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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: Issues and Decision Memorandum for the Final Determination in
the Countervailing Duty Investigation of Common Alloy
Aluminum Sheet from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided above the *de minimis* level to producers and exporters of common alloy aluminum sheet (common alloy sheet) from the People's Republic of China (China), as provided for in section 705 of the Tariff Act of 1930, as amended (the Act).¹ Below is the complete list of issues in this investigation for which we received comments from interested parties.

- Comment 1: Whether Commerce's Self-Initiation of This Investigation Was Lawful
- Comment 2: Whether Commerce's Investigation of Critical Circumstances Was Lawful
- Comment 3: Whether to Make a Separate Critical Circumstances Determination for TCI
- Comment 4: Whether Commerce Should Continue to Apply AFA to the Export Buyer's Credit Program
- Comment 5: Whether Commerce's Finding that the Aluminum and Steel Coal Markets are Distorted is Supported by Substantial Evidence
- Comment 6: Whether Commerce Should Apply AFA to Yong Jie New Material's Financing
- Comment 7: Whether Commerce Should Adjust Its Benefit Calculation for the Provision of Land for Less Than Adequate Remuneration
- Comment 8: Whether Commerce Should Apply AFA to Mingtai's Financing

¹ See also section 701(f) of the Act.



Comment 9: Whether Commerce Should Amend Its Preliminary Calculation for Subsidies Received by Mingtai

II. BACKGROUND

A. Case History

On April 23, 2018, we published the *Preliminary Determination* for this investigation,² in which we aligned the final countervailing duty (CVD) determination with the final antidumping duty determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4). In the *Preliminary Determination*, we calculated above *de minimis* rates for Henan Mingtai Industrial Co., Ltd. and Zhengzhou Mingtai (collectively, Mingtai); and Yong Jie New Material Co., Ltd. (Yong Jie New Material). The subsidy rates for Chalco Ruimin Co., Ltd. (Chalco Ruimin) and Chalco-SWA Cold Rolling Co., Ltd. (Chalco-SWA) were based entirely on adverse facts available.³ We conducted verifications of the questionnaire responses submitted by Mingtai and Yong Jie New Material between June 5, 2018, and June 14, 2018.⁴ Subsequent to the *Preliminary Determination*, we received timely filed requests for a hearing from Mingtai and Yong Jie New Material.⁵ On October 11, 2018, we held a hearing.⁶

We received case briefs regarding the *Preliminary Determination* from the domestic industry,⁷ AA Metals,⁸ Mingtai, Yong Jie New Material, TCI,⁹ and the Government of China on July 27, 2018, and rebuttal briefs from the domestic industry, Mingtai, Yong Jie New Material, and the Government of China on August 1, 2018.¹⁰

² See *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) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

³ See PDM at 18-24.

⁴ See Memoranda, “Verification of the Questionnaire Responses of Henan Mingtai Al Industrial Co., Ltd. and Zhengzhou Mingtai Industry Co., Ltd.: Countervailing Duty Investigation of Common Alloy Sheet from the People's Republic of China,” (Mingtai Verification Report) and “Verification of the Questionnaire Responses of Yong Jie New Material: Countervailing Duty Investigation of Common Alloy Sheet from the People's Republic of China,” (Yong Jie New Material Verification Report), both dated July 3, 2018.

⁵ See Mingtai Letter, “Common Alloy Aluminum Sheet from the People's Republic of China-Request for Hearing,” dated May 23, 2018; Yong Jie New Material Letter, “Common Alloy Aluminum Sheet from the People's Republic of China: Yong Jie New Material Request for Public Hearing,” dated April 29, 2018.

⁶ See Letter to All Interested Parties, dated October 1, 2018.

⁷ The domestic industry to this investigation is the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members (collectively, the domestic industry).

⁸ AA Metals, Inc. (AA Metals) is an U.S. importer of subject common alloy aluminum sheet from China.

⁹ Ta Chen International Inc. and affiliates Empire Resources Inc. and Galex Inc. (collectively, TCI) are U.S. importers of subject common alloy aluminum sheet from China.

¹⁰ See Domestic Industry Case Brief, “Common Alloy Aluminum Sheet from the People's Republic of China: Domestic Industry's Case Brief,” dated July 27, 2018 (Domestic Industry's Case Brief); AA Metals' Case Brief, “Countervailing Duty Investigation on Common Alloy Aluminum Sheet from the People's Republic of China: Case Brief,” dated July 27, 2018 (AA Metals' Case Brief); Mingtai's Case Brief, “Common Alloy Aluminum Sheet from the People's Republic of China: Case Brief,” dated July 27, 2018 (Mingtai's Case Brief); Yong Jie New Material's Case Brief, “Common Alloy Aluminum Sheet from the People's Republic of China: Case Brief,” dated July 27, 2018 (Yong Jie New Material's Case Brief); TCI's Case Brief, “Common Alloy Aluminum Sheet from the People's

The “Analysis of Programs” and “Subsidies Valuation” sections below describe the subsidy programs and the methodologies used to calculate the subsidy rates for our final determination. Based on our verification findings, we made certain modifications to the *Preliminary Determination*, which are discussed under each program, below. For details of the resulting revisions to Commerce’s rate calculations resulting from those modifications, *see* the final calculation memoranda.¹¹ We recommend that you approve the positions we describe in this memorandum.

B. Period of Investigation

The period of investigation (POI) for which we are measuring subsidies is January 1, 2016, through December 31, 2016.

III. FINAL DETERMINATION OF CRITICAL CIRCUMSTANCES, IN PART

Commerce preliminarily found that critical circumstances existed for Chalco Ruimin, Chalco-SWA, and all other producers or exporters, but not for Yong Jie New Material or Mingtai.¹² For Chalco Ruimin and Chalco-SWA, we continue to find that critical circumstances exist on the basis of AFA.¹³ In accordance with section 776(a) and (b) of the Act, and 19 CFR 351.308(c) we find that imports of subject merchandise from Chalco Ruimin and Chalco-SWA were massive over a relatively short period of time and that Chalco Ruimin and Chalco-SWA received subsidies that are inconsistent with the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement).

For Yong Jie New Material and Mingtai, based on the examination of the shipping data placed on the record by the mandatory respondents after the preliminary determination, as requested by Commerce, we are modifying our critical circumstances analysis to expand the “base” and “comparison periods” by a month. Accordingly, we examined shipment data placed on the

Republic of China,” dated July 27, 2018 (TCI’s Case Brief); the Government of China’s Case Brief, “GOC Administrative Case Brief in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China,” dated July 27, 2018 (Government of China’s Case Brief); Domestic Industry’s Rebuttal Brief, “Common Alloy Aluminum Sheet from the People’s Republic of China: Domestic Industry’s Rebuttal Brief,” August 1, 2018 (Domestic Industry’s Rebuttal Brief); Mingtai’s Rebuttal Brief, “Common Alloy Aluminum Sheet from the People’s Republic of China-Rebuttal Brief,” dated August 1, 2018 (Mingtai’s Rebuttal Brief); Yong Jie New Material’s Rebuttal Brief, “Common Alloy Aluminum Sheet from the People’s Republic of China: Rebuttal Brief,” August 1, 2018 (Yong Jie New Material’s Rebuttal Brief); Government of China’s Rebuttal Brief, “GOC Rebuttal Brief in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China,” August 1, 2018 (Government of China’s Rebuttal Brief).

¹¹ *See* Memoranda, “Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Final Determination Calculation Memorandum for Henan Mingtai Industrial Co., Ltd. and Zhengzhou Mingtai,” dated November 5, 2018 (Mingtai Final Calculation Memorandum) and “Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Final Determination Calculation Memorandum for Yong Jie New Material Co., Ltd.,” dated November 5, 2018 (Yong Jie New Material Final Calculation Memorandum).

¹² *See* PDM at 6-8.

¹³ *See* “Use of Facts Otherwise Available and Adverse Inferences” section below; *see also* PDM at 6-7.

record for the period August 2017, through March 2018. Because the shipment data are business proprietary, our analysis can be found in a separate memorandum issued concurrently with this final determination.¹⁴

For this final determination, we continue to find that the increase in imports was greater than 15 percent and was therefore “massive” for the all other producers or exporters, but not for Yong Jie New Material and Mingtai.¹⁵ Because we continue to find evidence of the existence of countervailable subsidies that are inconsistent with the SCM Agreement (*e.g.*, Value-Added Tax Rebates on Domestically-Produced Equipment), and because we continue to determine that the increase in imports was greater than 15 percent and was therefore “massive” for all other producers or exporters, we find that critical circumstances continue to exist for all other producers or exporters. Comments regarding critical circumstances for all other producers or exporters are addressed at Comment 3.

IV. SCOPE OF THE INVESTIGATION

The product covered by this investigation is common alloy sheet from China. For a full description of the scope of this investigation, see the accompanying *Federal Register* notice at Appendix II.

V. SCOPE COMMENTS

We invited parties to comment on Commerce’s Preliminary Scope Memorandum.¹⁶ Commerce has reviewed the briefs submitted by interested parties, considered the arguments therein, and has made changes to the scope of the investigation. For further discussion, *see* Commerce’s Final Scope Decision Memorandum.¹⁷

VI. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

Commerce has made no changes to the allocation period and the allocation methodology used in the *Preliminary Determination* and no issues were raised by interested parties in case briefs regarding the allocation period or the allocation methodology. For a description of the allocation

¹⁴ See Memorandum, “Calculations for Final Determination of Critical Circumstances in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China,” dated concurrently with this final determination.

¹⁵ *Id.* See also Memorandum, “Calculations for Preliminary Determination of Critical Circumstances in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China,” dated April 16, 2018.

¹⁶ See Memorandum, “Common Alloy Aluminum Sheet from the People’s Republic of China: Scope Comments Preliminary Decision Memorandum,” dated June 15, 2018.

¹⁷ See Memorandum, “Common Alloy Aluminum Sheet from the People’s Republic of China: Final Scope Decision Memorandum,” dated concurrently with this memorandum.

period and the methodology used for this final determination, *see* the *Preliminary Determination*.¹⁸

B. Attribution of Subsidies

Commerce has made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies. For a description of the methodology used for this final determination, *see* the *Preliminary Determination* and accompanying PDM and the final analysis memoranda.¹⁹

C. Denominators

In accordance with 19 CFR 351.525(b), Commerce considers the basis for the respondent's receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondent's export or total sales, or portions thereof. The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the calculation memorandum prepared for this final determination.²⁰

VII. BENCHMARKS AND DISCOUNT RATES

The Government of China and the domestic interested party submitted comments regarding the benchmarks used in the *Preliminary Determination*. These comments are addressed below, at Comment 5. The benchmarks and discount rates that we used for these final results are unchanged from the *Preliminary Determination*. For a description of the benchmarks and discount rates used for these final results, *see* the *Preliminary Determination* and the accompanying PDM.²¹

VIII. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

A. Legal Standard

Sections 776(a)(1) and (2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply "facts otherwise available" (FA) if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.²²

¹⁸ *See* PDM at 9-10.

¹⁹ *Id.*; *see also* Mingtai Final Calculation Memorandum and Yong Jie New Material Final Calculation Memorandum.

²⁰ *Id.*

²¹ *See* PDM at 13-18.

²² On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (TPEA), which made numerous amendments to the AD and CVD law, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act, as summarized below. *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015). The 2015 law does not specify dates of

Section 776(b) of the Act further provides that Commerce may use an adverse inference in selecting from among 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) 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."²³ 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."²⁴

Section 776(c) of the Act 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. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."²⁵ It is Commerce's practice to consider information to be corroborated if it has probative value.²⁶ In analyzing whether information has probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used.²⁷ However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.²⁸

Finally, under the new section 776(d) of the Act, Commerce may use any countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, use a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of 776(c), or any other purpose, to estimate what the countervailable subsidy rate would have been

application for those amendments. On August 6, 2015, Commerce published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the United States International Trade Commission. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015). Therefore, the amendments apply to this investigation.

²³ 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 China Final*); see also *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

²⁴ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199 (SAA) at 870.

²⁵ See, e.g., SAA at 870.

²⁶ See SAA at 870.

²⁷ See, e.g., SAA at 869.

²⁸ See SAA at 869-870.

if the interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.²⁹

B. Application of Facts Otherwise Available and Adverse Facts Available and Selection of the AFA Rate

Commerce relied on “facts otherwise available,” including adverse facts available (AFA), for several findings in the *Preliminary Determination*.³⁰ For a description of these decisions, see the *Preliminary Determination*. Commerce continues to use facts otherwise available and AFA for these final results. Also, as described below, Commerce is using facts otherwise available and AFA for several additional findings. We further address our AFA decisions in Comments 4, 6, and 8, below.

It is Commerce’s practice in CVD proceedings to compute a total AFA rate for non-cooperating companies using the highest calculated program-specific rates 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 applied for the same or similar program in a countervailing duty 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 authority considers reasonable to use, including the highest of such rates.³²

Accordingly, when selecting AFA rates, if we have cooperating respondents, as we do in this investigation, we first determine if there is an identical program in the investigation and use the highest calculated rate for the identical program. If there is no identical program that resulted in a subsidy rate above zero for a cooperating respondent in the investigation, we then determine if an identical program was used in another CVD proceeding involving the same country, and apply the highest calculated rate for the identical program (excluding *de minimis* rates).³³ If no such rate exists, we then determine if there is a similar/comparable program (based on the

²⁹ See section 776(d)(3) of the Act.

³⁰ See PDM at 18-39.

³¹ See, e.g., *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 FR 70971, 70975 (November 24, 2008) (unchanged in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009), and accompanying IDM at “Application of Facts Available, Including the Application of Adverse Inferences;” see also *Aluminum Extrusions from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) (*Aluminum Extrusions from China*), and accompanying IDM at “Application of Adverse Inferences: Non-Cooperative Companies.

³² 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 from China*), and accompanying IDM at 13; see also *Essar Steel Ltd. v. United States*, 753 F.3d 1368, 1373-1374 (Fed. Cir. 2014) (*Essar Steel*) (upholding “hierarchical methodology for selecting an AFA rate”).

³³ For purposes of selecting AFA program rates, we normally treat 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 “1. Grant Under the Tertiary Technological Renovation Grants for Discounts Program” and “2. Grant Under the Elimination of Backward Production Capacity Award Fund.”

treatment of the benefit) in another 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 502 of the TPEA, which the President of the United States signed into law on June 29, 2015. Section 502 of the TPEA added new subsection (d) to section 776 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 adverse facts available 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 adverse facts available 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."³⁵ No legislative history accompanied this provision of the TPEA. 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 adverse facts available 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 adverse facts available, Commerce determines that the situation warrants a rate different than the rate derived from the hierarchy be applied.³⁶

In applying the adverse facts available 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

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

³⁵ See Section 776(d)(2) of the Act.

³⁶ This differs from antidumping proceedings, for which no hierarchy applies, under section 776(d)(1)(B). Under that provision, "any dumping margin from any segment of the proceeding under the applicable antidumping order" may be applied, which suggests an adverse rate could be derived from different available margins, given the facts on the record.

party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”³⁷ 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.”³⁸ It is pursuant to this knowledge and experience that Commerce has implemented its adverse facts available hierarchy in CVD cases to select an appropriate adverse facts available rate.³⁹

In applying its adverse facts available 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 adverse facts available 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 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 to the particular program.

Under the first step of Commerce’s investigation hierarchy, Commerce applies the highest non-zero rate calculated for a cooperating company for the identical program in the investigation.

³⁷ See SAA at 4040, 4090; see also *Essar Steel*, 678 at 1276 (citing *F. Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (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.”) (*De Cecco*)).

