C-570-085
Investigation
POI: 01/1/2017 – 12/31/2017
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DATE: May 14, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to the producers of certain quartz surface products (quartz surface products) from the People's Republic of China (China), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1: Whether This Investigation Was Improperly Initiated
Comment 2: The Application of Adverse Facts Available (AFA) to Foshan Hero Stone Co., Ltd. (Hero Stone)
Comment 3: The Application of AFA to Foshan Yixin Stone Co., Ltd.'s (Foshan Yixin's) and Hero Stone's Unaffiliated Suppliers of Subject Merchandise
Comment 4: The Application of AFA to Input Market Distortion
Comment 5: The Application of AFA Regarding Whether Inputs are Specific
Comment 6: Whether Commerce's Use of a Tier Two Benchmark Takes into Account Prevailing Market Conditions in China
Comment 7: The Benchmark Used in the Calculation of the Provision of Polyester Resin for LTAR Program
Comment 8: The Benchmark Used in the Calculation of the Provision of Quartz for LTAR Program
Comment 9: Whether Commerce Should Continue to Treat Quartz "Powder" as Crushed Quartz Sand

Comment 10: Whether Commerce's Preliminary Critical Circumstances Determination Was Lawful

II. BACKGROUND

<u>Case History</u>

The mandatory respondents in this investigation are Fasa Industrial Corporation Limited (Fasa Industrial), Foshan Yixin, and Hero Stone. On September 21, 2018, Commerce published the *Preliminary Determination* in this investigation and aligned this final countervailing duty (CVD) determination with the final antidumping duty (AD) determination, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4)(i).[1] On November 6, 2018, Commerce issued a post-preliminary analysis of new subsidy allegations filed by Cambria Company LLC (the petitioner).[2] On November 15, 2018, Commerce published the *Preliminary Critical Circumstances Determination*.[3] Also in November 2018, we conducted verification at the offices of Foshan Yixin, in accordance with section 782(i) of the Act.[4] On November 20, 2018, Commerce extended the deadline for the final results of this investigation until April 4, 2019.[5]

We invited parties to comment on the *Preliminary Determination*. We received timely-filed case briefs from Dal-Tile Corporation (Dal-Tile); Foshan Yixin; the Government of China (GOC); Hero Stone; Arizona Tile LLC, Bedrosians Tile & Stone, MS International, Inc., Piedrafina Marble, Inc., Quartz Stone, Inc., and Surface Warehouse LP dba US Surfaces and US Surface Warehouse (collectively, Quartz Importers); and the petitioner.[6] We also received timely-filed

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[1] *See Certain Quartz Surface Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 47881 (December 21, 2018) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, "Post-Preliminary Analysis of Countervailing Duty Investigation: Certain Quartz Surface Products from the People's Republic of China," dated November 6, 2018 (Post-Prelim Analysis Memorandum).

[3] *See Certain Quartz Surface Products from the People's Republic of China: Preliminary Affirmative Determination of Critical Circumstances, in Part, in the Countervailing Duty Investigation*, 83 FR 57419 (November 15, 2018) (*Preliminary Critical Circumstances Determination*).

[4] *See* Memorandum, "Verification of the Questionnaire Responses of Foshan Yixin Stone Co., Ltd.," dated December 14, 2018 (Foshan Yixin Verification Report).

[5] *See Certain Quartz Surface Products from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 83 FR 58540 (November 20, 2018).

[6] *See* Foshan Yixin's Letter, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China: Yixin Case Brief," dated December 21, 2018 (Foshan Yixin's Case Brief); *see also* Hero Stone's Letter, "Quartz Surface Products from the People's Republic of China: Case Brief of Hero Stone," dated December 21, 2018 (Hero Stone's Case Brief); Quartz Importers' Letter, "Quartz Surface Products from the People's Republic of China: Case Brief of Arizona Tile LLC, Bedrosians Tile & Stone, MS International, Inc., Piedrafina Marble, Inc., Quartz Stone, Inc., and Surface Warehouse LP dba US Surfaces and US Surface Warehouse," dated December 21, 2018 (Quartz Importers' Case Brief); GOC's Letter, "GOC Administrative Case Brief in the Countervailing Duty Investigation of Certain Quartz Surface Products form the People's Republic of China," dated February 4, 2019; Dal-Tile's Letter, "Certain Quartz Surface Products from the People's Republic of China: Case Brief," dated December 26, 2019; and Petitioner's Letter, "Certain Quartz Surface Products from the

rebuttal briefs from Francini Inc. (Francini), Foshan Yixin, the GOC, Hero Stone, and the petitioner.[7]

Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.[8] Therefore, the revised deadline for the final determination of this investigation is May 14, 2019.

Period of Investigation

The period of investigation (POI) is January 1, 2017, through December 31, 2017.

III. Final Determination of Critical Circumstances

Section 705(a)(2) of the Act provides that Commerce will determine that critical circumstances exist if: (A) the alleged countervailable subsidy is inconsistent with the WTO Subsidies and Countervailing Measures (SCM) Agreement;[9] and (B) there have been massive imports of the subject merchandise over a relatively short period. A final determination with respect to critical circumstances may be affirmative even if critical circumstances were found not to exist in the preliminary determination.[10] In determining whether there are "massive imports" over a "relatively short period," pursuant to section 705(a)(2)(B) of the Act and 19 CFR 351.206(h) and (i), Commerce normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the base period) to a comparable period of at least three months following the filing of the petition (*i.e.*, the comparison period). However, the regulations also provide that if Commerce finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning

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People's Republic of China: Submission of Revised Case Brief," dated December 21, 2018 (Petitioner's Case Brief).

[7] *See* GOC's Letter, "GOC Rebuttal Brief in the Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China," dated February 11, 2019 (GOC's Rebuttal Brief); *see also* Hero Stone's Letter, "Quartz Surface Products from the People's Republic of China: Rebuttal Brief of Hero Stone," dated February 11, 2019 (Hero Stone's Rebuttal Brief); Francini's Letter, "Certain Quartz Service {sic} Products from the People's Republic of China: Rebuttal Brief," dated February 11, 2019 (Francini's Rebuttal Brief); Foshan Yixin's Letter, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China: Rebuttal Case Brief of Foshan Yixin," dated March 6, 2019 (Foshan Yixin's Rebuttal Brief); and Petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Submission of Rebuttal Brief," dated February 11, 2019 (Petitioner's Rebuttal Brief).

[8] *See* Memorandum to the Record from 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, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

[9] Commerce limits its critical circumstances findings to those subsidies contingent upon export performance or use of domestic over imported goods (*i.e.*, those prohibited under Article 3 of the SCM Agreement). *See, e.g.*, *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire from Germany*, 67 FR 55808, 55809-10 (August 30, 2002) (*Steel Wire from Germany*).

[10] Section 705(a)(2) of the Act.

of the proceeding, that a proceeding was likely, Commerce may consider a period of not less than three months from the earlier time.[11] Imports must increase by at least 15 percent during the comparison period to be considered massive.[12]

As explained in our *Preliminary Determination*, we applied total adverse facts available (AFA) to Fasa Industrial and Hero Stone, pursuant to section 776(a)-(b) of the Act. In applying total AFA to these two companies, we preliminarily determined that both Fasa Industrial and Hero Stone benefited from countervailable subsidies under all the programs in this proceeding, including the "Export Assistance Grants" program.[13] As explained in the *Preliminary Critical Circumstances Determination*,[14] we preliminarily found, pursuant to section 776(a)-(b) of the Act, that there is a reasonable basis to believe or suspect that the "Export Assistance Grants" program, as alleged in the Petition[15] and supported by information reasonably available to the petitioner, is export contingent within the meaning of section 771(5A)(B) of the Act and, thus, inconsistent with the SCM Agreement.[16] We preliminarily found this program to have a program-specific rate of 0.58 percent.[17] We made the inconsistency determination with regard to this program because it had the lowest rate in the *Preliminary Determination* among the programs alleged to be inconsistent with the SCM Agreement.

In addition, for the purposes of the "massive imports" analysis, we preliminarily determined, pursuant to section 776(a)-(b) of the Act, that there was a reasonable basis to believe or suspect that Fasa Industrial and Hero Stone shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criteria under section 703(e)(1)(B) of the Act.[18] As a result, we preliminarily determined that critical circumstances existed with regard to Fasa Industrial and Hero Stone.[19]

For this final determination, we continue to apply total AFA to Fasa Industrial and Hero Stone, pursuant to section 776(a)-(b) of the Act.[20] No party provided comments regarding the "Export Assistance Grants" program's inconsistency with the SCM Agreement. Therefore, for this final determination, we determine, as AFA, that the "Export Assistance Grants" program is contingent

[11] *See* 19 CFR 351.206(i).
[12] *See* 19 CFR 351.206(h)(2).
[13] *See* PDM at 11.
[14] *See Preliminary Critical Circumstances Determination*, 83 FR at 57420-21.
[15] *See* "Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Quartz Surface Products from the People's Republic of China," dated April 17, 2018 (Petition).
[16] *See* Countervailing Duty Investigation Initiation Checklist: Certain Quartz Surface Products from the People's Republic of China, dated May 7, 2018.
[17] *See* PDM at Appendix.
[18] *See Preliminary Critical Circumstances Determination*, 83 FR at 57421.
[19] *Id.* at 57420.
[20] For further discussion of the application of AFA to Hero Stone, *see* Comment 2, *infra*. For further discussion of critical circumstances, *see* Comment 10, *infra*.

upon export within the meaning of section 771(5A)(B) of the Act and, therefore, inconsistent with the SCM Agreement pursuant to section 705(a)(2)(A) of the Act.[21]

Moreover, as explained in the section, "Application of AFA: Export Buyer's Credits," we are now finding, as AFA, that the Export Buyer's Credits program is an export subsidy.[22] Accordingly, for this final determination, we also find that the Export Buyer's Credit program is export contingent within the meaning of section 771(5A)(B) of the Act and, thus, inconsistent with the SCM Agreement.

Additionally, as AFA, we find that there was a massive increase in the volume of imports of the subject merchandise from Fasa Industrial and Hero Stone during the critical circumstances period, pursuant to section 705(a)(2)(B) of the Act.[23]

Consistent with the *Preliminary Critical Circumstances Determination*, because we find, pursuant to section 776(a)-(b) of the Act, that the "Export Assistance Grants" program is export contingent, and we now also find that the "Export Buyer's Credits" program is export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met.[24] In addition, for the purposes of the "massive imports" analysis, we determine, pursuant to section 776(a)-(b) of the Act, that Fasa Industrial and Hero Stone shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criteria under section 705(a)(2)(B) of the Act. As a result, we determine that critical circumstances continue to exist with regard to Fasa Industrial and Hero Stone. For further discussion of critical circumstances for Fasa Industrial and Hero Stone, *see* Comment 10.

Finally, in the *Preliminary Critical Circumstances Determination*, we found that Foshan Yixin did not receive any countervailable subsidies during the POI that are inconsistent with the SCM Agreement. However, as discussed in the section, "Application of AFA: Export Buyer's Credits," we are now finding, as AFA, that Foshan Yixin used the Export Buyer's Credit program during the POI. Because this program is export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met with regard to Foshan Yixin. In addition, Foshan Yixin failed to timely report its monthly quantity and value data for subject merchandise shipped to the United States during the critical circumstance period.[25] Pursuant to section 776(a)(1) and (a)(2)(B) of the Act, we find that necessary information regarding Foshan Yixin's

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[21] *See* Countervailing Duty Investigation Initiation Checklist: Certain Quartz Surface Products from the People's Republic of China, dated May 7, 2018 (Initiation Checklist) at 25-26.
[22] *See, e.g.*, *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 17382 (April 25, 2019) (*Passenger Tires 2016 AR*), and accompanying IDM at Comment 16.
[23] *See* Letter from the petitioner, "Certain Quartz Surface Products from the People's Republic of China: Amendment to Petition for the Imposition of Antidumping and Countervailing Duties to Allege Existence of Critical Circumstances," dated October 9, 2018 (Critical Circumstances Allegation).
[24] *See Preliminary Critical Circumstances Determination*, 83 FR at 57420.
[25] *See* Commerce Letter, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China: Rejection of Untimely Submission," dated October 22, 2018.

imports during the critical circumstances period is missing from the record due to Foshan Yixin's failure to provide such information requested by the deadline for submission of that information. In addition, we find that Foshan Yixin failed to cooperate by acting to the best of its ability to comply with our request for its import information, pursuant to section 776(b)(1). We thus find the use of AFA appropriate in determining whether Foshan Yixin had massive imports during the critical circumstances period. In making this determination, we are relying, as AFA, on the data from the petitioner's Critical Circumstance Allegation[26] to find that there was a massive increase in the volume of imports of the subject merchandise from Foshan Yixin during the critical circumstances period. Therefore, pursuant to section 776(a)-(b) of the Act, we determine that Foshan Yixin shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criteria under section 705(a)(2)(B) of the Act.[27] Accordingly, we determine that critical circumstances exist for Foshan Yixin.

In addition, we determine that critical circumstances exist with respect to the imports of subject merchandise from "all other" producers/exporters of subject merchandise during the POI. As explained in the *Preliminary Critical Circumstances Determination*, we based the all-others rate applied in the *Preliminary Determination* on the rate preliminarily calculated for Foshan Yixin. In this investigation, Commerce preliminarily assigned a rate based entirely on facts available to Fasa Industrial and Hero Stone, and we continue to do so for this final determination. Therefore, the only rate that is not zero, *de minimis*, or based entirely on facts otherwise available is the rate calculated for Foshan Yixin; as a result, Foshan Yixin's rate is also assigned as the all-others rate. Because we are now finding, as AFA, that Foshan Yixin used the Export Buyer's Credit program during the POI and this program is export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met with regard to companies covered by the all-others rate. Regarding our "massive imports" analysis, consistent with prior determinations, we have not imputed the adverse inference of massive imports that we applied to the mandatory respondents to the companies receiving the all-others rate.[28] Because we have no shipment data from Chinese producers/exporters of subject merchandise on the record, we are relying on the data provided in the petitioner's allegation of critical circumstances. The data in the petitioner's allegation shows an increase of 81 percent between the base and comparison periods.[29] Therefore, pursuant to section 776(a)-(b) of the Act, we determine that companies covered by the all-others rate shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criteria under section 705(a)(2)(B) of the Act. Consequently, we find that critical circumstances exist for "all other" producers and exporters of subject merchandise.

In addition to finding critical circumstances for Foshan Yixin and companies covered by the all-others rate, based on our review and analysis of the comments received from interested parties,

[26] *See* Critical Circumstances Allegation.
[27] *See* Critical Circumstances Allegation.
[28] *See, e.g.*, *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Preliminary Affirmative Determination, Preliminary Partial Affirmative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 80 FR 79558 (December 22, 2015), and accompanying PDM at 17-20, unchanged in *Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Partial Affirmative Critical Circumstances Determination*, 81 FR 32729 (May 24, 2016).
[29] *See* Critical Circumstances Allegation.

for this final determination, we are assigning individual estimated subsidy rates based on AFA to Foshan Yixin's unaffiliated suppliers that failed to cooperate in this investigation: Foshan Nanhai Julang Quartz Co. (Foshan Nanhai) and Qinguan Yuefeng Decoration Material Co. (Qinguan Yuefeng). For further discussion of our AFA determination, *see* the "Use of Adverse Facts Available" section and Comment 3. Because we are assigning a rate to Foshan Nanhai and Qinguan Yuefeng based on AFA, we also determine, based on AFA, that critical circumstances exist for these two companies. We find that critical circumstances exist for Foshan Nanhai and Qinguan Yuefeng for the same reasons as discussed with regard to Fasa Industrial and Hero Stone above. Specifically, because we find, pursuant to section 776(a)-(b) of the Act, that both the "Export Assistance Grants" and "Export Buyer's Credits" programs are export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met with regard to Foshan Nanhai and Qinguan Yuefeng. In addition, for the purposes of the "massive imports" analysis, we determine, pursuant to section 776(a)-(b) of the Act, that Foshan Nanhai and Qinguan Yuefeng shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criterion under section 705(a)(2)(B) of the Act.

IV. SCOPE COMMENTS

During the course of this investigation, and the concurrent AD investigation of quartz surface products from China, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope case and rebuttal briefs.[30] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[31] In addition, on March 1, 2019, the petitioner submitted a proposed clarification to the scope of this and the concurrent AD investigation.[32] In response to the petitioner's proposed scope clarification, Commerce established a separate scope briefing schedule and received case and rebuttal briefs regarding the proposed clarification, which we addressed in the Scope Modification Determination.[33] As a result, for this final determination, we made certain changes to the scope of these investigations from that published in the *Preliminary Determination*.

V. Use of Adverse Facts Available

Commerce relied on "facts otherwise available," including AFA, for several findings in the *Preliminary Determination*. Commerce has made changes to its use of facts otherwise available

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[30] *See* Memorandum, "Certain Quartz Surface Products from the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determination," dated September 14, 2018 (Preliminary Scope Decision Memorandum).
[31] *See* Memorandum, "Certain Quartz Surface Products from the People's Republic of China: Final Scope Comments Decision Memorandum," dated May 10, 2019 (Final Scope Decision Memorandum).
[32] *See* Petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Request for Scope Clarification," dated March 1, 2019.
[33] *See* Memorandum, "Certain Quartz Surface Products from the People's Republic of China: Scope Modification Determination," dated concurrently with this notice (Scope Modification Determination).

and AFA, as applied in the *Preliminary Determination*.[34] Those changes are discussed in detail below.

A. Legal Standard

Section 776(a) of the Act provides that Commerce shall, subject to section 782(d) of the Act, select from among the "facts otherwise available" if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by 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.

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) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an 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."[35] 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."[36]

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."[37] It is Commerce's practice to consider information to be corroborated if it has probative value.[38] In analyzing whether information has probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used.[39] However, the SAA emphasizes that Commerce need not prove that the selected facts available are the best alternative information.[40]

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[34] *See* PDM at 5-22.
[35] *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); *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).
[36] *See* Statement of Administrative Action (SAA) 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.
[37] *See, e.g.*, SAA at 870.
[38] *Id.* at 870.
[39] *Id.* at 869.
[40] *Id.* at 869-870.

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

Otherwise, under section 776(d) of the Act, Commerce may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, use a CVD rate for a subsidy program from a proceeding that Commerce 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 if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[41] For purposes of this final determination, in addition to continuing to apply AFA to Fasa Industrial and Hero Stone, we are also applying AFA to Foshan Yixin's unaffiliated suppliers which failed to respond to the CVD questionnaire: Qingyuan Yuefeng and Foshan Nanhai.

