



C-533-874  
Investigation  
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December 4, 2017

MEMORANDUM TO: Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder  
Senior Director  
for Antidumping and Countervailing Duty Operations  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

SUBJECT: Issues and Decision Memorandum for the Final Determination in  
the Countervailing Duty Investigation of Certain Cold-Drawn  
Mechanical Tubing of Carbon and Alloy Steel from India

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## I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain cold-drawn mechanical tubing of carbon and alloy steel products (cold-drawn mechanical tubing) from India, within the meaning of section 705 of the Tariff Act of 1930, as amended (the Act).<sup>1</sup> Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1: The Department's Application of Adverse Facts Available (AFA) for the Government of India's (GOI) Failure to Provide Requested Information

Comment 2: Whether the Advanced Authorization Program (AAP) and Duty Drawback (DDB) Programs Are Countervailable

Comment 3: The Department's Treatment of the Export Promotion of Capital Goods Scheme (EPCGS)

Comment 4: The Department's Treatment of Status Holders Incentive Scheme (SHIS)

Comment 5: Whether the Benefit for the Merchandise Import from India Scheme (MEIS) Is Determined at the Date of Issuance

Comment 6: Whether the Deduction under 32-AC of the Income Tax Act Is Countervailable

Comment 7: The Department's Determination Regarding the Entry Tax Exemption for the Iron and Steel Industry in Uttar Pradesh

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<sup>1</sup> See also section 701(f) of the Act.

- Comment 8: The Denominator Used to Calculate Goodluck India Limited's (Goodluck) DDB Exemption
- Comment 9: The Inclusion of Tube Investments of India Ltd.'s (Tube Investments) Non-Subject Merchandise in the Benefit Calculation for DDB
- Comment 10: The Department's Calculation Methodology for Tube Investments' EPCGS Benefits
- Comment 11: The Department's Application of AFA for Certain Unreported Subsidies Discovered at Tube Investments' Verification
- A. Tube Investments' Failure to Report its Export Oriented Unit (EOU)
  - B. Tube Investments' Failure to Report its Use of the Industrial Promotion Subsidy (IPS) Program
  - C. Tube Investments' Failure to Report a Benefit Received by a Shuttered Division of the Company
- Comment 12: The Department's Calculation Methodology for the Income Tax for Research and Development Program
- Comment 13: The Department's Decision to Countervail Benefits for Tube Investments' Non-Subject Merchandise
- Comment 14: The Revised Sales and Subsidy Data Presented as Minor Corrections

## II. BACKGROUND

On September 25, 2017, the Department published the *Preliminary Determination* in this proceeding.<sup>2</sup> Between October 23 and October 31, 2017, we conducted verification of the questionnaire responses submitted by the GOI, Goodluck, and Tube Investments of India Limited.<sup>3</sup> Interested parties submitted case and rebuttal briefs between November 16 and November 21, 2017.<sup>4</sup> On November 29, 2017, the Department held a public hearing, limited to the issues raised in the case and rebuttal briefs.

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<sup>2</sup> See *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 44558 (September 25, 2017) and accompanying Preliminary Decision Memorandum (*Preliminary Determination*).

<sup>3</sup> See, Memorandum, "Verification of the Government of India in the Countervailing Duty Investigation of Certain Cold-Drawn Mechanical Tubing from India," dated November 9, 2017 (GOI Verification Report); Memorandum, "Verification of Goodluck India Limited in the Countervailing Duty Investigation of Certain Cold-Drawn Mechanical Tubing from India," dated November 9, 2017; Memorandum, "Verification of the Questionnaire Responses of Tube Investments of India Ltd.," dated November 9, 2017 (Tube Investments' Verification Report).

<sup>4</sup> See the GOI's Case Brief, "Case Brief on behalf of Government of India," dated November 16, 2017 (GOI's Case Brief); Goodluck's Case Brief, "Goodluck Administrative Case Brief," dated November 16, 2017 (Goodluck's Case Brief); Tube Investments' Case Brief, "Case Brief—Tube Investments of India Ltd.," dated November 16, 2017 (Tube Investments' Case Brief); the Petitioners' Case Brief, "Petitioners' Case Brief," dated November 16, 2017 (the Petitioners' Case Brief); the Petitioners' Rebuttal Brief, "Petitioners' Rebuttal Brief," dated November 21, 2017 (the Petitioners' Rebuttal Brief).

### III. PERIOD OF INVESTIGATION

The period of investigation (POI) for which we are measuring subsidies is April 1, 2016 through March 31, 2017.<sup>5</sup>

### IV. SCOPE COMMENTS

In the Department's Preliminary Scope Decision Memorandum, we set aside a period of time for parties to raise issues regarding product coverage (*i.e.*, scope) in scope case briefs or other written comment on scope issues.<sup>6</sup> Certain interested parties commented on the scope of the investigation as it appeared in the Preliminary Scope Decision Memorandum. On December 4, 2017, the petitioners withdrew a portion of their comments regarding the scope language.<sup>7</sup> For a summary of the product coverage comments and rebuttal responses submitted to the record for this final determination, and accompanying discussion and analysis of all comments timely received, *see* the Final Scope Decision Memorandum.<sup>8</sup>

### V. SCOPE OF THE INVESTIGATION

The scope of this investigation covers cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) of circular cross-section, 304.8 mm or more in length, in actual outside diameters less than 331mm, and regardless of wall thickness, surface finish, end finish or industry specification. The subject cold-drawn mechanical tubing is a tubular product with a circular cross-sectional shape that has been cold-drawn or otherwise cold-finished after the initial tube formation in a manner that involves a change in the diameter or wall thickness of the tubing, or both. The subject cold-drawn mechanical tubing may be produced from either welded (*e.g.*, electric resistance welded, continuous welded, etc.) or seamless (*e.g.*, pierced, pilgered or extruded, etc.) carbon or alloy steel tubular products. It may also be heat treated after cold working. Such heat treatments may include, but are not limited to, annealing, normalizing, quenching and tempering, stress relieving or finish annealing. Typical cold-drawing methods for subject merchandise include, but are not limited to, drawing over mandrel, rod drawing, plug drawing, sink drawing and similar processes that involve reducing the outside diameter of the tubing with a die or similar device, whether or not controlling the inside diameter of the tubing with an internal support device such as a mandrel, rod, plug or similar device. Other cold-finishing operations that may be used to produce subject merchandise include cold-rolling and cold-sizing the tubing.

Subject cold-drawn mechanical tubing is typically certified to meet industry specifications for cold-drawn tubing including but not limited to:

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<sup>5</sup> *See Preliminary Determination* at 3.

<sup>6</sup> *See* Memorandum, "Scope Comments Decision Memorandum for the Preliminary Determinations," dated November 15, 2017 (Preliminary Scope Memorandum).

<sup>7</sup> *See* the Petitioners' Letter, "Certain Cold-Drawn Mechanical Tubing from Germany *et al.* – EN-10305-3," dated December 4, 2017.

<sup>8</sup> *See* Memorandum, "Scope Comments Decision Memorandum for the Final Determinations," dated December 4, 2017 (Final Scope Decision Memorandum).

(1) American Society for Testing and Materials (ASTM) or American Society of Mechanical Engineers (ASME) specifications ASTM A-512, ASTM A-513 Type 3 (ASME SA513 Type 3), ASTM A-513 Type 4 (ASME SA513 Type 4), ASTM A-513 Type 5 (ASME SA513 Type 5), ASTM A-513 Type 6 (ASME SA513 Type 6), ASTM A-519 (cold-finished);

(2) SAE International (Society of Automotive Engineers) specifications SAE J524, SAE J525, SAE J2833, SAE J2614, SAE J2467, SAE J2435, SAE J2613;

(3) Aerospace Material Specification (AMS) AMS T-6736 (AMS 6736), AMS 6371, AMS 5050, AMS 5075, AMS 5062, AMS 6360, AMS 6361, AMS 6362, AMS 6371, AMS 6372, AMS 6374, AMS 6381, AMS 6415;

(4) United States Military Standards (MIL) MIL-T-5066 and MIL-T-6736;

(5) foreign standards equivalent to one of the previously listed ASTM, ASME, SAE, AMS or MIL specifications including but not limited to:

(a) German Institute for Standardization (DIN) specifications DIN 2391-2, DIN 2393-2, DIN 2394-2);

(b) European Standards (EN) EN 10305-1, EN 10305-2, EN 10305-4, EN 10305-6 and European national variations on those standards (*e.g.*, British Standard (BS EN), Irish Standard (IS EN) and German Standard (DIN EN) variations, etc.);

(c) Japanese Industrial Standard (JIS) JIS G 3441 and JIS G 3445; and

(6) proprietary standards that are based on one of the above-listed standards.

The subject cold-drawn mechanical tubing may also be dual or multiple certified to more than one standard. Pipe that is multiple certified as cold-drawn mechanical tubing and to other specifications not covered by this scope, is also covered by the scope of these investigations when it meets the physical description set forth above.

Steel products included in the scope of these investigations are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

For purposes of this scope, the place of cold-drawing determines the country of origin of the subject merchandise. Subject merchandise that is subject to minor working in a third country that occurs after drawing in one of the subject countries including, but not limited to, heat treatment, cutting to length, straightening, nondestructive testing, deburring or chamfering, remains within the scope of these investigations.

All products that meet the written physical description are within the scope of these investigations unless specifically excluded or covered by the scope of an existing order. Merchandise that meets the physical description of cold-drawn mechanical tubing above

is within the scope of the investigations even if it is also dual or multiple certified to an otherwise excluded specification listed below. The following products are outside of, and/or specifically excluded from, the scope of these investigations:

(1) cold-drawn stainless steel tubing, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(2) products certified to one or more of the ASTM, ASME or American Petroleum Institute (API) specifications listed below:

- ASTM A-53;
- ASTM A-106;
- ASTM A-179 (ASME SA 179);
- ASTM A-192 (ASME SA 192);
- ASTM A-209 (ASME SA 209);
- ASTM A-210 (ASME SA 210);
- ASTM A-213 (ASME SA 213);
- ASTM A-334 (ASME SA 334);
- ASTM A-423 (ASME SA 423);
- ASTM A-498;
- ASTM A-496 (ASME SA 496);
- ASTM A-199;
- ASTM A-500;
- ASTM A-556;
- ASTM A-565;
- API 5L; and
- API 5CT

except that any cold-drawn tubing product certified to one of the above excluded specifications will not be excluded from the scope if it is also dual- or multiple-certified to any other specification that otherwise would fall within the scope of these investigations.

The products subject to the investigations are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.31.3000, 7304.31.6050, 7304.51.1000, 7304.51.5005, 7304.51.5060, 7306.30.5015, 7306.30.5020, 7306.50.5030. Subject merchandise may also enter under numbers 7306.30.1000 and 7306.50.1000. The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the investigations 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*.<sup>9</sup>

## **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 a description of the methodologies used for all programs in the final determination, *see the Preliminary Determination*.<sup>10</sup>

## **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 denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the Final Analysis Memoranda, dated concurrently with this final determination.<sup>11</sup> As a result of verification, and in consideration of comments received in case briefs, we have made certain changes pursuant to the minor corrections presented at verification to the denominators used to calculate the subsidy rates in this final determination.<sup>12</sup>

## **VII. BENCHMARKS AND INTEREST RATES**

The Department has made no changes to the benchmarks or discount rates used in the *Preliminary Determination*. For a description of the benchmarks and interest rates used for this final determination, *see the Preliminary Determination* and the Final Calculation Memoranda.<sup>13</sup>

## **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*.<sup>14</sup> The Department continues to rely on AFA with respect to financial contribution and specificity for the following programs: Export Promotion of Capital Goods Scheme (EPCGS), Interest Equalization Scheme for Export Financing (IES), Duty Drawback Program (DDB), Status Holder Incentive Scheme (SHIS), Section 80-IC Income Tax Deduction, Section 32-AC Income Tax Deduction, the Provision of Steel Inputs by the Steel

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<sup>9</sup> *See Preliminary Determination* at 4-5.