³⁸ See *De Cecco*, 216 F.3d at 1032.

³⁹ 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, Cmt. 4 at 28-31 (applying the adverse facts available hierarchical methodology within the context of 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 adverse facts available hierarchical methodology within the context of 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 adverse facts available hierarchical context, the highest combined standard income tax rate for corporations in Indonesia).

Under this step, we will even use a *de minimis* rate as adverse facts available if that is the highest rate calculated for another cooperating respondent in the same industry for the same program.

However, if there is no identical program match within the investigation, or if the rate is zero, then Commerce will shift to the second step of its investigation hierarchy, and either apply the highest non-*de minimis* rate calculated for a cooperating company in another countervailing duty proceeding involving the same country for the identical program, or if the identical program is not available, for a similar program. This step focuses on the amount of subsidies that the government has provided in the past under the investigated program. The assumption under this step is that the non-cooperating respondent under investigation uses the identical program at the highest above *de minimis* rate of any other company using the identical program.

Finally, if no such rate exists, under the third step of Commerce's investigation hierarchy, Commerce applies the highest rate calculated for a cooperating company from any non-company-specific program that the industry subject to the investigation could have used for the production or exportation of subject merchandise.⁴⁰

In all three steps of Commerce's adverse facts available investigation hierarchy, if Commerce were to choose low adverse facts available rates consistently, the result could be a negative determination with no order (or a company-specific exclusion from an order) and a lost opportunity to correct future subsidized behavior. In other words, the "reward" for a lack of cooperation would be no order discipline in the future for all or some producers and exporters. Thus, in selecting the highest rate available in each step of Commerce's investigation adverse facts available hierarchy (which is different from selecting the highest possible rate in the "pool" of all available rates), Commerce strikes a balance between the three necessary variables: inducement, industry relevancy, and program relevancy.⁴¹

Furthermore, we find that section 776(d)(2) applies as an exception to the selection of an adverse facts available rate under 776(d)(1); that is, after "an evaluation of the situation that resulted in the application of an adverse inference," Commerce may decide that given the unique and unusual facts on the record, the use of the highest rate within that step is not appropriate.

⁴⁰ In an investigation, unlike an administrative review, Commerce is just beginning to achieve an understanding of how the industry under investigation uses subsidies. Commerce may have no prior understanding of the industry and no final calculated and verified rates for the industry.

⁴¹ It is significant that all interested parties, since at least 2007, that choose not to provide requested information have been put on notice that Commerce, in the application of facts available with an adverse inference, may apply its hierarchy methodology and select the highest rate in accordance with that hierarchy. See, e.g., *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007), and accompanying IDM at 2, dated October 17, 2007 ("As AFA in the instant case, the Department is relying on the highest calculated final subsidy rates for income taxes, VAT and Policy lending programs of the other producer/producer in this investigation, Gold East Paper (Jiangsu) Co., Ltd. (GE). GE did receive any countervailable grants, so for all grant programs, we are applying the highest subsidy rate for any program otherwise listed..."). Therefore, when an interested party is making a decision as to whether or not to cooperate and respond to a request for information by Commerce, it does not make this decision in a vacuum; instead, the interested party makes this decision in an environment in which Commerce may apply the highest rate as adverse facts available under its hierarchy.

There are no facts on this record that suggest that a rate other than the highest rate envisioned under the appropriate step of the hierarchy applied in accordance with section 776(d)(1) of the Act should be applied as adverse facts available. As explained below, Commerce is applying adverse facts available because the Government of China, Chalco Ruimin, Chalco-SWA, Mingtai, and Yong Jie New Material chose not to cooperate by not providing the information Commerce requested. Therefore, we find that the record does not support the application of an alternative rate, pursuant to section 776(d)(2) of the Act.

In determining the program-specific AFA rates we will apply to Chalco Ruimin, Chalco-SWA, Mingtai, and Yong Jie New Material, we are guided by Commerce's methodology detailed above. We begin by selecting, as AFA, the highest calculated program-specific above-zero rates determined for a cooperating respondent in the instant investigation, as applicable to each company. Accordingly, we are applying the highest applicable subsidy rates for Chalco Ruimin, Chalco-SWA, Mingtai, and Yong Jie New Material for the following programs:⁴²

1. Government of China – Financial Contribution and Specificity for Certain Alleged Subsidy Programs

Commerce's initial questionnaire instructed the Government of China to respond on behalf of all mandatory respondent companies, including Chalco Ruimin and Chalco-SWA.⁴³ In its response, the Government of China stated that it was responding to the questionnaire with respect to the alleged programs used by the mandatory respondents Mingtai and Yong Jie New Material Co.⁴⁴ In a supplemental questionnaire, Commerce instructed the Government of China that it should, "provide complete questionnaire responses for all programs under investigation and for all mandatory respondents to this investigation."⁴⁵ In its response to this supplemental questionnaire, the Government of China stated that it would not provide information for any companies other than Mingtai and Yong Jie New Material.⁴⁶

⁴² In the *Preliminary Determination*, we inadvertently selected rates that were inconsistent with our AFA hierarchy methodology. For this final determination, in accordance with the AFA hierarchy, we corrected the Export Sellers Credit program AFA rate to reflect the highest rate for an identical program. For the seven programs that we are treating as grants, we have corrected the rates to reflect the highest rate for a similar program based on benefit or type. See Appendix to this memorandum.

⁴³ See Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Countervailing Duty Questionnaire," dated December 20, 2017 (December 20, 2017 (CVD Questionnaire)), at 18.

⁴⁴ See Government of China Letter, "GOC Initial CVD Questionnaire Response: Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China (C-570-074 {})," dated February 6, 2018, at 7.

⁴⁵ See Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Request for Additional Information Regarding the Government of the People's Republic of China's Response to the December 20, 2017 initial questionnaire," dated March 5, 2018.

⁴⁶ See Government of China Letter, "GOC First Supplemental Questionnaire Response: Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China (C-570-074 {})," dated March 20, 2018.

Because of the Government of China's refusal to provide the requested information, the record is incomplete with regard to program information about alleged subsidies that could have been used by Chalco Ruimin and Chalco-SWA.⁴⁷ Specifically, the Government of China only provided information pertaining to the financial contribution and specificity of subsidy programs that were reported as "used" by Mingtai and Yong Jie New Material. For the remaining alleged subsidy programs, there is no record information from the Government of China as to whether the alleged subsidies provided a financial contribution or whether the alleged programs are specific. By not responding to the initial questionnaire with regard to alleged subsidies that could have been used by Chalco Ruimin and Chalco-SWA, the Government of China withheld information that had been requested and failed to provide information with the deadlines established. Therefore, in reaching a final determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we base our findings regarding the specificity and financial contribution by the Government of China for these alleged subsidies on facts otherwise available.

Moreover, we determine that an adverse inference is warranted, pursuant to section 776(b) of the Act, because the Government of China did not cooperate to the best of its ability to comply with the requests for information in this investigation. Commerce is, therefore, finding all programs in this proceeding for which the Government of China did not provide information pertaining to financial contribution or specificity to be countervailable – that is, these programs provide a financial contribution within the meaning of sections 771(5)(B)(i) and (D) of the Act and are specific within the meaning of section 771(5A) of the Act. We are including those programs upon which Commerce initiated in this investigation in determining the AFA rate for Chalco Ruimin and Chalco-SWA.⁴⁸

2. Yong Jie New Material - Unreported Financing

As discussed further in Comment 6 below, Commerce was unable to verify certain financing information that was submitted by Yong Jie New Material. Specifically, Commerce was unable to reconcile Yong Jie New Material's reported loans to its financial statements due to the discovery at verification of additional, unreported loans (*i.e.*, alleged letters of credit) and other forfeiting interest.⁴⁹ Commerce also discovered that Yong Jie New Material's reported interest paid did not match the loan interest report in the reconciliation worksheet, which was based on its accounting system.⁵⁰ Further, Commerce found additional reporting discrepancies pertaining to the interest rate and days covered by the interest payments for the two pre-selected loans that Commerce reviewed at verification.⁵¹

Accordingly, given the information reported in its questionnaire responses, and the conflicting information discovered at verification, we determine that Yong Jie New Material withheld requested necessary information during the course of the investigation, impeded the proceeding, and, through its actions, prevented Commerce from being able to verify that information.

⁴⁷ *Id.*

⁴⁸ See Appendix for the AFA rates for Chalco Ruimin and Chalco-SWA.

⁴⁹ See Yong Jie New Material Verification Report at 10-11.

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 11-12.

Therefore, Commerce determines that the use of facts available pursuant to sections 776(a)(1) and 776 (a)(2)(A), (C), & (D) of the Act is warranted in determining whether Yong Jie New Material held countervailable financing during the POI.

We further find that an adverse inference is warranted, pursuant to section 776(b) of the Act. Despite repeated requests,⁵² Yong Jie New Material failed to accurately report its outstanding loans. As a result, we find that Yong Jie New Material did not act to the best of its ability in this investigation. In drawing an adverse inference, we find that Yong Jie New Material benefitted from the alleged financing subsidy programs. These alleged financing programs include Policy Loans, Export Seller's Credit, Export Buyer's Credit,⁵³ and Export Loans from Chinese State-Owned Banks programs.⁵⁴ For further discussion, *see* Comment 6 below.

Consistent with section 776(d) of the Act and our established practice, we used the highest non-*de minimis* rate calculated for an identical program in another China proceeding for Export Seller's Credit program, which is 4.25 percent.⁵⁵ For the Policy Lending to the Aluminum Sheet Industry, Export Buyer's Credit, and the Export Loans from Chinese State-Owned Banks, because there are no calculated rates for these programs from another proceeding, we sought the highest non-*de minimis* rate calculated for a comparable or similar program (based on the treatment of the benefit) in another China proceeding. The highest calculated rate for a similar program in another China proceeding for these programs is 10.54 percent.⁵⁶

Consistent with the *Preliminary Determination*, we find that Policy Loans to the Common Alloy Sheet Industry provide a financial contribution within the meaning of sections 771(5)(B)(i) and 771(5)(D)(i) of the Act, and are specific within the meaning of section 771(5A)(D)(i) of the Act.⁵⁷ For Export Loans from Chinese State-Owned Banks, Export Buyer's Credits, and Export Seller's Credits, as explained, *supra*,⁵⁸ we determine that these programs provided a financial contribution within the meaning of sections 771(5)(B)(i) and (D) of the Act and are specific within the meaning of section 771(5A) of the Act.

⁵² See CVD Questionnaire at 66-67; Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Request for Additional Information Regarding February 6, 2018 Questionnaire Responses," dated March 1, 2018 at 6-7; and Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Request for Additional Information Regarding March 16, 2018," dated March 28, 2018.

⁵³ As explained in the *Preliminary Determination*, we have applied AFA due to the Government of China's failure to provide information that was requested by Commerce about this program.

⁵⁴ Because Yong Jie New Material is not a state-owned enterprise, we find that it could not have benefitted from the Loans to State-Owned Enterprises program.

⁵⁵ See *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011) (*Citric Acid from China*), and accompanying IDM at "Export Seller's Credit for High-and New-Technology Products."

⁵⁶ See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet Fed Presses from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 70201, 70202 (November 17, 2010) (*Coated Paper from China*) (revised rate for "Preferential Lending to the Coated Paper Industry" program).

⁵⁷ See PDM at 40-42.

⁵⁸ See above at "1. Government of China – Financial Contribution and Specificity for Certain Alleged Subsidy Programs." See also PDM at 24-26.

3. Mingtai – Unreported Financing

As explained in the *Preliminary Determination*, Mingtai did not report all of its financing that was outstanding during the POI.⁵⁹ The record is thus incomplete with regard to Mingtai's outstanding loans, and we therefore must rely on "facts otherwise available" in issuing our final determination, pursuant to section 776(a)(2)(A) of the Act. Moreover, by failing to provide information that it was otherwise able to provide, we find that Mingtai did not act to the best of its ability to comply with our request for information. Consequently, we find that an adverse inference is warranted in the application of facts available pursuant to section 776(b) of the Act. In drawing an adverse inference, we find that Mingtai benefitted from the alleged financing subsidy programs. These alleged financing programs include Policy Loans, Export Seller's Credit, Export Buyer's Credit,⁶⁰ and Export Loans from Chinese State-Owned Banks programs.⁶¹

Consistent with section 776(d) of the Act and our established practice, we used the highest non-*de minimis* rate calculated for an identical program in another China proceeding for Export Seller's Credit program, which is 4.25 percent.⁶² For the Policy Lending to the Aluminum Sheet Industry, the Export Loans from Chinese State-Owned Banks, and the Export Buyer's Credit programs, because there are no calculated rates for these programs from another proceeding, we sought the highest non-*de minimis* rate calculated for a comparable or similar program (based on the treatment of the benefit) in another China proceeding. The highest calculated rate for a similar program in another China proceeding for these programs is 10.54 percent.⁶³

Consistent with the *Preliminary Determination*, we find that Policy Loans to the Common Alloy Sheet Industry provide a financial contribution within the meaning of sections 771(5)(B)(i) and 771(5)(D)(i) of the Act, and are specific within the meaning of section 771(5A)(D)(i) of the Act.⁶⁴ For Export Loans from Chinese State-Owned Banks, Export Buyer's Credits, and Export Sellers Credits, as explained, *supra*,⁶⁵ we determine that these programs provided a financial contribution within the meaning of sections 771(5)(B)(i) and (D) of the Act and are specific within the meaning of section 771(5A) of the Act.

⁵⁹ See PDM at 38-39.

⁶⁰ As explained in the *Preliminary Determination*, we have applied AFA due to the Government of China's failure to provide information that was requested by Commerce about this program.

⁶¹ Because Mingtai is not a state-owned enterprise, we find that it could not have benefitted from the Loans to State-Owned Enterprises program.

⁶² See *Citric Acid from China* IDM at "Export Seller's Credit for High-and New-Technology Products."

⁶³ See *Coated Paper from China* (revised rate for "Preferential Lending to the Coated Paper Industry" program).

⁶⁴ See PDM at 40-42.

⁶⁵ See above at "1. Government of China – Financial Contribution and Specificity for Certain Alleged Subsidy Programs." See also PDM at 24-26.

IX. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

1. Policy Loans to the Common Alloy Sheet Industry

The domestic industry, the Government of China, Mingtai, and Yong Jie New Material submitted comments in either their case or rebuttal briefs regarding this program and the calculation methodology. These are addressed in Comments 6 and 8. As discussed in Comment 6, Commerce has made certain changes to the methodology used to calculate Yong Jie New Material's subsidies under this program since the *Preliminary Determination*.

Mingtai:	10.54 percent <i>ad valorem</i>
Yong Jie New Material:	10.54 percent <i>ad valorem</i>

2. Export Loans from Chinese State-Owned Banks

No parties commented on this program. However, as discussed in the Use of Facts Otherwise Available and Adverse Inferences section above, Commerce has made changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination* subsequent to its application of AFA to Mingtai's and Yong Jie's lending programs.

Mingtai:	10.54 percent <i>ad valorem</i>
Yong Jie New Material:	10.54 percent <i>ad valorem</i>

3. Export Seller's Credit

No parties commented on this program. However, as discussed in the Use of Facts Otherwise Available and Adverse Inferences section above, Commerce has made changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination* subsequent to its application of AFA to Mingtai's and Yong Jie's lending programs.

Mingtai:	4.25 percent <i>ad valorem</i>
Yong Jie New Material:	4.25 percent <i>ad valorem</i>

4. Export Buyer's Credit

The domestic industry, the Government of China, Mingtai, and Yong Jie submitted comments in either their case or rebuttal briefs regarding this program. As explained below in Comment 4, Commerce has made no changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*.

