C-533-896
Investigation
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March 1, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India

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I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of common alloy aluminum sheet (aluminum sheet) from India, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). The mandatory respondents subject to this investigation are Hindalco Industries Limited (Hindalco) and Manaksia Aluminium Company Limited (MALCO). The period of investigation is January 1, 2019, through December 31, 2019.

After analyzing the comments submitted by interested parties, we have made certain changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of issues in this investigation for which we received comments from interested parties:

General Issues

Comment 1: Whether to Exclude the Subsidy Rate for the Provision of Coal for Less Than Adequate Remuneration (LTAR) from the All-Others Rate
Comment 2: Whether to Reconsider Initiation of New Subsidy Allegations (NSAs)
Comment 3: Whether Commerce Appropriately Initiated the Investigation After the Government of India (GOI) Withdrew from Consultations
Comment 4: Whether Commerce Conducted a Selective/Incomplete Investigation

[1] *See Common Alloy Aluminum Sheet from India: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 49631 (August 14, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

Comment 5: Whether the GOI has an Effective System in Place to Confirm Input Consumption
Comment 6: Whether the Provision of Coal for LTAR is Countervailable

Company-Specific Issues

Hindalco Issues

Comment 7: Whether Water for LTAR and Land for LTAR in the State of Gujarat are Countervailable
Comment 8: Whether to Correct the Consumer Price Index (CPI) Rate Used in the Land for LTAR Benefit Calculation
Comment 9: Whether to Exclude Certain Rebates from the Duty Drawback Benefit Calculation
Comment 10: Whether to Correct the Duty Exemption Rate Used in the State Government of Madhya Pradesh (SGMP) Electricity Duty Exemption
Comment 11: Whether to Correct the Benefit Calculation Relating to the Export Promotion of Capital Goods Scheme (EPCGS)
Comment 12: Whether to Adjust the Inland Freight Benchmark Used in the Coal for LTAR Benefit Calculation

MALCO Issues

Comment 13: Whether to Apply Adverse Facts Available (AFA) to MALCO's EPCGS Usage
Comment 14: Whether to Correct the Discount Rate Used in the Export-Oriented Unit (EOU) Scheme Benefit Calculation

II. BACKGROUND

A. Case History

On August 14, 2020, Commerce published the *Preliminary Determination* in this proceeding.[2] On September 16, 2020, we issued an NSA Memorandum[3] in which we declined to initiate on two NSAs submitted by the petitioners.[4] On December 3, 2020, we issued an in lieu of verification questionnaire to MALCO.[5] On December 11, 2020, MALCO timely responded to the in lieu of verification questionnaire.[6] Interested parties submitted case and rebuttal briefs

[2] *Id.*
[3] *See* Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: New Subsidy Allegations," dated September 16, 2020 (NSA Memorandum) (declining to initiate on the provision of bauxite captive mining rights for LTAR and coal captive mining rights for LTAR, consistent with Commerce's analysis at the initiation stage of this investigation).
[4] The petitioners are the Aluminum Association Common Alloy Aluminum Sheet Working Group and its individual members, Aleris Rolled Products, Inc., Arconic, Inc., Constellium Rolled Products Ravenswood, LLC, JW Aluminum Company, Novelis Corporation, and Texarkana Aluminum, Inc. (collectively, the petitioners).
[5] *See* Commerce's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: In Lieu of Verification Questionnaire," dated December 3, 2020.
[6] *See* MALCO's Letter, "Common Alloy Aluminium Sheet from India: Manaksia Aluminium Company Limited responding to In-Lieu of Verification Questionnaire Response," dated December 11, 2020 (MALCO In Lieu of Verification QR).

between December 30, 2020, and January 6, 2021.[7] On January 27, 2021, Commerce held a public hearing, limited to the issues raised in the case and rebuttal briefs.[8] On February 2, 2021, Commerce held a meeting with the GOI.[9]

B. Period of Investigation

The period of investigation (POI) is January 1, 2019, through December 31, 2019.[10]

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is aluminum sheet from India. For a complete description of the scope of this investigation, see the *Federal Register* notice accompanying this memorandum at Appendix I.

IV. FINAL NEGATIVE DETERMINATION OF CRITICAL CIRCUMSTANCES

In the *Preliminary Determination*, we found that the imports of subject merchandise by Hindalco and MALCO were not massive, and, thus, critical circumstances did not exist for the companies.[11] Additionally, we attempted to analyze import trends for "all others," in accordance with 19 CFR 351.206(i), using shipment data from Global Trade Atlas, adjusted to remove shipments reported by Hindalco and MALCO.[12] However, we found the resulting data unusable for purposes of our massive increase analysis. Therefore, we based our analysis for all other producers/exporters of aluminum sheet from India on the data submitted by Hindalco and

[7] *See* Virgo Aluminum Limited's (Virgo Aluminum's) Letter, "Common Alloy Aluminium Sheet from India: Submission of Letter in Lieu of Case Brief," dated December 30, 2020 (Virgo Aluminum Case Brief); Jindal Aluminum Limited's (Jindal Aluminum's) Letter, "Common Alloy Aluminum Sheet from India: Submission of Letter in Lieu of Case Brief," dated December 30, 2020 (Jindal Aluminum Case Brief); GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India (Case No. C-533-896) – Case Brief on behalf of Government of India," dated December 30, 2020 (GOI Case Brief); Petitioners' Letter, "Common Alloy Aluminum Sheet from India: Petitioners' Case Brief Regarding Manaksia Aluminium Company Limited," dated December 30, 2020 (Petitioners MALCO Case Brief); Petitioners' Letter, "Common Alloy Aluminum Sheet from India: Petitioners' Case Brief Regarding Hindalco Industries Limited," dated December 30, 2020 (Petitioners Hindalco Case Brief); and Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Case Brief of Hindalco Industries Limited," dated December 30, 2020 (Hindalco Case Brief); *see also* MALCO's Letter, "Common Alloy Aluminium Sheet from India: Submission of Rebuttal Case Brief," dated January 6, 2021 (MALCO Rebuttal Brief); Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Rebuttal Brief of Hindalco Industries Limited," dated January 6, 2021 (Hindalco Rebuttal Brief); GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India (Case No. C-533-896) – Rebuttal Case Brief on behalf of Government of India," dated January 6, 2021 (GOI Rebuttal Brief); and Petitioners' Letter, "Common Alloy Aluminum Sheet from India: Petitioners' Rebuttal Brief," dated January 6, 2021 (Petitioners Rebuttal Brief).

[8] *See* Hearing Transcript, "The Investigation of the Antidumping Duty Order on Common Alloy Aluminum Sheet from India: Public Hearing," dated January 27, 2021.

[9] *See* GOI's Letter, 'Common Alloy Aluminum Sheet from India: Request for Consultations," dated December 24, 2020; *see also* Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: Meeting with Officials from the Government of India," dated February 2, 2021 (GOI Meeting Memorandum).

[10] *See Preliminary Determination* PDM at 4.

[11] *Id.* at 6-7.

[12] *Id.*

MALCO. As a result, we determined that there was not a massive increase in shipments from the all other companies.[13]

We have conducted the analysis using the additional data provided by the mandatory respondents, which allow us to expand the comparison period for "massive" imports analysis by an additional two months.[14] Consistent with the preliminary determination, we continue to find that imports of subject merchandise by Hindalco and MALCO were not massive. Just as with our preliminary determination, we continue to base our "massive" analysis for all other companies on the experience of the mandatory respondents.[15] Thus, for this final determination, we continue to find that critical circumstances do not exist for Hindalco, MALCO, and the "all other" companies under section 705(a)(2) of the Act and 19 CFR 351.206(h).[16]

V. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and the methodology used for this final determination, *see* the *Preliminary Determination*.[17]

B. Attribution of Subsidies

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the attribution of subsidies methodology used in the *Preliminary Determination*. For a description of the methodologies used for all programs in the final determination, *see* the *Preliminary Determination.*[18]

C. Denominators

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the denominators applied in the *Preliminary Determination*. For a description of the denominators used for all programs in the final determination, *see* the *Preliminary Determination.*[19]

[13] *Id*.
[14] *See* Memorandum, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India: Critical Circumstances Analysis," dated March 1, 2021 (Critical Circumstances Analysis Memorandum).
[15] We also note that no party to this investigation submitted comments on Commerce's preliminary determination regarding critical circumstances.
[16] *See* Critical Circumstances Analysis Memorandum.
[17] *Id*. at 8.
[18] *Id*. at 8-10.
[19] *Id*. at 10.

D. Benchmarks and Interest Rates

Interested parties raised issues in their case briefs regarding the coal benchmark we used in the *Preliminary Determination*.[20] However, we made no changes to the benchmark for coal, except as explained in Comment 12. Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the long-term lending rate or the land benchmark applied in the *Preliminary Determination*. For a description of the interest rates and the land benchmark used in the final determination, *see* the *Preliminary Determination.*[21]

VI. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Commerce relied on "facts otherwise available," including AFA, for several findings in the *Preliminary Determination*. For a description of these decisions, *see* the *Preliminary Determination*. Aside from the additional application of AFA discussed below, Commerce has not made any changes to its decision to use facts otherwise available and AFA in this final determination.

In a change from the *Preliminary Determination*, we are now relying on AFA in finding that MALCO failed to act to the best of its ability in reporting usage information for the EPCGS program.

Application of Facts Available: MALCO Response with Respect to Non-Use of the EPCGS

Due to the COVID-19 pandemic, in place of our normal in-person verification procedures, Commerce sent MALCO an in-lieu-of-verification questionnaire.[22] Question four in this questionnaire requested that MALCO provide evidence to demonstrate its non-use of the EPCGS during the years 2014 and 2015.[23] Specifically, Commerce requested that MALCO provide screenshots of its equipment purchase ledger(s) in those years. Reviewing the screenshots of the equipment ledgers would have enabled Commerce to verify whether MALCO made EPCGS-eligible imports during the relevant period. Commerce requested that, "for any entries shown therein, please provide the name and location of the supplier." The purpose of this question was to test the accuracy and completeness of MALCO's responses for benefits received under the EPCGS. In response to Commerce's verification request, however, MALCO provided downloads from its accounting system in Excel spreadsheets, not screenshots as instructed and it also provided its audited FY 2014-15 and FY 2015-16 financial statements.

MALCO argued that screenshots for such accounts would be voluminous, and, therefore, it proffered the above-referenced documents in place of screenshots. MALCO also stated that its financial statements conclusively demonstrated that it did not import any capital equipment during FY 2014-15 and FY 2015-16[24] because the financial statements reported a "nil" value under a heading relating to "CIF Value of Capital Goods Imports."

[20] *Id.* at 10-13.
[21] *Id.*
[22] *See* Commerce's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: In Lieu of Verification Questionnaire," dated December 3, 2020.
[23] *See* MALCO in In-Lieu of Verification QR at V-5.
[24] *See* MALCO Rebuttal Brief at 6.

As an initial matter, we note that MALCO characterizes these Excel spreadsheets as "downloads" from its accounting system. However, without the accompanying source documents from which these files were generated, Commerce has no way to establish that these spreadsheets accurately or completely reflect the information in those source documents. For this reason, we explicitly requested *screenshots* of actual ledgers in the accounting system; that is the type of information we would examine at an in-person verification to confirm the completeness and accuracy of the questionnaire response. We do not consider it appropriate or useful to compare an Excel file generated for a later-in-time questionnaire response to another Excel file submitted in an earlier questionnaire response. This circular exercise is not a substitute for checking the information submitted with the earlier questionnaire response against the actual ledgers in the accounting system.

Moreover, MALCO's audited financial statements show that it imported "Spares parts and chemicals" in FY 2014-15 and FY 2015-16.[25] The GOI's response concerning this program indicates that the EPCGS covers spare parts in addition to initial purchases of capital goods.[26] Therefore, the alternative documentation MALCO provided does not establish that it has completely and accurately reported all the benefits received under the EPCGS. To the contrary, the EPCGS covers spare parts and MALCO's financial statements indicate that MALCO imported items recorded under the financial statement line item titled "spare parts and chemicals" during the tested years. In addition, as noted in the MALCO Final Calculation Memorandum, MALCO reported that it imported a variety of EPCGS-eligible items during the POI/average useful life (AUL) period.[27]

In light of the above, we have relied on facts available, in accordance with section 776(a)(2)(D) of the Act, because we find that MALCO provided information that could not be verified. Specifically, for purposes of verifying that MALCO has completely and accurately reported all the benefits under the EPCGS program, Commerce requested the screenshots of relevant ledgers from MALCO's accounting system. However, MALCO did not provide the requested screenshots of its ledgers, but instead, merely provided financial statements and downloads. As noted above, the financial statements indicated that MALCO could have used the EPCG program in 2014 and 2015, while the downloads are not reliable substitutes for the requested information.

In summary, MALCO did not provide Commerce with the documents requested and, instead, provided it with documents that, at best (even if we were to construe them in the way that is most favorable to MALCO), leave significant uncertainty as to the accuracy and completeness of MALCO's non-use claim. This further calls into question the accuracy of all of MALCO's reported benefits under the EPCGS program. Commerce is therefore unable to verify the completeness and accuracy of MALCO's reported usage of the EPCGS with the information

[25] *See* MALCO In-Lieu of Verification QR at Exhibits 4, 5.
[26] *See* GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India," dated June 15, 2020 (GOI June 15, 2020 IQR) at 44.
[27] *See* MALCO's Letter, "Common Alloy Aluminium Sheet from India: Submission of CVD Supplemental Response of Countervailing Duty Investigation," dated July 6, 2020 at Exhibit S2-28 (identifying the names of the items imported under the EPCGS)*; see also* Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: MALCO Final Analysis Calculations," dated concurrently with this memorandum (MALCO Final Calculation Memorandum).

provided by MALCO. Thus, we must rely on facts otherwise available in accordance with section 776(2)(D) of the Act.

Application of AFA: MALCO Response with Respect to Non-Use of the EPCGS

In selecting from among the facts available, Commerce has determined that an adverse inference is warranted, pursuant to section 776(b) of the Act. Where Commerce determines that the use of facts available is warranted, section 776(b) of the Act permits Commerce to apply an adverse inference if it makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." The Court of Appeals for the Federal Circuit (CAFC), in *Nippon Steel*, provided an explanation of the "failure to act to the best of its ability" standard, noting that it requires a respondent to "put forth its maximum effort to provide {Commerce} with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness or inadequate record keeping."[28] It requires them to, among other things, "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of" their ability to do so.[29] The CAFC has noted that "{t}he statutory trigger for {Commerce's} consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."[30]

Here, Commerce requested information for purposes of verification, which was within the possession of MALCO, yet the information was not provided in the manner requested. In addition, contrary to MALCO's claims, the replacement information that MALCO provided did not comprehensively demonstrate that MALCO accurately and completely reported the benefits under the EPCGS. Thus, we have based our final determination with respect to MALCO's usage of the EPCGS on AFA.

Selection of the AFA Rate

It is Commerce's practice in countervailing duty (CVD) proceedings to select an AFA rate using the highest calculated program-specific rate determined for the cooperating respondents in the instant investigation or, if not available, rates calculated in prior CVD cases involving the same country.[31] When selecting AFA rates, section 776(d) of the Act provides that Commerce may use any countervailable subsidy rate determined for the same or a similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering

[28] *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (*Nippon Steel*).
[29] *Id.*
[30] *Id.*
[31] *See, e.g., Common Alloy Aluminum Sheet from the People's Republic of China: Preliminary Affirmative Countervailing Duty (CVD) Determination, Alignment of Final CVD Determination with Final Antidumping Duty Determination, and Preliminary CVD Determination of Critical Circumstances*, 83 FR 17651 (April 23, 2018), and accompanying PDM at "X: Use of Facts Otherwise Available and Adverse Inferences: A. Application of Total AFA: Chalco Ruimin and Chalco-SWA," unchanged in *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018), and accompanying Issues and Decision Memorandum (IDM).

authority considers reasonable to use, including the highest of such rates.[32] Accordingly, when selecting AFA rates, if we have cooperating respondents in the investigation, we first determine if there is an identical program in the instant investigation and use the highest calculated rate for the identical program. If there is no identical program that resulted in a subsidy rate above *de minimis* for a cooperating respondent in the investigation, we then determine if an identical program was countervailed in another CVD proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the identical program.[33] If no such rate exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) countervailed in any CVD proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the similar/comparable program. Finally, where no such rate is available, we apply the highest calculated above-*de minimis* rate from any non-company-specific program in a CVD case involving the same country that the company's industry could conceivably use.[34]

Commerce's methodology is consistent with section 776(d)(1)(A) of the Act. Section 776(d)(1)(A) of the Act states that when applying an adverse inference in selecting from the facts otherwise available, Commerce may (i) use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or (ii) if there is no same or similar program, use a countervailable subsidy for a subsidy rate from a proceeding that Commerce considers reasonable to use. Thus, section 776(d)(1)(A) of the Act expressly allows for Commerce's existing practice of using an AFA hierarchy in selecting a rate "among the facts otherwise available" in CVD cases, should the facts warrant such a selection.

Section 776(d)(2) of the Act authorizes Commerce to rely on the highest prior rate under certain circumstances. In deriving an AFA rate under section 776(d)(1)(A) of the Act described above, the provision states that Commerce "may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available." No legislative history accompanied this provision. Accordingly, Commerce is left to interpret this "evaluation by the administering authority of the situation" language in light of existing agency practice and the structure and provisions of section 776(d) of the Act itself.

We find that the Act anticipates a two-step process for determining an appropriate AFA rate in CVD cases: (1) Commerce may apply its hierarchy methodology; and (2) Commerce may apply the highest rate derived from this hierarchy to a respondent, should it choose to apply that hierarchy in the first place, unless, after an evaluation of the situation that resulted in the use of

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[32] *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*), and accompanying IDM at 12-14; *see also Essar Steel, Ltd. v. United States*, 753 F. 3d 1368, 1373-74 (Fed. Cir. 2014) (upholding use of a "hierarchical methodology for selecting an AFA rate").

[33] For purposes of selecting AFA program rates, we normally consider rates less than 0.5 percent to be *de minimis*. *See, e.g., Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying IDM at "E. Various Grant Programs: 1. Grant Under the Tertiary Technological Renovation Grants for Discounts Program" and "2. Grant Under the Elimination of Backward Production Capacity Award Fund."

[34] *See Shrimp from China* IDM at 13-14.

AFA, Commerce determines that the situation warrants a rate different than the rate derived from the hierarchy be applied.[35]

In applying the AFA rate provision, it is well established that, when selecting the rate from among possible sources, Commerce seeks to use a rate that is sufficiently adverse to effectuate the statutory purpose of section 776(b) of the Act to induce respondents to provide Commerce with complete and accurate information in a timely manner. This ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[36] Further, "in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin."[37] It is pursuant to this knowledge and experience that Commerce has implemented its AFA hierarchy in CVD cases to select an appropriate AFA rate.[38]

In applying its AFA hierarchy in CVD investigations, Commerce's goal is as follows: in the absence of necessary information from cooperative respondents, Commerce is seeking to find a rate that is a relevant indicator of how much the government of the country under investigation is likely to subsidize the industry at issue, through the program at issue, while inducing cooperation. Accordingly, in sum, the three factors that Commerce takes into account in selecting a rate are: (1) the need to induce cooperation; (2) the relevance of a rate to the industry in the country under investigation (*i.e.*, can the industry use the program from which the rate is derived); and (3) the relevance of a rate to a particular program, though not necessarily in that order of importance.

Furthermore, the hierarchy (as well as section 776(d)(1) of the Act) recognizes that there may be a "pool" of available rates that Commerce can rely upon for purposes of identifying an AFA rate for a particular program. In investigations, for example, this "pool" of rates could include the rates for the same or similar programs used in either that same investigation or prior CVD

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[35] This differs from antidumping (AD) proceedings, for which no hierarchy applies, under section 776(d)(1)(B) of the Act. Under that provision, "any dumping margin from any segment of the proceeding under the applicable {AD} order" may be applied, which suggests an adverse rate could be derived from different available margins, given the facts on the record.

[36] *See* Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 at 870, reprinted in 1994 U.S.C.C.A.N 4040, 4090; *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (*Essar Steel*) (finding that "{t}he purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation, not to impose punitive damages") (quoting *F. Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (*De Cecco*)).

[37] *See De Cecco*, 216 F. 3d at 1032.

[38] Commerce has adopted a practice of applying its hierarchy in CVD cases. *See, e.g., Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM at Comment 4 (*Steel Flanges from India*) (applying the AFA hierarchical methodology within the context of a CVD investigation); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 41003 (July 14, 2015), and accompanying IDM at 11-15 (applying the AFA hierarchical methodology within the context of a CVD administrative review). However, depending on the type of program, Commerce may not always apply its AFA hierarchy. *See, e.g., Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3104 (January 20, 2016), and accompanying IDM at 7-8 (applying, outside of the AFA hierarchical context, the highest combined standard income tax rate for corporations in Indonesia).

proceedings for that same country. Of those rates, the hierarchy provides a general order of preference to achieve the goal identified above. The hierarchy, therefore, does not focus on identifying the highest possible rate that could be applied from among that "pool" of rates; rather, it adopts the factors identified above of inducement, relevancy to the industry, and relevancy to the particular program.