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> *See* Memorandum, "Final Determination Calculation for Goodluck India Limited," dated December 4, 2017 (Goodluck Final Calculation Memorandum) and Memorandum, "Final Determination Calculation for Tube Investments of India Limited," dated December 4, 2017 (Tube Investments Final Calculation Memorandum) (collectively, Final Calculation Memoranda).

<sup>12</sup> *Id.*

<sup>13</sup> *See Preliminary Determination* at 6-7; Final Calculation Memoranda.

<sup>14</sup> *See Preliminary Determination* at 7-11.

Authority of India Ltd. (SAIL) for less than adequate remuneration (LTAR), Exemption from Entry Tax for the Iron and Steel Industry, Investment Promotion Scheme, Electric Duty Exemption in the State of Uttar Pradesh, and Stamp Duty Exemption in the State of Uttar

Pradesh.<sup>15</sup> We continue to rely on the respondents' reported usage information for the aforementioned programs to calculate program benefits.<sup>16</sup>

Additionally, in this final determination, the Department has relied on AFA to determine additional CVD rates for certain programs determined to be used by Tube Investments. As discussed in detail at Comment 1 below, prior to the *Preliminary Determination*, we instructed the GOI and Tube Investments to report all assistance provided by the GOI (or entities owned directly, in whole or in part, by the GOI or any provincial or local governments) to producers or exporters of cold-drawn mechanical tubing.<sup>17</sup> As such, in the *Preliminary Determination*, we relied on Tube Investments' responses to our questions regarding financial assistance provided by the GOI. During verification, we discovered additional assistance provided by the GOI that was not previously reported in Tube Investments' questionnaire responses. Specifically, we discovered that Tube Investments received assistance from three subsidy programs 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 GOI or any provincial or local government. Consequently, record information indicates that Tube Investments used, and benefitted from, subsidies during the POI that it 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: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.<sup>18</sup>

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

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Department Letter re: Countervailing Duty Questionnaire, dated June 1, 2017 (Initial CVD Questionnaire) at 34 and 129.

<sup>18</sup> Under the Trade Preferences Extension Act of 2015, numerous amendments to the AD and CVD law were made, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act, as summarized below. See *Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362, dated June 29, 2015. See also *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015).

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.

The Trade Preferences Extension Act of 2015 (TPEA), amended the AD and CVD provisions of the Act.<sup>19</sup> The amendments are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this investigation.<sup>20</sup>

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 so doing, and under the TPEA, the Department is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> Furthermore, the Department is not required to corroborate any CVD rate applied in a separate segment of the same proceeding.

Finally, under section 776(d) of the Act, when applying an adverse inference, 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, the Department may use a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use.<sup>25</sup> 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

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<sup>19</sup> 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*, 82 FR 46793 (August 6, 2015) (*Applicability Notice*).

<sup>20</sup> *Applicability Notice*, 82 FR at 46794-46795.

<sup>21</sup> See section 776(b)(1)(B) of the Act; *see also* section 502(1)(b) of the TPEA.

<sup>22</sup> See section 776(b)(2) of the Act; *see also* 19 CFR 351.308(c).

<sup>23</sup> See section 776(c) of the Act; *see also* 19 CFR 351.308(d).

<sup>24</sup> 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.C.A.N. 4040, 4199 (1994) (SAA).

<sup>25</sup> See section 776(d)(1) of the Act; *see also* section 502(3) of the TPEA.



commercial reality” of the interested party.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> If no identical program exists, we then determine if there is a similar or comparable program, based on 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.<sup>29</sup>

## **B. Application of Adverse Facts Available**

In addition to those programs for which AFA was applied in the *Preliminary Determination*, we find the application of AFA is warranted with respect to Tube Investments’ failure to timely report government assistance received (*i.e.*, the programs discovered at verification, as discussed below).

## **C. Selection of the Adverse Facts Available Rates**

It is the Department’s practice in CVD proceedings to select 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.<sup>30</sup> 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

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<sup>26</sup> See section 776(d)(3) of the Act; *see also* section 502(3) of the TPEA.

<sup>27</sup> 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) (*PRC Shrimp 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”).

<sup>28</sup> 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.

<sup>29</sup> See *Shrimp PRC Final* IDM at 13-14.

<sup>30</sup> 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.”

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.<sup>31</sup>

Because Tube Investments failed to act to the best of its ability in this investigation by not reporting certain programs as required, in accordance with section 776(b) of the Act, we made an adverse inference in selecting from the facts available that Tube Investments benefitted from six alleged subsidy programs: four EOU programs, IPS Program, and finally a benefit received by a shuttered division of Tube Investments.<sup>32</sup> Using the methodology described above, we have applied AFA rates to Tube Investments for these programs.<sup>33</sup>

Specifically, because there is no calculated rate in this investigation for the four EOU programs in this proceeding, pursuant to our AFA hierarchy for CVD investigations, we are applying as AFA the 27.75 percent aggregate *ad valorem* subsidy rate calculated for identical/similar programs in another CVD proceeding involving India.<sup>34</sup> Because there is no calculated rate for the IPS program in this investigation or in a prior investigation, we are applying as AFA the 6.06 *ad valorem* subsidy rate calculated for a similar program in *Hot-Rolled Steel from India 2001 Final*.<sup>35</sup> Because there is no calculated rate for the program used by the shuttered division of Tube Investments in this proceeding or in this investigation, we are applying as AFA the 6.06 *ad valorem* subsidy rate calculated for a similar program in *Hot-Rolled Steel from India 2001 Final*.<sup>36</sup>

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<sup>31</sup> See, e.g., *Lawn Groomers PRC Preliminary Determination*, 73 FR 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.”

<sup>32</sup> For further information regarding our application of AFA, see Comment 11. We note that discussion of these programs contains business proprietary information; thus, for further analysis, see Tube Investments Final Calculation Memorandum.

<sup>33</sup> 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*).

<sup>34</sup> See *Notice of Final Determination of Sales at Less than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13451 (March 21, 2005) (*Bottle Grade PET Resin 2005 Final*); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 FR 28665 (May 17, 2006); *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) (*PET Resin from India 2016 Final*).

<sup>35</sup> See *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from India*, 66 FR 49635 (September 28, 2001) (*Hot-Rolled Steel from India 2001 Final*). Notably, in its application of AFA for the identical IPS program in *PET Resin from India 2016 Final*, the Department relied on the same calculated rate from *Hot-Rolled Steel from India 2001 Final*.

<sup>36</sup> *Id.*

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.”<sup>37</sup> The SAA provides that to “corroborate” secondary information, the Department will satisfy itself that the secondary information to be used has probative value.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

With regard to the reliability aspect of corroboration, we note that the rates on which we are relying are subsidy rates calculated in other India CVD proceedings. Further, the calculated rates are based on information from identical or similar programs, and 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.<sup>41</sup> Thus, we have corroborated the selected rates to the extent possible and find that the rates are reliable and relevant for use as an AFA rate for the programs listed above.

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 subsidy rates which were calculated in a previous India CVD proceeding and have corroborated the AFA rates to the extent practicable.

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<sup>37</sup> SAA at 870.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 869-870.

<sup>40</sup> See section 776(d) of the Act.

<sup>41</sup> See, e.g., *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

## 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. *Advanced Authorization Program (AAP), aka Advance License Program (ALP)*

The GOI and the petitioners 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 from the *Preliminary Determination*.<sup>42</sup>

Goodluck: 1.48 percent *ad valorem*

#### 2. *Duty Drawback*

The GOI, Goodluck, Tube Investments, and the petitioners submitted comments in their case briefs regarding this program. The countervailability of the program is discussed below in Comments 2, 8, and 9. The Department's methodology for calculating the benefits received under this program is discussed in the Final Calculation Memoranda.<sup>43</sup> On this basis, we determine a revised countervailable subsidy rate of 1.23 percent *ad valorem* for Goodluck and 1.96 percent *ad valorem* and Tube Investments.

#### 3. *Merchandise Export from India Scheme*

The GOI submitted comments in its case brief regarding this program. The countervailability of the program is discussed below in Comment 5. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>44</sup>

Goodluck: 1.48 percent *ad valorem*

Tube Investments: 0.12 percent *ad valorem*

#### 4. *Status Holders Incentive Scrip Scheme*

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<sup>42</sup> See *Preliminary Determination* at 12-14.

<sup>43</sup> See Final Calculation Memoranda.

<sup>44</sup> See *Preliminary Determination* at 16-17.

The GOI and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comment 4. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>45</sup>

Goodluck: 0.39 percent *ad valorem*

#### 5. *Incremental Exports Incentive Scheme*

We have not changed our methodology for calculating a subsidy rate for this program from the *Preliminary Determination*.<sup>46</sup>

Tube Investments: 0.10 percent *ad valorem*

#### 6. *Export Promotion of Capital Goods Scheme*

The GOI, Tube Investments, and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comments 3 and 10. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>47</sup>

Tube Investments: 0.21 percent *ad valorem*

#### 7. *Interest Equalization Scheme for Export Financing*

The GOI and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comment 1. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>48</sup>

Goodluck: 0.27 percent *ad valorem*

#### 8. *Income Tax Deductions for Research and Development Expenses*

Tube Investments and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comment 12. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>49</sup>

Tube Investments: 0.29 percent *ad valorem*

#### 9. *Section 80-IC Tax Deduction for Assessment Year 2016-2017 (Fiscal Year 2015-2016)*

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<sup>45</sup> *Id.* at 17-19.

<sup>46</sup> *Id.* at 19-20.

<sup>47</sup> *Id.* at 20-23.

<sup>48</sup> *Id.* at 23-24.

<sup>49</sup> *Id.* at 24-25.

The GOI and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comment 1 and 13. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>50</sup>

Tube Investments: 0.05 percent *ad valorem*

#### *10. Deduction Under 32-AC of the Income Tax Act*

The GOI and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comments 1 and 6. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>51</sup>

Goodluck: 0.08 percent *ad valorem*

#### *11. Provision of Steel Inputs by SAIL for LTAR*

We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>52</sup>

Goodluck: *de minimis*

#### *12. Exemption from Entry Tax for the Iron and Steel Industry*

Goodluck and the petitioners submitted comments in their case briefs regarding this program, discussed below in Comment 7. We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*.<sup>53</sup>

Goodluck: 3.05 percent *ad valorem*

#### *13. Electric Duty Exemption in the State of Uttar Pradesh*

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

Goodluck: 0.03 percent *ad valorem*

#### *14. Stamp Duty Exemption in the State of Uttar Pradesh*

We have not changed our methodology for calculating a subsidy rate from the *Preliminary Determination*, where we found that all benefits received by Goodluck under this program were

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<sup>50</sup> *Id.* at 25.

<sup>51</sup> *Id.* at 25-26.

<sup>52</sup> *Id.* at 26-27.

<sup>53</sup> *Id.* at 27-28.

expensed prior to the POI.<sup>54</sup>

## **B. Programs Determined to Be Not Used**

### *Government of India Programs*

- a) Duty Free Import Authorization Scheme
- b) Focus Product Scheme
- c) Duty Free Importation of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts, and Packing Material
- d) Exemption from Payment of Central Sales Tax on Purchases of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts, and Packing Material
- e) Exemption from Stamp Duty of all Transactions and Transfers of Immovable Property within the SEZ
- f) Exemption from Electric Duty and Cess (a tax or levy) Thereon on the Sale or Supply to the SEZ Unit
- g) SEZ Income Tax Exemption Scheme (Section 10A)
- h) Discounted Land Fees in an SEZ
- i) Duty Free Import of Goods, Including Capital Goods and Raw Materials
- j) Reimbursements of Central Sales Tax Paid on Goods Manufactured in India
- k) Duty Drawback on Fuel Procured from Domestic Oil Companies
- l) Exemption from Payment of Central Excise Duty on Goods Manufactured in India Procured from a DTA
- m) Market Access Initiative
- n) Market Development Assistance Scheme
- o) GOI Loan Guarantees
- p) Steel Development Fund Loans
- q) Provision of High-Grade Iron Ore for LTAR
- r) Industrial Promotion Subsidy/Sales Tax Program
- s) Interest Subsidy
- t) Waiver of Stamp Duty
- u) Incentives to Strengthening Micro-, Small-, and Medium-Sized and Large-Scale Industries

### *State Government Programs*

- a) Investment Promotion Scheme
- b) Special Assistance for Mega Projection
- c) Electric Duty Exemption in the State of Maharashtra

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<sup>54</sup> *Id.* at 28.

