C-570-991
Administrative Review
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June 5, 2018

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

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Final Results and Partial Rescission of Review of Countervailing Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China

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I. SUMMARY

The Department of Commerce (Commerce) has completed this administrative review of the countervailing duty (CVD) order on chlorinated isocyanurates (chloro isos) from the People's Republic of China (China), for the period of review (POR) January 1, 2015, through December 31, 2015, in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (Act). The mandatory respondents are Hebei Jiheng Chemical Co., Ltd. (Hebei Jiheng), Heze Huayi Chemical Co., Ltd. (Heze Huayi), and Juancheng Kangtai Chemical Co., Ltd. (Kangtai). We find that the mandatory respondents received countervailable subsidies during the POR. We analyzed the case and rebuttal briefs submitted by interested parties following the *Preliminary Results*[1] and address the issues raised in the "Analysis of Comments" section below.

[1] *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2015*, 82 FR 57209 (December 4, 2017) and accompanying Preliminary Decision Memorandum (PDM) (collectively, *Preliminary Results*).

II. BACKGROUND

Commerce published the *Preliminary Results* of this administrative review in the *Federal Register* on December 4, 2017, finding the mandatory respondents received countervailable subsidies during the POR related to certain programs.[2] We invited interested parties to comment on the *Preliminary Results.* On January 16, 2018, we received a jointly filed case brief from Bio-Lab, Inc., Clearon Corporation and Occidental Chemical Corporation (collectively, the petitioners).[3] On January 16, 2018, we also received case briefs from the Government of China (GOC) as well as from Kangtai and Heze Huayi.[4] From January 25 through January 29, 2018, we received rebuttal briefs from the petitioners, the GOC, Heze Huayi, and Kangtai.[5]

III. LIST OF INTERESTED PARTY COMMENTS

Below is a complete list of the issues raised in this administrative review for which we received comments from interested parties. We analyzed these comments in the "Analysis of Comments" section below.

Comment 1: Export Buyer's Credit Program
Comment 2: Provision of Electricity for Less Than Adequate Remuneration (LTAR)
Comment 3: Alleged Calculation Errors in Benefit Calculation

IV. SCOPE OF THE ORDER

The products covered by the order are chlorinated isocyanurates. Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) trichloroisocyanuric acid ("TCCA") ($Cl_3(NCO)_3$); (2) sodium dichloroisocyanurate (dihydrate) ($NaCl_2(NCO)_3$ X $2H_2O$); and (3) sodium dichloroisocyanurate (anhydrous) ($NaCl_2(NCO)_3$). Chlorinated isocyanurates are available in powder, granular and solid *(e.g.,* tablet or stick) forms.

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.50.4000, 3808.94.5000, and 3808.99.9500 of the Harmonized Tariff Schedule of the United States (HTSUS). The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dihydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include

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[2] *See Preliminary Results*.
[3] *See* Petitioners' Letter, "Case Brief of Bio-Lab, Inc., Clearon Corp. and Occidental Chemical Corporation," dated January 16, 2018 (Petitioners' Case Brief).
[4] *See* GOC's Letter, "GOC Administrative Case Brief: Second Administrative Review of the Countervailing Duty Order on Chlorinate Isocyanurates from the People's Republic of China (C-570-991)," dated January 16, 2018 (GOC's Case Brief); *see also* Heze Huayi and Kangtai's Letter, "Chlorinated Isocyanurates from the People's Republic of China: Case Brief," dated January 16, 2018 (Respondents' Case Brief).
[5] *See* Petitioners' Letter, "Rebuttal Brief of Bio-Lab, Inc., Clearon Corp. and Occidental Chemical Corporation," dated January 29, 2018 (Petitioners' Rebuttal Brief); *see* GOC's Letter, "GOC Administrative Rebuttal Brief: Second Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China (C-570-991)," dated January 29, 2018 (GOC's Rebuttal Brief); *see* Heze Huayi and Kangtai's Letter, "Chlorinated Isocyanurates from the People's Republic of China: Rebuttal Brief," dated January 26, 2018 (Respondents' Rebuttal Brief).

chlorinated isocyanurates and other compounds including an unfused triazine ring. The tariff classifications 3808.50.4000, 3808.94.5000 and 3808.99.9500 cover disinfectants that include chlorinated isocyanurates. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the investigation is dispositive.

V. CHANGES FROM THE PRELIMINARY RESULTS

After evaluating case and rebuttal briefs and supporting documentation submitted by interested parties, we have not made changes to the countervailable subsidy rates calculated for Kangtai in the *Preliminary Results*. For Heze Huayi, we have made corrections to the countervailable subsidy rate to account for transpositional errors made in Heze Huayi's calculations. Additionally, in the *Preliminary Results*, we applied total adverse facts available (AFA) to Jiheng because it did not respond to our questionnaire, and thus, significantly impeded this administrative review.[6] No party submitted comments on our application of total AFA to Jiheng, and thus, our application of total AFA to Jiheng remains unchanged for the final results. Accordingly, Jiheng will continue to receive the net AFA countervailable subsidy rate of 25.19 percent *ad valorem*.[7]

VI. SUBSIDIES VALUATION INFORMATION

Allocation Period

We made no changes to the allocation period and the allocation methodology used in the *Preliminary Results*.[8]

Attribution of Subsidies

We made no changes to the attribution methodologies used in the *Preliminary Results* for attributing subsidies.[9]

VII. BENCHMARKS

We made no changes to the loan benchmark and discount rates used in the *Preliminary Results*.[10]

IX. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

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

[6] *See* PDM at 7.
[7] *Id*. at 7-8.
[8] *See generally* PDM.
[9] *Id.*
[10] *Id*.

Act. Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.

Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an adverse facts available (AFA) rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide Commerce with complete and accurate information in a timely manner."[11] Commerce's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[12]

Section 776(c) of the Act also provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. However, Commerce is not required to corroborate any countervailing duty applied in a separate segment of the same proceeding.[13]

Under section 776(d) of the Act, Commerce may use as AFA a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[14]

In a CVD case, as discussed further below, Commerce requires information from both the foreign producers and exporters of the merchandise under investigation and the government of the country where those producers and exporters are located. When the government fails to provide requested and necessary information concerning alleged subsidy programs, Commerce, as AFA, may find that a financial contribution exists under the alleged program and that the program is specific. However, where possible, Commerce will rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit conferred, to the extent that those records are useable and verifiable.

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[11] *See, e.g., Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011) (*Drill Pipe from the PRC*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909 (February 23, 1998).

[12] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I at 870 (1994), reprinted at 1994 USCCAN. 4040, 4199 (SAA) at 870.

[13] *See* section 776(c)(2) of the Act.

[14] *See* section 776(d)(3) of the Act.

Otherwise, consistent with section 776(d) of the Act and our established practice of the hierarchal methodology for selecting an AFA rate in reviews, for certain of the programs discussed below, as appropriate, we selected as AFA the highest calculated rate for the same or a similar program.[15] The AFA hierarchy for reviews has four steps, applied in sequential order. The first step is to apply the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the proceeding, or if the rate is *de minimis*, the second step is to apply the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within same proceeding, the third step is to apply the highest non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. If no such rate exists under the first through third steps, the fourth step is to apply the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

In the *Preliminary Results*, we relied on "facts otherwise available," including AFA, for several findings. In the *Preliminary Results*, with regard to the provision of electricity for LTAR, we relied on AFA to determine that the provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act, and is specific within the meaning of section 771(5A) of the Act.[16] We also relied on an adverse inference to determine the existence and the amount of the benefit; we selected as our benchmark the highest electricity rates on the record for the applicable rate and user categories.[17] Because the rates were derived from information submitted during this review, they do not constitute secondary information and there is no requirement to corroborate pursuant to section 776(c) of the Act. As discussed below, for purposes of these final results, we have not changed these AFA findings.

In the *Preliminary Results*, we also found that the GOC had not provided information with respect to (1) whether it uses third party banks to disburse/settle Export Buyer's Credits, (2) the interest rates it used during the POR, and (3) whether the China Ex-Im Bank limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million.[18] Without this information we were unable to fully analyze how the Export Buyer's Credits flow to/from foreign buyers and the China Ex-Im Bank and found that the GOC had not cooperated to the best of its ability and, as AFA, found that Heze Huayi and Kangtai used and benefited from this program, despite their claims of non-use and certifications of non-use from their customers.[19]

Due to the failure of the GOC to cooperate to the best of its ability, for the Export Buyer's Credit Program discussed below, Commerce applied AFA. To select the AFA rate for this program, as discussed further below, Commerce applied step two of the AFA hierarchy for reviews and

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[15] *See*, *e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp*) and accompanying Issues and Decision Memorandum (IDM) at 13; *see also Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373-74 (Fed. Cir. 2014) (upholding "hierarchical methodology for selecting an AFA rate").
[16] *See* PDM at 8-9.
[17] *Id*. at 9.
[18] *See Preliminary Results* at 12.
[19] *Id*.

selected a similar program from the investigation of this proceeding. Pursuant to section 776(c)(2) of the Act, Commerce is not required to corroborate under these circumstances.

X. PROGRAMS DETERMINED TO BE COUNTERVAILABLE

We have not made changes to the *Preliminary Results* with regard to the methodology used to calculate the subsidy rates for the programs listed below with regard to Heze Huayi and Kangtai. Also, except where noted, no issues were raised by interested parties in case briefs regarding these programs. The final program rates calculated for Heze Huayi and Kangtai are as follows:

Heze Huayi:

1. Export Buyer's Credit: 0.87 percent *ad valorem*
2. Electricity for LTAR: 1.22 percent *ad valorem*
3. Self-reported grants – Market Development Fund for Middle-and-Small Sized Enterprise; Award for Conquering Dangerous Chemicals; and South Four Lakes Ecological Environment Protection Fund: 0.75 percent *ad valorem* combined

Kangtai:

1. Export Buyer's Credit: 0.87 percent *ad valorem.*
2. Electricity for LTAR: 0.66 percent *ad valorem.*

XI. PROGRAMS DETERMINED NOT TO CONFER MEASURABLE BENEFITS

We find that the following programs do not confer a measurable benefit during the POR:

1. Industrial Technology Research and Development Fund in 2006
2. Fund for Eco-compensation Pilot Projects in Regions South of the Yellow River and Provincial Region of Huaihe River under South-to-North Water Transfer
3. Heze Municipal Key Special Project Fund for Promotion of Technology Creation in 2011
4. Heze Municipal Intellectual Property Technology Award in 2014
5. Subsidy Fund
6. Financial Fund
7. Market Development Funds
8. "Government Subsidy"
9. Patent Awards
10. Awards for Patent Application
11. Technological Innovation Funds

XII. PROGRAMS DETERMINED NOT TO BE USED DURING THE POR

We find that the following programs were not used during the POR:

1. Grants under the Haixing County Science and Technology Research & Development Plan Project
2. Special National Bond Fund for Energy Conservation and Waste Recycling Projects
3. Export Seller's Credits from China Ex-Im
4. Shandong Industrial Structure Adjustment Entrusted Loan

5. Corporate Income Tax Law Article 33: Reduction of Taxable Income for the Revenue Derived from the Manufacture of Products that are in Line with State Industrial Policy and Involve Synergistic Utilization of Resources
6. Enterprise Income Tax Reduction for High and New Technology Enterprises
7. Land and Land Usage for Foreign Invested Enterprises ("FIEs") in National Economic and Technological Zones at Preferential Rates
8. "Two Free/Three Half" Program for FIEs
9. Income Tax Benefits for FIEs Based on Geographic Location
10. Value Added Tax and Tariff Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
11. VAT refunds for FIEs on purchases of Chinese-made equipment
12. Preferential direct tax treatment on purchases of domestically produced equipment for FIEs
13. Policy Loans under the Chlor-alkali Industry Second Five Year Plan
14. Stamp Tax exemption on share transfers under Non-Tradable Share Reform
15. State Key Technology Renovation Project Fund
16. Shareholder loans (debt forgiveness)
17. Discounted Loans for Export-Oriented Enterprises
18. VAT rebate on domestically produced equipment
19. VAT exemption on imports by encouraged industries
20. Preferential lending for industrial readjustment
21. Export credit insurance from Sinosure
22. Preferential loans provided by China Ex-Im "Going-out" for Outbound Investments
23. Foreign Trade Development Fund
24. "Famous Brands" program
25. Preferential policies to attract foreign investment in Jiangsu Province
26. Outline of light industry restructuring and revitalization plan in Jiangsu Province
27. Jiangsu province grants for legal fees in foreign trade remedy proceedings
28. Shandong Province: grants to enterprises exporting key product
29. The Clean Production Technology Fund
30. Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically Owned Companies
31. VAT Tax Rebate for Comprehensive Utilization of Resources

XIII. ANALYSIS OF COMMENTS

Comment 1: Export Buyer's Credit Program

GOC's Comments:

- Commerce's application of AFA for the Export Buyer's Credit was unlawful because the information requested from the GOC was irrelevant for determining the non-use of the Export Buyer's Credit Program. Although Commerce has unanswered questions from the GOC with regard to this program, Commerce does not have unanswered questions from the respondents to make a determination on the program's use.[20]

[20] *See* GOC's Case Brief at 3.

- The requested information about the 2013 Administrative Measures Revisions that were not provided by the GOC was irrelevant as to whether Commerce could have conducted the usage verification at Ex-Im Bank. Therefore, Commerce failed to investigate whether the absence of this information on the record had an impact on the usage determination.[21]
- Commerce requested information on the names of domestic settlement banks and third-party financial institutions through which the program could be indirectly disbursed by the China Ex-Im Bank. This information was irrelevant because the respondent's customers did not use this program.[22]
- Commerce could have determined usage by (1) the GOC's questionnaire response; (2) review of the China Ex-Im Bank's computer systems; and (3) declarations of non-use from the respondent's customers.[23]
- The respondents provided evidence on the record demonstrating that their customers did not use this program, which consisted of declarations from the respondents' U.S. customers certifying that they did not receive funding from the Ex-Im Bank or a third-party bank.[24]
- The petitioners' argument that Commerce should apply a different AFA rate, under a different AFA rate selection, is unreasonable. The petitioners misunderstand the difference between Commerce's AFA rate selection in an investigation and administrative review. Commerce has a long-standing AFA rate selection hierarchy for use in administrative reviews that calls for the rate of a similar program within the same proceeding.[25]

Respondents' Comments:
- In applying AFA, Commerce fails to show that the requested information from the GOC was relevant for finding that the respondents in this review used and benefitted from the Export Buyer's Credit Program.[26]
- Commerce requested a list of the partner and corresponding banks involved in disbursement of funds to all companies that participated in the program for the POR. The GOC did not fully answer these questions, and while not yielding any results, it did search its records for relevant information of disbursements specific to the respondents and their corresponding customers.[27]
- Commerce must use the respondents' own data in determining the existence or amount of benefit from the Export Buyer's Credit Program, and not apply AFA to benchmark information requested from the GOC.[28]
- Commerce's past determinations have set a precedent in this regard, though the preliminary results in this case did not follow this precedent and should be reversed for

[21] *Id* at 4.
[22] *Id.* at 5.
[23] *Id*.
[24] *Id.* at 8.
[25] *See* GOC's Rebuttal Brief at 3-4.
[26] *See* Respondents' Case Brief at 3.
[27] *Id*.
[28] *Id*. at 7-8.

the final results.[29]

- The petitioners' argument should be rejected as investigations and reviews call for different methodologies and hierarchies for selecting a rate, which were developed to provide predictability to parties for AFA selection as a consequence of non-cooperation.[30]
- The Export Seller's Credit Program is the most similar loan program that Commerce can use for AFA rate calculation, as it is the counterpart to the Export Buyer's Credit Program.[31]

The Petitioners' Comments:

- Commerce found in the prior review that the Export Buyer's Credit Program is countervailable and that the information on the record did not support finding non-use of the Export Buyer's Credit Program.[32]
- The GOC failed to provide the information requested by Commerce, and the information provided by the respondents is insufficient to assess the use of the Export Buyer's Credit Program.[33]
- The respondents provided customer declarations stating the program was not used, but the recipient of the credit does not have to be the respondents' customer or the importer to receive the credit. The program provides credits to foreign importers as well as banks and other institutions. Declarations from all of the respondents' US customers, for example, would not be dispositive evidence.[34]
- It cannot be determined from the record whether the companies identified by the respondents were the only authorized recipients of the credits, and a full list of the foreign importers that purchased chloro isos from the respondents would be necessary to make that determination.[35]
- Lack of cooperation by the GOC calls for the application of AFA pursuant to the statute. Commerce must rely upon facts otherwise available when necessary information is not available on the record due to an interested party withholding such information, or failing to provide it before the deadlines established by Commerce.[36]
- Credits paid to the seller are different than credits paid to buyers, which may include importers and lending institutions in addition to direct purchasers. The recipients of

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[29] *Id*. at 8 citing to *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination: 2012*, 79 FR 56560 (September 22, 2014) and accompanying IDM at 21; *Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2011,* 78 FR 58283 (September 23, 2013) and accompanying IDM at "Provision of Electricity for LTAR"; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Preliminary Intent To Rescind, in Part; 2014,* 82 FR 2317 (January 9, 2017) and accompanying PDM at 38.

[30] *See* Heze Huayi's and Kangtai's Rebuttal Brief, "Chlorinate Isocyanurates from the People's Republic of China: Case Brief," dated January 25, 2018 (Heze and Kangtai Rebuttal Case Brief) at 4.

[31] *Id.* at 6.

[32] *See* (Petitioners' Case Brief at 3; *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) and accompanying IDM at Comment 2 (Isos AR1 IDM).

[33] *See* Petitioners' Case Brief at 4.

[34] *Id.*

[35] *Id*. at 6.

[36] *Id*.

credits for buyers are not the same as companies who sell merchandise. A subsidy to importers results in a direct reduction in the price of exported merchandise, because the price paid by the importer is reduced.[37]

- Commerce has a hierarchy for selecting an AFA rate based on the highest calculated rate of an identical, similar, or comparable program. There is not a similar program for which a subsidy has been identified in this proceeding, as the Export Seller's Credits are not similar to the Export Buyer's Credits.[38]
- The selected 0.87 percent rate by Commerce is lower than the *de minimis* statutory minimum. This rate is inconsistent with the rationale for relying on AFA, which gives Commerce the discretion to apply the highest rate. The *de minimis* threshold should not be lower than the statutory threshold, which is defined in Section 703(b)(4) of the Act as a subsidy less than one percent, or less than two percent in a developing country.[39]

Commerce's Position: We continue to find that the information provided to us by the GOC, or lack thereof, prevented Commerce from fully examining the Export Buyer's Credit Program with respect to usage, and as a result, we are continuing to apply AFA to the Export Buyer's Credit program, which is consistent with Commerce's decision in the first administrative review of chloro isos.[40] As stated in the *Preliminary Results*, we requested from the GOC a list of all partner/corresponding banks involved in the disbursement of funds under the Export Buyer's Credit Program.[41] The GOC failed to respond to Commerce's request, and instead continued to state that neither of the mandatory respondents used the program. Additionally, the GOC refused to answer questions specific to the interest rates established during the POR for this program and instead stated that the request for information was not applicable because none of the respondents' customers used the program.[42] Moreover, we requested that the GOC provide original and translated copies of any laws, regulations or other governing documents regarding an alleged 2014 revision to the Export Buyer's Credit Program.[43] However, the GOC was unresponsive to the request, preventing Commerce from analyzing the function of the program.

In prior proceedings in which we have examined this program, we have found that the China Ex-Im Bank, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of the program which is prerequisite to Commerce's ability to verify the accuracy of the respondents' claimed non-use of the program.[44] As we noted in the *Preliminary Results*, the GOC has not provided the

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[37] *Id*. at 11.
[38] *See* Petitioners' Case Brief at 9-10.
[39] *Id*. at 16.
[40] *See Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review*; 2014, 82 FR 27466 (June 15, 2017), and accompanying Issues and Decision Memorandum at Comment 2.
[41] *See Preliminary Results* at 11.
[42] *Id.*
[43] *Id*.
[44] *See*, *e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016) and accompanying IDM at Comment 6; *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) and accompanying IDM at Comment 16.

requested information and documentation necessary for Commerce to develop a complete understanding of this program, *i.e.*, the use of third-party banks to disburse/settle Export Buyer's Credits, information on the interest rates China Ex-Im Bank established during the POR, and information on the size of the business contracts for which Export Buyer's Credits are applicable.[45] Such information is critical to understanding how Export Buyer's Credits flow to and from foreign buyers and China Ex-Im Bank. Absent the requested information, the GOC's claims that the respondent companies did not use this program are not reliable. Moreover, without a full and complete understanding of the involvement of third party banks, the respondent companies' (and their customers) claims are also not reliable.

We further disagree with the GOC's argument that the information on the record of this review is identical to the information submitted in *Solar Cells* from China.[46] In this review, we have information on the record regarding the 2013 revisions to the program and the involvement of third-party banks, which was not present on the record in *Solar Cells*.[47] In *Solar Cells*, Commerce stated that though we found the record there supported a conclusion of non-use, Commerce intended, in future proceedings to continue requesting the GOC's cooperation on this program, and we would base subsequent evaluations of this program on the record for each respective proceeding.[48] The GOC was uncooperative in the instant proceeding in not responding to our requests for additional information regarding the operations of this program. Without this information, Commerce determines that the information provided by the GOC on this program is insufficient to determine non-use and that our understanding on this program is incomplete. As such, we cannot rely on information about this program provided by parties other than the GOC, *i.e.*, the respondent companies' customers' certifications of non-use.[49]

With respect to arguments that AFA should not be applied with respect to this program, we continue to find that the GOC withheld necessary information that was requested of it and significantly impeded the proceeding. Accordingly, Commerce must rely on facts otherwise available in issuing these final results, pursuant to sections 776(a)(2)(A) and 776(a)(2)(C) of the Act. Specifically, the GOC withheld information that we requested that was reasonably available to it. Consequently, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. As AFA, we determine that this program provides a financial contribution, is specific, and provides a benefit to the company respondents within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E), specifically, of the Act. Here, Commerce requested operational program information from the GOC on this program, noting that there were substantial changes to the program in 2013, which the GOC declined to provide. Without this information, Commerce cannot determine whether this program is countervailable or whether respondents used this program.

Commerce has considered all information on the record of this proceeding, including the statements of non-use provided by the respondent companies (*i.e.*, declarations of non-use from

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[45] *See Preliminary Results* at 12.
[46] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 FR 46904 (July 19, 2016) (*Solar Cells 2013*), and accompanying IDM.
[47] *See* Memorandum, "Placing Information on the Record," dated October 21, 2016.
[48] *See* Solar Cells from China AR 2 IDM at Comment 1.
[49] *See* PDM at 31.

respondents' customers); however, as explained above, we are unable to rely on information provided by respondent companies due to Commerce's lack of a complete and reliable understanding of the program, which is a prerequisite to our reliance on information provided by the respondent companies regarding non-use. Thus, without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use.

In these final results, as in the *Preliminary Results*, Commerce has applied its CVD AFA hierarchy to determine an AFA rate for the Export Buyer's Credit Program. Under the first step of Commerce's CVD AFA hierarchy for administrative reviews, Commerce applies the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is *de-minimis*, under step two of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within the same proceeding, under step three of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for an identical or similar program in another CVD proceeding involving the same country. Finally, if there is no non-*de minimis* rate calculated for an identical or same program in another CVD proceeding involving the same country, under step four, Commerce applies the highest calculated rate for a cooperating company for any program from the same country that the industry subject to the investigation could have used.[50]

Our examination of the results of all the segments of this proceeding leads us to conclude that there are no calculated rates for this program in this proceeding - and thus no rates are available under step one of the CVD AFA hierarchy. Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in the same proceeding, excluding *de minimis* rates. In the instant review, the GOC reported that the Export Buyer's Credit Program provides loan support through export buyer's credits.[51] Based on the description of the Export Buyer's Credit Program as provided by the GOC, we continue to find that Export Seller's Credit Program and the Export Buyer's Credit Program are similar/comparable programs as both programs provide access to loans. When Commerce selects a similar program, it looks for a program with the same type of benefit. For example, it selects a loan program to establish the rate for another loan program, or it selects a grant program to establish the rate for another grant program.[52] Consistent with this practice, upon examination of the available above *de minimis* programs from the current review and the underlying investigation, Commerce selected the Export Seller's Credit Program because it confers the same type of benefit as the Export Buyer's Credit Program, as both programs are subsidized loans

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[50] *See* section 776(d) of the Act; *see also SolarWorld Americas, Inc. v. United States*, CIT No. 15-00232 (CIT 2017) (*SolarWorld*) (sustaining Commerce's CVD AFA hierarchy and selection of AFA rate for CVD reviews).
[51] *See* GOC's May 3, 2016 submission at 147-51.
[52] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 80 FR 41003 (July 14, 2015) (final countervailing duty admin. review), and accompanying IDM at 14, 44; *Narrow Woven Ribbons With Woven Selvedge from the People's Republic of China*, 79 FR 78036 (December 29, 2014) (final results admin. review), and accompanying IDM at 5; *Large Residential Washers from the Republic of Korea*, 80 FR 55336 (September 15, 2015) (final results admin. review), and accompanying IDM at 5.

from the China Ex-Im Bank.[53] As a result, we are continuing to apply the 0.87 percent *ad valorem* countervailable subsidy rate for the Export Seller's Credit Program, which was calculated in the investigation, as the AFA rate for the Export Buyer's Credit Program.

Regarding the petitioner's arguments that Commerce should apply a different rate for a similar program from another proceeding, we disagree. Commerce has an established practice for selecting an adverse facts available rate in countervailing duty proceedings with different hierarchical methodologies for investigations versus administrative reviews. These hierarchical methodologies for countervailing duty proceedings have been upheld by the courts.[54] Specifically, the *SolarWorld* court evaluated, and sustained, Commerce's application of its CVD AFA review methodology in the first administrative review regarding the Export Buyer's Credit Program, where Commerce selected a similar program with an AFA rate of 5.46 percent, rather than using the CVD AFA investigation hierarchy advocated by petitioners, which would have resulted in a 10.54 percent rate.[55] The Court noted that, in developing and applying its hierarchies, Commerce seeks a rate that serves its "dual goals" of relevancy and inducing cooperation from respondents, and that Commerce seeks to achieve relevancy by attempting to select an AFA rate that "best approximates how the non-cooperating respondent likely used the subsidy program."[56] Commerce continues to decline to deviate from our CVD AFA review hierarchy in this segment. Accepting the petitioner's argument and selecting a different rate from another proceeding in this segment would be a change in practice to not use our review methodology in a review, which would upset the balance between relevancy and inducement that Commerce seeks when it applies its CVD AFA hierarchy to non-cooperating respondents. Furthermore, consistently applying our CVD AFA hierarchies provides predictability and administrative transparency to parties involved in administrative proceedings before Commerce. Accordingly, we decline to step outside of our CVD AFA review hierarchy in this proceeding and continue to apply the second step of the review hierarchy which results in the AFA rate of 0.87 percent for the Export Buyer's Credit Program.

Lastly, regarding the petitioner's argument that the 0.87 percent rate assigned to the Export Buyer's credit program by Commerce is lower than the *de minimis* statutory minimum threshold, we disagree. Pursuant to sections 703(b)(4)(A) and 705(a)(3) of the Act, a countervailable subsidy is *de minimis* if Commerce determines that the aggregate of the net countervailable subsidies is less than one percent ad valorem or the equivalent specific rate for the subject merchandise. As a result, the *de minimis* threshold only applies to the overall total subsidy rate and not the individually calculated rates for specific programs.

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[53] *See* PDM at 13, 15-16, Appendix; *see also Chloro Isos Investigation IDM* at 14-15.

[54] *See, e.g., Essar Steel Ltd. v. United States*, 908 F. Supp. 2d 1306 (Ct. Int'l Trade 2013) (sustaining Commerce's application of the second step of the review hierarchy and use of an adverse rate calculated for Essar for a similar program in a previous administrative review of the countervailing duty order at issue), *aff'd*, 753 F.3d 1368 (Fed. Cir. 2014); *SolarWorld Am., Inc. v. United States*, 229 F. Supp. 3d 1362, 1366 (Ct. Int'l Trade 2017) (*SolarWorld*) (sustaining Commerce's application of the second step of the review hierarchy despite a lower rate than using the investigation hierarchy).

[55] *See SolarWorld*, 229 F. Supp. 3d at 1368.

[56] *Id*. at 1367-68.

Comment 2: Electricity for LTAR

The Petitioners' Comments:

- Commerce appropriately applied an AFA rate based on the GOC's failure to provide provincial price proposals for electricity. Commerce must rely on facts otherwise available pursuant of the Act when necessary requested information is withheld by interested parties.[57]
- For electricity purchased after April 2015, the GOC responses were inadequate as the data requested by Commerce was not received. The GOC argues that price proposals were not used after April 2015, but did not submit adequate information or documents to support this claim.[58]
- The GOC conceded that if the provincial price schedules were inconsistent with pricing values set by The National Development and Reform Commission (NDRC), the NDRC retains authority to "require revision of the provincial prices." The NDRC therefore has the ultimate authority to ensure provincial governments adhere to pricing values it has set. [59]
- The respondents argue that Commerce used an incorrect benchmark as the basis for calculating the benefit bestowed by the provision of electricity for LTAR. However, the GOC did not provide information requested by Commerce as it pertains to the provision of electricity for LTAR, and AFA is calculated in accordance with the Act.[60]

GOC's Comments:

- Commerce's application of AFA to the GOC for electricity for less than adequate remuneration (LTAR) was unlawful because the GOC provided evidence that the electricity price regime in China had changed. The GOC demonstrated that provincial electricity price proposals were no longer used to set prices, and significant authority had been vested in the provincial authorities to set their own electricity prices, citing to Notice 748 and Notice 2909.[61]
- The NDRC suggested price adjustments for electricity to the provincial price authorities instead of dictating the price. Each provincial price authority made their own adjustments either above or below the NDRC's suggested price.[62]
- Since the NDRC ceded the authority of price adjustments to the provinces, the regional specificity finding cannot be made. The program cannot be found countervailable without a valid specificity finding.[63]
- Commerce has no basis to apply AFA to the electricity prices set after April 20, 2015, since there is no information missing from the record after that time period.[64] The GOC explained, in the Second Supplementary Response at 3, that the provincial price

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[57] *Id*. at 13.
[58] *Id*. at 15-16.
[59] *Id*.
[60] *Id*. at 18.
[61] *See* GOC's Case Brief at 14.
[62] *Id.* at 15-16.
[63] *Id.* at 16.
[64] *Id.* at 14.

schedules on and after April 20, 2015, were not created or used.[65]

Respondents' Comments:

- Commerce must correct errors made in the benefit calculation for the provision of electricity for LTAR. In Commerce's worksheet for both respondents, under the benchmark to apply the basic fee, Commerce mistakenly used the benchmark for "max demand" for all four meters instead of applying the benchmark for "transformer capacity" for the meters that indicate a basic fee under "transformer capacity."[66]
- Another electricity calculation error was in the benchmark used for high peak in Heze Huayi's meter 4. For the fourth meter, instead of repeating the high peak rate contained in cell C7 of "Electricity Benchmarks," the incorrect subsequent cells appear to have been copied over as a benchmark. The high peak benchmark 1.0941 RMB/KWH should be contained in cells AD61 through AD73 in Heze Huayi's calculation to account for Commerce's high peak electricity calculation.[67]

Commerce's Position: We continue to apply AFA as a result of the failure of the GOC to provide information requested by Commerce pertaining to the provision of electricity, specifically to provide provincial price proposals. The GOC claims that it has provided sufficient information to demonstrate that provincial electricity price proposals were no longer used to set prices, and significant authority had been vested in the provincial authorities to set their own electricity prices.[68] However, the GOC failed to provide information requested by Commerce pertaining to the provision of electricity for LTAR. With respect to price derivation at the provincial level, Commerce requested specific information regarding how increases in cost elements led to retail price increases, the derivations of those cost increases, how cost increases were calculated, and how cost increases impacted final prices.[69] The GOC failed to provide complete responses to these requests. Specifically, the GOC failed to provide the specific derivation of increases in cost elements and the methodology used to calculate cost element increases. Lastly, the GOC failed to explain how final price increases were allocated across the respondents' provinces and across tariff end-user categories.[70]

Commerce requested that the GOC identify the legislation which may have eliminated the Provincial Price Proposals.[71] The GOC referred Commerce to Notice 748,[72] as well as Notice 2909.[73] These two documents, issued by the NDRC, direct provinces to reduce prices by amounts specific to provinces. However, they neither explicitly eliminate Provincial Price Proposals nor define distinctions in price-setting roles between national and provincial pricing authorities. Additionally, we requested that the GOC explain whether the province-specific price

[65] *Id.*
[66] *See* Respondents' Case Brief at 1-2.
[67] *Id.* at 2.
[68] *See* GOC's Case Brief at 14.
[69] *See* GOC's May 16, 2016 submission at 8-13; GOC's July 25, 2016 submission.
[70] *See* GOC's October 2, 2017 submission at 3.
[71] *Id.* at 4.
[72] *Id.* at 3.
[73] *Id.* at 4.

reductions indicated in Notice 748 were required to be adopted by all provinces.[74] The GOC responded that, "{t}he price adjustment values contained in Notice 748 must be taken into account by each province and sub-central jurisdiction in formulating their specific schedules (pursuant to Article 6 of Notice 748) but are not strictly mandatory."[75] This response does not accord with the directive language in Notice 748, as discussed above. Finally, we requested that the GOC explain how the NDRC monitors compliance with the price changes directed in Notice 748 and what action the NDRC would take were any province not to comply with the directed price changes.[76] The GOC responded that "if the provincial tariff schedule prices are completely inconsistent with the pricing values, the NDRC may require revision of the provincial prices." It failed to explain what direct actions the NDRC would take in the event of non-compliance with directed price changes.

As discussed above, in a CVD case, Commerce requires information from both the foreign producers and exporters of the merchandise under investigation and the government of the country where those producers and exporters are located. When the government fails to provide requested and necessary information concerning alleged subsidy programs, Commerce, as AFA, may find that a financial contribution exists under the alleged program and that the program is specific. However, where possible, Commerce will rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit conferred, to the extent that those records are useable and verifiable.[77]

Here, based on the record evidence and consistent with our practice for electricity for LTAR programs in China CVD cases,[78] we have continued to apply AFA to the benchmark electricity rates by comparing the electricity usage rates reported by the respondents to the AFA benchmark electricity rate, which is the appropriate highest provincial rate in the PRC, for each category reported by the respondents. For example, Heze Huayi reported electricity usage for its meters that show at certain points during the POR, Heze qualified for multiple energy usage categories.[79] Because Heze Huayi reported energy usage in more than one energy category, we applied the highest provincial rate for each of the categories Heze Huayi qualified under to the amount of energy usage that Heze Huayi reported in each of these energy categories. Further, the petitioners argue that applying the highest rate reported for any province for purposes of calculating the benchmark electricity rate assumes that Heze Huayi and Kangtai were in fact "large industry" users and within the "10kv" category, which is an assumption that is not supported by the record. We find that the respondents provided record evidence pertaining to their respective electricity usage and rate category, including proper classification and usage as a "large scale industry."[80] The petitioners' argument that GOC's lack of cooperation should be

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[74] *Id.* at 4.
[75] *Id*. at 4-5.
[76] *Id.* at 5.
[77] *See e.g., Solar Cells 2013,* 81 FR at 46904, and accompanying IDM at Comment 10.
[78] *See e.g., Countervailing Duty investigation of 1-Hydroxyethylidene-1, 1-diphosphonic acid from the People's republic of China: Final Affirmative Determination*, 82 FR 14872 (March 23, 2017) and accompanying IDM at Comment 1.
[79] We note that Heze Huayi's reporting of it energy usage is proprietary. *See* Heze's Initial Questionnaire Response, dated May 17, 2016, at Exhibit 10, for more information on Heze Huayi's energy usage.
[80] *See*, *e.g.*, *Heze's Initial Questionnaire response*, dated May 17, 2016 (Heze IQR), at Exhibit 10; *Kangtai's Initial Questionnaire response*, dated May 17, 2016 (Kangtai IQR), at Exhibit 12.

reflected on the mandatory respondents through an adverse inference by applying the highest rate for this program to each respondent's reported energy usage rate goes beyond Commerce's practice and is contrary to the record evidence, and therefore is not warranted in this instance.

The basis for identifying comparative benchmarks for determining whether a government good or service is provided for LTAR is set forth in 19 CFR 351.511(a)(2). These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (Tier 1); (2) world market prices that would be available to purchasers in the country under investigation (Tier 2); or (3) an assessment of whether the government price is consistent with market principles (Tier 3). Commerce has investigated and determined this program confers a countervailable subsidy for less than adequate remuneration in several prior China investigations.[81] As discussed in "Use of Facts Otherwise Available and Adverse Inference," we are basing our finding on the government's provision of electricity, in part, on AFA. As AFA, we determine that the GOC's provision of electricity is a financial contribution in the form of the provision of a good or service under section 771(5)(D)(iii) of the Act, and that it is specific within the meaning of section 771(5A)(D) of the Act.

The petitioners also state, the highest reported benchmark rate for electricity is the "general industry" rate and not the "large scale industry" rate and that Commerce should use the higher "general industry" rate as the benchmark electricity rate in the final determination. Again, in the *Preliminary Results*, Commerce compared the electricity usage rates reported by the respondents, which is supported by record evidence,[82] to the AFA benchmark electricity rate for each usage category reported by each respondent. As a result, as stated above, Commerce did not choose the "large industry category" over the "general industry" category. Rather, we relied on respondents' reporting of their respective energy usage, then applied the highest benchmark for each rate to each category the respondents reported.

Therefore, we disagree with the petitioners, and will not adjust the net benefit of the provision of electricity LTAR. Commerce will continue to use the methodology used in the *Preliminary Results* to calculate the electricity benefits conferred to Kangtai and Heze Huayi. Accordingly, for the provision of electricity LTAR, we determine a countervailable subsidy of 2.19 percent *ad valorem* for Heze Huayi, and 0.66 percent *ad valorem* for Kangtai.

Comment 3: Alleged Calculation Errors in the Benefit Calculation for the Provision of Electricity for LTAR

Respondents' Comments

- In the *Preliminary Results*, Commerce used the incorrect electricity benchmark for calculating the benefit of the provision of electricity for LTAR.

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[81] *See, e.g., Certain Seamless Carbon and Alloy Steel SLP Pipe IDM at 18-19; Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination,* 74 FR 64045 (December 7, 2009) IDM at 22-23; *PVLT Tires* IDM at 35-36.

[82] *See*, *e.g.,* Heze IQR at Exhibit 10*; Jiheng's initial questionnaire response*, dated May 17, 2016 (Jiheng IQR), at Exhibit 12.

- The first calculation error was made when Commerce used the benchmark for "max demand" instead of applying the benchmark for "transformer capacity" to the electricity meters.[83] This error was made for both Heze Huayi's and Kangtai's calculation for the electricity benefit.
- The second calculation error was when Commerce did not transpose the correct high peak rate for all of Heze Huayi's electricity meters when the electricity benefit was calculated.[84]
- All of these calculation errors should be corrected in the final results.

The Petitioners' Comments

- In the *Preliminary Results*, Commerce correctly calculated the benefit of the provision of electricity for LTAR for both Heze Huayi and Kangtai. Specifically, the basis of this benefit was determined under section 776(b) of the Act and thus, Commerce was correct to select the highest rate in the PRC for each type of user as the benchmark.[85]
- Accordingly, Commerce did not make an error by applying the highest rate as the maximum demand benchmark and Commerce should continue to do so for the final results since the GOC did not provide the requested information regarding electricity during this administrative review.[86]

Commerce's Position: We agree with the petitioners that Commerce did not make an error in the calculation by applying the highest rate as the maximum demand benchmark. For Heze Huayi and Kangtai, Commerce correctly calculated the benefit of the provision of electricity for LTAR. Commerce based its decision under section 776(b) of the Act, and selected the highest reported rate in China for each type of user benchmark and applied these rates to the respective calculations for both Heze Huayi and Kangtai. As a result, when calculating the benefit received by respondents under this program, Commerce applied the highest available benchmark rate, as reported by the GOC, to each user category reported by each respondent. Commerce will continue to use the previously mentioned rates as the GOC has failed to timely provide information regarding electricity during this administrative review.

Regarding respondents' second argument that Commerce did not transpose the correct high peak rate for all Heze Huayi's electricity meters, we agree. As a result, Commerce is correcting this and transposing the correct high peak rate for those meters where the high peak rate should have been applied.

[83] *See* Respondents' Case Brief at 1.
[84] *Id.*, at 2.
[85] *See* Petitioners' Rebuttal Brief at 18.
[86] *Id.*, at 18-19.

XII. CONCLUSION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results in the *Federal Register*.

☒	☐
____________	____________
Agree	Disagree

6/5/2018

X ______________________________

Signed by: GARY TAVERMAN

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