Under the first step of Commerce's investigation AFA rate hierarchy, Commerce applies a non-zero rate calculated for a cooperating company for the identical program in the investigation. Therefore, we are applying to MALCO the subsidy rate calculated for the identical program in this investigation: Hindalco's rate for the EPCGS program, which is 0.54 percent *ad valorem*.

VII. ANALYSIS OF PROGRAMS

Commerce made no changes to its *Preliminary Determination* with regard to the methodology used to calculate the subsidy rates for the programs listed below, with the exceptions noted in the program-specific comments. For the descriptions, analyses, and calculation methodologies of these programs, *see* the *Preliminary Determination*. The final program rates are identified below.

A. Programs Determined to be Countervailable

1. Advance Authorization Program (AAP)[39]

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 2.10 percent *ad valorem* for MALCO.[40]

2. Duty Drawback (DDB) Program

For Hindalco, as noted in Comment 9, we excluded certain rebates in the benefit calculation under this program. For MALCO, we made no changes to our methodology for calculating a subsidy rate. The final subsidy rates for this program are 1.09 percent *ad valorem* for Hindalco and 0.30 percent *ad valorem* for MALCO.[41]

3. EPCGS

As noted in Comment 11, we modified the calculated benefit for this program, for Hindalco, by expensing outstanding licenses to the POI. As explained in Comment 13, we have applied, as AFA, Hindalco's calculated rate to MALCO. The final subsidy rates for this program are 0.54

[39] The AAP has also been referenced as the Advance License Program; *see, , e.g.*, *Certain Corrosion-Resistant Steel Products from India: Final Affirmative Determination of the Countervailing Duty Investigation*, 81 FR 35323 (June 2, 2016), and accompanying IDM at 9.
[40] *See Preliminary Determination*; and Comment 5.
[41] *Id.; see also* Comment 9 and Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: Hindalco Final Analysis Calculations," dated concurrently with this memorandum (Hindalco Final Calculation Memorandum).

percent *ad valorem* for Hindalco and 0.54 percent *ad valorem* for MALCO.[42]

4. Merchandise Export from India Scheme

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rates for this program are 1.65 percent *ad valorem* for Hindalco and 1.91 percent *ad valorem* for MALCO.[43]

5. EOU Scheme – Reimbursement of Central Sales Tax (CST) Paid on Goods Manufactured in India

As noted in Comment 14, we corrected the discount rate used to calculate the benefit for this program. The final subsidy rate for this program is 0.04 percent *ad valorem* for MALCO.[44]

6. *Provision of Coal for LTAR*

As noted in Comment 12, we modified the benchmark used to calculate the benefit for this program. The final subsidy rate for this program is 30.72 percent *ad valorem* for Hindalco.[45]

7. *State Government of Maharashtra (SGOM) Subsidy Program*

a. *Electricity Duty Exemption*

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.01 percent *ad valorem* for Hindalco.[46]

8. State Government of Gujarat (SGOG) Subsidy Programs

a. SGOG Water for LTAR

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.07 percent *ad valorem* for Hindalco.[47]

b. SGOG Land for LTAR

As noted in Comment 8, we corrected the CPI used to calculate the benefit for this program. The final subsidy rate for this program is 0.04 percent *ad valorem* for Hindalco.[48]

[42] *See* Comments 11 and 13, respectively; *see also* Hindalco Final Calculation Memorandum and MALCO Final Calculation Memorandum.
[43] *See Preliminary Determination* at 30.
[44] *See* Comment 14; *see also* MALCO Final Calculation Memorandum.
[45] *See* Comment 12; *see also* Hindalco Final Calculation Memorandum.
[46] *See Preliminary Determination* at 31.
[47] *Id.*; *see also* Comment 7.
[48] *See* Comment 8; *see also* Hindalco Final Calculation Memorandum.

c. *Electricity Duty Exemption*

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.01 percent *ad valorem* for Hindalco.[49]

9. *State Government of Uttar Pradesh (SGUP) Subsidy Program*

a. *Electricity Duty Exemption*

We made no changes to our methodology for calculating a subsidy rate under this program. The final subsidy rate for this program is 0.05 percent *ad valorem* for Hindalco.[50]

10. *SGMP Subsidy Program*

a. *Electricity Duty Exemption*

As noted in Comment 10, we corrected the electricity duty rate used to calculate the benefit for this program. The final subsidy rate for this program is 1.07 percent *ad valorem* for Hindalco.[51]

B. Programs Determined Not to be Used or Not to Confer a Measurable Benefit During the POI

The following programs: (1) were not used; (2) were fully expensed prior to the POI; or (3) are less than 0.005 percent *ad valorem* when attributed to the respondent's applicable sales, as discussed in the "Attribution of Subsidies" section in the *Preliminary Determination*.[52] Consistent with Commerce's practice,[53] we have not included programs which provided no measurable benefit in our final subsidy rate calculations. Moreover, we determine that it is unnecessary for Commerce to make a determination as to the countervailability of these programs.

GOI Programs:

1. Renewable Energy Certificates Program
2. Duty Free Import Authorization Scheme
3. Status Holders Incentive Script Scheme
4. Incremental Exports Incentive Scheme

[49] *See Preliminary Determination* PDM at 34.
[50] *Id.* at 35.
[51] *See* Comment 10; *see also* Hindalco Final Calculation Memorandum.
[52] *See Preliminary Determination* PDM at 36-37.
[53] *See, e.g., Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012), and accompanying IDM at "Income Tax Reductions for Firms Located in the Shanghai Pudong New District"; and *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016) (*CRS from Russia*), and accompanying IDM at "Tax Deduction for Research and Development (R&D) Expenses."

5. Special Economic Zone (SEZ) Programs
    a. Duty-Free Importation of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts and Packing Material
    b. Exemption from Payment of CST on Purchases of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts, and Packing Material
    c. Exemption from Stamp Duty of All Transactions and Transfers of Immovable Property within the SEZ
    d. Exemption from Electricity Duty and Cess on the Sale and Supply of Electricity to an SEZ Unit
    e. Unit SEZ Income Tax Exemption Scheme (10A)
    f. Discounted Land Fees in an SEZ
6. EOU Scheme
    a. Duty-Free Imports of Goods, Including Capital Goods and Raw Materials
    b. Exemption from Payment of Central Excise Duty on Goods Manufactured in India and Procured through a Domestic Tariff Area
    c. Duty-Drawback on Furnace Oil Procured from Domestic Companies
7. Market Access Initiative
8. Market Development Assistance Program
9. GOI Loan Guarantees
10. Income Tax Deductions for Research and Development Expenses

State Programs:

11. State and Union Territory Sales Tax Incentive
12. SGOM Programs
    a. Industrial Promotion Subsidy/Sales Tax Program
    b. Interest Subsidy under the SGOM Package Scheme of Incentives
    c. Exemption of Stamp Duty
    d. Incentives to Strengthen Micro to Large-Scale Industries
    e. Subsidies for Mega Projects under the Package Scheme of Incentives
13. SGOG Subsidy Programs
    a. SGOG Industrial Policy 2009
14. SGUP Subsidy Programs
    a. Investment Promotion Scheme
    b. Special Assistance for Mega Projects
    c. Stamp Duty Exemption
15. State Government of Chhattisgarh Subsidy Programs
    a. Stamp Duty Exemption
    b. Exemption of Entry Tax
16. State Government of Odisha Subsidy Programs
    a. SGOO Industrial Policy 2015
17. State Government of Jharkhand Subsidy Program
    a. Electric Duty Exemption

VIII. DISCUSSION OF THE ISSUES

General Issues

Comment 1: Whether to Exclude the Subsidy Rate for the Provision of Coal for LTAR from the All-Others Rate

Jindal Aluminum and Virgo Aluminum Comments

- Commerce should continue to calculate the "all-others" subsidy rate based on the weighted average of the subsidy rate calculated for MALCO and Hindalco, but should exclude the subsidy calculated under the provision of coal for LTAR for Hindalco.[54]
- Neither Jindal Aluminum nor Virgo Aluminum has procured any coal directly from Coal India Limited (CIL) or any of its subsidiaries. Additionally, coal is not a primary input for Jindal Aluminum or Virgo Aluminum because, unlike Hindalco, neither company is an integrated aluminum producer. Jindal Aluminum's and Virgo Aluminum's operations are similar to those of MALCO (which did not benefit from coal for LTAR).[55]

The Petitioners' Rebuttal Comments

- Section 705(c)(5)(A)(i) of the Act governs Commerce's calculation of the all-others rate in CVD investigations, which is generally determined to be "an amount equal to the weighted-average countervailable subsidy rates established for exporters and producers individually examined, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely" based on facts available. This methodology was properly applied in the *Preliminary Determination*, and section 705(c)(5)(A)(ii) of the Act does not contemplate that Commerce may deviate from the statutory guidance to use another method (*i.e.*, "any reasonable method") unless all rates are zero, *de minimis*, or based entirely on facts available.[56]
- In any case, the record does not contain information regarding the operations of Jindal Aluminum or Virgo Aluminum because neither company was individually examined by Commerce. For this additional reason, these companies' arguments must fail.[57]
- Therefore, Commerce should decline to calculate company-specific all-others rates.[58]

Commerce Position: We have not changed our calculation of the all-others rate. Section 705(c)(5)(A)(i) of the Act provides that "the all-others rate shall be an amount equal to the weighted-average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 776." Hindalco and MALCO are the only companies being individually examined in this investigation, and neither company's subsidy rate is zero, *de minimis* or determined entirely under section 776 of the Act.

[54] *See* Jindal Aluminum Case Brief at 2 and Virgo Aluminum Case Brief at 2.
[55] *Id.*
[56] *See* Petitioners Rebuttal Brief at 61-62.
[57] *Id.* at 61.
[58] *Id.* at 63.

Jindal Aluminum and Virgo Aluminum argue that Commerce should exclude the subsidy calculated under the provision of coal for LTAR program for Hindalco because their operations are unlike Hindalco's operations. As an initial matter, this assertion is unsupported by the record, as the record contain no information regarding the companies' operations. In any case, section 705(c)(5)(A)(i) of the Act does not contemplate that Commerce calculate company-specific all-others rates. Rather, the all-others rate is derived based on the experience of the exporter(s) selected for individual examination, *i.e.*, in this case the largest exporters. Thus, for this final determination, we continue to rely on the weighted-average countervailable subsidy rates established for exporters and producers individually investigated – without excluding or adding any particular programs – in calculating the all-others rate.

Comment 2: Whether to Reconsider Initiation of NSAs

On July 2, 2020, the petitioners timely submitted two NSAs, one involving bauxite mining rights for LTAR and the other coal mining rights for LTAR. After analyzing these NSAs, however, we found that the petitioners did not provide sufficient evidence to show the mining rights were provided at LTAR, and we did not initiate an investigation into these alleged programs.[59]

The Petitioners' Comments

- Commerce erred in finding that the petitioners failed to provide: (1) a price comparison relating to the adequacy of remuneration for the bauxite/coal mining rights themselves; (2) a reasonably-available public source indicating that the bauxite/coal mining rights were provided at LTAR; or (3) a detailed explanation of the steps that the petitioners took to attempt to obtain such information.[60]
- Although Commerce stated that, "{i}n past cases, the benchmark Commerce used to analyze mining rights for LTAR was a calculated market-based price for mining rights," in *CRS from Russia*, Commerce did not analyze benefit based on a benchmark for "mining rights," but rather a benchmark for the value of the mined good (*i.e.*, coal).[61]
- In *CRS from Russia*, Commerce determined that, as "the {Government of Russia (GOR)} is the sole issuer of such mining rights licenses, ... there are no private, market-determined prices in Russia on the record," and that the GOR failed to provide the information requested regarding its mining rights auction system.[62]
- The petitioners submitted nearly identical analyses and comparisons in their NSAs. Specifically, the petitioners explained both (1) why tier one mining rights prices were unavailable for each respective input; and (2) that, consistent with established precedent, tier two mining prices are inadequate in the instant proceeding. They also provided a tier three mining rights analysis to demonstrate that mining rights were provided for LTAR.[63]
- The petitioners provided appropriate price comparisons for each allegation, consistent with Commerce's treatment of captive mining rights programs in prior investigations.[64]

[59] *See* Petitioners' Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India – New Subsidy Allegations," dated July 2, 2020.
[60] *See* Petitioners Hindalco Case Brief at 3.
[61] *Id.* (citing *CRS from Russia* IDM).
[62] *Id.* at 4.
[63] *Id.* at 5-6.
[64] *Id.* at 6.

- No tier one benchmark exists. The GOI owns all mining rights within India, and it grants mining licenses through a government-run auction process. The auctions are open to eligible entities, known as "technically qualified bidders." To the petitioners' knowledge, although the GOI has not publicly issued guidance on criteria to be a "technically qualified bidder," it appears that certain criteria must be met (*e.g.*, a participant must be an Indian national or company under the GOI's definition, and the GOI requires particular end-uses for the mined products). Despite there being limited information about such auctions, the evidence indicates that mining rights auctions are not open to all parties, but rather only to select entities.[65] Therefore, Commerce should determine that the GOI's auctions are not "competitive," pursuant to 19 CFR 351.511(a)(2)(i),[66] and that prices resulting from the GOI auctions are not market-determined and cannot serve as a tier one benchmark.[67]
- A tier two benchmark analysis is also inappropriate in the context of mining rights. Mining licenses "are goods that do not lend themselves to comparison to a world market price under tier two of the LTAR benchmark hierarchy," as world prices would not be available to purchasers in the country under investigation.[68]
- Accordingly, Commerce should rely on a tier three benchmark and examine whether the value of the resource acquired with bauxite and coal mining rights is market-based pursuant to 19 CFR 351.511(a)(2)(iii).[69]
- In conducting a tier three analysis, in *CRS from Russia*, Commerce determined that the GOR did not distort the domestic market and, therefore, conducted a tier three analysis utilizing an in-country mineral price as the market-determined benchmark.[70] In this case, however, the GOI controls both the bauxite and coal mining industries, such that the domestic markets for both bauxite and coal mining rights are distorted and Indian benchmark prices are not available.[71]
- Mineral prices are a reasonable proxy for mining rights prices because usable mining rights prices are unavailable. Commerce generally conducts mining rights benefit calculations utilizing certain royalty payments, extractions payments, and mining lease costs. However, details of the respondents' mineral rights purchases are not publicly available to the petitioners based on the current record.[72]
- The Court of International Trade (CIT) has confirmed that the standard for alleging a subsidy and benefit received therefrom is a low bar.[73] Further, the "reasonably available" standard that the petitioners must meet in demonstrating support for their allegations is similarly met with a demonstration of reasonable effort.[74]

[65] *Id.* at 7.
[66] *Id.* at 7-8.
[67] *Id.* at 8.
[68] *Id.* (citing *CRS from Russia* IDM at 91).
[69] *Id.* at 9.
[70] *Id.* (citing *CRS from Russia* IDM at 30).
[71] *Id.* at 9.
[72] *Id.* at 8.
[73] *Id.* at 13 (citing *RZBC Group Shareholding Co., Ltd. v. United States*, 100 F. Supp. 3d 1288, 1292 (CIT 2015) (*RZBC*)).
[74] *Id.*

- The petitioners have demonstrated the likelihood of Hindalco's benefit from the NSAs to a significant degree based on extensive available information.[75] Although, the petitioners were unable to find a usable mining right benchmark, to fault the petitioners for the absence of public information, notwithstanding extensive search efforts, defies the permissive initiation standard as set forth in the Act and understood by the CIT.[76]
- Thus, the petitioners adequately supported their NSAs by providing publicly-available information regarding financial contribution, specificity, and benefit.[77]

Hindalco's Rebuttal

- Because the petitioners never provided an appropriate price comparison, Commerce properly determined not to initiate investigations into the mining rights subsidy allegations.[78] Commerce should again decline to initiate because of the petitioners' failure to demonstrate that the GOI provided the mining rights at issue for LTAR.[79]
- The petitioners argued that no usable tier one benchmark exists because "the GOI owns all mining rights within India" and "the domestic markets for both bauxite and coal mining rights are distorted."[80] The petitioners explain that the government-run auctions for mining rights in India do not meet the regulatory requirement of being "competitive," because the GOI's auctions are not open to all. However, the evidence cited by the petitioners fails to demonstrate that the auction prices in India are unusable.[81]
- The petitioners are incorrect when they argue that "information regarding the exact auction operations carried out by the GOI is not publicly available."[82] The GOI provided a copy of the "Methodology for Auction of Coal Mines/Blocks for sale of coal under the Coal Mines (Special Provisions) Act, 2015 and the MDDR Act in Exhibit 6 of the GOI June 25, 2020 IQR.[83] This document demonstrates that the exact auction operations carried out by the GOI for coal mining leases are publicly available, and do not suggest that the government's mining rights auctions are not competitive.[84]
- The petitioners have not commented on the fact that Commerce previously has relied on tier one benchmark prices in India for a captive coal mining rights program, which means that Commerce already has found that the market in India is not distorted for CVD benchmarking purposes in an investigation of mining rights.[85]

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[75] *Id.* at 14.
[76] *Id.*
[77] *Id.* at 13.
[78] *See* Hindalco Rebuttal Brief at 3.
[79] *Id.* at 4.
[80] *Id.* at 6.
[81] *Id.* at 6-8 (arguing that, contrary to the petitioners' assertion, Sections 5(1) and 13(2)(a) of the Mines and Minerals (Development and Regulation) Act, 1957" (MDDR) Act and Rule 22 of the Mineral Concession Rules, 1960, as amended (MC Rules), read together, contain the entire universe of qualifications for an applicant or technically qualified bidder for mining leases, and do not indicate anything uncompetitive about the government's mining rights auctions).
[82] *Id.* at 8.
[83] *Id.* at 9 (citing GOI June 25, 2020 IQR at Exhibit 6).
[84] *Id.*
[85] *Id.* (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 1578 (January 9, 2008) (*Hot-Rolled from India Preliminary Results*); and *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty*

- The petitioners themselves argued that a tier two benchmark is "insufficient to determine whether … mining rights were provided consistent with market principles" because world prices for rights "would not be available to purchasers in the country under review/investigation."[86]
- The only basis the petitioners provided to Commerce to initiate an investigation was tier three world export prices for the resources mined from the mining rights at issue, *i.e.*, bauxite and coal. However, the petitioners' tier three benchmarks – and the assumptions that led the petitioners to use these benchmarks – are highly flawed.[87]
- The petitioners did not demonstrate that the India markets for bauxite and coal mining rights are distorted, thus, did not demonstrate that in-country benchmarks are inappropriate.[88]
- The petitioners' tier three benchmarks rely on UN Comtrade data, however, Hindalco demonstrated in its case brief that the UN Comtrade coal benchmark data (as provided by the petitioners for the alleged provision of coal for LTAR) are fatally flawed because they do not include export data from Indonesia, one of the world's largest exporters of coal.[89]
- The petitioners did not have to rely on world export prices for the tier three benchmarks and could have provided a variety of other information to support their allegations that mining rights are being provided at prices that are inconsistent "with market principles" and, thus, provided for LTAR.[90]
- The petitioners already knew that their mining rights subsidy allegations were insufficient to demonstrate a benefit. Commerce said so when it declined to initiate an investigation into these two programs after the petition was filed, explaining that the petitioners "have not provided sufficient evidence to show the mining rights were provided at LTAR."[91]
- Instead of providing more information to support the NSAs relating to these programs, the petitioners relied on the world export price data that they already had provided in the petition, which Commerce already rejected.[92]
- If the petitioners believe that "usable mining rights prices are unavailable" and that they were "unable to find" usable mining rights benchmarks, it is unclear why the petitioners believe a countervailable subsidy has been provided.[93]

Administrative Review, 73 FR 40295 (July 14, 2008) (*Hot-Rolled from India Final*), and accompanying IDM at 66 and 72).

[86] *Id.* at 10.

[87] *Id.* at 11.

[88] *Id.*

[89] *Id.* at 12 (citing Hindalco Case Brief at 64-66).

[90] *Id.* at 13 (citing 19 CFR 351.511(a)(2)(iii)).

[91] *Id.* at 14.

[92] *Id.*

[93] *Id.* at 15.