## **X. DISCUSSION OF THE ISSUES**

### **Comment 1: The Department's Application of AFA for the GOI's Failure to Provide Requested Information**

#### **GOI's Comments:**

- The GOI has cooperated in this investigation and has provided all available information to the best of its ability.<sup>55</sup> Thus, the Department erred in applying AFA to the following programs: EPCGS, Interest Equalization Scheme for Export Financing (IES), DDB, SHIS, Section 80-IC Income Tax Deduction, and Section 32-AC Income Tax Deduction.<sup>56</sup>
- The GOI has never withheld information nor impeded the proceeding, and in fact has stated that it would provide the requisite assistance in case the Department decided to verify the information available on the record.<sup>57</sup> Thus, the application of adverse facts available is inconsistent with Section 776(b) of the Act and Article 12.7 of the Agreement on Subsidies and Countervailing Measures (ASCM).<sup>58</sup>

#### **The Petitioners' Comments:**

- Although the GOI argues that it has provided the requisite information regarding the subsidy programs at issue and has neither withheld information nor impeded the proceeding, the record contradicts these claims.<sup>59</sup>
- As described at the *Preliminary Determination*, the GOI failed, on multiple occasions, to provide information on key program procedures and guidelines necessary to conduct the Department's analysis regarding financial contribution and specificity.<sup>60</sup> The Department detailed deficiencies regarding EPCGS, IES, DDB, SHIS, and the two income tax programs.
- Section 776(a)(2) of the Act requires the Department to resort to facts available where, as here, a party fails to provide information requested by the Department by the deadlines established or in the form and manner requested, thereby significantly impeding the investigation.<sup>61</sup> Although the GOI appears to argue that the Department must employ the best information under the ASCM, the Department is authorized under U.S. law to use an adverse inference when a party has failed to cooperate.<sup>62</sup>
- The U.S. Court of Appeals for the Federal Circuit (CAFC) has held that a party's compliance with the "best of its ability" standard is determined by assessing whether the party has put forth its maximum effort to provide the Department with "full and

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<sup>55</sup> See the GOI's Case Brief at 7.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.*

<sup>59</sup> See the Petitioners' Rebuttal Brief at 4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 6.

<sup>62</sup> *Id.* at 6-7.



complete” answers to all inquiries.<sup>63</sup> The application of AFA is warranted even when the GOI’s failure to cooperate is alleged to be unintentional.<sup>64</sup>

**Department Position:** The Department disagrees with the GOI and continues to find that the application of AFA is warranted. As described in more detail in the *Preliminary Determination*, on August 4, 2017, and August 22, 2017, the Department issued the GOI supplemental questionnaires in response to certain deficiencies that we identified in its initial questionnaire response, submitted on July 17, 2017.<sup>65</sup> In these supplemental questionnaires, for a second time, we requested specific information that had been previously requested and which the GOI had failed to provide. This information included key program procedures and guidelines necessary to conduct our analysis regarding financial contribution and specificity. Specifically, in both its initial response and supplemental response, the GOI provided partial information for the following programs: EPCGS; SHIS; the IES; DDB; Section 80-IC Tax Deduction for Assessment Year 2016 to 2017; Deduction under Section 32-AC of the Income Tax Act; and the Provision of Steel Inputs by the Steel Authority of India Ltd. (SAIL) for less than adequate remuneration (LTAR).<sup>66</sup> However, the GOI did not provide complete responses permitting the Department to make determinations regarding these programs. The GOI did not provide any substantive response for the following programs in either the initial or supplemental questionnaire responses: Exemption from Entry Tax for the Iron and Steel Industry, Investment Promotion Scheme, Electric Duty Exemption in the State of Uttar Pradesh, and Stamp Duty Exemption in the State of Uttar Pradesh.<sup>67</sup>

Therefore, we continue to find that the necessary information with respect to the above programs is not available on the record and that the GOI did not provide information that was requested of it in a timely manner, thereby impeding the proceeding. Thus, the Department is relying 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 GOI failed to cooperate by not acting to the best of its ability to comply with our requests 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 that the programs listed above 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)(A) of the Act.

With respect to the GOI’s WTO-related arguments, as we explained in *India Carbon Steel Flanges*, the Department has conducted this investigation in accordance with the Act and the Department’s regulations, and U.S. law is fully compliant with our WTO obligations:

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<sup>63</sup> *Id.* at 7 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)).

<sup>64</sup> *Id.*

<sup>65</sup> See Department Letter, re: Supplemental Questionnaire for Section III Questionnaire Response, dated August 4, 2017; Department Letter, re: Supplemental Questionnaire on Duty Drawback, dated August 22, 2017; *see also* GOI Questionnaire Response.

<sup>66</sup> See *generally* Letter to the Department from the GOI, re: Response to Supplemental Questionnaire, dated August 18, 2017 (GOI Supplemental Questionnaire Response); GOI Questionnaire Response.

<sup>67</sup> *Id.*

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.<sup>68</sup> In this regard, WTO reports "do not have any power to change U.S. law or to order such a change."<sup>69</sup>

## **Comment 2: Whether AAP and DDB Programs are Countervailable**

### **GOI's Comments:**

- The AAP and DDB programs are not countervailable under the ASCM, which allows both indirect tax rebate schemes and substitution drawback schemes.<sup>70</sup> According to the ASCM, these schemes can only constitute export subsidies to the extent they allow the exemption, remission, deferral, or refund of taxes or charges in excess of the amount of inputs consumed in production.<sup>71</sup> The GOI has a verification system in place for both AAP and DDB to ensure that benefits are not granted in excess of the amount consumed in production.<sup>72</sup> Thus, these programs are not countervailable.

### **The Petitioners' Comments:**

- The arguments presented by the GOI regarding the countervailability of the AAP and DDB programs are the same claims that the Department previously determined were insufficient.<sup>73</sup>
- With respect to APP, the GOI failed to provide a complete explanation of the standard input-output norm (SION) calculations and the program's enforcement process, and thus the Department is unable to establish the effectiveness of the system to track inputs in the production of exported products.<sup>74</sup> The Department has previously determined that the GOI failed to demonstrate that it implemented an effective enforcement system.<sup>75</sup>
- Regarding the DDB program, the GOI continues to reference the text of the relevant laws and regulations, which the Department had already found lacking.<sup>76</sup> The GOI has failed to provide proof that the stated process is followed as written, enforced, and actually effective in accomplishing the goal of verifying imported input usage.<sup>77</sup> The Department has rejected these arguments in the recent investigation of *Carbon Steel Flanges from India*.<sup>78</sup>

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<sup>68</sup> See *Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM (*India Carbon Steel Flanges*), Comment 1.

<sup>69</sup> *Id.*

<sup>70</sup> See the GOI's Case Brief at 10.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 11-13.

<sup>73</sup> See the Petitioners' Rebuttal Brief at 8.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (citing, e.g., *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), and accompanying IDM (*OTR Tires*) at 28).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 12 (citing *India Carbon Steel Flanges* at Comment 2).

**Department Position:** The Department disagrees with the GOI and continues to find that the AAP and DDB programs are countervailable. As explained in the *Preliminary Determination*, import duty exemptions on inputs for exported products are not countervailable so long as the exemption extends only to inputs consumed in the production of the exported product, making normal allowances for waste.<sup>79</sup> 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.<sup>80</sup> This system must be reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export.<sup>81</sup> 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.<sup>82</sup>

Regarding AAP/ALP, in the 2003 administrative review of countervailing duties on *Polyethylene Terephthalate Film, Sheet, and Strip from India* (2003 PET Film), the GOI indicated that it had revised its Foreign Trade Policy and Handbook of Procedures for the AAP/ALP during 2005.<sup>83</sup> The Department acknowledged that certain improvements to the AAP/ALP system were made. However, the Department found that, based on the information submitted by the GOI and examined during previous reviews of that proceeding, and no information having been submitted for that review demonstrating that the GOI had revised its laws or procedures governing this program since those earlier reviews, systemic issues continued to exist in the AAP/ALP system during that POR.<sup>84</sup> Specifically, in the 2003 review, the Department stated that it continued to find the AAP/ALP countervailable based on:

the GOI's lack of a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts that is reasonable and effective for the purposes intended, as required under 19 CFR 351.519. Specifically, we still have concerns with regard to several aspects of the ALP including (1) the GOI's inability to provide the SION calculations that reflect the production experience of the PET Film industry as a whole; (2) the lack of evidence regarding the implementation of penalties for companies not meeting the export requirements under the ALP or for claiming excessive credits; and, (3) the availability of ALP benefits for a broad category of "deemed" exports.<sup>85</sup>

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<sup>79</sup> See 19 CFR 351.519(a)(1)(ii).

<sup>80</sup> See *PRC Shrimp Final*, and accompanying IDM at "Duty Drawback (DDB)."

<sup>81</sup> *Id.*

<sup>82</sup> See 19 CFR 351.519(a)(4)(i)-(ii).

<sup>83</sup> See *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 71 FR 7534 (February 13, 2006) (2003 Review of PET Film from India), and accompanying IDM at 3-5.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Since the 2003 *PET Film* review, the Department has, in several other proceedings, made determinations consistent with this treatment of the AAP/ALP.<sup>86</sup> In the current investigation, record evidence shows, including the GOI verification,<sup>87</sup> that there has been no change to the AAP/ALP program and therefore we find that the program confers a countervailable subsidy because: (1) a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided under the program, as the GOI exempts the respondent from payment of import duties that would otherwise be due; (2) the GOI does not have in place, and does not apply, a system that is reasonable and effective for the purposes intended in accordance with 19 CFR 351.519(a)(4), to confirm which inputs, and in what amounts, are consumed in the production of the exported products, making normal allowance for waste, nor did the GOI carry out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts; thus, the entire amount of the import duty deferral or exemption provided to the respondent constitutes a benefit under section 771(5)(E) of the Act; and (3) this program is specific under section 771(5A)(B) of the Act because it is contingent upon exportation.

For the DDB program, and regarding its establishment of applicable duty drawback rates, the GOI explained that a committee is established to review data and recommend duty drawback rates. Specifically, the GOI stated the following:

The rates are determined following a specified procedure that is undertaken by an independent committee appointed by GOI. The committee makes its recommendations after discussions with all stake holders including Export Promotion Councils, Trade Associations, and individual exporters to solicit relevant data, which includes the data on procurement prices of inputs, indigenous as well as imported, applicable duty rates, consumption ratios and FOB values of exports products. Corroborating data is also collected from Central Excise and Customs field formations. This data is analyzed and this information is used to form the basis for the rate of DDB.<sup>88</sup>

As submitted by the GOI, Rule 3(2) of the Drawback Rules 1995, states that in determining the amount of drawback, “the Central Government shall have regard to” the average quantity and value of an input, component or intermediate product, whether produced in India or imported, the import duties or excise duties paid thereon, as well as account for waste, re-use or sale of a by-product, and packing and input services rendered.<sup>89</sup>

We requested that the GOI provide a copy of the recommendations and supporting documents (e.g., accounting records, company-specific files, databases, budget authorizations, *etc.*) for the

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<sup>86</sup> See, e.g., *Certain Oil Country Tubular Goods from India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 41967 (July 18, 2014) (*Oil Country Tubular Goods from India Final*), and accompanying IDM; see also *Certain Lined Paper Products from India: Final Results of Countervailing Duty Administrative Review; Calendar Year 2012*, 80 FR 19637 (April 13, 2015), and accompanying IDM.

<sup>87</sup> See GOI Questionnaire Response at 11-22 and Exhibits C-F.

<sup>88</sup> *Id.* at 75.