Mingtai:	10.54 percent <i>ad valorem</i>
Yong Jie New Material:	10.54 percent <i>ad valorem</i>

5. Income Tax Reduction for Research and Development Expenses Under the Enterprise Income Tax Law

No parties commented on this program. However, as discussed in Comment 9, Commerce made corrections to Mingtai's total sales denominator, which was used to calculate the benefit Mingtai experienced from this program.

Mingtai: 0.06 percent *ad valorem*

6. Income Tax Credits for Purchase of Special Equipment

No parties commented on this program. However, as discussed in Comment 9, Commerce made corrections to Mingtai's total sales denominator, which was used to calculate the benefit Mingtai experienced from this program.

Mingtai: 0.02 percent *ad valorem*

7. VAT Rebates on Domestically-Produced Equipment

No parties commented on this program. Commerce has made no changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*.

Yong Jie New Material: 0.05 percent *ad valorem*

8. Government Provision of Land for Less Than Adequate Remuneration

The domestic industry and Mingtai commented on this program in their case or rebuttal briefs. As explained below in Comment 7, Commerce has made changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*. Further, as discussed in Comment 9, Commerce made corrections to Mingtai's total sales denominator, which was used to calculate the benefit Mingtai experienced from this program.

Mingtai: 0.37 percent *ad valorem*

Yong Jie New Material: 0.24 percent *ad valorem*

9. Government Provision of Primary Aluminum for Less Than Adequate Remuneration

The domestic industry and the Government of China submitted comments in their case or rebuttal briefs regarding this program. As explained below in Comment 5, Commerce has made no changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*. However, as discussed in Comment 9, Commerce made corrections to Mingtai's total sales denominator, which was used to calculate the benefit Mingtai experienced from this program.

Mingtai: 4.09 percent *ad valorem*
Yong Jie New Material: 15.67 percent *ad valorem*

10. Government Provision of Steam Coal for Less Than Adequate Remuneration

The domestic industry and the Government of China submitted comments in their case or rebuttal briefs regarding this program. As explained below in Comment 7, Commerce has made no changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*. However, as discussed in Comment 9, Commerce made corrections to Mingtai's total sales denominator, which was used to calculate the benefit Mingtai experienced from this program.

Mingtai: 5.20 percent *ad valorem*

11. Government Provision of Electricity for Less Than Adequate Remuneration

The domestic industry and Mingtai submitted comments in their case or rebuttal briefs regarding this program. As explained below in Comment 9, Commerce has made changes to the methodology used to calculate or attribute subsidies under this program since the *Preliminary Determination*.

Mingtai: 0.86 percent *ad valorem*
Yong Jie New Material: 0.86 percent *ad valorem*

12. "Other Subsidies"

No parties commented on these programs. Commerce has made no changes to the methodology used to calculate or attribute subsidies under these programs since the *Preliminary Determination*.

Mingtai: 0.01 percent *ad valorem*
Yong Jie New Material: 2.33 percent *ad valorem*

B. Programs Determined Not Used by, or Not to Confer a Measurable Benefit to, Mingtai and Yong Jie

1. Preferential Loans for State-Owned Enterprises (SOEs)
2. Equity Infusions into Nanshan Aluminum
3. Dividends for SOEs from Distributing Dividends
4. Income Tax Concessions for Enterprises Engaged in Comprehensive Resource Utilization
5. Income Tax Deductions/Credits for Purchase of Special Equipment
6. Stamp Tax Exemption on Share Transfers Under Non-Tradeable Share Reform
7. Deed Tax Exemption for SOEs Undergoing Mergers or Restructuring
8. Government of China and Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands

9. The State Key Technology Renovation Project Fund
10. Foreign Trade Development Fund Grants
11. Grants for Energy Conservation and Emission Reduction
12. Grants for the Retirement of Capacity
13. Grants for the Relocation of Productive Facilities
14. Grants for Nanshan Aluminum

X. ANALYSIS OF COMMENTS

Comment 1: Whether Commerce’s Self-Initiation of this Investigation Was Lawful

Government of China’s Comments:

- Commerce’s self-initiation of this investigation was in violation of its obligations under the WTO, and not in accordance with law or with Commerce’s past practice.⁶⁶
- Commerce has self-initiated only twice before – in cases involving semi-conductors from Japan, where the investigation was later suspended, and softwood lumber from Canada. Both of those cases, as opposed to this investigation, represented extraordinarily rare exceptions to the petition-based initiation.⁶⁷
- Commerce’s authority to self-initiate derives from the Trade Agreement of 1979 implementing the General Agreement on Tariffs and Trade (GATT). GATT stipulated that investigations may only be self-initiated under “special circumstances.”⁶⁸ After the establishment of the WTO, similar provisions were included in the SCM Agreement. However, neither of the agreements defined what “special circumstances” meant.⁶⁹
- In 1998, when Venezuela asked the United States to clarify under what circumstances a self-initiated investigation could be carried out consistent with 19 CFR 351.201, the United States answered that it would do so “only in situations involving special circumstances.”⁷⁰
- The only self-initiated CVD investigation was of *Softwood Lumber from Canada*. In the initiation notice of that case, Commerce stated that Canada’s withdrawal from the 1986 Memorandum of Understanding (MOU) were the special circumstances prompting the investigation.⁷¹ Commerce also self-initiated that investigation after consultations with Canada.
- Canada appealed to a GATT panel claiming, among other things, that there were no “special circumstances.”

⁶⁶ See Government of China’s Case Brief at 3.

⁶⁷ *Id.* at 6-12 (citing Report of the Panel, *Japan – Trade in Semi-Conductors*, L/6309 (May 4, 1988) GATT BISD (35th Supp.) at 116 (1989) and Report of the Panel, *United States – Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162 (October 27, 1993) GATT BISD (40th Supp.) at 358 (1993) (*Softwood Lumber from Canada* GATT Report).

⁶⁸ *Id.* at 4 (citing Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 2, WTO Doc. LT/TR/A/3 (April 12, 1979).

⁶⁹ *Id.* at 4-6.

⁷⁰ *Id.* at 5-6 (citing *Notification of Laws and Regulations Under Articles 18.5 and 42.6 of the Agreements, Replies of the United States to Questions Posed by Japan and Venezuela*, G/ADP/Q1/USA/8, G/SCM/Q1/USA/8 (July 6, 1998) at “Replies to Questions Posed by Venezuela, Q.1.”).

⁷¹ *Id.* at 8 (citing *Certain Softwood Lumber Products from Canada: Self-Initiation of Countervailing Duty Investigation*, 56 FR 56055 (October 31, 1991) (*Softwood Lumber from Canada*)).

- The GATT panel found that Canada’s termination of the MOU constituted a “special circumstance.” Although the GATT panel stated that “special circumstances” were not defined in the Trade Agreement of 1979, the panel stated that “special circumstances” would have to be “sufficiently exceptional” to not undermine the main purpose of the initiation provision which was to ensure petition-based initiations. Also, the GATT panel stated that the requirement for “special circumstances” is in addition to the “sufficiency of evidence.”
- Commerce failed to identify or articulate any basis for the “special circumstances” in this investigation.
- Although Commerce referred to potentially unique considerations concerning “systematic and significant over-capacity in the Chinese aluminum industry,” Commerce provided no indication that it considers this a “special circumstance.”
- Commerce also failed to indicate how this investigation involved sufficiently exceptional circumstances to ensure that investigations were normally initiated through a petition procedure.
- This investigation could and should have been initiated through the normal petition procedure because (1) the initiation memoranda relied heavily on information provided by counsel (Kelley Drye) for the domestic aluminum sheet industry, (2) Kelley Drye is one of the most prolific petitioning law firms, (3) Kelley Drye represented petitioners in the Aluminum Foil from China AD/CVD investigations, and (4) Commerce already self-initiated a Section 232 investigation concerning aluminum imports and the President exercised his authority to impose a 10 percent tariff on aluminum imports.

Domestic Industry Rebuttal Comments:

- Indication of “special circumstances” is not a threshold requirement for self-initiations, and Commerce’s decision to self-initiate was consistent with law and past practice.⁷²
- The statute mandates that Commerce self-initiate if an examination of the elements under section 701(a) of the Act is warranted and the Government of China has identified no legal authority to show how Commerce did not comport with U.S. law by self-initiating this investigation.⁷³
- Commerce has long recognized that U.S. law is fully compliant with United States’ WTO obligations.⁷⁴
- Commerce satisfied the requirements for self-initiating this investigation by identifying the factual information and explaining how that information provides sufficient basis for further examination of the elements under section 701(a) of the Act.
- The Government of China has identified no legal authority to show how Commerce did not comport with U.S. law by self-initiating this investigation.
- Additionally, “special circumstances” is not defined in the GATT or the SCM Agreement.
- In response to Venezuela’s question regarding self-initiations in 1998, the United States did not offer a definition of “special circumstances.”

⁷² See Domestic Industry Case Brief at 6.

⁷³ *Id.* 6-7.

⁷⁴ *Id.* at 10 (citing *Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from India: Final Affirmative Determination*, 83 FR 3122 (January 23, 2018) (*Fine Denier PSF from India*), and accompanying IDM at Comment 1.

- Commerce’s investigation was warranted because of the rapid increase in imports of subject merchandise and “systemic and significant over-capacity in the Chinese aluminum industry.”
- This self-initiation is consistent with both the United States’ response to the question posed by Venezuela and the GATT panel report regarding softwood lumber from Canada, because in its initiation notice Commerce stated it rarely invoked this statutory authority and expects future investigations to normally proceed based on petitions
- Finally, Commerce’s purported failure to identify “special circumstances” in the initiation notice was not inconsistent with its past practice, because in one of the only two prior self-initiations which involved semiconductors from Japan, Commerce did not refer to any special circumstances. Therefore, the Government of China cannot claim the existence of any past practice regarding this issue.

Commerce’s Position: Consistent with U.S. law, Commerce initiated this case based on record evidence of potential countervailable subsidization of the Chinese common alloy aluminum sheet industry. The United States law is consistent with our WTO obligations. The fact that U.S. law does not contain the words “special circumstances,” and that Commerce did not use those words in its determination does not mean that U. S. law and the determination to self-initiate are inconsistent with the WTO obligations. AD and CVD investigations are normally initiated through a petition procedure. This case represents an exception rather than the norm because of the unusual facts involving a rapid increase in import volumes over the last three years and a “systemic and significant over-capacity in the Chinese aluminum industry,” as stated in the initiation notice.⁷⁵ Commerce stated in the initiation notice that it expects most of the subsequent investigations to normally proceed based on petitions filed by or on behalf the industry.

Comment 2: Whether Commerce’s Investigation of Critical Circumstances Was Lawful

AA Metals Comments:

- Commerce lacked legal authority to consider the issue of critical circumstances in this self-initiated investigation.⁷⁶
- Pursuant to 19 CFR 351.206(b), Commerce may consider the issue of critical circumstances only when it receives a written allegation of critical circumstances from a petitioner; or on its own initiative, examines whether critical circumstances exist.⁷⁷
- Commerce cannot make a determination without meeting the procedural predicates.⁷⁸
- In self-initiated investigations, Commerce may consider the issue of critical circumstances only on its own initiative because there is no petitioner.

⁷⁵ See *Common Alloy Aluminum Sheet from the People’s Republic of China: Initiation of Less-Than-Fair-Value and Countervailing Duty Investigations*, 82 FR 57214 (December 4, 2017).

⁷⁶ See AA Metals, Inc.’s Case Brief, “Countervailing Duty Investigation on Common Alloy Aluminum Sheet from the People’s Republic of China: Case Brief,” dated July 27, 2018 (AA Metals Case Brief).

⁷⁷ *Id.* at 1 and 3 (citing *e.g. Jennings v. Rodriguez*, 138 S. Ct. 830,844 (2018) (“Negative-Implication Canon: Expression of one thing implies the exclusion of others (expression *unius est exclusion alterius*)” (internal citations omitted)).

⁷⁸ *Id.* at 2 (citing *Carton-Closing Staples from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 13236 (March 28, 2018), and accompanying IDM at Comment 4).

- Commerce did not allege the presence of critical circumstances on its own initiative and did so only after the issue was raised by the domestic industry.
- Commerce did not articulate why it initiated the inquiry into critical circumstances other than reliance on the domestic industry's allegations.
- Therefore, Commerce's preliminary critical circumstances determination is unlawful, and Commerce should reverse that determination in the final determination.

Domestic Industry Rebuttal Comments:

- Commerce's preliminary critical circumstances determination is lawful.⁷⁹
- AA Metals does not challenge the substantive basis for Commerce's inquiry into critical circumstances.
- Commerce had the necessary information on the record to support a critical circumstances investigation, albeit placed on the record by the domestic industry.
- The statute is silent as to whether a domestic interested party may allege critical circumstances in a self-initiated investigation; therefore, Commerce is entitled to a *Chevron* deference for construction of the statute that a domestic interested party may do so.⁸⁰
- Commerce's decision to rely on information submitted by the domestic industry for considering the issue of critical circumstance is permissible because the domestic industry has acted in a manner similar to that of a petitioner.

Commerce's Position: Generally, Commerce will make a finding of whether critical circumstances exist if a petitioner submits a written allegation.⁸¹ In self-initiated investigations, Commerce will examine whether critical circumstances exist on its own initiative.⁸² Neither the statute nor the regulations preclude Commerce from making a critical circumstances finding based on record evidence in the absence of a petitioner allegation. While the regulations provide detail on how a petitioner's request for critical circumstances must be treated, there is no prohibition on Commerce conducting a critical circumstances analysis on its own when it has evidence that critical circumstances exist. Such a reading of the statute and the regulations would undermine the effectiveness of any resulting investigation margins. Therefore, we find that Commerce, when faced with record evidence of critical circumstances, has the authority to make a finding of whether critical circumstances exist on its own initiative, using available information that was appropriately placed on the record.

⁷⁹ See Domestic Industry Rebuttal Brief at 64.

⁸⁰ *Id.* at 65 (citing "19 U.S.C. §1677b(e)(1) {sic} and *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*)).

⁸¹ See 19 CFR 351.206(b).

⁸² *Id.*

Comment 3: Whether to Make a Separate Critical Circumstances Determination for TCI

TCI Comments:

- TCI refiles its April 26, 2018, submission as its case brief on the preliminary determination.⁸³
- TCI provides rebuttal information to the GTA data placed on the record by Commerce within the standard ten-day rule period given for rebuttal facts from the date Commerce introduced new facts into the record on April 18, 2018.⁸⁴
- In its preliminary critical circumstances determination, Commerce stated that it analyzed “all-other” exporters’ export volumes based on Global Trade Atlas (GTA) data.
- In so doing, Commerce made two factual assumptions: (1) the GTA Harmonized Tariff Schedule (HTS) numbers accurately represented the merchandise under consideration,⁸⁵ and (2) “all-other” exporters increased their exports in the same amount.
- Based on the data submitted for TCI’s two China exporters, Commerce should not find critical circumstances in its final determination.
- Additionally, Commerce should (1) consider the shipment data for the entire period between initiation and the preliminary determination – not just the first three months after the initiation of the investigation,⁸⁶ and (2) exclude certain shipments by TCI’s China exporter from its “massive imports” analysis because those shipments were not motivated by foreign exporters seeking to avoid AD/CVD duties.

