to offset CVDs based on export subsidies. Section 772(c)(1)(C) of the Act, combined with the absence of any such corresponding adjustment to offset domestic subsidies, strongly suggests that Congress did not intend for any adjustment to offset domestic subsidies.⁸⁰

⁷⁸ See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 22871 (April 25, 2011) and accompanying Issues and Decision Memorandum at Comment 13 ("PRC Tires 2011").

⁷⁹ See, e.g., Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order, 76 FR 77772 (December 14, 2011) and accompanying Issues and Decision Memorandum at Comment 4; Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) and accompanying Issues and Decision Memorandum at Comment 5.

⁸⁰ See Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-177 (USSC 1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (USSC 1975) ("When Congress wished to provide a remedy . . . it had little trouble in doing so expressly."); Franklin National Bank v. New York, 347 U.S. at 373, 378 (USSC 1954) (finding "no indication that Congress intended to make this phrase of national banking subject to local restrictions, as it has done by express language in several other instances"); Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (USSC 1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of clean up costs, and . . . the language used to define the remedies under RCRA does not provide that remedy"); FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 302 (USSC 2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); Dole Food Co. v. Patrickson, 538 U.S. 468, (Congress knows how to refer to an "owner" "in other than the formal sense," and did not do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality"); Whitfield v. United States, 125 S. Ct. 687, 692 (USSC 2005) at 216 (noting that "Congress has included an explicit

AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value. With the exception of section 772(c)(1)(C) of the Act, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

With respect to section 772(c)(1)(C) of the Act, the legislative history of the export subsidy adjustment establishes only that Congress considered it to satisfy the obligations of the United States under Article VI: 5 of the GATT ("General Agreement on Tariffs and Trade"). The legislative history does not suggest specific assumptions about whether foreign government subsidies lower prices in the United States, *i.e.*, contribute to dumping and, in fact, is not solely concerned with the effects of subsidies in the United States.⁸¹ Thus, although the Act requires a full adjustment of AD duties for CVDs based on export subsidies in all AD proceedings, it provides no basis for concluding that Congress' action was based on any specific assumptions about the effect of subsidies upon EPs. It may be simply that Congress recognized the complexity of the issues that would have to be resolved to provide anything less than a complete offset for export subsidies, and simply opted for a full offset to avoid those potential problems. Whether Congress considered the economic assumptions that might have been behind the failure of the GATT contracting parties to address domestic subsidies in Article VI, Section 5 of the GATT is not clear. In any event, all that the contracting parties may have assumed was that domestic subsidies had a symmetrical effect upon export and domestic prices. This presumed symmetrical impact may have been a *pro rata* or *de minimis* reduction in these prices. Thus, it is not correct to conclude that Congress assumed that the GATT contracting parties assumed that domestic subsidies lower EP, *pro rata*, still less that Congress built any assumptions about the price effects of domestic subsidies into the AD law.

Baozhang argues that under the NME methodology, the Department compares the EP, presumably reduced by the domestic subsidies, to a NV that has been calculated using non-subsidized surrogate values. Also, Baozhang contends that there is a safeguard against double-counting inherent in the ME methodology that is missing in the NME methodology, *i.e.*, section 772 of the Act.

The argument that domestic subsidies inflate dumping margins by lowering EP assumes that domestic subsidies in NME countries do not affect NV. However, while NME subsidies may not affect the factor values used to calculate NV in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the subject merchandise. For example, a domestic subsidy in an NME country may enable a respondent to purchase more efficient equipment in turn lowering its consumption of labor, raw materials, or energy. When the surrogate values are multiplied by the NME producer's lower factor

overt-act requirement in at least 22 other current conspiracy statutes" but has not done so in the provision governing conspiracy to commit money laundering).

