C-570-980
Administrative Review
POR: 01/01/2016-12/31/2016
Public Document
E&C/VII: GHC

August 19, 2019

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

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

SUBJECT: Decision Memorandum for Final Results of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China

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I. SUMMARY

The Department of Commerce (Commerce) has completed the administrative review of the countervailing duty (CVD) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells) from the People's Republic of China (China), for the period of review (POR) January 1, 2016 through December 31, 2016. This is the fifth administrative review of this CVD order. This administrative review was conducted in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). The mandatory respondents are Canadian Solar Inc. and its cross-owned affiliates (collectively, Canadian Solar), and Jinko Solar Import & Export Co., Ltd. and its cross-owned affiliates (collectively, Jinko Solar). We find that the mandatory respondents received countervailable subsidies during the POR. We analyzed the case and rebuttal briefs submitted by interested parties following the *Preliminary Results*,[1] and address the issues raised in the "Analysis of Comments" section.

II. BACKGROUND

We published the *Preliminary Results* of this administrative review in the *Federal Register* on February 20, 2019, finding that the mandatory respondents received countervailable subsidies

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review, in Part; 2016* (February 20, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

during the POR related to certain programs. We invited interested parties to comment on the *Preliminary Results*. On May 23, 2019, we extended the deadline for issuing the final results of this administrative review to August 19, 2019.[2] From May 29 through June 1, 2019, we conducted verification of the questionnaire responses submitted by Canadian Solar, pursuant to 19 CFR 351.307(b)(v)(A) and (B). We did not verify the questionnaire responses submitted by the Government of China (the GOC) or Jinko Solar.

On August 1, 2019, we received timely filed case briefs from the following interested parties: SolarWorld Americas, Inc. (the petitioner in the underlying CVD investigation); the GOC; Canadian Solar; and Jinko Solar.[3] On this same day, Changzhou Trina Solar Energy Co., Ltd. and its affiliates (Trina Solar), which are non-selected companies that are subject to this administrative review, submitted a letter in lieu of a case brief that concurs with and incorporates by reference the arguments made by the other respondent parties in their case briefs.[4]

On August 6, 2019, we received timely filed rebuttal briefs from the petitioner; the GOC; Canadian Solar; and Jinko Solar.[5] Also on August 6, 2019, BYD Shangluo Industrial Co., Ltd. (BYD Shangluo) and Shanghai BYD Co., Ltd. (collectively, the BYD Companies), which are non-selected companies that are subject to this administrative review, submitted a letter in lieu of a rebuttal brief disagreeing with, and requesting that we reject, the arguments presented in Petitioner's Case Brief, and supporting the arguments presented in the rebuttal briefs submitted by the GOC and the mandatory respondents.[6]

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[2] *See* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2016: Extension of Deadline for the Final Results," dated May 23, 2019.

[3] *See* Petitioner's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules from the People's Republic of China: Case Brief," dated August 1, 2019 (Petitioner's Case Brief); GOC's Letter, "GOC Administrative Case Brief: Fifth Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules from the People's Republic of China (C-570-980)," dated August 1, 2019 (GOC's Case Brief); Canadian Solar's Letter, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Case Brief," dated August 1, 2019 (Canadian Solar's Case Brief); and Jinko Solar's Letter, "Antidumping {sic} Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules: Jinko's Case Brief," dated August 1, 2019 (Jinko Solar's Case Brief).

[4] *See* Trina Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China: Letter in Lieu of Case Brief," dated August 1, 2019.

[5] *See* Petitioner's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Rebuttal Brief," dated August 6, 2019 (Petitioner's Rebuttal Brief); GOC's Letter, "GOC Administrative Case Brief: Fifth Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules from the People's Republic of China (C-570-980), dated August 6, 2019 (GOC's Rebuttal Brief); Canadian Solar's Letter, "Administrative Review of the Countervailing Duty Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Rebuttal Case Brief," dated August 6, 2019 (Canadian Solar's Rebuttal Brief); and Jinko Solar's Letter, "Antidumping {sic} Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules: Jinko's Rebuttal Brief," dated August 6, 2019 (Jinko Solar's Rebuttal Brief).

[6] *See* BYD Companies' Letter, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China (2016 Review): Letter in Lieu of Rebuttal Brief," dated August 6, 2019.

III. LIST OF INTERESTED PARTY COMMENTS

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

Comment 1: Export Buyer's Credit Program
Comment 2: Provision of Aluminum Extrusions for Less Than Adequate Remuneration (LTAR)
Comment 3: Provision of Electricity for LTAR
Comment 4: Solar Grade Polysilicon Benchmark
Comment 5: Solar Glass Benchmark
Comment 6: Land Benchmark
Comment 7: Ocean Freight Benchmark
Comment 8: Commerce's Use of "Zeroing" in Benefit Calculations
Comment 9: Creditworthiness
Comment 10: Calculation Methodology for Canadian Solar's Subsidy Rate
Comment 11: Canadian Solar's Denominator for the Golden Sun Program
Comment 12: Entered Value Adjustment Regarding Canadian Solar
Comment 13: Clerical Errors in Canadian Solar's Benefit Calculations

IV. SCOPE OF THE ORDER

The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of this order.