B. Application of Total AFA: Foshan Nanhai and Qingyuan Yuefeng

As discussed in Comment 3, Foshan Nanhai and Qingyuan Yuefeng, Foshan Yixin's unaffiliated suppliers of subject merchandise, failed to provide requested information needed for Foshan Yixin's response to the CVD questionnaire by the established deadline. This information was necessary for us to determine the total amount of the subsidies on subject merchandise that Foshan Yixin exported to the United States. Therefore, we find that Foshan Nanhai and Qingyuan Yuefeng withheld information that had been requested and failed to provide information within the established deadlines. By not providing the information, Foshan Nanhai and Qingyuan Yuefeng significantly impeded this proceeding. Thus, in reaching a final determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we determined the CVD rate for these companies and our findings regarding specificity and government financial contribution by selecting from among the facts otherwise available on the record.

Moreover, we determine that AFA is warranted, pursuant to section 776(b) of the Act, because by failing to provide information necessary for the CVD questionnaire response and not participating in this investigation, Foshan Nanhai and Qingyuan Yuefeng did not cooperate to the best of their abilities to comply with Commerce's requests for information. Accordingly, we determine that the use of an adverse inference in selecting from among the facts otherwise available is warranted to ensure that these companies do not obtain a more favorable result by failing to cooperate than if they had complied with our requests for information.

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

As AFA, we find that all programs in this proceeding are countervailable with respect to Foshan Nanhai and Qingyuan Yuefeng – that is, they provide a financial contribution within the meaning of sections 771(5)(B)(i) and (D) of the Act, confer a benefit within the meaning of sections 771(5)(B) and (E) of the Act, and are specific within the meaning of section 771(5A) of the Act. Therefore, we are including each of these programs in the determination of the AFA rate for Foshan Nanhai and Qingyuan Yuefeng. We selected an AFA rate for each of these programs based on the statutory hierarchy provided in section 776(d) of the Act and in accordance with Commerce's practice, and we included them in the determination of the AFA rate applied to Foshan Nanhai and Qingyuan Yuefeng. Commerce has previously countervailed these or similar programs. For a description of the selection of the AFA rate and our corroboration of this rate, *see* "Selection of the AFA Rate" and "Corroboration of the AFA Rate."

Selection of the AFA Rate

It is our practice in CVD proceedings to determine an 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.[42] When selecting AFA rates, section 776(d) of the Act provides that Commerce may use a countervailable subsidy rate determined for the same or a similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates.[43] Accordingly, when selecting AFA rates, if we have cooperating respondents, as in this investigation, we first determine if there is an identical program in the instant investigation and use the highest calculated rate for the identical program. If there is no identical program for which we calculated 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).[44] If no such rate exists, we then determine if there is a similar/comparable program (based

[42] *See, e.g., Common Alloy Aluminum Sheet from the People's Republic of China: Preliminary Affirmative Countervailing Duty (CVD) Determination, Alignment of Final CVD Determination with Final Antidumping Duty Determination, and Preliminary CVD Determination of Critical Circumstances*, 83 FR 17651 (April 23, 2018), and accompanying PDM at "X: Use of Facts Otherwise Available and Adverse Inferences: Application of Total AFA: Chalco Ruimin and Chalco-SWA"; *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) (*Aluminum Extrusions*), and accompanying IDM at "VI. Use of Facts Otherwise Available and Adverse Inferences: Application of Adverse Inferences: Non-Cooperative Companies"; *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."

[43] *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; *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").

[44] For purposes of selecting AFA program rates, we normally treat rates less than 0.5 percent to be *de minimis*. *See,*

on the 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.[45]

In applying AFA to determine a net subsidy rate for Quingyuan Yuefeng and Foshan Nanhai, we applied the methodology detailed above. We began by selecting, as AFA, the highest calculated program-specific above-zero rates determined for Foshan Yixin in the instant investigation. Accordingly, we applied the subsidy rate calculated for Foshan Yixin for the following programs:

- Provision of Polyester Resin for LTAR
- Provision of Quartz for LTAR
- Provision of Electricity for LTAR
- Policy Loans to the Quartz Surface Products Industry
- 2016 Market Development Assistance (Special Fund for Domestic & Foreign Economic and Trade Development)
- 2016 Guangdong Province High-Tech Enterprise Assistance
- Foshan City's Subsidy for Recognition as High-Tech Enterprises
- Special Award for Guangdong Province's Stable Growth Structure (2016)
- High and New Technology Enterprise for Education and Training
- Gaoming District Engineering Center Assistance

In determining an AFA rate for the following income tax reduction programs on which Commerce initiated an investigation, we are finding, as AFA, that Quingyuan Yuefeng and Foshan Nanhai paid no Chinese income tax during the POI:

- Preferential Income Tax Reductions for High and New Technology Enterprises (HNTEs)
- Preferential Deduction of Research & Development (R&D) Expenses for HNTEs
- Income Tax Credits for Domestically-Owned Companies Purchasing Domestically- Produced Equipment
- Preferential Income Tax Subsidies for High or New Technology Foreign Invested Enterprises (FIEs)
- Income Tax Benefits for Domestic Enterprises Engaging in R&D
- Foshan High-Tech Industrial Development Zone Income Tax Subsidies

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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."

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

- Fujian Pilot Free Trade Zone Payments of Income Tax

The standard income tax rate for corporations in China in effect during the POI was 25 percent.[46] Thus, the highest possible benefit for these income tax programs is 25 percent. Accordingly, we are applying the 25 percent AFA rate on a combined basis (*i.e.*, that the seven programs, combined, provide a 25 percent benefit). Consistent with Commerce's practice, application of this AFA rate for preferential income tax programs does not apply to tax credit, tax rebate, or import tariff and value-added tax (VAT) exemption programs, because such programs may provide a benefit in addition to a preferential tax rate.[47]

For all other programs not identified above, we are applying, where available, the highest above *de minimis* subsidy rate calculated for the same or comparable programs in a CVD proceeding involving China. For this final determination, we are able to match, based on program names, descriptions, and treatment of the benefit, the following programs to the same or similar programs from other CVD proceedings involving China:

Same programs:

- Export Loans
- Export Seller's Credits
- Export Buyer's Credits
- Preferential Loans for State-Owned Enterprises (SOEs)
- Loan and Interest Forgiveness for SOEs
- Preferential Deduction of Research and Development Expenses for High or New Technology Enterprises
- Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax
- Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
- Provision of Land Use Rights for LTAR
- Provision of Land to SOEs for LTAR
- The State Key Technology Project Fund
- Export Assistance Grants
- Subsidies for Development of Famous Export Brands and China World Top Brands
- Sub-Central Government Programs to Promote Famous Export Brands and China World Top Brands
- Export Credit Insurance Subsidies
- Export Credit Guarantees

Similar programs:

- Foshan High-Tech Industrial Development Zone Duty Exemption
- Foshan High-Tech Industrial Development Zone City Maintenance Fee Exemption
- Foshan High-Tech Industrial Development Zone Land Use Reductions

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[46] *See* CVD Initiation Checklist at 14.
[47] *See, e.g.*, *Aluminum Extrusions* IDM at "Application of Adverse Inferences: Non-Cooperative Companies."

- Fujian Pilot Free Trade Zone Tariff and VAT Exemptions
- Fujian Pilot Free Trade Zone Port Tax Refund Policy
- Fujian Pilot Free Trade Zone Liberalization of Interest Rates

For the calculation of this portion of the AFA rate, *see* PDM at Appendix. The sum of the subsidy rates for the programs listed above is 178.45 percent.

Additionally, on November 6, 2019, Commerce issued a post-preliminary memorandum, analyzing 17 programs based on new subsidy allegations filed by the petitioner.[48] Thus, we find, based on AFA, and guided by the methodology detailed above, that Foshan Nanhai and Qingyuan Yuefeng also used the following programs:

- Provision of International Ocean Shipping Services for LTAR
- Special Funds of Guangdong Province for International Market Expansion
- Special Funds of Guangdong Province for Development of Foreign Trade
- Support Funds of Guangdong Province of Export Rebate for Mechanic, Electronic, and High-Tech Products
- Funds of Guangdong Province to Support the Adoption of E-Commerce by Foreign Trade Enterprises
- "Two New" Product Special Funds of Guangdong Province
- Guangdong Province Science and Technology Bureau Project Fund
- Funds for Outward Expansion of Industries in Guangdong Province
- Guangdong Patent and Honor Award Grants
- Special Fund for Significant Science and Technology in Guangdong Province
- Foshan City Government Technology Renovation and Technology Innovation Special Fund Grants
- Special Funds for Development of Foreign Trade (Foshan City)
- Foshan City Government Patent and Honor Award Grants
- Trial Incentive Measures for Rewarding Attraction of Investment in Gaoming District, Foshan City
- City of Qingyuan Fiscal Support Policy
- Incentive Measures of Nanhai District
- Incentive Measures of Sanshui District

We selected an AFA rate for each of these programs and included them in the determination of the net subsidy rate[49] applied to Foshan Nanhai and Qingyuan Yuefeng. Commerce has previously countervailed these or similar programs.[50] For the calculation of this portion of the

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[48] *See* Post-Prelim Analysis Memorandum.
[49] For further discussion regarding Commerce's analysis of petitioner's new subsidy allegations, *see* Post-Prelim Analysis Memorandum.
[50] *See* Memorandum, "Decision Memorandum on New Subsidy Allegations," dated September 7, 2018 (NSA Initiation).

AFA rate, *see* the Post-Preliminary Analysis Memorandum at Appendix. The sum of the subsidy rates for the programs listed above is 12.54 percent.[51] Consequently, based on the methodology described above, we determine the AFA net countervailable subsidy rate for Foshan Nanhai and Qingyuan Yuefeng to be 190.99 percent *ad valorem*.

Corroboration of the AFA Rate

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 defined as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[52] The SAA provides that to "corroborate" secondary information, Commerce will satisfy itself that the secondary information to be used has probative value.[53]

Commerce will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that Commerce need not prove that the selected facts available are the best alternative information.[54] Furthermore, Commerce is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[55]

With regard to the reliability aspect of corroboration, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroboration, Commerce will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Commerce will not use information where circumstances indicate that the information is not appropriate as AFA.[56]

Because Foshan Nanhai and Qingyuan Yuefeng failed to provide information concerning their usage of the subsidy programs due to their decision not to participate in the investigation, we have reviewed the available record information[57] as well as information concerning Chinese subsidy programs in other cases. Where we have a program-type match, we find that, because

[51] We are also including the additional 12.54 percent subsidy rate calculated in the Post-Preliminary Analysis Memorandum as part of the AFA rate applied to Fasa Industrial and Hero Stone. As a result, the AFA rate applied to Fasa Industrial and Hero Stone for purposes of this final determination is 190.99 percent.
[52] *See* SAA at 870.
[53] *Id*.
[54] *Id*. at 869-870.
[55] *See* section 776(d) of the Act.
[56] *See, e.g.*, *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017), and accompanying IDM at 14 (citing *Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996)).
[57] *See* NSA Initiation.

these are the same or similar programs, they are relevant to the programs in this investigation. The relevance of these rates is that they are actual calculated subsidy rates for Chinese programs, from which the non-responsive companies could actually receive a benefit. Due to the lack of participation by these companies and the limited record information concerning these programs, we have corroborated the rates we selected to use as AFA to the extent practicable.

C. Application of AFA: Export Buyer's Credits

As discussed below under the section "Programs Determined to be Countervailable," in our preliminary determination, we inadvertently failed to include the Export Buyer's Credit program provided by the Export-Import Bank of China (EXIM Bank) in the subsidy rate calculation for Foshan Yixin. We are correcting that omission here. Commerce determines that use of AFA is warranted in determining the countervailability of export buyer's credits because the GOC did not provide the requested information needed to allow Commerce to fully analyze this program.

In the initial and supplemental questionnaire issued to the GOC, we requested that the GOC answer all the questions in the Standard Questions Appendix and other specific questions relating to the EXIM Bank's Export Buyer's Credit program, which are necessary for Commerce to analyze how the program is administered and how it functions.[58] In response, the GOC stated that none of Foshan Yixin's U.S. customers used export buyer's credits during the POI, but it did not respond to the Standard Questions Appendix.[59] The GOC provided the Administrative Measures and Implementing Rules for the Export Buyer's Credit of China EXIM Bank, but upon request, did not submit the 2013 revision to the Export Buyer's Credit program.[60] The GOC maintained that it had contacted Foshan Yixin, obtained a copy of its customers list, and confirmed that none of Foshan Yixin's listed importers obtained export buyer's credits from the EXIM Bank during the POI.[61] The GOC also provided a brief description of the program indicating that it involves interaction between the EXIM Bank and the borrowers (*i.e.*, Foshan Yixin's U.S. customers), with Foshan Yixin's knowledge.

It is clear from past proceedings that the information provided by the GOC and Foshan Yixin to Commerce in this proceeding regarding Foshan Yixin's use of this program is unverifiable. Commerce first investigated and countervailed the Export Buyer's Credit program in the 2012 investigation of *Solar Cells*.[62] Our initiation was based on, among other information, the EXIM Bank's 2010 annual report, demonstrating that the credits provided under this program are

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[58] *See* Commerce Letters re: Certain Quartz Surface Products from the People's Republic of China: Countervailing Duty Questionnaire, dated June 8, 2018 (Initial CVD Questionnaire); and re: First Supplemental Questionnaire for GOC, dated August 9, 2018 (GOC First SQ).
[59] *See* GOC July 23, 2018 Initial Questionnaire Response (GOC July 23, 2018 IQR) at 8-9.
[60] *Id*. at Exhibit II 8.B; *see also* GOC's August 22, 2018 First Supplemental Questionnaire Response (GOC August 22, 2018 SQR) at 13.
[61] *See* GOC July 23, 2018 IQR at 9.
[62] *See 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) (*Solar Cells*), and accompanying IDM at 9 and Comment 18.

"medium-and long-term loans, and have preferential, low interest rates. Included among the projects that are eligible for such preferential financing are energy projects.[63] There, the GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, but simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."[64] In response to a request from Commerce for information concerning the operation of the Export Buyer's Credit program and how we might verify usage of the program, the GOC stated that none of the respondents' customers had used the program either. The GOC added: "The GOC understands that this program, including the buyer's credit, cannot be implemented without knowledge of the exporters because the program has a substantial impact on the exporter's financial and foreign exchange business matters."[65] Although asked, the GOC provided no additional information concerning exactly how an exporter's financial and foreign exchange matters would be affected. Based on the GOC's responses, Commerce understood that under this program loans were provided directly from the EXIM Bank to the borrowers (*i.e.*, a respondent's customers), and that a respondent might have knowledge of loans provided to its customers through its involvement in the application process. Commerce then gave the GOC a third opportunity to provide the information requested. Once again, we prefaced our questions by explaining why the information was necessary: "In order for {Commerce} to be able to verify that the respondents' customers have not received these credits…you must answer {the following questions}."[66]

The GOC once again refused to provide the sample application documents or any regulations or manuals governing the approval process, providing instead its statement that none of the respondent companies or their foreign buyers had used the export seller's or buyer's credits from the EXIM Bank. It also provided a very brief description of the application process for export seller's credits and noted that the application process for export buyer's credits was "similar."[67] The description suggested the provision of export credits is a matter between the EXIM Bank and the borrower *only*.[68] The GOC's two-paragraph discussion of the application process mentioned only the EXIM Bank and "borrowers,"[69] thereby indicating that the loans were issued directly from the EXIM Bank to the borrowers.

What little information the GOC provided indicated an interaction between the EXIM Bank and the borrowers (*i.e.*, the respondent's U.S. customers, who were not participating in the proceeding), with knowledge by the company respondents. Commerce concluded it could not verify non-use of export buyer's credits with the company respondents (*i.e.*, the exporters), and

[63] *Id*. at Comment 18 (Commerce initially asked the GOC to complete the "standard questions appendix" for the Export Buyer's Credit program. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant records the government maintains, the identification of the relevant laws and regulations, and a description of the application process (along with sample application documents). The standard questions appendix is attached to the initial questionnaire issued in every CVD investigation and review and is intended help Commerce understand the structure, operation, and usage of the program.).
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.

provided a detailed explanation as to why the lack of information concerning the operation of the Export Buyer's Credit program prevented an accurate assessment of usage at verification of the respondent exporters:

> {E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that {Commerce} needs to examine in order to verify that the information is complete and accurate. For verification purposes, {Commerce} must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, well as to review supporting documentation for individual loans, grants, rebates, etc. If all a company received was a notification that its buyers received the export credits, or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs {Commerce} that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.[70]

Essentially, Commerce concluded that usage of the Export Buyer's Credit program could not be confirmed at the respondent exporters in a manner consistent with its verification methods, which are primarily the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements,[71] or other documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, etc., provides no assurance to Commerce that it has seen all relevant information.[72]

This "completeness" concept is an essential element of Commerce's verification methodology. If Commerce were attempting to confirm whether a respondent exporter had received any loans from a state-owned bank, for example, its first step would be to examine the company's balance sheets to derive the exact amount of lending outstanding during the period of examination. Second, once that figure was confirmed, Commerce would then begin examining subledgers or bank statements providing the details of all individual loans. Because Commerce could tie the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheet, it could be assured that the subledgers were complete and that it therefore had the entire universe of loan information available for further scrutiny. After examining the subledgers for references to the state-owned banks (*e.g.*, possibly something like "Account 201-02: Short-term lending, Industrial and Commercial Bank of China"), Commerce's third step would be to

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[70] *Id*.
[71] This explanation constituted "detailed reasoning for why documentation from the GOC was necessary" to verify non-use. *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, Court No. 17-00198; Slip Op. 18-166 (CIT 2018) (*Changzhou Trina*) at 9-10.
[72] In *RZBC Group v. United States*, following a remand, the Court found that Commerce could not verify non-use of the program by examining the respondent-exporter's audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. *See RZBC Group Shareholding Co., Ltd. et al v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017).

select specific entries from the subledger and request to see underlying documentation, such as applications and loan agreements, in order to confirm the accuracy of the subledger details. Thus, confirmation that a complete picture of relevant information is in front of the verification team, by tying relevant books and records to audited financial statements or tax returns, is critical.

In *Solar Cells*, however, despite Commerce's repeated requests for information, the GOC failed to offer any guidance as to how Commerce could search for Export Buyer's Credit program lending in respondent exporters' books and records that could be tied to financial statements, tax returns, etc. Therefore, Commerce concluded in that investigation that it could not verify usage of the Export Buyer's Credit program at the respondent exporters and instead attempted verification of usage of the program at the EXIM Bank itself because it "possessed the supporting records needed to verify the accuracy of the reported non-use of the export buyer's credit program {and} would have complete records of all recipients of export buyer's credits." We noted our belief that "{s}uch records could be tested by the Department to check whether the U.S. customers of the company respondents had received export buyer's credits, and such records could then be tied to the {China} Ex-Im Bank's financial statements."[73] However, the GOC refused to allow Commerce to query the databases and records of the EXIM Bank.[74] Furthermore, there was no information on the record of *Solar Cells* from the respondent exporters' customers.