⁸¹ See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 870 (1994) ("SAA").

quantities, they result in lower NVs and, hence, lower dumping margins.⁸² Any reduction in factor usage by NME producers would reduce NV in a second manner, because the final factor values are also used to calculate the amounts for selling, general, and administrative (“SG&A”) expenses, and profit⁸³ that are additional components of NV. Baozhang has argued that this position is theoretical and inaccurate because any new equipment purchases would result in a higher SG&A expenses ratio. The Department disagrees because applying the NME methodology is a complex calculation that takes into consideration many factors, such as the cost of capital and administrative expenses. Hence, additional equipment purchases do not necessarily result in a higher SG&A expenses ratio as there are other factors which could impact the calculations.

Moreover, in determining NV in NME cases, the Department does not exclusively use factor quantities in the NMEs valued in the surrogate, ME country. Some factor values are based on the prices of imported inputs (priced in the currency of the country from which the inputs were obtained or in U.S. dollars).⁸⁴ Given that the input suppliers in these countries are often competing with PRC suppliers of those same inputs, it is fair to conclude that those prices are influenced by subsidies in the PRC.

Finally, in some cases, the NME exports of the subject merchandise will account for a significant share of the world market, enough to influence world market prices. In such cases, particularly where the industry is export oriented or has excess capacity (as is often observed in the PRC), subsidies could increase output and exports from the PRC which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets which, in turn, would reduce the profit the Department derives from their financial statements, (used as surrogates for the PRC producers) and, thus, reduce NV.

Baozhang also argues that the AD NME methodology provides a remedy for any and all countervailable subsidies such that concurrent application of CVDs is necessarily duplicative.⁸⁵ The general premise of Baozhang’s argument is that concurrent application of AD ME methodology and CVD law does not create automatic double remedies in ME proceedings because domestic subsidies automatically lower NV, and hence the dumping margins, pro rata. The AD NME methodology, on the other hand, produces a NV that is not affected by subsidies in any way, so that it necessarily exceeds what would have been the ME dumping margin by the full amount of the subsidy, thus creating a double-remedy, which the statute requires the Department to offset.

The Department disagrees with this argument. There are several reasons why subsidies in ME cases would not necessarily lower the NV calculated by the Department, pro rata, below what it would have been absent any subsidies. Subsidies can be accompanied with conditions attached that reduce the cost savings to the recipient below the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimal, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored sources, and so forth. Even if subsidies are

⁸² See section 773(c)(3) of the Act.

⁸³ See, e.g., Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 366 F. Supp. 2d 1277 (CIT 2005); Dorbest Limited, et al. v. United States, 462 F. Supp. 2d 1300-01 (CIT 2006).

⁸⁴ See Preliminary Determination, 76 FR at 68418.

⁸⁵ See Baozhang Case Brief at 8.

unaccompanied by such requirements, it is not necessarily the case that they will contribute to a lower cost of production. For example, subsidies could be paid out as dividends, used to increase executive pay, or could also be wasted in any number of ways.

Further, the Act provides that NV in ME cases is to be based on home market prices, where possible. Where NV is based on home market prices, the relationship of subsidies to NV becomes yet more tenuous. Not only is the extent to which the subsidies will affect costs uncertain but, even to the extent that subsidies may lower costs, the extent to which the producer will pass these cost savings through to home market or third-country prices is uncertain. Basic economic principles indicate that the prices are a function of the supply and demand for the product in the relevant market, so that any cost savings will be reflected in prices only indirectly.

Finally, to the extent that domestic subsidies lower NV in ME cases, they may lower EP commensurately, so that the dumping margins may not change. Thus, it is not safe to conclude that subsidies in MEs automatically reduce dumping margins, still less that they automatically reduce dumping margins, pro rata.

In Kitchen Racks from the PRC⁸⁶ and Tires LTFV 2008,⁸⁷ the Department did not deduct domestic CVDs from U.S. prices because this would have resulted in the collection of total AD duties and CVDs that would have exceeded both independent remedies in full. The CAFC has upheld this position.⁸⁸ Similarly, the Department's refusal to treat AD duties and safeguard duties as a cost in AD calculations reflects the Department's effort to collect these distinct remedies in full, but no more.