<sup>89</sup> See GOI Supplemental Questionnaire Response at Exhibit E.

drawback rates in effect during the POI.<sup>90</sup> As discussed above, the GOI did not provide documentation enabling the Department to determine whether the GOI has a sufficient system in place to confirm which inputs are consumed in the production of the exported products.<sup>91</sup> Thus, consistent with our practice, based on the GOI's questionnaire response that lacks the documentation to support that the GOI has a system in place to confirm which inputs are consumed in the production of the exported products, we conclude that the GOI has not supported its claim that its system is reasonable or effective for the purposes intended.<sup>92</sup>

Under the DDB, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because rebated duties represent revenue forgone by the GOI. Moreover, as explained above, the GOI 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 product. Therefore, under 19 CFR 351.519(a)(4), the entire amount of the import duty rebate earned during the POI constitutes a benefit. Finally, this program is only available to exporters; therefore, it is specific under sections 771(5A) (B) of the Act. Accordingly, we determine that the DDB confers a countervailable subsidy.

The GOI's WTO-related arguments are addressed in Comment 1 above.

### **Comment 3: The Department's Treatment of EPCGS**

#### **GOI's Comments:**

- At the *Preliminary Determination*, the Department stated that it used the total amounts of duties waived in its benefit calculation.<sup>93</sup> The only benefit available to an importer under the EPCGS is the exemption from basic custom duty and associated cess.<sup>94</sup> The Department should clarify what components of the import duties have been considered in the benefit calculation.<sup>95</sup>
- Capital goods imported under EPCGS can be used for the production of both domestic and exported products, and thus benefit under this program should be attributed to the company's total sales.<sup>96</sup>

#### **The Petitioners' Comments:**

- The GOI has not raised any legal or factual argument against the countervailability of EPCGS, but rather made a vague request that the Department clarify what components of import duties were considered in calculating the benefit.<sup>97</sup> As no argument has been put forth, the Department should not revise its preliminary decision.
- The GOI is incorrect that the Department should attribute the program benefits to the respondent companies' total sales. The Department has consistently found EPCGS to be

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<sup>90</sup> See Countervailing Duty Questionnaire.

<sup>91</sup> See GOI Questionnaire Response at 81; GOI Supplemental Questionnaire Response at 18-20.

<sup>92</sup> See *Shrimp from India Final Determination* IDM at 12-14.

<sup>93</sup> See the GOI's Case Brief at 15.

<sup>94</sup> *Id.* (A "cess" is a tax on existing taxes).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See the Petitioners' Rebuttal Brief at 13.

contingent on export performance.<sup>98</sup> Thus, the Department should continue to treat EPCGS as an export-contingent subsidy attributable to the export sales of Tube Investments.

**Department Position:** The Department agrees with the petitioners and continues to find that EPCGS is an export-contingent subsidy attributable to export sales. In previous cases, the Department has determined that this program is contingent upon export performance.<sup>99</sup> The evidence on the record of this investigation is consistent with those cases, with the GOI reporting that the program is used to reduce duties and taxes on capital goods used in the production of exported products.<sup>100</sup> According to 19 CFR 351.525(b), the Department will attribute export subsidies only to products exported by a firm. Thus, the Department will continue to attribute program benefits to the export sales of subject merchandise for Tube Investments.<sup>101</sup> We have addressed the GOI's concern regarding which components of import duties were considered in calculating the benefit in the Final Calculation Memorandum for Tube Investments, dated concurrently with this memorandum.<sup>102</sup>

#### **Comment 4: The Department's Treatment of SHIS**

##### **GOI's Comments:**

- As reported in its questionnaire response, the SHIS program has been discontinued.<sup>103</sup> However, it was utilized by the respondents prior to discontinuation of the program.<sup>104</sup>
- As SHIS provided recurring benefits to the mandatory respondents during the AUL, the GOI shall cooperate in verifying the information provided by the respondents, if required.<sup>105</sup>

**Department Position:** The GOI does not appear to make any factual or legal arguments regarding the Department's determination pertaining to the SHIS program. Therefore, the Department is making no changes to the *Preliminary Determination* with regard to this program.

#### **Comment 5: Whether the Benefit for MEIS Is Determined at the Date of Issuance**

##### **GOI's Comments:**

- MEIS scrips function as a credit note from the GOI for the export of specific goods to specific countries to offset future duty liability on the import of capital goods or raw materials.<sup>106</sup> Thus, there is no duty forgone by the GOI at the time of issuance of the

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<sup>98</sup> *Id.* at 14 (citing, e.g., *OTR Tires* IDM at Comment 15).

<sup>99</sup> See, e.g., *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India*, 67 FR 34905 (May 16, 2002) (*PET Film Final Determination*), and accompanying IDM at "EPCGS" section.

<sup>100</sup> See Letter to the Secretary from the GOI, re: Response to Section II of the CVD Questionnaire, dated July 17, 2017 (GOI Questionnaire Response) at 24-37.

<sup>101</sup> See Comment 11 below.

<sup>102</sup> See Tube Investments' Final Determination Calculation at 2.

<sup>103</sup> See the GOI's Case Brief at 16.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 16.

scrip.<sup>107</sup> It is only at the time of utilization of the scrip for the duties owed at the time of entry that the scrip holder receives a benefit from the GOI.<sup>108</sup>

#### **The Petitioners' Comments:**

- The Department has previously rejected these arguments with respect to similar programs such as SHIS.<sup>109</sup> In the *Preliminary Determination*, the Department found that the MEIS scrips function as a credit in a manner similar to the SHIS program and further found that the benefit forgone by the GOI is determined at the time of license issuance, not the time of license utilization as argued by the GOI.<sup>110</sup>
- At the time the license is issued, the GOI determines the benefit the company is able to claim when importing goods in the future and issues a license for the determined amount.<sup>111</sup> In addition, the fact that the license is transferable demonstrates that the full amount of benefit is known upon issuance of the license.<sup>112</sup> Thus, the Department should continue to utilize the date of MEIS license issuance when calculating the program benefit.<sup>113</sup>

**Department Position:** The Department disagrees with the GOI and continues to find that the benefit is determined at the time of issuance of the license. As stated at the *Preliminary Determination*, the MEIS benefit, *i.e.* the scrip amount, is not automatic and is not known to the exporter until after the exports are made. Upon receipt of documentation showing a company's value of exports, the GOI determines the benefit amount a company is able to claim under the program.<sup>114</sup> Because of this, the benefit amount is known to the companies and the GOI at the time a license is issued. Thus, the MEIS licenses, which contain the date of validity and the duty exemption amount as issued by the GOI, are the best method to determine and account for when the benefit is received.<sup>115</sup>

Importantly, the MEIS license is freely transferable to other companies while the license remains valid.<sup>116</sup> The fact that the license can be sold before expiry is further evidence that the actual amount of the benefit is determined at the time the license is issued by the GOI. If the Department were to rely exclusively on the actual amount of duties saved at the time of utilization, it would disregard the benefit inherent in the fact that the licenses were transferable when bestowed.

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<sup>107</sup> *Id.* at 17.

<sup>108</sup> *Id.*

<sup>109</sup> See the Petitioners' Rebuttal Brief at 15.

<sup>110</sup> *Id.* at 16.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 17.

<sup>113</sup> *Id.*

<sup>114</sup> See GOI Questionnaire Response at 45.

<sup>115</sup> See *Polyethylene Terephthalate Film, Sheet and Strip from India: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review*; 2012, 79 FR 50616 (August 25, 2014) (*PET Film from India Preliminary Results 2012*), unchanged in *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*; 2012, 80 FR 11160 (March 2, 2015) (*PET Film from India Final Results 2012*), and accompanying IDM at Comment 2; *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*; 2013, 81 FR 7753 (February 16, 2016) (*PET Film from India Final Results 2013*), and accompanying IDM at Comment 2.

<sup>116</sup> See Goodluck Questionnaire Response at 34.

## **Comment 6: Whether the Deduction under 32-AC of the Income Tax Act Is Countervailable**

### **GOI's Comments:**

- This income tax deduction is not specific under the ASCM because it is not limited to certain enterprises, the eligibility criteria and amount of the subsidy is based on objective criteria, and the deduction permissible is not contingent on export.<sup>117</sup> Thus, the deduction is not countervailable.

### **The Petitioners' Comments:**

- The Department properly concluded that the GOI failed to act to the best of its ability and thus it was appropriate to treat the program as specific pursuant to an adverse inference.<sup>118</sup>

**Department Position:** The Department disagrees with the GOI and continues to find, as AFA, that the deduction under 32-AC of the Income Tax Act is countervailable. As described above at Comment 1, the GOI failed to provide certain necessary information requested by the Department. Specifically, as detailed at the *Preliminary Determination*, we requested that the GOI describe the assistance under the program in detail, including the amounts, dates of receipt, purpose and terms. We also instructed the GOI to answer all questions in the Standard Questions Appendix and all other appropriate appendices. In response, the GOI submitted only a single page exhibit purporting to show the amounts deducted by the respondents.<sup>119</sup> In addition, the GOI failed to complete any of the requested appendices.<sup>120</sup> Thus, we continue to find that the GOI failed to cooperate by not acting to the best of its ability to comply with our requests for information and continue to use an adverse inference to find the program constitutes a financial contribution within the meaning of section 771(5)(D) of the Act and is specific within the meaning of section 771(5A)(A) of the Act.

The GOI's WTO-related arguments are addressed in Comment 1 above.

## **Comment 7: The Department's Determination Regarding the Entry Tax Exemption for the Iron and Steel Industry in Uttar Pradesh**

### **Goodluck's Comments:**

- The Department should reverse its finding that the entry tax exemption is countervailable.<sup>121</sup> Although the GOI did not provide the requested information for this program, the Department has an obligation to consider evidence elsewhere on the record.<sup>122</sup>

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<sup>117</sup> See the GOI's Case Brief at 17.

<sup>118</sup> See the Petitioners' Rebuttal Brief at 7.

<sup>119</sup> See Letter to the Department from the GOI, re: Response to Supplemental Questionnaire, dated August 18, 2017, at Exhibit I.

<sup>120</sup> *Id.* at 35.

<sup>121</sup> See Goodluck's Case Brief at 3.

<sup>122</sup> *Id.* (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013)).



- The fact that different entry tax rates are set by the government is insufficient to demonstrate specificity.<sup>123</sup> Although the Department determined in a previous case that the entry tax exemption was expressly limited to five specific iron and steel products, that is contradicted by the record evidence in this case.<sup>124</sup> The evidence on the record of this case shows that not all products are subject to an entry tax, and those that are subject have different entry tax rates.<sup>125</sup> Many products beyond the five steel products are not subject to an entry tax.<sup>126</sup>
- The entry tax exemption is neither *de jure* nor *de facto* specific, because the law does not expressly limit it to only a few products, and the exemption also applies to a group of diverse and varied industries.<sup>127</sup> Instead, the majority of products are not subject to an entry tax.<sup>128</sup>
- If the Department continues to find the program countervailable, it should calculate the benefit based on a one percent tax rate, rather than the five percent tax rate applied at the *Preliminary Determination*.<sup>129</sup> The record evidence demonstrates that absent the exemption, the rate that Goodluck would have paid was one percent.<sup>130</sup> The information supplied by Goodluck shows that although the maximum entry tax that could apply to a product entering Uttar Pradesh is five percent, the specific rate applicable to iron and steel products is one percent.<sup>131</sup>
- Section 351.526(b) of the Department’s regulations states that a cash deposit rate should be reduced to take into account a “program wide change” if such change took place subsequent to the period of investigation but prior to the preliminary determination.<sup>132</sup> Evidence on the record indicates that the entry tax program has been terminated effective July 1, 2017, and thus the cash deposit rate should be reduced to zero.<sup>133</sup>

#### **The Petitioners’ Comments:**

- Goodluck does not challenge the Department’s AFA determination that the GOI did not provide any substantive response for the entry tax exemption program.<sup>134</sup> As an adverse inference, the Department found that the program constituted a financial contribution and was specific.<sup>135</sup>
- Although Goodluck argues that the Department had an obligation to review the record to make such a determination, more recent court cases indicate that a government’s failure

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<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Id.* at 7 (citing *Certain Oil Country Tubular Goods from India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 41967 (July 18, 2014), and accompanying IDM at Comment 15).