The GOI's Rebuttal

- Commerce has stated that it would not apply a *per se* rule that a government's majority market share is tantamount to market distortion. In fact, in *Supercalendered Paper from Canada*, Commerce stated that it will consider all relevant factors or measures that may distort a market.[94] Therefore, even although the GOI owns mining rights in India, this by no means implies that a tier one benchmark is unusable.[95]
- The petitioners have failed to provide evidence which would adequately demonstrate that the auction prices in India are unusable. The petitioners' assertions are based on a selective reading and incorrect understanding of the MMDR Act and the MC Rules. Section 10B(4) of the MMDR Act provides that, for the grant of a mining lease, the state governments shall select an applicant who fulfills the eligibility conditions specified in "this Act."[96] Contrary to the petitioners' assertion, Sections 5(1) and 13(2)(a) of the MMDR Act and Rule 22 of the MC Rules, read together, contain the entire universe of qualifications for an applicant or "technically qualified bidder" for mining leases.[97]
- The petitioners are incorrect when they argue that "information regarding the exact auction operations carried out by the GOI is not publicly available." The GOI, in its June 25, 2020, questionnaire response, provided a copy of the Methodology for Auction of Coal Mines/Blocks for sale of coal under the Coal Mines (Special Provisions) Act, 2015 and the MMDR Act, 1957, dated 27 February 2018. Thus, the GOI questionnaire response demonstrates that the auction operations carried out by the GOI for coal mining leases are publicly available.[98]
- Commerce previously has relied on tier one benchmark prices in India for a captive coal mining rights program, which means that Commerce already has found that the market in India is not distorted for CVD benchmarking purposes in an investigation of mining rights.[99]

Commerce Position: We will not revisit our decision at the initiation stage, and our subsequent decision in the NSA Memorandum, to decline to initiate on the petitioners' captive mining rights allegations. To warrant initiation of an investigation into a subsidy program, a petitioner must allege the elements necessary for a subsidy, and such allegations must be accompanied by supporting information reasonably available to the petitioner. Although the "reasonably available" standard does not set the evidentiary bar high, a petitioner must proffer reasonably available evidence of financial contribution, specificity, and benefit.

Here, the petitioners attempted to show that the alleged programs provide a benefit based on a comparison of the average unit values between domestic bauxite/coal prices in India and world export prices of bauxite/coal. At initiation, we explained that the price comparison was inadequate to demonstrate that the alleged programs provided a benefit. Specifically, the

[94] *See* GOI Rebuttal Brief at 11 (citing *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017) (*Supercalendered Paper from Canada*), and accompanying IDM at 49).
[95] *Id.* at 10-11.
[96] *Id.* (citing Petitioners 'Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India – New Subsidy Allegations," dated July 2, 2020 at Exhibit 4).
[97] *Id.* at 12-14.
[98] *Id.* at 10 (citing GOI June 25, 2020 IQR at Exhibit 6).
[99] *Id.*

petitioners did not provide sufficient evidence to show the *mining rights* (rather than the output mined good) were provided at LTAR.[100] Therefore, Commerce declined to initiate investigations into the mining rights subsidy allegations.

In the NSA Memorandum, in response to the petitioners' revised allegation which was premised on the same price comparison, we again found that this insufficient evidence to show that the mining rights were provided for LTAR, *i.e.*, that the program provided a benefit.[101] We explained that the petitioners did not provide: (1) a price comparison relating to the adequacy of remuneration for the mining rights; (2) a reasonably-available public source indicating that the mining rights were provided at LTAR; or (3) a detailed explanation of the steps that the petitioners took to attempt to obtain such information.[102] Therefore, we continued to find that the petitioners had not established the existence of a benefit from the alleged programs and did not justify their inability to do so by providing a detailed explanation of the steps taken.

The petitioners' reliance on Commerce's treatment of the mining right for LTAR program in *CRS from Russia* is misplaced. In our initiation of an investigation into the "Provision of Mining Rights for LTAR" in *CRS from Russia*, we stated that "{w}ith regard to benefit, the team recommends relying on the information which indicates that NLMK ***purchased a license for 420 million rubles*** to obtain a license based on a plot containing 73 million metric tons of hard coking coal at the Zhemovsky Coal Deposit, but the deposit actually contains approximately 163 million metric tons of commercial reserves of coking coals."[103] Therefore, in *CRS from Russia*, Commerce, in fact, relied on a price comparison relating to the adequacy of remuneration for the mining rights themselves for initiation purposes.

Therefore, for the same reasons noted in our NSA Memorandum, for the final determination, we continue to find that it is not appropriate to initiate an investigation of these allegations.

Comment 3: Whether Commerce Appropriately Initiated the Investigation After the GOI Withdrew from Consultations

The GOI's Comments

- Commerce erred by not conducting pre-initiation consultations in this investigation. The lack of consultations is a violation of U.S. obligations under the Agreement on Subsidies and Countervailing Measures (ASCM) and deprived the GOI of its right to 'clarify the situation' whereby the GOI could have been able to question the foundational basis for an investigation.[104]

Commerce Position: As an initial matter, Commerce arranged for pre-initiation consultations with the GOI on March 23, 2020.[105] However, on the day that consultations were scheduled to

[100] *See* CVD Checklist at 35-37.
[101] *See* NSA Memorandum at 3-4.
[102] *Id*.
[103] *See* Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: Placing Documents on the Record," dated September 16, 2020 at Attachment 2 at 15.
[104] *See* GOI Case Brief at 12.
[105] *See* GOI's Letter, "Scheduling of Pre-Initiation Consultation for Countervailing Duty Petition on Common Alloy Aluminum Sheet from India," dated March 16, 2020.

be held (*i.e.*, March 23, 2020), the GOI requested that the consultations be postponed.[106] The GOI acknowledges that the scheduled consultations were postponed at its own request. Therefore, the GOI's assertion that it was deprived of pre-initiation consultations is entirely without merit. Commerce was ready, willing, and able to meet with the GOI on March 23, 2020, the scheduled date for the consultations, and Commerce was likewise available for consultations at a later date after the GOI informed Commerce one day before the consultations that it was unable to participate.

Although we issued a memorandum stating that consultations would be postponed at the GOI's request, following the initiation of this investigation, and through Commerce's issuance of the *Preliminary Determination*, the GOI never renewed its request for consultations or proposed a date to Commerce for such consultations. It was not until December 29, 2020 – one day before case briefs were due – that the GOI again requested consultations.[107] On December 30, 2020, *i.e.*, the very next day, the GOI asserted in its case brief that Commerce erred by not holding consultations in this matter, even though the GOI itself requested that Commerce postpone the consultations and did not request to reschedule the consultations until one day before it filed its case brief.[108]

With respect to the GOI's broader claims about our adherence to the procedural requires of the ASCM, Commerce is conducting this investigation pursuant to U.S. CVD law, specifically the Act and Commerce's regulations, which are consistent with our international obligations. To the extent that the GOI is raising arguments concerning certain provisions of the ASCM in this proceeding, the U.S. CVD law is consistent with the United States' obligations under the ASCM. As we explained in *Steel Flanges from India*:

> {O}ur CVD laws are consistent with our {World Trade Organization (WTO)} obligations. Moreover, it is the Act and {Commerce's} regulations that have direct legal effect under U.S. law, and not the WTO Agreements or WTO reports. In this regard, WTO reports "do not have any power to change U.S. law or to order such a change.[109]

Therefore, because our decisions and procedures applied in this investigation are consistent with the Act and our regulations, they are also consistent with our obligations under the ASCM.

Further, in response to the GOI's December 29, 2020, request for consultations, Commerce held a meeting with the GOI on February 2, 2021, to discuss this investigation.[110] Indeed, in every instance that the GOI asked that Commerce arrange a meeting with the GOI on this investigation,

[106] *See* Memorandum, "Countervailing Duty Petition on Common Alloy Aluminum Sheet from India: Government Consultations," dated March 23, 2020.
[107] *See* GOI's Letter, Common Alloy Aluminum Sheet from India Request for Consultations," dated December 24, 2020.
[108] *See* GOI Case Brief at 12-13.
[109] *See Steel Flanges from India* IDM at Comment 1.
[110] *See* GOI Meeting Memorandum.

Commerce arranged such a meeting, consistent with our obligations.[111] The only instance in which such a meeting was not held was when the meeting was cancelled by the GOI itself. Thus, we disagree that our initiation of this case was improper on procedural grounds.

Finally, our initiations are governed by the Act and it does not give Commerce the discretion to delay initiation, or decline to initiate, because a foreign government is not available for consultations within our 20-day initiation window.[112] Therefore, the GOI cannot control whether we initiate an investigation by not participating in previously-scheduled consultations. Acceptance of this premise could allow foreign governments to postpone consultations in order to derail these proceedings.

Comment 4: Whether Commerce Conducted a Selective/Incomplete Investigation

The GOI's Comments

- It is incumbent upon Commerce to undertake a considered analysis of each of the elements of an alleged subsidy, namely financial contribution, benefit and specificity, for each of the schemes/programs investigated. However, Commerce has undertaken a selective and incomplete analysis of the above factors in various schemes.[113] Commerce has, in this preliminary determination, placed excessive weight on its prior determinations without providing necessitated justifications for their application to the present investigation.[114]

The Petitioners' Rebuttal

- The GOI relies heavily on the ASCM and WTO Panel and/or Appellate Body reports. However, Commerce properly applied U.S. law which is consistent with the ASCM, and the CAFC has affirmed that Commerce is not bound by, nor are the reasonableness of the agency's decisions undermined by, WTO Panel and/or Appellate Body reports.[115]
- For instance, in *Polyester Textured Yarn from India*, Commerce similarly confirmed that, because its "decisions here are consistent with the Act and {Commerce's} regulations, they are also consistent with {Commerce's} obligations under" the ASCM.[116]
- Commerce fully analyzed all three elements of each program determined to be used, referencing specific evidence on the record or generally-applicable information (*i.e.*, information related to program operation) provided by the GOI in other CVD investigations involving India.[117]

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[111] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65350 (November 25, 1998) (*CVD Preamble*) (stating that Commerce will "invite the government of any exporting country named in a CVD petition to hold consultations with respect to the petition. Further, consistent with Article 13.2 of the SCM Agreement, {Commerce} affords foreign governments reasonable opportunities to consult throughout the period of investigation").
[112] *See* section 702(c)(1)(A) of the Act.
[113] *See* GOI Case Brief at 14-15.
[114] *Id.* at 16.
[115] *See* Petitioners Rebuttal Brief at 5-6 (citing *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 n.2 (Fed. Cir. 2012)).
[116] *Id.* at 7 (citing *Polyester Textured Yarn from India: Final Affirmative Countervailing Duty Determination*, 84 FR 63848 (November 19, 2019) (*Polyester Textured Yarn from India*), and accompanying IDM at 12).
[117] *Id.*

- The lack of specificity in the GOI's challenge to Commerce's analysis of every element of every program "deprives {Commerce} of an opportunity to consider the matter, make its ruling, and state the reasons for its actions."[118] Thus, the GOI's arguments should be rejected. The GOI points to no specific citation that it asserts was in error, and it ignores that Commerce consistently referenced and relied on program-specific evidence placed on the record in this investigation when available.[119]

Commerce Position: As explained in Comment 3, Commerce has conducted this investigation in accordance with the Act and Commerce's regulations, which are consistent with our WTO obligations. Thus, the GOI's WTO-related arguments have no merit.

We disagree with the GOI's assertion that we conducted a selective and incomplete analysis by relying on prior determinations. For each program, we identified the source documentation for our determinations of financial contribution, benefit, and specificity from information on the record of this proceeding, or, where appropriate, through the application of facts available and/or AFA, as applicable.[120] The GOI has not identified a single instance where Commerce relied solely on a prior determination to make its finding.[121]

In addition, the GOI misconstrues Commerce's citation to prior cases. Our references to prior determinations in the *Preliminary Determination* were to demonstrate that: (1) we have previously investigated a particular program and found it countervailable; (2) nothing provided by the GOI, in the instant investigation, indicates a change to the program which would allow Commerce to come to a different conclusion with regards to the program's countervailability; and (3) Commerce has been consistent in its treatment of these programs. This is relevant information, which we considered in addition to other information on the record of this investigation. Therefore, we disagree that Commerce's investigation has been incomplete.

[118] *Id.* at 10 (citing *Ad Hoc Shrimp Trade Action Committee v. United States*, 675 F. Supp. 2d 1287, 1300-01 (CIT 2009)).
[119] *Id.*
[120] *See Preliminary Determination* PDM.
[121] *See* GOI Case Brief at 10.

Comment 5: Whether the GOI has an Effective System in Place to Confirm Input Consumption

The GOI's Comments

- Commerce's *Preliminary Determination* regarding schemes related to the remission and drawback of indirect taxes is erroneous because the GOI has an effective system in place to confirm which inputs, in what amounts, are consumed in the production of the ultimate exported product. Under Annex II of the ASCM, an investigating authority is required to examine whether the system/procedure is "reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export."[122] Therefore, unless Commerce follows the guidelines laid out in Annex II, no conclusive finding with respect to schemes/programs related to exemption, remission, and drawback of indirect taxes can be made, *i.e.*, the AAP and DDB programs.[123]
- In the present case, the exemption, remission or drawback is extended only to inputs consumed during the process of production of the exported product, with normal allowances for waste. Therefore, the GOI has a reasonable and effective system to confirm which inputs are consumed in the production of the exported products and in what amounts.[124]
- For instance, the AAP, administered by the GOI, is a duty exemption scheme fully compatible with the ASCM. The GOI has an effective control mechanism at every stage of the process.[125] The GOI tracks usage (*i.e.*, the amount of imported material used in the production of the exported product) through application of standard input-output norms (SIONs), which are "based on actual wastages … verified and certified" by the GOI.[126] Additionally, program participants must keep records and report usage/consumption, and the GOI Customs Authority maintains records on program participation.[127]
- The AAP is not countervailable as Footnote 1 of the ASCM provides that the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.[128]

The Petitioners' Rebuttal

- There is no disagreement that import duty exemptions are not countervailable, so long as the exemptions extend only to inputs consumed in the production of the exported product, making normal allowances for waste. The GOI contends that Commerce improperly countervailed the AAP and DDB programs and attempts to support its argument by describing the "effective control mechanism" that it referenced in its questionnaire responses. Commerce, however, properly determined that the GOI's explanations of such a mechanism were insufficient, and that both programs are countervailable.[129]
- The GOI claims that only excess drawback can be countervailed, pursuant to footnote 1

[122] *Id*. at 16.
[123] *Id.* at 17.
[124] *Id.*
[125] *Id.*
[126] *Id.*at 18.
[127] *Id.*
[128] *Id.*
[129] *See* Petitioners Rebuttal Brief at 12-13.

of the ASCM. The GOI's reliance on this aspect of the ASCM is misplaced as the GOI failed to demonstrate that it had, at a minimum, a system in place to effectively track any input consumption. In fact, no information on the record indicates that the GOI could track excess consumption.[130]

- Consistent with Commerce's regulations and prior practice, Commerce properly countervailed the AAP and DDB programs and should continue to do so in the final determination.[131]

Commerce's Position: The GOI has not identified any record information that would contradict our findings in the *Preliminary Determination*, and previous investigations,[132] with regard to the AAP and DDB programs.[133] Our findings in this regard are made in accordance with the Act and Commerce's regulations, which are consistent with our WTO obligations.

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.[134] 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.[135] This system must be reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export.[136] 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.[137]

Here, the GOI's response lacks the documentation to support a finding that the GOI has a system in place to confirm which inputs are consumed in the production of the exported products, and in what amounts.[138] Most notably, the GOI has not provided information demonstrating that the GOI system to confirm inputs consumed in the production of exported products is adequate.

AAP

As noted in the *Preliminary Determination*, Commerce has continued to find that the GOI does not have an adequate input tracking system in place. In *PET Film India AR 2005*, the GOI indicated that it had revised its Foreign Trade Policy and Handbook of Procedures for the AAP

[130] *Id.* at 17.
[131] *Id.*
[132] *See, , e.g., Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from India: Final Affirmative Determination*, 83 FR 3122 (January 23, 2018) (*Fine Denier from India*), and accompanying IDM at Comment 1; and *Certain Lined Paper Products from India: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 23765 (May 23, 2019), and accompanying IDM at Comment 3.
[133] *See Preliminary Determination* PDM at 20-26.
[134] *See* 19 CFR 351.519(a)(1)(ii).
[135] *See Certain Frozen Warmwater Shrimp from India: Final Affirmative Countervailing Duty Determination*, 78 FR 50385 (August 19, 2013) (*Shrimp from India*), and accompanying IDM at "Duty Drawback."
[136] *Id.*
[137] *See* 19 CFR 351.519(a)(4)(i)-(ii).
[138] *See Preliminary Determination* PDM at 20-26.

during 2005.[139] Commerce acknowledged that certain improvements to the AAP system were made. However, Commerce found that, based on the information submitted by the GOI and examined during previous reviews of that proceeding, and lacking information that the GOI had revised its laws or procedures governing this program since those earlier reviews, systemic issues continued to exist in the AAP system during that period of review.[140]

In this investigation, record evidence shows[141] there has been no change to the AAP program. 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 product, making normal allowance for waste. Moreover, the GOI did not 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.[142]

In a supplemental questionnaire to the GOI, we requested "a detailed description of the steps taken to establish and verify the accuracy of the {applicable standard input-output norm} SION. Please state the frequency of industry-specific audits."[143] In its response, the GOI described the application process, wherein it explained that it collects information from the company as part of the AAP application process. However, the GOI did not provide information demonstrating the accuracy of the SIONs, explaining the derivation of the SIONs, or the extent to which SIONs are subject to review. With respect to audits, the GOI simply stated that audits are authorized by the chairman of the concerned norms committee and that there is no set frequency of industry audits.[144] Therefore, the GOI did not provide evidence demonstrating the presence of an adequate system to track temporary imports via the SION system (pursuant to section 351.519(a)(4)(i)); nor is there record evidence that the GOI carried out "an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts," as completed by 351.519(a)(4)(ii). Under these circumstances, and consistent with extensive Commerce precedent, we continue to find that the information provided did not demonstrate that an adequate program is in place to confirm input consumption.

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[139] *See Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 73 FR 7708 (February 11, 2008) (*PET Film India AR 2005*), and accompanying IDM at Comment 3.

[140] *Id.* (noting that Commerce's decision was 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 {AAP} 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 {AAP} or for claiming excessive credits; and, (3) the availability of {AAP} benefits for a broad category of "deemed" exports").

[141] *See* GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India: Questionnaire" dated June 22, 2020 at 7-20.

[142] *See* GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India: Supplemental Questionnaire," dated July 20, 2020 (GOI July 20, 2020 SQR) at 14-15.

[143] *See* Commerce's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: Supplemental Questionnaire," dated June 29, 2020 (GOI Supp. Questionnaire) at 1.

[144] *See* GOI July 20, 2020 SQR at 15*; see also* GOI June 15, 2020 IQR at Exhibit 12 (identifying a categories of "deemed exports"); and GOI July 20, 2020 SQR at Exhibit A.

DDB

Consistent with numerous previous proceedings, such as *Shrimp from India*,[145] the record of this investigation indicates that the GOI continues to employ universal input consumption rates based on aggregate data collected from various sources, rather than attempting to determine a recipient's actual consumption, production, and waste in granting a drawback amount.[146]

Here, we requested that the GOI "describe, if any, the specific data analysis and verification process that occurred with regard to (a) the mandatory respondents and (b) producers of aluminum sheet products generally," and to report "the number of (a) audits and (b) site visits that took place at the facilities of producers of aluminum sheet during the POI. In your response, detail the data that were gathered from the visits and provide a copy of all documents/reports that were generated based on the visits. If no audits or site visits occurred during the POI, then provide the requested information for the most recent audits and site visits."[147] In response, the GOI only stated that the "All Industry Rate (AIR) is residuary rate therefore data analysis and verification process, site visit and audit are not required during the period of POI."[148] Therefore, we find that – consistent with numerous past proceedings – the GOI's response does not demonstrate that an adequate program is in place to confirm input consumption.

As Commerce has emphasized, to merely state or point to a system is not enough to demonstrate that such a system actually exists in practice; that system must also be implemented and supported with documentation.[149] The GOI did not provide such documentation here. For the reasons stated, we disagree with the GOI's claims that it has a reasonable and effective system in place to track inputs consumed in production for the purposes of the AAP and DDB programs, such that these programs would not be found to provide a countervailable benefit within the meaning of 19 CFR 351.519(a)(4). Accordingly, we continue to find the AAP and DDB programs are countervailable for this final determination.

[145] *See Shrimp from India* IDM at "Duty Drawback."
[146] *See* GOI July 20, 2020 SQR at 17 (The GOI "has been appointing a Drawback Committee to review and recommend AIRs of Duty Drawback on an annual basis. These AIRs are worked out by the Committee based on factors such as average prices of inputs, their import-indigenous ratio, duty rates, average FOB value of export goods, etc. as provided by the Export Promotion Councils (EPCs), Trade and Industry Associations, *etc*. For certain export items, the committee provides a residuary rate which are broad assessment of unrebated incidence (direct and embedded) of the duties. These rates are notified by the Government after the acceptance of recommendations of the committee").
[147] *See* GOI Supp. Questionnaire at 2.
[148] *See* GOI July 20, 2020 SQR at 19.
[149] *See, , e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 10789 (March 22, 2019), and accompanying IDM at Comment 4.