The Department has explained that the effect of domestic subsidies upon EPs depends on many factors (e.g., the supply and demand for the product on the world market, and the exporting countries' share of the world market), and is, therefore, speculative.⁸⁹ Thus, the Department has determined that domestic subsidies do not inevitably reduce EPs, pro rata.⁹⁰

In considering the impact of domestic subsidies upon EPs, the form of the subsidy is important because, like export subsidies, some domestic subsidies give domestic producers a greater incentive to increase production than others. A production subsidy (e.g., raw materials at reduced prices) reduces the unit cost of producing that merchandise and, therefore, increases the producer's profit on sales of that merchandise. This may give the producer a commercial incentive to increase production of that merchandise. In an NME, however, it is not necessarily the case that economic decisions are made on the basis of such market forces. In any event, more general subsidies (e.g., general grants or debt forgiveness) would not provide that direct incentive. A foreign producer might use a general subsidy to modernize its plant, pay higher

⁸⁶ See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2009) and accompanying Issues and Decision Memorandum at Comment 1 ("Kitchen Racks from the PRC").

⁸⁷ See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 2 ("Tires LTFV 2008").

⁸⁸ See Wheatland Tube 2007 (reversing Wheatland Tube v. United States, 414 F. Supp. 2d at 1271 (CIT 2006)).

⁸⁹ See Tires LTFV 2008 at Comment 2.

⁹⁰ See World Trade Organization, World Trade Report 2006; see also Alex F. McCall and Timothy E. Jostling, Agricultural Policies and World Markets, MacMillan Pub. Co., 1985.

dividends, fund research and development, clean up the environment, make severance payments, increase the production of some other product, or waste the money. Consequently, this type of domestic subsidy will not necessarily result in any increase in production and, therefore, will not necessarily result in any reduction in EP, still less an automatic pro rata reduction.

Even if a producer attempted to respond to a domestic subsidy exclusively by increasing production, it might not be able to do so, at least in the short or medium term. Various constraints (e.g., limits on the supply of raw materials, energy, or transportation) might limit its ability to do so. Moreover, capacity expansion is time-consuming. Thus, it would be incorrect to claim that domestic subsidies automatically result in increased production.

Additionally, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is an uncertainty that this increase would result in lower EP. For example, if world market prices are increasing, it is an unrealistic assumption that an NME producer that receives a domestic subsidy will reduce its EP by the full amount of the subsidy, as allocated under the Department's CVD methodology. Increased production and exports will tend to lower EP over time, but this reduction will be neither automatic nor necessarily pro rata. For example, in previous cases, the ITC has determined that some PRC producers raised their prices in line with world market prices, despite having received substantial subsidies.⁹¹ Increased export sales will reduce the price of the subject merchandise on world markets only to the extent that the producer or producers in question supply a substantial share of the world market, so that the additional production will drive down prices in that market. Even this will take time and will not occur if other producers in the market reduce production to avoid a price war.

Congress established two separate remedies for what it evidently regards as two separate unfair trade practices. The only point at which the Act requires the Department to reconcile these separate remedies is in the adjustment of AD duties to offset export subsidies. Because neither AD nor CVD duties are concerned with economic distortion, as such, but are simply remedial duties calculated according to the detailed specifications of the Act, it follows that no overall economic distortion cap for concurrent proceedings can be distilled from the Act.

Baozhang's reference to Uranium from France⁹² is misplaced. The Department's statement that, "domestic subsidies presumably lower the price of the subject merchandise in the home and the U.S. markets" does not stand for the firm proposition that domestic subsidies are always passed through into EP, pro rata. This is no more than a presumption, and a very limited one, at that. In Uranium from France, the Department noted that not all domestic subsidies are presumed to be fully passed through into domestic and EP, but that the effect of domestic subsidies on the price in each market presumably was the same. For example, the reductions in price could be one percent of the subsidy in each market.