Domestic Industry Rebuttal Comments:

- TCI’s April 26, 2018, submission of new factual information was not timely because TCI’s letter intended to rebut the GTA import data for “all-other” exporters which was *first* placed on the record by the Domestic Industry on March 23, 2018, and again on April 11, 2018.⁸⁷
- TCI did not identify any authority or practice for issuing a separate critical circumstances determination for a non-mandatory respondent. Moreover, doing so would be unduly burdensome for Commerce and U.S. Customs and Border Protection (CBP) because CBP

⁸³ See Ta Chen International Inc.’s, Empire Resources Inc.’s, and Galex Inc.’s Case Brief, “Common Alloy Aluminum Sheet from People’s Republic of China,” dated July 27, 2018 (TCI Case Brief).

⁸⁴ *Id.* at 2 (citing 19 CFR 351.102(b)(21)(v) and 19 CFR 351.301).

⁸⁵ *Id.* at 1 (citing *Preliminary Determination* (“Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive.”) and *Common Alloy Aluminum Sheet from China: Investigation Nos. 701-TA-591 and 731-TA-1399 (Preliminary)*, Publication 4757, January 2018 (“The National Marine Manufacturers Association, Recreational Vehicle Manufacturers Association and S F Smith Co. state that tariff categories, which are the same as used by Commerce as to the above GTA data, include non-subject product and do not include aluminum can stock and so cannot insure integrity as to what mean {sic}, so should use questionnaire data.”)).

⁸⁶ *Id.* at 2 (citing *Bottom Mount Combination Refrigerator-Freezers from Korea*, 77 FR 17413, 17416 (March 26, 2012)).

⁸⁷ See Domestic Industry Case Brief at 66-67.

entry data used for respondent selection indicated 681 potential producers or exporters of merchandise under consideration.⁸⁸

Commerce's Position: We continue to find that critical circumstances exist for all-other companies. Consistent with our practice, we have not determined critical circumstances using individual shipment data, except for cooperative companies that were selected as mandatory respondents.⁸⁹

The critical circumstances provisions are focused on determining whether a surge of sales to the United States occurred in response to the filing of an AD/CVD petition. Analyzing producer data evidences whether that producer increased its sales following the filing of a petition. An importer-specific analysis would allow a producer to mask such a surge by selling to multiple exporters or importers. Finally, Commerce agrees that the importer-specific methodology proposed by TCI would be unduly burdensome for Commerce to administer. As the domestic industry has argued, as a matter of equity, Commerce cannot make importer-specific critical circumstances determinations based on data from TCI's two China exporters without doing the same for all-other importers. Much of the specific shipment data used in such an analysis would be difficult, if not impossible, to verify, particularly if shipments originate with producers who have declined to cooperate.

TCI also claims that the GTA data under the HTS numbers used by Commerce for making its critical circumstances determination for the "all-other" companies included non-subject merchandise. However, consistent with our practice, we collect data based on the non-basket HTS category numbers listed in the scope.⁹⁰ TCI did not suggest how we could adjust the data reported under the HTS numbers used by Commerce to remove shipments of non-subject merchandise. Thus, we continue to use data from the non-basket category HTS numbers listed in the scope.

⁸⁸ *Id.* at 67 (citing Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Respondent Selection," dated December 20, 2017 at 2).

⁸⁹ *See, e.g., Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 80 FR 34888 (June 18, 2015), and accompanying IDM at Comment 24; *see also, e.g., Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008), and accompanying IDM at Comment 10.

⁹⁰ *See, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012), and accompanying IDM at 10.

Comment 4: Whether Commerce Should Continue to Apply AFA to the Export Buyer's Credit Program

Government of China's Comments:⁹¹

- Any failure of the Government of China to provide information goes to the issue of countervailability, not use. Thus, there was no ambiguity with regard to the fact that the Export Buyer's Credit program was not used by the respondents' customers.
- Commerce stated that due to the Government of China's failure to provide the 2013 Administrative Measures (2013 Measures) revisions, regarding the two-million-dollar threshold, it lacked information critical to understanding how the program operates and to make a determination.
- Commerce has never used this as the threshold for finding non-use even when this program was previously verified. At past verifications Commerce has looked to review the China Export-Importer Bank (China Ex-Im Bank) database, the two-million-dollar threshold is irrelevant, and Commerce could have conducted a similar verification.
- Commerce failed to determine whether the absence of this information on the record had any real impact, and whether it created a gap in the record that required the use of AFA.⁹²
- Even with the Government of China's failure to provide certain information Commerce still could have determined usage by the Government of China's questionnaire responses, verification, or declarations of non-use by the respondent's customers. Commerce's refusal was unreasonable and unsupported by substantial evidence.
- There is evidence on the record from both the Government of China and respondents that this program was not used. In *Roasted Pistachios from Iran*, Commerce stated, "if information on the record indicates that the respondent did not use the program, the Department will find the program was not used, regardless of whether the foreign government participated to the best of its ability."⁹³
- In *Hot-Rolled Steel from India* Commerce stated, "...the Department relies on information provided by respondent firms to determine the extent to which the firms benefited from the alleged subsidy program."⁹⁴
- Mingtai placed declarations on the record from all of their U.S. customers certifying to the fact that they received no funding from the China Ex-Im Bank either directly or indirectly. Commerce should follow the precedent established in *Solar Cells from China; 2013*⁹⁵ and find the declarations sufficient to establish non-use of the Export Buyer's Credit Program.

⁹¹ See Government of China's Case Brief at 26-37.

⁹² See *Zhejiang Dunan Hetian Metal Co., Ltd. v. United States*, 652 F. 3d 1333, 1348 (Fed. Cir. 2011) (noting, "Commerce can only use facts otherwise available to fill a gap in the record.")

⁹³ See *Countervailing Duty New Shipper Review: Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran*, 73 FR 9993 (February 25, 2008) (*Roasted Pistachios from Iran*), and accompanying IDM at comment 2.

⁹⁴ See *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*Hot Rolled Steel from India*), and accompanying IDM at Comment 6.

⁹⁵ 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 from China; 2013*).

- In *Boltless Steel Shelving Units from China*, Commerce did not verify the China Ex-Im Bank and still found that the program was not used during the POI based on the Government of China's responses and verification of non-use at both respondents.⁹⁶
- The applied AFA rate of 10.54 percent is unreasonable. The highest rate a company could receive for this program should be 0.56 percent *ad valorem*. Similar to how Commerce has recognized a limitation on Chinese tax programs where it capped the AFA CVD rate for income tax programs at 25 percent, the Department should do the same here.
- Commerce should expressly recognize that the Export Buyer's Credit program is an export subsidy program as it noted in its initiation checklist when stating, "export buyer's credits are specific because they are contingent on export performance under section 771(5A)(A) and (B) of the Act."⁹⁷

Mingtai Comments:⁹⁸

- Commerce's finding that respondents benefitted from the export buyer's credit program was not supported by substantial evidence. Further, Mingtai acted to the best of its ability.
- The Government of China confirmed that none of the respondents' identified U.S. customers used the program during the POI. Mingtai confirmed that none of its customers received any kind of buyer's credits under the program. Mingtai also provided declarations from its customers certifying it did not apply for or receive buyer's credits.
- In line with both *Boltless Steel Shelving Units from China* and *Chlorinated Isocyanurates from China; 2012*, Commerce could and should have verified non-use at respondents' headquarters.⁹⁹
- The program requires that the exporter, Mingtai, buy export credit insurance as a prerequisite to apply for the buyer's credit. Because Mingtai did not buy any insurance for exports its customers could not have applied for an export buyer's credit.
- Where the Government of China fails to respond to Commerce's questionnaire, Commerce's normal practice is to apply adverse facts available to the benchmark information requested from the Government of China but use the respondents' own data to measure the benefit received. Therefore, Commerce should use Mingtai's data, reported non-use, which is verifiable. It is unreasonable to assume that Mingtai's customers are wholly incapable of identifying the sources and reasons for their loan receipt, Commerce may not speculate that they did receive loans when they reported that they did not.
- Furthermore, Commerce's selection of the 10.54 percent rate from *Coated Paper from China*¹⁰⁰ was unreasonable. It is not the appropriate facts available rate because the program "Preferential Lending to the Coated Paper Industry" is not the same or similar to any export lending or financing program that Mingtai may have used.

⁹⁶ See *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 51775 (August 26, 2015) (*Boltless Steel Shelving Units from China*), and accompanying IDM at Comment X.

⁹⁷ See Memorandum, "Initiation of the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China," dated November 28, 2017.

⁹⁸ See Mingtai's Case Brief at 17-31.

⁹⁹ See *Boltless Steel Shelving Units from China*, and accompanying IDM at Comment X; see also *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isocyanurates from China; 2012*), and accompanying IDM at 15.

¹⁰⁰ See *Coated Paper from China*, 75 FR 70201, 70202.

- The Department should use the “policy lending” rate from the investigation of *Aluminum Foil from China*.¹⁰¹ In that investigation the Department determined a 3.62 percent subsidy rate for policy loans to the aluminum foil industry. Alternatively, the Department can choose to use the 0.82 percent subsidy rate calculated for the “export seller’s credit” program also from the *Aluminum Foil from China* investigation. Mingtai produces and sells aluminum foil and, thus, is in the same industry and getting the same loans as those in the aluminum foil industry.¹⁰²
- The name of the program, as well as the fact that there is a separate domestic lending program, indicate that the Export Buyer’s Credit program is in fact export dependent. The Department’s initiation memorandum also indicated that this program was export specific. The Department should find this program specific according to section 771(5A)(B) of the Act and a corresponding adjustment should be made to the antidumping cash deposit rate.¹⁰³

Yong Jie New Material’s Comments:¹⁰⁴

- Both Yong Jie New Material and the Government of China answered all of Commerce’s questions regarding the Export Buyer’s Credit program. Both parties reported that no U.S. customers obtained any benefit under this program.
- Citing the initial questionnaire to the Government of China, Yong Jie New Material argued that if the program was not used, the Government of China did not have to fully answer the questionnaire.¹⁰⁵ The additional questions in the Standards Questions Appendix were irrelevant.
- The response that no U.S. customers received any export buyer credits is substantial evidence on the record. Therefore, Commerce’s decision to use AFA because it thought information was missing was not based on substantial evidence.¹⁰⁶
- Commerce may not treat failure to cooperate the same as failure to provide requested information.¹⁰⁷ Commerce may not use AFA against a government when there is no evidence it maintained the data it refused to give Commerce.¹⁰⁸
- Citing *Chevron*, Yong Jie New Material argues that if the statute has spoken to an issue, then it is settled; however if the statute is unclear Commerce may make a decision that is both reasonable and based on substantial evidence.¹⁰⁹ Here, with both the Government of China and Yong Jie New Material answering “no,” the matter is settled because the statute is clear that Commerce cannot use either facts otherwise available or adverse facts available unless

¹⁰¹ See *Countervailing Duty Investigation of Certain Aluminum Foil from the People’s Republic of China: Final Affirmative Determination*, 83 FR 9274 (March 5, 2018) (*Aluminum Foil from China*).

¹⁰² Mingtai also puts forth the same arguments as regards the “Export Loans from Chinese State-Owned Banks” program, for which it also received a 10.54 percent AFA rate. See Mingtai’s Case Brief at 29.

¹⁰³ Similarly, Mingtai argues that the Export Loans from Chinese State-Owned Banks program is an export subsidy. See Mingtai’s Case Brief at 29-31.

¹⁰⁴ See Yong Jie New Material’s Case Brief at 9-19.

¹⁰⁵ See Letter, “Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Countervailing Duty Questionnaire,” dated December 20, 2017, at 18.

¹⁰⁶ See *Chevron*, 837.

¹⁰⁷ See *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003) (*Nippon Steel*).

¹⁰⁸ See *Maverick Tube Corp. v. United States*, 857 F.3d 1353, (Fed. Cir. 2017) (*Maverick Tube*).

¹⁰⁹ See *Chevron*.

the required information is missing from the record. There is no information missing from the record in this instance.

- Commerce also stated that the program could disburse funds through banks other than the China Ex-Im Bank, and therefore, “a complete understanding of how this program is administered is necessary.”¹¹⁰ But if no one received a benefit, only limited information is necessary.
- Commerce’s determination was arbitrary especially in light of the fact that both Yong Jie New Material, and Mingtai, reported on more than 100 other subsidies that were obtained from the Government of China. Commerce asked no further questions on these programs. The same can be said for other initiated programs that Yong Jie New Material reported it did not use. Therefore, it was arbitrary and capricious for Commerce to require such details on the non-used export buyer’s credits program.
- Citing *Mueller*, Commerce cannot use AFA against Yong Jie New Material because Yong Jie New Material has no control over the Government of China and its alleged failure to participate.¹¹¹
- Commerce’s refusal to verify this program is contrary to law.¹¹²
- Commerce should have verified whether the export buyer’s credits were requested and received by Yong Jie New Material’s U.S. buyers.¹¹³

Domestic Industry’s Rebuttal Comments:¹¹⁴

- The Government of China failed to cooperate to the best of its ability. It refused to provide the 2013 Measures and the list of partner banks authorized to distribute program funds. As a result, the Government of China hindered Commerce’s investigation and its ability to verify the purported non-use. It is for Commerce, not the Government of China, to determine what information is relevant and needed.
- In the *Aluminum Foil from China* investigation, Commerce stated, “...without a full and complete understanding of the involvement of third-party banks, the respondent companies (and their customers) claims are also not reliable because Commerce cannot be confident in its ability to verify those claims.”¹¹⁵
- Yong Jie New Material claims the *Preliminary Determination* is due no deference under *Chevron*; however, *Chevron* is an appellate standard. Furthermore, Yong Jie New Material ignores gaps in the record. Section 776 of the Act provides that 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.
- Respondents also rely on outdated Commerce precedent, citing to the 2013 administrative review of *Solar Cells from China; 2013* where Commerce relied on declarations of non-use.

¹¹⁰ See PDM at 25.

¹¹¹ See *Mueller Comercial de Mex., S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1235 (Fed. Cir. 2014) (*Mueller*).

¹¹² See *Shandong Dongfang Bayley Wood Co. Ltd. v. United States*, 236 F. Supp. 3d 1346 (CIT 2017).

¹¹³ See e.g., *Boltless Steel Shelving Units from China* IDM at Comment X.

¹¹⁴ See Domestic Industry’s Rebuttal Case Brief at 12-28.

¹¹⁵ See *Aluminum Foil from China* IDM at Comment 6.

However, in the 2014 administrative review of the same order Commerce revised its position.¹¹⁶

- Commerce has also previously addressed arguments against its current practice and refuted reliance on *Chlorinated Isocyanurates from China* and *Boltless Steel Shelving Units from China*.¹¹⁷
- Mingtai's and Yong Jie New Material's reliance on the U.S. Court of International Trade decisions in *SKF USA Inc.*¹¹⁸ and *Mueller* is also misguided. In those cases, there were unaffiliated suppliers which had failed to supply certain information to the Department. Here, it is the failure of a foreign government, the Government of China, an interested party, that failed to respond.
- Additionally, the respondent's reliance on *Fine Furniture* is also incorrect. In that case, the Federal Circuit found that in the context of a countervailing duty proceeding, a government's failure to cooperate is a legitimate basis to apply an adverse inference that affects a cooperating respondent that has benefited from subsidies from that government.¹¹⁹
- Commerce should continue to apply the 10.54 percent rate for the Export Buyer's Credit program because despite the Government of China's argument that this is an "export loan program" the precise treatment of benefits under this program is unknown as a result of the Government of China's noncooperation.
- The Government of China argues that the highest conceivable rate under this program would be 0.56 percent – assuming that loans received under this program would be in US dollars and that any benefit would be calculated based on the interest rate of the loan. However, none of this information is on the record because the Government of China refused to provide it. Commerce rejected this rate and logic in *Fine Denier PSF from China*.¹²⁰
- Arguments asserting that Commerce should use the rates calculated for the "policy loans" or "export seller's credit" programs calculated in the *Aluminum Foil from China* investigation should also be rejected. Commerce would have to assume that the benefit from the Export Buyer's Credit program is treated similarly to either of these programs; however, there is no record evidence to support this.
- Mingtai asserts that either of these rates should be used because they were for programs for the aluminum foil industry and respondents here produce aluminum foil as well – but this ignores Commerce's AFA hierarchy which states that when an agency has not previously countervailed a certain subsidy program, Commerce will use the highest calculated rate "from any non-company specific program in a CVD case involving the same country that the company's industry could conceivably use."
- According to section 776 of the Act Commerce is not required to make any adjustments or assumptions based on any information the interested party would have provided if it had

¹¹⁶ 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, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017) (*Solar Cells from China; 2014*), and accompanying IDM at Comment 1.