<sup>125</sup> *Id.* at 8.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 10.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 16.

<sup>132</sup> *Id.* at 18.

<sup>133</sup> *Id.*

<sup>134</sup> See the Petitioners’ Rebuttal Brief at 31.

<sup>135</sup> *Id.*

to cooperate is a legitimate basis on which to apply an adverse inference.<sup>136</sup> This is permissible even when the application of an adverse inference impacts a cooperating party, as it encourages the government to cooperate so as not to hurt its overall industry.<sup>137</sup>

- Because the GOI refused to provide substantive information regarding the program, the purported program information supplied by Goodluck has not been corroborated by the GOI.<sup>138</sup> It is the Department's practice to rely on information provided by the government regarding financial contribution and specificity.<sup>139</sup> That official documentation is missing from the record in this investigation.<sup>140</sup>
- The Department was justified as a matter of law in applying AFA to the Entry Tax Exemption program, and should continue to calculate a benefit to Goodluck.<sup>141</sup>
- In the alternative, the record evidence supports a specificity finding, consistent with past cases.<sup>142</sup> *India OCTG* does not stand for the contention that all goods must be taxed at the same rate.<sup>143</sup> Instead, the relevant fact is that the tariff schedule exempts specific subgroups of iron and steel products.<sup>144</sup> Because the taxing authority selected these products to benefit the industries using these products, it meets the definition of specificity.<sup>145</sup>
- Goodluck's argument that the Department should remove the calculated rate due to a program wide change should fail.<sup>146</sup> Goodluck reported receipt of the benefits under this program during the POI, and the date of the alleged repeal (based on uncorroborated evidence) is after the POI.<sup>147</sup> The Department's regulations require the calculation of benefits starting from the time of the recipient firm otherwise would have been required to pay the indirect or import charge, and thus there is no legal basis for the Department to abstain from calculating a subsidy rate under this program.<sup>148</sup>
- Goodluck also argues that the Department miscalculated its benefits from this program based on a five percent duty that would ordinarily have been paid, rather than a one percent duty purportedly applicable to iron and steel products.<sup>149</sup> This argument, however, is based on a tariff schedule published in 2015, while the POI in this investigation is from April 1, 2016 through March 31, 2017.<sup>150</sup> Because the GOI refused

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<sup>136</sup> *Id.* at 32 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014) (*Fine Furniture*)).

<sup>137</sup> *Id.* (citing *Fine Furniture*, 748 F.3d at 1373).

<sup>138</sup> *Id.* at 33.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 33-34.

<sup>142</sup> *Id.* at 34 (citing *Certain Oil Country Tubular Goods from India: Final Affirmative Countervailing Duty Determination and Partial Final Affirmative Determination of Critical Circumstances*, 79 FR 41967 (July 18, 2014), and accompanying IDM (*India OCTG*)).

<sup>143</sup> *Id.* at 35.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 36.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (citing 19 CFR 351.510(b)(1)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 37.

to cooperate, there is no official documentation on the record demonstrating the tariff rates in effect during the POI.<sup>151</sup>

- Goodluck’s claim that the one percent tariff rate established in the 2015 publication was in effect from May 17, 2013 through June 30, 2017 is baseless.<sup>152</sup> Even according to the information provided by Goodluck, the tariff rate for iron and steel products changed often, from every four to eighteen months.<sup>153</sup> There is no evidence that this rate remained unchanged for over four years.<sup>154</sup>
- Thus, without any corroborating data from the GOI, the Department properly concluded that the maximum rate applicable to Goodluck’s hot-rolled coil entries during the POI was five percent.<sup>155</sup>

**Department Position:** The Department disagrees with Goodluck that it should reverse its AFA finding of specificity for the Entry Tax Exemption for the Iron and Steel Industry in Uttar Pradesh. Goodluck acknowledges that the GOI did not provide the information requested by the Department regarding this program.<sup>156</sup> In a CVD case, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters.<sup>157</sup> When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.<sup>158</sup> As explained in detail at the *Preliminary Determination*, the GOI failed to provide any substantive response for the entry tax exemption in both its initial and supplemental questionnaire responses.<sup>159</sup> The CAFC has upheld the Department’s application of AFA to a non-cooperating government even if it subjects a cooperating respondent to the “collateral effects” of the adverse inference.<sup>160</sup> Therefore, consistent with practice, the Department finds, as AFA, that the entry tax exemption confers a financial contribution under section 771(5)(D)(iii) of the Act. With respect to the specificity of this program, we understand that Goodluck argues that this program is not specific because several products allegedly benefit from an exemption to the entry tax. However, for the reasons explained above, we do not have sufficient information on the record to satisfy the Department that this program is nonspecific under section 771(5A)(A) of the Act. Accordingly, we are applying AFA with respect to this issue and do not find Goodluck’s claims in this regard to be persuasive.

In addition, the Department agrees with the petitioners that it should continue to calculate a benefit for this program based on an entry tax rate of five percent. The Department normally relies on the government to provide information regarding the administration of a program. As

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 38.

<sup>156</sup> See Goodluck’s Case Brief at 3.

<sup>157</sup> See, e.g., *Multilayered Wood Flooring from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 64313 (October 18, 2011), and accompanying IDM at 14.

<sup>158</sup> *Id.*

<sup>159</sup> See *Preliminary Determination* at 9.

<sup>160</sup> See *Fine Furniture*, 748 F.3d at 1373.

mentioned above, the GOI failed to provide any substantive response for the program, including information regarding the program's operation or the entry tax rates in effect during the POI. Although Goodluck submitted a rate schedule published in 2015 showing that iron and steel products were subject to a one percent entry tax rate, there is no corroborating information from the GOI confirming that this is the applicable rate during the POI. Contrary information on the record indicates that the products entering Uttar Pradesh are subject to an entry tax as high as five percent.<sup>161</sup> Because the GOI declined to provide the necessary information, the entry tax rates for this program were not part of the Department's verification of the GOI.<sup>162</sup> Absent such corroborating information, and given the information on the record, the Department determines to continue to base its benefit calculation on an entry tax rate of five percent, consistent with *India OCTG*.<sup>163</sup>

Last, the Department disagrees with Goodluck that the record supports the existence of a "program wide change" that demands a zero percent cash deposit rate under 19 CFR 351.526. Although Goodluck contends that the program has been terminated, the GOI failed to provide any program information and moreover the required information concerning program wide change to this program. Therefore, we find Goodluck's argument to be an unsubstantiated claim of program termination and therefore remains uncorroborated. Moreover, 19 CFR 351.525(d) states that the Department will not adjust the cash deposit rate to reflect a terminated program if residual benefits may continue to be bestowed or a substitute program has been introduced. Because the GOI did not provide the requested information regarding this program, the Department is unable to determine if there are residual benefits or a substitute program, and thus will not reduce the cash deposit rate.

#### **Comment 8: The Denominator Used to Calculate Goodluck's DDB Exemption**

##### **Goodluck's Comments:**

- At the *Preliminary Determination*, the Department included duty drawback benefits for all exports to the United States (including subject merchandise, non-subject merchandise, and mixed sales) and yet only used Goodluck's export sales of subject merchandise to the United States as the denominator.<sup>164</sup> This inflated Goodluck's rate because it reflected non-subject benefits but not non-subject sales.<sup>165</sup>
- The Department's calculation memorandum indicated that it intended to include subject merchandise and some sales where Goodluck could not discern between subject and non-subject merchandise.<sup>166</sup> However, the Department also included non-subject merchandise in its calculation.<sup>167</sup>
- By including non-subject merchandise benefits in the numerator but not non-subject sales to the United States in the denominator, the Department created an unbalanced attribution

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<sup>161</sup> See Letter to the Secretary from Goodluck, re: Goodluck's Initial CVD Questionnaire Response, dated July 19, 2017 at Exhibits 20(a)-(b).

<sup>162</sup> See, generally, GOI Verification Report.

<sup>163</sup> See *India OCTG* at 33-34.

<sup>164</sup> See Goodluck's case brief. at 14.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 15.

<sup>167</sup> *Id.*

contrary to 19 CFR 351.525(b)(5).<sup>168</sup> The Department should instead include all benefits for U.S. exports and divide these benefits by Goodluck's total export sales to the United States.<sup>169</sup>

**Department Position:** At the *Preliminary Determination*, the Department intended to include in its benefit calculation sales to the United States of subject merchandise, including non-subject merchandise where it was unclear if the sales were subject or non-subject.<sup>170</sup> However, in so doing, we inadvertently included all sales of non-subject merchandise in our calculation. We then divided the benefit by Goodluck's sales of subject merchandise to the United States, as intended.<sup>171</sup> The Department agrees with Goodluck that by including non-subject merchandise in the numerator but not the denominator, an imbalance is created contrary to 19 CFR 351.525(b)(5). However, the Department does not agree with Goodluck that the Department should include total U.S. sales of both subject and non-subject merchandise in the denominator. The Department's tying methodology is to tie subsidies where there is clear and robust information showing the subsidies being provided are in fact tied to a particular market or product. Therefore, consistent with our practice, where there is clear evidence demonstrating the subsidies are tied the Department will exclude those from the numerator and the denominator.<sup>172</sup> However, in this instance, for certain sales, the information on the record was unclear as to whether those sales were for subject or non-subject, thus consistent with our practice we will include those certain sales and subsidies amounts in the numerator and denominator.<sup>173</sup>

#### **Comment 9: The Inclusion of Tube Investments' Non-Subject Merchandise in the Benefit Calculation for DDB**

##### **Tube Investments' Comments:**

- The Department should not include non-subject sales of subject merchandise when calculating Tube Investments' DDB benefit because the Department verified which sales were subject and which sales were non-subject.<sup>174</sup>

##### **The Petitioners' Rebuttal Comments:**

- Tube Investments' claims that the Department verified which sales were subject and non-subject is a mischaracterization of the record because at no point does the Department state it verified that all sales were subject and non-subject.<sup>175</sup>

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<sup>168</sup> *Id.* at 16.

<sup>169</sup> *Id.*

<sup>170</sup> See Memorandum, "Preliminary Determination Calculation for Goodluck India Limited," dated September 18, 2017 at 3.

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., *Finished Carbon Steel Flanges from India: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 85928 (November 29, 2016), and accompanying Preliminary Decision Memorandum (*Prelim India Steel Flanges*) at 12 (unchanged in *India Carbon Steel Flanges*).

<sup>173</sup> See Tube Investments Final Calculation Memorandum at 2.

<sup>174</sup> See Tube Investments' Case Brief, "Case Brief – Tube Investments of India Ltd.," dated November 16, 2017 at 2 (Tube Investments' Case Brief).

<sup>175</sup> See the Petitioners' Rebuttal Brief at 18-19.

- The documentation examined at verification was not included in the universe of U.S. sales reported to the Department, and consequently, was not used in the Department's benefit calculation.<sup>176</sup>
- As such, no additional record evidence has been placed on the record following the preliminary determination allowing the Department to discern which reported sales were classified as subject and non-subject merchandise.<sup>177</sup>

**Department Position:** The Department agrees with Tube Investments, in part. As explained in the Department's Preliminary Determination Calculations for Tube Investments Memorandum and in accordance with 19 CFR 351.525(b)(4) and (5), where there is clear supporting information confirming a subsidy is tied to a certain product or market, we will then attribute that subsidy to only that product or market.<sup>178</sup> At the *Preliminary Determination*, the Department found that we could not discern the amount (by weight or value) attributable to subject or non-subject merchandise for the transaction at issue we treated all such items as subject merchandise for purposes of this calculation.<sup>179</sup> Tube Investments claims that the Department verified all subsidy amounts tied to non-subject merchandise, thus necessitating this change in methodology. However, as the petitioners point out, the Department's verification report draws no such conclusion as to whether the reported information was successfully verified, as findings regarding how the facts obtained at verification will be treated in our final determinations are issued only pursuant to our final determination *Federal Register* notices and accompanying final issues and decision memoranda.<sup>180</sup> Therefore, while the Department does agree with Tube Investments that our methodology should be changed, it does so for reasons different than what Tube Investments has proposed. The Department finds that during the verification of affirmative information for Tube Investments' DDB benefit, Tube Investments demonstrated to the Department how it clearly discerns the amount attributable to certain subject or non-subject merchandise for select transactions at issue, which, as originally reported, accurately reflect a division of subject and non-subject merchandise. One of the Department's purposes in verifying factual information on the record is to ensure the completeness of a party's responses. Here, as part of the completeness check, the Department necessarily examined information not included in the universe of U.S. sales reported to the Department and not used in the benefit calculation to serve this purpose.<sup>181</sup> The Department also reconciled the DDB benefit received for a month of the POI during verification.<sup>182</sup> Both of these exercises allowed the Department to understand how Tube Investments discerns the amount attributable to subject or non-subject merchandise, allowing us to do the same, and as such, the Department is no longer treating non-subject merchandise as subject merchandise in its denominator in accordance with 19 CFR

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<sup>176</sup> *Id.* at 20.

<sup>177</sup> *Id.* at 21.

<sup>178</sup> See Memorandum, "Preliminary Determination Calculations for Tube Investments Limited," dated September 18, 2017 (Preliminary Determination Calculations for Tube Investments Memorandum) (citing *PRC Shrimp Final*).

<sup>179</sup> See Preliminary Determination Calculations for Tube Investments Memorandum at 3.

<sup>180</sup> See the Petitioners' Rebuttal Brief (quoting Tube Investments' Verification Report ("This report does not draw conclusions as to whether the reported information was successfully verified, and further, does not make findings or conclusions regarding how the facts obtained at verification will ultimately be treated in the Department's analysis.")).

<sup>181</sup> See Tube Investments' Verification Report at 7.

<sup>182</sup> *Id.*

351.525(b)(5). Thus, consistent with our practice,<sup>183</sup> the Department, where appropriate, is excluding non-subject merchandise from the numerator, while continuing to use sales of subject merchandise to the United States as the denominator.<sup>184</sup>

#### **Comment 10: The Department’s Calculation Methodology for Tube Investments’ EPCGS Benefits**

##### **Tube Investments’ Comments:**

- The Department should consider the date on which the redemption letter is received as the date on which the export obligation was fulfilled and treat all remaining licenses where the redemption letters have not been received as contingent liability loans.<sup>185</sup>
- The Department should calculate the results of “0.5 percent” test using a numerator and denominator on an equivalent basis by dividing the license benefit by the export sales value reported by Tube Investments, unlike its calculations in the Preliminary Determination.<sup>186</sup>

##### **The Petitioners’ Rebuttal Comments:**

- The Department should reject Tube Investments’ argument that it should revise its calculations of the “0.5 percent test” because the Department’s calculation for the *Preliminary Determination* was made on an equivalent basis.<sup>187</sup>

**Department Position:** The Department agrees with the petitioners and continues to use total exports of subject merchandise as the denominator in the relevant EPCGS calculations. The Department allocated Tube Investments’ EPCGS benefits to subject merchandise, and in accordance with 19 CFR 351.525(b)(4) and (5), when a subsidy is tied to a certain product or market, we will attribute that subsidy to only that product or market.<sup>188</sup> As such, because the numerator of the benefit we calculated consisted only of subject merchandise and this was an export-contingent subsidy, the Department was correct in utilizing the equivalent sales figure, total exports of subject merchandise, as the denominator in both its benefit calculation and its application of the “0.5 percent test.”

#### **Comment 11: The Department’s Application of AFA for Certain Unreported Subsidies Discovered at Tube Investments’ Verification**

##### **Tube Investments’ Comments:**

- Tube Investments has submitted voluminous explanations, documents, and data for the Department’s consideration, as well as expended countless man-hours, and as such, the

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<sup>183</sup> See, e.g., *Prelim Carbon Steel Flanges from India* PDM at 12 (unchanged in *India Carbon Steel Flanges*)).

<sup>184</sup> See, Memorandum, “Final Determination Calculation for Goodluck India Limited,” dated December 4, 2017 at 2.

<sup>185</sup> See Tube Investments’ Case Brief at 3.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 21-22.

<sup>188</sup> See Preliminary Determination Calculations for Tube Investments Memorandum at 4-6.

Department should not make a determination that Tube Investments has not cooperated.<sup>189</sup>

- Despite the investigation's tight timelines and Tube Investments' unfamiliarity with the complexities of U.S. CVD law, the Department was able to remedy any incompleteness or lack of clarity in Tube Investments' questionnaire responses with its supplemental questionnaires, as confirmed by the Department's verification report "which yielded no material discrepancies and confirmed that Tube Investments did not receive other subsidies."<sup>190</sup>
- Tube Investments participated in this investigation to the best of its ability and capability as well as with full transparency.<sup>191</sup>
- The Department should not apply "punitive adverse assumptions" to Tube Investments' responses and should calculate its margin based on the submitted information which has been verified.<sup>192</sup>
- Because Tube Investments met the specific objective and subjective showings of cooperation outlined in *Nippon Steel* by the Federal Circuit (taking into consideration its unfamiliarity with the rules and regulations of the Department), the Department should not apply total AFA as advocated by the petitioners.<sup>193</sup>

#### **The Petitioners' Comments:**

- In accordance with its CVD AFA hierarchy, the Department should assign as AFA, the highest non-*de minimis* rates from identical or similar programs in another CVD proceeding involving India.<sup>194</sup>

**The Department's Position:** As discussed above, consistent with our practice and in accordance with the law, the Department is applying AFA to Tube Investments for its failure to report usage of its EOU, IPS program, and its receipt of a benefit during the AUL which was discovered during verification.<sup>195</sup> Tube Investments' claim that the Department's verification report yielded no material discrepancies, and thus, our application of AFA is unwarranted, is false. While, as discussed above, the Department's verification report does not draw any conclusions on its own, the Department outlined in its summary of observations its discovery of these programs which had not previously been reported in response to the Department's questionnaire.<sup>196</sup> The Department's Initial CVD Questionnaire specifically requested that Tube Investments report EOUs and other subsidies received during the POI and AUL.<sup>197</sup> Specifically, as noted above, during verification the Department discovered two additional unreported subsidy programs. Verification is not the opportunity for respondents to provide new factual information to the Department. By not reporting these subsidies to the Department during the course of the

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<sup>189</sup> See Tube Investments' Rebuttal Brief, "Rebuttal Brief of: Tube Investments of India Ltd.," dated November 21, 2017 at 2 (Tube Investments' Rebuttal Brief).

<sup>190</sup> *Id.* at 2-3.

<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 4-6 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)).

<sup>194</sup> See the Petitioners' Case Brief at 12, 16, and 22.

<sup>195</sup> See Section VIII. Use of Facts Otherwise Available and Adverse Inferences, *supra*.

<sup>196</sup> See Tube Investments' Verification Report at 2.

<sup>197</sup> See generally, Department Letter re: Countervailing Duty Questionnaire, dated June 1, 2017.



investigation, Tube Investments did not provide the Department an opportunity to investigate these unreported programs. As such, consistent with section 776(a)(1) and (2) of the Act, Tube Investments failed to provide necessary information to the Department in the form and manner requested by the established deadline for its questionnaire response.<sup>198</sup>

Tube Investments' requests that the Department consider the time dedicated to its participation in the investigation, the fact that this is its first proceeding before the Department, and the alleged minor nature of the benefits are also unpersuasive. The Court of International Trade (CIT) has found that the Department is warranted in applying an adverse inference when a company has failed to provide complete and accurate information, even when such failure is not willful, but rather marked by "inattentiveness and carelessness."<sup>199</sup> Further, as Tube Investments, itself, points out, it retained and was represented by experienced trade counsel throughout the entirety of this proceeding, and therefore had the ability to understand the Department's requests for information at the time such requests were issued.<sup>200</sup> In addition, regardless of the alleged size of the subsidy, it was Tube Investments' responsibility to provide complete and accurate information to the Department so that the Department could analyze and determine the amount of benefit received. As the CAFC held recently in *Maverick Tube*, it is the responsibility of the Department, and not the responsibility of a respondent, to analyze and determine if a benefit exists, and if it does, to determine the amount of benefit received.<sup>201</sup> Finally, it is well-established that applying adverse inferences is not a punitive measure, but rather is intended "to encourage future cooperation and ensure that a respondent does not obtain a more favorable { . . . } rate by failing to cooperate."<sup>202</sup> Here, by not providing requested benefit information, and thus, failing to cooperate by not acting to the best of its ability, Tube Investments would have received a more favorable rate because these benefits would not have been considered had the Department not discovered these benefits during its verification.<sup>203</sup> Thus, the Department finds an application of AFA is appropriate for each of the following programs, as outlined in more specific detail below.

#### **A. Tube Investments' Failure to Report its EOU**

##### **Tube Investments' Comments:**

- The Department's questionnaire asks "for each program, if your company { . . . } did not apply for, use, or benefit from that program during the POI, you must clearly state so. Otherwise, please answer the questions listed."<sup>204</sup>

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<sup>198</sup> See, e.g., Tube Investments Verification Report at 7 (noting Tube Investments had not previously disclosed its use of an EOU during the AUL).

<sup>199</sup> See *Tianjin Machinery Imp. & Exp. Corp.*, 353 F. Supp. 2d 1294, 1305 (CIT 2004) (*Tianjin Machinery*).

<sup>200</sup> See Tube Investments Case Brief at 6.

<sup>201</sup> *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360-61 (Fed. Cir. 2017) (*Maverick Tube*); See also, *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 FR 16341 (April 4, 2017), and accompanying Issues and Determination Memorandum (*CTL Plate Korea Final*).

<sup>202</sup> See *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014).

<sup>203</sup> See *India Carbon Steel Flanges* (outlining the Department's practice to apply AFA in determining benefits for unreported subsidies discovered at verification).

<sup>204</sup> See Tube Investments' Case Brief at 5.

- Tube Investments did not receive benefits under the EOU program, so its questionnaire responses were accurate and complete.<sup>205</sup>
- Tube Investments did not receive any benefits under the EOU program because the payment of duties upon the de-bonding of the unit negated those benefits and the exemption of the remaining duties were captured in the reported EPCGS license benefits.<sup>206</sup>
- The Department should not penalize or otherwise modify its calculation with respect to the EPCGS license and EOU program.<sup>207</sup>

#### **The Petitioners' Comments:**

- Tube Investments provided false information, whether deliberately or carelessly, in response to the Department's questionnaire regarding its use of an EOU, so the Department should apply AFA.<sup>208</sup>
- The Department should follow its practice in the *Polyester Staple Fiber India Preliminary Determination* that applied AFA for six special economic zone programs alleged in the petition when the Department discovered the respondent failed to report a benefit under one of the programs and similarly apply AFA to all four EOU programs for which Tube Investments claimed were not used in its questionnaire response.<sup>209</sup>
- As verification is not the time to submit new factual information regarding program use, the Department should not presume that the limited EOU program usage reported at verification is accurate, complete, and/or limited to one program.<sup>210</sup>
- Tube Investments' decision to withhold information from the Department and its failure to remedy its withholding until verification has deprived the Department of the ability to further investigate the program(s) and the extent of the subsidies received.<sup>211</sup>
- In the *PET Resin India Final*, the respondent reported, prior to verification, a similar de-bonding of an EOU captured in EPCGS license benefits allowing the Department to accurately verify the record information, unlike here.<sup>212</sup>
- The Department should countervail the EOU program separately from the EPCGS scheme under its AFA analysis.<sup>213</sup>

#### **Tube Investments' Rebuttal Comments:**

- Tube Investments reported the benefit it received from the EOU, but merely characterized how it received the benefit by reporting it under the EPCGS program.<sup>214</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See the Petitioners' Case Brief at 7 and 9.