The Department also disagrees with Baozhang's characterization of the Department's previous practice with respect to NME countries and, by implication, Georgetown Steel.⁹³ Specifically, it

⁹¹ See Tires LTFV 2008 at Comment 2; see also ITC Final Report (08/2008); see also Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, ITC Preliminary Report, (Publ. 3938 July 2007), at pages V-12 ((Table V-3) V-14 (Table V-5), and V-19.

⁹² See Uranium from France, 69 FR at 46501.

⁹³ See Georgetown Steel Corp. v. United States, 801 F.2d at 1310 (CAFC 1986) ("Georgetown Steel").

is not the case that the Department determined, in Georgetown Steel, not to apply CVD law concurrently with the AD NME methodology because of distortions. In fact, the Department declined to apply the CVD law to the Soviet Bloc countries in the mid-1980s because of the difficulties involved in identifying and measuring subsidies in the context of those command-and-control economies, at that time. In the underlying Georgetown Steel proceedings, the Department determined that the concept of a subsidy had no meaning in an economy that had no markets and in which activity was controlled according to central plans.⁹⁴

The CAFC noted the broad discretion due the Department in determining what constituted a subsidy, then called a “bounty” or “grant” by the statute, and held that:

We cannot say that the administrations’ conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law, or an abuse of discretion.⁹⁵

As the CAFC stated, even if one were to label these incentives as a subsidy, in the most liberal sense of the term, the governments of these NMEs would in effect be subsidizing themselves.⁹⁶ Thus, Georgetown Steel did not hold that the CVD law could never be applied to exports from an NME country. It simply upheld the Department’s determination that it could not identify a “bounty or grant” in the conditions of the Soviet Bloc that were before it. Because the Department’s prior practice of not applying the CVD law to NME countries was not based on the theory that the NME AD methodology already remedied any domestic subsidies in NME countries, the Department’s current practice of applying the CVD law to exports from the PRC remains consistent with our earlier practice.

Also, Boazhang’s reliance on GPX I and GPX II, is misplaced. The GPX II decision is not final, as a final order has not been issued by the CIT, nor have all appellate rights been exhausted. Even if reliance on GPX I and GPX II were not misplaced, GPX I does not support the positions attributed to it by Baozhang. GPX I did not find a double-remedy necessarily occurs through concurrent application of the CVD law and AD NME methodology. Rather, GPX I held that the “potential” for such double-counting may exist. The finding of a “potential” for double-counting in the GPX I decision does not mean that the Department must make an adjustment to its dumping calculations in this AD investigation. The SAA places the burden on the respondent to demonstrate the appropriateness of any adjustment that benefits the respondent.⁹⁷ In this case, Baozhang makes failed attempts to demonstrate that there is actual double-counting for electricity when the Department preliminarily determined that electricity⁹⁸ was provided on a less-than-adequate-remuneration basis in the companion CVD investigation. Baozhang does not provide any actual costs or prices but instead makes general theoretical arguments about the impact of this subsidy. Therefore, Baozhang has not provided any evidence demonstrating how

⁹⁴ See *id.*

⁹⁵ See *id.*, at 1318.

⁹⁶ See *id.*, at 1316.

⁹⁷ See SAA at 829; 19 CFR 351.401(b)(1) (“The interested party that is in possession of relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment.”); Fujitsu General Limited v. United States, 88 F.3d at 1034 (CAFC 1996) (explaining that a party seeking an adjustment bears the burden of proving the entitlement to the adjustment).

⁹⁸ See Baozhang Case Brief at 8-9.

the CVD the Department found on electricity in the companion CVD case lowered NV in this AD investigation.

Baozhang cites to the Appellate Body Report (WTO 2011) as support that the WTO has determined that the application of CVD to the PRC while using NME methodology is contrary to the United States' WTO obligations. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.⁹⁹ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.¹⁰⁰ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.¹⁰¹ Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.¹⁰² For this reason, the Appellate Body Report (WTO 2011) does not establish whether the Department's application of AD NME methodology and CVD in concurrent investigations results in double remedies is consistent with U.S. law.