¹¹⁷ See *Aluminum Foil from China* IDM at Comment 6.

¹¹⁸ See *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264 (CIT 2009) (*SKF USA*).

¹¹⁹ See *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014) (*Fine Furniture*).

¹²⁰ See *Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from the People's Republic of China: Final Affirmative Determination*, 83 FR 3120 (January 23, 2018) (*Fine Denier PSF from China*), and accompanying IDM at Comment 2.

complied with the request for information. Commerce also does not need to demonstrate that the rate reflects a commercial reality of the interested party.¹²¹

- Furthermore, the Department should not adjust margins in the parallel antidumping duty investigation for export subsidy rates based on AFA. In applying AFA, the respondent must not receive a lower rate than if it cooperated fully. An offset would decrease the respondent's margin in an antidumping investigation by more than it would have if the respondent had cooperated.
- Additionally, because the 10.54 percent rate was determined on the basis of adverse facts available, the Department has not made an affirmative determination regarding whether such subsidies are in fact export subsidies.¹²² The Department's practice has been not to make any offsets where there is no finding of whether the subsidy is an export subsidy.¹²³

Commerce's Position: Consistent with the *Preliminary Determination*, and Commerce's past practice, we continue to find that the record of the instant investigation does not support a finding of non-use regarding the Export Buyer's Credit program.¹²⁴ In prior examinations of this program, we found that the authority administering this lending program, China Ex-Im Bank, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of this program, which is a prerequisite to Commerce's ability to verify the accuracy of the respondents' claimed non-use of the program.¹²⁵ As discussed in the *Preliminary Determination*, the Government of China did not provide the requested information or documentation necessary for Commerce to develop a complete understanding of this program (*i.e.*, information regarding whether China Ex-Im Bank uses third-party banks to disburse/settle export buyer's credits, and information on the size of the business contracts for which export buyer's credits are applicable).¹²⁶ Furthermore, this information is critical for Commerce to understand how export buyer's credits flow to and from foreign buyers and China Ex-Im Bank.¹²⁷ Absent the requested information, the Government of China's claims that the respondent companies did not use the 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 because Commerce cannot be confident in its ability to verify those claims.

¹²¹ See section 776 of the Act.

¹²² For these reasons, the Domestic Industry contends that Commerce's selection of the AFA rate for the "Export Loans from Chinese State-Owned Commercial Banks" program is also appropriate.

¹²³ See *Fine Denier Polyester Staple Fiber from the People's Republic of China: Final Affirmative Determination of Sales at the Less-Than-Fair-Value*, 83 FR 24740, (May 23, 2018) (*Fine Denier PSF from China AD*), and accompanying IDM at 6.

¹²⁴ See PDM at 24-26. See also *Solar Cells from China; 2014*, and accompanying IDM at Comment 1.

¹²⁵ 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) (*CORE from China*), and accompanying IDM at Comment 6; see also *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) (*Chlorinated Isocyanurates from China; 2014*), and accompanying IDM at Comment 2 (concluding that "without the Government of China's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use").

¹²⁶ See PDM at 24-26.

¹²⁷ *Id.* at 25.

We disagree with the Government of China's argument that Commerce did not need to review the 2013 Measures or consider the \$2 million contract minimum to determine non-use of the program. As we explained in the *Preliminary Determination*, we requested the 2013 Measures because information on the record of this proceeding indicated that the 2013 Measures affected important program changes. For example, the 2013 Measures may have eliminated the \$2 million contract minimum associated with this lending program.¹²⁸ By refusing to provide the requested information, and instead asking Commerce to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the Government of China impeded Commerce's understanding of how this program operates and how to verify it with both the Government of China and the respondent companies. In addition, record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.¹²⁹ Specifically, the record information indicates that customers can open loan accounts for disbursements through this program with other banks, whereby the funds are first sent to the China Ex-Im Bank to the importer's account, which could be at the China Ex-Im Bank or other banks, and that these funds are then sent to the exporter's bank account.¹³⁰ Given the complicated structure of loan disbursements for this program, Commerce's complete understanding of how this program is administered is necessary.¹³¹ Thus, the Government of China's refusal to provide the most current 2013 Administrative Measures, which provide internal guidelines for how this program is administered by the China Ex-Im Bank, impeded Commerce's ability to conduct its investigation of this program.

In this investigation, information on the record indicates that there were revisions to the 2013 Measures program and the involvement of third-party banks, which were not present on the record of *Solar Cells from China; 2013*, *Chlorinated Isocyanurates from China; 2012*, and *Boltless Steel Shelving Units from China*, which have been cited by the Government of China and the respondent companies to support their arguments.¹³² In addition, we find that, with respect to *Chlorinated Isocyanurates from China; 2012*, *Boltless Steel Shelving Units from China*, and *Solar Cells from China; 2013*, Commerce has since modified its position with respect to the Export Buyer's Credit program as explained in *Chlorinated Isocyanurates from China; 2014*,¹³³ where it determined that AFA was warranted because the Government of China did not cooperate to the best of its ability in responding to Commerce's request for additional information regarding the operations of the Export Buyer's Credit program.¹³⁴ As such, we find the Government of China's and the respondent companies' reliance on *Chlorinated Isocyanurates from China* and *Boltless Steel Shelving Units from China* is misplaced and unpersuasive.

¹²⁸ See Memorandum to the File, "Placing Information on the Record," dated January 16, 2018, at Attachment 1 (Citric Acid Verification Report) at 2.

¹²⁹ See Government of China's February 6, 2018 Questionnaire Response at Exhibit A4-2.

¹³⁰ *Id.*

¹³¹ See PDM at 24-26.

¹³² See *Solar Cells from China; 2013* IDM at Comment 1. See also Citric Acid verification report; *Boltless Steel Shelving Units from China* IDM at Comment X.

¹³³ See *Chlorinated Isocyanurates from China; 2014* IDM at Comment 2 (concluding that "without the Government of China's necessary information, the information provided by respondent companies is incomplete for reaching a determination of non-use").

¹³⁴ See *Chlorinated Isocyanurates from China; 2014* IDM at Comment 2.

Moreover, in *Solar Cells from China; 2013*, we specifically stated that, even though we found the record in those cases supported a conclusion of non-use, we intended to continue requesting the Government of China's full cooperation regarding this program in future proceedings, and we would base subsequent evaluations of this program on the record for each respective proceeding.¹³⁵ Thus, by not responding to our requests for additional information regarding the operation of this program, the Government of China was uncooperative in the instant proceeding. Furthermore, in *Solar Cells from China; 2014*, Commerce revised its position, stating that "...the Department finds the mandatory respondent's customers' certifications of non-use to be unreliable because without a complete understanding of the operation of the program which could only be achieved through a complete response by the GOC to the Department's questionnaires, the Department could not verify the respondent's customer's certifications of non-use."¹³⁶ Accordingly, Commerce can no longer rely on declarations of non-use. In response to Mingtai's claims that it provided declarations from customers claiming non-use of the program, similar to documents provided in *Chlorinated Isocyanurates from China* and *Solar Cells from China; 2013*, we find that the facts of this case are different. In the instant investigation, we are unable to verify the accuracy of these documents because the primary entity that possesses such supporting records is the China Ex-Im Bank. We find Mingtai's customers' certifications of non-use to be unverifiable because, without a complete understanding of the operation of the program, which could only be achieved through a complete response by the Government of China to our questions on this program, verification of the respondents' customer's certifications of non-use would be meaningless.

With respect to the arguments that AFA should not be applied for this program, we continue to find that the Government of China withheld necessary information that was requested and significantly impeded the proceeding. Thus, we must rely on facts otherwise available in issuing the final determination, pursuant to sections 776(a)(2)(A) and 776(a)(2)(C) of the Act. Moreover, we determine that the Government of China failed to cooperate by not acting to the best of its ability to comply with our request for information. Specifically, the Government of China withheld information that we requested that was reasonably available to it. As such, 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 respondent companies within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E) of the Act, respectively. This finding is identical to the application of AFA in prior proceedings. Specifically, we find the circumstances in this case to be similar to those in *Chlorinated Isocyanurates from China; 2014* and *Truck and Bus Tires from China*,¹³⁷ where Commerce requested operational program information from the Government of China on this program, pointing out that there were substantial changes to the 2013 Measures, which the Government of China declined to provide. As we explained in the *Preliminary Determination*, this information is necessary to the analysis of this program.¹³⁸

¹³⁵ See *Solar Cells from China; 2013* IDM at Comment 2.

¹³⁶ See *Solar Cells from China; 2014* IDM at Comment 1.

¹³⁷ See *Truck and Bus Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 8606 (January 27, 2017) (*Truck and Bus Tires from China*), and accompanying IDM at Comment 5.

¹³⁸ See PDM at 24-26.

The Government of China argues that, while it may not have provided specific information regarding the mechanics of the Export Buyer's Credit program, information that it did not provide only goes to the countervailability of this program and not to usage. As stated above and in our *Preliminary Determination*, we disagree. Our complete understanding of the operation of this program is a prerequisite to our reliance on the information provided by the company respondents regarding non-use. Therefore, without the necessary information that we requested from the Government of China, the information provided by the company respondents is incomplete for reaching a determination of non-use.¹³⁹ Accordingly, information regarding the operation of this program and the respondents' usage would come from the Government of China.

Commerce considered all the information on the record of this proceeding, including the statements of non-use provided by the mandatory respondents. As explained above and in the *Preliminary Determination*, we are unable to rely on the information provided by the respondents because Commerce lacks a complete and reliable understanding of the program.¹⁴⁰

The U.S. Court of Appeals for the Federal Circuit (CAFC) has affirmed that certain information comes from the government and that Commerce can take an action that adversely affects a respondent if the government fails to provide requested information:

Fine Furniture is a company within the Country of China, benefitting directly from subsidies the {GOC} may be providing, even if not intending to use such subsidy for anticompetitive purposes. Therefore, a remedy that collaterally reaches Fine Furniture has the potential to encourage the {GOC} to cooperate so as not to hurt its overall industry. Unlike *SKF*, Commerce in this case did not choose the adverse rate to punish the cooperating plaintiff, but rather to provide a remedy for the {GOC's} failure to cooperate.¹⁴¹

With respect to the Government of China's and the respondents' claim that the 10.54 percent AFA is punitive, we reviewed the comments from interested parties, and made no change to the AFA rate selected in the *Preliminary Determination* for this program. As we explained in the *Preliminary Determination*, it is Commerce's practice in CVD proceedings to compute a total AFA rate for non-cooperating companies by selecting rates pursuant to a well-established hierarchical methodology in accordance with section 776(d) of the Act and consistent with *Section 502 of the Trade Preferences Extension Act of 2015*, as described in detail above under "VIII. Use of Facts Otherwise Available and Adverse Inferences."

As explained in that section, in applying the methodology, Commerce takes into account 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. Thus, in selecting a rate, Commerce takes due consideration of factors that determine the applicability of the rate while satisfying the statutory mandate for inducing cooperation. Hence,

¹³⁹ See, *e.g.*, *Chlorinated Isocyanurates from China*; 2014 IDM at Comment 2.

¹⁴⁰ See PDM at 24-26.

¹⁴¹ See *Fine Furniture*, 1365, 1373.

Commerce follows a reasonably calibrated approach in applying AFA, the intent of which is not punitive as such.

With regard to the Government of China's contention that the preferential government lending program is not similar to the Export Buyer's Credit program, we find that because the Government of China did not provide the necessary information requested with respect to the 2013 Administrative measures, there is no evidence on the record from the Government of China that indicates that the Government Policy Lending program from *Coated Paper from China* is dissimilar to the Export Buyer's Credit program. We are similarly unpersuaded that the highest CVD rate a company could receive under this program is 0.56 percent. The Government of China's argument concerning the calculation methodology is misplaced, in light of the fact that we lack a full understanding of the program due to its own failure to provide the very information we requested as essential to such an understanding. As such, the record does not contain information to support the Government of China's suggested calculation methodology. Additionally, respondents' arguments that Commerce should select a rate from the *Aluminum Foil from China*¹⁴² investigation, specifically the rate calculated for either the Policy Loans to the Aluminum Foil Industry program or the Export Seller's Credit program, are unavailing. When no identical program with an above *de minimis* rate exists, Commerce looks for a similar or comparable program from the same country (based on the treatment of the benefit) and takes the highest calculated rate for a similar or comparable program from any proceeding, pursuant to the methodology described in detail earlier. Accordingly, we continue to rely on the 10.54 percent rate as AFA for the Export Buyer's Credit program benefit.

Additionally, we disagree with the Government of China and respondents that Commerce should find this program specific under section 771 (5A)(B) of the Act in order to allow for a proper corresponding offset to the AD margin. Again, due to the Government of China's lack of participation and refusal to answer all questions for this program, we do not have all the necessary facts to make such a call.¹⁴³ Furthermore, providing an offset for an AFA rate would defeat the statutory intent not to provide respondents with a more favorable result than if they were to fully cooperate, assuming that the calculated rate would have been lower than the AFA rate.¹⁴⁴

Comment 5: Whether Commerce's Finding that the Primary Aluminum and Steel Coal Markets are Distorted is Supported by Substantial Evidence

Government of China's Comments

- The *CVD Preamble* indicates a strong preference for the use of Tier 1 benchmarks in conducting the less than adequate remuneration (LTAR) benefit analysis.¹⁴⁵ The focus

¹⁴² See *Aluminum Foil from China*.

¹⁴³ See *Fine Denier PSF from China AD*.

¹⁴⁴ Likewise, we will not be changing or offsetting the AFA rate applied to the "Export Loans from Chinese State-Owned Banks" program.

¹⁴⁵ See Government of China's Case Brief at 17 (citing *Countervailing Duties; Final Rule*, 63 FR 65348, 65377 (November 25, 1998) (*CVD Preamble*)).

on whether actual transactions prices are significantly distorted is consistent with the WTO Dispute Settlement Body (DSB) and Appellate Body (AB) jurisprudence.¹⁴⁶

- The record demonstrates that the Chinese government's presence in the primary aluminum and coal industries is less than a majority.¹⁴⁷
- Commerce is required to demonstrate with record evidence that actual transaction prices are significantly distorted by government intervention in the economy. Commerce did not do so.¹⁴⁸

Domestic Industry's Rebuttal Comments

- Commerce recently rejected identical arguments by the Government of China in *Iron Pipe Fittings from China*.¹⁴⁹ Commerce concluded that the Government of China misinterpreted the *CVD Preamble* and WTO determinations to claim Commerce's findings of distortion are unlawful.¹⁵⁰
- The record demonstrates that the Chinese primary aluminum and steam coal markets are distorted. The preliminary determinations regarding these markets were based on negligible consumption of imported products, the Government of China's significant ownership of the producers, the existence of export controls that were in effect during the POI.¹⁵¹

Commerce's Position: Commerce's long-standing practice is to utilize a benchmark outside of the country of provision when record evidence indicates that the high level of the government's share of the market of the good in question, along with other factors, results in a distortion of that market.¹⁵² Such a finding is consistent with the *CVD Preamble*, which states that government involvement in a market may, in certain circumstances, have a distortive effect on the price of a good even when the government provider accounts for less than a majority of the market.¹⁵³ The Government of China's arguments regarding this matter have been previously addressed and rejected by Commerce.¹⁵⁴ Out-of-country benchmarks are required in such instances because the

¹⁴⁶ *Id.* at 18 (citing *United States-Countervailing Duty Measures on Certain Products from China*, WT/DS437/RW (March 21, 2018) at para. 7.205-6, finding that an investigating authority must explain how government intervention in the market results in in-country prices for the inputs at issue deviating from a market-determined price; citing also *United States-Countervailing Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014) at para. 4.62 (collectively, WTO/DS437); *United States-Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (December 8, 2014) at para. 4.157, and note 754).