Comment 6: Whether the Provision of Coal for LTAR is Countervailable

A. Financial Contribution

The GOI's Comments

- Commerce has failed to establish that CIL was vested with the power and authority to perform governmental functions and/or that it had the authority to direct private entities.[150]
- Commerce's preliminarily conclusion that CIL is "meaningfully controlled" by the GOI and is a "public body" is improperly based on a few limited factors, such as the fact that the GOI owns shares in CIL and the fact that certain GOI officers hold management positions in CIL.[151]
- It appears that Commerce has "blurred the distinction drawn by the Appellate Body … between the *existence of control* by a government over an entity, on the one hand, and '*meaningful control*, ' on the other hand."[152]

Hindalco's Comments

- Commerce relied on an incomplete analysis of statements and documents provided by the GOI, none of which demonstrates that the GOI exercises "meaningful control" over CIL or that CIL's coal prices are government-directed.[153]
- Commerce relied on the GOI's statement that "CIL is identified as 'a Central Public Sector Enterprise {('CPSE')}… responsible for production and marketing of planned quantity of coal and coal products efficiently and economically."[154] However, CIL's business objective says absolutely nothing about government control.[155]
- Commerce ignored the GOI's explanation that CIL is a CPSE in the form of a Maharatna company, in which the GOI has "delegated the financial and administered powers," such that CIL is "empowered to take {its} commercial decisions as per {its} market strategy."[156]
- Commerce relied on the fact that a Memorandum of Understanding (MOU) exists between the GOI and CIL that "set{s} annual targets for production and profit."[157] However, these performance targets are not evidence that the GOI exercises "meaningful control" over CIL, because there are absolutely no consequences if CIL misses these targets.[158]
- Commerce did not evaluate whether government directors: (1) constitute a majority of the Board of Directors; (2) have any operational powers or responsibilities; or (3) have any other means of directing the company to do the GOI's bidding. During 2018-2019, CIL's board of directors consisted of 14 individuals, only two of which have current

[150] *See* GOI Case Brief at 19-20.
[151] *Id.*
[152] *Id.*
[153] *See* Hindalco Case Brief at 1.
[154] *Id.* at 8.
[155] *Id.*
[156] *Id.* at 8 (citing GOI June 25 IQR at 8 and Exhibit 2).
[157] *Id.* at 9.
[158] *Id.*

affiliation with the GOI. Therefore, because decisions are by majority vote, the two government directors cannot direct any action that the company takes.[159]

- Paragraph 6 of the "Role of Government Directors on the Boards of Central Public Sector Enterprises," makes clear that a board may take a decision contrary to the views of the government director(s), and the only recourse or consequence in that situation is that the dissent of the government director(s) be recorded.[160]
- For these reasons, CIL is not an "authority." Therefore, for its final determination, Commerce should reverse its conclusion in this regard and determine not to countervail the alleged provision of coal for LTAR.[161]

The Petitioners' Rebuttal

- Record evidence shows that: (1) a government director is a director of the company and a representative of the government; (2) all government directors must be present for any major company decision; and (3) the GOI can unilaterally approve and carry out projects of "national interest."[162]
- A government director's role is to: (1) safeguard the interest of the GOI in view of the shareholding/investment held; (2) take formal instructions from the government on critical issues and to voice them in the Board of Director meetings; (3) provide timely feedback on decisions taken by the company to the nominating administrative Ministry/Department organization; and (4) act as a liaison and channel of communications between the government and the CPSE.[163]
- With respect to issues having substantial financial and other consequences, the government director "should escalate such issues to the concerned administrative Ministry … take their advice to formally prepare a view point of the Ministry and present that same in the Board of Directors meeting …{and} also regularly sensitize the Board about the relevant Government Guidelines (including DPF Guidelines) and compliance of the same."[164]
- The GOI's claims that it does not maintain control over CIL, as a Maharatna CPSE, is not supported by the record.[165] In fact, it is evident that the government director serves as a proxy for the GOI and a liaison for implementing the GOI's policies through participation on CIL's board of directors.[166]
- CIL and the Ministry of Coal signed an MOU, which states that "CIL is under administrative control of Ministry of Coal, Govt. of India."[167] Thus, operational decisions, including the establishment of a coal production "target" for the year are controlled by the GOI.[168]
- Hindalco argues that there are no consequences for missing the GOI-determined targets, but there is no record information to support such a claim. However, based on record

[159] *Id.* at 10-11.
[160] *Id*. at 11 (citing GOI June 25 IQR at Exhibit 4).
[161] *Id.* at 13.
[162] *See* Petitioners Rebuttal Brief at 19 (citing GOI June 25 IQR – Exhibit 2 and Exhibit 4).
[163] *Id.* at 19-20 (citing GOI June 25 IQR – Exhibit 4).
[164] *Id.*
[165] *Id.* at 18.
[166] *Id.* at 20.
[167] *Id.* (citing GOI June 25 IQR – Exhibit 5).
[168] *Id.*

evidence, CIL clearly strives to hit the GOI-determined targets for the purpose of complying with the GOI's established coal policy.[169]

- The GOI also controls CIL financially, as the GOI stipulates that for investments by CPSEs that exceed 15 percent of the CPSE's net worth and exceed Rs. 5,000 Cr., the GOI must provide approval.[170]
- Although the GOI and Hindalco argue that Commerce did not fully evaluate CIL's board of directors, Commerce thoroughly analyzed the role of the overall board of directors and noted that, in addition to official government directors on CIL's board, numerous directors were formerly GOI officials.[171]
- While the government directors may not constitute a majority of CIL's Board during the POI, the actual voting power and weight of each director's vote is unknown. Rather, the requirements that government directors be present when all major company operational and financial decisions are made, that Maharatna CPSEs defer all significant financial investment decisions to the GOI, and that the government directors must "safeguard the interest of the Government of India," together demonstrate that government directors continually control and apply pressure to CIL to ensure CIL operates consistently with GOI instructions and policies.[172]
- The GOI and Hindalco claim that government directors exercise their own judgment, and not necessarily that of the GOI. This assertion is without merit, and should be rejected, because the record has clearly established that government directors "{t}ake formal instructions from the Government" and "voice them in the meetings of the Board of the company."[173]
- Commerce should reject the GOI's and Hindalco's claims that the GOI does not exercise meaningful control over CIL and should continue to find that the GOI provides a financial contribution under this program through CIL's classification as an authority.[174]
- Commerce has previously rejected the idea that profitability indicates that an entity is not a public entity.[175]

Commerce's Position: We disagree with the GOI's and Hindalco's assertion that Commerce improperly treated CIL as a government authority. For the reasons explained below, we continue to find that CIL is an "authority" within the meaning of section 771(5)(B) of the Act, and that coal purchases from CIL represent financial contributions within the meaning of section 771(5)(D)(iii) of the Act.

In the *Preliminary Determination*, we explained that:

> We preliminarily find that CIL is a public body. To determine if an entity constitutes a public body, and therefore can provide a financial contribution, Commerce considers whether the government exercises meaningful control over

[169] *Id.* at 21 (citing GOI June 25 IQR – Exhibit 5).
[170] *Id.* (citing GOI June 25 IQR – Exhibit 2).
[171] *Id.* at 21-22.
[172] *Id.* at 22.
[173] *Id.* (citing GOI June 25 IQR – Exhibit 4).
[174] *Id.* at 23.
[175] *Id.* (citing *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 FR 50412 (October 3, 2001)).

> the entity based on the totality of the circumstances. The GOI owns 69.05 percent of CIL, and CIL is identified as 'a Central Public Sector Enterprise … responsible for production and marketing of planned quantity of coal and coal products efficiently and economically.' Through an MOU, the GOI and CIL set annual targets for production and profit. The company has a 'Government Director' on its board who is 'a Director of the company and representative of the Government.' This director must "Safeguard the interest of the Government of India in the company' and '{t}ake formal instructions from the Government on critical issues and … voice them in the meetings of the Board of the company.' Beyond the individual that is explicitly identified as a "Government Director, ' multiple other board members have held, or currently do hold, posts in government ministries. Taken together, the record supports a determination that CIL is a public body. Accordingly, we preliminarily find that CIL is an 'authority' within the meaning of section 771(5)(B) of the Act and that coal purchases from CIL represent financial contributions within the meaning of section 771(5)(D)(iii) of the Act.[176]

The GOI and Hindalco contend that the totality of evidence does not demonstrate that the GOI exercised "meaningful control" over CIL. However, beyond the GOI's majority ownership, the record shows that the government exercises meaningful control over CIL, whereby CIL possesses, exercises, or is vested with governmental authority. In particular, CIL, a state-owned mining company, was "established under the Indian Companies Act, 1956,"[177] and is "under administrative control of the Ministry of Coal, Govt. of India."[178] The record demonstrates that CIL "is a Maharatna company under the Indian legal order," and is "responsible for production and marketing of planned quantity of coal and coal products efficiently and economically."[179] That CIL is under the control of a government ministry, and is tasked with production of a planned quantity of coal, *i.e.*, meeting annual "targets" for production and profit set by the GOI and CIL, supports a finding that CIL is a government authority. These conclusions are further supported by additional evidence of the GOI's pervasive influence in the coal market, such as through the enforcement of production targets,[180] though setting auction quantities,[181] and through maintaining a growth plan consistent with GOI priorities.[182]

In addition, record evidence does not support the GOI's and Hindalco's assertion that the GOI does not have control over CIL's board of directors, or that the directors are independent. Specifically, Hindalco claims that decisions are made by majority vote and, therefore, the two

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[176] *See Preliminary Determination* PDM at 31 (internal citations omitted).
[177] *See* GOI June 25, 2020 IQR at 8.
[178] *Id.* at Exhibit 5 (containing the MOU between the GOI and CIL).
[179] *Id.*
[180] *Id*. at Exhibit 7, page 299 (noting that, when a subsidiary of CIL was unable to meet targeted production by a specified time limit, it received a deduction to its bank guarantee).
[181] *Id*. at page 223 (noting that "{t}he quantity of coal to be offered under E-Auction is reviewed from time to time by the Ministry of Coal").
[182] *Id*. at page 166 ("CIL has envisaged coal supply target of 660 Mt in 2019-20 which is a growth of about 8.5% over the previous year. About 80% of the said production would be consumed by power sector only. CIL's growth plan for the future *is in synergy with the ambitious plan of the Government* for 24 X 7 power supply to all homes in the country for which a roadmap to achieve 1 Bt of coal production by 2024-25 has been finalized.") (emphasis added).

government directors cannot direct any action that the company takes.[183] As an initial matter, although only two directors are official government directors, the GOI nonetheless controls the appointment of all directors on the board. In its response, the GOI provided the "Annual Report & Accounts: 2018-2019" for CIL.[184] In the "Report on Corporate Governance," CIL states that,

> Coal India Ltd is a Government Company within the meaning of Section 2, Sub-Section (45) of Companies Act, 2013 {(2013 Companies Act)}. As per the Articles of Association of the Company, the power to appoint Directors vests with the President of India. The Chairman shall be appointed by the President and the terms and conditions of his appointment shall be determined by the President. In addition to Chairman, the President shall also appoints Managing Director, whole time Functional Directors and other Directors in consultation with the Chairman, {and that} Independent Directors are appointed by the Government of India.[185]

Additionally, "{d}irectors are appointed for a period of five years from the date of assumption of charge or till the date of superannuation of the incumbent o*r till further orders from the Government of India* whichever event occurs earlier."[186] CIL further explains that "CIL being a Central Public Sector Undertaking, *appointment and tenure of Functional Directors are done by Govt. of India*. Their remuneration is also fixed by Govt. of India."[187] These passages demonstrate the direct control of the GOI over the selection of the board as well as control over the directors' ability to continue to serve on the board.

Therefore, CIL's Board of Directors is comprised of the chairman, four functional directors, two non-executive directors (*i.e.*, government directors) and seven independent directors,[188] and, as explained above, the GOI appointed or approved of all fourteen directors. These 14 directors include two that are Ministry of Coal (MOC) officials, and the President of India directly appointed the chairman. While Hindalco's arguments focus on the distinctions between functional directors, government directors, and independent directors, and assert that the government directors do not constitute a majority necessary to dictate company actions, these arguments are unpersuasive, for the reasons stated above. The GOI has meaningful control of CIL because: (1) the GOI appointed all directors, even the independent directors, (2) the GOI sets the salaries for the directors, and (3) the GOI, through executive order, may terminate the directors and appoint new directors at any time.

The GOI further exerts comparable control over CIL's subsidiaries. For instance, the "Management Reply to the Secretarial Audit Report – 2018-19" of Eastern Coalfields Limited (ECL), states "{a}ppointment of Directors in ECL is being done by Ministry of Coal, Govt of India."[189] Similarly, South Eastern Coalfields Limited reported that CIL, "being the holding company has constituted the Remuneration Committee for all its subsidiaries. The remuneration

[183] *Id.* at 10-11.
[184] *Id.* at Exhibit 7.
[185] *Id.* at 144.
[186] *Id.* (emphasis added).
[187] *Id.* at 147 (emphasis added).
[188] *Id.*
[189] *Id.* at 117.

of Directors/Officers however, is decided by Government of India."[190] Mahanadi Coalfields Limited (MCL) reported that the "MCL Board has 04 Independent Directors. 03 of them have been appointed by MOC. Appointment of remaining 01 Independent Director is pending with {MOC}."[191] Central Coalfields Limited (CCL) reported that with "the approval of the President of India, Ministry of Coal, Government of India, {it} has reconstituted the Board of the Company consisting five Functional Directors, two part time Directors representing Government and Five Non-official Directors, thus making the total number of Directors to twelve and two permanent invitees one from Eastern Central Railways and another to be Secretary Mines & Geology, Govt. of Jharkhand."[192] Therefore, the record demonstrates that directors on the boards of CIL and its subsidiaries are not independent. The GOI exerts meaningful control over CIL's subsidiaries because, as with CIL itself, (1) the GOI appoints the board of directors, even the independent directors; (2) the GOI sets the salaries for the directors; and (3) GOI, through executive order, had the power to restructure the board of directors and appoint new directors at any time. Accordingly, the GOI's and Hindalco's argument that CIL is not meaningfully controlled by the GOI remains unpersuasive.

Furthermore, Hindalco argues that Commerce did not account for the GOI's explanation that the GOI has "delegated the financial and administered powers," such that CIL is "empowered to take {its} commercial decisions as per {its} market strategy."[193] However, we are unconvinced that, merely because the GOI has stated that it delegated the "financial and administered powers" to the board of CIL, the GOI does not exercise 'meaningful control' over CIL. As described above, the board (and the boards of CIL's subsidiaries) are selected, retained, and paid, by the GOI. The record shows that the roles of the Government Directors on the board include to "safeguard the interest of the GOI in the company and take formal instructions from the Government on critical issues; and to voice them in the meetings of the Board of the company; {and } to provide timely feedback on decisions taken by the company to their nominating administrative Ministry/Department/Organization."[194] Further, the Government Directors are required to regularly "sensitize the Board about the relevant Government Guidelines and compliance of the same."[195] The GOI also can identify critical policy issues and prepare the issues as guidance for the CPSEs under its administrative control.[196] If the Board decides contrary to the Government policy, the Government Directors are required to raise alerts when things are not happening as expected in the company.[197] In addition, the GOI sets the eligibility criteria to qualify for Maharatna CPSEs status. These criteria include requirements on company turnover, net worth, profit, and global presence. The performance "of Maharatna CPSEs would be reviewed annually by the inter-Ministerial Committee … by the Apex Committee headed by the Cabinet Secretary which will recommend continuation/divestment of Maharatna status."[198] Thus, CIL's Maharatna CPSE status is controlled by the GOI.

[190] *Id.* at 121.
[191] *Id.* at 127.
[192] *Id.* at 131.
[193] *See* Hindalco Case Brief at 8.
[194] *See* GOI June 25, 2020 IQR at Exhibit 4.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at Exhibit 2.

Finally, Hindalco's argument that there are no consequences for missing the GOI-determined production targets is not supported by the record. The only record evidence on this point shows that CIL did, in fact, meet these targets during the time period covered by the MOU.

In this investigation, the record demonstrates that the GOI exerts meaningful control over CIL and its subsidiaries. Accordingly, we continue to find that CIL is an "authority" within the meaning of section 771(5)(B) of the Act and that coal purchases from CIL represent financial contributions within the meaning of section 771(5)(D)(iii) of the Act.

B. Specificity

Hindalco's Comments

- Commerce should not apply AFA to find that the provision of coal for LTAR is specific. Commerce did not comply with its obligation under section 782(d) of the Act to: (1) inform the GOI of deficiencies in its questionnaire response on the issue of industrial coal purchases in India; and (2) provide the GOI an opportunity to remedy those deficiencies.[199] Therefore, Commerce cannot apply facts available or AFA.
- The CIT has explained that section 782(d) of the Act "provides the procedure Commerce must follow when a party files a deficient submission," and that failing to respond is a basis for using facts available once the requirements of section 782(d) and (e) of the Act have been met.[200]
- Because Commerce did not allow the GOI to remedy deficiencies in its specificity reporting for coal, Commerce may not apply facts available (much less AFA) in its final determination. Therefore, Commerce's only recourse is to use the record evidence, or to issue another supplemental questionnaire to the GOI, that provides the GOI an opportunity to remedy any remaining deficiencies.[201]
- The GOI did not withhold information. Instead, due to COVID-19 and associated lockdowns and restrictions, the GOI could not compile the information from several sources geographically located throughout India in time to submit the information with its June 25, 2020, questionnaire response. The GOI explained this when it timely asked for extensions of that deadline prior to the due date.[202] Therefore, Commerce erred in concluding it had a legal basis to apply facts available under section 776(a) of the Act.[203]
- Commerce made no separate and additional finding that either Hindalco or the GOI "failed to cooperate by not acting to the best of its ability to comply with a request for information," as required from section 776(b) of the Act, and cannot make such a finding based on the record of this investigation.[204] Thus, Commerce failed to identify the facts on which it relied when making its AFA determination that the alleged provision of coal is specific.

[199] *See* Hindalco Case Brief at 13.
[200] *Id.* at 17 (citing *Hyundai Heavy Indus. Co., Ltd. v. United States*, 393 F. Supp. 3d 1293, 1303 (CIT 2019)).
[201] *Id.* at 20.
[202] *Id.* at 21.
[203] *Id.* at 23.
[204] *Id.* at 23-24 (citing *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1359 (CIT 2003) (*China Steel Corp*) and *POSCO v. United States*, 337 F. Supp. 3d 1265, 1273 (CIT 2018) (*POSCO*)).

- The CAFC and CIT have made clear that a failure to provide requested information is not in and of itself grounds for applying AFA and making a finding that a party did not act "to the best of its ability."[205]
- The GOI stated that the restrictions associated with the global COVID-19 pandemic "affected the movement of people and adversely impacted the normal functioning of all establishments including that of CIL and its subsidiaries by impeding their access to data and details required for a proper response."[206]
- Under these circumstances, the GOI's "abilities, efforts, and cooperation in responding to Commerce's requests for information" were severely hindered by the pandemic restrictions. Nonetheless, the GOI "put forth its maximum effort" under the circumstances, and it is not "reasonable for Commerce to expect that more forthcoming responses should have been made."[207]
- In prior proceedings, Commerce has not applied AFA based on a respondent's single failure to respond to a request for information.[208]
- Commerce is required to ensure that its application of AFA does not adversely impact a cooperating party (*e.g.*, Hindalco), when relevant information is available on the record. However, Commerce did not do so in this instance.[209]
- There is relevant evidence elsewhere on the record of this investigation that Commerce can use to conduct its specificity analysis for the alleged provision of coal for LTAR. Thus, consistent with the CIT's rulings, in order to base its determination on a complete and accurate record while seeking not to adversely impact a cooperating party (when alternative record evidence exists), Commerce no longer find, as AFA, that the alleged provision of coal to Hindalco is specific.[210]
- Commerce must utilize the available record evidence, even if Commerce does apply facts available, including information supplied by Hindalco and the GOI, in accordance with section 776(a) and 782(e) of the Act.[211]
- The evidence on the record demonstrates that the provision of coal for LTAR is not *de facto* specific under the Act.[212] Because the record contains no factual information to support a finding that the alleged recipients of coal for LTAR are "limited in number" pursuant to section 771(5A)(D)(iii)(I) of the Act, Commerce must move on to the subsequent prongs of the *de facto* specificity analysis.[213]
- First, Annexure 6 of the Annual Report of CIL indicates that CIL dispatches coal to the power, steel, cement, fertilizer, and numerous other industries, and that those "other industries" account for almost 18 percent of total dispatches.[214]

[205] *Id.* at 27.
[206] *Id.* at 28.
[207] *Id.* at 28-29.
[208] *Id.* at 30 (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review and Final Rescission, in Part*, 77 FR 14495 (March 12, 2012) (*OTR Tires from China*), and accompanying IDM at 23).
[209] *Id.*
[210] *Id.* at 30-31.
[211] *Id.* at 34.
[212] *Id.* at 35 (citing section 771(5A)(D)(iii) of the Act).
[213] *Id.*
[214] *Id.* at 39-40.