Lastly, contrary to its assertion, the GAO Report study cited by Baozhang does not create any legitimate doubts about the Department's interpretation of the Act. While, the GAO Report indicates that the Department has decided to not apply CVD law to NME firms and that this decision has been affirmed in Georgetown Steel,¹⁰³ as an initial matter, we emphasize that the GAO does not administer AD and CVD laws and has no expertise in AD and/or CVD calculations. As explained supra, the Department has not determined to abstain from applying CVD law concurrently with the AD NME methodology. More importantly, the GAO did not decisively conclude that double-counting occurs when CVD and AD NME methodology is applied. Instead, the GAO Report only states that double-counting may occur.¹⁰⁴

Comment 6: Whether the NME Separate Rate Methodology is Contrary to Law and Should Be Eliminated

Huayuan's Case Brief:

- The separate rates approach should be eliminated as contrary to law because the presumptions underlying it are no longer valid.
- The Department's findings in the 2007 Georgetown Memorandum¹⁰⁵ found that the "current nature of China's economy does not give rise to the same issues that were litigated in

⁹⁹ See Uruguay Round Agreements Act ("URAA"), Pub L. No. 103-465, 108 Stat. at 4809 (1994) affirmed in Corus Staal BV v. United States, 395 F.3d at 1347-49 (CAFC 2005), cert. denied 126 S. Ct. at 1023, 163 L. Ed. 2d at 853 (Jan. 9, 2006); accord Corus Staal BV v. United States, 502 F.3d at 1370, 1375 (CAFC 2007); NSK Ltd. v. United States, 510 F.3d at 1375 (CAFC 2007); and PRC Tires 2011 at Comment 13.

¹⁰⁰ See 19 USC 3538.

¹⁰¹ See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

¹⁰² See 19 USC 3533(g); see, e.g., Antidumping Proceedings (December 27, 2006). With respect to respondent's argument that the Department's actions are inconsistent with Article 19.3 of the SCM Agreement, the Department disagrees for the reasons discussed above and further notes that a purported inconsistency with the SCM Agreement is not a permitted basis on which to challenge the Department's actions under US law. See 19 USC 3512(c)(1).

¹⁰³ See GAO Report at 8.

¹⁰⁴ See *id.*, at 17.

¹⁰⁵ See, e.g., Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 59217, September 27, 2010, citing to "Memorandum from Shana Lee-Alaia and Lawrence Norton to David M. Spooner, Assistant

Georgetown Steel, which were mainly related to “Soviet-style economies” that were essentially comprised of a single central authority or central control that would result in presumption of state ownership.”¹⁰⁶ Huayuan states that “{a} presumption of state control implies that the Chinese economy is nothing less ‘than the traditional communist economic system of the early 1980s. i.e., the so-called ‘Soviet-style economies’” that were at issue in Georgetown Steel, which the Department clearly now rejects based on its application of CVD law.”¹⁰⁷

- At a minimum, “the Department’s decision to enforce the CVD laws based on the above conclusions clearly indicates that at least with respect to de jure control, interference by the government in a companies’ export activities can no longer simply be presumed, since the 1994 Company Law (as amended in 2006) requires that all companies make all export decisions independent from Chinese governmental control.” In support, Huayuan notes that the Department has consistently found an absence of de jure control when a separate rates applicant has provided all of the necessary paperwork.
- Finally, citing to the 2007 Georgetown Memo (in which the Department quotes a statement from the Economist Intelligence Unit) Huayuan argues that the fact “that market forces now determine the prices of more than 90 percent of products traded in China” reverses any de facto presumption that the PRC government controls pricing.
- Most importantly, the Department found that state owned enterprises (“SOEs”) and other domestic enterprises have a legal right and obligation to act as independent economic entities under the 1994 Company Law (as amended in 2006), including independent import and export decisions on both amounts and price. Thus, even SOEs are obligated by law to act independently of the PRC government in making import and export decisions.
- These findings by the Department, when it began applying the CVD laws to China, contradicts the Department’s AD presumption that “all firms within an NME country are subject to government control and thus should all be assigned a single country-wide rate unless a respondent can demonstrate an absence of both de jure and de facto control over its export activities.”
- Based on the above, the Department should not apply the presumption of state control in this case but instead should be consistent with its findings used to justify bringing CVD cases and presume that no such state control exists unless record evidence overcomes the presumption of no state control.