Two years later, in *Chlorinated Isos from China*,[75] respondents submitted certified statements from all customers claiming that they had not used the Export Buyer's Credit program. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, was under the impression that the Export Buyer's Credit program provided medium and long-term loans and that those loans were provided directly from the EXIM Bank to the borrowers (*i.e.*, the respondents exporter's customers) *only*. Because the respondent's customers were participating in the proceeding, verification of non-usage appeared to be a relatively straightforward matter of examining the financial statements and books and records of the U.S. customers for evidence of loans provided *directly* from the EXIM Bank to the U.S. customer pursuant to verification steps similar to the ones described above. We thought, perhaps incorrectly, that we would see the name "China Ex-Im Bank" in the subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at China ExIm, . . . {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customers' accounting and financial records that no loans were received under this program."[76]

[73] *See Solar Cells* IDM at Comment 18.
[74] *Id*.
[75] *See Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos from China*), and accompanying IDM.
[76] *Id*. at 15.

Our understanding of the operation of the Export Buyer's Credit program began to change, however, after *Chlorinated Isos from China* had been completed. Information obtained in a prior CVD proceeding indicates that the GOC revised the Export Buyer's Credit program in 2013 to eliminate the requirement that loans under the program be a minimum of two million U.S. dollars.[77] Moreover, information on the record also indicates that the EXIM Bank may disburse export buyer's credits either directly or through third-party partner and/or correspondent banks.[78] We asked the GOC to provide the 2013 revisions to the Administrative Measures to the Export Buyer's Credit program, a list of all third-party banks involved in the disbursement/settlement of export buyer's credits, and a list of all partner/correspondent banks involved in disbursement of funds under the this program.[79] The GOC failed to provide the requested information.[80] Thus, Commerce does not have the information necessary to understand the details of this program, including: the application process, internal guidelines and rules governing this program, interest rates used during the POI, and whether the GOC uses third party banks to disburse/settle export buyer's credits.

As a result, this information altered Commerce's understanding of how the Export Buyer's Credit Program operated (*i.e.*, how funds were disbursed under the program). This change was especially significant because it indicated the credits were not *direct* transactions from the EXIM Bank to U.S. customers of the respondent exporters, but rather, that there were intermediary banks involved, the identities of which were unknown to Commerce. Performing the verification steps outlined above would require knowing the names of the intermediary banks; it would be their names, not the name "China Ex-Im Bank," that would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in the investigation of aluminum sheet: "Record evidence indicates that the loans associated with this program are not limited to direct disbursements through the {EXIM Bank }. 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 importer's account, which could be at the EXIM Bank or other banks, and that these funds are then sent to the exporter's bank account."[81] In other words, there will not necessarily be an account in the name "China Ex-Im Bank" in the books and records (*e.g.*, subledger, tax return, bank statements) of the U.S. customer. Thus, if we cannot verify claims of non-use at the GOC,[82] having a list of the correspondent banks is critical.

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[77] *See* Memorandum, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China: Placing Information on the Record" (Export Buyer's Credit Additional Documents Memorandum), dated concurrently with this memorandum.
[78] *Id*.
[79] *See* Initial CVD Questionnaire at 5-6; *see also* GOC First SQ at 1.
[80] *See* GOC July 23, 2018 IQR at 7-11; *see also* GOC August 22, 2018 SQR at 13-14.
[81] *See Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Aluminum Sheet*), and accompanying IDM at 30.
[82] Commerce no longer attempts to verify usage of the Export Buyer's Credit program with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 revisions to the administrative rules. *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), and accompanying IDM at Comment 1.

A careful verification of Foshan Yixin's non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Because it does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (no correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a sub-set of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan – *i.e.*, whether the loan was provided from the EXIM Bank *via* an intermediary bank. This would be an unreasonably onerous undertaking for any company that received more than a small number of loans.

Furthermore, the third step of Commerce's typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation, such as applications and loan agreements) likewise would be of no value. This step might serve merely to confirm whether banks were correctly identified in the subledger – not necessarily whether those banks were correspondent banks participating in the Export Buyer's Credit program. This is especially true given the GOC's failure to provide other requested information, such as the 2013 revisions, a sample application, and other documents making up the "paper trail" of a direct or indirect export credit from the EXIM Bank.[83] Commerce would simply not know what to look for behind each loan in attempting to identify a loan provided by the EXIM Bank via a correspondent bank.

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. Suppose, for example, that one of the correspondent banks is HSBC. Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the EXIM Bank. In order to do this, Commerce would need to know what underlying documentation to look for in order to determine whether particular subledger entries for HSBC might actually be EXIM Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of EXIM Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even were Commerce to attempt to verify respondent's non-use of the Export Buyer's Credit program notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks by examining each loan received by each of the respondent's U.S. customers, Commerce would still not be able to verify which loans were normal loans versus Export Buyer's Credit program loans due to its lack of understanding of what underlying documentation to expect, and whether/how that documentation would indicate EXIM Bank involvement. In effect, companies could provide Commerce with incomplete loan

[83] In this investigation, our questionnaire stated: "Provide a sample application for each type of financing provided under the Buyer Credit Facility, the application's approval, and the agreement between the respondent's customer and the China ExIm Bank that establish the terms of the assistance provided under the facility." *See* Initial CVD Questionnaire at 5. The GOC responded "{b}ased on the information available to the GOC at this stage, the GOC confirms that none of the respondents applied for, used, or benefited from the alleged program during the POI." *See* GOC July 23, 2018 IQR at 18.

documentation without Commerce understanding that the loan documentation was incomplete. Even if it were complete and identified EXIM Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

That is why Commerce requires disclosure of the 2013 administrative rules, as well as other information concerning the operation of the Export Buyer's Credit program, in order to verify usage. Understanding the operation of the program is not, therefore, solely a matter determining whether there is a financial contribution or whether a subsidy is specific. A complete understanding of the program provides a "roadmap" for the verifiers by which they can conduct an effective verification of usage. By analogy, consider attempting to verify whether a company has received a tax break without having an adequate understanding of how the underlying tax returns should be completed or where use of the tax break might be recorded.

Thus, Commerce finds it could not *accurately and effectively* verify usage at Foshan Yixin's customers, even were it to have attempted the unreasonably onerous examination of each of its customers' loans. To conduct verification at the Foshan Yixin's customers without the information requested from the GOC would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found. Therefore, Commerce concludes that, as a result of the GOC's failure to cooperate, the record of this investigation lacks verifiable information concerning Foshan Yixin's use of the Export Buyer's Credit program.

As explained in the *Preliminary Determination*, because the GOC failed to provide requested and necessary information, Commerce determined, as AFA, that the Export Buyers Credit program provides a financial contribution and is specific. [84] Additionally, the GOC withheld the requested information described above, which is necessary to determine whether Foshan Yixin's U.S. customers actually used the Export Buyer's Credit program during the POI. The GOC's withholding of this information prevents us from fully understanding and analyzing the operation of this program, thereby impeding this proceeding. Accordingly, we find that we must rely on the facts otherwise available, pursuant to sections 776(a)(1) and 776(a)(2)(A) of the Act, to determine whether this program was used by Foshan Yixin and conferred a benefit.

Furthermore, pursuant to section 776(b) of the Act, we find that the GOC, by virtue of its withholding of information and significantly impeding this proceeding, failed to cooperate with Commerce by not acting to the best of its ability. As noted above, the GOC did not provide the requested information needed to allow Commerce to analyze this program fully. As a result, the GOC did not provide information that would permit us to make a determination as to whether this program confers a benefit. Moreover, absent the requested information, we are unable to rely on the GOC's and Foshan Yixin's claims of non-use of this program. The GOC has not provided information with respect to whether it uses third-party banks to disburse/settle export buyer's credits from the EXIM Bank. Such information is essential to understanding how export buyer's credits flow to/from foreign buyers and the EXIM Bank. Absent the requested information, the GOC's and Foshan Yixin's claims of non-use of this program are not verifiable. We requested the 2013 revisions to the Administrative Measures because information indicates

[84] *See* PDM at 8.

that the 2013 revisions implemented important program changes. For example, record evidence indicates that the loans associated with this program are not limited to direct disbursements through the EXIM Bank.[85] Specifically, the record indicates that: 1) customers can open loan accounts for disbursements through this program with third-party banks; 2) the funds are first sent to the importer's account, which could be at the EXIM Bank or third-party banks; and 3) these funds are then sent to the exporter's bank account.[86] Because of the complicated structure of loan disbursements for this program, Commerce's complete understanding of how this program is administered is necessary to confirm whether Foshan Yixin's customers obtained loans under the program.

Thus, as discussed above, the GOC's refusal to provide the 2013 revisions to the Administrative Measures, setting internal guidelines for how this program is administered by the EXIM Bank, and a list of partner/correspondent banks that are used to disburse funds through this program, constitutes withholding necessary information, which impeded Commerce's ability to conduct its investigation of this program. Therefore, we now find that the GOC has not cooperated to the best of its ability and, as AFA, find that Foshan Yixin used and benefited from this program, despite its claims that its U.S. customers had not obtained export buyer's credits from the EXIM Bank during the POI.[87]

Finally, relying on AFA because we do not have complete information, Commerce finds the Export Buyer's Credit program to be an export subsidy for this final determination. Although the record regarding this program suffers from significant deficiencies, we note that the GOC's description of the program and supporting materials (albeit ultimately found to be deficient) demonstrates that through this program, state-owned banks, such as the EXIM Bank, provide loans at preferential rates for the purchase of exported goods from China.[88] Moreover, the program was alleged by the petitioner as an example of a possible export subsidy.[89] Furthermore, Commerce has found this program to be an export subsidy in the past.[90] Thus, taking all such information into consideration indicates the provision of the export buyer's credits is contingent on exports within the meaning of section 771(5A)(B) of the Act.

Selection of the AFA Rate

Section 776(b) of the Act 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) of the Act states that an adverse inference may include reliance on information derived from the petition,

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[85] *See* Export Buyer's Credit Additional Documents Memorandum.
[86] *Id.*
[87] *See* Foshan Yixin's Letter, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China; Response to the Department of Commerce's CVD Questionnaire," dated July 23, 2018 at 18 and Exhibit 12.
[88] *See* GOC's July 23, 2018, Initial Questionnaire Response (IQR) at Exhibits II B.7, B.8 and B.9.
[89] *See* Petition at Vol. III-44.
[90] *See* Solar Cells IDM at 33.

the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an 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."[91] 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."[92]

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."[93] It is Commerce's practice to consider information to be corroborated if it has probative value.[94] In analyzing whether information has probative value, it is Commerce's practice to examine the reliability and relevance of the information to be used.[95] However, the SAA emphasizes that Commerce need not prove that the selected facts are the best alternative information.[96] Furthermore, Commerce is not required to corroborate any countervailing subsidy rate applied in a separate segment of the same proceeding.[97]

Finally, under 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 section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[98]

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[91] *See, e.g., Countervailing Duty Investigation of Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175 (December 11, 2017), and accompanying IDM at Comment 5 at "Use of Facts Otherwise Available and Adverse Inferences;" *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), and accompanying IDM at "Use of Facts Otherwise Available and Adverse Inferences;" *and Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909 (February 23, 1998).
[92] *See* SAA at 870.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 869.
[96] *Id*. at 869-870.
[97] *See* section 776(c)(2) of the Act.
[98] *See* section 776(d)(3) of the Act.

It is Commerce's practice in CVD proceedings to compute a program-specific AFA rate using the highest calculated program-specific rate determined for the cooperating respondents in the instant investigation, or, if not available, rates calculated in prior CVD cases involving the same country.[99] 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 countervailable 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.[100] 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).[101] If no such rate exists, we then determine if there is a similar/comparable program (based on the 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.[102]

Commerce's methodology is consistent with section 502 of the Trade Preferences Extension Act of 2015 (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

[99] *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"); *Aluminum Extrusions* IDM at "Application of Adverse Inferences: Non-Cooperative Companies."
[100] *See, e.g., Shrimp from China* IDM at 13; *Essar Steel* 753 F.3d at 1373-1374 (upholding "hierarchical methodology for selecting an AFA rate").
[101] For purposes of selecting AFA program rates, we normally treat rates less than 0.5 percent as *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."
[102] *See Shrimp from China* IDM at 13-14.

for Commerce's existing practice of using an AFA hierarchy in selecting a rate "among the facts otherwise available" in CVD cases, should the facts warrant such a selection.

Section 776(d)(2) of the Act authorizes Commerce to rely on the highest prior rate under certain circumstances. In deriving an AFA rate under section 776(d)(1)(A) of the Act described above, the provision states that Commerce "may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available."[103] 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 AFA rate in CVD cases: (1) Commerce may apply its hierarchy methodology; and (2) Commerce may apply the highest rate derived from this hierarchy to a respondent, should it choose to apply that hierarchy in the first place, unless, after an evaluation of the situation that resulted in the use of AFA, Commerce determines that the situation warrants a rate different than the rate derived from the hierarchy be applied.[104]

In applying the AFA rate provision, it is well established that when selecting the rate from among possible sources, Commerce seeks to use a rate that is sufficiently adverse to effectuate the statutory purpose of section 776(b) of the Act to induce respondents to provide Commerce with complete and accurate information in a timely manner. This ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[105] 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."[106] It is pursuant to this knowledge and experience that Commerce has implemented its AFA hierarchy in CVD cases to select an appropriate AFA rate.[107]

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[103] *See* section 776(d)(2) of the Act.
[104] This differs from antidumping proceedings, for which no hierarchy applies, under section 776(d)(1)(B) of the Act. Under that provision, "any dumping margin from any segment of the proceeding under the applicable antidumping order" may be applied, which suggests an adverse rate could be derived from different available margins, given the facts on the record.
[105] *See* SAA at 870,; *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) (*De Cecco*) (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.'")).
[106] *See De Cecco*, 216 F.3d at 1032.
[107] Commerce has adopted a practice of applying its hierarchy in CVD cases. *See, e.g., Finished Carbon Steel Flanges from India: Final Affirmative Countervailing Duty Determination*, 82 FR 29479 (June 29, 2017), and accompanying IDM at Comment 4 (applying the hierarchical methodology within the context of a CVD investigation); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's*

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

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

Republic of China: Final Results of Countervailing Duty Administrative Review; 2012, 80 FR 41003 (July 14, 2015), and accompanying IDM at 11-15 (applying the AFA hierarchical methodology within the context of a CVD administrative review). However, depending on the type of program, Commerce may not always apply its AFA hierarchy. *See, e.g.*, *Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 81 FR 3104 (January 20, 2016), and accompanying IDM at 7-8 (applying, outside of the AFA hierarchical context, the highest combined standard income tax rate for corporations in Indonesia).

company-specific program that the industry subject to the investigation could have used for the production or exportation of subject merchandise.[108]

In all three steps of Commerce's AFA investigation hierarchy, if Commerce were to choose low AFA 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 AFA 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.[109]

Furthermore, we find that section 776(d)(2) of the Act applies as an exception to the selection of an AFA rate under section 776(d)(1) of the Act; 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.

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 AFA. As explained above, Commerce is applying AFA to the Export Buyer's Credit program because the GOC failed to cooperate to the best of its ability in responding to Commerce's inquiries. Therefore, we find that the record does not support the application of an alternative rate, pursuant to section 776(d)(2) of the Act.

Therefore, because we have not previously calculated a rate for this program in this investigation, we are relying on the highest non-*de minimis* rate calculated for a cooperating company in another CVD proceeding involving the same country for a similar program. On this basis, we are using an AFA rate of 10.54 percent *ad valorem*, the rate assigned to the Export Buyer's Credit program in *Steel Wheels from China*, as the rate for this program for Foshan Yixin.[110] However, this rate was not calculated in *Steel Wheels from China*, but in *Coated Paper*

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[108] 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.

[109] 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 ("As AFA in the instant case, {Commerce} 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 AFA under its hierarchy.

[110] *See Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty*

from China for the Preferential Lending to the Coated Paper Industry program.[111] As a result, it is not a calculated rate for the identical program, but rather a calculated rate from a non-company specific program in any CVD case involving the same country. This rate was also applied to Fasa Industrial and Hero Stone for this program in the *Preliminary Determination*.[112]

Corroboration of the AFA Rate

We discuss the requirements of corroboration set forth in section 776(c) of the Act, above. Regarding the Export Buyer's Credit Program, given the failure of the GOC to provide adequate responses to our inquiries, we have reviewed the available record information[113] as well as information concerning Chinese subsidy programs in other cases. We find that, because this is a program Commerce has previously investigated, this information is relevant to the program in this final determination. The relevance of this rate is that it is a calculated subsidy rate for a similar non-company specific program in a different Chinese CVD proceeding,[114] from which Foshan Yixin could actually receive a benefit. Due to the lack of cooperation by the GOC and the limited record information concerning these programs, we have corroborated the AFA rate we selected to use for the Export Buyer's Credit program to the extent practicable for this final determination.

VI. Subsidies Valuation Information

A. Allocation Period

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and the methodology used for this final determination, *see* the *Preliminary Determination*.[115]

B. Attribution of Subsides

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the attribution of subsidies used in the *Preliminary Determination*. For a description of the methodologies used for this final determination, *see* the *Preliminary Determination*.[116]

Determination, 84 FR 11744 (March 28, 2019) (*Steel Wheels from China*).
[111] *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 (November 17, 2010) (*Coated Paper from China*).
[112] *See* PDM at 40.
[113] *See* Petition at 44.
[114] *See Steel Wheels from China* at 27.
[115] *See* PDM at 22.
[116] *Id.* at 22-24.

C. Denominators

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the denominators used in the *Preliminary Determination*.[117]

D. Benchmarks

Interested parties raised issues in their case briefs regarding the benchmarks Commerce used in the *Preliminary Determination*.[118] Accordingly, Commerce has revised the benchmark for quartz sand. For further discussion of the benchmarks used in the final determination, *see* Comments 7 through 9.

VII. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

Except where noted,[119] Commerce has made no changes to the methodology used to calculate the subsidy rates for the following programs in its *Preliminary Determination*. Additionally, except as discussed under the Analysis of Comments section no issues were raised by interested parties in case briefs regarding these programs. The final program rates calculated for Foshan Yixin are as follows:

1. *Preferential Income Tax Program for High and New Technology Enterprises*

   1.00 percent *ad valorem*

2. *Provision of Polyester Resin for LTAR*

   27.26 percent *ad valorem*

3. *Provision of Quartz for LTAR*

   5.37 percent *ad valorem*

4. *Provision of Electricity for LTAR*

   0.57 percent *ad valorem*

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[117] *Id.* at 24-25.
[118] *Id.* at 25-27.
[119] *See* Memorandum, "Countervailing Duty Investigation of Certain Quartz Surface Products from the People's Republic of China: Final Determination Calculation Memorandum for Foshan Yixin," dated concurrently with this memorandum.

5. Policy Loans to the Quartz Surface Products Industry

0.37 percent *ad valorem*

6. Export Buyer's Credit

In the *Preliminary Determination*, we inadvertently failed to include this program in our subsidy rate calculation for Foshan Yixin. For the reasons explained in the "Use of Facts Otherwise Available and Adverse Inferences" section above, we now find this program to be countervailable based on AFA. As AFA, we determine that the GOC's provision of export buyer's credits confers a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. Furthermore, we determine on the basis of AFA that Foshan Yixin benefitted from this program during the POI within the meaning of section 771(5)(E) of the Act. We selected a subsidy rate of 10.54 percent *ad valorem* for this program for Foshan Yixin on the basis of AFA.

7. Other Subsidies[120]

0.21 percent *ad valorem*

B. Programs Determined Not to be Used by Foshan Yixin

1. Export Loans
2. Export Seller's Credits
3. Preferential Loans for SOEs
4. Loan and Interest Forgiveness for SOEs
5. Preferential Deduction of Research and Development Expenses for HNTEs
6. Income Tax Credits for Domestically-Owned Companies Purchasing Domestically-Produced Equipment
7. Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax
8. Income Tax Benefits for Domestic Enterprises Engaging in Research and Development
9. Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
10. Provision of Land-Use Rights for LTAR
11. Provision of Land to State-Owned Enterprises for LTAR
12. The State Key Technology Project Fund
13. Export Assistance Grants
14. Subsidies for Development of Famous Export Brands and China World Top Brands

[120] These programs are as follows: 2016 Market Development Assistance (Special Fund for Domestic & Foreign Economic and Trade Development); 2016 Guangdong Province High-Tech Enterprise Assistance; Utility Model Patent Assistance; Foshan City's Subsidy for Recognition as High-Tech Enterprises; Special Award for Guangdong Province's Stable Growth Structure (2016); High and New Technology Enterprise for Education and Training; and Gaoming District Engineering Center Assistance.

15. Sub-Central Government Programs to Promote Famous Export Brands and China World Top Brands
16. Export Credit Insurance Subsidies
17. Export Credit Guarantees
18. Foshan High-Tech Industrial Development Zone Income Tax Subsidies
19. Foshan High-Tech Industrial Development Zone Duty Exemption
20. Foshan High-Tech Industrial Development Zone City Maintenance Fee Exemption
21. Foshan High-Tech Industrial Development Zone Land Use Reductions
22. Fujian Pilot Free Trade Zone Payments of Income Tax
23. Fujian Pilot Free Trade Zone Tariff and VAT Exemptions
24. Fujian Pilot Free Trade Zone Port Tax Refund Policy
25. Fujian Pilot Free Trade Zone Liberalization of Interest Rates
26. Preferential Income Tax Subsidies for FIEs
27. Preferential Income Tax Subsidies for "Productive" FIEs
28. Preferential Income Tax Subsidies for Export-Oriented FIEs

VIII. ANALYSIS OF COMMENTS

Comment 1: Whether This Investigation Was Improperly Initiated

Quartz Importers' Case Brief

- The petitioner has failed to demonstrate sufficient industry support for its petition.[121] Section 702 of the Act requires that a petition be filed on behalf of the domestic industry.[122] In order to determine whether the petition has sufficient industry support, the Act directs Commerce to look to U.S. producers that produce the domestic like product.[123]
- While the scope of this investigation covers both fabricated and not fabricated quartz slabs, Commerce did not include U.S. fabricators as part of the domestic industry in determining whether the petition had sufficient industry support.[124]
- The record of this investigation supports including quartz slab producers as part of the domestic industry. When measured by dollars-per-square foot and annual output, U.S. fabricators relative to slab manufacturers: 1) invest more in domestic capital equipment; 2) add more domestic value to the end product; and 3) apply more domestic labor to a quartz surface product.[125]

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[121] *See* Quartz Importers' Case Brief at 3.
[122] *Id*. (citing section 702(b)(1) of the Act).
[123] *See* Quartz Importers' Case Brief at 3.
[124] *Id*. at 4.
[125] *Id*. at 5 (citing Letters, "Quartz Surface Products from the People's Republic of China: Comments on the Lack of Standing of the Petitioner and Requests for Action, A-570-084 & C-570-085," dated May 1, 2018, and "Antidumping and Countervailing Duty Investigations of Quartz Surface Products from the People's Republic of

- Additionally, it is the International Trade Commission's (ITC's) practice to include producers similar to fabricators as part of the domestic industry.[126]
- Given the error in not including U.S. fabricators in its industry support determination, Commerce was obligated under the Act to poll the U.S. domestic industry, including fabricators, to determine whether sufficient industry support for the petition exists.[127] Because Commerce failed to poll the domestic industry, it initiated this investigation in a manner contrary to law and should therefore terminate this investigation.

Petitioner's Rebuttal Brief

- Commerce found that there was sufficient industry support to initiate this investigation.[128] Specifically, Commerce rejected the argument that U.S. fabricators should be part of the domestic industry based on its findings that "fabricators do not perform sufficient production-related activities" and that there are "significant differences in the level of complexity and capital investment, employment, training and technical expertise, production processes, and type of equipment between quartz surface product slab producers and fabricators."[129]
- Contrary to the claim put forth by the Quartz Importers, the record fully supports Commerce's determination that fabricators should be excluded as part of the domestic industry for purposes of determining industry support.[130]
- Additionally, contrary to the Quartz Importers' claim, entities that only edge, trim, or finish a product in the United States have been found not to perform sufficient production-related activities to qualify as domestic producers.[131]

Commerce's Position: With respect to comments regarding industry support, section 702(c)(4)(E) of the Act directs Commerce as follows:

> Before the administering authority makes a determination with respect to initiating an investigation, any person who would qualify as an interested party under section 771(9) if an investigation were initiated, may submit comments or information on the issue of industry support. *After the administering authority*

China: Reply to Petitioner's Comments on Lack of Standing, A-570-084 & C-570-085," dated May 4, 2018).
[126] *Id*. at 6 (citing, *e.g.*, *Stainless Steel Flanges from China*, Inv. No. 701-TA-585 (Final), USITC Pub. 4788 (May 2018) at 11-12, *Polytetrafluoroethylene Resin from China and India*, Inv. Nos. 701 TA-588 and 731-TA-1392-1393 (Final), USITC Pub. 4801 (July 2018) at 13, *Certain Iron Mechanical Transfer Drive Components from Canada and China*, Inv. Nos. 701-TA-550 and 731-TA-1304-1305 (Final), USITC Pub. 4587 December 2016) at 23, and *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia*, Inv. Nos. 701-TA-470-471 and 731-TA-1169-1170 (Final) USITC Pub. 4192 (November 2010) at 12).
[127] *Id*. at 6-7 (citing section 702(c)(4)(D) of the Act).
[128] *See* Petitioner's Rebuttal Brief at 33.
[129] *Id*. (citing Initiation Checklist at Attachment II).
[130] *Id*. at 33-34.
[131] *Id*. at 34-35 (citing, *e.g.*, *Raw Flexible Magnets from China and Taiwan*, Inv. Nos. 701-TA-452 and 731-TA-1129-1130 (Final), USITC Pub. 4030 (August 2008) at 7-9).

> *makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.*[132]

Therefore, Commerce is statutorily precluded from reconsidering its industry support determination at this stage of the investigation. As a result, we continue to rely on our determination of industry support provided in the Initiation Checklist, which we reiterate below.[133]

Section 702(c)(4)(A) of the Act states that the administering authority shall determine that a petition has been filed by or on behalf of the industry if the domestic producers or workers who support the petition account for: (1) at least 25 percent of the total production of the domestic like product; and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Based on information provided in the Petition, the petitioner established that the Petition is supported by domestic producers accounting for more than 50 percent of the total production of the domestic like product, within the meaning of sections 702(c)(4)(D) and 732(c)(4)(D) of the Act; therefore, it is unnecessary to poll the industry.[134]

With respect to fabricators, we have analyzed the information provided by the petitioner and find that there is reason to conclude that fabricators do not perform sufficient production-related activities to be included in the domestic industry for industry support purposes. The petitioner provided detailed information to support its argument that fabricators should not be considered part of the domestic industry for standing, making it clear that there are significant differences in the level of complexity and capital investment, employment, training and technical expertise, production processes, and type of equipment, between quartz surface product slab producers and fabricators.[135] Based on the information provided by the petitioner, quartz surface products slab production involves highly complex and interconnected machinery and engineering processes, and as a result, requires specialized equipment dedicated to quartz surface products production and a significantly greater amount of capital investment, training and technical expertise, and number of employees than the fabrication process.[136] In contrast, information provided by the petitioner indicates that the fabrication process requires limited equipment that is not dedicated solely to quartz surface products, fewer employees, much less technical expertise, and significantly less capital investment.[137] Information provided by the petitioner further indicates that the fabrication process does not change the fundamental

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[132] *See* section 702(c)(4)(E) of the Act (emphasis added); *see also Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2011*, 78 FR 58283 (September 23, 2013), and accompanying IDM at Comment 4.
[133] *See* Initiation Checklist at Attachment II.
[134] *Id*. (citing Petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Petitioner's Response to MSI's Comments on Standing," dated May 3, 2018 (Industry Support Supplement), at 4-10 and Exhibits 2-8).
[135] *Id*.
[136] *Id*. (citing Industry Support Supplement at 2-4 and 6).
[137] *Id*. (citing Industry Support Supplement at 2, 5, and 7-8).

physical characteristics imparted during the slab production process, as fabricators simply convert an existing slab into a geometrical form for its end use or application.[138] In addition, many fabricators rely on imported slabs to produce final fabricated products.[139]

Furthermore, we note that the petitioner's industry support calculation properly accounts for all production of quartz surface products in the United States; therefore, it necessarily accounts for the production of fabricators who fabricate U.S.-produced quartz surface products. As a result, it is unnecessary to collect data from companies that fabricate quartz surface products and doing so could result in double-counting. Given the facts regarding this industry, and consistent with Commerce's industry support methodology in past cases involving companies that may import and minimally process imported merchandise, such as *Chlorinated Isocyanurates* and *Calcium Hypochlorite*,[140] we have not included fabricators in the domestic industry and industry support calculation, because fabricators do not perform sufficient production-related activities to qualify as domestic producers of quartz surface products.[141]

Our analysis of the remaining information demonstrated that: 1) the domestic producers and workers who supported the petition accounted for at least 25 percent of total production of the domestic like product; and 2) domestic producers and workers who supported the petition accounted for more than 50 percent of the total production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. As a result, we continue to find that there was adequate industry support for the petition, within the meaning of section 702(c)(4)(A) of the Act.

Comment 2: The Application of AFA to Hero Stone

Hero Stone's Case Brief

- Commerce may apply facts available to a respondent when information is missing from the record and may then apply facts available with an adverse inference to fill gaps in the record if the gap is caused by the failure of the respondent to cooperate to the best of its ability.[142] While Hero Stone did not provide certain information sought by Commerce, it did cooperate to the best of its ability.[143]
- Hero Stone communicated to Commerce, both at a meeting and in its questionnaire responses, that it would have difficulty fully complying with Commerce's requests for information due to circumstances predating the initiation of this investigation, but

[138] *Id*. (citing Industry Support Supplement at 5).
[139] *Id*. (citing Industry Support Supplement at 9 and Exhibit 7).
[140] *Id*. (citing, *e.g.*, *Chlorinated Isocyanurates from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 78 FR 59001 (September 25, 2013), and accompanying Initiation Checklist, at Attachment II; and *Calcium Hypochlorite from the People's Republic of China: Initiation of Antidumping investigation*, 79 FR 2410 (January 14, 2014), and accompanying Initiation Checklist, at Attachment II).
[141] *Id.* (citing Industry Support Supplement at 10).
[142] *See* Hero Stone's Case Brief at 3-4 (citing *JSW Steel Ltd. v. United States*, Slip. Op. 18-51 (CIT May 9, 2018)).
[143] *See* Hero Stone's Case Brief at 4.

nonetheless would undertake maximum efforts to comply with Commerce's instructions, including responding to its initial questionnaire.[144]

- In the *Preliminary Determination*, despite Hero Stone's efforts to be transparent, Commerce nonetheless applied AFA to Hero Stone.[145]
- Given that Hero Stone is a small company, Commerce is obligated, pursuant to its WTO commitments, to provide special consideration to "small-and-medium-size enterprises" in AD and CVD proceedings.[146] Additionally, Commerce did not inquire whether the maintenance of the types of accounting records Commerce prefers is even required under Chinese law.
- *Nippon Steel*, which Commerce cited in the *Preliminary Determination*, does not provide support for applying AFA to Hero Stone.[147] The "inattentiveness, carelessness, or inadequate record keeping" Commerce cites as the "best of its ability" standard in *Nippon Steel* refers to the actions of importers, not foreign exporters or producers. Further, in *Nippon Steel*, the respondent failed to provide Commerce with the information it had requested, while here Hero Stone responded fully and completely to Commerce's inquiries to the maximum extent possible given its accounting records, and Commerce never issued a supplemental questionnaire to Hero Stone identifying deficiencies in its initial questionnaire response.
- Therefore, Commerce should apply neutral facts available to Hero Stone and assign it the same subsidy rate calculated for Foshan Yixin, the other mandatory respondent in this investigation.[148]

Petitioner's Rebuttal Brief

- It is not enough for a respondent to simply submit any information to Commerce; the information provided by the respondent must represent the "maximum it is able to do" and must be complete and accurate. The standard presumes that parties are familiar with the rules and regulations governing the sales of goods from other countries into the United States "and requires that {parties}…take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable {party} should anticipate being called upon to produce" as part of a proceeding.[149]
- Consistent with the Act and the guidance of the Court of Appeals for the Federal Circuit (Federal Circuit), Commerce has applied AFA to respondents that fail to maintain full

[144] *Id*. at 4-5.
[145] *Id*. at 6.
[146] *Id*. (citing Article 6.13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Article 12.11 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement)).
[147] *Id*. at 7 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*)).
[148] *Id*. at 9-10 (citing *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*,753 F.3d 1227, 1234-35 (Fed. Cir. 2014) (*Mueller Comercial*)).
[149] *See* Petitioner's Rebuttal Brief at 19-20 (citing *Nippon Steel*, 337 F. 3d at 1382-1383).

and complete records in the ordinary course of business that would allow the respondents to provide accurate and verifiable information to Commerce.[150]

- The record of this investigation shows that Hero Stone does not maintain full and complete records in the ordinary course of business, but rather uses anomalous accounting practices. Additionally, Hero Stone did not even attempt to reconcile the information it reported to Commerce in its financial statements, and instead claimed that its reported information could be reconciled to its bank statements.[151]
- Commerce has rejected similar reconciliations in prior cases. In *Flanges from China*, Commerce explained the need for a proper sales reconciliation and rejected the use of invoices and bank accounts as a method of performing a reconciliation.[152]
- Commerce should reject Hero Stone's claim that it made no allowance for the fact that Hero Stone is a small company that deserves special consideration because Hero Stone itself provided information that contradicts this claim.[153]
- Specifically, Hero Stone is part of a large group of companies, some of which are located outside of China.[154] Furthermore, publicly available information shows that Hero Stone engaged legal counsel in the United States to file patents for its quartz surface products in this country and had the resources to register its logo as a trademark in the United States.[155] None of these actions are consistent with Hero Stone's suggestion that it is a small and unsophisticated company.

Commerce's Position: We continue to base Hero Stone's subsidy rate on AFA for purposes of this final determination. In our *Preliminary Determination*, we found that, given the issues with Hero Stone's accounting systems and books and records, it was not possible for us to determine accurately the amount of countervailable benefits Hero Stone and its cross-owned affiliates received during the POI.[156] Under section 776(a) of the Act, Commerce may make a determination based on facts available if, among other reasons, a party significantly impedes a

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[150] *Id.* at 20 (citing, *e.g.*, *Forged Steel Fittings from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 FR 50339 (October 5, 2018), and accompanying IDM at Comment 5; *see also Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Affirmative Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 83 FR 16322 (April 16, 2018), and accompanying IDM at Comment 1).

[151] *Id*. at 21 (citing Memorandum, "Additional Analysis Regarding Preliminary Determination to Apply Adverse Facts Available to Foshan Hero Stone Co., Ltd." (Hero Stone BPI Memorandum) (September 17, 2018)); *see also* Hero Stone's August 9, 2018 Initial Questionnaire Response (Hero Stone August 9, 2018 IQR) at Volume I.

[152] *Id*. at 22 (citing *Stainless Steel Flanges from People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 13244 (March 28, 2018) (*Flanges from China*), and accompanying PDM at 8-10).

[153] *Id*. at 24.

[154] *Id*. (citing Hero Stone's Letter, "Quartz Surface Products from the People's Republic of China: Notification of Difficulty in Responding to Questionnaire," (Hero Stone Notification of Difficulty) dated July 11, 2018).

[155] *Id*. (citing Petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Response to Notice of Difficulties of Foshan Hero Stone Co., Ltd." dated July 17, 2018).

[156] Many of the specifics of Hero Stone's accounting system are business proprietary information which could not be discussed in our *Preliminary Determination*. Therefore, we provided additional analysis regarding this business proprietary information concurrent with our *Preliminary Determination. See* Hero Stone BPI Memorandum at 1-3.

proceeding,[157] or provides information but the information cannot be verified.[158] For the reasons discussed in the Hero Stone BPI Memorandum issued concurrently with our *Preliminary Determination*, and the reasons discussed (to the extent possible) publicly below, we continue to find that, because of its self-described inadequate record keeping, the information Hero Stone provided cannot be verified. We also find that Hero Stone's inadequate record keeping significantly impeded this proceeding. Thus, pursuant to sections 776(a)(2)(C) and (a)(2)(D) of the Act, we continue to base the net subsidy rate for Hero Stone and our findings regarding specificity and financial contribution by the GOC on the facts otherwise available.

Moreover, we continue to find that an adverse inference in selecting from among the facts otherwise available is warranted, pursuant to section 776(b) of the Act, because by failing to keep adequate books and records, Hero Stone did not cooperate to the best of its ability. In the early phases of this investigation, it became clear that, given Hero Stone's inadequate record keeping, we would be unable to rely on Hero Stone's reported information. The Court has recognized that while Commerce's "best of its ability" standard "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."[159] Therefore, while Hero Stone contends that it has cooperated in this investigation to the best of its ability, we disagree that it should not be held accountable for its failure to maintain adequate records. Hero Stone made the decision to begin producing and exporting subject merchandise before having established functional books and records. Hero Stone could have prioritized establishing functional books and records, but chose not to do so. As a result of that decision, Hero Stone put itself in a position where it was unable to cooperate to the best of its ability in this investigation.

We disagree with Hero Stone's explanations for its failure to keep adequate books and records. Information on the record contradicts Hero Stone's representation of itself as a small company.[160] In addition, as we noted in the *Preliminary Determination*, while Hero Stone stated that it has only been in operation since 2014 and was still establishing internal accounting and finance systems, the petitioner has provided information demonstrating that Hero Stone has been in operation since at least 2005.[161] Further, while Hero Stone claims that, under Chinese law, companies may not be required to maintain Commerce's preferred accounting records, the fact remains that the issues with Hero Stone's books and records do not allow us to accurately determine the amount of countervailable benefits Hero Stone and its cross-owned affiliates received during the POI.[162]

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[157] *See* section 776(a)(2)(C) of the Act.
[158] *See* section 776(a)(2)(D) of the Act.
[159] *See Nippon Steel*, 337 F.3d at 1382.
[160] Because this is business proprietary information we cannot discuss it here. However, we reach this conclusion for the same reasons, and after considering the same evidence, as are discussed in the petitioner's submission on this issue. *See* petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Response to Notice of Difficulties of Foshan Hero Stone Co., Ltd.," dated July 17, 2018, at 3-5.
[161] *See* PDM at 7.
[162] *See* Hero Stone BPI Memorandum at 2-3; *see also* Hero Stone August 9, 2018 IQR at 4-5.

We also disagree with Hero Stone that Commerce failed to comply with its WTO obligations to provide special consideration to "small-and-medium-size enterprises" in AD and CVD proceedings.[163] As discussed above, information on the record contradicts Hero Stone's representation of itself as a small company. Moreover, Commerce has acted in this proceeding in accordance with U.S. law, which is fully consistent with the international obligations of the United States. In particular, we note that pursuant to section 782(c) of the Act, if an interested party promptly notifies Commerce that a party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, Commerce shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements. Here, following Hero Stone's notification of expected difficulty in responding to Commerce's questionnaire, Commerce requested additional information from Hero Stone regarding alternatives considered by Hero Stone for responding, in a complete and verifiable manner, to Commerce's questionnaire.[164] Thus, Commerce considered Hero Stone's proposed alternative reporting, requested additional information regarding that proposed alternative reporting, and determined that the proposed alternative reporting would still not provide a complete and verifiable response,[165] in compliance with its obligations under section 782(c) of the Act.

Finally, we disagree with Hero Stone and the GOC that *Nippon Steel* does not support the application of AFA to Hero Stone in this investigation. While Hero Stone contends that the Court's determination in *Nippon Steel* is limited to importers, a plain reading of the opinion demonstrates that the Court is referring to the respondent in the underlying proceeding, Nippon Steel Corporation, a producer of subject merchandise.[166] Thus, we find that the Court's decision regarding Commerce's "best of its ability" standard is not limited to importers. This is consistent with the Court's subsequent application of the *Nippon Steel* standard to producers and exporters.[167] Moreover, we disagree with Hero Stone that *Nippon Steel* does not apply to it because it acted to the best of its ability. As discussed above and in the Hero Stone BPI Memorandum, Hero Stone failed to maintain adequate books and records. The Court in *Nippon Steel* held that Commerce's "best of its ability" standard does not condone inadequate record keeping.[168] As a result, we continue to find that *Nippon Steel* supports our application of AFA to Hero Stone in this final determination.

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[163] *Id*. (citing Article 6.13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Article 12.11 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement)).
[164] *See* letter to Hero Stone, "Countervailing Duty Investigation of Quartz Surface Products from the People's Republic of China," dated August 1, 2018.
[165] *See* Hero Stone BPI Memorandum at 2.
[166] *See Nippon Steel*, 337 F.3d at 1373.
[167] *See, e.g., Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 1204, 1213 (2005) ("{T}he Federal Circuit and this court have recognized that a reasonable and responsible <u>producer</u> will keep accurate records of factors of production. *See Nippon Steel*, 337 F.3d at 1382….") (emphasis added); and *Taian Ziyang Food Co. v. United States*, 637 F. Supp. 2d 1093, 1120 (CIT 2009) ("Ziyang and FHTK, as <u>exporters</u> of goods to the United States, are expected to keep records of its business operations and procedures for the cultivation of garlic and to apply maximum efforts to provide Commerce with full and complete answers. *See Nippon Steel*, 337 F. 3d at 1382….") (emphasis added).
[168] *See Nippon Steel*, 337 F.3d at 1382.

Comment 3: The Application of AFA to Foshan Yixin's and Hero Stone's Unaffiliated Suppliers of Subject Merchandise

Petitioner's Case Brief

- In its *Preliminary Determination*, Commerce did not assign a rate to Foshan Yixin based on AFA; however, Foshan Yixin's unaffiliated suppliers of subject merchandise chose not to cooperate in this investigation. By not assigning Foshan Yixin a rate based on AFA, Commerce is essentially rewarding Foshan Yixin's unaffiliated suppliers for not cooperating. Furthermore, its unaffiliated suppliers have an incentive not to cooperate because their refusal will affect neither Foshan Yixin's rate nor their own.[169]
- In addition, Hero Stone also purchased subject merchandise from a number of unaffiliated suppliers, which also chose not to cooperate in this investigation. Commerce applied an AFA rate to Hero Stone in the *Preliminary Determination.*
- Because all Chinese manufacturers of subject merchandise are interested parties, as defined in the Act, the Act requires that Commerce apply an AFA rate to them for their blatant failure to cooperate, regardless of whether they are identified as respondents in this investigation or not.[170]

Foshan Yixin's Rebuttal Brief

- To the extent that the petitioner requests the application of AFA with respect to Foshan Yixin, Foshan Yixin has cooperated to the best of its ability in this investigation in attempting to retrieve information from its unaffiliated suppliers. Thus, AFA is not warranted for Foshan Yixin.
- The Federal Circuit has recognized that there are some exceptional cases where Commerce may apply AFA to a fully-cooperating respondent;[171] however, Commerce must carry out a case-specific analysis before applying AFA to determine the rate of a cooperating party unable to provide requested data due to the actions of an uncooperative party.[172] Given the absence of such analysis here, there is no lawful basis to apply AFA to Foshan Yixin due to its uncooperative suppliers.
- The record also indicated that the two unaffiliated suppliers at issue supplied only a very small volume of subject merchandise Foshan Yixin sold during the POI.[173]

[169] *See* Petitioner's Case Brief at 9-10.
[170] *Id*.
[171] *Id*. at 9 (citing *Mueller Comercial*, 753 F.3d at 1236).
[172] *Id*. (citing *Mueller Comercial*, 753 F.3d at 1234-35).
[173] *Id*.

Hero Stone's Rebuttal Brief

- The petitioner does not allege that the suppliers in question are affiliates, nor are they mandatory respondents. Additionally, Commerce did not seek information directly from these unaffiliated suppliers.[174]
- These unaffiliated suppliers did not withhold information Commerce requested, fail to provide information, significantly impede this proceeding, or provide information that cannot be verified. Therefore, given that these unaffiliated entities did not fail to cooperate with Commerce, Commerce may not apply AFA to them.[175]

GOC's Rebuttal Brief

- It has been Commerce's established practice to excuse unaffiliated producers from reporting subsidies when the quantity of subject merchandise sold to the respondents was exported to a country other than the United States, or where the quantity purchased from the unaffiliated producer was minimal.[176] While Commerce has not expressly stated so in this investigation, it is clear that the respondents were provided with an exemption from reporting the subsidies of unaffiliated producers because Commerce never requested this information after the initial questionnaire. Therefore, the application of AFA to these producers for the failure to provide this subsidy information is not warranted.[177]
- Further, at no point in this investigation, other than in its initial questionnaire, did Commerce request this information from the respondents. Before applying AFA, Commerce is required, pursuant to section 782(d) of the Act, to advise respondents of a deficient response. Therefore, Commerce cannot apply AFA here.[178]

Commerce's Position: We agree with the petitioner that the failure of Foshan Yixin's unaffiliated suppliers of subject merchandise *(i.e.*, Foshan Nanhai and Qinguan Yuefeng) to cooperate by providing information necessary for a full response to Commerce's questionnaire in this proceeding warrants the application of AFA to these entities. However, we disagree with the petitioner to the extent that it argues that Foshan Nanhai's and Qinguan Yuefeng's failure to cooperate with Commerce's proceeding warrants an application of AFA to Foshan Yixin.

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[174] *See* Hero Stone's Rebuttal Brief at 2.
[175] *Id*. at 3-4.
[176] *See* GOC's Rebuttal Brief at 1-3 (citing *Certain Steel Nails from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination*, 79 FR 65184 (November 3, 2014) (*Nails from Vietnam*), and accompanying PDM at "Attribution of Subsidies;" *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 *Certain Pasta from Italy: Final Results of the Fourth Countervailing Duty Administrative Review*, 66 FR 64214 (December 12, 2001)).
[177] *Id*. at 3.
[178] *Id*. at 4-6 (citing *Mukland, Ltd. v. United States*, 767 F.3d 1300, 1304 (Fed. Cir. 2014); and *Borusan Mannesmann Sanayi Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1348-49 (CIT 2015)).

On June 8, 2018, we issued the CVD questionnaire to the GOC, with instructions to forward the questionnaire to the mandatory respondents.[179] The questionnaire directed respondents as follows regarding subject merchandise produced by other Chinese companies: "If your company exported subject merchandise produced by other companies in your country during the POI, then you must submit complete questionnaire responses for all producers that supply your company."[180] Therefore, in its initial questionnaire response, Foshan Yixin stated that it contacted its unaffiliated suppliers, Foshan Nanhai and Qinguan Yuefeng, and requested that they cooperate by submitting complete questionnaire responses.[181] However, these suppliers refused to cooperate in this investigation. Foshan Yixin provided Commerce with its correspondence with its unaffiliated suppliers requesting such information and the suppliers' subsequent responses.[182] Thus, we find no basis to determine that Foshan Yixin failed to cooperate to the best of its ability in this investigation.

However, as discussed above under "Use of Adverse Facts Available," we find that Foshan Nanhai's and Qinguan Yuefeng's failure to provide requested information needed for the questionnaire responses in this investigation significantly impeded this proceeding. Thus, pursuant to section 776(a)(2)(C) of the Act, we are basing the net subsidy rate for Foshan Nanhai and Qinguan Yuefeng and our findings regarding specificity and financial contribution by the GOC on the facts otherwise available. Moreover, we find that an adverse inference in selecting from among the facts otherwise available is warranted, pursuant to section 776(b) of the Act, because by failing to submit questionnaire responses in this investigation, Foshan Nanhai and Qinguan Yuefeng did not cooperate to the best of their ability.

We disagree with the GOC that Commerce exempted Foshan Yixin's unaffiliated suppliers from responding in this investigation. As noted above, we requested this information and, as Foshan Yixin's questionnaire response shows, Foshan Nanhai and Qinguan Yuefeng refused to cooperate by withholding the necessary information.[183] We also disagree with the GOC that Commerce is prohibited from applying AFA to Foshan Nanhai and Qinguan Yuefeng because Commerce did not issue a supplemental questionnaire to them. In situations where parties have failed to cooperate in response to Commerce's initial questionnaire, Commerce does not issue a supplemental questionnaire.[184] Doing so would unfairly reward such parties by giving them additional time to respond.

As a result of this AFA determination, we are applying the AFA rate calculated in this investigation (*i.e.*, 190.99 percent) to entries produced and/or exported by Foshan Nanhai or Qinguan Yuefeng. We are applying Foshan Yixin's calculated subsidy rate only to entries which Foshan Yixin both produced and exported. We are applying the all-others rate to entries which

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[179] *See* Initial CVD Questionnaire.
[180] *Id*. at Section III.
[181] *See* Foshan Yixin July 23, 2018 IQR at 3.
[182] *Id*. at Exhibit 1.
[183] *Id.*
[184] For example, in this investigation, we did not issue a supplemental questionnaire to respondent Fasa Industrial requesting again that it respond to the questionnaire when it failed to respond by the established deadline. *See, e.g.*, *Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 16345 (April 4, 2017).

were: (1) produced by Foshan Yixin and exported by any party, except Foshan Nanhai or Qinguan Yuefeng; (2) produced by any party, except Foshan Nanhai or Qinguan Yuefeng, and exported by Foshan Yixin; or (3) produced and/or exported by any company not receiving a company-specific rate.

Finally, as noted in Comment 2, we continue to determine the subsidy rate for Hero Stone in this investigation on the basis of AFA. Therefore, we find that the issue is moot for Hero Stone's unaffiliated suppliers.

Comment 4:   The Application of AFA to Input Market Distortion

Foshan Yixin's Case Brief

- In the *Preliminary Determination*, Commerce found that the GOC did not provide sufficient information regarding input market distortion and therefore concluded that input suppliers are "authorities" based on AFA. However, if the GOC withheld such information, Commerce should have attempted to obtain this information from the purchaser of these inputs, Foshan Yixin, but it failed to do so.[185]
- The GOC's initial questionnaire response included partial information, indicating that the input suppliers were not connected to the government.[186] Thus, it should have been apparent to Commerce that the GOC might not have the detailed company-specific information it sought.[187] According to *Nippon Steel*, Commerce may not draw an adverse inference solely from a party's failure to respond.[188]
- An alternative did exist to obtain this information. However, Commerce never asked Foshan Yixin for this information. When Foshan Yixin discovered the deficiency, it attempted to provide Commerce with this information at verification, but Commerce did not accept it.[189]
- In this investigation, the adverse inference being applied to the GOC has far greater impact on Foshan Yixin, the exporter of the merchandise, than on the GOC. If another party is able to provide the same information Commerce seeks, the application of AFA is not proper because the other party has not been given the opportunity to provide the information.[190]
- If the input suppliers are not controlled by the government, as the GOC claims, Commerce should either acquire market distortion information from the producers of the subject merchandise or find that there is insufficient evidence on the record to conclude that there is market distortion.[191]

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[185] *Id*. at 2.
[186] *Id*. at 3 (citing *Preliminary Determination* at 13).
[187] *Id*.
[188] *Id*. (citing *Nippon Steel*, 337 F. 3d at 1383).
[189] *Id*. at 4.
[190] *Id*. at 5.
[191] *See* Foshan Yixin's Case Brief at 5-6.

GOC's Case Brief

- While the GOC may not have provided all of the documents requested by Commerce, it did provide all of the information necessary for Commerce to determine whether the suppliers are authorities.[192]
- Specifically, Commerce requested various business registration documents which can serve no other purpose except to further confirm that these entities are commercial companies, rather than authorities. However, this has already been established on the record by the Chinese Enterprise Credit Information Publicity System (ECIPS). Given that Commerce has acknowledged that the ECIPS information is "authoritative," the extra information Commerce requested is unnecessary.[193]
- In order to apply AFA, Commerce must identify a gap in the record resulting from missing information and determine that a party has failed to act to the best of its ability.[194] The facts of this case demonstrate that: 1) there is no gap in the record that impedes Commerce's government authority analysis; and 2) the GOC acted to the best of its ability in responding to Commerce's requests for information.
- The circumstances here are similar to *Shandong Rongxin*, where the Court found that Commerce's determination to apply AFA to fill a gap in the record was contrary to law.[195] Here, as in *Shandong Rongxin*, Commerce failed to identify any record evidence showing that Foshan Yixin's suppliers were controlled by the government, and Commerce simply ignored the substantial evidence the GOC provided.[196]
- Additionally, there were instances where the information Commerce requested was out of reach of the GOC. For example, there were instances where the GOC could not provide ownership information for the original producers of the inputs because there was no way to trace the inputs from the respondents back to the producers where an intervening trading company was involved.[197]
- Given that the GOC acted to the best of its ability in responding to Commerce's requests for information, there is no grounds for Commerce to apply AFA.[198]
- Similarly, Commerce preliminarily determined that input suppliers are authorities because the GOC controls privately-owned entities through the Chinese Community Party's (CCP) involvement. However, the GOC put substantial information on the record

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[192] *See* GOC's Case Brief at 5.
[193] *Id*. at 5-6 (citing *Fine Denier Polyester Staple Fiber from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 51396 (November 6, 2017), and accompanying PDM at 21-22).
[194] *Id*. at 9 (citing SAA; *see also NTN Bearing Corp. of America v. United States*, 368 F.3d 1369,1377 (Fed. Cir. 2004); *NSK Ltd. v. United States*, F. Supp. 2d 1276, 1290 (CIT 2005); *Nippon Steel*, 337 F. 3d at 1381; *Changzhou Trina* at 10-11 and *Guizhou Tyre Co. v. United States*, Court No. 17-00101; Slip Op. 18-140 (CIT 2018) at 9-11 (October 17, 2018) (*Guizhou Tyre*)).
[195] *Id*. at 12 (citing *Shandong Rongxin Import & Export Co., Ltd. v. United States*, Court No. 17-00145; Slip Op. 19-3 (CIT 2019) (*Shandong Rongxin*)).
[196] *Id*.
[197] *Id*. at 13.
[198] *Id*.

establishing that the CCP is a political party, rather than a public authority, that cannot interfere in the business operations of a company. Thus, the existence of a primary party organization in a wholly privately-owned company cannot render it an "authority."

- Moreover, the GOC does not maintain information about CCP organizations within individual companies. Thus, the GOC cannot provide the CCP information Commerce requests.[199]
- Commerce's AFA findings that the polyester resin and quartz markets are distorted are unlawful. The Federal Circuit has held that Commerce may only apply AFA under circumstances where a party can be shown not to have cooperated to the best of its ability.[200] It is not reasonable to conclude that the GOC has exhibited less than full cooperation in this investigation.
- Specifically, the GOC provided production information by volume for companies in which it maintains a majority or a controlling interest.[201] While the GOC did not provide such information for companies in which it maintains a less than majority interest, this is because the GOC does not collect or maintain such information. Commerce cannot blindly rely on whatever has occurred in other cases to apply AFA to the GOC.[202]

Petitioner's Rebuttal Brief

- The GOC maintains that its failure to provide this information should be excused because it provided alternative information that, according to the GOC, renders information requested by Commerce to be "unnecessary," "redundant," and "superfluous."[203] However, the information the GOC supplied is insufficient to demonstrate that the input suppliers are not "authorities" within the meaning of the Act.[204] In fact, Commerce has found in numerous prior cases that information provided from the ECIPS is not, by itself, sufficient to establish independence from the GOC.[205] Commerce, as the administering authority, determines what information is necessary to complete the record of its investigation. Respondents are required under the Act to provide such information in the manner and form requested by Commerce.[206]
- The GOC also claims that it did not have sufficient time to provide the information requested by Commerce and/or that the requested information was not reasonably available to it.[207] However, these arguments must fail because the GOC did not follow

[199] *Id*. at 15.
[200] *Id*. (citing *Nippon Steel*, 337 F.3d at 1383).
[201] *Id*. at 29-30 (citing GOC August 9, 2018 IQR at 36-37, 39-40, and 74-75).
[202] *Id*.
[203] *See* Petitioner's Rebuttal Brief at 4 (citing GOC's Case Brief at 5, 14).
[204] *Id*.
[205] *Id*. at 5 (citing, *e.g.*, *Cast Iron Soil Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 30914 (July 2, 2018), and accompanying PDM at 10; and *Certain Plastic Decorative Ribbon from China*, 83 FR 29096 (June 22, 2018), and accompanying PDM at 18).
[206] *Id*. at 9 (citing *ABB Inc. v. United States*, 42 CIT ___, ___, Slip Op. 18-156 (Nov. 13, 2018) (*ABB Inc.*), at 27).
[207] *Id*. at 8 (citing GOC's Case Brief at 2, 6, and 12-13).

the statutory procedures for alerting Commerce that it would be unable to submit the requested information in the form and manner requested.

- Foshan Yixin's argument that the GOC's failures in responding to Commerce should not affect Foshan Yixin is without merit. This is clearly not how the Act intends for CVD investigations to work, and adopting Foshan Yixin's position would ensure that no foreign government would cooperate in a CVD investigation again because there would be no adverse consequences for failing to do so.[208]
- Commerce did not accept the ownership information for Foshan Yixin's suppliers that Foshan Yixin attempted to provide at verification. Presenting new evidence at verification is not permissible because, at a minimum, opposing interests will have no opportunity to rebut or clarify the new information.[209]
- Commerce, in its initial questionnaire, instructed the GOC to "coordinate immediately" with individual company respondents and, thus, Foshan Yixin's protestations that it was ignorant of any deficiencies in the GOC's responses to Commerce's requests for information are not credible.[210]
- Commerce correctly applied AFA to its market distortion analysis based on the GOC's failure to provide necessary information.[211] While the GOC did provide responses to Commerce's requests for information, these responses were insufficient.[212]
- Additionally, although the GOC has claimed that the information requested by Commerce is unavailable, Commerce has previously verified in other proceedings that the GOC maintains two databases containing precisely the type of information it requested.[213]

Commerce's Position: For purposes of the final determination, we continue to find based on AFA that, in the polyester resin and quartz markets: 1) the privately-owned domestic input producers that supplied polyester resin and quartz to Foshan Yixin are "authorities" within the meaning of section 771(5)(B) of the Act; and 2) the Chinese domestic prices of these inputs are significantly distorted by the involvement of the GOC in the market.

As discussed in the *Preliminary Determination* under "Application of AFA: Input Producers are 'Authorities,'" in order for Commerce to analyze whether the domestic producers that supplied polyester resin and quartz to Foshan Yixin are "authorities" within the meaning of section 771(5)(B) of the Act, we sought information regarding whether any individual owners, board members, or senior managers were government or CCP officials and the role of any CCP primary organization within the companies.[214] Specifically, to the extent that the owners,

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[208] *Id*. at 10-11.
[209] *Id*. at 13-14 (citing, *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).
[210] *Id*. (citing Initial CVD Questionnaire at Section II; and GOC August 22, 2018 SQR at 21-27).
[211] *Id*. at 15.
[212] *Id*. at 15-16.
[213] *Id*. at 16 (citing PDM at 18).
[214] *See* PDM at 13.

managers, or directors of a producer are CCP officials or otherwise influenced by certain CCP-related entities, Commerce requested information regarding the means by which the GOC may exercise control over company operations and other CCP-related information.[215] Commerce explained its understanding of the CCP's involvement in China's economic and political structure in current and past China CVD proceedings,[216] including why it considers the information regarding the CCP's involvement in China's economic and political structure to be relevant.

The GOC stated that all of the companies which it identified as producers of polyester resin and quartz purchased by Foshan Yixin during the POI were privately owned.[217] Regarding these input producers, we asked the GOC to provide information about the involvement of the CCP in each of these companies, including whether individuals in management positions are CCP members, in order to evaluate whether the privately-owned input suppliers are "authorities" with the meaning of section 771(B) of the Act. While the GOC provided a long narrative explanation of the role of the CCP, when asked to identify any owners, members of the board of directors, or managers of the input suppliers who were government or CCP officials during the POI, the GOC explained that there is "no central informational database to search for the requested information," and directed Commerce to obtain this information directly from Foshan Yixin's privately-owned input suppliers.[218] However, in prior CVD proceedings, we found that the GOC was able to obtain the information requested independently from the companies involved, and that statements from companies, rather than from the GOC or CCP themselves, were not sufficient.[219]

As explained in the *Preliminary Determination*, we understand that the CCP exerts significant control over economic activities in the PRC.[220] Thus, Commerce continues to find, as it has in prior CVD proceedings,[221] that the information requested regarding the role of CCP officials and CCP committees in the management and operations of Foshan Yixin's privately-owned input suppliers is necessary to our determination of whether these producers are "authorities" within the meaning of section 771(5)(B) of the Act. As explained above, however, the GOC failed to respond to Commerce's questions requesting information regarding the CCP's role in the ownership and management of Foshan Yixin's input suppliers. Therefore, Commerce continues to determine, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, that

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[215] *See* Initial CVD Questionnaire at the Input Producer Appendix.
[216] *See Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012 AR*) and accompanying IDM at Comment 5; *see also* Memorandum, "Additional Documents Memorandum," dated September 17, 2018 (Additional Documents for the Preliminary Determination) at Attachment III, which includes the Public Body Memorandum and its attachment, the CCP Memorandum.
[217] *See* GOC July 23, 2018 IQR at 17 and 52.
[218] *Id*. at 34 and 69.
[219] *See Citric Acid 2012 AR* IDM at Comment 5.
[220] *See* Additional Documents for the Preliminary Determination at Attachment III, which includes the Public Body Memorandum and its attachment, the CCP Memorandum.
[221] *See, e.g.*, *Citric Acid 2012 AR.*

necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding. Thus, we are continuing to rely on "facts available" in making our final determination. Moreover, we continue to determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to comply by failing to provide us with requested information regarding the CCP's role in the ownership and management of Foshan Yixin's input suppliers. Consequently, an adverse inference in selecting from among the facts otherwise available is warranted.

Regarding Foshan Yixin's argument that the adverse inference being applied to the GOC has far greater impact on Foshan Yixin, Commerce acknowledges that the effect of applying AFA to a government may impact respondents.[222] As the CIT has recognized, "{w}here the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry."[223] This is because the foreign government is in the best position to provide information regarding financial contribution and benefit.[224] Obviously, this has an effect on the respondent company, but this does not mean that Commerce's application of AFA was unlawful. The respondent company has the opportunity to demonstrate that it did not use, or benefit from, the program at issue. Moreover, the application of AFA to a non-cooperating government is permitted under the statute even if doing so has a collateral impact on a cooperating individually examined respondent.[225]

We also disagree with Foshan Yixin that Commerce should have requested information regarding its input suppliers directly from Foshan Yixin. We have found in prior cases that, when examining whether a company has owners, senior managers, or directors which are CCP officials or has a CCP primary organization, the party possessing direct knowledge of these facts is the CCP (or GOC) itself.[226] Thus, it would have been inappropriate for us to obtain this information, which we requested from the GOC, from Foshan Yixin instead. It would have been even more inappropriate for Commerce to obtain this information from Foshan Yixin at its verification. The purpose of verification is to verify the accuracy of information previously submitted to the record, not to collect new information that had been previously requested but not reported.[227]

In addition, we disagree with the GOC that it provided Commerce with sufficient information to determine that all of Foshan Yixin's input supplier companies are privately-owned entities. It is for Commerce, not the GOC, to determine what information is necessary in order for Commerce to complete its proceedings.[228] For the reasons described above, we find that the GOC failed to

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[222] *See, e.g., Citric Acid 2009 AR* at Comment 8; *Pistachios from Iran* at Comment 2; and *Hot-Rolled Steel from India* at Comment 6.
[223] *See Essar Steel Limited v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010).
[224] *Id*.
[225] *See Fine Furniture (Shanghai) Limited v. United States*, 748 F.3d 1365 (Fed. Cir. 2014).
[226] *See, e.g., Citric Acid 2012 AR* IDM at 4-6.
[227] *See 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.
[228] *See ABB Inc.*, at 27 ("Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.").

provide information necessary for us to analyze whether Foshan Yixin's input suppliers are authorities.

We also disagree with the GOC that *Shandong Rongxin* supports its argument that Commerce is prohibited from applying AFA to Foshan Yixin due to Commerce's failure to identify any record evidence that Foshan Yixin's suppliers were controlled by the government. As an initial matter, our application of AFA is only with regard to the GOC in terms of the financial contribution; we are using Foshan Yixin's verified usage data in determining the benefit. Moreover, in *Shandong Rongxin*: 1) Commerce made a preliminary determination based on facts available that the respondent in that proceeding had not established its independence from government control; and 2) after the preliminary determination, evidence emerged on the record which made the use of facts available no longer necessary.[229] No similar circumstances are present in this investigation. Rather, the GOC claims that, because it provided Commerce with information it deems authoritative, there is no gap on the record necessitating the use of facts available. However, Commerce did not ignore the evidence the GOC provided; instead, we found that the GOC did not provide us with information necessary to complete our analysis.

Therefore, we find that the GOC withheld necessary information that was requested of it and that Commerce must rely on facts available in conducting our analysis of Foshan Yixin's input suppliers.[230] As a result of incomplete responses to Commerce's questionnaires, we find that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information. Consequently, we determine that the GOC withheld information, and that an adverse inference is warranted in selecting from the facts available.[231] As AFA, we find that CCP officials are present in each of Foshan Yixin's privately-owned input suppliers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources. As explained in the Public Body Memorandum, an entity with significant CCP presence on its board or in management or in party committees may be controlled such that it possesses, exercises or is vested with governmental authority.[232] Thus, for these final results we continue to find that the input suppliers of polyester resin and quartz which supplied Foshan Yixin are "authorities" within the meaning of section 771(5)(B) of the Act.

With regard to our benchmarking analysis, as we stated in the *Preliminary Determination*,[233] we requested that the GOC provide the following information regarding the polyester resin and quartz industries in China to determine the extent to which the GOC is involved as a provider of these inputs and whether this involvement in the market distorts the prices for both inputs:[234]

a. The total number of producers.

[229] *See Shandong Rongxin* at 13-15.
[230] *See* section 776(a)(2)(A) of the Act.
[231] *See* section 776(b) of the Act.
[232] *See, e.g.,* Additional Documents for the Preliminary Determination at Attachment III: Public Body Memorandum at 33-36, 38.
[233] *See* PDM at 17.
[234] *See* Initial CVD Questionnaire at 9-10.

b. The total volume and value of Chinese domestic consumption of {input} and the total volume and value of Chinese domestic production of {input}.
c. The percentage of domestic consumption accounted for by domestic production.
d. The total volume and value of imports of {input}.
e. The percentage of total volume and (separately) value of domestic production that is accounted for by companies in which the Government maintains an ownership or management interest, either directly or through other Government entities, including a list of the companies that meet these criteria.

With respect to both inputs, the GOC claimed that "{n}either {the National Bureau of Statistics} nor relevant Associations collect data specific to {inputs}," and instead provided data for the statistical categories it claimed closest to polyester resin and quartz, *i.e.*, primary plastics and natural stone, respectively.[235]

We found this to be an insufficient response to our requests for information, insofar as it did not provide the requested volume and value data regarding the polyester resin and quartz producers in which the GOC maintains an ownership interest, instead providing information related to the broader natural stone and primary plastic industries, respectively. Consequently, we issued a supplemental questionnaire to the GOC reiterating our request for information specific to the polyester resin and quartz sectors.[236] However, the GOC again failed to provide Commerce with the specific information as requested and, further, did not completely identify, and provide GOC ownership information regarding, the primary plastic and natural stone producers in which the GOC maintains an ownership interest, stating that it does not possess this information.[237]

In a previous proceeding, Commerce was able to confirm at verification that the GOC maintains two databases at the State Administration of Industry and Commerce relevant to these requests for industry information. One is the business registration database, showing the most up-to-date company information; a second system, "ARCHIVE," houses electronic copies of documents such as business licenses, annual reports, capital verification reports, etc.[238] Therefore, we continue to find that the GOC has an electronic system available to it to gather the industry-specific information Commerce requested, including the GOC's ownership interests in companies producing polyester resin and quartz, but elected not to assist Commerce in obtaining necessary information for this proceeding.

Thus, because we determine that the GOC withheld necessary information that was requested of it, Commerce continues to rely on facts available in this final determination.[239] Moreover, we

[235] *See* GOC July 23, 2018 IQR at 36-37, 72 and Exhibit II.E.18.
[236] *See* GOC First SQ at 2-4.
[237] *See* GOC August 22, 2018 SQR at 24-26.
[238] *See, e.g.*, *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 FR 11177 (March 14, 2018), and accompanying IDM at 10-11.
[239] *See* section 776(a)(2)(A) of the Act.

determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information.[240] Consequently, an adverse inference is warranted in the application of facts available. In particular, we look to the available information regarding the GOC's involvement in the primary plastics and natural stone industries during the POI.[241] Applying an adverse inference to these facts, we conclude that the extent to which the GOC is involved in the polyester resin and quartz industries is such that Chinese prices from domestic transactions involving these inputs are significantly distorted.[242]

Comment 5: The Application of AFA Regarding Whether Inputs are Specific

GOC's Case Brief

- There is no basis for Commerce's application of AFA because there is no gap in the record of this investigation regarding the specificity of the polyester resin or quartz LTARs. The GOC provided information regarding the vast number of uses for these inputs and that there is no legal or other limitation on the consumption of these inputs.[243]
- The GOC provided consumption information indicating that: 1) the artificial stone industry is in the minority of industries that used certain types of polyester resin;[244] and 2) quartz is used in a very large number of industries.[245] Therefore, there is sufficient information on the record demonstrating that these inputs are not specific.[246]
- The facts here are similar to those of *Chlorinated Isos from China*, where Commerce found LTAR programs not to be specific because a large number of diverse industrial sectors in China used the input and the industry producing subject merchandise is not the predominant or disproportionate user of the input.[247]
- Additionally, Commerce never indicated that the information the GOC provided was deficient, in accordance with section 776(d) of the Act.[248]
- The GOC acted to the best of its ability to comply with Commerce's requests for information. The GOC did not provide certain information because the GOC does not collect data regarding the industries in China that produce polyester resin and/or quartz directly, and neither do the majority of other countries.[249]
- In the *Preliminary Determination*, to support its decision to apply AFA to the GOC, Commerce cited *Tubing from China*, but provided no reasoning why this decision adequately addresses how the GOC failed to act to the best of its ability in this

[240] *See* section 776(b) of the Act.
[241] *See* GOC August 22, 2018 IQR at 39-40 and 74-75.
[242] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65377 (November 25, 1998).
[243] *See* GOC's Case Brief at 19-20 (citing GOC July 23, 2018 IQR at 17 and 52).
[244] *Id*. at 21 (citing GOC July 23, 2018 IQR at 44-45).
[245] *Id*. at 21 (citing GOC July 23, 2018 IQR at 79).
[246] *Id*. at 21-22 (citing *Shandong Rongxin* at 16, *Changzhou Trina* at 9, and *Guizhou Tyre* at 9-11).
[247] *Id*. at 22 (citing *Chlorinated Isos from China* IDM at Comment 4).
[248] *Id*. at 23.
[249] *Id*. (citing GOC July 23, 2018 IQR at 44 and 78).

investigation.[250] The inability of the GOC to provide the requested data does not support the application of AFA as it is not "reasonable to conclude that less than full cooperation has been shown."[251]

Petitioner's Rebuttal Brief

- Commerce should continue to apply AFA to determine that the provision of quartz and polyester resin for LTAR programs are specific.
- While the GOC now claims that it provided sufficient information for Commerce to determine specificity, it is not for the GOC to dictate to Commerce the information that is necessary to complete its investigation.[252] Additionally, the information the GOC provided is insufficient because it does not report all of the Chinese industries that purchased polyester resin and quartz and the volume and value of each industry's respective purchase for the POI, information which is necessary for Commerce to make a specificity determination.
- Additionally, the GOC's reliance on *Chlorinated Isos from China* is misplaced, as the facts there are distinguishable from this investigation.[253] In *Chlorinated Isos from China*, the GOC provided complete information on the industries that consumed urea and the total consumption of that input among those industries and Commerce verified the accuracy of the underlying industry data.[254] Here, in contrast, the GOC failed to provide verifiable and complete consumption data by industry for quartz and polyester resin.[255]

Commerce's Position: For purposes of the final determination, we continue to find that the provision of polyester resin and quartz for LTAR programs are *de facto* specific based on AFA.

As we described in the *Preliminary Determination*, Commerce asked the GOC to provide a list of industries in China that purchase polyester resin and quartz directly, and to provide the amounts (volume and value) purchased by each of the industries.[256] Commerce requests such information for purposes of its *de facto* specificity analysis. Specifically, our questionnaire askes the GOC to:

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[250] *Id.* at 23-24 (citing PDM at 17 and *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 44562 (September 25, 2017) (*Tubing from China*), and accompanying PDM at 22-24, unchanged in *Countervailing Duty Investigation of Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175 (December 11, 2017) (*Tubing from China Final*)).
[251] *Id*. (citing *Nippon Steel*, 337 F. 3d at 1383).
[252] *Id*. (citing *ABB Inc.*, Slip Op. 18-156 at 27).
[253] *Id*. (citing GOC's Case Brief at 22).
[254] *Id*. (citing *Chlorinated Isos from China* IDM at Comment 4).
[255] *Id*. at 10.
[256] *See* Initial CVD Questionnaire at Section II, 11 and 13.

> Provide a list of the industries in China that purchase {inputs} directly, using a consistent level of industrial classification. Provide the amounts (volume and value) purchased by the industry in which the mandatory respondent companies operate, as well as the totals purchased by every other industry. In identifying the industries, please use whatever resource or classification scheme the Government normally relies upon to define industries and to classify companies within an industry. Please provide the relevant classification guidelines, and please ensure the list provided reflects consistent levels of industrial classification. Please clearly identify the industry in which the companies under investigation are classified.[257]

The GOC only provided examples of industries that used polyester resin and quartz,[258] an excerpt of a research report of the unsaturated polyester resin standard industry, and an excerpt from the People's Republic of China Building Materials Industry Standard for artificial stone.[259] We find this response to be insufficient because it does not provide information for all Chinese industries that purchased polyester resin and quartz or the volume and value of each industry's purchases during the POI, as we requested in the questionnaire. Therefore, given that the GOC failed to provide requested information, there is a gap in the record regarding all industries that use polyester resin and quartz and in what quantities, and we find the application of facts available appropriate in determining whether the polyester resin and quartz LTAR programs are specific. Moreover, because the GOC failed to cooperate to the best of its ability when it failed to provide us with requested information regarding the industries that purchase polyester resin and quartz, an adverse inference in selecting from among the facts otherwise available is warranted.

We disagree with the GOC that *Chlorinated Isos from China* supports finding that the polyester resin and quartz LTAR programs are not specific here. In *Chlorinated Isos from China*, the GOC provided Commerce with the data necessary to analyze *de facto* specificity. Here, in contrast, the GOC failed to provide Commerce with the necessary information to perform such an analysis, as explained above.

We also disagree with the GOC's claim that Commerce erred in applying AFA because it acted to the best of its ability to respond to Commerce's inquiries regarding whether the polyester resin and quartz LTAR programs are specific. As an initial matter, we note that the GOC has previously provided, and Commerce has verified, information from other GOC-maintained databases concerning the value and volume of production by enterprises producing input products.[260] Moreover, Commerce has verified the operation of the ECIPS, which requires that the administrative authorities release detailed information of enterprises and other entities and

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[257] *See* Initial CVD Questionnaire at Section II, 11 and 13-14.
[258] *Id*. at 44-45 and 78-79.
[259] *Id*. at Exhibit II.E.23 and II.E.24.
[260] *See, e.g., Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2013*, 80 FR 77318 (December 14, 2015), and accompanying IDM at Comment 1.

which is intended to bring clarity to companies registered in China.[261] Based on this experience, we are aware that this system is a national-level internal portal that holds certain information regarding any Chinese-registered company. Among other information, each company must upload its annual report, make public whether it is still operating, and update any changes in ownership. The GOC has stated that "Pursuant to Article 3.1 of {the Circular of the State Council on Printing and Issuing the Reform Proposals for the Registered Capital Registration System (Guo Fa (2014) No.7)}, the ECIPS was established requiring authorities to publish details regarding the registration, filings, supervision, and administration of enterprises and other entities. The system is kept up to date. Therefore, the information obtained from the ECIPS provides authoritative evidence of the ownership structure of enterprises in China."[262] In a previous investigation, when Commerce requested that the GOC provide information related to the specificity of an input LTAR program, the GOC provided information from a GOC-maintained database concerning the industries that consumed this input.[263] Given this, it is clear that the GOC does maintain information related to industries that use inputs, but did not provide such information for the purposes of this investigation. Therefore, we find that the GOC did not cooperate to the best of its ability in responding to Commerce's inquiries related to the specificity of the polyester resin and quartz for LTAR programs.

Moreover, we disagree with the GOC that it submitted sufficient information on the record to determine that the polyester resin and quartz and for LTAR programs are not specific. It is for Commerce, not the GOC, to determine whether the information provided is sufficient for Commerce to make its determinations with regard to specificity.[264] For the reasons described above, we find that the GOC failed to provide information necessary for us to analyze whether the polyester resin and quartz for LTAR programs are specific.

We also disagree with the GOC that we improperly cited *Tubing from China* as support for our decision to find that the polyester resin and quartz LTAR programs are specific based on AFA. *Tubing from China* is one of many examples where Commerce based its specificity determination for an input LTAR program on AFA because the GOC failed to provide us with requested information.[265]

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[261] *See Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 46643 (July 18, 2016), and accompanying PDM at 21-22, unchanged in *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017).

[262] *See* GOC July 23, 2018 IQR at 18 and Exhibit II.E.2.

[263] *See Cast Iron Soil Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 6770 (February 28, 2019), and accompanying IDM at 15.

[264] *See ABB Inc.*, at 27 ("Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.").

[265] *See, e.g., Tubing from China PDM* at 22-24, unchanged in *Tubing from China Final*; *see also, e.g., Utility Scale Wind Towers from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 FR 33422 (June 6, 2012) (unchanged in *Utility Scale Wind Towers from the People's Republic of China: Final*

Finally, we disagree with the GOC that the application of AFA is inappropriate because Commerce did not provide the GOC with notice of deficiencies in its response regarding the specificity of the input LTAR programs. Commerce did notify the GOC of these deficiencies in a supplemental questionnaire;[266] nonetheless, the GOC failed to provide the requested information.[267]

Therefore, Commerce continues to determine, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, that necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding. Thus, we are continuing to rely on facts available in making our final determination. Moreover, we continue to determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to comply by failing to provide us with requested information regarding the industries that purchase polyester resin and quartz. Consequently, an adverse inference in selecting from among the facts otherwise available is warranted. In particular, we look to the examples of industries that, according to the GOC, used polyester resin and quartz during the POI.[268] Applying an adverse inference to these facts, we conclude that the industries listed by the GOC are the sole industries that purchase polyester resin and quartz, and, thus, we continue to find that the GOC's provision of polyester resin and quartz is specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Comment 6: Whether Commerce's Use of a Tier Two Benchmark Takes into Account Prevailing Market Conditions in China

GOC's Case Brief

- If Commerce continues to use a tier two benchmark in its final determination, it must evaluate those benchmark prices in relation to prevailing market conditions in China.[269]
- Commerce's regulations provide that tier one or tier two benchmarks be on a "delivered" basis, reflecting "the price that a firm actually paid or would pay if it imported the product" and will include "delivery charges and import duties." However, the Act requires that the adequacy of remuneration be determined in relation to prevailing market conditions, which include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.[270]

Affirmative Countervailing Duty Determination, 77 FR 75978 (December 26, 2012)).
[266] *See* Commerce's Letter, "Countervailing Duty Investigation of Quartz Surface Products from the People's Republic of China: Second Supplemental Questionnaire," dated August 24, 2018, at 4.
[267] *See* GOC September 4, 2018 SQR at 3.
[268] *See* GOC August 22, 2018 IQR at 44-45 and 78-79.
[269] *See* GOC's Case Brief at 36.
[270] *Id*.

- Thus, Commerce's regulations cannot ignore the Act and require that tier one or tier two benchmarks be adjusted for ocean freight and import duties without first analyzing prevailing market conditions, an analysis which Commerce did not perform here.[271]
- The "prevailing conditions" referenced in the Act relate to the good being provided for LTAR, not the benchmark. On this basis, the Act requires Commerce to consider in-country conditions, such as availability and transportation.[272]
- The prevailing market conditions language referenced in section 771(5)(E)(iv) of the Act is indirectly derived from Article 14 of the SCM Agreement. In *U.S.-Hot-Rolled India*, the WTO Appellate Body examined this language in the context of Commerce's "delivered prices" regulation. The WTO Appellate Body found that, in order to assess the adequacy of remuneration in relation to prevailing market conditions in the country of provision, the investigating authority must allow for adjustments to the benchmark price to reflect delivery charges that closely approximate the generally applicable delivery charges for the good in question in the country of provision.[273]
- Based on the WTO Appellate Body's reasoning, the prominence of domestic supply in the market relative to import supply is an important consideration when determining whether it is proper to add delivery charges in the benchmark calculation. Specifically, import delivery charges should not be used simply because the benchmark was derived from world market prices where ocean freight and import duties are not part of the prevailing market conditions.[274]
- Given Commerce's finding that the imports of the goods in question is insignificant, it must limit any adjustment that includes ocean freight and import duties because imports are not generally available to purchasers in China. Alternatively, Commerce could apply a relative domestic-to-import supply ratio to the proposed duty or freight adjustment.[275]
- As a result, for the final determination, Commerce must recalculate its benchmarks for quartz and polyester resin by removing ocean freight and import duties to account for the prevailing market conditions in China for those inputs, as required by the Act.[276]

Petitioner's Rebuttal Brief

- Commerce's adjustment to its tier two benchmarks by including ocean freight and import duties is consistent with the Act. The GOC fails to consider that the United Nations International Trade Statistics Database (UN Comtrade) export data used for these benchmarks are based on prices for products outside of China that could not be used to produce subject merchandise unless transported to China. An export price cannot be used

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[271] *Id*. at 37.
[272] *Id*.
[273] *Id*. at 37-38 (citing *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, India*, WT/DS436/AB/R (December 8, 2014) (*U.S.-Hot-Rolled India*)).
[274] *Id*. at 38-39.
[275] *Id*. at 40.
[276] *Id*.

as a replacement for a domestic price without accounting for the additional costs associated with importing the goods.[277]

- Although the GOC maintains that Commerce's determination ignores "prevailing market conditions" in China, Commerce's decision to use tier two benchmarks is based on its finding that the Chinese markets for polyester resin and quartz are distorted. It makes little difference whether the inputs were readily available in the Chinese market because Commerce could not rely on Chinese prices. Thus, having determined that the Chinese markets for polyester resin and quartz were distorted in accordance with its statutory obligation, Commerce selected export prices as tier two benchmarks and made the appropriate adjustments.[278]
- The GOC's reliance on WTO Appellate Body opinions is also unpersuasive. It is well-established that WTO jurisprudence is not binding on the United States unless and until it is implemented by Congress through legislation. Because the WTO opinions cited by the GOC have not been implemented into the law of the United States, they are irrelevant to this proceeding.[279]

Commerce's Position: We disagree with the GOC that we must recalculate the benchmarks for quartz and polyester resin by removing ocean freight and import duties to account for the prevailing market conditions in China for those inputs. In the instant case, as noted above in Comment 4, we are relying on tier two benchmarks because we have determined, based on AFA, that the polyester resin and quartz markets in China are distorted because of the GOC's involvement in them. These tier two prices (*i.e.*, world market prices) are, by definition, based on prices for products located outside of China that could not be used to produce subject merchandise unless first transported to China. The domestically-produced quartz sand and polyester resin inputs would compete with world-market inputs that would include all delivery charges, taxes, and duties required for sale within the Chinese market, *i.e.*, the prevailing market conditions. Thus, it would be inappropriate, as the GOC suggests, to compare this tier two benchmark to a delivered input price without adjusting the benchmark to account for ocean freight and import duties.

Pursuant to 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under "tier one" or "tier two" benchmarks, Commerce will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Not only are such adjustments to the benchmark consistent with Commerce's practice, but the courts have upheld our application of these adjustments as lawful and in compliance with our regulations.[280] For our benchmark, we are calculating a delivered price that

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[277] *See* Petitioner's Rebuttal Brief at 17.
[278] *Id*.
[279] *Id*. at 18 (citing *Corus Stall BV v. Dep't of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005) (finding that "Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law")).
[280] *See, e.g.*, *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), and accompanying IDM at Comment 7*; Beijing Tiahai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1372-75

includes freight and import duties, which reflects the price that companies would pay if they imported the inputs in question. Thus, because we are using a tier two benchmark, whether Foshan Yixin actually imported the inputs and paid international freight is not relevant.[281]

Nonetheless, consistent with section 771(5)(E) of the Act, we considered the prevailing market conditions in China when determining the benchmark. Specifically, we used Maersk ocean freight charges, actual inland freight charges as reported by Foshan Yixin, and actual Chinese import duties on polyester resin and quartz to compute the benchmark prices used in our calculations. Thus, these charges reflect prices and rates in, or applicable to, the Chinese market, and thus relate directly to prevailing market conditions in China.[282]

Finally, we find that the GOC's reliance on the WTO Appellate Body decision in *U.S.-Hot-Rolled India*, to support its argument regarding Commerce's evaluation of the prevailing market conditions in China, is misplaced. Commerce has acted in this proceeding in accordance with U.S. law, which is fully consistent with the international obligations of the United States. Moreover, the Court of International Trade 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).[283] Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[284] 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.[285] As Commerce has previously explained, "the Department has issued no new determination and the United States has adopted no change to its methodology pursuant to the URAA's statutory procedure" with respect to this issue.[286] Thus, we find *U.S.-Hot-Rolled India* unavailing with respect to this issue.

Comment 7: The Benchmark Used in the Calculation of the Provision of Polyester Resin for LTAR Program

Foshan Yixin's Case Brief

- In the *Preliminary Determination*, Commerce used the benchmark data for polyester resin provided by the petitioner. Although Commerce stated that no other interested

(CIT 2015); *and Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 929 F. Supp. 2d 1324, 1327 (CIT 2013).

[281] *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 3.

[282] *Id*.

[283] *See Corus Staal*, 395 F.3d at 1347-49; accord *Corus Staal*, 502 F.3d at 1375.

[284] *See, e.g.*, 19 U.S.C. §§ 3533, 3538.

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

[286] *See 53-Foot Domestic Dry Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 21209 (April 17, 2015), and accompanying IDM at 50.

party provided benchmark prices for polyester resin, Hero Stone provided a timely clarification to the petitioner's submitted data, identifying outlier data in the petitioner's UN Comtrade source. This additional data should be included in the calculation of the applicable polyester resin benchmark for the final determination.[287]

Petitioner's Rebuttal Brief

- While Foshan Yixin argues that Commerce should adjust certain benchmark data based on clarifying rebuttal data Hero Stone provided, it does not explain the precise adjustments it seeks. Foshan Yixin has not provided any reason to adopt the adjustments it requests.[288]
- Moreover, the benchmark information that Foshan Yixin now asks Commerce to consider Hero Stone submitted less than 30 days before the preliminary determination for the purported purpose of clarifying the petitioner's benchmark information. This "refinement" of information already submitted was improper.[289]
- Therefore, Commerce should continue to use the preliminary determination benchmark data for purposes of the final determination.[290]

Commerce's Position: For purposes of the final determination, we have included the benchmark data provided by Hero Stone in determining the benchmark price for polyester resin. Commerce's Court-affirmed practice is to average all available data, absent record evidence justifying the exclusion of certain data, in order to determine a robust benchmark price and to prevent the cherry picking of data at one end of the spectrum.[291] Hero Stone's benchmark submission appears to be identical to that of the petitioner, but for the omission of certain allegedly outlier data; both datasets are therefore similarly specific to polyester resin, contemporaneous to the POI, and reported on the same basis. Because we find that both datasets reasonably reflect world market prices for polyester resin, consistent with 19 CFR 351.511(a)(2)(ii), we averaged the prices from these two datasets to establish a benchmark for evaluating the price that would have been available to purchasers of polyester resin in China.

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[287] *See* Foshan Yixin's Case Brief at 7 (citing Letter from Hero Stone, "Quartz Surface Products from the People's Republic of China: Rebuttal and Clarification to Factual Information Concerning the Adequacy of Remuneration," dated August 27, 2018 (Hero Stone Benchmark Rebuttal)).
[288] *See* Petitioner's Rebuttal Brief at 18.
[289] *Id*.
[290] *Id*. at 19.
[291] *See, e.g., Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 79 FR 108 (January 2, 2014) (*Citric Acid 2011 AR*), and accompanying IDM at Comment 13.E.; and *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*), and accompanying IDM at Comment 6; *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1293 (CIT 2010) ("…when using a tier two benchmark, Commerce must average all commercially available world market prices to arrive at the benchmark figure.").

We also disagree with the petitioner that Hero Stone's rebuttal benchmark data was improperly filed. Pursuant to 19 CFR 351.301(c)(3)(iv), Hero Stone's submission was timely submitted to rebut benchmark data on the record.[292] Specifically,19 CFR 351.301(c)(3)(iv) allows an interested party one opportunity to submit publicly available information to rebut, clarify, or correct factual information submitted pursuant to 19 CFR 351.511(a)(2) ten days after such factual information is submitted. Hero Stone's rebuttal submission was received within ten days of petitioners' benchmark submission.[293] Therefore, as explained above, we included Hero Stone's rebuttal benchmark data for polyester resin in this final determination.

Comment 8: The Benchmark Used in the Calculation of the Provision of Quartz for LTAR Program

Petitioner's Case Brief

- The Act requires that the adequacy of remuneration for goods provided by a government "shall be determined in relation to prevailing market conditions for the good or service being provided," and that prevailing market conditions include "quality."[294]
- Industrial quartz is divided into natural and artificial categories. The difference between natural and artificial quartz sand is that natural quartz sand is rock that is turned into particles naturally through erosion, while artificial quartz sand is made from rock that has been ground into particles.
- Natural quartz sand is classified under harmonized tariff schedule (HTS) number 2505.10, while artificial quartz sand is classified under HTS 2506.10.[295]
- Both the petitioner and Hero Stone supplied data from UN Comtrade for HTS 2505.10 (natural quartz sand), while the petitioner supplied UN Comtrade data for HTS 2506.10 (artificial quartz sand). These data show that the price of artificial quartz sand in every month of the POI ranges from more than twice to nearly four times the price of natural quartz sand.[296]
- It is unlikely that natural quartz sand is used to make subject merchandise for export to the United States because natural quartz sand may contain impurities (*e.g.*, clay, silt, or off-colored stone) and mechanical crushing better controls the particle size and shape. Moreover, the only evidence that any natural quartz sand is used to make subject

[292] *See* Hero Stone Benchmark Rebuttal at 2 and Exhibit 3.
[293] *See* Petitioner's Letter, "Certain Quartz Surface Products from the People's Republic of China: Submission of Benchmark Data," dated August 15, 2018; *see also* Hero Stone Benchmark Rebuttal. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005). Because August 25, 2018 - ten calendar days after the petitioner's submission - fell on a weekend, Hero Stone's submission on the following business day, August 27, was timely in accordance with Commerce's practice.
[294] *See* Petitioner's Case Brief at 6 (citing section 771(5)(E) of the Act).
[295] *Id*. at 3.
[296] *Id*. at 3-4.

merchandise is an unverified affidavit from Hero Stone, which does not address what type of quartz sand Foshan Yixin used.[297]

- Accordingly, to avoid distortion, Commerce should use data regarding imports under only HTS 2506.10 (artificial quartz sand) to value the provision of quartz for LTAR to Foshan Yixin.[298]
- In any event, if Commerce continues to use the benchmark data for HTS 2505.10 (natural quartz sand), it should not double count the data.[299]
- Specifically, the benchmark data for HTS 2505.10 that both the petitioner and Hero Stone supplied were based on the same UN Comtrade data, except that Hero Stone deleted some transactions. Thus, there is no reason to count the UN Comtrade data for HTS 2505.10 twice and the use of both datasets double counts the value of imports under HTS 2505.10 when averaging the data under HTS 2505.10 and 2506.10. It is Commerce's practice to avoid double counting benchmark transaction data.[300]

Foshan Yixin's Rebuttal Brief

- Commerce should continue to use benchmark data for both HTS 2505.10 and 2506.10 (*i.e.*, natural quartz sand and artificial quartz sand) for determining the adequacy of remuneration for Foshan Yixin's purchases of quartz.[301]
- Commerce followed prior practice in reasonably finding that inputs of the same product at varying qualities are sufficiently comparable for purposes of establishing a benchmark price. Where there is more than one average commercially available world price for an input product, Commerce is directed to average such prices, making allowance for factors affecting comparability.[302]
- Commerce's practice demonstrates that it has repeatedly included input products at different quality grades in its benchmarks.[303]

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[297] *Id*. at 4-5.
[298] *Id*. at 6.
[299] *Id*. at 7.
[300] *Id*. (citing *Toscelik Profil ve Sac Endustrisi A.S. v. United States*, 2014 Ct. Int'l Trade LEXIS 127, at *18, 36 Int'l Trade Rep. (BNA) 1152 (October 29, 2014)).
[301] *See* Foshan Yixin's Rebuttal Brief at 2.
[302] *Id*. (citing 19 CFR 351.511(a)(2)(ii)).
[303] *Id*. at 3 (citing *TMK IPSCO v. United States*, 179 F. Supp. 3d 1328, 1348-49 (CIT 2016) ("Plaintiffs argue that Commerce was required to adjust the benchmark prices to reflect the higher value of OCTG-quality steel rounds used in the production of subject merchandise ... Defendant responds that Commerce properly declined to make a premium quality adjustment because all purchases of steel rounds by producers were included in its benefit calculations, not just those for premium quality steel rounds ... Commerce's decision not to adjust the benchmark prices to reflect premium quality steel rounds is reasonable"); *Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1367-1370 (CIT 2015) ("BTIC argues that the record demonstrates that there is a significant price variation based on diameter ... although Commerce must use benchmark prices for merchandise that is comparable to a respondent's purchases ... there is nothing that requires that it use prices for merchandise that are identical to a respondent's purchases ... because the Italian and Iranian data contain prices for all diameters, these prices are arguably more representative, Plaintiff's arguments are therefore unconvincing"); *Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1269, 1278 (CIT 2014) ("The only issue is whether Commerce properly considered

- In *Changzhou Trina*, Commerce found sufficient comparability between a dataset including prices for solar glass, the specific input product in question, as well as "safety glass, toughened, tempered, or other," of which solar glass was only one subcategory.[304]
- In the instant case, natural and artificial quartz sand are similar, and sometimes identical, products, and are interchangeable as substitute inputs in the quartz surface products manufacturing process. Commerce's determination of comparability is reasonable, supported by substantial evidence, and in accordance with its established practice.[305]
- Therefore, Commerce should continue to rely on the quartz benchmark data used in the *Preliminary Determination* for purposes of the final determination.[306]

Commerce's Position: We disagree with the petitioner that we should only use data for imports under HTS 2506.10 (artificial quartz sand) to value the provision of quartz for LTAR to Foshan Yixin. Although the petitioner alleges that "it is not likely that any natural sand is used to make subject merchandise,"[307] the record does not indicate the type of sand used by Foshan Yixin in its production process, or that natural sand cannot be used in the production of subject merchandise. Rather, as the petitioner discusses, uncontradicted record evidence indicates that natural sand can be, and is, used by at least some producers of subject merchandise.[308] Thus, in the *Preliminary Determination*, we weight-averaged the monthly benchmark data on the record for natural and artificial quartz sand, in accordance with 19 CFR 351.511(a)(2)(ii), to determine the benchmark price for quartz sand, and for this final determination, we continue to rely on the data for both types of quartz sand, adjusted as discussed below.