- Second, Indian Minerals Yearbook: Coal 2018 indicates coal is dispatched to several industrial sectors: electricity, steel, sponge iron, cement, basic metal, fertilizer, paper & pulp, chemical, textile & rayons, bricks, and others.[215]
- Third, CIL does not restrict its coal sales to any particular users; rather, any Indian purchaser may purchase coal from CIL through the applicable auction mechanisms.[216]
- These facts establish that the provision of coal for LTAR is not specific in this case.[217]
- The CIT has sustained Commerce's findings that an alleged subsidy "distributed to a large number of customers, across a wide range of industries" was not *de facto* specific under the first specificity factor.[218] Similarly, here Commerce cannot find the alleged provision of coal for LTAR to be *de facto* specific, pursuant to section 771(5A)(D)(iii)(II) or (III), because the record does not demonstrate that either Hindalco or the aluminum sector in which Hindalco operates is the predominant user of coal, or receives a disproportionately large amount of the alleged subsidy to coal.[219] Finally, Commerce has no basis to conclude that the provision of coal for LTAR is *de facto* specific under section 771(5A)(D)(iii)(IV) of the Act because CIL exercises no discretion in selling coal.[220]

The GOI's Comments

- Commerce failed to comply with its obligation under section 782(d) of the Act to inform the GOI of deficiencies in its questionnaire response on the issue of industrial coal purchases in India and failed to provide the GOI an opportunity to remedy those deficiencies.[221]
- In *OTR Tires from China*, Commerce explained that, "{t}ypically, {Commerce} does not consider AFA suitable unless respondents have been unresponsive to multiple requests from {Commerce} for information in a manner establishing that they have failed to cooperate to the best of their ability."[222] Therefore, Commerce cannot act in a manner contrary to this precedent.
- Commerce should have given due regard to the fact that, in the trying and difficult circumstances associated with COVID-19, including implementation of complete lockdown of India's operations and the difficulties faced in resuming operations, the GOI provided information that it was able to collate to the best of its ability.[223]
- The GOI did not withhold information. Instead, due to COVID-19 and associated lockdowns and restrictions, the GOI was unable to compile certain information from

[215] *Id.* at 40 (citing Petitioners' Letter, "Petition for the Imposition of Antidumping and Countervailing Duties: Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey," dated March 9, 2020 (the Petition) at Exhibit CVD-IND-30).
[216] *Id.*
[217] *Id.* at 38.
[218] *Id.* at 41 (citing *Bethlehem Steel Corp. v. United States*, 25 C.I.T. 307, 321, 140 F. Supp. 2d 1354, 1368 (CIT 2001)).
[219] *Id.* at 41-42 (citing *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014), and accompanying IDM at 31).
[220] *Id.* at 44.
[221] *See* GOI Case Brief at 21.
[222] *Id.* at 22 (citing *OTR Tires from China* IDM at 23).
[223] *Id.* at 23.

several sources geographically located throughout India in the allotted time for submission of its questionnaire response.[224]

- Commerce did not identify a willful decision not to comply, or behavior below the standard for a reasonable respondent, in its analysis of the GOI's conduct. However, Commerce has, without conducting any such analysis, concluded that the inability of GOI to provide information owing to constraints due to the pandemic amounts to a willful decision not to comply with its request and, therefore, levied the allegation of "withholding information" against the GOI.[225]
- Commerce has failed to establish that the GOI did not act to the best of its ability and has not taken into account the timely and constant correspondence by the GOI to demonstrate its inability to obtain the requisite information. Commerce also ignored the GOI's subsequent request to submit the information at a later point in this investigation.[226]
- Commerce has failed to establish that the mandatory respondents are the "predominant users" of coal and has further failed to establish that the aluminum industry in India is the recipient of a "disproportionately large amount" of the alleged benefit from CIL.[227]
- Annexure 6 of CIL's Annual Report contains the sector-wise dispatch of coal and coal products by CIL, which indicates that the usage of coal is diversified across a variety of sectors.[228] Therefore, Commerce improperly concluded that the aluminum industry is a predominant user of the alleged subsidy and/or that aluminum enterprises or the aluminum industry received a disproportionately large amount of the alleged subsidy.[229]
- Commerce illegally circumvented its obligation to make a determination that was supported by a reasonable reading of the record, including consideration of the relevant evidence that "fairly detract(s)" from the reasonableness of its conclusions.[230]
- Although, Commerce has presently invoked its authority to use AFA, it must still make the necessary factual findings to satisfy the requirements for countervailability.[231]

The Petitioners' Rebuttal

- Commerce properly applied AFA to find the provision of coal for LTAR to be specific and, under the facts of this case, was not required to renew its request for the information. In *Ta Chen Stainless Steel Pipe*, the CAFC explained that "Ta Chen knew that 'the nature of the deficiency' was its complete failure to respond. The statute only applies when a 'response to a request' is deemed to not comply. A failure to respond is not the same as a "response" as required by the statute. Therefore, Commerce was under no statutory duty to formally tell Ta Chen that its failure to respond was deficient."[232] Thus, when a respondent refuses to provide the required information, Commerce and the courts do not classify this refusal as a deficiency and, therefore, section 782(d) of the Act is not

[224] *Id.*
[225] *Id.* at 24.
[226] *Id.*
[227] *Id.* at 25.
[228] *Id.*
[229] *Id.*
[230] *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 United States 474, 488 (1951)).
[231] *Id.* at 26 (citing *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018)).
[232] *See* Petitioners Rebuttal Brief at 25 (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1337–38 (Fed. Cir. 2002) (*Ta Chen Stainless Steel Pipe*)).

triggered.[233]

- Commerce has continued to apply AFA, consistent with CAFC and CIT precedent, in situations where the respondent refuses to provide the required information, finding that "when a respondent outright refuses to submit requested information," "further request for that necessary information would be fruitless."[234]
- The GOI deliberately and explicitly refused to submit the required information. Under sections 776(a) and (b) of the Act, if information is missing from the record due to a respondent's failure to act to the best of its ability, Commerce may apply an adverse inference.[235]
- The GOI did not state that it was unable to access the information because of the pandemic, but rather refused to put in the effort to report the required data to Commerce. Thus, as a legal matter, Commerce's *Preliminary Determination* regarding specificity is in accordance with law, and Commerce should reach the same result for the final determination.[236]
- Commerce granted the GOI a more-than-generous period of 64 days to compile and report the information. In doing so, Commerce accounted for the conditions affecting the GOI's ability to gather the information.[237]
- Hindalco's argument that the application of AFA is improper because it adversely impacts a cooperating party is without merit, and the courts have repeatedly addressed and dismissed it.[238] A government's failure to cooperate can lead decision on countervailability that may impact a respondent. The GOI's failure to cooperate to the best of its ability in this investigation, therefore, has permissible "collateral consequences" for Hindalco.[239]
- Commerce should decline to rely on the other information on the record in place of the *de facto* specificity data that it requested from the GOI. If Commerce were to evaluate other information on the record despite the GOI's refusal to provide the required data, and find that no specificity exists, the result would be more favorable to the GOI than if it had participated, and would fail to encourage future cooperation – thereby defeating the statutory purposes of the AFA provision.[240]
- The CIT has held that, "if {Commerce} were forced to use the partial information submitted by respondents, interested parties would be able to manipulate the process by submitting only beneficial information. Respondents, not {Commerce}, would have the ultimate control to determine what information would be used for the margin calculation. This is in direct contradiction to the policy behind the use of facts available."[241] Thus,

[233] *Id.* at 25-26.
[234] *Id.* at 26 (citing *Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 53473 (November 16, 2017)).
[235] *Id.* at 27.
[236] *Id.* at 27-28.
[237] *Id.* at 28.
[238] *Id.* at 28-29 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369-70, 1372 (Fed. Cir. 2014) (finding that a "collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper," citing *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010))).
[239] *Id.* at 28-30 (citing *Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014); and *RZBC*, 222 F. Supp. 3d at 1208-09).
[240] *Id.* at 31.
[241] *Id.* (citing *Rhone Poulenc, Inc. v. United States*, 710 F. Supp. 341, 347 (1989)).

the CIT has affirmed Commerce's practice in finding that a respondent's failure to provide the required information, in the format stipulated, cannot be remedied by information elsewhere on the record.[242]

- The GOI and Hindalco claim that Commerce should review CIL's annual report and/or the Indian Minerals Yearbook to determine that the aluminum industry is not a predominant or disproportionate user of coal in India. These documents,[243] however, cannot substitute for a complete response to Commerce's specificity questions.
- Commerce requires "a list of the industries in India that purchase coal directly," the volume *and value* of coal "purchased by the industry in which the mandatory respondent companies operate, as well as the totals purchased by every other industry, and the relevant industry classification guidelines."[244] However, neither document fully meets these requirements.
- In addition, neither CIL's annual report nor the Indian Minerals Yearbook report coal data contemporaneous with the POI. The POI is calendar year 2019, while CIL's annual report provides data from April 2018 to March 2019, and the Indian Minerals Yearbook includes earlier data that does not overlap with the POI at all, *i.e.*, it covers April 2017 to March 2018.[245]
- While Hindalco asserts that the provision of coal is not specific because it is not limited to a small number of industries, Hindalco's reliance on the GOI's vague statement that the number of industries that use coal in India is "many" is misplaced. To be clear, "many" is neither a number nor an adequate response to Commerce's clear instructions for data necessary to its *de facto* specificity analysis.[246] Additionally, Commerce has found the provision of widely-used products, such as coal, to be specific in other contexts.[247]

Commerce's Position: We continue to find that partial application of AFA with respect to coal for LTAR is appropriate, because necessary information is not available on the record, the GOI withheld information that was requested of it, and the GOI has significantly impeded this investigation, under sections 776(a)(1) and 776(a)(2)(A) and (C) of the Act. Additionally, we continue to find that the GOI did not cooperate to the best of its ability to comply with Commerce's requests for information on the provision of coal for LTAR. Thus, in accordance with sections 776(a) and 776(b) of the Act, we continue to find that the application of AFA is warranted, and that this program is specific.

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[242] *Id.* at 32 (citing *Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 928 (CIT 2001); and *Papierfabrik August Koehler SE v. United States*, 7 F. Supp. 3d 1304, 1314 (CIT 2014), affirmed by, 843 F.3d 1373 (Fed. Cir. 2016)).
[243] *Id.*
[244] *Id.* at 34.
[245] *Id.* at 33-34.
[246] *Id.* at 34.
[247] *Id.* (citing *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 81 FR 46643 (July 18, 2016), and accompanying PDM at 43 unchanged in *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017)).

As we described in the *Preliminary Determination*, Commerce asked the GOI to provide a list of industries in India that purchase coal directly, and to provide the amounts (volume and value) purchased by each of the industries.[248] Commerce requests such information for purposes of its *de facto* specificity analysis. Specifically, our questionnaire asked the GOI to:

> Provide a list of the industries in India that purchase coal directly, using a consistent level of industrial classification. Provide the amounts (volume and value) purchased by the industry in which the mandatory respondent companies operate, as well as the totals purchased by every other industry. In identifying the industries, please use whatever resource or classification scheme the government normally relies upon to define industries and to classify companies within an industry. Please provide the relevant classification guidelines, and please ensure the list provided reflects consistent levels of industrial classification. Please clearly identify the industry in which the companies under investigation are classified.[249]

The GOI responded that "{t}he number of industries are many, and the data if required to be provided would be extremely voluminous, therefore, if USDOC wants the data with respect to specific industries, the same may be and sought {sic} from GOI and the GOI would provide the same."[250] In our *Preliminary Determination*, we highlighted the importance of such information, explaining that "{t}he GOI failed to provide necessary information related to the industries that purchase coal, or trade publications specifying the price of coal" and emphasizing that "{w}e requested data on coal consumption, by industry, to allow us to assess whether the program is *de facto* specific, *e.g.*, whether the industry to which the respondents belong is a predominant user of coal."[251]

We continue to find this response to be insufficient because it does not provide information about any of the Indian industries that purchased coal during the POI, as we requested in the questionnaire. Therefore, given that the GOI failed to provide requested necessary information, there is a gap in the record regarding the industries that use coal and, thus, we find the application of facts available appropriate in determining whether the coal for LTAR program is specific.

Hindalco cites *China Steel Corp* and *POSCO* to argue that Commerce cannot use the same rationale for section 776(a) and (b) of the Act to find that AFA is warranted, and, as a result, that Commerce must provide a separate and additional explanation on how the GOI failed to act to the best of its ability in not providing the requested data. We agree. In *China Steel Corp*, the CIT held that Commerce must explain and/or analyze whether the respondent "willfully decided not to cooperate or behaved below the standard of a reasonable respondent" before Commerce can determine that AFA is warranted.[252] Similarly, here, we have explained why information is missing on the record, in accordance with section 776(a) of the Act, and why the GOI had the

[248] *See Preliminary Determination* PDM at 15-16.
[249] *See* Commerce's Letter, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India: Countervailing Duty Questionnaire," dated April 22, 2020 (Initial CVD Questionnaire) at 13.
[250] *See* GOI June 25, 2020 IQR at 16-17.
[251] *See Preliminary Determination* PDM at 15.
[252] *See China Steel Corp*, 264 F. Supp. 2d at 1360 (citing *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366, 1379).

ability to provide that information in a timely manner but failed to do so, triggering an adverse inference under section 776(b) of the Act.

In *POSCO*, the CIT explained that "{section 776}(b) {of the Act} applies only when {Commerce} makes a separate determination that the respondent failed to cooperate 'by not acting to the best of its ability.'"[253] The court further explained, citing *Nippon Steel*, "{w}hen determining whether a respondent has complied to the 'best of its ability, ' Commerce 'assess{es} whether {a} respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.'"[254] The CIT found that Commerce's determination that the respondent failed to provide information and our explanation of how this failure demonstrated that the respondent did not act to the best of its ability despite responding to multiple questionnaire responses was reasonable.[255]

As we explained above, and in the *Preliminary Determination*, the GOI failed to provide the requested information that is necessary for us to determine whether the program is *de facto* specific. Thus, we find that facts available, sections 776(a)(1) and 776(a)(2)(A) and (C) of the Act, is warranted. Further, the requested information was within the GOI's possession, and it had the ability to provide it to Commerce. Therefore, pursuant to section 776(b), Commerce has determined that AFA is appropriate. Accordingly, because the GOI did not cooperate to the best of its ability when it failed to provide us with requested information regarding the industries that purchase coal, an adverse inference in selecting from among the facts otherwise available is warranted.[256]

We disagree with the GOI's and Hindalco's contention that the application of AFA is inappropriate in this investigation because the GOI failed to provide the requested coal for LTAR information. The GOI provided no information in response to Commerce's coal-related questions, and, instead, merely stated that the requested data were "voluminous."[257] While the GOI offered to provide a narrow portion of the data at a later date, if Commerce were to make a repeated request,[258] we do not consider this offer to be responsive to our question. By stating that, if Commerce "wants the data with respect to specific industries, the same may be sought from GOI," the GOI refused to provide the requested information and essentially granted itself an extension to submit a portion of the requested information, while refusing to provide the full information that Commerce requested. This is distinct from a situation in which a respondent provides a response with information but the response contains a deficiency in the information provided; here, the GOI simply declined to provide the information (and offered to provide an incomplete and partial answer if Commerce asked a different question). Additionally, the GOI provided this response, which did not contain any of the information requested, despite

[253] *See POSCO*, 337 F. Supp. 3d at 1273.
[254] *Id*.
[255] *Id*. at 1275-76.
[256] *See, e.g., RZBC Grp. Shareholding Co. Ltd. v. United States*, 100 F. Supp. 3d 1288, 1296-97 (CIT 2015) (upholding Commerce's finding that the GOC was "unresponsive" to specificity-related questions in the context of an input for LTAR program, and that "the GOC had not worked to the best of its ability to provide data," thus warranting application of AFA).
[257] *See* GOI June 25, 2020 IQR at 16-17.
[258] *Id*.

Commerce granting several extension requests,[259] that provided the GOI a total of 64 days to submit its coal for LTAR questionnaire response, well-beyond the original 37-day deadline.

Importantly, the GOI did not notify Commerce of any specific difficulties in providing that information within 14 days of receipt of the questionnaire, as required by section 782(c)(1) of the Act. Instead, after receiving multiple extensions of the deadline to provide the necessary information, the GOI merely made a statement, in its questionnaire response, that the information was "voluminous" and offered to provide a narrow portion of it.

The GOI and Hindalco now argue that Commerce has acted unreasonably in failing to account for the impact of the COVID-19 pandemic and associated lockdowns. On the contrary, as noted above, we granted the GOI numerous extensions of the deadline to provide the data at issue, based on the reasons provided in the GOI's multiple requests for additional time. In light of these requests, and in view of the ongoing pandemic, we afforded the GOI an unusually extended period of time for responding to a questionnaire.[260] Commerce must balance a respondent's request for additional time with our strict requirement to meet statutory deadlines. Thus, Commerce must build in sufficient time for analyzing the responses, issuing supplemental questionnaires, and preparing the preliminary determination, and we must also provide interested parties sufficient time to participate meaningfully in an investigation via their own analysis of any responses received in the course of the proceeding. Therefore, we disagree that our actions were unreasonable; we afforded the GOI the maximum amount of time available to reply, while also taking these other important factors into consideration.

In addition, the record indicates that, despite the pandemic, the GOI (and CIL) were able to compile certain information from several sources geographically located throughout India. According to the GOI's response, CIL and the MOC have an extensive technology infrastructure in place, which includes reporting and information distribution through mobile apps, online portals, digitization of documents and "paperless offices."[261] CIL further explains that it holds multiple daily in-house video conferencing sessions involving all its subsidiaries, the MOC, and other government organizations, and it has available video conference rooms at all subsidiaries for simultaneous video conference sessions with CIL's headquarters, its subsidiaries, and other locations across the globe.[262] Therefore, record evidence demonstrates that the MOC and CIL's modern technological infrastructure should have allowed it to compile the requested information and that, in fact, the GOI and CIL were able to compile and provide information for other programs in this proceeding despite the pandemic.

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[259] *See* GOI's Letters, "Common Alloy Aluminum sheet from India: Request for an Extension of Time to Submit Questionnaire Response," dated May 24, 2020; "Common Alloy Aluminum Sheet from India: Request for an Extension of Time to Submit Partial Questionnaire Response," dated June 12, 2020; and GOI's Letter, "Countervailing Duty Investigation on Common Alloy Aluminium Sheet from India: Countervailing Duty Questionnaire: Request for Extension of Time to File Response," dated June 20, 2020.
[260] *See* Memorandum, "Countervailing Duty Investigation on Common Alloy Aluminum Sheet from India: Government of India Extension of Time for Questionnaire Response," dated June 12, 2020.
[261] *See* GOI June 25, 2020 IQR – Exhibit 7 at 36*; see also* Exhibit 7 at 40 for a list of CIL and its subsidiaries' key information technology initiatives.
[262] *Id.* at 340.

The GOI asserts that Commerce "ignored" its efforts to put data on the record later in the proceeding. This is incorrect. Rather, when the GOI made an untimely attempt to supplement the record later in the proceeding (*i.e.*, well after the *Preliminary Determination* had been issued, in which we applied AFA for this program), we rejected the GOI's submission and issued several letters explaining our reasoning on the issue.[263] Nonetheless, the GOI's attempts to respond to the initial questionnaire in its untimely and unsolicited submission demonstrate that it did, in fact, have the ability to acquire the data.

Moreover, we disagree with the GOI and Hindalco that other information on the record demonstrates that the coal for LTAR program is not specific. As an initial matter, it is for Commerce, not the GOI or Hindalco, to determine whether the information provided is sufficient for Commerce to make its determinations with regard to specificity.[264] Additionally, the information that the GOI and Hindalco identify as an adequate substitute do not, in fact, replace the data Commerce requested because of the limitations of that data identified below. We continue to find the coal for LTAR program to be specific based on an application of AFA, because the GOI failed to cooperate to the best of its ability.

The GOI and Hindalco argue that CIL's "Annual Report & Accounts: 2018-2019" contains information which Commerce can use for its specificity analysis, *i.e.*, a discussion indicating that CIL dispatches coal to the power, steel, cement, and fertilizer industries, as well as to numerous other industries. First, CIL's coal dispatch report only covers three months of the POI, rendering the data incomplete. Second CIL's "Annual Report & Accounts: 2018-2019" provides no descriptions of industry classifications; without knowing the industry classifications applicable to the mandatory respondents, we are unable to ascertain how these data apply to them. We note that the GOI failed to respond to our specific request for this essential information: "{p}lease clearly identify the industry in which the companies under investigation are classified." This question is particularly critical here because, for instance, Hindalco and its affiliates operate several power plants[265] and, therefore, could belong to multiple industries, including the "power" industry. Therefore, we cannot simply rely on CIL's "Annual Report & Accounts: 2018-2019" as a basis for making a specificity determination.

We also disagree with the GOI and Hindalco that CIL's "Annual Report & Accounts: 2018-2019" supports a finding that coal for LTAR program is not specific. On the contrary, this evidence can be viewed as further support for our use of an inference adverse to the interests of the GOI. Specifically, CIL's "Annual Report &Accounts: 2018-2019" contains information showing that the power sector is the predominate user of coal,[266] and, as noted above, Hindalco

[263] *See* Commerce's Letter His Excellency Anup Wadhawan, Commerce Secretary of the Government of India dated October 15, 2020; and Commerce's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India: Rejection of New Factual Information," dated January 6, 2021.
[264] *See ABB Inc. v. United States*, 355 F. Supp. 3d 1206, 1222 (CIT 2018) (*ABB*) ("Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record").
[265] *See* Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Hindalco Industries Limited's Response to Remainder of Section III Questionnaire," dated June 15, 2020 (Hindalco June 15, 2020 IQR) at Exhibit GEN-2 at 11 (showing that Hindalco operates four power plants).
[266] *See* GOI June 25, 2020 IQR – Exhibit 7 at 77 and 300.

and its affiliates operate several power plants. Thus, we continue to find as AFA, this program is *de facto* specific.