¹⁴⁷ *Id.* at 20 (citing Government of China April 16, 2018 Questionnaire Response at 74 and 92).

¹⁴⁸ *Id.* at 21.

¹⁴⁹ See Domestic Industry Rebuttal Comments at 29, citing *Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 83 FR 32075 (July 11, 2018) (*Iron Pipe Fittings from China*), and accompanying IDM at Comment 1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 30 (citing PDM at 49-52, 40-41).

¹⁵² See *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008) (*Line Pipe from China*), and accompanying IDM at Comment 5.

¹⁵³ See *CVD Preamble*, 63 FR 65348, 65377.

¹⁵⁴ See, e.g., *Certain Kitchen Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) (*Racks from China*), and accompanying IDM at Comment 8; *Line Pipe from China* IDM at Comment 5; and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative*

use of in-country private producer prices would be akin to comparing the benchmark to itself (*i.e.*, such a benchmark would reflect the distortions of the government presence).¹⁵⁵ Additionally, the Government of China's reliance on WTO/DS437 to argue for in-country benchmarks is misplaced. The CAFC has held that WTO reports are without effect under U.S. law "unless and until such ruling has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).¹⁵⁶ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.¹⁵⁷ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of Commerce's discretion in applying the statute.¹⁵⁸ Concerning primary aluminum, the Government of China has reported that SOEs accounted for a substantial share of primary aluminum production in China (*i.e.*, 37 percent) during the POI.¹⁵⁹ This percentage is similar to that observed in *Cylinders from China* in which Commerce declined to use in-country seamless tube steel benchmarks due to the distortive effect caused by the market share held by state-owned seamless tube steel producers, in light of the added fact that imports of seamless tube steel as a share of domestic consumption were insignificant.¹⁶⁰ Moreover, the record in this investigation includes other indicators of distortive government involvement in the primary aluminum market. In particular, the record information shows that the Government of China imposed an export tariff on primary aluminum.¹⁶¹ Such export restraints discourage exportation of the good, thus, artificially increasing the supply of primary aluminum in the domestic market and lowering domestic prices. Moreover, similar to *Cylinders from China*, the share of imports in the domestic market of the good in question, at less than one percent, is insignificant, further indicating that the government plays a predominant role through its involvement in the market.¹⁶²

Concerning steam coal, the Government of China has reported that government-owned or controlled enterprises accounted for a substantial share of primary aluminum production in China (*i.e.*, 25 percent) during the POI, and an overwhelming percentage of total production of steam coal was produced by enterprises in which the Government maintains an ownership or management interest (*i.e.*, 68 percent).¹⁶³ Further, the Government of China reported that an export quota on coal was in place during the POI, limiting coal exports from China.¹⁶⁴ Moreover, similar to *Cylinders from China*, the share of imports in the domestic market of the good in question, at less than two percent, is insignificant, further indicating that the government plays a predominant role through its involvement in the market.¹⁶⁵

Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008) (*CWP from China*), and accompanying IDM at Comment 7.

¹⁵⁵ See *CWP from China* IDM at Comment 7.

¹⁵⁶ See *Corus* 1343, 1347-49.

¹⁵⁷ See, *e.g.*, 19 U.S.C. §3533, 3538.

¹⁵⁸ See, *e.g.*, 19 U.S.C. §3538 (implementation of WTO reports is discretionary).

¹⁵⁹ See Government of China February 6, 2018 Questionnaire Response at 74-75.

¹⁶⁰ See *High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) (*Cylinders from China*), and accompanying IDM at 19.

¹⁶¹ See Government of China February 6, 2018 Questionnaire Response at 77.

¹⁶² *Id.* at 74-75.

¹⁶³ See Government of China February 6, 2018 Questionnaire Response at 92.

¹⁶⁴ *Id.* at 93.

¹⁶⁵ *Id.*

Regarding the Government of China's contention that a large number of private primary aluminum and steam coal producers ensures that the domestic market for primary aluminum and steam coal is not distorted by the involvement of state-owned firms, we find the argument unpersuasive, in light of the government's significant market share and, as noted above, the additional indicators of distortive government involvement in the market. On this basis, we continue to find that it is appropriate to use Tier 2 benchmarks, as described under 19 CFR 351.511(a)(2)(ii), when determining whether benefits were conferred under the provision of primary aluminum and steam coal for LTAR programs.

Comment 6: Whether Commerce Should Apply AFA to Yong Jie New Material's Financing

Yong Jie New Material's Comments:¹⁶⁶

- Commerce's decision to countervail loans and other instruments under the preferential loan program was not supported by substantial evidence.
- Commerce erred when it decided to countervail letters of credit. Letters of credit are not loans.
- There is no evidence on the record that the banks from whom Yong Jie New Material obtained loans were either majority owned or controlled by any government entity.

Domestic Industry's Comments:¹⁶⁷

- Commerce should apply adverse facts available to Yong Jie New Material for the policy lending program.
- As evident in the *Preliminary Determination*, where its reporting was riddled with inaccuracies, Yong Jie New Material has consistently failed to report its lending completely and accurately. The Department issued three separate questionnaires providing Yong Jie New Material an opportunity to report fully and accurately its loan reporting.
- In Yong Jie New Material's preliminary determination calculation memorandum Commerce needed to make numerous adjustments as a result of Yong Jie New Material's deficiencies in reporting, these included: reporting interest payments based on 360 days rather than 365 days; incorrect reporting of the total number of days covered by each interest payment for certain loans; failure to provide the total number of days covered by each interest payment for certain loans; failure to report the principal balance for certain loans; incorrect currency reporting for certain loans; failure to report the number of years for each long-term loan; and other discrepancies.
- Commerce also issued a post-preliminary supplemental questionnaire with additional loan questions, providing Yong Jie New Material with another opportunity to accurately report its lending.
- At verification, Commerce was unable to reconcile Yong Jie New Material's reported loans to its accounting system and discovered unreported loans. This was due to the discovery of additional unreported loans and other forfeiting interest. Beginning and ending loan balances did not reconcile, and reported interest paid did not reconcile with the company's year-end

¹⁶⁶ See Yong Jie New Material's Case Brief at 19-21.

¹⁶⁷ See Domestic Industry's Case Brief at 2-14.

cash statement. Yong Jie New Material, in response, as an explanation, stated that the discrepancies were attributable to “forfeiting expenses and to interest paid on additional letters of credit that they had not included in their loan template.”¹⁶⁸

- There were also similar inconsistencies and an ultimate inability to reconcile the loans reported by Yongjie Aluminum and Nanjie Industry.
- There were additional reconciliation discrepancies found regarding Commerce’s pre-selected loans at verification.
- 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.”¹⁶⁹ In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit defined the “best of its ability” standard by assessing whether the party has put forth its maximum effort to provide “full and complete” answers to all inquiries.¹⁷⁰
- It appears that Yong Jie New Material was aware of its deficient reporting. As a minor correction, Yong Jie New Material attempted to remove 18 loans from its reporting, defining them as letters of credit, which according to them are not loans and are not countervailable. Commerce rightfully rejected this correction. Nevertheless, Yong Jie New Material should have reported all letters of credit to Commerce prior to verification.
- Yong Jie New Material referred to what letters of credit they did report throughout verification interchangeably as loans incurring interest payments. Additionally, when reviewing one of the pre-selected loans that Yong Jie New Material categorized at verification as a letter of credit, it was evident that the amount paid to the bank on the due date was more than the initial amount received – this difference was consistently referred to by company officials as “interest,” and according to the verification report, the letters of credit were nearly always referred to as loans.
- Furthermore, Commerce has found letters of credit to be countervailable in past cases. In *Fine Denier PSF from China*, Commerce rejected arguments that letters of credit and other traditional forms of financing are not countervailable.¹⁷¹
- Commerce has an established practice of applying AFA when it is unable to fully verify a respondent’s information. For example, in *Truck and Bus Tires from China*, a respondent attempted to submit as a minor correction additional unreported financing.¹⁷² Commerce rightfully rejected this as a minor correction and ultimately determined that AFA was warranted and applied a rate of 10.54 percent. Similarly, AFA is warranted here because Yong Jie New Material failed to completely and accurately report all loans and interest payments prior to verification.
- According to Commerce’s AFA hierarchy, it should apply a 10.54 percent *ad valorem* rate to Yong Jie New Material for this program, as this is the highest rate calculated for the same program in another countervailing duty proceeding involving China. This rate would also then be applied to Mingtai, according to the AFA hierarchy.

¹⁶⁸ See Yong Jie New Material’s Verification Report at 10.

¹⁶⁹ See Section 776 of the Act.

¹⁷⁰ See *Nippon Steel*, 1373, 1382.

¹⁷¹ See *Fine Denier PSF from China* IDM at 39-40.

¹⁷² See *Truck and Bus Tires from China*.

Yong Jie New Material's Rebuttal Comments:¹⁷³

- All actual loans were reported by Yong Jie New Material. Discounts on letters of credit are not loans and loan interest was not paid by the Yongjie companies.
- The original questionnaire asked to “report all financing to your company that was outstanding at any point during the POI, regardless of whether you consider the financing to have been provided under this program.”¹⁷⁴ Letters of credit are not loans and there is no evidence on the record that any loans were taken out for these letters of credit, nor is there any evidence that any of the Yongjie companies made any principal or interest payments on the borrowed principal.
- Contrary to a loan, the discount price received by the Yongjie companies for its letters of credit have no association with either, borrowing money, period of time for repayment of the principal, or payment by Yongjie to the bank of any interest calculated on the length of the loan.
- The Domestic Industry has overstated the reconciliation issue. Every item reported to Commerce that Commerce attempted to verify was traced to the financial statement. The problem was how does one trace a loan or letter of credit to the appropriate sub-account and then to the financial statement.
- Initially, Yong Jie New Material reported its loans and letters of credit in its “short-term” loan account. However, its auditor believed that letters of credit are better classified in a different account, *i.e.*, “financing expenses.” The auditor instructed Yong Jie New Material to create this new account. Certain letters of credit erroneously remained in the “short-term” account. The accountants did not realize that there were two accounts for letters of credit. It reported the “short-term” account and only discovered the second account when preparing for verification.
- The reason the beginning and year end balances in the accounting system did not reconcile to what was in Yong Jie New Material's audited balance sheet was due to the fact that some loans were booked the previous year.
- With the addition of the minor correction that was not accepted, the previously reported loans reconciled to the financial statement. Only unreported letters of credit and some forfeiting expenses had been excluded – Commerce did not give Yong Jie New Material an opportunity to show how the previously reported data and the new data reconciled to the financial statement.
- Commerce refused to allow Yong Jie New Material a chance to include the newly-reported letters of credit as a minor correction. This was an abuse of discretion.
- Only actual loans need to be reported. If all letters of credit, both what Yong Jie New Material reported, and those it did not, are excluded, then all loans reconciled to the financial statement.
- Yongjie Aluminum also had a “financing expenses” account, that if considered by Commerce, its information would have reconciled as well.

¹⁷³ See Yong Jie New Material's Rebuttal Brief at 2-9.

¹⁷⁴ See CVD Questionnaire.

Domestic Industry Rebuttal Comments:¹⁷⁵

- Yong Jie New Material argues that Commerce erroneously countervailed its letters of credit, yet Commerce has consistently treated letters of credit as countervailable loans.¹⁷⁶
- Commerce was right to reject Yong Jie New Material's minor correction, which attempted to delete numerous letters of credit from its reporting, because as Commerce stated, this issue should have been raised much earlier.
- However, even if Commerce were to have accepted Yong Jie New Material's minor correction, the record still would lack sufficient verified evidence to calculate a benefit for this program.
- Yong Jie New Material does not make any detailed argument regarding countervailability other than to say that letters of credit, on their face, are not countervailable. This is incorrect.
- Despite Yong Jie New Material's arguments that the Government of China did not have control of any of the commercial banks providing lending, the record demonstrates that Yong Jie New Material received certain loans from China state-owned commercial banks (SOCBs) that were outstanding during the POI. Neither Yong Jie New Material nor the Government of China submitted any evidence supporting such a claim. Yong Jie New Material also never identifies which banks it specifically claims are not SOCBs.
- As Commerce has stated in the *Preliminary Determination*, and further detailed in its *Public Bodies Memorandum*, "the national and local government control over the SOCBs render the loans a government financial contribution."¹⁷⁷
- Yong Jie New Material's attempt to compare the Government of China's control of banks with the antidumping standard for affiliation is immaterial. The Department has determined that the Government of China exercises control over entities through ownership, policy directives, and integration of state actors in the industrial sector.¹⁷⁸
- Whether letters of credit are countervailable or not, and whether the banks from which Yong Jie New Material obtained loans are controlled by the Government of China, Yong Jie New Material, still failed to report its lending completely and accurately, and Commerce should find that AFA is warranted in determining the magnitude of the benefit associated with all of Yong Jie New Material's policy lending.

Commerce's Position: During verification of this program for Yong Jie New Material, Commerce officials encountered numerous inconsistencies with what the respondent reported. One of the largest discrepancies, as laid out with detail in Yong Jie New Material's verification report,¹⁷⁹ was the reported amount of interest paid during the POI by Yong Jie New Material, which was significantly less than its cash flow statement indicated. Company officials stated that the difference was attributable to forfeiting expenses and to interest paid on additional "letters of credit" that they had *not* included in their loan template. We faced similar issues with Yong Jie New Material's cross-owned affiliates where we were unable to reconcile what was reported.¹⁸⁰

¹⁷⁵ See Domestic Industry's Rebuttal Brief at 56-59.

¹⁷⁶ See, e.g., *Fine Denier PSF from China* IDM at Comment 8.

¹⁷⁷ See PDM at 40; see also Public Bodies Memorandum, placed on record January 16, 2018.

¹⁷⁸ See Public Bodies Memorandum at 3.

¹⁷⁹ See Yong Jie New Material's Verification Report at section V.B.

¹⁸⁰ *Id.*

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

Yong Jie New Material’s arguments rely on their assertion that the alleged “letters of credit” are not countervailable, and thus any non-reporting is immaterial. Specifically, Yong Jie New Material claims that there were no issues at verification because to the extent information did not reconcile, this involved information that did not need to be reported (*i.e.*, the unreported “letters of credit”), which Commerce should ignore, because everything else did reconcile. However, this claim is disingenuous; it is not for the respondent to determine what is or is not reportable or not countervailable. Indeed, Commerce has previously found letters of credit to be countervailable financing in the past.¹⁸¹ Commerce was very clear in its request in the initial questionnaire in asking respondents to “[r]eport all financing to your company that was outstanding at any point during the POI, regardless of whether you consider the financing to have been provided under this program.”