<sup>209</sup> *Id.* at 10 (citing *Fine Denier Polyester Staple Fiber from India: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 51387 (November 6, 2017), and accompanying Preliminary Decision Memorandum (*Polyester Staple Fiber from India Preliminary Determination*)).

<sup>210</sup> *Id.* at 11.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 13-14 (citing *Bottle Grade PET Resin 2005 Final*, and accompanying IDM).

<sup>213</sup> *Id.* at 14.

<sup>214</sup> See Tube Investments' Rebuttal Brief at 7.

- Incorrectly categorizing the benefit Tube Investments received does not amount to a failure to provide information, as the reporting standard is not perfection.<sup>215</sup>
- Tube Investments has not significantly impeded this proceeding as the Department was able to calculate preliminary margins based on the information on the record without the Department having to adjust, alter, modify, or make assumptions with respect to any of Tube Investments' reported data, therefore, AFA is not warranted.<sup>216</sup>
- There is no legal or factual basis for an application of facts available, let alone for the Department to analyze whether Tube Investments acted to the best of its ability and whether adverse inferences are warranted for the EOU program reported as part of the EPCGS benefit.<sup>217</sup>
- The petitioners falsely claim that the Department observed Tube Investments' "use" of an additional subsidy during verification, rather the Department observed that Tube Investments reported these benefits under an EPCGS license.<sup>218</sup>
- Tube Investments did not receive any benefit under an EOU program because the de-bonding process would have resulted in full payment of duties, a process that was scrutinized by the GOI.<sup>219</sup>
- While Tube Investments initially imported the capital goods under on EOU program, Tube Investments ultimately used and received a benefit under the EPCGS program, so reporting the EOU program was unnecessary.<sup>220</sup>
- The petitioners' reliance on previous AFA determinations is inapposite because there is no question regarding whether Tube Investments failed to report a benefit, but rather whether Tube Investments properly characterized its benefit.<sup>221</sup>
- Because the Department verified non-use of all other subsidy programs and reviewed Tube Investments' full chart of accounts and financial statements which did not mention EOUs, the Department should not apply AFA to any EOU program.<sup>222</sup>
- The petitioners' reliance on the *Polyester Staple Fiber India Preliminary Determination* is misplaced because, unlike here, the Department specifically requested information on the special economic zone in the supplemental questionnaires and the respondent never reported the benefit.<sup>223</sup>
- The petitioners' reliance on the *PET Resin India Final* to support the claim that Tube Investments should have disclosed the de-bonding of its EOU is puzzling because the only similarity between the cases is a de-bonded EOU where goods were transferred to an EPCGS license.<sup>224</sup>

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<sup>215</sup> *Id.* at 8.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 9.

<sup>219</sup> *Id.* at 10.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 11-12.

<sup>222</sup> *Id.* at 13.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 14.

### The Petitioners' Rebuttal Comments:

- The Department should reject Tube Investments' arguments and apply AFA for its failure to report its use of an EOU during the AUL because parties do not have the discretion to not report subsidies to the Department.<sup>225</sup>
- The Department's discovery of the use of an EOU program at verification calls into question the entirety of Tube Investments' claimed non-use response with respect to EOUs, and thus application of AFA for all EOU programs is warranted.<sup>226</sup>

**Department Position:** The Department agrees with the petitioners and is applying AFA to all four EOU programs alleged in the Petition. As discussed at section "VIII. Use of Facts Otherwise Available and Adverse Inferences," *supra*, at verification we discovered that Tube Investments used and later de-bonded an EOU during the AUL that had not been previously reported.<sup>227</sup> In its Initial CVD Questionnaire, the Department asked whether Tube Investments utilized subsidies for EOUs under four alleged programs: (1) Duty-Free Import of Goods, Including Capital Goods and Raw Material; (2) Reimbursements of Central Sales Tax Paid on Goods Manufactured in India; (3) Duty Drawback on Fuel Procured from Domestic Oil Companies; and (4) Exemption from Payment of Central Excise Duty on Goods Manufactured in India and Procured from a Domestic Tariff Area.<sup>228</sup> In its response, Tube Investments stated that it "has not utilized or otherwise availed of any benefits under the programs for subsidies for EOU's."<sup>229</sup> Tube Investments argues that despite the contradiction of its response with its use of an EOU during the AUL, as discovered during verification, the facts at issue here are the characterization of the benefit since it was reported in the EPCGS benefit. The Department rejects this argument.

As recently held by the CAFC in *Maverick Tube Corp. v. United States*, it is the Department, and not the interested parties, who determines whether a company is required to provide a response to its questions and which information is necessary for its analysis.<sup>230</sup> 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.<sup>231</sup> Indeed, section 776(a) of the Act specifically contemplates the application of facts available when interested parties withhold requested information and allow the Department to take action in response. Further, section 776(a)(2) of the Act specifically recognizes that in determining whether or not to apply facts otherwise available, the Department considers whether a party provides the information in the form and manner requested by the Department. Here, the Department specifically requested whether Tube Investments had used an EOU during the POI or AUL, and Tube Investments failed to respond accurately within the established deadlines for its questionnaire response.

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<sup>225</sup> See the Petitioners' Rebuttal Brief at 23 (citing *CTL Plate Korea Final*).

<sup>226</sup> *Id.* at 24.

<sup>227</sup> See Tube Investments' Verification Report at 6-7.

<sup>228</sup> See generally Initial CVD Questionnaire.

<sup>229</sup> See Tube Investments' July 10, 2017 Initial Questionnaire Response Section (Tube Investments July 10, 2017 IQR).

<sup>230</sup> See *Maverick Tube*, 857 F.3d at 1360-61.

<sup>231</sup> See *India Steel Flanges*, and accompanying IDM at 27.

Moreover, Tube Investments' transfer of goods from an EOU to an EPCGS license is not a unique instance before the Department.<sup>232</sup> In the *Bottle Grade PET Resin from India 2005 Final*, the Department investigated a similar instance where a respondent moved capital goods from a de-bonded EOU via an EPCGS license, but there, pursuant to the Department's questionnaire, the respondent provided full information on its use of the EOU program and EPCGS licenses.<sup>233</sup> This is in stark contrast with Tube Investments' incomplete response in this investigation.<sup>234</sup>

Further, the Department agrees with the petitioners that application of AFA to all four alleged EOU programs is warranted. Tube Investments' failure to report its use of an EOU during the AUL deprived the Department of the ability to further investigate all of the program(s) and determine which and amount of benefit(s) Tube Investments' received. Thus, the application of an adverse inference to all of those programs is warranted, because Tube Investments did not act to the best of its ability in providing that information upon request. Furthermore, as the petitioners point out, doing so follows the Department's practice in *Polyester Staple Fiber from India Preliminary Determination*, where the Department applied AFA to six SEZ programs after discovering the respondent received a benefit from at least one SEZ program.<sup>235</sup>

Finally, while Tube Investments claims that the Department verified non-use of the EOU program and found that the benefit was captured in the EPCGS benefit, the Department drew no such conclusions in its verification report.<sup>236</sup> While the Department verified Tube Investments' reported EPCGS benefits, the disclosure of its use of an EOU was discovered for the first time at verification.<sup>237</sup> Given that the EOU was in existence during the AUL, the Department does not know, nor can it know, the extent of the benefit Tube Investments received through any EOU program prior to receiving a subsequent benefit via the EPCGS program. As such, the Department agrees with the petitioners and will apply AFA to all four EOU programs alleged in the petition and will not exclude the subsequent EPCGS benefit from its EPCGS calculation.

## **B. Tube Investments' Failure to Report its use of the IPS Program**

### **Tube Investments' Comments:**

- The Department should not "penalize" Tube Investments by applying AFA for Tube Investments' failure to report its use of the IPS Program because it was an inadvertent omission of a negligible subsidy related to setting up a non-subject plant.<sup>238</sup>
- The Department should consider that while Tube Investments was assisted by counsel, this is Tube Investments' first time participating in a U.S. countervailing duty investigation.<sup>239</sup>

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<sup>232</sup> See generally *Bottle Grade PET Resin 2005 Final*, and accompanying IDM.

<sup>233</sup> See *id.* at Comment 9.

<sup>234</sup> *Id.*

<sup>235</sup> See the Petitioners' Case Brief at 10 (citing *Polyester Staple Fiber from India*).

<sup>236</sup> See generally Tube Investments' Verification Report.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 7.

- There is no legal or factual basis to apply an adverse inference to Tube Investments for its omission in reporting non-subject merchandise benefits.<sup>240</sup>
- Tube Investments received a benefit from the IPS program in the form of a deferred payment of its sales tax liability on the last day of the POI.<sup>241</sup>
- The Department should calculate the subsidy rate for this program using the benefit Tube Investments received for setting up its plant in 2011 for the production of non-subject merchandise divided by the total sales of the company as a whole.<sup>242</sup>
- No matter the manner in which the Department chooses to calculate the benefit for this program, the calculable benefit is essentially non-existent.<sup>243</sup>
- If the Department does apply AFA, it should utilize the same subsidy rate, 0.12 percent, that it has utilized as adverse facts available for this program in prior investigations involving India.<sup>244</sup>

#### **The Petitioners' Comments:**

- The Department should apply AFA, but does not need to make a finding of intentional non-cooperation to do so, where, as here, a respondent's conduct is marked by inattentiveness and carelessness.<sup>245</sup>
- To the extent Tube Investments deemed reporting usage of the IPS program irrelevant because it was outside the POI, there is no record evidence that this subsidy was not received during the POI.<sup>246</sup>
- The Department should find that the record lacks information related to the IPS grant because Tube Investments should have examined the account(s) which the subsidy funds were found in and reported them prior to the verification.<sup>247</sup>

#### **Tube Investments' Rebuttal Comments:**

- The Department's verification finding of an accounting entry for the IPS program did not amount to a finding that Tube Investments received the subsidy despite the petitioners' claims that it did.<sup>248</sup>
- Should the Department decide to apply facts available, it should do so without an adverse inference because the amount of benefit in question is insignificant and the accounting entry is from a unit that does not produce subject merchandise.<sup>249</sup>
- In using its discretion to apply facts available without an adverse inference, the Department should consider that Tube Investments diligently reported its benefits received related to the production of subject merchandise.<sup>250</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 8.

<sup>242</sup> *Id.* at 8-9.

<sup>243</sup> *Id.* at 8-9 and Exhibit 1.

<sup>244</sup> *Id.* at 9.

<sup>245</sup> *See* the Petitioners' Case Brief at 4.

<sup>246</sup> *Id.* at 14-15.

<sup>247</sup> *Id.* at 15-16.

<sup>248</sup> *See* Tube Investments' Rebuttal Brief at 15-16.

<sup>249</sup> *Id.* at 16-17.

<sup>250</sup> *Id.* at 17.

- The petitioners' allegations that Tube Investments failed to fully review its accounts is factually incorrect.<sup>251</sup>
- The Department should be guided by the standard outlined by the CIT in *Ad Hoc Shrimp* and apply facts available without an adverse influence.<sup>252</sup>

**The Petitioners' Rebuttal Comments:**

- The fact that this investigation was Tube Investments first time participating in a U.S. CVD investigation and the benefit discovered was allegedly minor, does not free Tube Investments from its responsibility to report benefits to the Department.<sup>253</sup>
- The Department cannot calculate a rate for the benefit Tube Investments received from the IPS program as Tube Investments proposes, because the record lacks information regarding financial contribution and specificity from the GOI as a direct consequence of Tube Investments' failure to report its use of the program.<sup>254</sup>
- The AFA rate suggested by Tube Investments, 0.12 percent, is *de minimis* and not consistent with the Department's CVD AFA hierarchy, and as such, the Department should apply an AFA rate of 6.06 percent for this program.<sup>255</sup>

**Department Position:** As stated above in the Department's Position following "The Department's Application of AFA for Certain Unreported Subsidies Discovered at Tube Investments' Verification," the size of the subsidy discovered and Tube Investments' alleged unfamiliarity with CVD proceedings do not excuse it from its duty to respond completely and accurately to the Department's questionnaire. As such, the Department agrees with the petitioners that Tube Investments' failure to report its receipt of a benefit from the IPS program during the POI warrants the application of AFA.