Similarly, Hindalco argues that the "Indian Minerals Yearbook: Coal 2018" report indicates that coal is dispatched to several industrial sectors: electricity, steel, sponge iron, cement, basic metal, fertilizer, paper & pulp, chemical, textile & rayons, bricks, and others. However, this report also cannot serve as a substitute for the requested specificity data. Similar to the above, the GOI failed to provide industry classifications for the mandatory respondents, resulting in the same limitation identified above in applying the information in this source to those companies. Therefore, we also disagree with the GOI and Hindalco that the "Indian Minerals Yearbook: Coal 2018" supports a finding that coal for LTAR program is not specific. On the contrary, this evidence can be viewed as further support our use of an inference adverse to the interests of the GOI. Specifically, the "Indian Minerals Yearbook: Coal 2018" report contains information showing the power sector is the predominate user of coal,[267] (and as explained above, Hindalco and its affiliates operate several power plants). Thus, we continue to find, as AFA, this program is *de facto* specific.[268]

Finally, Hindalco argues that the provision of coal is not specific because CIL does not restrict its coal sales to any particular user or group of users. First, this is inaccurate, as the "Terms and Conditions of Spot e-Auction Scheme 2007" states that "{t}he coal procured under e-Auction is for use within the country and Not for Export."[269] Similarly, the "Terms & Conditions of Exclusive e-auction Scheme, 2015 for Non-Power Consumers (including CPPs)" states that "{t}he coal procured under e-Auction is for the own use of the registered consumer / successful bidder within the country and not for Sale, Transfer or export."[270] Therefore, the evidence indicates that CIL does restrict coal sales based on usage and/or sector, at least for particular sale types. In any case, regardless of such considerations (which would be relevant for a *de jure* specificity analysis), the information missing from the record relates to our *de facto* specificity analysis.

For the reasons stated above, we determine that necessary information relating to the specificity of the provision of coal for LTAR program is not available on the record and that the GOI withheld information that was requested of it. Further, we determine that the GOI's lack of a response to Commerce's questions regarding the provision of coal for LTAR significantly impeded this investigation. Thus, Commerce must rely on facts available in making its final determination, in accordance with sections 776(a)(1) and, 776(a)(2)(A) and (C) of the Act. We further determine that the GOI failed to cooperate by not acting to the best of its ability to

[267] *See* Volume XXII of the Petition at Exhibit-IND-30 at 7-2.
[268] In our questionnaire, we specifically requested that the GOI "provide the relevant classification guidelines, and … ensure the list provided reflects *consistent levels of industrial classification*." (emphasis added). *See* Initial CVD Questionnaire at 13. This information is critical for a proper analysis under sections 771(5A)(D)(iii)(II) or (III) of the Act. Although Hindalco states in its brief that it "does not operate in the power sector, but rather in the aluminum sector," it remains unclear whether the company operates in multiple sectors, or how those sectors are defined. In addition to aluminum production and the operation of mines and captive power plants, Hindalco has also stated that it has substantial copper operations. As a result, Hindalco may be classified in a "metals" sector rather than "aluminum" and/or "copper" sector specifically; it may also be classified in the "power" sector and the "metals" sector. This information is not on the record due to the GOI's failure to provide the requested information.
[269] *See* Hindalco June 15, 2020 IQR at Exhibit COAL-1.
[270] *Id.* at Exhibit COAL-3.

comply with Commerce's request for information by not providing the information requested of it, which was in the GOI's possession, despite multiple extensions of time, and by only offering to provide a subset of the data on an untimely basis. Consequently, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. Therefore, we continue to find that this program is specific within the meaning of section 771(5A)(D)(iii) of the Act.

C. Distortion

The GOI's Comments

- Because Commerce has failed to establish that CIL is a public body, its conclusion that the market for coal in India is distorted holds no basis in fact or law.[271] Also, Commerce has used an arbitrary and incorrect benchmarking tier.[272]
- Article 14(d) of ASCM requires an investigating authority to do its best to identify a benchmark that approximates the market conditions that would prevail in the absence of the distortion. However, Commerce has improperly used an out-of-country benchmark that has not been adjusted to reflect in-country prevailing market conditions.[273]

Hindalco's Comments

- If a benchmark is required, it must be either a tier one benchmark, because the Indian coal market is not distorted, or an accurate tier two benchmark that is appropriately reflective of world coal export prices and the grades of steam coal purchased by Hindalco.[274]
- The prices that Hindalco paid through these public e-auctions are market-based, are not controlled by the GOI, and are established by supply and demand conditions in India. Thus, these prices are market-determined prices, not government prices. As a result, there is no provision of coal for LTAR.[275] Commerce has used the coal prices of CIL as surrogate values in AD investigations involving respondents from China (*i.e.*, a non-market economy).[276] In these cases, Commerce has rejected arguments that CIL's data are "aberrational" and "unreliable" due to government control of the coal industry and that CIL's prices are "subsidized" and "monopolized."[277]

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[271] *See* GOI Case Brief at 21-24.
[272] *Id.*
[273] *Id.*
[274] *See* Hindalco Case Brief at 45.
[275] *Id.* at 47.
[276] *Id.* at 47-48 (citing *First Administrative Review of Certain Polyester Staple Fiber from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 1336 (January 11, 2010) (*PSF from China*), and accompanying IDM at 4-5; *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 66087 (December 14, 2009) (*Isos from China*), and accompanying IDM at 9-10; *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) (*Activated Carbon from China*), and accompanying IDM at 21; *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 41121 (August 14, 2009) (*Glycine from China*), and accompanying IDM at 16; and *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 73 FR 58113 (October 6, 2008) (*Tissue Paper from China*), and accompanying IDM at 8).
[277] *Id.*

- Commerce presented no evidence that CIL's coal prices are government-directed. However, Commerce selected a tier one coal benchmark in a prior CVD administrative review involving India, noting no evidence that coal prices in the Indian market "have been distorted by GOI involvement in the market."[278]
- Commerce has previously found CIL's coal prices to be market-determined, deregulated prices in several AD proceedings for the purpose of defining surrogate values.[279]
- Recently, in the context of rejecting a "particular market situation" (PMS) allegation in an AD investigation, Commerce did not conclude that the GOI's influence in the coal market is distortive, and in doing so made note of a World Bank study that explains "there is no direct subsidies to coal and CIL is a profit-making entity."[280]
- Commerce's findings of distortion focused on the "government's involvement in the market," but did not make the requisite causal connection between that alleged involvement and significantly-distorted actual transaction prices.[281]
- Commerce's reasoning as to why the domestic coal market is distorted is virtually the same as its reasoning for why CIL is a government "authority," yet these are distinct inquiries that require distinct analyses.[282]
- In stating that "the GOI controls certain aspects of CIL's auction process," Commerce generally referenced – without citing any specific evidence – five attachments of factual information that the petitioners submitted in rebuttal to Hindalco's benchmark information.[283]
    - Two of the attachments, which reference a "reserve price," do not support the conclusion that the GOI interferes in the market. First, while a reserve price is established in any auction, the actual bid prices are often much higher than the reserve price.[284] Second, one of the attachments relates to a period prior to the POI.
    - The other three attachments that Commerce cited do not establish any governmental control over pricing.[285]
- Two other articles, provided as rebuttal factual information, show that "the GOI reportedly has capped certain 'reserve prices' for the power sector as a result of a preferential pricing strategy regarding energy providers."[286] However, Hindalco does not operate in the power sector, but rather in the aluminum sector, so these articles are inapposite with regard to prices of the type of coal at issue in this investigation.[287]

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[278] *Id.* at 12 (citing *Certain Hot-Rolled from India Preliminary Results*, 73 FR at 1592, unchanged in *Hot-Rolled from India Final* IDM at 72).
[279] *Id.* (citing *PSF from China* IDM at 4-5; *Isos from China* IDM at 9-10; *Activated Carbon from China* IDM at 21; *Glycine from China* IDM at 16; and *Tissue Paper from China* IDM at 8).
[280] *Id.* at 12 (citing *Forged Steel Fittings from India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 32007 (May 28, 2020) (*Forged Steel Fittings from India*), and accompanying PDM at 26).
[281] *Id.* at 50-51.
[282] *Id.* at 51.
[283] *Id.*
[284] *Id.* at 52.
[285] *Id.* at 53.
[286] *Id.* at 52 (citing Petitioners' Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India − Petitioners' Pre-Preliminary Comments," dated July 27, 2020 at 34).
[287] *Id.*

- Commerce pointed to the fact that CIL is responsible for producing and marketing coal products "efficiently and economically," and that "the GOI and CIL set annual targets for production and profit" through an MOU. These statements, however, actually demonstrate that CIL acts as a rational market participant that seeks to produce coal efficiently and economically in order to maximize profits.[288]
- CIL's representation of "over 80 percent of domestic production" and supply of "nearly two-thirds of the coal consumed in India" is not enough for Commerce to presume that actual transaction prices are distorted.[289] Additionally, the GOI stated that there were no export tariffs or licensing requirements in place during the POI, further supporting a finding of no distortion to the Indian coal market.
- Evidence from the competitive auctions that Hindalco has placed on the record demonstrate that the prices for coal are determined by the market and not the government.[290]
- If the government had been controlling these prices, instead of the market determining these prices through competitive auctions, there would not have been such a large fluctuation in prices.[291]

The Petitioners' Rebuttal

- Hindalco is incorrect that CIL's coal prices are not government prices, as extensive record evidence supports Commerce's preliminary determination that CIL is an authority within the meaning of the Act, and that the GOI's presence in the market distorts Indian coal prices. Therefore, Commerce should reach the same conclusion in its final determination.[292]
- If the CIL auction prices are truly market prices as Hindalco asserts, comparison to a market benchmark should show no benefit. Hindalco merely asserts that no benefit exists without Commerce conducting a benefit analysis.[293]
- Evidence on the record demonstrates that CIL auctions do not represent market prices because they do not meet Commerce's specified criteria for government-run auctions.[294]
    - In its terms and conditions for the 2007 and 2015 Spot e-auctions, the GOI specified that only Indian buyers are able to bid, that the coal must be purchased for use in-country and cannot be exported, and that trading companies cannot purchase the coal.[295]
    - The GOI carries out "exclusive auctions" for "non-power" sectors.[296]
    - CIL's auction prices appear to be capped by the GOI.[297]
- The CAFC has upheld Commerce's refusal to utilize auction prices for benchmark purposes when the auctions do not meet Commerce's requirements. Commerce has

[288] *Id.* at 54.
[289] *Id.*
[290] *Id.* at 55 (citing Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Hindalco Industries Limited's Submission of Coal Benchmark Information," dated July 13, 2020 (Hindalco Benchmark Submission) at Exhibit 1).
[291] *Id.* at 58.
[292] *See* Petitioners Rebuttal Brief at 36.
[293] *Id.* (citing 19 CFR 351.511(a)(1)).
[294] *Id.* at 37.
[295] *Id.*
[296] *Id.*
[297] *Id.*

stated that a "competitively run government auction must be open to everyone, protect confidentiality, and be based solely on price."[298]

- The *CVD Preamble* contemplates that a government's significant involvement in a market can result in prices in the distorted market being unusable as a tier one benchmark, as they do not reflect the commercial realities of a market absent government involvement.[299]
- Commerce analyzed numerous factors in concluding that the GOI distorted the India coal market, including: (1) majority ownership of CIL; (2) overarching control of CIL memorialized through comprehensive official documentation; (3) significant presence on CIL's Board of Directors; (4) control over CIL's coal auction process; and (5) CIL's representation of over 80 percent of the domestic coal production (and supply of nearly two-thirds of the coal consumed in India), collectively establishes that the Indian domestic coal market is distorted.[300]
- Although Commerce does not apply a *per se* rule that a majority government presence in a market renders the market distorted, when a government maintains a predominant role in the market, Commerce will use out-of-country benchmarks based on the government's distortive presence.[301]
- Commerce cannot evaluate coal transaction prices in India due to the GOI's predominant involvement in the market. In fact, the GOI's predominant role in the domestic Indian coal market is so extensive that an analysis of domestic coal prices is moot. The GOI sets the coal prices and other entities must adjust to the GOI-established price.
- Commerce should similarly reject claims that the GOI's control over CIL and the coal market in India does not extend to CIL's coal auctions, as record evidence clearly establishes that the GOI does not operate a competitively run auction process consistent with 19 CFR 351.511(a)(2)(i), but, rather, limits who is able to participate in what type of auction and caps the prices of coal.[302]
- While Hindalco focuses its analysis on the coal auction prices, Hindalco ignores that the GOI controls central aspects of the auction process such that GOI-run auctions are not competitively run.[303]
- For instance, the GOI operates "exclusive auctions" for non-power sectors. While Hindalco claims that this "exclusive auction" represents auctions outside of the POI, the article submitted by the petitioners refers to "exclusive auctions" that occurred in April 2019, which is during the POI.[304]
- Commerce has declined to use government-run auction prices from auctions operated in a similar manner as they failed to me*et al*l three criteria constituting a competitively-run

[298] *Id.* at 37-38 (citing *Essar Steel*, 678 F.3d at 1273-74).
[299] *Id.* at 39 (citing *CVD Preamble*, 63 FR at 65403 ("Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative hierarchy")).
[300] *Id.*
[301] *Id.* at 41 (citing *Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 83 FR 32075 (July 11, 2018)).
[302] *Id.* (citing 19 CFR 351.511(a)(2)(i), and noting that the government must sell "a significant portion of the goods or services through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price").
[303] *Id.* at 42.
[304] *Id.* at 43.

auction, as stipulated in the *CVD Preamble, i.e.*, open to everyone, confidential, based solely on price.[305]

- The record does not support Hindalco's contention that the GOI's target-setting maximizes profits or allows CIL to sell coal at the highest possible prices. In fact, the record does not include any information that demonstrates the GOI considered any commercial realities in establishing profit and production targets.[306]
- In response to Commerce's instruction to explain "what laws or policies govern the pricing of coal," the GOI responded that CIL's Board of Directors establishes coal prices.[307] Thus, according to the GOI, CIL, *i.e.*, a government-controlled entity, establishes the coal prices in India.
- Hindalco's reliance on *Hot-Rolled Steel from India* is misplaced as that proceeding involved an analysis of the Indian coal market thirteen years prior to the POI.[308] Unlike in *Hot-Rolled Steel from India*, the record here strongly demonstrates that the GOI's involvement in the market distorts domestic Indian coal prices.[309]
- Hindalco also cites certain AD cases and argues that Commerce's position that CIL's prices are usable as surrogate values there demonstrates that the prices offered by CIL are market-determined prices here. However, the standard for selection of a surrogate value is very different from that of selection of benchmarks for analyzing LTAR programs.[310]
- Hindalco also mischaracterizes Commerce's PMS decision regarding domestic Indian coal prices. In *Forged Steel Fittings from India*, Commerce did not state that no distortion was present in the domestic Indian coal market. Rather, Commerce found that the petitioners did not demonstrate how such distortion influenced the price of the input in question, *i.e.*, steel bar prices, based on a different record.[311]
- Hindalco's reference to a World Bank study as support for the proposition that CIL is not an authority is without merit. The World Bank's identification of CIL as a "profit-making entity" does not equate to CIL's prices being market-driven or free of government control. A business can be profitable and still sell commodities below market value; that business must only sell above cost.[312]

Commerce's Position: As explained in Comment 3, Commerce has conducted this investigation in accordance with the Act and Commerce's regulations, which are consistent with our WTO obligations. Thus, the GOI's WTO-related arguments have no merit.

To start our analysis, it is important to review the regulatory language with respect to 19 CFR

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[305] *Id.* (citing *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002); and *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Intent To Rescind Review, in Part; 2017*, 85 FR 6908 (February 6, 2020)).
[306] *Id.* at 44.
[307] *Id.* at 45 (citing GOI June 25 IQR at 15).
[308] *Id.* at 45.
[309] *Id.* at 46.
[310] *Id.* at 46-47.
[311] *Id.* at 48-49 (citing *Forged Steel Fittings from India* PDM unchanged in *Forged Steel Fittings from India: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 FR 66306 (October 19, 2020) (*Forged Steel Fittings from India Final*)).
[312] *Id.* at 49.

351.511 – the provision of a good or service for LTAR. Under the regulation, we prefer to measure the adequacy of remuneration using in-country prices as a benchmark, referred to a tier-one benchmark. This tier-one benchmark could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively-run government auctions. However, where it is reasonable to conclude that prices in that market are significantly distorted as a result of the government's involvement in that market, Commerce will not use the prices within that market.[313] Therefore, when information on the record indicates that the government is involved in the market, before determining whether it is appropriate to use prices from within that market, Commerce must determine whether that market is distorted due to the presence of the government.[314] Once it is determined that the market is distorted by the presence of the government, prices between private parties, import prices, or government auction prices are no longer viable benchmark prices.

Hindalco offered the following as "tier one" (in-country) benchmarks: government-run auction prices and import prices from India Coal Market Watch (ICMW).[315] For the reasons explained below, we find that the market is distorted by the presence of the government. Therefore, we disagree with the GOI's and Hindalco's assertion that these benchmarks can be used as "tier one" benchmarks. As a result, we continue to rely on "tier two" (world market) prices for calculating the benchmark for the provision of coal, in accordance with 19 CFR 351.511(a)(2)(ii).

In the *Preliminary Determination*, Commerce found the domestic market for coal in India to be distorted. We explained that:

> The GOI owns 69.05 percent of CIL, and CIL is identified as 'a Central Public Sector Enterprise … responsible for production and marketing of planned quantity of coal and coal products efficiently and economically.' Through a memorandum of understanding (MOU), the GOI and CIL set annual targets for production and profit. The company has a designated representative responsible for representing the GOI, and multiple other board members have held, or currently do hold, posts in government ministries. Additionally, the GOI controls certain aspects of CIL's auction process. Given that CIL represents over 80 percent of domestic production and supplies nearly two-thirds of the coal consumed in India, we preliminarily find that the Indian Coal market is distorted. Accordingly, we determine that there are no undistorted 'tier one' prices on the record that are suitable for use as a tier one benchmark, including the auction prices and import prices submitted by Hindalco. Consequently, we are relying on 'tier two' (world market) prices for calculating the benchmark for the provision of coal, in accordance with 19 CFR 351.511(a)(2)(ii).[316]

[313] *See, e.g., CVD Preamble*, 63 FR at 65377.
[314] *Id.*, 63 FR at 65377 (referring to situations where the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market).
[315] *See* Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Hindalco Industries Limited's Submission of Coal Benchmark Information," dated July 13, 2020.
[316] *See Preliminary Determination* PDM at 12. (internal citations omitted)

The *CVD Preamble* states that government involvement in the market "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market."[317] However, Commerce does not apply a *per se* rule that a government's majority market share equates to government distortion.[318] Rather, Commerce will consider all relevant evidence that may distort a market.

As an initial matter, in our examination of the record, we considered the information provided by the GOI on production, consumption, and importation of coal in India.[319] The GOI only identified CIL as a government participant in the coal market; however, record evidence demonstrates that Singareni Collieries Company Limited (SCCL) is a joint venture between the GOI and the State Government of Telangana.[320] Therefore, the GOI's majority control of the coal market may actually be underrepresented by only considering CIL.

As noted above, in the *Preliminary Determination* Commerce analyzed relevant evidence in concluding that the GOI distorted the India coal market, including: (1) majority ownership of CIL; (2) overarching control of CIL memorialized through comprehensive official documentation; (3) significant presence on CIL's Board of Directors; and (4) CIL's representation of over 80 percent of the domestic coal production (and supply of nearly two-thirds of the coal consumed in India). Beyond these facts, we also examined additional evidence of government influence which distorts the coal market, specifically, the operation of CIL's auction process and the GOI's control over certain aspects of that process. As a result of our analysis, we continue to find that the record as a whole establishes that the Indian domestic coal market is distorted and that the auction prices cannot be used as "tier one" price.

CIL accounts for the sale of approximately two-thirds of the coal consumed in India, and it sells much of this coal through an e-auction process. Although the GOI provided limited documentation surrounding CIL's auction process,[321] Hindalco described the process, and indicated that it purchased 96 percent of its coal via the CIL e-auction. The e-auctions conducted by CIL may be classified into the following four types: (a) Spot e-auction; (b) Special Spot e-auction; (c) Exclusive e-auction for non-power sector; or (d) Special forward e-auction for the

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[317] *See CVD Preamble*, 63 FR at 65377.

[318] *See, , e.g., CRS from Russia* IDM at 52-56; and *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 FR 75917 (December, 20, 2004) (Softwood Lumber IV AR 1), and accompanying IDM at 94-96; *see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1331 (CIT 2015) (remanding for further explanation a finding of government distortion where Commerce relied on the government's market share without explaining why a substantial share of the market was necessarily substantively distortive).

[319] *See* GOI June 25, 2020 IQR at 13-15.

[320] *See* Volume XXII of the Petition at Exhibit IND-30 at 7-18.