We also disagree with the petitioner that we have double-counted the benchmark data for natural quartz sand. The datasets provided by Hero Stone and petitioner are not identical; therefore, these data have not been double-counted. As discussed in Comment 7 above, our practice is to average datasets where more than one commercially viable price is available. Thus, consistent with prior cases, we continue to rely on both sets of data for the purpose of creating a more robust world market benchmark price.[309]

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factors affecting comparability in its selection of world market prices ... More specifically, the court requested that Commerce consider the different grades of sulfuric acid referenced by RZBC ... Commerce considered this information and concluded that there was no need to adjust its benchmark price calculation ... although there may be variations in pricing among different grades and concentration ... RZBC fails to establish that Commerce's benchmarks unreasonably distort the price of sulfuric acid"); *Essar Steel*, 721 F. Supp. 2d at 1294 ("Even if Essar's claim that fine prices represent only prices for BF grade fines, the company still provided no explanation as to why the BF grade is so dissimilar that it cannot be fairly compared to the fines provided by the NMDC")); and *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 54963 (September 15, 2014), and accompanying IDM at Comment 5).

[304] *Id*. (citing *Changzhou Trina* at 24).
[305] *Id*. at 3-4.
[306] *Id*. at 4.
[307] *See* Petitioner's Case Brief at 4.
[308] *See* Hero Stone Benchmark Rebuttal at Exhibit ADEQ-2.
[309] *See, e.g.*, *Solar Cells* IDM at Comment 6.

Nonetheless, to address the concerns raised by the petitioner regarding the quartz sand benchmark, for this final determination we made certain adjustments to our benchmark calculation. Specifically, we determined the benchmark price for quartz sand, on a monthly basis, by: (1) calculating a simple average of the two UN Comtrade datasets submitted by the petitioner and Hero Stone for natural quartz sand to determine an average benchmark price for natural sand, on a monthly basis; and (2) calculating a simple average of the resulting natural quartz sand benchmark price with the UN Comtrade data submitted by the petitioner for artificial quartz sand. We used the resulting benchmark price in our calculations for the final determination.

Comment 9: Whether Commerce Should Continue to Treat Quartz "Powder" as Crushed Quartz Sand

Petitioner's Case Brief

- Respondents claim to use both quartz sand and a substance called quartz or silica powder to make subject merchandise.[310] It is unclear from Foshan Yixin's responses what, if any, distinction exists between quartz powder and quartz sand; whatever the particle size, both substances are encompassed by the allegation in the petition.[311]
- Therefore, Commerce should continue to treat Foshan Yixin's purchases of quartz powder as purchases of quartz sand in the final determination.[312]

No other party commented on this issue.

Commerce's Position: We agree with the petitioner. For the purposes of this final determination, we continue to use all of Foshan Yixin's purchases of quartz sand and quartz (or silica) powder in our calculation of the provision of quartz for LTAR program, as we did in the *Preliminary Determination*.

[310] *See* Petitioner's Case Brief at 8 (citing Hero Stone's August 9, 2018 Initial Questionnaire Response (Hero Stone August 9, 2018 IQR) at 4 and Foshan Yixin's July 26, 2018 Initial Questionnaire Response at Exhibit 3)).
[311] *Id*. (citing petition Vol. III at 80-81 and Initiation Checklist at 22-23).
[312] *Id*.

Comment 10: Whether Commerce's Preliminary Critical Circumstances Determination Was Lawful

Dal-Tile's and Quartz Importers' Case Briefs

- Commerce's preliminary finding that Fasa Industrial and Hero Stone shipped subject merchandise in massive quantities during the critical circumstances comparison period based on AFA is not supported by record evidence and is inconsistent with U.S. law.[313]
- The record does not show that Fasa Industrial and Hero Stone failed to comply with Commerce's request for information regarding the critical circumstances allegation. In fact, Commerce never sought export shipment data from any party other than Foshan Yixin.[314]
- Moreover, Commerce failed to consider record information indicating that imports of quartz surface products from China are seasonal. Commerce further failed to assess the import quantities in light of "unusual" circumstances such as the section 301 action on Chinese products, which directly impacted the import volumes of quartz surface products from China during the comparison period. By not seeking relevant import data and not considering factors pertinent to the finding of "massive imports," Commerce failed to investigate critical circumstances in a transparent and fair manner.[315]
- Section 703(d) of the Act authorizes Commerce, after making an affirmative preliminary countervailing determination, to order the posting of cash deposits. However, the Act does not authorize Commerce to order the retroactive posting of cash deposits due to a preliminary affirmative finding of critical circumstances. The Act only permits Commerce to order the suspension of liquidation of entries of subject merchandise.[316]
- The Act only provides Commerce with the authority to impose a cash deposit obligation at two occasions: 1) the publication of its preliminary determination (*see* sections 703(b) and (d) of the Act); and 2) the publication of Commerce's final determination (*see* sections 705(a) and (c) of the Act).[317]

Hero Stone's Case Brief

- Commerce's preliminary finding that critical circumstances exist with respect to Hero Stone was unlawful because Commerce has falsely imputed that Hero Stone used an export subsidy program during the POI.[318]
- The record of this investigation contains Hero Stone's certified statements that it did not use an export subsidy program.[319] Thus, the information available to Commerce

[313] *See* Dal-Tile's Case Brief at 2.
[314] *Id.* at 3.
[315] *Id*. at 4-5.
[316] *See* Dal-Tile's Case Brief at 5 and Quartz Importers' Case Brief at 9-10.
[317] *See* Quartz Importers' Case Brief at 10-11.
[318] *See* Hero Stone's Case Brief at 11.
[319] *Id*. (citing Hero Stone August 9, 2018 IQR).

demonstrated that Hero Stone has not used an alleged countervailable subsidy inconsistent with the SCM Agreement.[320]

Petitioner's Rebuttal Brief

- Commerce met all statutory requirements for a determination of critical circumstances in the *Preliminary Critical Circumstances Determination* were met. Therefore, Commerce should reject the respondents' claim that the application of AFA to reach an affirmative determination of critical circumstances for these two companies was unlawful.[321]
- There is no merit to Dal-Tile's contention that Commerce's critical circumstances determination was unlawful because the agency "never sought export shipment data" from Fasa Industrial or Hero Stone. Given that both respondents expressed a clear intent not to provide information to Commerce, there was no need for Commerce to seek export data from these respondents. Moreover, even if these respondents had been willing to provide export shipment data, these data would not have been verifiable due to the respondents' failure to provide other necessary information. Because Commerce is prohibited from relying on unverified information, it could not have relied on any export shipment data submitted by Fasa Industrial or Hero Stone.[322]
- Commerce's reliance on AFA to reach an affirmative critical circumstances determination is consistent with its practice in prior investigations.[323]
- Commerce must reject Hero Stone's claim that it was improper for Commerce to find that the company received export subsidies which are inconsistent with the SCM Agreement. In applying AFA to Hero Stone, Commerce properly found that Hero Stone benefitted from an export subsidy.[324]
- Moreover, there is no basis for Dal-Tile's contention that Commerce failed to consider evidence related to the seasonality of imports or the impact of the imposition of section 301 duties on imports of quartz surface products from China. Dal-Tile does not point to any evidence indicating that imports are seasonal because there is no such evidence on the record.
- Commerce attempted to collect monthly export data from Foshan Yixin; however, Foshan Yixin failed to submit its monthly export data in a timely manner. Other importers also attempted to submit information regarding seasonality after the relevant deadlines for submitting such information.

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[320] *Id*. at 12.
[321] *Id*. at 26-27.
[322] *Id*. at 27-28 (citing *Yantai Timken Co. Ltd. v. United States*, 31 C.I.T. 1741, 1762 (2007) ("Commerce cannot rely on unverified information."); and *Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 FR 28186 (June 18, 2018), and accompanying IDM at Comment 21).
[323] *Id*. at 28 (citing *Stainless Steel Flanges from India: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 83 FR. 40748 (August 16, 2018), and accompanying IDM at 3; and *Aluminum Sheet* IDM at 2).
[324] *Id*. at 29.

- Dal-Tile does not explain how the imposition of section 301 duties would impact the import volumes of quartz surface products from China during either the base or comparison periods and points to no evidence showing that section 301 duties had any impact on import volumes that would affect the critical circumstances analysis.[325]
- Dal-Tile's and the quartz importers' arguments that the Act does not authorize Commerce to collect cash deposits based on a preliminary affirmative determination of critical circumstances is incorrect and should be rejected.[326]
- Section 705(c)(4)(A) of the Act allows Commerce, in the event of an affirmative critical circumstances determination under section 703(b)(2) of the Act and an affirmative preliminary determination under section 703(e)(1) of the Act, to instruct U.S. Customs and Border Protection (CBP) to continue the retroactive suspension of liquidation and the posting of a cash deposit previously ordered under section 703(e)(2) of the Act.[327]

Francini's Rebuttal Brief

- Commerce's regulations at 19 CFR 351.206(d) only allow the retroactive suspension of liquidation as a result of a preliminary affirmative determination of critical circumstances. Commerce's regulations do not authorize the retroactive collection of cash deposits.[328]

Commerce's Position: We find that our critical circumstances determination in this investigation is supported by law.

In the *Preliminary Critical Circumstances Determination*, we found that the criteria under section 703(e) were met with respect to Fasa Industrial and Hero Stone.[329] In the *Preliminary Determination*, we found, based on AFA, that Fasa Industrial and Hero Stone used programs including the "Export Assistance Grants" program.[330] As explained in the *Preliminary Critical Circumstances Determination*, we preliminarily found, pursuant to section 776(a)-(b) of the Act, that there was a reasonable basis to believe or suspect that the "Export Assistance Grants" program is export contingent within the meaning of section 771(5A)(B) of the Act and, thus, inconsistent with the SCM Agreement.[331] In addition, for the purposes of the "massive imports" analysis, we preliminarily determined, pursuant to section 776(a)-(b) of the Act, that Fasa Industrial and Hero Stone shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criterion under section 703(e)(1)(B) of the Act.[332] There is no evidence on the record which would warrant a reconsideration of our preliminary critical circumstances determination. Because we preliminarily applied AFA to Fasa Industrial and Hero Stone, we did not seek their shipments data or other import data during the critical circumstances period and, due to the deficiencies in Hero Stone's questionnaire response (and

[325] *Id*. at 30-31.
[326] *Id.* at 31-32.
[327] *Id*. at 32.
[328] *See* Francini's Rebuttal Brief at 2-3.
[329] *See Preliminary Critical Circumstances Determination* at 4-5.
[330] *See* PDM at 11, 41.
[331] *See Preliminary Critical Circumstances Determination* at 4-5.
[332] *Id.*

the lack of any questionnaire response from Fasa Industrial), would not have considered such data in our analysis had it existed on the record due to its unverifiable nature. As a result, we did not consider other factors (*e.g.*, seasonality, the section 301 duties) in our preliminary analysis of massive imports.

We also disagree that we improperly found critical circumstances with regard to Hero Stone. Hero Stone argues that Commerce's preliminary finding of critical circumstances for it was unlawful because Commerce falsely imputed that Hero Stone used an export subsidy program during the POI. Specifically, Hero Stone states that the record contains its certified statements that it did not use an export subsidy program during the POI. However, consistent with the *Preliminary Determination*, and as discussed above in Comment 2, we continue to find that because of Hero Stone's self-described inadequate record keeping, the information Hero Stone provided in this investigation cannot be verified; thus, we continue to apply total AFA to Hero Stone for purposes of this final determination.[333] Therefore, we cannot rely on Hero Stone's assertion that it did not use any program inconsistent with the SCM Agreement during the POI. Accordingly, we continue to find, as AFA, that Hero Stone used a program inconsistent with the SCM Agreement for purposes of our final critical circumstances determination.

Consistent with the *Preliminary Critical Circumstances Determination*, because we determine that the "Export Assistance Grants" program is export contingent, we find that the criterion under section 705(a)(2)(A) of the Act has been met. Moreover, as explained in the sections "Final Determination of Critical Circumstances" and "Application of AFA: Export Buyer's Credits" above, we are now finding, as AFA, that the Export Buyer's Credit program is also an export subsidy,[334] *i.e.*, that the program is export-contingent within the meaning of section 771(5A)(B) of the Act and, thus, inconsistent with the SCM Agreement. Consistent with our *Preliminary Determination*, we continue to find, based on AFA, that Hero Stone and Fasa Industrial used the Export Buyer's Credit program during the POI.[335]

For purposes of the "massive imports" analysis, we determine, pursuant to section 776(a)-(b) of the Act, that Fasa Industrial and Hero Stone shipped quartz surface products in "massive" quantities during the comparison period, thereby fulfilling the criterion under section 705(a)(2)(B) of the Act. As a result, we find that that critical circumstances exist with regard to Fasa Industrial and Hero Stone.

Moreover, we disagree that our preliminary critical circumstances instructions to CBP, requiring the retroactive collection of cash deposits, were unlawful. Section 703(e)(2) of the Act states:

> If the {critical circumstances} determination of the administering authority under paragraph (1) is affirmative, then any suspension of liquidation ordered under subsection (d)(2) shall apply, or, if notice of such suspension of liquidation is already published, be amended to apply, to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the later of—

[333] *See* PDM at 8-9.
[334] *See Passenger Tires 2016 AR* IDM at Comment 16.
[335] *See* PDM at 11.

> (A) the date which is 90 days before the date on which the suspension of liquidation was first ordered, or
> (B) the date on which notice of the determination to initiate the investigation is published in the Federal Register.

While section 703(e)(2) of the Act is silent with respect to the imposition of cash deposits, the Act in other areas clearly requires the collection of cash deposits in conjunction with the suspension of liquidation. For example, section 703(d)(1)(B) of the Act states:

> If the preliminary {countervailing duty} determination of the administering authority under subsection (b) is affirmative, the administering authority—
> …
>
> (B) shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable… {and}(2) order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after … {a certain date}.[336]

Moreover, section 705(c)(4) of the Act contemplates the requirement of cash deposits where Commerce makes both an affirmative preliminary countervailing duty determination and an affirmative preliminary determination of critical circumstances under section 703(e)(2) of the Act:

> If the {final critical circumstances} determination of the administering authority under subsection (a)(2) is affirmative, then the administering authority shall—
> (A) in cases where the preliminary determinations by the administering authority under sections 703(b) and 703(e)(1) were both affirmative, {(*i.e.*, in cases where Commerce made both an affirmative preliminary countervailing duty determination and an affirmative preliminary determination of critical circumstances)}, continue the retroactive suspension of liquidation and the posting of a cash deposit, bond, or other security previously ordered under section 703(e)(2)….

In short, we find that the Act generally contemplates the posting of cash deposits (or bonds or other security) for suspended entries. Although section 703(e)(2) of the Act does not specifically direct Commerce to instruct CBP to collect cash deposits on entries retroactively suspended because of a preliminary critical circumstances determination, the statute does not prohibit Commerce from instructing CBP to collect cash deposits on those retroactively suspended entries. We find that instructing CBP to collect cash deposits on retroactively suspended entries pursuant to a critical circumstances determination is consistent with section 705(c)(4) of the Act,

[336] *See* sections 703(d)(1)(B) and (2) of the Act.

the Act's linkage of cash deposits for suspended entries in other provisions including section 703(d), and Commerce's long-established practice, when making a preliminary finding of critical circumstances, to instruct CBP to collect cash deposits when it suspends liquidation during the critical circumstances period.[337] As a result, we are not revising our critical circumstances instructions to CBP to eliminate the cash deposit requirement in this final determination.

Finally, as discussed in the "Final Determination of Critical Circumstances" section above, we now determine that critical circumstances exist for Foshan Yixin and "all other" producers/exporters of subject merchandise during the POI, as well as for Foshan Yixin's unaffiliated suppliers that failed to cooperate in this investigation: Foshan Nanhai and Qinguan Yuefeng. Thus, in the event that the ITC makes an affirmative finding of critical circumstances, in accordance with section 705(c)(4) of the Act, we will also suspend liquidation and require cash deposits for unliquidated entries of merchandise from Foshan Yixin, Foshan Nanhai, Qinguan Yuefeng, and all other exporters/producers that were entered, or withdrawn from warehouse, for consumption on or after June 23, 2018 (*i.e.*, 90 days prior to the date of the *Preliminary Determination*).

IX. RECOMMENDATION

We recommend approving all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the ITC of our determination.

☒ ☐

Agree Disagree

5/14/2019

X

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[337] *See, e.g.*, *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 68858 (November 19, 2014), and accompanying IDM at Comment 4. *See also 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).