Tube Investments requests that the Department calculate the rate received by Tube Investments based specifically on the numerical information discovered by the Department during verification. However, the Department agrees with the petitioners that it cannot accurately calculate a rate based on that data because the administrative record does not contain verifiable record information regarding financial contribution, specificity, and benefit amounts with respect to the IPS program.

Further, Tube Investments curiously and repeatedly alleges that the benefits from the IPS program were received on the last day of the POI, as though the timing of its receipt is relevant to the Department's AFA analysis. We disagree with Tube Investment's arguments in this regard. As noted in the verification report, Tube Investments has an accounting system which allows for filtering by time period.<sup>256</sup> In addition, Tube Investments' IQR was received by the Department in July, months after this benefit was received and posted to Tube Investments' accounting system. Accordingly, Tube Investments had ample time and opportunity to find and report usage of the program to the Department, yet it did not. Therefore, because Tube

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 18-19 (citing *Ad Hoc Shrimp Trade Action Committee v. United States*, 675 F. Supp. 2d 1287, 1305 (CIT 2009) (*Ad Hoc Shrimp*)).

<sup>253</sup> See the Petitioners' Rebuttal Brief at 25.

<sup>254</sup> *Id.* at 26.

<sup>255</sup> *Id.*

<sup>256</sup> See generally Tube Investments' Verification Report.

Investments failed to report information relating to the IPS program in response to our requests for information, and the Department discovered this failure at verification, where there is no opportunity to remedy the deficient response, we determine that there is non-verifiable information on the record which was withheld and not provided in the form and manner to the Department upon request, pursuant to sections 776(a)(2)(A)(B) and (D) of the Act. In addition, we further determine that Tube Investments failed to cooperate by not acting to the best of its ability in responding to our requests for information, pursuant to section 776(b) of the Act. Whether the cause of this failure was carelessness or a deliberate attempt to conceal information from the Department, an application of AFA is nonetheless warranted in both circumstances.<sup>257</sup>

Finally, Tube Investments' proposed AFA rate is *de minimis* and under these facts would not provide Tube Investments with an incentive to cooperate in future proceedings if applied.<sup>258</sup> As such, the Department is applying the 6.06 percent rate in accordance with its CVD AFA hierarchy outlined above.

### **C. Tube Investments' Failure to Report a Benefit Received by a Shuttered Division of the Company**

#### **The Petitioners' Comments:**

- Tube Investments failed to report the use of this subsidy program in response to the Department's initial questionnaire.<sup>259</sup>
- Similar to the IPS program which was also not previously reported, the Department should find that the record lacks information related to this benefit because Tube Investments should have examined the account(s) in which the subsidy funds were found and reported them prior to the verification.<sup>260</sup>
- Assuming Tube Investments may not have reported this subsidy believing it was not reportable, it was mistaken because a respondent cannot unilaterally determine what is relevant to the Department's investigation.<sup>261</sup>
- If Tube Investments believed the program was not countervailable, it should have provided that information during the investigation, not at verification.<sup>262</sup>
- Because Tube Investments failed to disclose its receipt of this benefit, the Department could not gather information from the GOI regarding financial contribution or specificity for this subsidy.<sup>263</sup>

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<sup>257</sup> See, e.g., *Tianjin Machinery*, 353 F. Supp. 2d at 1305.

<sup>258</sup> See SAA at 870 (stating that the Department "may employ adverse inferences ... to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation").

<sup>259</sup> See the Petitioners' Case Brief at 17.

<sup>260</sup> *Id.* at 18.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 19.

<sup>263</sup> *Id.* at 20.



- The application of AFA is warranted because Tube Investments' failure to cooperate and provide necessary information results in the Department's inability to analyze the countervailability of this subsidy.<sup>264</sup>
- Taking into account the information provided by Tube Investments officials at verification, this subsidy may have been used in the production of subject merchandise, however, because the Department could not fully investigate the applicability of this subsidy, the Department should apply AFA by finding that this program did benefit subject merchandise.<sup>265</sup>

**Tube Investments' Rebuttal Comments:**

- Tube Investments was not required to report this benefit because it was not on the list of subsidies alleged in the petition, in the Department's questionnaire, or in the list of programs in the Preliminary Decision Memorandum.<sup>266</sup>
- The Department's questionnaire did not require Tube Investments to report recurring subsidies that occurred outside of the POI.<sup>267</sup>
- The *CTL Plate Korea Final* that the petitioners rely on to support their argument for AFA is distinguished here because this record contains information supporting Tube Investments' description of the subsidy and its reasons for not reporting.<sup>268</sup>
- Should the Department decide to apply facts available, it should do so without an adverse inference per the standard outlined by the CIT in *Ad Hoc Shrimp*.<sup>269</sup>
- The amount of the potential benefit is small and does not affect the overall reliability of data submitted by Tube Investments.<sup>270</sup>

**Department Position:** The Department agrees with the petitioners. While Tube Investments claims that it was not required to report this subsidy, the Department's questionnaire specifically asks respondents to report the receipt of other subsidies not named in the petition.<sup>271</sup> Tube Investments demonstrated its understanding and awareness of this provision by disclosing its use of the Section 80-IC Tax Deduction program.<sup>272</sup> Tube Investments additionally alleges that the record contains evidence that this program is not countervailable. However, as described above, it is not within Tube Investments' discretion to determine which subsidies, whether named in the petition or not, should be reported to the Department.<sup>273</sup> Here, again, Tube Investments' determination to substitute its judgment for the Department's has prevented the Department from conducting a full investigation in order to determine the countervailability of this program. Thus, the application of AFA is warranted. Therefore, because Tube Investments failed to report information relating to the benefit received by a shuttered division of the company in response to our requests for information, and the Department discovered this failure at verification where there is no opportunity to remedy the deficient response, we determine that there is non-

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<sup>264</sup> *Id.* at 21.

<sup>265</sup> *Id.*

<sup>266</sup> See Tube Investments' Rebuttal Brief at 20.

<sup>267</sup> *Id.* at 20-21.

<sup>268</sup> *Id.* at 21 (citing *CTL Plate Korea Final*).

<sup>269</sup> *Id.* at 18-19 (citing *Ad Hoc Shrimp*).

<sup>270</sup> *Id.* at 22.

<sup>271</sup> See generally Initial CVD Questionnaire.

<sup>272</sup> See Tube Investments' July 10, 2017 IQR at 69.

<sup>273</sup> See *Maverick Tube*, 857 F.3d at 1360-61; *India Carbon Steel Flanges*, and accompanying IDM at 27.

verifiable information on the record which was withheld and not provided in the form and manner to the Department upon request, pursuant to sections 776(a)(2)(A)(B) and (D) of the Act. In addition, we further determine that Tube Investments failed to cooperate by not acting to the best of its ability in responding to our requests for information, pursuant to section 776(b) of the Act.

#### **Comment 12: The Department's Calculation Methodology for the Income Tax for Research and Development Program**

##### **Tube Investments' Comments:**

- The Department should not consider the portion of Tube Investments' income tax benefit that would have been permitted as a normal tax deduction as part of the benefit it received for the Income Tax for Research and Development Program.<sup>274</sup>

##### **The Petitioners' Rebuttal Comments:**

- In its proposed revised calculation, Tube Investments artificially lowered the corporate tax rate, so, if the Department determines to use the methodology argued by Tube Investments in its revised calculation, it should still apply the appropriate corporate tax rate of 34.6 percent.<sup>275</sup>

**Department Position:** The Department disagrees with Tube Investments and does not intend to change its calculation methodology for the Income Tax for Research and Development Program. Further, and in accordance with the petitioners' comments, the Department intends to continue applying the appropriate corporate tax rate of 34.6 percent in its calculation. The methodology used in the *Preliminary Determination* is consistent with the Department's past practice in the *PET Resin from India 2016 Final*.

#### **Comment 13: The Department's Decision to Countervail Benefits for Tube Investments' Non-Subject Merchandise**

##### **Tube Investments' Comments:**

- In its *Preliminary Determination*, the Department calculated the subsidy rate for the DDB program, the MEIS program, and the EPCGS program using a methodology which only accounted for the benefit received by Tube Investments for the production and/or export of subject merchandise.<sup>276</sup>
- The Department should also apply this methodology and not calculate a subsidy rate for the IEIS program, the Income Tax Deduction for Research and Development program, and the 80-IC Tax Deduction program since these programs are not associated with the production of subject merchandise as verified by the Department.<sup>277</sup>

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<sup>274</sup> See Tube Investments' Case Brief at 6.

<sup>275</sup> See the Petitioners' Rebuttal Brief at 29-31.

<sup>276</sup> See Tube Investments' Case Brief at 10.

<sup>277</sup> *Id.*

- The 80-IC Tax deduction is specific to Tube Investments' TI Diamond Chain division which produces non-subject merchandise and for which benefits cannot transfer to subject merchandise.<sup>278</sup>
- The Department should also apply this reasoning to the subsidy rate calculated for the IPS program where all benefits received apply only to non-subject merchandise.<sup>279</sup>

**The Petitioners' Rebuttal Comments:**

- Tube Investments' divisions do not constitute separate corporate entities, and as such, Tube Investments as a corporate entity received the benefits for these programs.<sup>280</sup>
- There is no record evidence supporting Tube Investments' claim that benefits it attributes to non-subject merchandise under these programs cannot transfer to subject merchandise.<sup>281</sup>
- Tube Investments incorrectly stated that the Department verified these programs were used solely with respect to non-subject merchandise.<sup>282</sup>
- Due to the fungibility of money, there is no evidence demonstrating that absent corporate walls between Tube Investments divisions, there were any restrictions on the movement of funds received as benefits for these programs.<sup>283</sup>

**Department Position:** The Department agrees with the petitioners and does not intend to remove non-subject merchandise from its benefit calculation for the IEIS program, the Income Tax Deduction for Research and Development program, and the 80-IC Tax Deduction program. In accordance with 19 CFR 351.525(b)(4) and (5), when a subsidy is tied to a certain product or market, we will attribute that subsidy to only that product or market.<sup>284</sup> Here, however, the Department does not find the program to be tied to the production of subject or non-subject merchandise. Specifically, Tube Investments stated during verification that its taxes were filed, and thus tax deductions are received, at the stand-alone level of the company, and as such the Department attributed these benefits to Tube Investments' stand-alone sales.<sup>285</sup> The IEIS program is predicated on the incremental increase of all exports, not merely those of subject merchandise, and as such, the Department only attributed this subsidy to export sales. Thus, as the petitioners point out, absent corporate walls, there is no evidence that these benefits were restricted by subject or non-subject merchandise. Further, as explained throughout this final determination, the Department's verification did not draw any conclusions regarding its verification findings. As such, the Department's calculation at the *Preliminary Determination* is consistent with 19 CFR 351.525(b)(4) and (5), and we are not making changes to the determination made therein.

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> See the Petitioners' Rebuttal Brief at 27.

<sup>281</sup> *Id.* at 28.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 29.

<sup>284</sup> See *PRC Shrimp Final*, and accompanying IDM at Section IV.A.4.

<sup>285</sup> See Tube Investments' Verification Report

## Comment 14: The Revised Sales and Subsidy Data Presented as Minor Corrections

### The Petitioners' Comments:

- The Department should utilize the revised sales values and subsidy information reported by Tube Investments and Goodluck and accepted by the Department as minor corrections.<sup>286</sup>

### Tube Investments' Comments:

- The Department should use the revised sales values and the revised MEIS license benefits presented at verification as minor corrections for purposes of the Final Determination.<sup>287</sup>

**Department Position:** The Department agrees with the Petitioners and Tube Investments and intends to use the minor corrections presented at verification in its final determination.

## XI. CONCLUSION

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

12/4/2017

X



Signed by: GARY TAVERMAN

\_\_\_\_\_  
Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

<sup>286</sup> See the Petitioners' Case Brief at 2.

<sup>287</sup> Tube Investments' Case Brief at 9.