[321] *See, , e.g.*, GOI June 25, 2020 IQR at Exhibit 7. Although the record indicates that consumers can purchase coal through Fuel Supply Agreements or via e-auction with CIL, the GOI's response regarding coal contains no information on the agreements and limited information on the auction process. We asked that the GOI provide "A discussion of what laws or policies govern the pricing of coal, the levels of production of coal, or the development of coal capacity." *Id.* The GOI responded: "Governing the pricing of coal is a sheer business decision taken by the enterprise, keeping in view the profitability. It is a purely market driven commercial decision which is taken by CIL with the approval of its Board of Director. There is no role of GOI in its commercial decisions." *Id.* Despite the GOI's cursory response in this regard, we have examined the record information regarding the auction process, and note that it covers the vast majority of Hindalco's coal purchases during the POI.

power sector.[322] In addition to the above, CIL also provides e-auctions coal linkages to non-regulated sectors, such as the aluminum sector, with the objective of creating a long-term demand for the coal companies.[323] The evidence on the record demonstrates the extent of the GOI's exercise of control over CIL's coal auction process.

For example, in Petitioners Rebuttal Benchmark Submission at Attachment 1, the petitioners provided an article from 2016 titled "Coal India To Start Spot E-Auction On Thursday."[324] This document states that CIL "announced a one-time offer of 20 MT of coal under a special spot e-auction," that the "reserve price will be limited to the upper cap of 20 per cent add-on over the notified price of coal for the non-power sector," and that MOC has said "power producers being supplied coal through the MOU route by CIL will have to take it via special e-auction being conducted for the power sector."[325] This document demonstrates that the GOI, through the MOC and CIL, is controlling prices and participation in the auctions in question. Attachment 2 of the same submission contains an article from 2016 titled "Coal India to Hold E-Auction for Power Plants," which states that CIL announced that the "reserve price for power sector consumers will remain at 10 per cent over the notified price of coal for the power sector and for {captive power plants} it will remain at 10 per cent over the notified price for non-power sector."[326] This document, similarly, demonstrates that the GOI is controlling prices and participation in the auctions in question.

Hindalco provided a similar document, the "Terms and Conditions of Spot e-Auction Scheme 2007," as Attachment 3 of this submission, which contains the "Terms and Conditions of Spot e-Auction Scheme 2007," which states that "{t}he coal procured under e-Auction is for use within the country and Not for Export."[327] Attachment 4 contains SCCL's "Revised Terms & Conditions of Sport e-Auction Scheme 2015-2016," which also states that "{t}he coal procured under e-Auction is for use within the country and Not for Export," and that if "any individual/trader, resale / unload / transship coal procured through e-auction within 60 kms of Coal Belt Area, SCCL reserves the right to suspend/stop supply of coal to such individual / trader / owner of the industry and they will be subject to penalty of a value equivalent to 3 times the quantity of coal sold / unloaded / transshipped within 60kms of the Coal Belt Area at basic e-sales value of such coal."[328] These documents demonstrate that, throughout the last several years, the GOI has placed limitations on purchased coal and is, in practice, limiting participation in the auctions by functionally preventing particular classes of purchasers from participation, *e.g.*, traders who would purchase and transport/resell the coal. Accordingly, although the GOI states that it places no export tariffs or export restrictions on coal,[329] there is evidence that the GOI has placed limitations on the trade (internationally and domestic) of coal obtained through government auctions.

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[322] *See* Hindalco June 15, 2020 IQR at 48.
[323] *Id*.
[324] *See* Petitioners' Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from India − Petitioners' Submission of Factual Information to Rebut Hindalco's Benchmark Submission," dated July 23, 2020 (Petitioners Rebuttal Benchmark Submission) at Attachment 1.
[325] *Id*.
[326] *Id.* at Attachment 2.
[327] *Id.* at Attachment 3; and Hindalco June 15, 2020 IQR at Exhibit COAL-1.
[328] Petitioners Rebuttal Benchmark Submission at Attachment 4.
[329] *See* GOI June 25, 2020 IQR at 16.

Therefore, we find that the GOI directly, or indirectly, (1) controls the reserve price of coal through e-Auction, (2) controls the quantity that will be offered through e-Auction, and (3) restricts exports and sales of coal within 60 kms of the Coal Belt Area. Moreover, we agree with petitioners that record evidence clearly establishes that the GOI does not operate a competitively-run auction process consistent with 19 CFR 351.511(a)(2)(i), but, rather, limits who is able to participate in what type of auction and caps the prices of coal.[330] As a result, we find that these government auctions are not suitable for use as a tier one benchmark. In addition, we recognize that approximately one-fourth of coal sales in India are sourced internationally; however, given the GOI's involvement in the domestic coal market, as explained above, we continue to find that in-country benchmarks are not appropriate.

We disagree with Hindalco that, if the GOI controlled coal prices, there would not have been such a large fluctuation in prices. The GOI/CIL can impact the price of coal through other mechanisms beyond simple price-setting. For example, the government could impact the price through manipulating the available supply of coal – and, in fact, CIL and the GOI have entered into an MOU on production targets, and, as noted above, the GOI has placed limitations on the trade (internationally and domestic) of coal. We also disagree with Hindalco that Commerce must discount the GOI's/CIL's annual targets for production and profit in our analysis. The fact that CIL may seek a profit, or may in fact realize a profit, does not translate into a finding that CIL is operating as a "rational market participant." On the contrary, the fact that CIL has an MOU with a government ministry relating to annual production targets suggest the opposite is true. This is further supported by additional pieces of evidence, including documents indicating that "{t}he quantity of coal to be offered under E-Auction is reviewed from time to time by the Ministry of Coal."[331]

In its brief, Hindalco's cites a prior CVD determination in which Commerce found no evidence that coal prices were distorted by the GOI's involvement in the market (*i.e.*, *Hot-Rolled from India*), as well as several non-market economy AD duty proceedings in which Commerce relied on CIL's coal prices as surrogate values (*e.g.*, *PSF from China*). However, reliance on these cases is misplaced. With respect to *Hot-Rolled from India*, the cited determination in that proceeding was 13 years ago and relied on a different record; here, the record contains extensive evidence regarding the GOI's involvement in the market.[332] Further, the cited AD determinations are similarly dated and based on different records; significantly, in those cases Commerce was evaluating whether Indian coal prices could constitute the best available information for use as a surrogate value. Whether such prices met this criterion is a function of

[330] *See* 19 CFR 351.511(a)(2)(i); *see also CVD Preamble*, 63 FR at 65377 (explaining that the circumstances where prices from government-run competitive bidding could be appropriate as a tier one benchmark are where the government sells "a significant portion of the goods or services through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price").
[331] *See* GOI June 25, 2020 IQR at Exhibit 7 page 223; *see also id.* at 166, 299 (showing evidence of the GOI's pervasive influence in the coal market, such as through the enforcement of production targets, though setting auction quantities, and through maintaining a growth plan consistent with GOI priorities).
[332] *See* Petitioners Rebuttal Benchmark Submission at Attachment 1 through 4.

what information was on the record in that particular proceeding,[333] and other factors that are critical to surrogate value selection (*e.g.*, the specificity of the data compared to the respondent's factors of production). Because those findings were made for a different purpose using different facts under a different analytical framework, we find that they have no relevance here.

Finally, we disagree with Hindalco that our PMS analysis in *Forged Steel Fittings from India* is relevant. There, Commerce found that, while "the GOI's influence in the coal market through CIL could be considered distortive, the petitioners fail to demonstrate or quantify how such influence impacts steel bar prices."[334] Thus, our decision in *Forged Steel Fittings from India* specifically noted potential GOI-related distortion in the coal market. However, our (negative) PMS determination was based on the record of that case and the fact that the petitioners failed to demonstrate GOI's influence could impact steel bar prices. We find no inconsistency with our analysis here, which is based on a different record.[335]

Accordingly, in the absence of useable tier one benchmarks on the record, Commerce will continue to rely on tier two benchmarks for its calculations.

D. Whether to Adjust the Tier Two Benchmark

Hindalco's Comments

- If Commerce continues to apply a tier two benchmark in its final determination, it must use an accurate tier two benchmark.[336]
- The UN COMTRADE benchmark data submitted by petitioners are flawed for three reasons. First, they do not represent a complete set of world coal export price data for 2019; most notably, data are missing for Indonesia, which is one of the world's largest coal exporters.[337]
- Second, the data reflect prices for a broad basket category of coal products and do not accurately reflect the pricing for the particular grades of steam coal purchased by Hindalco.[338] Notably, this basket category includes higher-priced coking coal not at issue in this investigation, which creates demonstrable distortions.[339]

[333] In *PSF from China*, for instance, Commerce noted that there was no direct evidence of GOI control of the market or distortion. In contrast, here, there is such evidence, as the role of CIL has been central to our analysis of the coal for LTAR program. *See PSF from China* at Comment 1A.
[334] *See Forged Steel Fittings from India* PDM at 26, unchanged in *Forged Steel Fittings from India Final.*
[335] Additionally, Hindalco references a World Bank report that was on the record of *Forged Steel Fittings from India* which discusses CIL as a profit-making enterprise and states that the GOI provides no direct subsidies to coal. This report also indicates that CIL "supplies coal at discounted prices." *See Forged Steel Fittings from India* PDM at 26, unchanged in *Forged Steel Fittings from India Final*. However, because this report is not on the record, Commerce cannot evaluate here what criteria the World Bank used to make its assessment. Additionally, the fact that CIL is a profit-making enterprise is not determinative in our distortion analysis. Therefore, Hindalco's reliance on this report is unavailing.
[336] *See* Hindalco Case Brief at 63-64.
[337] *Id.*
[338] *Id.*
[339] *Id.* at 66.

- Third, the record evidence does not establish the terms of sale for the UN COMTRADE data. This makes it impossible to ascertain whether the addition of the ocean freight data is appropriate.[340]
- Hindalco's benchmark data, in contrast, allow Commerce to derive monthly tier two benchmarks based on world export prices for the world's major coal exporters, account for coal grades, and have clearly-established terms of sale.[341]
- Commerce has previously revised its benchmark between preliminary and final determinations to account for more specific benchmark data for coal. Commerce should do so again in this investigation,[342] by adopting the modified benchmark and benefit calculations prepared by Hindalco for the final determination.[343]
- Commerce's regulations state that, "{w}here there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability."[344] Therefore, at a minimum, Commerce should average commercially-available tier two benchmark datasets for the final determination.[345]

The Petitioners' Rebuttal

- Commerce should continue to use the petitioners' tier two benchmark and decline to use Hindalco's proposed benchmark.[346]
- Hindalco contends that the UN Comtrade data are unusable as they do not include certain export data from Indonesia. However, Commerce's regulations do not stipulate which countries must be included in a tier two benchmark.[347]
- Commerce uses world market prices that would be available to the purchasers in question. Every price submitted by the petitioners is available to the Indian market. Thus, there is no threshold established by Commerce for a country to be included or excluded from the benchmark.[348]
- Because Commerce's decision to use tier two benchmarks is based on its finding that the domestic Indian market for coal is distorted, Commerce cannot rely on Indian coal prices, including those of imported coal referenced by Hindalco.[349] The coal import prices, based on imports from Indonesia, constitute domestic Indian prices that may not be used when constructing a tier two benchmark.[350]
- The absence of Indonesia from the petitioners' tier two benchmark does not undermine its accuracy or appropriateness, as Commerce has repeatedly affirmed the use of UN

[340] *Id.*
[341] *Id.* at 67.
[342] *Id.* at 72 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014), and accompanying IDM at 16).
[343] *Id.* at 73.
[344] *Id.* (citing 19 CFR 351.511(a)(2)(ii)).
[345] *Id.*
[346] *See* Petitioners Rebuttal Brief at 50.
[347] *Id.* at 50-51 (citing section 351.511(a)(2)(ii) of Commerce's regulations).
[348] *Id.*
[349] *Id.* at 51.
[350] *Id.*

Comtrade data to calculate the benefit received in LTAR analyses.[351]

- In *Kegs from China*, Commerce affirmed the use of UN Comtrade export data, even though the dataset in that case excluded only seven exporting countries, because it was the "best available information on the record" of the two competing benchmark options. Here, the petitioners submitted data that included coal prices from 57 countries (excluding India), while Hindalco admits that its data cover only three countries.[352]
- Hindalco's alternative benchmark is so riddled with deficiencies and inaccuracies that it is unusable, and, as a result, Commerce should continue to rely on the petitioners' benchmark as it is the most reliable benchmark on the record.[353] Significantly Hindalco fails to point to any evidence that the referenced prices from India Coal Market Watch (ICMW) are actually world export prices pursuant to Commerce's regulations, or any evidence that identifies how such prices were compiled or determined.[354]
- Even if ICMW data are export prices, Hindalco significantly adjusted, filled in gaps, and otherwise changed Hindalco's previously-reported coal purchases and the ICMW data to the point that the ICMW are not true grade-specific costs. Therefore, the benchmarks calculated by Hindalco are artificially constructed and did not use actual grade-specific transaction prices or even actual grade-specific prices.[355]

Commerce's Position: As explained in Comment 6C and in the *Preliminary Determination*, we determine that there are no undistorted tier one benchmark prices on the record that are suitable for use as a benchmark, including the auction prices and import prices submitted by Hindalco.[356] Therefore, we are relying on tier two benchmark prices for calculating the benchmark for the provision of coal, in accordance with 19 CFR 351.511(a)(2)(ii).

As an initial matter, Commerce regularly relies on Comtrade data for construction of tier two benchmarks.[357] Further, Commerce may use a world market price that does not contain exports from all countries, if that is the best information available on the record.[358]

Hindalco asserts that the UN Comtrade data are overly broad and not representative of the type of coal it purchased. However, the only tier two data on the record are the UN Comtrade data submitted by the petitioners, given that no party submitted alternate tier two data - – such as world export data covering a different set of countries or data at a more specific tariff classification.[359] Accordingly, we continue to find that the UN Comtrade data constitute the best available information for use in this final determination.

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[351] *Id.* at 51-52.
[352] *Id.* at 52 (citing *Refillable Stainless Steel Kegs from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 57005 (October 24, 2019) (*Kegs from China*), and accompanying IDM at Comment 4).
[353] *Id.*
[354] *Id.* at 53.
[355] *Id.* at 54-55 (citing section 351.511(a)(2)(ii) of Commerce's regulations).
[356] *See Preliminary Determination* PDM at 31.
[357] *See, , e.g., Kegs from China* IDM at Comment 4.
[358] *Id.*
[359] While we recognize that different types and grades of coal are covered under the four-digit tariff classification comprising the petitioners' data, we do not have alternative tier two data on the record, and the four-digit data, therefore, constitute the best available information.

We disagree with Hindalco that it is appropriate to rely on Hindalco's ICMW data. Hindalco stated that "the ICMW reports contain the monthly free on board (FOB) price of exported steam coal of various GCVs from South Africa, Australia, and Indonesia during the POI… these price data are not specific for exports to India, but rather reflect exports to the entire world, so they are no different from the COMTRADE data in that regard."[360] However, this characterization is inaccurate. In its benchmark submission, Hindalco states that ICMW reports prices based on "imports of coal of various grades imported into India," and "imports into India."[361] As described above, we find the market in India to be distorted. To the extent that Hindalco asserts that a subset of the data in the publication is presented on a different basis – *i.e.*, are world export prices rather than import prices – this statement is not supported by evidence on the current record. There is nothing in the ICMW reports which indicates these are export prices or identifies how such prices were compiled or determined.[362] Because there are no underlying data, we are unable to determine how ICMW derived these prices or whether the methodology for preparing the prices is reasonable. Therefore, we are unable to rely on the ICMW data, as a tier two benchmark (world price).

Finally, because we cannot rely on the ICMW data as a tier two world market price, we disagree that an average of the Comtrade and ICMW sources is appropriate for this final determination. Accordingly, we have made no adjustments to the tier two benchmark, except as described in Comment 12.

Hindalco Issues

Comment 7: Whether Water for LTAR and Land for LTAR in the State of Gujarat are Countervailable

Hindalco's Comments

- Commerce erroneously countervailed the provision of water for LTAR and the provision of land for LTAR by the SGOG, because these programs are tied to non-subject merchandise.[363]
- Hindalco's Dahej Plant is located in Gujarat; therefore, this is the only possible location that could use the provision of water for LTAR and the provision of land for LTAR programs. Because the Dahej Plant is part of Hindalco's copper unit, record evidence unambiguously demonstrates that the Dahej Plant does not manufacture subject merchandise or inputs that were used, or could have been used, to produce subject merchandise.[364] Therefore, any benefit under the SGOG's provision of water and land for LTAR programs cannot be attributed to subject merchandise.[365]

The Petitioners' Rebuttal

[360] *See* Hindalco Case Brief at 67.
[361] *See* Hindalco Benchmark Submission at 2.
[362] *Id.* at Exhibit 3. In each monthly report, Hindalco replies on a one to two sentence statement comparing the current month's free on board (FOB) price to the last month's FOB price, for each of the three countries, with no details regarding what the data represent, *i.e.*, import/export data, spot prices, etc.
[363] *See* Hindalco Case Brief at 74.
[364] *Id.* at 75.
[365] *Id.* at 76.

- Hindalco has not demonstrated that the relevant authority in the SGOG intended, at the time of bestowal, to confer a benefit on a particular product for either of the two SGOG LTAR programs. Therefore, its argument that the subsidies are tied to non-subject merchandise is unsupported.[366]
- In accordance with the *CVD Preamble*, Commerce determines whether a subsidy is tied to specific merchandise by examining "the purpose of the subsidy based on information available at the time of bestowal" – not based on how a firm actually uses the subsidy.[367]
- In *Fine Denier from India*, Commerce explained that it is respondent's burden to produce evidence that benefits are tied to a particular product or market.[368]
- Here, Hindalco claims that the SGOG authority provided water and land acknowledging that the Dahej facility at issue produced non-subject merchandise, based on the application for the water connection and the allotment of land agreement. However, these documents do not demonstrate that the water and land subsidies were bestowed due to the production of specific merchandise at the Dahej facility.[369]
- Commerce's practice is to attribute subsidies received under state and regional programs to total sales, inclusive of subject and non-subject merchandise.[370]
- Commerce has rejected similar arguments and should continue to determine that Hindalco's SGOG subsidies are countervailable and attributable to the company's total sales under 19 CFR 351.525(b)(3).[371]

Commerce's Position: We disagree with Hindalco that these SGOG programs are not countervailable because the facility that receives these benefits does not produce subject merchandise. Accordingly, we have continued to attribute these subsidies to Hindalco for purposes of this final determination.

Commerce normally attributes domestic subsidies to all products sold by a firm. However, 19 CFR 351.525(b)(5) provides that, if a subsidy is tied to a certain product, we will attribute that subsidy to only that product. In making this determination, we analyze the purpose of the subsidy based on information available at the time of bestowal.[372] A subsidy is tied only when the intended use is known to the subsidy provider, and when this use is acknowledged prior to, or concurrent with, the bestowal of the subsidy.[373] For example, in determining whether a loan is tied to a particular product, Commerce examines the loan approval documents, *e.g.*, for an indication that the loan is exclusively for the purpose of a particular product. Whether a subsidy is tied to a particular product is an inquiry depends on the facts of a particular case.

Consistent with the *CVD Preamble*, we have generally stated that we will not trace how subsides are used by companies but, rather, will analyze the purpose of the subsidy based on the

[366] *See* Petitioners Rebuttal Brief at 56.
[367] *Id.* at 57 (citing *CVD Preamble*, 63 FR at 65403).
[368] *Id.* at 58 (citing *Fine Denier from India* IDM at 56).
[369] *Id.* at 58.
[370] *Id.* at 60.
[371] *Id.* at 60-61 (citing *Polytetrafluoroethylene Resin from India: Preliminary Affirmative Countervailing Duty Determination*, 83 FR 9842 (March 8, 2018), and accompanying PDM at 18 unchanged in *Polytetrafluoroethylene Resin from India: Final Affirmative Countervailing Duty Determination*, 83 FR 23422 (May 21, 2018)).
[372] *See CVD Preamble*, 63 FR at 65403.
[373] *Id.*

information available at the time of bestowal.[374] The courts have previously upheld Commerce's analysis in this regard.[375] Further, as the *CVD Preamble* explains:

> we are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure the attribution rules are not manipulated to reduce countervailing duties. If the Secretary determines as a factual matter that a subsidy is tied to a particular product, then the Secretary will attribute that subsidy to sales of that particular product, in accordance with (b)(5). If subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, the Secretary will attribute the subsidy to sales of all products by the company.[376]

With respect to Hindalco's arguments that its factory in Gujarat does not produce subject merchandise, this is an insufficient basis on which to establish that the programs are tied to non-subject merchandise. Our tying analysis is focused on the reason for the granting of a subsidy, and any limitations imposed on the recipient; it is not driven by a respondent's particular use of that subsidy.[377]

Hindalco's facility within Gujarat is not a separate entity, but a subdivision of Hindalco, as evidenced by the fact that Hindalco files its taxes as one corporate entity.[378] Neither the Act nor the regulations provide for, or require, the attribution of a domestic subsidy to a specific subdivision or facility within a firm.[379] Hindalco is incorrect in concluding that, because subsidies were provided to a facility that does not produce subject merchandise, the subsidies are tied to the production of non-subject merchandise, despite the facility's being a division of a subject merchandise producer (*i.e.*, Hindalco).