No other interested parties commented on this issue.

Department’s Position:

The Department disagrees with Huayuan, noting that Huayuan has conflated the concepts of the “NME-wide entity” for duty assessment purposes with the “single economic entity” that characterized those economies at issue in Georgetown Steel.

Secretary of Commerce, Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China’s Present-Day Economy,” dated March 29, 2007 (“2007 Georgetown Memorandum”). The 2007 Georgetown Memorandum is available at: <http://trade.gov/ia/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf>.

¹⁰⁶ See Huayuan case brief at 6-7.

¹⁰⁷ See id.

The Department's analysis in the 2007 Georgetown Memorandum focused only on the latter concept. These economies were characterized by both the CAFC in Georgetown Steel and the Department "as economies with a marked absence of market forces, in which: "(p)rices are set by central planners. 'Losses' suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods."¹⁰⁸ In other words, the government *is* the entire economy for all intents and purposes. Given the reforms discussed in the 2007 Georgetown Memorandum, the Department found that the PRC's economy is no longer comprised of a single central authority and that the policy that gave rise to the Georgetown Steel litigation does not prevent the Department from concluding that the PRC government has bestowed a CVD upon a Chinese producer.

As Huayuan notes, in proceedings involving NME countries such as the PRC, the Department has a rebuttable presumption that the export activities of all firms within the country are subject to government control and influence. However, this presumption stems not from an economy comprised entirely of the government, *e.g.*, a firm is nothing more than a government work unit, but rather from the NME government's use of a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the entire assembly of economic actors across the economy. As such -- and contrary to Huayuan's assertions -- this presumption is patently different from a presumption that all firms are one-and-the-same as the government, such that they comprise a monolithic economic entity. Moreover, the presumption underlying the separate rates test was upheld in Sigma, where the CAFC affirmed the Department's separate rates test as reasonable, stating that the statute recognizes a close correlation between a NME and government control of prices, output decisions, and the allocation of resources. The CAFC also stated that it was within the Department's authority to employ a presumption of state control for exporters in an NME, and to place the burden on the exporters to demonstrate an absence of central government control.

Firms that do not rebut the presumption are assessed a single AD duty rate (*i.e.*, the NME-Entity rate).¹⁰⁹ However, in recognition that parts of the PRC's economy are transitioning away from the state-controlled economy the Department has developed the separate rates test. In an economy comprised of a single, monolithic state entity, it would be impossible to identify separate firms, let alone rebut government control. Rather, the PRC's economy today is neither command-and-control nor market-based; government control and/or influence is omnipresent (which gives rise to the presumption) but not omnipotent (and hence, the presumption is rebuttable).¹¹⁰

Further, Huayuan argues that, even if the Department continues to maintain a presumption that *de facto* control over export pricing exists, the *de jure* requirement of the separates rates test is essentially obsolete, given the Department's reliance on China's 2006 Company Law in the 2007 Georgetown Memorandum. The 2006 Company Law provides the legal basis for the formation of all firms as a separate legal entity, whether state-owned, private or mixed. This is indeed one of the reforms undertaken by China which permitted the Department to identify individual firms

¹⁰⁸ See 2007 Georgetown Memorandum at 4, citing to Georgetown Steel quoting Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19375, 19376 (May 7, 1984).

¹⁰⁹ See 19 CFR 107(d) (providing that "in an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers").

¹¹⁰ See 2007 Georgetown Memorandum at 9.