In the first place, Yong Jie New Material sought, as a “minor correction” at the outset of verification, to delete what it claimed were non-countervailable “letters of credit” among its previously reported financing, which Commerce rightly rejected as not a minor correction. Regarding additional claimed “letters of credit” discovered at verification, Yong Jie New Material argues that Commerce should have somehow provided it with an opportunity to submit this new information on the record, which Commerce also rightly rejected. The purpose of verification is to ascertain the accuracy and completeness of information previously submitted, not to collect new factual information for which no adequate time remains for analysis or comment.¹⁸² Thus, the deadlines for providing factual information, as delineated in 19 CFR 351.301, are in place well in advance of verification to provide Commerce sufficient time to review and analyze information provided by interested parties. Therefore, it is critical to Commerce’s efficient administration of these proceedings that parties provide the necessary information by the established deadlines or timely request an extension of such deadlines. The Federal Circuit has upheld Commerce’s discretion to reject or refuse to consider information that is submitted late in the proceeding.¹⁸³

Thus, when it becomes apparent that respondents have not cooperated to the best of their ability to timely and fully respond to our requests for information, and that this lack of cooperation has impeded our investigation, section 776 of the Act provides that Commerce may rely on the facts available and to draw adverse inferences from those facts, as appropriate.

¹⁸¹ See *Fine Denier PSF from China* IDM at Comment 8.

¹⁸² See, e.g., *Final Determination of Sales at Less Than Fair Value: Silica Bricks and Shapes from the People’s Republic of China*, 78 FR 70918 (November 27, 2013), and accompanying IDM at Comment 7; see also *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 931 F. Supp. 2d 1258, 1280 (CIT 2013) (agreeing that “[t]he purpose of verification is not to collect new information”).

¹⁸³ See *Dongtai Peak Honey Industry Co., Ltd. v. United States of America*, 777 F.3d 1343 (Fed. Cir. 2015).

With regard to Yong Jie New Material’s argument that the record does not show that it received loans from Chinese government banks, we disagree. The loan information submitted by Yong Jie New Material in its questionnaire responses demonstrates that it received certain loans from Chinese SOCBs and that these were outstanding during the POI. As Commerce stated in the *Preliminary Determination*, and further detailed in its Public Bodies Memorandum, “the national and local government control over the SOCBs render the loans a government financial contribution.”¹⁸⁴ Commerce has previously determined that the Government of China exercises control over entities through ownership, policy directives, and integration of state actors in the industrial sector.

As discussed in further detail, in the section “Use of Facts Otherwise Available and Adverse Inferences,” we find that Yong Jie New Material failed to provide information regarding its use of Policy Loans to the Aluminum Sheet Industry that was requested of it by the deadlines we established, and thus, section 776(a)(2)(B) of the Act applies. Further, Yong Jie New Material significantly impeded the proceeding, within the meaning of section 776(a)(2)(C) of the Act. We further find that by not timely reporting this assistance, Yong Jie New Material failed to cooperate by not acting to the best of its ability and precluded the Commerce from investigating and verifying this financing. Thus, pursuant to section 776(b) of the Act, we are determining that the application of AFA to Policy Loans to the Aluminum Sheet Industry is warranted.

Comment 7: Whether Commerce Should Adjust Its Benefit Calculation for the Provision of Land for LTAR

Domestic Industry Comments

- Given the preliminary finding the provision of land for LTAR is *de jure* specific to promote the aluminum industry, Commerce should include the land purchases that Mingtai reported following the Preliminary Determination.¹⁸⁵
- Commerce should only use land prices, exclusive of fees to calculate the benefit.¹⁸⁶
- At verification, it was found that Mingtai’s classification of certain items as payments for land use fees and others as administrative fees is arbitrary, and, thus, not tied to the actual purchase price for the underlying right.¹⁸⁷
- Administrative fees are not included in the “tier three” benchmarks that Commerce uses to measure the adequacy of remuneration.¹⁸⁸

¹⁸⁴ See also Memorandum Placing “Review of China’s Financial System Memorandum” on the record, dated January 16, 2018.

¹⁸⁵ See Domestic Industry’s Case Brief at 15.

¹⁸⁶ *Id.* at 16.

¹⁸⁷ *Id.* at 17.

¹⁸⁸ *Id.* at 18.

Mingtai Rebuttal Comments

- The land for LTAR allegation was initiated on the basis of benefits provided to SOEs and producers in high-technology special economic zones (SEZs).¹⁸⁹ Mingtai is not an SOE, and its additional land purchases were not made in SEZs.¹⁹⁰
- Commerce’s preliminary analysis of this program is clear, and the discussion is limited to SEZs. This is consistent with other investigation wherein Commerce has found land for LTAR only in SEZ locations.¹⁹¹
- If Commerce includes land purchases reported by Mingtai after the *Preliminary Determination*, only the land use certification fee and the land deed tax should be excluded from the acquisition cost.¹⁹²
- The pure transfer charge only accounts for the land sale portion that is directly earned by the Government of China. The price required to be paid to the collective landowners, the villagers, is not included in this charge. If these payments are left out of the calculation then the full, accurate acquisition cost of the land will not be accounted for.¹⁹³
- Commerce used an industrial land value in Thailand as a benchmark. As in any normal economy, the supplier of land must have acquired the land from individual land owners to form an industrial park. Thus, the Thai benchmark prices must also have entailed the original compensation from the individual owners. Excluding the Government of China purchase of land from the villager, through compensation paid by companies like Mingtai, would not result in an apple-to-apple comparison.¹⁹⁴

Commerce’s Position: As described in the *Preliminary Determination*,¹⁹⁵ we find that national and provincial level development plans, including the “Catalogue for the Guidance of Industrial Structure Adjustment” (Guidance Catalogue, provide for priority land supply and financing arrangements for priority development projects. These plans also consistently identify the deep processing aluminum industry and high-technology industries as targets for economic development. The “Decision of the State Council on Promulgating the Interim Provisions Promoting Industrial Structure Adjustment for Implementation (Guo Fa {2005} No. 40)” (Decision 40) identifies the Guidance Catalogue as “the important basis for guiding investment directions, and for governments to administer investment projects, to formulate and enforce policies on public finance, taxation, credit, land, import and export, etc.”¹⁹⁶ Decision 40 provides for encouragement policies, including land, for the industries in the encouraged industry category.¹⁹⁷

Given the evidence demonstrating the Government of China’s use of preferential pricing policies to develop the aluminum sector, together with evidence of similar policies in the provinces where respondents are located, we determine that the Government of China, in conjunction with certain provincial authorities, pursues a program to provide land for LTAR to producers of

¹⁸⁹ See Mingtai Rebuttal Brief at 1.

¹⁹⁰ *Id.* at 3.

¹⁹¹ *Id.* at 2. See also, e.g., *Fine Denier PSF from China* IDM at 9.

¹⁹² *Id.* at 3.

¹⁹³ *Id.* at 4.

¹⁹⁴ *Id.*

¹⁹⁵ See PDM at 45-48.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

common alloy sheet within the meaning of section 771(5A)(D)(i) of the Act. Because the Chinese government owns all land in China, we determine that the entities that provided the land to the respondents are “authorities” within the meaning of section 771(5)(B) of the Act, and that such authorities conferred a financial contribution to the respondents in the form of a provision of a good, pursuant to section 771(5)(D)(iii) of the Act. Accordingly, we have calculated a benefit for all of the land parcels that were acquired by the respondents during the average-useful-life period, which includes the land parcels that were reported by Mingtai as located outside of the SEZ.

With regard to the taxes and administrative fees that were paid by Mingtai in connection with its land purchases, we find that the record supports including these taxes and fees in Mingtai’s total land purchase price.¹⁹⁸ According to the land-use rights contracts, the total amount that Mingtai paid for its land is also the value of the land purchase.¹⁹⁹ When comparing the price of a good received for LTAR to a benchmark price, Commerce seeks to ensure the comparison is made on a like-for-like basis. There is no information on our record to support a finding that our tier 3 land benchmark does not include taxes and fees. Thus, there is no basis, in this proceeding, to adjust Mingtai’s reported land purchase price by excluding the fees and taxes it paid as part of its contracted price for land.

Comment 8: Whether Commerce Should Countervail Mingtai’s Financing

Mingtai Comments

- Commerce has previously considered time drafts to be non-countervailable.²⁰⁰ Mingtai does not defer the payment with a time draft. Mingtai’s bank makes payment either when the time draft matures six months later or immediately, in which case Mingtai’s supplier pays interest for the case. Mingtai does not owe any interest on payments that are not due.²⁰¹
- Commerce has failed to explain its changed interpretation of the time drafts as a countervailable subsidy. The Courts require a reasonable explanation for the change.²⁰²
- Mingtai attempted to put information on the record of this investigation concerning the time drafts, which Commerce rejected. Mingtai asked Commerce to accept the information in accordance with Commerce’s explanation in its *Final Rule* on factual information concerning information to supplement a deficient record.²⁰³

¹⁹⁸ See Mingtai April 30, 2018 Supplemental Questionnaire Response at Exhibit SQ4-4.

¹⁹⁹ *Id.*

²⁰⁰ See Mingtai Case Brief at 4 (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) (*Hardwood Plywood from China*), and accompanying IDM at Comment 5).

²⁰¹ *Id.* at 5.

²⁰² *Id.* at 6 (citing *Motor Vehicle Mfrs Assoc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). “A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence.” *Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp. 2d 865, 880 n.20 (CIT 1998)).

²⁰³ *Id.* at 7-8 (citing *Final Rule*, 78 FR 21246, 21249 (April 10, 2014) (*Final Rule*)).

- Commerce failed to ask Mingtai expressly for specific data on the time drafts outstanding during the POI.²⁰⁴ Mingtai's misunderstanding of Commerce's questions concerning these time drafts is the type of situation discussed in the *Final Rule* on factual information.²⁰⁵
- Mingtai relied on Commerce's decision in *Hardwood Plywood from China* and sincerely believed that it had answered Commerce's completely and satisfactorily.²⁰⁶ Mingtai has cooperated in every respect to Commerce's requests for information, and the application of AFA is unwarranted.²⁰⁷ Commerce is required by law to issue a supplemental questionnaire requesting that the respondent correct all deficiencies."²⁰⁸
- The Courts have concluded that Commerce's practice of not accepting new information at verification could not trump the letter of the law that requires respondents be given opportunity to remedy or explain the deficiency.²⁰⁹ Moreover, Commerce clearly had time following the *Preliminary Determination* to issue a supplemental questionnaire.²¹⁰
- In examining whether Commerce has improperly rejected untimely filings, the CIT has noted that it will "review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality."²¹¹
- Mingtai has tried to correct and supplement the record of this case in response to Commerce's preliminary determination, and application of adverse facts available rather than a supplemental questionnaire from the Department does not relieve Commerce of applying section 782(d) of the Act, if necessary.²¹²

Domestic Industry Rebuttal Comments

- The record does not establish that these are time drafts as claimed by Mingtai.²¹³
- Mingtai was clearly instructed in the initial questionnaire to report all forms of financing during the POI, noting that this encompasses more than traditional loans, such as bank promissory notes, invoice discounting, and factoring of accounts receivable.²¹⁴ Mingtai failed twice to properly report its policy lending.²¹⁵ Mingtai replied that it had reported all of its financing.²¹⁶ Commerce subsequently issued another supplemental questionnaire

²⁰⁴ *Id.* at 8-9.

²⁰⁵ *Id.* at 9 (citing *Final Rule* at 21246, 21248-21249).

²⁰⁶ *Id.* at 9-10.

²⁰⁷ *Id.* at 10.

²⁰⁸ *Id.* at 10 (citing sections 776(a) and 782(d) of the Act and *China Kingdom Imp. & Exp. Co. v. United States*, 507 F. Supp. 2d 1337, 1353-1354 (CIT 2007) (*China Kingdom*)).

²⁰⁹ *Id.* at 11-12.

²¹⁰ *Id.* at 12-13.

²¹¹ *Id.* at 12-13 (citing *Grobest & I-Mei Industrial (Vietnam) Co., Ltd. v. United States*, 815 F. Supp.2d 1342, 1365 (CIT 2012) (*Grobest*); *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1267 (CIT 2012); *Timken US. Corp. v. United States*, 4343 F.3d 1345, 1351-52 (Fed. Cir. 2006) (holding that *NTN Bearing* was not limited to submission of clerical errors)).

²¹² *Id.* at 13-14 (citing *Agro Dutch Indus. v. United States*, 31 CIT 2047, 2055-2056 (CIT 2007) (*Agro Dutch*)).

²¹³ See Domestic Industry's Rebuttal Brief at 37.

²¹⁴ *Id.* (citing Commerce December 20, 2017 Countervailing Duty Questionnaire (December 20, 2017 Questionnaire) at Section III, Program-Specific Questions at Question A.1.a.).

²¹⁵ *Id.* at 39 (citing Henan Mingtai IQR at 12, Exhibit 7; Zhengzhou Mingtai IQR at 10, Exhibit 6; Letter, "Request for Additional Information Regarding January 29, 2018 Questionnaire Responses, Supplemental Questionnaire," dated February 5, 2018 (Commerce February 5, 2018 Supplemental Questionnaire), at 2).

²¹⁶ *Id.*, (citing Henan Mingtai February 15, 2018 Supplemental Questionnaire Response at 5).

regarding Mingtai's financing, at which point Mingtai clarified that it did not report "a kind of letter of guarantee/time draft from the bank."²¹⁷

- In its supplemental questionnaire response, Mingtai did not put forth any substantive legal argument regarding countervailability, let alone cite *Hardwood Plywood from China*.²¹⁸ Thus, there was no information that would allow Commerce or other interested parties to discern the basis for Mingtai's alleged legal position.²¹⁹
- Mingtai's reliance on its belief in the non-countervailability of the financial instruments at issue is misplaced. Commerce has held, and the courts have affirmed, that it is not within a respondent's discretion to determine which subsidies should be reported to Commerce. To the contrary, Mingtai's unilateral decision to withhold information warrants the application of AFA because it prevented Commerce from conducting a full investigation in order to determine the countervailability of the particular instruments in question.²²⁰
- The time drafts, as described by Mingtai, are a countervailable form of financing.²²¹ There is no basis to claim that Commerce has arbitrarily changed its decision regarding the countervailability of time drafts. Rather, Commerce properly applied a countervailable subsidy rate as an adverse inference as a result of Mingtai's failure to report the time drafts.
- Commerce properly rejected Mingtai's attempts to place new information on the record relating to these time drafts. Mingtai's argument that the allowances in the *Final Rule* are applicable because "there was a misunderstanding" as to how to respond to Commerce's questions is unpersuasive. If Mingtai needed clarification about these questions, it should have contacted Commerce, as instructed in the countervailing duty questionnaire.²²²
- As the party in control of the information, it was Mingtai's responsibility to present information requested by Commerce and to prepare a complete and accurate record for Commerce's decision.²²³
- Mingtai's focus on the provision in the *Final Rule* allowing Commerce to accept untimely information ignores the stated policy rational behind Commerce's factual information time limits.²²⁴ Commerce's regulations strongly favor the submission of factual information during the time allotted to ensure both fairness and efficiency in the proceeding.²²⁵
- Commerce should reject Mingtai's arguments that section 782(d) of the Act and appellate court precedent required Commerce to accept Mingtai's unsolicited submission. Its reliance on section 782(d) of the Act is misplaced because Mingtai had three opportunities to report

²¹⁷ *Id.* (citing Henan Mingtai March 15, 2018 Supplemental Questionnaire Response (Henan Mingtai March 15, 2018 SQR), at 2).

²¹⁸ *Id.* at 40 (citing Henan Mingtai March 15, 2018 SQR at 2-3).

²¹⁹ *Id.* at 41.

²²⁰ *Id.* at 42 (citing *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Affirmative Countervailing Duty Determination*, 82 FR 58172 (December 11, 2017) (*Mechanical Tubing from India*), and accompanying IDM at 41; *Maverick Tube*, 857 F.3d 1353, 1360-61; *Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM at 54.

²²¹ *Id.* at 43-44, citing *Fine Denier PSF from China* IDM at Comment 8).

²²² *Id.* (citing December 20, 2017 Questionnaire at Section I, General Instructions, at 1).

²²³ *Id.* at 48 (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1130, 1336 (Fed. Cir. 2002) (*Ta Chen*)).

²²⁴ *Id.* at 49 (citing *Final Rule*, 78 FR 21247-21248).

²²⁵ *Id.*

the missing information.²²⁶ The statute does not require Commerce to provide a respondent with endless opportunities to correct the record.²²⁷

- *China Kingdom* held that Commerce erred by not giving the respondent an opportunity to remedy or explain a deficiency that the respondent identified at verification.²²⁸ Mingtai has had multiple opportunities to report information that Commerce identified as deficient.²²⁹
- In *Agro Dutch*, the Court found that Commerce erred in disregarding the information provided by the respondent in response to that supplemental questionnaire, instead using the response to “defeat {the respondent’s} earlier responses.”²³⁰ In contrast, Mingtai provided no earlier responses, substituting its own judgment regarding countervailability for that of Commerce.
- If every respondent were allowed to supplement the record to “correct” adverse preliminary determinations, the application of adverse inferences would lose all deterrent effect.²³¹
- Mingtai’s argument that Commerce should have verified the missing information is inappropriate and inconsistent with Commerce’s policy and practice.²³²

Government of China’s Rebuttal Comments:

- Mingtai’s responses were reasonable and based on its belief that these time drafts were not countervailable.²³³
- Commerce’s questions were unclear, as the second supplemental questionnaire requested that Mingtai identify the items in its account. Commerce did not request that Mingtai identify and submit the items in the form of a loan worksheet.²³⁴
- If Commerce disagreed with Mingtai’s response to this issue, it should have requested that Mingtai submit a revised loan worksheet with these items. Commerce had time to request this information before the *Preliminary Determination*, and, if it did not have time, it could have deferred a decision until a post-preliminary decision.²³⁵
- Commerce issued three supplemental questionnaires to these respondents after the *Preliminary Determination*. Its refusal to ask additional questions about these time drafts is arbitrary and capricious.²³⁶ The Government of China has become increasingly concerned that this procedural gamesmanship rather than the pursuit of truth and the calculation of accurate duties has become Commerce’s primary objective.²³⁷

²²⁶ *Id.* at 50.

²²⁷ *Id.* at 53 (citing *Gerber Food (Yunnan) Co. v. United States*, 491 F. Supp. 2d 1326, 1336 (CIT 2007)).

²²⁸ *Id.* at 51, citing *China Kingdom*, 1337, 1343-44).

²²⁹ *Id.* at 51-52.

²³⁰ *Id.* at 52 (citing *Agro Dutch*, 2047, 2054 (2007)).

²³¹ *Id.* at 54-55 (citing SAA at 870).

²³² *Id.* at 56 (citing Commerce’s May 29, 2018 Verification Agenda at 2; *Mechanical Tubing from India* IDM at 40).

²³³ See Government of China’s Rebuttal Brief at 1 (citing *Hardwood Plywood from China* IDM at Comment 5).

²³⁴ *Id.* at 2.

²³⁵ *Id.* at 3 (citing, e.g., *Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 FR 28186 (June 18, 2018) (issuing a post-preliminary determination regarding certain types of loans); *Drawn Stainless Steel Sinks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) (issuing a post-preliminary determination regarding export financing but finding policy lending countervailable in the preliminary determination)).

²³⁶ *Id.* at 4 (citing *Ta Chen Stainless Pipe*, at n. 16).

²³⁷ *Id.* (citing *CP Kelco US, Inc. v. United States*, 2018 CIT Lexis 39 (2018)).

- Under 19 USC 1677m(d), Commerce was legally required to permit Mingtai an opportunity to remedy or explain the deficiency.

Commerce Position: Consistent with the *Preliminary Determination*, we find that Mingtai failed to provide information that was requested of it. Mingtai did not report all of its financing that was outstanding during the POI,²³⁸ despite being given three opportunities to do so. The CVD Questionnaire clearly instructs respondents to report all financing, including, but not limited to, interest expenses on bank promissory notes, invoice discounting, and factoring of accounts receivable.²³⁹ Commerce’s first supplemental questionnaire re-iterated this request, and it also instructed Mingtai to submit a revised Excel loan table, if needed.²⁴⁰ In its response, Mingtai stated that it had reported all financing it had outstanding during the POI.²⁴¹ In Commerce’s final attempt to gather the requested information, we instructed Mingtai to identify certain items on its financial statements that appeared to contradict Mingtai’s assertion that it had completely reported all financing. At this point, Mingtai clarified that it had not reported certain notes that are a “letter of guarantee/time draft.”²⁴² Mingtai did not submit any source documentation to support its narrative claim.

Mingtai contends that it was not required to report these letters of guarantee/time drafts. Commerce disagrees. As upheld in *Ansaldo Componenti* and discussed in *Cold-Rolled Steel Flat Products from Korea*, it is Commerce, and not interested parties, who determines whether a response is required.²⁴³ As such, the respondents cannot unilaterally decide to withhold information that may require further analysis by Commerce. Commerce is unable to conduct an accurate and complete investigation if interested parties decide on their own to provide, or not provide, information based on their own judgments of what is necessary, without an opportunity for Commerce or other parties to examine the information. Indeed, the facts available provisions of Section 776(a) of the Act specifically contemplate the application of facts available when an interested party withholds requested information and allows Commerce to take necessary action in response.

We disagree with Mingtai that it acted to the best of its abilities to comply with Commerce’s request for information about its financing. The Federal Circuit in *Nippon Steel* provided an explanation of the “failure to act to the best of its ability,” stating that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the

²³⁸ See PDM at 38-39.

²³⁹ See CVD Questionnaire at 66-67.

²⁴⁰ See Letter, “Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Request for Additional Information Regarding January 29, 2018 Questionnaire Responses,” dated February 5, 2018 at 2.

²⁴¹ See Mingtai Letter, “Common Alloy Aluminum Sheet from the People’s Republic of China-Section III 2nd Supplemental Questionnaire Response,” dated February 15, 2018.

²⁴² See Mingtai Letter, “Common Alloy Aluminum Sheet from the People’s Republic of China-Section III 3rd Supplemental Questionnaire Response,” dated March 15, 2018 (Mingtai March 15, 2018 SQR) at 2-3.

²⁴³ See *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (*Ansaldo Componenti*); see also *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 49946 (July 29, 2016) (*Cold-Rolled Steel Flat Products from Korea*), and accompanying IDM at Comment 5.

“best of its ability” requires the respondent to do the maximum it is able to do.²⁴⁴ The Federal Circuit acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate inquiries to respond to agency questions may suffice as well.²⁴⁵ Compliance with the “best of its ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.²⁴⁶ The Federal Circuit further noted that, while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.²⁴⁷

Mingtai argues that these same financial instruments were found to be not countervailable in the *Hardwood Plywood from China* proceeding. However, its reliance on this proceeding as a basis to not comply with the CVD Questionnaire instructions is misplaced. There is no record information about these financial instruments as they were used by Mingtai. Specifically, it is impossible to determine whether these are “time drafts” as claimed that operate in the same manner as those in the *Hardwood Plywood from China* proceeding. Further, there is no way to establish that all of Mingtai’s unreported financing were in connection with time drafts.

Mingtai and the Government of China assert that Mingtai should have been allowed to submit the missing information subsequent to our *Preliminary Determination*. We disagree. The statute does not require Commerce to provide a respondent with limitless opportunities to correct the record.²⁴⁸ Further, Mingtai’s reliance on *Grobest* is misguided. Unlike the plaintiff in *Grobest*, Mingtai did not promptly try to correct its failure “upon discovering its error.”²⁴⁹ Instead of providing the detailed transaction information about these instruments, as requested by Commerce, it made an unsupported argument that the financing it chose not to report is not countervailable.²⁵⁰ Commerce’s enforcement of the AFA provision of the statute under these circumstances is necessary to ensure that “the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”²⁵¹

Finally, regarding Mingtai’s and the Government of China’s assertions that Commerce’s request for information was unclear, we disagree. The CVD Questionnaire and supplemental questionnaire instructed Mingtai to “report all financing.”²⁵² If Mingtai was unclear about this instruction, it should have followed the guideline given in the CVD Questionnaire to consult with the officials in charge in the event of any questions.²⁵³ Moreover, Mingtai and the

²⁴⁴ See *Nippon Steel* at 1373, 1380-1382.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 53 (citing *Gerber Food (Yunnan) Co. v. United States*, 491 F. Supp. 2d 1326, 1336 (CIT 2007)).

²⁴⁹ *Id.* at 53-54, citing *Grobest*, 1342, 1367).

²⁵⁰ See Mingtai March 15, 2018 SQR at 2-3.

²⁵¹ See *SAA* at 870.

²⁵² See CVD Questionnaire at 66-67; Letter, “Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China: Request for Additional Information Regarding January 29, 2018 Questionnaire Responses,” dated February 5, 2018 at 2.

²⁵³ See CVD Questionnaire at Section I, General Instructions, at 1.

Government of China cannot have it both ways, simultaneously asserting that Mingtai's decision to not report these instruments based on its understanding of prior proceedings was reasonable, while also asserting that Mingtai was unclear as to whether it must report this financing. Accordingly, we find that Mingtai did not act to the best of its abilities in responding to Commerce's CVD Questionnaire about its outstanding financing.

Comment 9: Whether Commerce Should Amend Its Preliminary Calculation for Subsidies Received by Mingtai

Domestic Industry Comments

- Commerce should use corrected sales information that was submitted by Mingtai. Specifically, it should exclude service income that was previously mistakenly classified by Mingtai as product sales income.²⁵⁴
- Commerce should also adjust Mingtai's sales income to exclude two service fees that were found at verification to have been included in "other operation income" for products.²⁵⁵
- Mingtai reported negative electricity adjustment fees. These should have been added, and not subtracted, to the total electricity benefit. Similar adjustments were made in other proceedings, such as *Chlorinated Isocyanurates from China*, for purposes of calculating electricity for LTAR benefit.²⁵⁶

Mingtai Rebuttal Comments

- Commerce does not have a benchmark to compare this electricity expense adjustment, and, thus, could not find any adjustment was less than adequate remuneration. Accordingly, there should not be a benefit calculated for this item. It should continue to be treated neutrally, as Commerce did in the *Preliminary Determination*. This is consistent with Commerce's approach in other investigations.²⁵⁷

Commerce Position: We agree that the record establishes that Mingtai's reported service income should be excluded from its product sales income. We also agree that we should exclude two service fees that were found at verification. Finally, we agree that the electricity adjustments, which decrease the amounts Mingtai paid for its electricity, should be subtracted from the total electricity benefit. These adjustments are simple reductions in the total price that Mingtai paid for its electricity, and do not need to be separately measured against a different benchmark.

²⁵⁴ See Domestic Industry's Case Brief at 19.

²⁵⁵ *Id.* at 20.

²⁵⁶ *Id.* at 21-24.

²⁵⁷ See Mingtai's Rebuttal Brief at 5 (citing *Hardwood Plywood Products from China*, and accompanying Sanfortune Final Calculation).

XI. RECOMMENDATION

We recommend approving all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these Commerce 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

11/5/2018

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

APPENDIX

AFA Rate Calculation

	Program Name	AFA Rate	Source	Citation
1.	Deed Tax Exemption for SOEs Undergoing Mergers or Restructures	9.71%	Highest Rate for Similar Program Based on Benefit Type: VAT and Import Duty Exemptions on Imported Materials	<i>New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review</i> , 75 FR 64268, 64275 (October 19, 2010), unchanged in the final (<i>see New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review</i> , 76 FR 23286 (April 26, 2011) (<i>OTR Tires from China</i>).
2.	Equity Infusions into Nanshan Aluminum	N/A	N/A	
3.	Exemptions for SOEs from Distributing Dividends	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>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</i> , 82 FR 27466 (June 15, 2017) (<i>Chlorinated Isocyanurates from China; 2014</i>)
4.	Export Buyer's Credits	10.54%	Highest Rate for Similar Program Based on Benefit Type: Preferential Lending to the Coated Paper Industry	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using SheetFed Presses from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order</i> , 75 FR 70201, 70202 (November 17, 2010) (<i>Coated Paper from China</i>)
5.	Export Loans from Chinese SOCBs	10.54%	Highest Rate for Similar Program Based on Benefit Type: Preferential Lending to the Coated Paper Industry	<i>Coated Paper from China</i>
6.	Export Seller's Credits	4.25%	Highest Rate for Identical Program	<i>Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review</i> , 76 FR 77206 (December 12, 2011).
7.	Foreign Trade Development Fund Grants	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>Chlorinated Isocyanurates from China; 2014</i>
8.	Government of China and Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands	0.62%	Highest Rate for Similar Program Based on Benefit Type	<i>Chlorinated Isocyanurates from China; 2014</i>
9.	Government Provision of Electricity for LTAR	0.86%	Calculated – Mingtai	
10.	Government Provision of Land for LTAR	0.37%	Calculated – Mingtai	
11.	Government Provision of Primary Aluminum for LTAR	15.67%	Calculated – Yong Jie New Material	
12.	Government Provision of Steam Coal for LTAR	5.20%	Calculated – Mingtai	
13.	Grants for Energy Conservation and Emission Reduction	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>Chlorinated Isocyanurates from China; 2014</i>

14.	Grants for the Relocation of Productive Facilities	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>Chlorinated Isocyanurates from China; 2014</i>
15.	Grants for the Retirement of Capacity	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>Chlorinated Isocyanurates from China; 2014</i>
16.	Grants to Nanshan Aluminum	N/A	N/A	
17.	Import Tariff and VAT exemptions on Imported Equipment in Encouraged Industries	9.71%	Highest Rate for Similar Program Based on Benefit Type: VAT and Import Duty Exemptions on Imported Materials	<i>OTR Tires from China</i>
18.	Income Tax Concessions for Enterprises Engaged in Comprehensive Resource Utilization	25.00%	Corporate Income Tax Rate	Government of China February 6, 2018 Questionnaire Response at 21
19.	Income Tax Deductions/Credits for Purchase of Special Equipment			
20.	Income Tax Reduction for HNTEs			
21.	Income Tax Reduction for R&D under the EITL			
22.	Policy Loans to Common Alloy Sheet Industry	10.54%	Highest Rate for Similar Program Based on Benefit Type: Preferential Lending to the Coated Paper Industry	<i>Coated Paper from China</i>
23.	Preferential Loans for SOEs			
24.	Stamp Tax Exemption on Share Transfers Under Non-Tradeable Share Reform	9.71%	Highest Rate for Similar Program Based on Benefit Type: VAT and Import Duty Exemptions on Imported Materials	<i>OTR Tires from China</i>
25.	The State Key Technology Fund Project	0.62%	Highest Rate for Similar Program Based on Benefit Type: Special Fund for Energy Saving Technology	<i>Chlorinated Isocyanurates from China; 2014</i>
26.	VAT Rebates on Domestically-Produced Equipment	0.05%	Calculated – Yong Jie New Material	