Finally, Commerce has previously addressed the issue of tying regional subsidies to production in a particular region, or to a particular facility or mill. The *CVD Preamble* explicitly rejects the concept that benefits from regional subsidies are tied to the production in that particular region and to the particular facility located in that region.[380] In addition, Commerce does not tie subsidies on a plant – or factory-specific basis. Such an approach in consistent with past practice.[381]

Accordingly, for the reasons discussed above, we continue to find these SGOG programs to be countervailable.

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[374] *Id.*
[375] *See Maverick Tube Corp. v. United States, Slip Op. 16-16, Consol. Court No. 14-00229 (CIT 2016), aff'd, Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017).
[376] *See CVD Preamble*, 63 FR at 65400.
[377] *See Polyester Textured Yarn from India* IDM at Comment 5.
[378] *See* Hindalco June 15, 2020 IQR at Exhibit GEN-17.
[379] *See Polyester Textured Yarn from India* IDM at Comment 5*; see also Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Softwood Lumber from Canada*, 67 FR 67638 (November 5, 2002), and accompanying IDM at Comment 8.
[380] *See CVD Preamble*, 63 FR at 65404.
[381] *See, e.g., Polyester Textured Yarn from India* IDM at Comment 5; and *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 53439 (August 12, 2016), and accompanying IDM at Comment 9.

Comment 8: Whether to Correct the CPI Rate Used in the Land for LTAR Benefit Calculation

The Petitioners' Comments

- Commerce should correct its calculation of Hindalco's benefit under the SGOG Provision of Land for LTAR program by using the correct CPI rate.[382]
- In the *Preliminary Determination*, Commerce employed the correct methodology, but used an incorrect CPI rate in its calculations. Commerce should, therefore, correct this error for the final determination.[383]

Hindalco's Rebuttal

- The alleged provision of land by the SGOG is not countervailable for Hindalco because this program is tied to non-subject merchandise.[384]
- This program could only relate to Hindalco's one plant in Gujarat, which is the Dahej Plant. Hindalco's Dahej Plant, however, is part of the company's copper unit, and record evidence unambiguously demonstrates that the Dahej Plant does not manufacture subject merchandise or inputs that were used or could have been used to produce subject merchandise.[385]

Commerce Position: As an initial matter, Commerce continues to find SGOG's provision of land at LTAR to Hindalco is countervailable, as discussed in Comment 7. In reviewing our benefit calculations for this program, we agree with the petitioners that, in the *Preliminary Determination*, we used the incorrect CPI rate. For this final determination, we have used the correct, *i.e.*, 2014, CPI rate in the benchmark calculation.[386]

Comment 9: Whether to Exclude Certain Rebates from the Duty Drawback Benefit Calculation

Hindalco's Comments

- Commerce's formula for calculating the benefit from the Duty Drawback program included rebates associated with certain exports to countries other than the United States.[387]
- Commerce should exclude these exports when calculating the benefit for this program in the final determination.[388]

No other interested party commented on this issue.

[382] *See* Petitioners Hindalco Case Brief at 18.
[383] *Id.* at 18-19.
[384] *See* Hindalco Rebuttal Brief at 16.
[385] *Id.*
[386] *See* Hindalco Final Calculation Memorandum.
[387] *See* Hindalco Case Brief at 76.
[388] *Id.* at 76-77.

Commerce's Position: We agree with Hindalco that the benefit calculation included rebates associated with exports to countries other than the United States. In the *Preliminary Determination*, we stated that "{i}n 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. For Hindalco, we divided the {Duty Drawback} rebates earned on exports to the United States during the POI by Hindalco's POI exports to the United States."[389] Therefore, for the final determination, we have excluded rebates associated with exports to countries other than the United States in the benefits calculation for this program, consistent with Commerce's practice.[390]

Comment 10: Whether to Correct Duty Exemption Rate Used in the SGMP Electricity Duty Exemption

The Petitioners' Comments

- For the final determination, Commerce should correct its calculation of Hindalco's benefit under the SGMP Electricity Duty Exemption program by using the correct duty exemption rate. While Commerce employed the correct methodology in its preliminary calculations, it used an incorrect duty exemption rate. For the final determination, Commerce should use the reported electricity duty rate in calculating Hindalco's benefit under this program.[391]

No other interested party commented on this issue.

Commerce Position: We agree with the petitioners that, in the *Preliminary Determination*, we used the incorrect duty exemption rate. Therefore, for the final determination, we have used the prescribed energy charges of Rs. 5.65 per unit for the months through August 2019, multiplied by the 12 percent electricity duty rate, to arrive at the electricity duty exemption amount.[392] We continue to use Rs. 6.1 per unit for the month of September 2019 through the end of the POI.

Comment 11: Whether to Correct the Benefit Calculation Relating to the EPCGS

The Petitioners' Comments

- In the *Preliminary Determination,* Commerce stated that it calculated benefits received by respondents in the form of import duty exemptions in two ways under the EPCGS: (1) for exempted import duties tied to export obligations that have not been met, Commerce treated the balance of the unpaid liability as an interest-free contingent-liability loan; and (2) for exempted import duties tied to export obligations that have been met, Commerce treats the duties saved as a grant received in the year in which the GOI waived the contingent liability obligation.[393]

[389] *See Preliminary Determination* PDM at 25.
[390] *See* Hindalco Final Calculation Memorandum.
[391] *See* Petitioners Hindalco Case Brief at 19-20.
[392] *See* Hindalco Final Calculation Memorandum.
[393] *See* Petitioners Hindalco Case Brief at 20.

- Commerce did not include the expensed benefits for outstanding EPCGS licenses that were received during the POI in the final EPCGS benefit calculation. Thus, Commerce should correct this error in the final determination.[394]

No other interested party commented on this issue.

Commerce Position: We agree with the petitioners that, in the *Preliminary Determination*, we excluded the expensed benefits for outstanding EPCGS licenses that were received during the POI. Hindalco reported that it had outstanding licenses that were not yet fulfilled during the POI.[395] Commerce's practice is to treat any balance on an unpaid liability that may be waived in the future as a contingent-liability interest-free loan pursuant to 19 CFR 351.505(d)(1).

In the *Preliminary Determination*, Commerce correctly treated these outstanding EPCGS licenses as contingent-liability interest-free loans; however, we inadvertently expensed the benefits for these outstanding licenses to the year in which merchandise was imported under these licenses. Because these licenses were outstanding during the POI, consistent with Commerce's practice and prior determinations, we should have expensed the benefits for these outstanding licenses in the POI.[396]

Therefore, for the final determination, the benefit received under the EPCGS program is the sum of: (1) the benefit attributable to the POI from the formally-waived duties for imports of EPCGS-eligible items for which the respondent met export requirements by the end of the POI; and (2) the interest that would have been due had the respondent borrowed the full amount of the duty reduction or exemption at the time of importation for imports EPCGS-eligible items that have unmet export requirements during the POI. We then divided the total benefit received by Hindalco under the EPCGS program by its total export sales of subject merchandise.

We note that MALCO also received subsidies under EPCGS. However, because we have based MALCO's subsidy rate for this program on AFA, we did not consider this issue for MALCO. *See* "Use of Facts Otherwise Available and Adverse Inferences" and Comment 13.

Comment 12: Whether to Adjust the Inland Freight Benchmark Used in the Coal for LTAR Benefit Calculation

The Petitioners' Comments

- Commerce should adjust the benchmark inland freight price used to calculate Hindalco's benefits under the Provision of Coal for LTAR program. When calculating benefits under LTAR programs, it is Commerce's practice to include in the benchmark price any ocean freight and inland freight costs, as appropriate.[397]

[394] *Id.*
[395] *See* Hindalco's Letter, "Common Alloy Aluminum Sheet from India: Second Supplemental Section III Questionnaire Response of Hindalco Industries Limited," dated July 13, 2020 at Exhibit SUPPII-8.
[396] *See, , e.g., Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Preliminary Results of Countervailing Duty Administrative Review, 2017– 2018*, 85 FR 12897 (March 5, 2020), and accompanying PDM at 21-22, unchanged in *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Results of Countervailing Duty Administrative Review, 2017-2018*, 85 FR 66304 (October 19, 2020).
[397] *See* Petitioners Hindalco Case Brief at 21.

- In the *Preliminary Determination*, Commerce calculated the inland freight for the coal benchmark by determining a rupee-per-kilometer freight price based on a price estimate reported by Hindalco. The inland freight benchmark submitted by Hindalco, however, includes additional freight estimates that were not used in the inland freight benchmark calculation.[398]
- The submitted estimates reflect prices reasonably available to Hindalco and there is insufficient evidence on the record to select one prices over the others. Therefore, consistent with its practice, Commerce should average all of the available freight estimates in determining the inland freight benchmark.[399]

Hindalco's Rebuttal

- Commerce should not consider this argument and should conclude that the alleged provision of coal for LTAR is not countervailable for Hindalco both because CIL is not an "authority" under the statute, meaning there is no financial contribution in the form of a provision of goods for LTAR, and because the alleged provision of coal to Hindalco is not specific.[400]

Commerce Position: We disagree with Hindalco. As explained in Comment 6 under "Financial Contribution," we continue to find CIL to be an "authority" within the meaning of section 771(5)(B) of the Act, and, thus, its provision of coal to Hindalco constitutes a financial contribution, under section 771(5)(D)(iii) of the Act. Further, as discussed in Comment 6 under "Specificity," we continue to find, as AFA, that the financial contribution is specific within the meaning of section 771(5A)(D)(iii) of the Act. Finally, as discussed in Comment 6 under "Distortion," we also find that the domestic Indian coal market distorted, and we have continued to use a tier two benchmark in our benefit analysis.

With respect to the calculation of the benchmark, we agree with the petitioners that, in the *Preliminary Determination*, we should have averaged the three inland freight rates on the record. When Commerce resorts to using a "tier two" world market price to construct a benchmark to measure the adequacy of remuneration, and there are multiple commercially-available market prices, 19 CFR 351.511(a)(2)(ii) directs Commerce to "average such prices to the extent practicable." Additionally, 19 CFR 351.511(a)(2)(iv) directs Commerce to adjust the tier two benchmark price for inland freight costs "to reflect the price that a firm actually paid or would pay if it imported the product."

We have on the record of this investigation inland freight rates from Indian Railways for three routes from various Indian ports to Hindalco's Aditya facility.[401] These three rates are representative of the delivery charges that a purchaser in India would pay. Thus, in accordance with 19 CFR 351.511(a)(2)(iv), it is appropriate to adjust the tier-two world market price for inland freight based on an average of the three inland freight rates on the record to construct the most robust inland freight benchmark permitted by the record.[402]

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[398] *Id.*
[399] *Id.*
[400] *See* Hindalco Rebuttal Brief at 17.
[401] *See* Hindalco Benchmark Submission at 3, and Exhibit 6.
[402] *See* Hindalco Final Calculation Memorandum.

MALCO Issues

Comment 13: Whether to Apply AFA to MALCO's EPCGS Usage

The Petitioners' Comments

- MALCO's response to Commerce's verification questionnaire demonstrates that MALCO failed to act to the best of its ability with respect to its claim of non-use under the EPCGS. This warrants the application of partial AFA by Commerce for the EPCGS program.[403]
- Section 776(a)(2) of the Act, as amended, requires Commerce to resort to facts available if an interested party: (1) withholds information that has been requested by Commerce; (2) fails to provide such information by the deadlines established, or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides information that cannot be verified.[404]
- Further, if Commerce determines "that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[405]
- MALCO's in-lieu-of-verification questionnaire response contains numerous deficiencies, making it impossible for Commerce to verify MALCO's claims of non-use of the EPCGS program for 2014 and 2015.
- MALCO reported that it imported capital equipment under the EPCGS. Although MALCO reported that it imported these products under the program during the AUL period, MALCO stated that it did not import any products under this scheme in 2014 and 2015.[406] MALCO reiterated this claim in its verification questionnaire response.[407]
- Commerce instructed MALCO to submit screenshots of MALCO's equipment purchase subledgers for fiscal years (FY) 2014-15 and 2015-16. In response, MALCO provided "downloads," not screenshots as instructed, from its accounting system, as well as audited FY 2014-15 and FY 2015-16 financial statements. MALCO further stated that it did not import any capital equipment during FY 2014-15 and FY 2015-16.[408]
- MALCO did not attempt to reconcile the total value of capital equipment imports to its accounting system by providing screenshots of each subledger total in MALCO's accounting system, as requested.[409] As a result, MALCO's capital equipment orders are not substantiated by the type of accounting and financial records that Commerce would ordinarily rely on in the course of verification.
- MALCO's audited financial statements indicate that MALCO did import certain capital equipment in FY 2014-15 and FY 2015-16. MALCO's audited financial statements

[403] *See* Petitioners MALCO Case Brief at 2.
[404] *Id.* at 2 (citing section 776(a)(2) of the Act).
[405] *Id.* (citing section 776(a)(2) and (b)(1) of the Act).
[406] *Id.* at 4 (citing MALCO's Letter, "Common Alloy Aluminium Sheet from India: Submission of Section III Response of Countervailing Duty Investigation," dated June 15, 2020 (MALCO June 15, 2020 IQR) at 33-34 and Exhibits 32.b and 32.c).
[407] *See* MALCO In Lieu of Verification QR at Exhibit V-5.
[408] *See* Petitioners' MALCO Case Brief at 5.
[409] *Id.* at 5-6 (citing MALCO In-Lieu of Verification QR at Exhibit 3).

show that it imported "Spares parts and chemicals" in FY 2014-15 and FY 2015-16,[410] which MALCO did not report in its EPCGS response.[411] For this reason, MALCO's submission cannot be used to verify that MALCO did not import any capital equipment in 2014 and 2015.

- Because MALCO failed to completely report all imported capital and spare parts, it failed to act to the best of its ability to confirm EPCGS non-use in 2014 and 2015. Given MALCO's overall failure to confirm program non-use, and the indications that MALCO did use EPCGS in 2014 and 2015, Commerce should find that AFA is warranted. As AFA, Commerce should apply the highest CVD rate to the EPCGS program (*i.e.*, 16.63 percent) in accordance with its hierarchy.[412]

MALCO's Rebuttal

- Application of partial AFA to MALCO is not warranted because MALCO did not: (1) withhold information that has been requested by Commerce; (2) fail to provide information by the deadline established, or in the form and manner in which the information was requested; (3) significantly impede the proceeding; or (4) provide any information which cannot be verified. MALCO has fully cooperated to the best of its ability and provided all the information requested in the form and manner requested.[413]
- The 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 Commerce with "full and complete" answers to all inquiries in an investigation.[414] This includes providing complete, accurate, and timely responses to Commerce's requests for information.[415]
- MALCO provided complete, accurate and timely responses to Commerce's requests for information, and it properly demonstrated non-use of EPCGS for 2014 and 2015. A benefit under EPCGS can be earned only if a company imports capital goods duty free.[416]
- The audited financial statements on the record demonstrate that MALCO did not import capital goods during FY 2013-2014, FY 2014-2015 or FY 2015-2016.[417] This is confirmed by the "nil" value reported for "CIF value" of "import of capital goods" during those periods. It is very clear that, in the absence of import of capital goods, a benefit under EPCGS does not exist.[418]
- Exhibit V-3 part 1 of MALCO's verification response contains a summary of capital asset additions made during FYs 2014-2015 and 2015-2016. Exhibit V-3 part 2 and part 3 contain downloads from its SAP system showing capital assets purchased during the period. Exhibit V-3 part 2 and Exhibit V-3 part 3 show that all additions to capital assets during the period were purchased from domestic sources; hence, benefits under the EPCGS scheme cannot be claimed for such purchases.[419]

[410] *Id.* at 6 (citing MALCO In-Lieu of Verification QR at Exhibits 4, 5).
[411] *Id.* at 6-7 (citing MALCO In-Lieu of Verification QR at Exhibits 3).
[412] *Id.*
[413] *See* MALCO Rebuttal Brief at 4.
[414] *Id.* at 5 (citing *Nippon Steel*).
[415] *Id.*
[416] *Id.* (citing MALCO's June 15, 2020 IQR at 33).
[417] *Id.* at 6 (citing MALCO In-Lieu of Verification QR at Exhibits V-4, V-5).
[418] *Id.*
[419] *Id.* (citing MALCO In Lieu of Verification QR at Exhibit V-3).

- Imported spare parts and chemicals are not capital goods. Had those been capital goods, they would have been reported under "Capital Goods" in the audited financial statements. No accounting standards or generally accepted accounting principles of any country would ever recognize chemicals as capital goods.[420]
- MALCO's Excel spreadsheets are downloads from its SAP system, and, therefore, MALCO reported the source of the information.[421] The information in these spreadsheets tie to MALCO's audited financial statements. MALCO did not provide the requested screenshots because they were extremely voluminous and would not have presented any meaningful information.[422]
- MALCO did not fail to act to the best of its ability to confirm EPCG non-use in 2014 and 2015. Therefore, Commerce should not apply partial AFA to MALCO.[423]

Commerce Position: We find that MALCO failed to act to the best of its ability with respect to its response to Commerce's in-lieu-of-verification questionnaire. Section 776(a)(2) of the Act, as amended, requires Commerce to resort to facts available if an interested party: (1) withholds information that has been requested by Commerce; (2) fails to provide such information by the deadlines established, or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides information that cannot be verified.[424] If Commerce determines that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[425]

As described above, in response to Commerce's in-lieu-of-verification questionnaire, MALCO provided downloads from its accounting system and not screenshots of the specified accounts that contain capital equipment purchases for the respective years, as instructed.[426] Although MALCO provided alternative information – financial statements for the years in question – the statements cannot conclusively demonstrate non-use of the EPCGS.

We agree that MALCO's audited financial statements show that MALCO did not import capital goods because the "capital equipment" line items reflect zero values during the time period in question. However, this does not end our inquiry because the financial statements show that MALCO did import "Spares parts and chemicals."[427] EPCGS participants may claim benefits under the EPCGS for spare parts.[428] Therefore, the alternative data proffered by MALCO do not confirm the accuracy and completeness of MALCO's response.

For these reasons, MALCO's in-lieu-of-verification submission does not demonstrate that MALCO did not import any EPCGS-eligible goods in 2014 and 2015. MALCO opted to submit alternative information in response to Commerce's questionnaire, rather than providing the

[420] *Id.*
[421] *Id.* at 6-7 (citing MALCO In-Lieu of Verification QR at V-5).
[422] *Id.* at 7 (citing MALCO In-Lieu of Verification QR at Exhibits V-3, V-4, and V-5).
[423] *Id.*
[424] *See* section 776(a)(2) of the Act.
[425] *See* section 776(a)(2) and (b)(1) of the Act.
[426] *See* MALCO In-Lieu of Verification QR at Exhibit 3.
[427] *Id.* at Exhibits 4, 5.
[428] *See* GOI June 15, 2020 IQR at 43-44.

specific information requested, and this information does not conclusively establish that MALCO did not use the program in 2014 and 2015. MALCO's failure to provide the requested documents calls into question whether MALCO has accurately reported all the benefits it received under the EPCGS. Thus, Commerce determines that (1) MALCO provided information that cannot be verified, within the meaning of section 776(a)(2) of the Act; and (2) that MALCO failed to act to the best of its ability in this investigation, within the meaning of section 776(b) of the Act, by not putting forth the maximum effort to comply with Commerce's request for source documentation, which MALCO admits was in its possession. Therefore, we find that the application of AFA is warranted.

We disagree with the petitioner that we should use the rate of 16.63 percent as the AFA rate.[429] While the application of the AFA is warranted, Commerce does not automatically apply the highest rate available. Rather, as described above, in the section titled "Use of Facts Otherwise Available and Adverse Inferences," the record shows that Hindalco used the identical program. Thus, as AFA, consistent with our standard hierarchy for assigning AFA subsidy rates in CVD cases, we are assigning the subsidy rate calculated for Hindalco for the EPCGS program to MALCO.[430] This is the most appropriate rate because it is a relevant indicator of how much the government of the country under investigation is likely to subsidize the industry at issue, through the program at issue, while inducing cooperation. In light of this decision, arguments from the petitioners and MALCO regarding Commerce's calculation of MALCO's benefit for the EPCGS program are moot.

Comment 14: Whether to Correct Discount Rate Used in the EOU Scheme Benefit Calculation

The Petitioners' Comments

- In calculating the benefit MALCO received under the "EOU Scheme – Reimbursement of Central Sales Tax Paid on Goods Manufactured in India" program, Commerce used an incorrect discount rate. Commerce should correct this error in the final determination.[431]

No other interested party commented on this issue.

Commerce Position: We agree that, in the *Preliminary Determination*, we used an incorrect discount rate in calculating the benefit MALCO received under the EOU Scheme – Reimbursement of Central Sales Tax Paid on Goods Manufactured in India. Accordingly, for the final determination, we have used the correct discount rate in the calculation of the benefit received under this program.[432]

[429] *See* Petitioners' MALCO Case Brief at 7.
[430] *See* "Selection of the AFA Rate" section above.
[431] *See* Petitioners' MALCO Case Brief at 10.
[432] *See* MALCO Final Calculation Memorandum.

IX. RECOMMENDATION

We recommend approving all of the above positions. If these 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

3/1/2021

X 

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance