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Investigation
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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in
the Countervailing Duty Investigation of Finished Carbon Steel
Flanges from India

I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of finished carbon steel flanges (steel flanges) from India, within the meaning of section 705 of the Tariff Act of 1930, as amended (the Act).¹ Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1: Whether the Department Should Have Rejected the Government of India's Supplemental Questionnaire Response

Comment 2: Whether the Duty Drawback (DDB) Program Provides a Countervailable Subsidy

Comment 3: Whether R.N. Gupta & Co., Ltd. (RNG) and USK Group² Should Report Duty Export Pass Book (DEPB) Licenses During the Average Useful Life (AUL) Period Prior to the Period of Investigation (POI)

Comment 4: Whether USK Group and RNG Received Benefits from Certain Government of India Majority-Owned Banks

Comment 5: Whether the Export Promotion of Capital Goods Scheme (EPCGS) Provides a Countervailable Subsidy and Whether the EPCGS Used the Correct Denominator for the Benefit Calculation of Respondents

Comment 6: Whether to Apply Adverse Facts Available (AFA) to Norma's AUL Sales Data

¹ See also section 701(f) of the Act.

² Norma (India) Ltd. (Norma India) and its cross-owned affiliate(s) USK Exports Private Limited (USK); UMA Shanker Khandelwal & Co. (UMA); and Bansidhar Chiranjilal (BDCL) (collectively, USK Group).



- Comment 7: Whether to Apply AFA to RNG's Unaffiliated Indian Suppliers of Subject Merchandise
- Comment 8: Whether to Countervail Funds Received by RNG Under the Focus Product Scheme (FPS) During the POI

II. BACKGROUND

On November 29, 2016, the Department published the *Preliminary Determination* in this proceeding.³ In accordance with section 705(a)(1) of the Act, and 19 CFR 351.210(b)(4), and based on the petitioners'⁴ request, we aligned the final countervailing duty (CVD) determination in this investigation with the final determination in the companion antidumping duty (AD) investigation of steel flanges from India.⁵

Between January 30, and February 10, 2017, we conducted verification of the questionnaire responses submitted by the Government of India, USK Group, and RNG.⁶ Interested parties submitted case and rebuttal briefs between April 7, and April 14, 2017.⁷ We conducted a public hearing in this case on May 2, 2017.

III. PERIOD OF INVESTIGATION

The POI for which we are measuring subsidies is April 1, 2015, through March 31, 2016.⁸

³ See *Finished Carbon Steel Flanges from India: Preliminary Affirmative Countervailing Duty Determination*, 81 FR 85928 (November 29, 2016) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

⁴ The petitioners are Weldbend Corporation and Boltex Manufacturing Co., L.P (collectively, the petitioners).

⁵ See Preliminary Determination PDM at 4.

⁶ See Memoranda, "Verification Report of Norma (India) Ltd., Uma Shanker Khandelwal & Co., USK Exports Private Limited, and Bansidhar Chiranjilal," dated March 29, 2017 (USK Group Verification Report), "Verification Report of R.N. Gupta & Co., Ltd.," dated March 29, 2017 (RNG Verification Report), and "Verification Report of the Government of India," dated March 29, 2017 (Government of India Verification Report).

⁷ See Petitioners' Case Brief, "Re: Finished Carbon Steel Flanges from India: Case Brief – Weldbend Corporation and Boltex Manufacturing Co., L.P.," dated April 7, 2017 (Petitioners' Case Brief); USK Group's Case Brief, "Re: Finished Carbon Steel Flanges from India: Case Brief of Norma (India) Limited," dated April 13, 2017 (USK Group's Case Brief); RNG's Case Brief, "Re: Finished Carbon Steel Flanges from India: Case Brief of R.N. Gupta & Company Limited," dated April 7, 2017 (RNG's Case Brief); Government of India's Case Brief, "Re: Carbon Steel Flanges from India: Case Brief," dated April 7, 2017 (Government of India's Case Brief); Petitioners' Rebuttal Brief, "Re: Finished Carbon Steel Flanges from India: Rebuttal Brief – Weldbend Corporation and Boltex Manufacturing Co., L.P.," dated April 14, 2017 (Petitioners' Rebuttal Brief); USK Group's Rebuttal Brief, "Re: Finished Carbon Steel Flanges from India: Rebuttal Brief of Norma (India) Limited," dated April 14, 2017 (USK Group's Rebuttal Brief); RNG's Rebuttal Brief, "Re: Finished Carbon Steel Flanges from India: Rebuttal Brief of R.N. Gupta & Company Limited," dated April 14, 2017 (RNG's Rebuttal Brief); Government of India's Rebuttal Brief, "Re: Carbon Steel Flanges from India: Rebuttal Brief," dated April 14, 2017 (Government of India's Rebuttal Brief).

⁸ See *Preliminary Determination* PDM at 3.

IV. SCOPE COMMENTS

In the *Preliminary Determination*, we did not modify the scope language as it appeared in the *Initiation Notice*.⁹ No interested parties submitted scope comments in case or rebuttal briefs; therefore, the class or kind of merchandise covered by the scope of this investigation remains unchanged for this final determination. However, the text of the scope published in the *Initiation Notice* and the *Preliminary Determination* contained typographical errors, which have been corrected in Appendix I of the accompanying final determination *Federal Register* notice.

V. SCOPE OF THE INVESTIGATION

The scope of this investigation covers finished carbon steel flanges. Finished carbon steel flanges differ from unfinished carbon steel flanges (also known as carbon steel flange forgings) in that they have undergone further processing after forging, including, but not limited to, beveling, bore threading, center or step boring, face machining, taper boring, machining ends or surfaces, drilling bolt holes, and/or de-burring or shot blasting. Any one of these post-forging processes suffices to render the forging into a finished carbon steel flange for purposes of this investigation. However, mere heat treatment of a carbon steel flange forging (without any other further processing after forging) does not render the forging into a finished carbon steel flange for purposes of this investigation.

While these finished carbon steel flanges are generally manufactured to specification ASME B16.5 or ASME B16.47 series A or series B, the scope is not limited to flanges produced under those specifications. All types of finished carbon steel flanges are included in the scope regardless of pipe size (which may or may not be expressed in inches of nominal pipe size), pressure class (usually, but not necessarily, expressed in pounds of pressure, *e.g.*, 150, 300, 400, 600, 900, 1500, 2500, *etc.*), type of face (*e.g.*, flat face, full face, raised face, *etc.*), configuration (*e.g.*, weld neck, slip on, socket weld, lap joint, threaded, *etc.*), wall thickness (usually, but not necessarily, expressed in inches), normalization, or whether or not heat treated. These carbon steel flanges either meet or exceed the requirements of the ASTM A105, ASTM A694, ASTM A181, ASTM A350 and ASTM A707 standards (or comparable foreign specifications). The scope includes any flanges produced to the above-referenced ASTM standards as currently stated or as may be amended. The term “carbon steel” under this scope is steel in which:

- (a) iron predominates, by weight, over each of the other contained elements:
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
 - (i) 0.87 percent of aluminum;
 - (ii) 0.0105 percent of boron;
 - (iii) 10.10 percent of chromium;

⁹ *Id.*, at “Scope Comments.”

- (iv) 1.55 percent of columbium;
- (v) 3.10 percent of copper;
- (vi) 0.38 percent of lead;
- (vii) 3.04 percent of manganese;
- (viii) 2.05 percent of molybdenum;
- (ix) 20.15 percent of nickel;
- (x) 1.55 percent of niobium;
- (xi) 0.20 percent of nitrogen;
- (xii) 0.21 percent of phosphorus;
- (xiii) 3.10 percent of silicon;
- (xiv) 0.21 percent of sulfur;
- (xv) 1.05 percent of titanium;
- (xvi) 4.06 percent of tungsten;
- (xvii) 0.53 percent of vanadium; or
- (xviii) 0.015 percent of zirconium.

Finished carbon steel flanges are currently classified under subheadings 7307.91.5010 and 7307.91.5050 of the Harmonized Tariff Schedule of the United States (HTSUS). They may also be entered under HTSUS subheadings 7307.91.5030 and 7307.91.5070. The HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope is dispositive.

VI. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

The Department has made no changes to the allocation period/methodology used in the *Preliminary Determination* and no issues were raised by interested parties in briefs regarding these topics. For a description of the allocation period and the methodology used for this final determination, see the *Preliminary Determination*.¹⁰

¹⁰ *Id.*, at 4-5.

B. Attribution of Subsidies

The Department has made no changes to the attribution of subsidies methodology applied in the *Preliminary Determination* and no issues were raised by interested parties in briefs regarding the attribution of subsidies methodology. For descriptions of the methodologies used for all programs in this final determination, *see the Preliminary Determination*.¹¹

C. Denominators

In accordance with 19 CFR 351.525(b), the Department considers the basis for respondents' receipt of benefits under each program when attributing subsidies, *e.g.*, to a respondent's export or total sales, or portions thereof. The Department made no changes to the attribution of subsidies. The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the *Preliminary Determination*.¹²

VII. BENCHMARKS AND INTEREST RATES

The Department has made no change to the interest payment benchmark for USK Group and RNG. For a description of the benchmarks and interest rates used for this final determination, *see the Preliminary Determination* and the Final Calculation Memoranda.¹³

VIII. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

The Department relied on "facts otherwise available," including AFA, for several findings in the *Preliminary Determination*.¹⁴ The Department continues to rely on AFA with respect to financial contribution and specificity for the following programs: Interest Equalization Scheme (IES);¹⁵ FPS;¹⁶ and the Status Holder Incentive Scheme (SHIS).¹⁷ We continue to rely on the respondents' reported usage of the aforementioned programs to evaluate program benefits.¹⁸

Additionally, in this final determination, the Department has relied on AFA to determine certain additional CVD rates for USK Group and RNG. As discussed in detail at Comment 4, below, prior to the *Preliminary Determination*, we instructed the Government of India, USK Group, and RNG to report all assistance provided by the Government of India (or entities owned directly, in whole or in part, by the Government of India or any provincial or local government) to producers

¹¹ *Id.*, at 5-6.

¹² *See Preliminary Determination PDM* at 6-7.

¹³ *See* Memoranda, "Final Determination Calculations for Norma (India) Ltd., USK Exports Private Limited, UMA Shanker Khandelwal & Co., and Bansidhar Chiranjilal," and "Final Determination Calculations for R.N. Gupta Co., Ltd." dated concurrently with this memorandum (collectively, Final Calculation Memoranda).

¹⁴ *Id.*, at 8-10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*, at 10.

or exporters of steel flanges.¹⁹ As such, in the *Preliminary Determination*, we relied on USK Group's and RNG's responses to our questions regarding financial assistance and lending provided by the Government of India. During verification, we discovered additional assistance provided by the Government of India that was not previously reported in USK Group's and RNG's questionnaire responses. Specifically, we discovered that USK Group and RNG each received two loans during the AUL from entities that fall within the description set forth in the Department's initial CVD questionnaire, *i.e.*, entities owned directly, in whole or in part, by the Government of India or any provincial or local government. Consequently, record information indicates that USK Group and RNG used, and thus benefitted from, subsidies during the POI that they failed to timely report in response to the Department's requests for information. Therefore, we have determined that the application of AFA is warranted with respect to these particular subsidies.

A. Legal Standard

Sections 776(a)(1) and (2) of the Act provide that the Department shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or an interested party or any other person withholds information that has been requested; fails to provide information within the established deadlines or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; significantly impedes a proceeding; or provides information that cannot be verified, as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Under the Trade Preferences Extension Act of 2015 (TPEA), numerous amendments to the AD and CVD laws were made.²⁰ The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this investigation.²¹

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

¹⁹ See Department Letter re: Countervailing Duty Questionnaire, dated August 24, 2017 (Initial CVD Questionnaire) at 26 and 57.

²⁰ See TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015); see also *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*).

²¹ See *Applicability Notice*, 80 FR at 46794-46795.

party had complied with the request for information.²² Furthermore, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the countervailing duty investigation, a previous administrative review, or other information placed on the record.²³

Section 776(c) of the Act provides that, in general, when the Department relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.²⁴ Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.²⁵ Furthermore, the Department is not required to corroborate any CVD applied in a separate segment of the same proceeding.²⁶

Finally, under section 776(d) of the Act, when applying an adverse inference, the Department may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country or, if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the Department considers reasonable to use.²⁷ The TPEA also makes clear that, when selecting facts available with an adverse inference, the Department is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.²⁸

Consistent with section 776(d) of the Act and our established practice, when choosing a rate to apply as AFA, we select the highest calculated rate for the same or similar program.²⁹ When selecting rates, we first determine if there is an identical program in the investigation and, if so, use the highest calculated rate, excluding zero rates, for the identical program. If there is no identical program with a rate above zero in the investigation, we then determine if an identical program was examined in another CVD proceeding involving the same country and apply the highest calculated rate, excluding rates that are *de minimis*, for the identical program.³⁰ If no identical program exists, we then determine if there is a similar or comparable program, based on

²² See section 776(b)(1)(B) of the Act; *see also* section 502(1)(B) of the TPEA.

²³ See section 776(b)(2) of the Act; *see also* 19 CFR 351.308(c).

²⁴ See section 776(c) of the Act; *see also* 19 CFR 351.308(d).

²⁵ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 at 870, reprinted at 1994 U.S.C.A.N. 4040, 4199 (1994) (SAA).

²⁶ See section 776(c)(2) of the Act; *see also* section 502(2) of the TPEA.

²⁷ See section 776(d)(1) of the Act; *see also* section 502(3) of the TPEA.

²⁸ See section 776(d)(3) of the Act; *see also* section 502(3) of the TPEA.

²⁹ See, e.g., *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp PRC Final*), and accompanying Issues and Decision Memorandum (IDM) at 13; *see also* *Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373-1374 (Fed. Cir. 2014) (upholding “hierarchical methodology for selecting an AFA rate”).

³⁰ See *Pre-Stressed Concrete Steel Wire Strand from China, Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying IDM at 13.

the treatment of the benefit, in another CVD proceeding involving the same country and apply the highest calculated rate for the similar or comparable program.³¹

B. Application of Adverse Facts Available

We find the application of AFA is warranted with respect to USK Group's and RNG's failure to timely report government assistance received (*i.e.* the four discovered loans under three lending programs, as discussed below).³²

C. Selection of the Adverse Facts Available Rate

It is the Department's practice in CVD proceedings to compute an AFA rate for non-cooperating companies using the highest calculated program-specific rates determined for a cooperating respondent in the same investigation or, if such rates are not available, rates calculated in prior CVD cases involving the same country.³³ Specifically, pursuant to an established hierarchy for selecting AFA rates, the Department applies the highest calculated rate for the identical subsidy program in the investigation if a responding company used the identical program and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, the Department uses the highest non-*de minimis* rate calculated for the identical program in a CVD proceeding involving the same country. If no such rate is available, the Department will use the highest non-*de minimis* rate for a similar program, based on treatment of the benefit, in another CVD proceeding involving the same country. Absent an above-*de minimis* subsidy rate calculated for a similar program, the Department applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.³⁴

Because USK Group and RNG failed to act to the best of their abilities in this investigation, in accordance with section 776(b) of the Act, we made an adverse inference in selecting from the facts available that USK Group and RNG benefited from the three lending programs (*i.e.* a loan to RNG for capital equipment purchases, export financing for RNG, and one additional loan

³¹ See *Shrimp PRC Final* IDM at 13-14.

³² For further discussion regarding our determination, as AFA, that USK Group and RNG benefited from unreported government assistance during the POI and that such assistance constitutes a financial contribution pursuant to section 771(5)(D) of the Act and is specific pursuant to section 771(5A) of the Act, see Comment 4.

³³ See, e.g., *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 FR 70971, 70975 (November 4, 2008) (*Lawn Groomers PRC Preliminary Determination*) (unchanged in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009) (*Lawn Groomers PRC Final*, and accompanying IDM at "Application of Facts Available, Including the Application of Adverse Inferences"); *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) (*Aluminum Extrusions PRC Final*, and accompanying IDM at "Application of Adverse Inferences: Non-Cooperative Companies."

³⁴ See, e.g., *Lawn Groomers PRC Preliminary Determination* at 70975 (unchanged in *Lawn Groomers PRC Final*); see also *Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (October 2, 2008), and accompanying IDM at "Selection of the Adverse Facts Available Rate."

program pertaining to USK Group for importing capital equipment).³⁵ Using the methodology described above, we have applied AFA rates to USK Group and RNG for the three lending programs.³⁶

Specifically, because no identical lending programs exist in the instant investigation, there is no calculated rate for an identical program in this proceeding. Accordingly, as AFA, we are applying the 2.90 percent *ad valorem* subsidy rate calculated for a similar program, *i.e.*, “Pre-Shipment and Post-Shipment Export Financing” in *PET Film India Final*, for each unreported lending program.³⁷ As such, we are applying a rate of 2.90 percent *ad valorem* to USK Group for its unreported loans discovered at verification pertaining to importing capital equipment. Additionally, we are applying a rate of 2.90 percent *ad valorem* to RNG pertaining to a loan for capital equipment purchases, and a rate of 2.90 percent *ad valorem* to RNG pertaining to a loan for export financing, which were discovered at verification.³⁸

Section 776(c)(1) of the Act provides that, when the Department relies on secondary information, rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Section 776(c)(1) of the Act provides that, when the Department relies on secondary information, rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”³⁹ The SAA provides that to “corroborate” secondary information, the Department will satisfy itself that the secondary information to be used has probative value.⁴⁰

The Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.⁴¹ Furthermore, the Department is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.⁴²

³⁵ For further information, *see* Comment 4.

³⁶ *See Final Affirmative Countervailing Duty Determinations; Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 FR 1268 (January 10, 1986) (*Welded Pipe and Tube from Turkey*).

³⁷ *See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34905 (May 16, 2002) (*PET Film India Final*), and accompanying IDM at 4-5. We note that as USK Group received two unreported loans for importing capital equipment, and, as such, we are applying one AFA rate to USK Group for use of this program.

³⁸ *Id.*

³⁹ SAA at 870.

⁴⁰ *Id.*

⁴¹ *Id.*, at 869 – 870

⁴² *See* section 776(d) of the Act.

With regard to the reliability aspect of corroboration, we note that the rate on which we are relying is a subsidy rate calculated in another India CVD proceeding. Further, the calculated rate was based on information from a similar program, “Pre-Shipment and Post-Shipment Export Financing,” and thus reflects the actual behavior of the Government of India with respect to these similar subsidy programs. Moreover, no information has been presented that calls into question the reliability of the calculated rate that we are applying as AFA for this program. Finally, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.⁴³ Thus, we have corroborated the selected rate to the extent possible and find that the rate is reliable and relevant for use as an AFA rate for the programs listed above (*i.e.*, loans provided for capital equipment purchases, export financing, and importing capital equipment).

Furthermore, under section 776(d) of the Act, the Department may use any countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country or, if there is no same or similar program, use a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Therefore, in accordance with section 776(c)(1) and 776(d) of the Act, we have applied a subsidy rate which was calculated in a previous India CVD proceeding, specifically, the underlying investigation of that order, and have corroborated the AFA rate to the extent practicable.

IX. ANALYSIS OF PROGRAMS

With the exceptions explained below, the Department made no changes to its *Preliminary Determination* with regard to the methodology used to calculate the subsidy rates for the programs listed below. For the descriptions, analyses, and calculation methodologies of these programs, *see* the *Preliminary Determination*. Except where noted, no issues were raised by interested parties in briefs regarding these programs. The final program rates for the mandatory respondents are identified below.

A. Programs Determined to Be Countervailable

1. DDB Program

The petitioners and the Government of India submitted comments in their case briefs regarding this program. The countervailability of the program is discussed below in Comment 2. We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*.⁴⁴

⁴³ See, *e.g.*, *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

⁴⁴ See *Preliminary Determination* PDM at 10-11.

USK Group: 1.92 percent *ad valorem*
RNG: 1.85 percent *ad valorem*

2. EPCGS

The Government of India submitted comments in its case briefs regarding this program.⁴⁵ RNG also commented on the manner the Department calculated its benefits.⁴⁶ Specifically, RNG contended that the Department did not exclude RNG's payments of partial duties from its benefit calculation.⁴⁷ The Government of India's and RNG's comments are discussed below, in Comment 5. The Department's methodology for calculating the benefits received under this program are discussed in the Final Calculation Memoranda.⁴⁸ On this basis, we determine a revised countervailable subsidy rate of 0.12 percent *ad valorem* for RNG.⁴⁹ The countervailable subsidy rate calculated for USK Group in the *Preliminary Determination* for this program remains unchanged.

USK Group: 0.33 percent *ad valorem*
RNG: 0.12 percent *ad valorem*

3. Merchandise Export from India Scheme (MEIS)

We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*.⁵⁰

RNG: 1.30 percent *ad valorem*

4. IES

We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*.⁵¹

RNG: 0.04 percent *ad valorem*

5. SHIS

We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*.⁵²

USK Group: 0.51 percent *ad valorem*

⁴⁵ See Government of India's Case Brief at 17-18.

⁴⁶ See RNG's Case Brief at 3.

⁴⁷ *Id.*

⁴⁸ See Final Calculation Memoranda.

⁴⁹ *Id.*

⁵⁰ See *Preliminary Determination* PDM at 15-17.

⁵¹ *Id.*, at 17-18.

⁵² *Id.*, at 18-19.

B. Programs Determined to Be Not Used

1. *Focus Product Scheme*
2. *Advanced License Program*
3. *Duty Free Import Authorization Scheme*
4. *Market Development Scheme*
5. *Market Access Initiative*
6. *Government of India Loan Guarantees*⁵³
7. *Status Certificate Program (SCP)*
8. *Steel Development Fund Loans*
9. *Incremental Export Incentivization Scheme (IEIS)*
10. *Pre and Post Export Finance Shipment*

State Government of Maharashtra (SGOM) Subsidy Programs

11. *Infrastructure Assistance for Mega Projects Under the Maharashtra Industrial Policy of 2013 and Other SGOM Industrial Promotion Policies to Support Mega Projects*
12. *Subsidies for Mega Projects under the Package Scheme of Incentives*

X. DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Should Have Rejected the Government of India's Supplemental Questionnaire Response

Government of India's Case Brief

- The Department improperly and unjustifiably rejected the Government of India's supplemental response,⁵⁴ which is in contravention to the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM).⁵⁵
- Despite technical issues with filing its supplemental response *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), the Government of India immediately notified the Department of the technical issues, once resolved, on the day after the established deadline.⁵⁶
- Article 12.7 of the ASCM, which is identical to Article 6.8 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD

⁵³ See Comment 4 below for further discussion.

⁵⁴ See Memorandum, "Request to Take Action on Certain Barcodes," dated November 2, 2016 (Government of India November 2, 2016 Rejection Memo), in which the Department rejected the supplemental questionnaire response.

⁵⁵ See Government of India's Case Brief at 5.

⁵⁶ *Id.*

Agreement), specifies reliance upon facts available where a party does not submit information within a “reasonable period.”⁵⁷

- The Government of India also points to the WTO Appellate Body ruling in the case *Hot-Rolled Steel from Japan*;⁵⁸ specifically, Article 6.8 of the AD Agreement, which indicates that where interested parties submit information within a reasonable period of time, such information must be used in lieu of resorting to facts available.⁵⁹ The Appellate Body held that a “reasonable period” implies a degree of flexibility that involves consideration of all the circumstances surrounding each case, including other relevant factors. In this case, the Department rejected information submitted by the exporters that was incomplete, filed well beyond the established deadlines, and filed immediately prior to verification. In that case, the WTO Appellate Body found that the Department failed to ascertain whether the information was submitted within a reasonable period of time.⁶⁰
- In the instant investigation, the deadline for the Government of India’s supplemental response had expired by a little more than 10 hours. This delay would not have impeded the investigation in any manner.

Petitioners’ Rebuttal Brief

- The Department extensively addressed the issue of rejecting the Government of India’s untimely filed response in the *Preliminary Determination*,⁶¹ and the Government of India has not presented any reasonable basis for the Department to reverse its decision.⁶²
- Further, the data in the rejected supplemental questionnaire response should have been submitted in the Government of India October 6, 2016 IQR⁶³ under the “other subsidies” portion, as explained by the Department in the *Preliminary Determination*.⁶⁴
- In response to the Government of India’s argument regarding the ASCM, the petitioners note that the Department has stated in numerous cases that it has an obligation to follow U.S. law, “barring instructions to amend our practices in a manner not inconsistent with the conclusions of the WTO.” Additionally, as explained in *Uncoated Paper Indonesia Final*, decisions reached by the WTO do “not have any power to change U.S. law or order such a change.”⁶⁵

⁵⁷ *Id.*, at 6-7.

⁵⁸ See Appellate Body Report, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, (*Hot-Rolled Steel from Japan*), at paragraph 77.

⁵⁹ See Government of India’s Case Brief, at 7-8.

⁶⁰ *Id.*, at 7-9.

⁶¹ See *Preliminary Determination* PDM at 9.

⁶² See Petitioners’ Rebuttal Brief at 1.

⁶³ See Government of India Letter re: Carbon Steel Flanges from India: Response to Section II of the CVD Questionnaire,” dated October 6, 2016 (Government of India October 6, 2016 IQR).

⁶⁴ See *Preliminary Determination* PDM at 9-10.

⁶⁵ See Petitioners’ Rebuttal Brief at 3 (citing *Certain Uncoated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Determination*, 80 FR 36971 (June 29, 2015) (*Uncoated Paper Indonesia Final* IDM at 18)).

Department's Position

We disagree with the Government of India and, therefore, continue to find that the supplemental questionnaire response filed by the Government of India was untimely, and was correctly rejected by the Department.

In the *Preliminary Determination*, we explained that the Government of India submitted an untimely response to the Government of India First SQ.⁶⁶ On October 18, 2016, we issued the aforementioned supplemental questionnaire in response to certain deficiencies that we identified in the Government of India October 6, 2016 IQR. In the Government of India First SQ, we requested information, for a second time, that had been previously requested and which the Government of India had failed to provide. This information included key program procedures and guidelines pertaining to the, IES and FPS. Further, both respondents self-reported use of the SHIS, for which the Government of India had not self-reported under the “other subsidies” portion of the questionnaire.⁶⁷ As such, we requested official documentation and program operation information to determine the countervailability of the aforementioned programs.

When we issued the supplemental questionnaire on October 18, 2016, we established an October 25, 2016, deadline for the Government of India's response. At the request of the Government of India, we extended the deadline Government of India until 5 p.m. Eastern Time on October 28, 2016. However, the Government of India failed to submit a timely response. Rather, the Government of India submitted its response on October 29, 2016.

Pursuant to 19 CFR 351.104(a)(2)(iii) and 19 CFR 351.301(c)(1), we rejected the submission as untimely on November 2, 2016.⁶⁸ Although the Government of India states that it encountered technical difficulties when submitting the response, contrary to the regulatory requirements, we were not notified of these difficulties until the deadline had already passed.⁶⁹ The regulations provide that extension requests must be made before the deadline expires for the Department to consider the request.⁷⁰ Once the deadline expires, an interested party must establish that “extraordinary circumstances” exist for the failure to make a timely extension request.⁷¹ In the *Preliminary Determination*, we found that the Government of India's arguments submitted in its November 7, 2016 letter did not establish extraordinary circumstances, as specified in 19 CFR 351.302(c).⁷²

Upon consideration of the Government of India's arguments in its case brief, and all other information on the record, we continue to find that the reasons set forth in the Government of India's November 7, 2016 letter does not establish extraordinary circumstances, as specified in 19 CFR 351.302(c). The Government of India's filing was unquestionably untimely submitted.

⁶⁶ *Id.*

⁶⁷ See Government of India October 6, 2017 IQR at 96.

⁶⁸ See Government of India November 2, 2016 Rejection Memo.

⁶⁹ See Government of India's Case Brief at 4.

⁷⁰ 19 CFR 351.302(c).

⁷¹ *Id.*

⁷² See *Preliminary Determination* PDM at 9-10.

Therefore, we continue to find that necessary information with respect to the IES, FPS, and SHIS programs is not available on the record and that the Government of India did not provide information that was requested of it in a timely manner, thereby impeding the proceeding. Thus, the Department must rely on “facts available” in making our final determination in accordance with sections 776(a)(1) and 776(a)(2)(A), (B) and (C) of the Act. Moreover, we determine that the Government of India failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. In drawing an adverse inference, we continue to find the IES, FPS, and SHIS programs constitute a financial contribution within the meaning of section 771(5)(D) of the Act and are specific within the meaning of section 771(5A)(B) of the Act.

We note that these three programs have been countervailed in prior cases.⁷³ As respondents reported their respective usage of the aforementioned programs, we are relying on the respondents’ reported usage data to calculate the benefit, within the meaning of section 771(5)(E) of the Act.

Additionally, we requested information for a fourth program in the Government of India First SQ, the SCP. Although we are applying AFA to the aforementioned three programs also listed in the Government of India First SQ (FPS, IES, and SHIS), we continue to find that we have sufficient information on the record regarding the Government of India October 6, 2016 IQR to determine financial contribution and specificity for the SCP. Further, as discussed below, we are relying on the respondents’ reported usage of the SCP to evaluate program benefit.

With respect to the Government of India’s WTO-related arguments, as we explained in *Uncoated Paper Indonesia Final*, the Department has conducted this investigation in accordance with the Act and the Department’s regulations, and United States law is fully compliant with our WTO obligations:

our CVD laws are consistent with our WTO obligations. Moreover, it is the Act and the Department’s regulations that have direct legal effect under U.S. law, and not the WTO Agreements or WTO reports.⁷⁴ In this regard, WTO reports “do not have any power to change U.S. law or to order such a change.”⁷⁵

Comment 2: Whether the DDB Program Provides a Countervailable Subsidy

Government of India’s Case Brief

- The DDB Program is not a countervailable program, as it is well established that duty exemption and remission programs are not inconsistent with the ASCM. Concerning indirect tax rebate and substitution drawback schemes, Annex I and II of the ASCM

⁷⁴ See *Uncoated Paper Indonesia Final* IDM at 18-19 (citing *e.g.*, *Corus Staal BV v. U.S. Dep’t of Commerce*, 395 F.3d 1343, 1347-1349 (Fed. Cir. 2005), cert. denied 126 S. Ct. 1023 (2006)).

⁷⁵ *Id.* (citing the SAA at 659).

allows for exemption, remission, deferral or refund of indirect taxes or import charges levied on inputs, provided they are consumed in the production of exported programs.⁷⁶

- As long as the benefits received on inputs are consumed in the exported product and the production of the exported product can be verified, the duty exemption and remission schemes are not countervailable, save for excess drawback. Similarly, the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 (Drawback Rules), as amended in 2006, provide for verification procedure under the DDB program. Additionally, the Drawback Rules and Customs Manual of 2015 (Customs Manual) put into place a verification system that confirms which inputs are consumed in the production of finished merchandise and the amounts required to be included in the exported product.⁷⁷
- Despite rejection of the Government of India's supplemental response, the Department should have verified information submitted by the Government of India in its initial response, which explained the Indian process used to calculate the DDB amount to be exempted, as discussed in the Government of India's Drawback Rules and Customs Manual.⁷⁸
- The Department inappropriately relied upon its decision from a different proceeding, *i.e.*, *Shrimp India Final*, in reaching its decision to use facts available for the *Preliminary Determination*.⁷⁹

Petitioners' Rebuttal Brief

- The petitioners contend that the Department addressed its countervailability finding regarding the DDB program in the *Preliminary Determination*.⁸⁰ Although the Government of India addresses issues surrounding whether it has a reasonable and effective system to monitor consumption of inputs in exported products, the Department has stated in numerous cases that it is aware of the laws and regulations of this program. However, as the Department states, the Government of India has not provided any information currently available in the instant segment of this proceeding to demonstrate that the program is properly and effectively administered and enforced.⁸¹
- The Department should continue to follow case precedent, as established in cases such as *Shrimp India Final*, and continue to determine that the record lacks the same evidence as in *Shrimp India Final* required to demonstrate that the program is reasonable and

⁷⁶ See Government of India's Case Brief at 11-12.

⁷⁷ *Id.*, at 12-13.

⁷⁸ *Id.*, at 14.

⁷⁹ *Id.*, at 16.

⁸⁰ See *Preliminary Determination PDM* at 10-16.

⁸¹ *Id.* (citing *Certain Frozen Warmwater Shrimp from India: Final Affirmative Countervailing Duty Determination*, 78 FR 50385 (August 19, 2013) (*Shrimp India Final*) and accompanying IDM at 12-14).

effective in confirming inputs consumed in exported products. Due to this lack of evidence, the Department should find the DDB program countervailable.⁸²

Department Position

We disagree with the Government of India and continue to find the DDB program to be countervailable. According to the Government of India, the DDB program provides rebates of duties or taxes chargeable on any (a) imported or exercisable materials and (b) input services used in the manufacture of export goods.⁸³ Specifically, the duties and tax “neutralized” under the program are the (i) Customs and Union Excise Duties on inputs and (ii) Service Tax in respect of input services.⁸⁴ The DDB is generally fixed as a percentage of the (FOB) price of the exported product.⁸⁵

Import duty exemptions on inputs for exported products are not countervailable as long as the exemption extends only to inputs consumed in the production of the exported product, making normal allowances for waste.⁸⁶ However, the government in question must have in place, and apply, a system to confirm which inputs are consumed in the production of the exported products, and in what amounts.⁸⁷ This system must be reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export.⁸⁸ If such a system does not exist, or if it is not applied effectively, and the government in question does not carry out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, the entire amount of any exemption, deferral, remission, or drawback is countervailable.⁸⁹

Regarding its establishment of applicable DDB rates, the Government of India stated the following:

The Committee undertakes analysis of data which includes the data on procurement process of inputs, indigenous as well as imported, applicable duty rates, consumption ratios and FOB values of export products, submitted on representative basis by Export Promotion Councils / commodity boards / trade bodies. The Government databases are used for appropriate cross-checks. The Committee also visits manufacturer exporter units for first-hand knowledge of the manufacturing process and observe nature of inputs ordinarily used and wastage. Committee also takes into account the industry experience and broad technical factors, as appropriate.⁹⁰

⁸² *Id.*

⁸³ See Government of India October 6, 2016 IQR at 24.

⁸⁴ *Id.*

⁸⁵ *Id.*, at 25.

⁸⁶ See 19 CFR 351.519(a)(1)(ii).

⁸⁷ See *Shrimp India Final IDM* at “Duty Drawback (DDB).”

⁸⁸ *Id.*

⁸⁹ See 19 CFR 351.519(a)(4)(i)-(ii).

⁹⁰ See Government of India October 6, 2017 IQR at 30-31.

In the Government of India First SQ, we requested that the Government of India identify and explain the types of records maintained by the relevant government or governments (*e.g.*, accounting records, company-specific files, databases, budget authorizations, *etc.*) regarding the program, and in effect during the POI.⁹¹ The Government of India did not provide the requested documentation. Based on the Government of India's questionnaire responses, consistent with past cases,⁹² and lacking the documentation to support that the Government of India has an adequate system in place to confirm inputs consumed in exported products, we determine that the Government of India has not supported its claim that its system is reasonable or effective for the purposes intended.

Accordingly, we determine that the DDB program confers a countervailable subsidy. Under the DDB program, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because the rebated duties represent revenue forgone by the Government of India. Moreover, as explained above, the Government of India has not supported its claim that the DDB system is reasonable and effective in confirming which inputs, and in what amounts, are consumed in the production of the exported products. Therefore, we have not changed our methodology from the *Preliminary Determination* with respect to this program and the calculation of program benefit attributed to USK Group and RNG.⁹³

Comment 3: Whether RNG and USK Group Should Report DEPB Licenses During the AUL Period Prior to the POI

Petitioners' Case Brief

- Consistent with the Department's practice (*i.e.*, *CTL Plate Korea Final* and *Truck and Bus Tires PRC Final*), and in accordance with sections 776(a) and (b) of the Act, the Department should continue to apply AFA to unreported subsidy benefits received during the POI or AUL.⁹⁴ Therefore, the Department should apply AFA to USK Group's and RNG's DEBP benefits received during the AUL, which were discovered at verification.⁹⁵
- The Department's discovery at verification that DEPB licenses were granted and sold throughout the AUL by both respondents demonstrates that the respondents failed to report properly "other subsidies" provided in whole or in part by the Government of India.⁹⁶

⁹¹ See Government of India First SQR at 3-4.

⁹² See, *e.g.* *Shrimp India Final* IDM at "Duty Drawback (DDB)."

⁹³ See *Preliminary Determination* PDM at 10-12.

⁹⁴ *Id.*, at 2-5 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea*, 82 FR 16341 (April 4, 2017) (*CTL Plate Korea Final*), and accompanying IDM at 42-43; and *Truck and Bus Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 8606 (January 27, 2017) (*Truck and Bus Tires PRC Final*), and accompanying IDM, at 15-16).

⁹⁵ See Petitioners' Case Brief at 2.

⁹⁶ *Id.*, at 6-7.

- RNG reported other programs administered by the DGFT. These additional programs administered by the DGFT are also applied for in the same module as the DEPB program. Therefore, RNG should have thoroughly examined the DGFT module when reporting program use to the Department.⁹⁷
- USK Group records FPS and DEPB license sales together in the accounting system and, as the Department initiated on the FPS program, USK Group should have reported the DEPB licenses early in the investigation, when responses were being prepared.⁹⁸
- The respondents cannot argue that the DEPB program provides recurring benefits because companies cannot decide for themselves how benefits are attributed or when benefits are determined to be “received.” Withholding information based on a respondent’s own viewpoint and judgment prevents the Department from conducting an accurate investigation, as discussed in *CTL Plate Korea Final*.⁹⁹

RNG’s Case Brief

- The DEPB program was a recurring benefit program that was terminated in 2011 and, as such, any subsidies received under this program during the AUL period prior to the POI were not required to be reported to the Department.¹⁰⁰
- RNG points to previous examples in which this program was deemed to be recurring by the Department, including *Shrimp India Final*,¹⁰¹ noting such benefits as being tied to exports and earned on the date of exportation.¹⁰²
- The Department confirmed in its Government of India verification report that RNG applied for and received benefits under the DEPB program during the AUL, but prior to the POI.¹⁰³
- The Department’s own CVD questionnaire states that, “[i]f the subsidy is recurring, then...only provide this information with respect to subsidies received during the POI” (emphasis added). Thus, there was no requirement by the Department to report any subsidies earned or received during the POI for a recurring, abolished DEPB program.¹⁰⁴

⁹⁷ *Id.*

⁹⁸ *Id.*, at 8.

⁹⁹ *Id.* (citing *CTL Plate Korea Final* IDM at 42).

¹⁰⁰ *Id.*, at 9.

¹⁰¹ *Id.* (citing *Shrimp India Final* IDM at 8).

¹⁰² *Id.*, at 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, at 10-11.

Government of India's Rebuttal Brief

- Given the Department's regulations under 19 CFR 351.524, the DEPB program should be deemed a non-recurring program and, as such, the Department should disregard the petitioners' claim that AFA be applied to USK Group's and RNG's DEPB programs.¹⁰⁵
- In accordance with 19 CFR 351.524(2)(i)-(iii), the DEPB program was to be available until September 30, 2011, after which this scheme was terminated; therefore, the recipient would not expect to receive additional subsidies under this program on a continual, yearly basis. Further, the DEPB program is not tied to capital assets. Therefore, a benefit under this program could not be non-recurring, in nature.¹⁰⁶
- While past practice demonstrates that the Department has treated the DEPB program as a recurring benefit, even if the Department were to treat this program as non-recurring in nature, the 0.5 percent test was not carried out for this program.¹⁰⁷
- Given the facts surrounding the DEPB program, there was no reason for the Government of India or the respondent companies to report this program during the AUL period and, therefore, AFA should not be applied to any benefits received under this program.¹⁰⁸

RNG's and USK Group's Rebuttal Briefs

- The petitioners' argument that the Department should apply AFA to the terminated DEPB program that was recurring in nature is baseless.¹⁰⁹
- USK Group and RNG cite to numerous instances in the Department's initial CVD questionnaire, including with respect to other subsidy programs, wherein it clearly instructs the respondent to report information concerning recurring programs during only the POI; and that the respondent should report information regarding non-recurring programs during the AUL period and the POI. USK Group and RNG reported DEPB program information to the Department in its questionnaire responses based on their understanding of the Department's questionnaire instructions.¹¹⁰
- The DEPB program is not a new subsidy program, as it has been considered in investigations and administrative reviews of other proceedings, such as in *Shrimp India Final*. In that investigation, the Department found that benefits are *conferred* as of the date of exportation.¹¹¹

¹⁰⁵ See Government of India's Rebuttal Brief at 6.

¹⁰⁶ *Id.*, at 6-7.

¹⁰⁷ *Id.*, at 7 (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34905 (May 16, 2002), and accompanying IDM).

¹⁰⁸ *Id.*

¹⁰⁹ See RNG's Rebuttal Brief and USK Group's Rebuttal Brief at 3-5.

¹¹⁰ See RNG's Rebuttal Brief 4-5, and 8; and USK Group's Rebuttal Brief at 3-6.

¹¹¹ See RNG's Rebuttal Brief at 5-7 and USK Group's Rebuttal Brief at 5-8 (citing *Shrimp India Final* IDM at 7-8).

- The Department itself noted in RNG's verification report that no benefits could have been earned on the DEPB program during the POI.¹¹²
- USK group argues that the Department verified at the Government of India that Norma India received DEPB licenses prior to the POI and, therefore, USK Group had not earned any DEPB benefit during the POI.¹¹³
- The petitioners' claim that the record of this investigation is insufficient with respect to information on the DEPB program, precluding any argument as to whether this program is recurring or non-recurring, holds no merit. Given the history of the DEPB program in previous investigations and reviews, if the petitioners had been concerned with the terminated DEPB program, they would have alleged this program as a subsidy in the underlying petition, but did not do so.¹¹⁴

Petitioners' Rebuttal Brief

- The petitioners reiterate that the subsidy benefits received under the DEPB program by RNG and USK Group were discovered during verification at the Government of India. The receipt of benefit was corroborated at RNG's verification, but RNG failed to report the use of this program in its questionnaire response. This discovery warrants application of AFA.¹¹⁵
- Because the respondents should have reported the use of this program to the Department, any argument that this program provides a recurring benefit is moot. If the program is indeed recurring, and no benefits were received during the POI, there would be no associated subsidy. However, such facts must be placed on the record during the investigation process, and not only once the benefits were discovered at verification.

Department's Position

We agree with the Government of India and the respondents that the DEPB program was terminated. As determined by the Department in previous cases,¹¹⁶ the DEPB program served to remit duties paid on inputs used in the manufacture of exported products.¹¹⁷ Exporting companies earned import duty exemptions in the form of credits on a post-export basis. At that point, companies could apply such credits to subsequent imports of materials, regardless of whether they were consumed in the production of an exported product.¹¹⁸ Credits received by companies under the DEPB program were valid for 12 months and became transferable upon realization of the foreign exchange on export sales from which the credits were earned.

¹¹² See RNG's Rebuttal Brief at 7.

¹¹³ See USK Group's Rebuttal Brief at 5 (citing Government of India Verification Report at 5).

¹¹⁴ See RNG's Rebuttal Brief at 8 and USK Group Rebuttal Brief at 5.

¹¹⁵ See Petitioners' Case Brief at 2-5.

¹¹⁶ See, e.g., *PET Film India Final IDM* at "DEPS" and *Shrimp India Final IDM* at 7-9.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, at *Shrimp India Final IDM* at 7.

As stated in *PET Film India Final*, the Department determined in past proceedings that the DEPB program was countervailable.¹¹⁹ The Department found that credits under the DEPB program constituted a financial contribution, pursuant to section 771(5)(D)(ii) of the Act, in the form of revenue foregone. Further, the Department found that the Government of India did not have a system in place and did not apply a system that was reasonable and effective to confirm which inputs, and in what amounts, were consumed in the production of the exported products.¹²⁰ Therefore, under section 771(5)(E) of the Act and 19 CFR 351.519(a)(4), in those past cases, the Department determined that the entire amount of the DEPB credit earned during the POI constituted a benefit.¹²¹ Additionally, this program was determined to only be available to exporters; therefore, the Department concluded it was specific under section 771(5A)(B) of the Act.

However, in accordance with past practice and pursuant to 19 CFR 351.519(b)(2), we found that the benefits received under this program were conferred as of the date of exportation of the shipment for which the credits were earned.¹²² As explained in *Shrimp India Final*, the Government of India provided the relevant documentation to conclude that it terminated the DEPB program, effective October 1, 2011, and the last date that the respondents could have applied for credits under the DEPB program was September 30, 2012 (as the application for obtaining credit should be filed within a period of twelve months from the date of exports).¹²³ The Department then determined that because the benefits are received on a recurring basis, no residual benefits existed after September 30, 2012.¹²⁴

At the Government of India verification, the Department noted that such licenses were granted during the AUL, but prior to the POI.¹²⁵ Consistent with the Department's practice regarding the calculation of benefit for the DEPB program on a recurring basis, because no licenses were granted during the POI, we determine that neither USK Group or RNG could have benefitted from this program during the POI. Therefore, we determine that the application of facts available or AFA is not warranted with respect to this subsidy program.

Comment 4: Whether USK Group and RNG Received Benefits from Certain Government of India Majority-Owned Banks

RNG's and USK Group's Case Briefs

- USK Group and RNG argue that, in accordance with the ASCM, although the Government of India has major ownership in a bank or banks, not all loans obtained

¹¹⁹ *Id.*, at *PET Film India Final* IDM at "DEPS."

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See e.g. *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from India*, 64 FR 73134 (December 29, 1999) (*Steel Plate India Final*) at 73134 and 73140.

¹²³ See *Shrimp India Final* IDM at 8-9.

¹²⁴ *Id.*, at 9.

¹²⁵ See Government of India Verification Report at 5.

through the various banks confer a benefit.¹²⁶ In particular, the fact that the Government of India holds majority ownership in the Bank of Baroda, and an additional bank,¹²⁷ does not support a notion that any loan obtained from these banks have a Government of India guarantee, or confer a benefit, despite reference to the contrary in the Department's verification report.¹²⁸

- USK Group and RNG cite to the ASCM, which defines subsidy as financial contribution from a public body. USK Group and RNG further cite to an Appellate Body Report of the WTO concerning the CVD case *Hot-Rolled Steel India*, in which the Appellate Body ruled that there must be a sufficient basis to determine that an entity is a public body such that it possesses, exercises, or is vested with government authority.¹²⁹
- The Bank of Baroda's core function is that of a commercial bank, operating exclusively on a commercial basis, and the Government of India maintains no involvement in the functioning of this bank. Moreover, the Government of India only extends loan guarantees to public sector companies in certain industries, as discussed in previous cases before the Department. Because RNG is a private, family-owned company, the issue of loan guarantees from the Government of India does not arise.¹³⁰
- Information placed on the record of this investigation, including any loan agreements, such as those for capital equipment purchase, clearly demonstrates that all borrowings from the Bank of Baroda were made on commercial terms comparable to interest rates on loans from other private banks in India; nowhere in any such agreement does it indicate that loans extended to RNG are guaranteed by the Government of India.¹³¹
- Any borrowings associated with export financing, and any benefit received on such borrowings, are captured under the interest subvention program. This is a separate and distinct program, the information of which is provided elsewhere on the record of this investigation.¹³²
- According to USK Group, three factors must be examined to evaluate whether the entity is a public body: core characteristics and functions of the entity, its relationship with the government, and legal and economic environment prevailing in the country in which the investigated entity operates.¹³³

¹²⁶ See USK Group's Case Brief, at 3 and RNG's Case Brief, at 5-6 (citing Article 1.1(a)(1) of the ASCM).

¹²⁷ The name of this bank, specific to borrowings by USK Group, is proprietary in nature. For further discussion, see USK Group's Final Calculation Memorandum.

¹²⁸ See RNG's Case Brief at 5.

¹²⁹ *Id.*, at 5-6 (citing *United States—Countervailing Duty Measures on Hot-Rolled Steel from India*, WT/DS436/AB/R (December 8, 2014) (*Hot-Rolled Steel from India*) at 126-127).

¹³⁰ *Id.*, at 7.

¹³¹ *Id.*

¹³² *Id.* at 8.

¹³³ See USK Group's Case Brief at 5.

- The loans discovered by the Department at verification were not required to be reported under the “Government of India Loan Guarantee” program because, according to USK Group, the loan guarantees provided by the Government of India are only extended to “public sector undertakings.”¹³⁴ USK Group states that as it is not a “public sector undertaking,” the company could not have received any loan guarantee or unreported benefit from the bank.¹³⁵

Petitioners’ Case Brief

- The petitioners contend that the Department should follow its established precedent (*see, e.g., Truck and Bus Tires PRC Final*) and apply AFA to the two loans received by USK Exports and the two loans received by RNG that were not reported in its questionnaire responses.¹³⁶
- The Department requested that USK Group report responses for numerous Government of India-financed loan programs, including the Steel Development Fund Loan and Pre-Shipment and Post-Shipment Export Financing. Certain qualities of the loans discovered by the Department at verification demonstrate that the Government of India had controlled various aspects of the unreported financing.¹³⁷ As such, USK Group should have reported these loans and by failing to do so, it did not act to the best of its ability.¹³⁸
- RNG’s financing was disbursed from the Bank of Baroda, a Government of India majority-owned bank, and the purposes of the loans likely are specific in nature.¹³⁹

USK Group’s and RNG’s Rebuttal Briefs

- The Department did not discover any “unreported subsidies” at verification. The only finding made by the Department at verification was the fact that the Bank of Baroda and an additional bank¹⁴⁰ are majority-owned by the Government of India. Thus, the Department cannot resort to an AFA finding merely because the Bank of Baroda and an additional bank are majority owned.¹⁴¹
- The petitioners’ claim that USK Group and RNG failed to report subsidy information about loans from the Bank of Baroda and an additional bank are baseless. USK Group and RNG did not receive any guarantees by the Government of India, at any time, in

¹³⁴ *Id.*, (citing *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Quality Steel Plate from India*, 64 FR 73131 (December 29, 1999) (*CTL Plate India Final*), and accompanying IDM at Section F).

¹³⁵ *Id.*, at 6.

¹³⁶ *See* Petitioners’ Case Brief at 19 (citing *Truck and Bus Tires PRC Final* IDM at 14).

¹³⁷ *Id.*, at 20.

¹³⁸ *Id.*

¹³⁹ *Id.* *See* RNG’s Final Calculation Memorandum for further discussion as the purposes of the loans are business proprietary in nature.

¹⁴⁰ *See* USK Group’s Final Calculation Memorandum for further discussion as the name of this bank is proprietary in nature.

¹⁴¹ *See* RNG’s Rebuttal Brief at 9 and USK Group’s Rebuttal Brief at 10.

relation to loans from the respective banks, as indicated in its initial questionnaire response.¹⁴² RNG points to 19 CFR 351.505(a), which specifies that the Department will treat borrowings from a government-owned bank as commercial loans unless where there is evidence that such loans were provided on non-commercial terms or at government direction.¹⁴³

- RNG argues that documentation on the record of this investigation clearly demonstrates that all long-term loans from the Bank of Baroda were received at interest rates comparable to other private banks. RNG states that the loan agreement with the Bank of Baroda, which specifies all borrowings from this bank, does not provide any affirmative indication that such loans were guaranteed by the Government of India.¹⁴⁴
- Further, RNG argues that there is no evidence of a subsidy on any interest rate related to borrowings specific to other programs, such as Pre- and Post-Shipment Export Financing, save for the IES program.¹⁴⁵
- USK Group and RNG point out further that, as verified by the Department, both companies did not have any borrowings from the State Bank of India during the AUL or the POI in which the Government of India provides loan guarantees to companies on a case-by-case basis.¹⁴⁶
- USK Group argues that the mere fact that USK Exports received a loan from a bank majority-owned by the Government of India does not equate to receiving assistance from the Government of India. Therefore, USK Group states that it was not required to list this loan under “Section L. Other Subsidies,” under which the Department requested companies to list assistance received by from the Government of India.¹⁴⁷

Petitioners’ Rebuttal Brief

- The petitioners argue that USK Group does not rebut the fact that they received a loan guarantee, or that the lending bank was majority-owned by the Government of India, only that it was not required to report the loan because the bank is not a “public body.”¹⁴⁸
- The indisputable fact is that USK Group should have reported the loans, and if they believe that the bank is not a “public body,” despite being majority owned, then it should have reported the loans to the Department and provided the facts in its questionnaire and/or pre-preliminary results comments.¹⁴⁹

¹⁴² See RNG’s Rebuttal Brief at 9-10 and USK Group’s Rebuttal Brief at 10-11.

¹⁴³ *Id.*

¹⁴⁴ See RNG’s Rebuttal Brief at 10-11.

¹⁴⁵ *Id.*, at 11-12.

¹⁴⁶ See RNG’s Rebuttal Brief at 11-12 and USK Group’s Rebuttal Brief at 12.

¹⁴⁷ See USK Group’s Rebuttal Brief at 12.

¹⁴⁸ See Petitioners’ Rebuttal Brief at 7.

¹⁴⁹ *Id.*

- Because USK Group did not report the loans and the Department only discovered them at verification, USK Group deprived the Department and the petitioners the ability to explore fully the argument of whether the bank is a “public body.”¹⁵⁰ As it is too late to raise the issue of status as a “public body” in a case brief, the petitioners state, this failure to report the loan, and the discovery of the loan at verification, warrants AFA.¹⁵¹
- With respect to loans discovered during verification at RNG, the petitioners reiterate that the Department has a long-standing practice to apply AFA to unreported subsidy benefits discovered at verification.¹⁵²
- The loans received from the Bank of Baroda bear multiple indicia of government-provided subsidies.¹⁵³
- RNG does not have discretion to decide whether a state-owned bank constitutes a government authority on its own. Considering the loans were discovered at verification, precluding a full investigation, AFA is warranted.¹⁵⁴

Department’s Position

We agree with the petitioners. The Department finds that, by failing to report the four loans (within three lending programs) provided by Government of India entities to USK Group and RNG in their responses to the Department’s requests for information, USK Group and RNG did not cooperate in this investigation to the best of their abilities and, therefore, the application of AFA with regard to the three lending programs is warranted.

As discussed at section “VII. Use of Facts Otherwise Available and Adverse Inferences,” above, at verification, we discovered that USK Group and RNG each received two loans from financial institutions in which the Government of India holds a majority interest, or maintains certain control.¹⁵⁵ As stated in the respective verification reports, when verifying non-use at each company of the program, “Government of India Loan Guarantees,” on which the Department initiated, we discovered that RNG and USK Exports received loans from banks majority-owned by the Government of India.¹⁵⁶ Further, in our initial CVD questionnaire to the Government of India, we asked under “L. Other Subsidies” whether “the Government of India (or entities owned directly, in or in part, by the Government of India or any provincial or local government) provide, directly or indirectly, any other forms of assistance to producers or exporters of flanges,”¹⁵⁷ and requested that the Government of India report all such assistance in its questionnaire response. In its response, the Government of India reported one additional program (*i.e.* the MEIS program) under which RNG availed countervailable benefits, but did not report the four loans pertaining to RNG and USK Group discovered at verification.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See also Petitioners’ Case Brief at 21-23.

¹⁵² See Petitioners’ Case Brief at 23-24.

¹⁵³ See Petitioners’ Rebuttal Brief at 9-10.

¹⁵⁴ *Id.*

¹⁵⁵ See USK Group Verification Report at 2 and RNG Verification Report at 2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Both companies argue that they were not required to report the loans as they were not “loan guarantees.” Further, according to RNG, the loans in question were extended to the company on commercial terms and, therefore, these loans cannot be deemed “public assistance” loans from the Government of India. Consequently, USK Group and RNG maintain that the discovered loans did not need to be reported under the program, “Government of India Loan Guarantees,” or as “Other Subsidies” in response to the Department’s initial CVD questionnaire.

The Department rejects this argument. The Department, not the interested parties, determines whether a company is required to provide a response to its questions and which information is necessary for its analysis. Accordingly, to ensure that interested parties do not prevent the Department from conducting an accurate and complete investigation, a respondent cannot unilaterally decide to withhold information from the Department that may require further analysis. In fact, the facts available provisions of section 776(a) of the Act specifically contemplate the application of facts available when interested parties withhold requested information and allow the Department to take action in response.

RNG:

As mentioned above, in its initial CVD questionnaire to RNG, the Department requested that RNG specify whether it received loans from the Government of India, whether in whole or in part:

Does the Government of India (or entities owned directly, in whole or in part, by the Government of India or any provincial or local government) provide, directly or indirectly, any other forms of assistance to producers or exporters of flanges? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the **Standard Questions Appendix**, as well as other appropriate appendices attached to this questionnaire.

While RNG provided information in its initial response indicating receipt of benefits under the IES program, it made no mention in its initial response of receipt of loans under other lending programs. Further, at no time leading up to the *Preliminary Determination* did RNG indicate that the financial institution(s) from which it obtained loans during the POI or AUL (*i.e.*, the Bank of Baroda) was “owned directly, in whole or in part, by the Government of India, or any provincial or local government,” as requested in the initial CVD questionnaire. The Department did not learn of the ownership details of RNG’s lending institution in relation to the loans in question until verification, specifically upon verifying non-use of other subsidy programs.

As specified in the RNG verification report,¹⁵⁸ at verification, we inquired whether the Bank of Baroda was a government-controlled bank. In response, RNG stated that review of that bank’s website revealed that the Bank of Baroda was majority-owned by the Government of India. Based on this information, we find that it was incumbent upon RNG to respond to the Department’s request for information in the initial CVD questionnaire. In the Department’s initial CVD questionnaire, we requested information related to other subsidies (*i.e.*, not otherwise

¹⁵⁸ See RNG Verification Report at 19.

mentioned under the program-specific questions in the Department's initial CVD questionnaire). In particular, as laid out in the initial CVD questionnaire, this information is required where the Government of India is directly or indirectly involved in, or holds some form of interest in, the entity associated with the subsidy received by the mandatory respondent.

In response to RNG's contention that the loans in question were extended to RNG on commercial terms, we note that we do not have any information on the record of this investigation related to the loans discovered at verification. Therefore, we are not able to analyze fully whether these loans were extended to RNG on commercial terms. Furthermore, while RNG argues that the borrowings associated with export financing were captured under the reported interest subvention program, we do not have information about the specifics of the loans that were discovered at verification. Accordingly, we do not have the necessary information on the record of this investigation to ascertain whether these loans were included elsewhere in RNG's questionnaire responses.

USK Group:

With respect to USK Group, we requested the identical information as that which was requested from RNG in the initial CVD questionnaire, regarding "Other Subsidies."¹⁵⁹ While USK Group responded that it received benefits under the SHIS program, it made no mention of receipt of loans or additional assistance from Government of India-owned entities (*i.e.*, majority-owned or owned in-part by the Government of India).

However, at verification, as Department officials were reconciling USK Group's response regarding non-use of "Other Subsidies," we discovered entries in USK Exports' accounting system for loans to import capital equipment.¹⁶⁰ Upon further examination of official documentation for these loans, we confirmed with USK Group officials that USK Exports received loans for imports of capital equipment and that one of these loans was provided by a bank that is publicly listed as a Government of India majority-owned bank on the Bombay Stock Exchange website.¹⁶¹ Based on these facts, we find that it was incumbent upon USK Group to respond to the Department's request for information in the initial CVD questionnaire wherein the Department requested information related to other subsidies (*i.e.*, not otherwise mentioned under the program-specific questions in the Department's initial CVD questionnaire). In particular, as laid out in the initial CVD questionnaire, this information is required where the Government of India is directly or indirectly involved in, or holds some form of interest in, the entity associated with the subsidy received by the respondent.

Government of India:

In addition to the investigation record being devoid of information from RNG and USK Group concerning the loans discovered at verification, we also point out that nowhere on this record did the Government of India report information specific to the loans discovered at the verifications

¹⁵⁹ See initial CVD questionnaire at 57.

¹⁶⁰ See USK Group Verification Report at 20.

¹⁶¹ *Id.*

of RNG and USK Group. For instance, in response to the initial CVD questionnaire, we asked the Government of India to report the following:

Does the Government of India (or entities owned directly, in whole or in part, by the Government of India or any provincial or local government) provide, directly or indirectly, any other forms of assistance to producers or exporters of flanges? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the **Standard Questions Appendix**, as well as other appropriate appendices attached to this questionnaire.

In response to this question, the Government of India reported information related to only the MEIS program that RNG availed during the POI.¹⁶² That is, the Government of India was silent on any additional subsidies, let alone borrowings from a Government of India majority-owned bank, availed by RNG and USK Group during the POI, despite the Department's request to provide such information. We also point out that, at the Government of India verification, the Government of India made no mention of lending to RNG and USK Group from Government of India majority-owned institutions.¹⁶³ Because the Government of India, USK Group, and RNG failed to respond to our requests for information, we do not have the necessary information on the record of this investigation concerning the loans discovered at verification. Further, because the programs in question were not reported in response to the Department's requests for information, the respondents deprived the Department of the opportunity to analyze fully these unreported programs to determine whether USK and RNG received a benefit under such programs. We point out that the purpose of verification is not to gather new information about previously unreported government subsidies.¹⁶⁴ For this reason, we have determined that the three lending programs discovered at verification (*i.e.*, capital equipment and export financing, and one additional program) are countervailable as AFA.

For the reasons stated above, we find that necessary information is not available on the record to fully analyze these programs discovered at verification, pursuant to section 776(a)(1) of the Act. Furthermore, pursuant to section 776(a)(2) of the Act, the Department finds that Government of India, USK Group, and RNG withheld information that was requested, failed to provide such information by the appropriate deadlines, and significantly impeded the proceeding by not providing accurate or complete responses to the Department's questions about the companies' receipt of government assistance. Consequently, we determine that, in accordance with section 776(a)(1) and (2) of the Act, the use of facts available is warranted. We also find that, because they did not report the receipt of assistance under the lending programs prior to verification (*e.g.* in their initial CVD questionnaire responses), the USK Group and RNG did not act to the best of their abilities in responding to the Department's requests for information, particularly under the "Other Subsidies" section of the initial CVD questionnaire. Because the USK Group and RNG impeded the investigation and precluded the Department from adequately examining the program (*i.e.*, the Department was unable to issue a supplemental questionnaire to the Government of India concerning the extent to which this program constitutes a financial

¹⁶² See Government of India October 6, 2016 IQR at 96.

¹⁶³ See Government of India Verification Report at 1-5.

¹⁶⁴ See, *e.g.*, Department Letter to RNG re: Verification Outline, dated January 19, 2017 (RNG Verification Outline) ("Please note that verification is not intended to be an opportunity for the submission of new factual information").

contribution and is specific under sections 771(5)(D) and 771(5A) of the Act, and provides a benefit under section 771(5)(E) of the Act and 19 CFR 351.519), an adverse inference is warranted. Therefore, we are applying AFA, pursuant to section 776(b) of the Act.

Consistent with our findings in prior proceedings, we find, as AFA, that the unreported lending programs meet the financial contribution and specificity criteria outlined under sections 771(5)(D) and 771(5A) of the Act, respectively.¹⁶⁵ As AFA, we also find that these subsidy programs confer a benefit under section 771(5)(E) of the Act and 19 CFR 351.519.

As described in section “Use of Facts Otherwise Available and Adverse Inferences” of this memorandum, above, under the hierarchy, the Department will select AFA rates in the following order of preference: the highest calculated rate for the identical subsidy program in the investigation if a responding company used the identical program and the rate is not zero; if there is no identical program match within the investigation, or if the rate is zero, the highest non-*de minimis* rate calculated for the identical program in a CVD proceeding involving the same country; if no such rate is available, the highest non-*de minimis* rate for a similar program, based on treatment of the benefit, in another CVD proceeding involving the same country; absent an above-*de minimis* subsidy rate calculated for a similar program, the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.¹⁶⁶

No non-*de minimis* rate has been calculated for an identical program in this or any other India proceeding. Pursuant to the rate selection hierarchy, as described above, we therefore determine that it is appropriate to apply, as AFA, a rate of 2.90 percent *ad valorem*, which is the subsidy rate calculated for an export financing program in *PET Film India Final*.¹⁶⁷ This is the highest rate for a similar program in a proceeding involving India. Because this rate constitutes secondary information, we have, in accordance with section 776(c)(1) of the Act, corroborated the rate to the extent practicable. With regard to the reliability aspect of corroboration, we are relying on a subsidy rate calculated in another CVD proceeding. Furthermore, under the Department’s CVD AFA methodology, when using secondary information, we seek to assign AFA rates that are the same in terms of the type of benefit (*e.g.*, grant to grant, loan to loan, indirect tax to indirect tax). Here, because the calculated rate was based on information provided for another government lending program (*i.e.*, “Pre-Shipment and Post-Shipment Export Financing”), it reflects the actual behavior of the Government of India with respect to a program that is similar to discovered lending programs.

With respect to the relevance aspect of corroborating the rate selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that certain

¹⁶⁵ See, *e.g.*, *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015), and accompanying IDM at 17-20, 153-154.

¹⁶⁶ See, *e.g.*, *Lawn Groomers PRC Preliminary Determination* at 70975 (unchanged in *Lawn Groomers PRC Final*); see also *Lightweight Thermal Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (October 2, 2008), and accompanying IDM at “Selection of the Adverse Facts Available Rate.”

¹⁶⁷ See *PET Film India Final* IDM at 4-5.

information on the record is not appropriate as AFA, the Department will not use it.¹⁶⁸ For these reasons, pursuant to section 776(c)(1) of the Act, the Department has applied a rate derived from another proceeding. We find that the rate is both reliable and relevant for use as an AFA rate for the lending programs. Accordingly, we have determined that this rate has been corroborated, to the extent practicable.

Comment 5: Whether the EPCGS Provides a Countervailable Subsidy and Whether the EPCGS Used the Correct Denominator for the Benefit Calculation of Respondents

Government of India Case Brief

- The Department should clarify the components of duties considered to arrive at the amount of duty saved, *i.e.*, the benefit, in its calculation of EPCGS subsidies at the *Preliminary Determination*. As specified in the Government of India's initial response, the only components that can be countervailed are the basic customs duty and associated education cess, or tax, on the basic customs duty. All other duties, once paid by the importer, are "CENVATable."¹⁶⁹
- In the PDM, the Department stated that it attributed the EPCGS benefits received to their total exports, consistent with 19 CFR 351.525(b)(5). That is, the Department used only export sales in its denominator. However, because capital goods imported under the EPCGS program can be used for both domestic and export products, the benefits should be attributed to the entire sales of the company, both export and domestic, where appropriate.¹⁷⁰
- For the final determination, the Department should correct the error in the *Preliminary Determination* with respect to the EPCGS subsidy rate for RNG, as the Department specified a different net subsidy rate in the PDM.¹⁷¹

RNG's Case Brief

- The Department incorrectly included: (1) CVD;¹⁷² (2) Secondary and Higher Secondary Education Cess (or tax) on CVD; and (3) Special Additional Duty (SAD) in the calculation of EPCGS.¹⁷³
- These duties do not confer a benefit because, under India's CENVAT system, such duties are refundable (*i.e.*, credit is available) to all importers. RNG cites to record information

¹⁶⁸ See, e.g., *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

¹⁶⁹ *Id.*, at 17. "CENVATable," or Central Value Added Tax system (CENVAT), refers to one of India's value-added tax systems, in which certain duties, e.g., the "Excise Duty," are refundable. See, e.g., RNG's Case Brief, at 3; see also, Government of India October 6, 2016 IQR at 45.

¹⁷⁰ *Id.*, at 18.

¹⁷¹ See *Preliminary Determination* PDM at 15.

¹⁷² RNG defines the CVD as an additional duty that is equivalent to the excise duty charged on domestic sales. See Government of India October 6, 2016 IQR.

¹⁷³ See RNG's Case Brief at 3.

arguing that only those importers that are required to pay duties on those goods not imported under the EPCG license receive a full credit of the CVD and SAD.¹⁷⁴

- In *Hot-Rolled Steel India Review Final*, the Department considered the net duty saved amount in the EPCGS calculation of each respondent and removed the CVD, Education Cess, and SAD from the EPCGS benefit calculation, where applicable.¹⁷⁵

Petitioners' Rebuttal Brief

- With regard to the Government of India's arguments, the petitioners explain that the Government of India's statement that the Department clarify certain components of the import duties used in the calculation of benefit under this program is simply a request for clarification. The petitioners note that the Government of India has not challenged the finding that the EPCGS is a countervailable program.¹⁷⁶
- Further, the petitioners argue that the EPCGS benefit was correctly attributed to export sales because, as the Government of India previously stated, the benefit received under this subsidy program is a reduction of, or exemption from, certain duties and taxes on imports of capital goods used in the production of *exported products*.¹⁷⁷ As this program is export-contingent, the Department should continue to follow previous cases, including *OTR Tires India Final*, and find that any benefit received under this program should be attributed to export sales.¹⁷⁸
- The petitioners also argue that the calculation of RNG's benefit received under this program is correct, although the Government of India only argues that the Department rectify the error instead of asking to clarify the correct rate.¹⁷⁹ Upon examination of RNG's preliminary calculations, the petitioners state, the correct rate is 0.37 percent *ad valorem*.¹⁸⁰
- The petitioners rebut RNG's reference to *Hot-Rolled Steel India Review Final*, and claim that Ispat, the company under review in the proceeding, demonstrated with record evidence that the noted import charges were not exempted due to the EPCGS program in that period.¹⁸¹ The petitioners argue that the information submitted by RNG on the record does not reasonably demonstrate that the same is true in the instant investigation.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, at 4-5 (citing *Certain Hot-Rolled Steel from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*Hot-Rolled Steel India Review Final*), and accompanying IDM at Comment 21).

¹⁷⁶ *Id.*, at 5.

¹⁷⁷ See *Preliminary Determination PDM* at 12; see also Government of India's Case Brief at 15 and 17-18.

¹⁷⁸ See Petitioners' Rebuttal Brief at 6 (citing *Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from India: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 2946 (January 10, 2017) (*OTR Tires India Final*), and accompanying IDM at 46).

¹⁷⁹ *Id.*, at 6.

¹⁸⁰ See Department Memorandum, "Preliminary Determination Calculations for RN Gupta & Company Limited," dated November 21, 2016, at Attachment 2.

¹⁸¹ See Petitioners' Rebuttal Brief at 8 (citing *Hot-Rolled Steel India Review* IDM at Comment 21).

Department's Position

We disagree with the Government of India's contention that the EPCGS benefit calculation should include both export and domestic sales in the denominator of this calculation. As the Government of India points out in its case brief, for the *Preliminary Determination*, the Department used export sales in its denominator to calculate the benefit received under this program. While the Government of India takes issue with the Department's use of only export sales in the denominator used to calculate benefit under this program, 19 CFR 351.514 specifies the manner in which the Department determines and treats export subsidies. Specifically, this regulation deems a subsidy to be an export subsidy where eligibility for, approval of, or the amount of, a subsidy is contingent upon export performance. Thus, where a given program is contingent upon export performance, regardless of whether the program is exclusively linked to exports, the Department considers this program to be an export subsidy and uses only export sales in the denominator to calculate benefit received under this program.

As explained in the *Preliminary Determination*, under the EPCG program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to a multiple of the duty value saved on the capital goods within a period of a certain number of years.¹⁸² For example, imported goods under this program may be subject to an export obligation equivalent to six times the duty saved on the imported goods, the obligation of which must be fulfilled within a period of six years of issuance of the import license. If this obligation is met, then the company would be eligible to import the goods at a concessional duty rate. If the company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction. Once a company has met its export obligations, the Government of India will formally waive the exempted duties on the imported goods.¹⁸³ The Government of India's own initial questionnaire response explains this program in detail. This explanation further supports the export nature of this program, wherein it states that the "...objective of the EPCG scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's export competitiveness" (emphasis added). Further, the Government of India states that "Export performance is relevant for determining eligibility for the receipt of assistance under this program."¹⁸⁴ Additionally, the Department has consistently used only export sales in the denominator of the benefit calculation because, as the Department has found in previous cases in which this program was reviewed, the EPCGS program is export contingent.¹⁸⁵ Given case precedent regarding the Department's treatment of this program, the Department's regulations concerning export-contingent subsidies, and the facts on the record of this case, the Department has, thus, continued to use only export sales in the denominator of the EPCG benefit calculation in this final determination.

¹⁸² See *Preliminary Determination*, section X.A.2. "Export Promotion of Capital Goods Scheme (EPCGS)," at 12.

¹⁸³ See Government of India October 6, 2016 IQR, at 42-45.

¹⁸⁴ *Id.*, at 52.

¹⁸⁵ See, e.g., *Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from India: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 13334 (March 14, 2016), and accompanying IDM, section VIII.A.A., at 14; see also, *Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Affirmative Determination*, 81 FR 66925 (September 29, 2016) and accompanying IDM, Comment 3, at 20.

Concerning the issue of whether the Department erred in its calculation of the EPCG benefit by including the: (1) CVD; (2) Secondary and Higher Secondary Education Cess on CVD; and (3) SAD, we agree with RNG. We inadvertently included those components in the EPCG calculation in the *Preliminary Determination*. Regarding the components of the EPCG benefit calculation, under this program, the Department calculates the benefit received from the waiver of import duties on capital equipment imports where the company's export obligation was met prior to the end of the POI. We consider the total amount of duties waived, *i.e.*, the calculated duties payable less the duties actually paid in the year, net of required application fees, to constitute the benefit, in accordance with section 771(6) of the Act.¹⁸⁶

In its initial questionnaire response, RNG indicated that the "CVD Higher Secondary Education Cess on CVD and SAD" do not confer a benefit. RNG explained that under India's CENVAT system, imposed since March 1, 2005, these duties, to the extent they are paid, are refundable, or "CENVATABLE," to all importers. RNG reasoned that no exemption or additional government revenue is foregone; therefore, no additional benefit accrues to the EPCG holder.¹⁸⁷ In previous cases, the Department has recognized that these specific components are CENVATABLE, *i.e.*, refundable, and, as such, should be excluded from the EPCG calculation.¹⁸⁸ To ensure the EPCG benefit calculation includes only those components on which a benefit was conferred, we removed the "CVD Higher and Secondary Education Cess and SAD" components from the EPCG calculation for purposes of the final determination.¹⁸⁹

Comment 6: Whether the Department Should Apply AFA to Norma's AUL Sales Data

Petitioners' Case Brief

- The Department was unable to reconcile total or domestic sales for the remainder of the AUL (excluding the POI) for Norma, USK Exports, and UMA.¹⁹⁰ Because the overall sales category adjustments were rejected by the Department (*i.e.* total sales), the subcategory reconciliations are consequently unable to be verified.¹⁹¹
- The Department was only able to reconcile Norma's, USK Export's, and UMA's reported export sales for the AUL to certain FOB files and shipping bills presented by the company.¹⁹² Therefore, the Department was unable to tie export values to the respective companies' general ledgers and financial statements.
- The petitioners also argue that the sales figures that the Department was unable to reconcile could contain export sales and, thus, this calls into question the veracity of the export sales reconciliation.

¹⁸⁶ See *Preliminary Determination*, section X.A.2. "Export Promotion of Capital Goods Scheme (EPCGS)," at 14.

¹⁸⁷ See Government of India October 6, 2016 IQR, at 27-30.

¹⁸⁸ See *e.g.*, *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008), and accompanying IDM at Comment 21.

¹⁸⁹ For further discussion, see RNG's Final Calculation Memorandum.

¹⁹⁰ See USK Group Verification Report at 5.

¹⁹¹ *Id.*, at 13.

¹⁹² *Id.*, at 10.

- USK Group waited until verification to disclose discrepancies between the reported sales data and the financial statements, significantly impeding the investigation.
- USK Group has numerous additional discrepancies with its sales data that were discovered by the Department at verification that warrants application of AFA.¹⁹³
- Consistent with *Silica Fabric PRC Final*, the Department should determine that, as AFA, all non-recurring subsidy benefits received during the AUL pass the 0.5 percent test, and thus, are allocable to the POI.¹⁹⁴

USK Group's Rebuttal Brief

- The Department should not apply AFA to USK Group's AUL sales data, including export sales, because USK Group never withheld any information requested by the Department.¹⁹⁵
- USK Group responded to all questionnaires within the established deadlines and in the manner required. The Department was able to verify information in the initial and supplemental questionnaires.¹⁹⁶
- Further, the Department explicitly stated in the verification report that it accepted the corrections reported in the AUL export sales turnover, verified the same information in detail, and collected the corresponding documents relevant to the invoices relating to any discrepancies.¹⁹⁷
- Therefore, the Department verified the relevant sales data required to apply the 0.5 percent tests for ascertaining whether a non-recurring subsidy is allocable to the POI.
- USK Group argues that the petitioners' statement that total AUL export turnover does not tie to the financial statements because total sales and total domestic sales do not tie, is inaccurate. USK Group states that the Department verified the minor correction, stating that the revision now ties with the balance sheet of each company for the AUL.¹⁹⁸

¹⁹³ *Id.*, at 18.

¹⁹⁴ *Id.*, at 17-18 (citing *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric PRC Final*), and accompanying IDM at 17.

¹⁹⁵ *Id.*, at 12.

¹⁹⁶ *Id.*, at 13.

¹⁹⁷ *Id.*, at 16 (citing USK Group Verification Report at V1-10).

¹⁹⁸ *Id.* (citing USK Group Verification Report at 15).

Department's Position

We agree with USK Group. At verification, USK Group presented certain minor corrections to their sales figures reported to the Department on October 28, 2016.¹⁹⁹ These minor corrections included corrections to AUL total, export, and domestic sales data for Norma, USK Exports, and UMA. As explained in USK's Verification Report, we only accepted minor corrections related to total AUL export sales for Norma, USK Group, and UMA because the proposed changes to total and domestic AUL sales (excluding POI sales) were not minor, in nature.²⁰⁰

Although we were unable to reconcile total and domestic sales figures (excluding POI sales) for Norma, USK Exports, and UMA to their October 28, 2016, responses, we fully verified export sales figures for each company. The export sales figures were thoroughly reconciled to each company's audited financial statements and to their respective accounting systems.²⁰¹ Further, in the instant investigation, we have only calculated benefits attributable to USK Group for programs related to export sales (*i.e.* EPCG, DDB, and SHIS). Furthermore, each company's total and domestic sales during the POI were verified, as reported in their respective October 28, 2016, supplemental questionnaire responses.²⁰² Moreover, no total sales values or domestic sales values were used in the calculation of countervailable subsidies attributable to USK Group. Considering that the Department thoroughly verified USK Group's export sales and no additional sales categories were used in the calculation of benefit, we determine that application of facts available with respect to USK Group's sales is not warranted. The Department verified the sales values that are applicable to USK Group's reported program usage and the additional sales values were not used in any individual program calculation related to USK Group.

We disagree with the petitioners that because the overall sales category adjustments were rejected by the Department, the subcategory reconciliations are unable to be verified. The Department clearly stated in USK Group's Verification Report that minor corrections regarding export sales were accepted and we subsequently reconciled the corrected export sales values to the accounting system and financial statement.²⁰³ While the petitioners argue that, in *Silica Fabric PRC Final*, the Department applied AFA to certain sales figures when sales values presented at verification did not reconcile to the company's reported response and the accounting system, we find the facts of the instant investigation to be different. In the instant investigation, the Department was able to reconcile fully the export, domestic, and total POI sales figures presented at verification to the respective company's accounting system, unlike in *Silica Fabric PRC Final*. Therefore, as explained above, we determine that facts available is not warranted in the instant investigation with regard to this issue.

¹⁹⁹ See USK Group Verification Report at 3.

²⁰⁰ *Id.*, at 4-5.

²⁰¹ *Id.*, at 8-13.

²⁰² *Id.*

²⁰³ *Id.*

Comment 7: Whether to Apply AFA to RNG's Unaffiliated Indian Suppliers of Subject Merchandise

Petitioners' Case Brief

- RNG did not make any effort to obtain questionnaire responses from unaffiliated suppliers of the subject merchandise, despite the Department's instructions requesting that RNG do so.²⁰⁴
- Pursuant to the CIT's decision in *Nippon Steel*, RNG was required to use "maximum effort" to provide information requested by the Department.²⁰⁵
- As explained in *Creatine Monohydrate PRC Final*, even though information may only impact an "insignificant" portion of the respondent's sales, companies must automatically report such information, regardless of whether the Department requests it.²⁰⁶
- As a result of RNG's inaction to submit required information regarding its unaffiliated suppliers, the Department should determine that RNG did not act to the best of its ability and apply AFA to RNG's unaffiliated Indian suppliers of subject merchandise during the AUL.²⁰⁷
- If the Department determines that AFA is not warranted in this instance, the Department should nonetheless apply "facts otherwise available" for RNG's unaffiliated Indian suppliers of subject merchandise during the AUL.²⁰⁸

RNG's Rebuttal Brief

- The Department's initial CVD questionnaire clearly lays out that it "may" be necessary for such producers to provide a questionnaire response. RNG provided timely and complete supplier information in responses to the Department's questionnaires concerning affiliated parties during the POI and AUL period.²⁰⁹ In particular, RNG indicated that none of its suppliers were affiliated, nor were any of them involved in RNG's exports to the United States.²¹⁰
- In RNG AFFR, RNG requested that it be exempted from requiring its unaffiliated suppliers to respond to the Department's initial CVD questionnaire. The Department

²⁰⁴ See Department Letter re: First Supplemental Questionnaire for RNG," dated August 24, 2016.

²⁰⁵ See Petitioners' Case Brief at 22 (citing *Nippon Steel v. United States*, 337 F. 3d 1373, 1382 (Fed. Cir. 2003)).

²⁰⁶ See Petitioners' Case Brief, at 22-24 (citing *Creatine Monohydrate from the People's Republic of China*, 64 FR 71104, 71104-71108 (December 20, 1999) (*Creatine Monohydrate PRC Final*)).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See RNG's September 7, 2016 Affiliation Response (RNG AFFR); see also RNG's September 20, 2016 Supplemental Affiliation Response (RNG September 20, 2016 SAFFR).

²¹⁰ See RNG's Rebuttal Brief, at 13-14; see also, the Department's Letter re: Supplemental Affiliation Questionnaire for RNG, dated September 13, 2016 (RNG First SAFFQ).

never requested that any of RNG's unaffiliated suppliers be required to submit a questionnaire response.²¹¹ Because the Department's record contains complete information regarding these unaffiliated suppliers, there are no gaps in the record that would warrant an AFA call.²¹²

Department's Position

We disagree with the petitioners. In the *Preliminary Determination*, the Department found that RNG's suppliers of subject merchandise were unaffiliated and, thus, we did not find those suppliers to be cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi).²¹³ The Department examined these suppliers at verification and confirmed that such suppliers are unaffiliated. We noted no discrepancies.²¹⁴ Accordingly, the issue of whether RNG should provide questionnaire responses for those suppliers is moot.

Comment 8: Whether to Countervail Funds Received by RNG Under the Focus Product Scheme During the POI

Petitioners' Case Brief

- For the final determination, the Department should find that RNG used the FPS program during the POI and, accordingly, it should calculate countervailable benefits for this program.²¹⁵
- While the MEIS program took effect on the same day on which the FPS program terminated (*i.e.*, April 1, 2015), the FPS and MEIS programs are similar in nature, and the purpose and mechanism for calculating benefits are the same among the two programs. Thus, the MEIS program is essentially a successor to RNG's FPS program.²¹⁶
- RNG previously reported that certain "Export Incentives" listed in its questionnaire response pertained to the FPS, but were earned prior to the POI, as the benefit is received at the time of export.²¹⁷ However, under the MEIS program, benefits are received at the time the license is granted. As the programs are nearly identical, RNG should not be allowed to claim benefits under two different time periods; to do so would otherwise cause an artificial undervaluation of RNG's subsidy margin.²¹⁸

²¹¹ See RNG's Rebuttal Brief at 14-15.

²¹² *Id.*, at 15.

²¹³ See the *Preliminary Determination*, and accompanying PDM, under "RNG" at section VII.B. "Attribution of Subsidies," at 6.

²¹⁴ See RNG Verification Report at 5-6.

²¹⁵ See Petitioner's Case Brief at 25.

²¹⁶ *Id.*, at 25-26.

²¹⁷ *Id.*, at 26 (citing RNG's October 27, 2017 Second Supplemental Questionnaire Response (RNG October 27, 2017 SQR)).

²¹⁸ *Id.*, at 26-27.

- Alternatively, the Department should countervail the amount listed in “Export Incentives” in RNG’s financial statements, under the FPS program.²¹⁹

RNG’s Rebuttal Brief

- For the final determination, the Department should continue to find that RNG did not use the FPS program during the POI; the Department verified non-use during verification.²²⁰
- In prior CVD proceedings, the Department found the FPS program to be recurring in nature. RNG points out further that in those proceedings, the Department determined that any benefit earned under this program is based on the date of export.²²¹
- RNG cites to a prior CIT decision,²²² wherein the CIT found that, once it rules on a specific issue or methodology, it must be adhered to by the Department, unless that determination results in a clearly erroneous or unjust outcome. Here, the petitioners have not provided any new or additional information; nor were there any verification findings that would similarly call into question when benefits are conferred under this program. Accordingly, consistent with *Toscelik Profil*, there is no reason for the Department to change its decision on when such benefits are earned under this program.²²³
- The FPS and MEIS programs are two distinct programs, as specified under India’s *Foreign Trade Policy 2015-20*. Additionally, MEIS is not a successor to the FPS program, as benefit is earned when the license is granted under the MEIS program, unlike the FPS program, in which benefit is earned upon export. Further, unlike the FPS program in which the recipients know the benefit amount when exportation occurs, under the MEIS program, benefit is not known to the exporter until well after exportation.²²⁴
- The Department verified RNG did not use the FPS program and found the “Export Incentive” to be related solely to the MEIS program. Because this program was not used during the POI, there are no FPS benefits on which to calculate a subsidy.²²⁵

Department’s Position

We disagree with the petitioners. For purposes of the *Preliminary Determination*, the Department found, as AFA, that the Government of India conferred a financial contribution through the FPS and found this program to be specific. However, the respondents reported non-

²¹⁹ *Id.*

²²⁰ See RNG’s Rebuttal Brief at 15-17.

²²¹ *Id.*, at 15-16.

²²² *Id.*, at 16 (citing *Toscelik Profil VE Sac Endustrisi A.S. vs United States*, Court No. 13-00371 (CIT October 29, 2014) (*Toscelik Profil*), at 10).

²²³ See RNG’s Rebuttal Brief at 16.

²²⁴ *Id.*, at 16-17 (citing *Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from India: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 13334 (March 14, 2016)); see also RNG Verification Report at 17; and Government of India Verification Report at 4.

²²⁵ See RNG’s Rebuttal Brief at 18.

use of this program.²²⁶ As part of our verification of non-use of programs of the Government of India and RNG, we examined whether this program was indeed, not used. As a result of our examination, we confirmed non-use of the FPS program.²²⁷ As there are no countervailable benefits to calculate for this final determination, this issue becomes moot.

XI. RECOMMENDATION

We recommend approving all of the above positions. If these Department positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.


☒

Agree

☐

Disagree

6/23/2017

X 

Signed by: RONALD LORENTZEN

Ronald Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

²²⁶ *Id.*, at section X.B. “Programs Preliminarily Determined to be Not Used,” at 19.

²²⁷ *See* Government of India Verification Report at 5; RNG Verification Report at 19.