-- separate from a monolithic command-and-control state-economic entity – for purposes of identifying and measuring subsidies. However, this legal “separation” for CVD purposes does not ensure that the firms operate outside the sphere of government influence and control for purposes of the separate rates analysis.

For example, as Huayuan correctly points out (and the 2007 Georgetown Memorandum notes), the 2006 Company Law provides SOEs with the legal right and obligation to act as independent economic entities, including the right to make independent import and export decisions on both amounts and price. However, the 2006 Company Law also explicitly leaves open the possibility for the Government of China (GOC) to use a variety of levers to influence or control firms in a manner above and beyond the regulatory role normally reserved for a government in a ME.

For example, article 1 of the 2006 Company Law states that, in addition to regulating the organization and operation of companies and protecting the interests of the relevant stakeholders, the law is also “formulated for the purposes of ... maintaining the socialist economic order and promoting the development of the socialist market economy.” The law does not elaborate on how the otherwise legitimate rights of a firm would be adjudicated if they stood in opposition to the “socialist economic order” or the “socialist market economy.” For example, could a small local firm be subject to legal government intervention where its production, pricing or labor decisions conflict with the operations or business plans of a competing “national champion” that is favored by China’s industrial and development policies?

This hypothetical has a basis in the PRC’s economy today. As noted in the 2007 Georgetown Memorandum, “SOEs are still a crucial part of the economy and remain many of the largest enterprises in the country. The government’s stated policy is to maintain a leading role for SOEs within many important sectors of the economy.” Protecting and promoting the state sector is a major pillar of the PRC’s “socialist market economy” and it would appear that the 2006 Commercial Law permits government intervention in its furtherance. This is supported by article 7 of the Law on State-Owned Enterprises which states that “{t}he state shall take measures ... to strengthen the control force and influence of the state-owned economy.”

Thus, in China today, under the current legal and regulatory regime, there are procedures and regulations for the establishment of firms that appear to be legally empowered to make independent decisions. However, the same legal and regulatory regime, in fact, in some cases, the same law, policy or regulation, also gives the State the legal authority and wide, unspecified latitude to control, influence or interfere in the operations or decisions of firms. This concern was echoed in the 2007 Georgetown Memorandum, where the Department found that “the lack of a reliable set of laws and procedures serves in part to preserve the role of the state in the economy, rather than simply being a feature of a chaotic period of transition.” Therefore, contrary to Huayuan’s assertion, given this context of conflicting and ambiguous legal provisions where the GOC has maintained undefined and unrestrained power over firms, it remains reasonable to maintain a rebuttable presumption of de jure government control over a firm’s export activity.

Finally, Huayuan’s reliance on a partial quote regarding prices in the PRC is misplaced. The entire quote from the 2007 Georgetown Memorandum states that “although price controls and guidance remain on certain ‘essential’ goods and services in China, the PRC Government has eliminated price controls on most products; ‘market forces now determine the prices of more

than 90 percent of products traded in China.”¹¹¹ This quote is a reference to deregulation of prices, i.e., phasing out of the direct, administrative price-setting common in command-and-control economies. It is not a reference, for example, to an absence of direct government control over resource allocations or government control or influence over economic actors that can fundamentally distort the price formation process.

Consequently, for the final determination, the Department has not made any changes to our NME methodology as it pertains to the rebuttable presumption of government control.

Comment 7: Appropriate Separate Rate to Assign to Cooperative Non-Selected Companies

AHM's Case Brief:

- AHM was a cooperative separate rate respondent.
- Section 776(b) of the Act establishes that the Department may only apply AFA in cases where respondents have been uncooperative.
- The Department may also only apply partial facts available when a respondent fails to provide information.
- No valid reason exists in this investigation that would warrant attribution of an AFA rate to AHM as a cooperative separate rate respondent; the CIT has rejected this practice in Bestpak and Amanda Foods,¹¹² and the Department itself has stated in Brake Rotors 1997 that it does not include AFA rates in the calculation of separate rates.¹¹³

Petitioners' Rebuttal Brief:

- While AHM objects to the assignment of a rate based on adverse inferences, it does not propose a rate or methodology for selecting a rate.
- Because the calculated rates from the Preliminary Determination are based on information that could not be verified, they cannot serve as the basis for assigning a separate rate to AHM.
- The separate rate for AHM should be based on the margins in the Initiation Notice, the lowest of which – 171 percent – would be a non-punitive rate for AHM.

Department's Position:

The Department's long-standing practice in determining the separate rate margin is to base it on the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding zero or de minimis margins or margins based entirely on FA.¹¹⁴ If, however, the estimated weighted-average margins for all individually investigated respondents are de minimis or based entirely on FA, the Department may use any reasonable method.¹¹⁵ In the Preliminary Determination, the Department calculated a separate rate margin

¹¹¹ See 2007 Georgetown Memorandum at 5, citing to The Economist Intelligence Unit, Country Commerce: China, 2006, p 73.

¹¹² See Bestpak Gifts & Crafts Co., Ltd. v. United States, 783 F. Supp. 2d 1343 (CIT 2011) (“Bestpak”); Amanda Foods (Vietnam) Ltd. v. United States, 647 F. Supp. 2d 1368, 1381-1382 (CIT 2009) (“Amanda Foods”).

¹¹³ See Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China, 62 FR 9160, 9173-74 (February 28, 1997) (“Brake Rotors 1997”).

¹¹⁴ See section 735(c)(5)(A) of the Act.

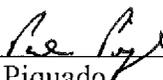
¹¹⁵ See section 735(c)(5)(B) of the Act.

based on the calculated weighted-average margins of two of the three mandatory respondents.¹¹⁶ However, since the Preliminary Determination, two mandatory respondents withdrew from their respective verifications, and have, consequently, received margins based entirely on AFA pursuant to sections 776(a) and (b) of the Act. The third mandatory respondent, Huayuan, did not receive a separate rate in the Preliminary Determination and was assigned the PRC-wide entity rate. Further, we continue to find that Huayuan is part of the PRC-wide entity for the final determination. Section 735(c)(5)(B) of the Act states that a reasonable method under these circumstances includes “averaging the estimated weighted average dumping margins determined for the exporters and producers individually examined.” However, given that the rate assigned to the companies selected for individual examination is based on the highest petition margin and other petition margins are available on the record, we believe another reasonable method is to include these margins in the separate rate calculation. Thus, pursuant to section 735(c)(5)(A) and (B) of the Act, we have, for the final determination, determined the separate rate margin using a reasonable method that is consistent with our established practice.¹¹⁷ Specifically, consistent with our practice, we have assigned to the separate rate recipients the simple average of the margins alleged in the Petition.¹¹⁸

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE DISAGREE



Paul Piquado
Assistant Secretary
for Import Administration

19 MARCH 2012
Date

¹¹⁶ As noted in comment 1 of this memorandum, the third mandatory respondent, Huayuan, has not received a separate rate in this proceeding. Thus, the separate rate margin was not based on information provided by Huayuan in the Preliminary Determination and for the final determination.

¹¹⁷ See, e.g., Aluminum Extrusions from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 18524, 18525 (April 4, 2011) (“For the final determination, we have assigned the 29 separate rate applicants to whom we are granting a separate rate a dumping margin of 32.79 percent, based on the simple average of the margins alleged in the petition...”); CWP 2008 (“...we have assigned to the separate rate companies the simple average of the margins alleged in the petition.”); Final Determination of Sales at Less Than Fair Value: Sodium Hexametaphosphate from the People’s Republic of China, 73 FR 6479, 6480-6481 (February 4, 2008) (“Specifically, we have assigned an average of the margins calculated for purposes of initiation as the separate rate for the final determination.”).

¹¹⁸ See Initiation Notice, 76 FR at 23552 (where the Department stated that “the estimated dumping margins for galvanized steel wire from the PRC, using the Department’s revised financial ratios, range from 171 percent to 235 percent.”)