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding 10,000mm^2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the

integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Modules, laminates, and panels produced in a third-country from cells produced in China are covered by this order; however, modules, laminates, and panels produced in China from cells produced in a third-country are not covered by this order.

Merchandise covered by this order is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6015, 8541.40.6020, 8541.40.6025, 8541.40.6030, 8541.40.6035, 8541.40.6045, and 8501.31.8000.[7] These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.

V. CHANGES SINCE THE *PRELIMINARY RESULTS*

Based on our analysis of the information we received after the publication of the *Preliminary Results* (*i.e.*, information we received regarding the creditworthiness of the mandatory respondents, information we examined during the verification of Canadian Solar's questionnaire responses, and comments submitted by interested parties), we made certain changes to the benefit calculations for the mandatory respondents. We address these issues in the "Analysis of Comments" section below.

VI. PARTIAL RESCISSION OF ADMINISTRATIVE REVIEW

We received a timely filed no-shipments certification from BYD Shangluo.[8] In the *Preliminary Results*, we explained that to confirm BYD Shangluo's statement, we issued a no-shipments inquiry to Customs and Border Protection (CBP), and that a final decision on whether to rescind this review with respect to BYD Shangluo would be made in the final results.[9] In response to our inquiry, CBP informed us that it found no evidence of shipments concerning subject merchandise that were produced and/or exported by BYD Shangluo to the United States during the POR.[10] Based on the no-shipments certification submitted by BYD Shangluo, and CBP's response to our no-shipments inquiry, we are rescinding this review with respect to BYD Shangluo in accordance with 19 CFR 351.213(d)(3).

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[7] *See* Memorandum, "Request from Customs and Border Protection to Update the ACE AD/CVD Case Reference File; Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China (C-570-980)," dated August 6, 2018, which references adding the additional HTSUS subheadings, 8541.40.6015, 8541.40.6025, 8541.40.6035, and 8541.40.6045 to the scope of the order.

[8] *See* BYD Shangluo's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: No Shipments Statement from BYD (Shangluo) Industrial Co., Ltd., dated March 26, 2018.

[9] *See Preliminary Results* PDM at 5.

[10] *See* Memorandum, "U.S. Customs and Border Protection Response to No Shipments Inquiry Regarding BYD (Shangluo) Industrial Co., Ltd.," dated July 17, 2019.

VII. NON-SELECTED COMPANIES UNDER REVIEW

The Act and Commerce's regulations do not directly address the establishment of rates to be applied to companies not selected for individual examination where Commerce limited its examination in an administrative review pursuant to section 777A(e)(2) of the Act. However, Commerce normally determines the rates for non-selected companies in administrative reviews in a manner that is consistent with section 705(c)(5) of the Act, which provides instructions for calculating the all others rate in an investigation. We also note that section 777A(e)(2) of the Act provides that "the individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all others rate of under section {705(c)(5) of the Act}." Section 705(c)(5)(A) of the Act instructs Commerce to calculate an all others rate using the weighted-average of the subsidy rates established for the producers/exporters individually examined, excluding zero, *de minimis*, or facts available rates.

For the companies for which a review was requested that were not selected as mandatory company respondents, and for which we did not receive a timely request for withdrawal of review, and which we are not finding to be cross-owned with the mandatory company respondents, we are basing the subsidy rate on a weighted-average of the subsidy rates calculated for Canadian Solar and Jinko Solar, using their publicly-ranged sales data for exports of subject merchandise to the United States during the POR. For a list of these companies, please see the Appendix to this memorandum.

VIII. SUBSIDIES VALUATION INFORMATION

Allocation Period

We made no changes to the allocation period (AUL) or to the allocation methodology used in the *Preliminary Results*.[11]

Attribution of Subsidies

To correct certain inadvertent calculation errors, we made certain changes to the attribution methodologies used in the *Preliminary Results*.[12] We also corrected certain clerical errors in the *Preliminary Results* regarding this issue as explained in the "Analysis of Comments" section below.

Denominators

Where noted below in the section, "Analysis of Comments," we certain changes to the denominators used in the *Preliminary Results*.[13]

[11] *See Preliminary Results* PDM at 7.
[12] *Id*. at 7-8.
[13] *Id*.

Benchmarks and Discount Rates

In the *Preliminary Results*, we relied solely on Maersk shipping rates to value international ocean freight when constructing the LTAR benchmarks.[14] In a change from the *Preliminary Results*, and as discussed in the section "Analysis of Comments," for the final results we are relying on an average of the Maersk shipping rates and the shipping rates generated by Xeneta, which were submitted by the mandatory respondents.[15] With respect to the Maersk shipping data, we are now only relying on shipping prices for the months that were not inflated by applying a price index. We also made certain changes to the United Nations Comtrade Database data (Comtrade) when constructing the benchmark for the provision of aluminum extrusions for LTAR, as discussed below. Finally, we adjusted certain discount rates based on our findings that Canadian Solar and Jinko Solar were creditworthy in certain years.

IX. USE OF FACTS AVAILABLE AND ADVERSE INFERENCES

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

Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an adverse facts available (AFA) rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide Commerce with complete and accurate information in a timely manner."[16] 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."[17]

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[14] *Id*. at 22.

[15] *See* Canadian Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Benchmark Submission," dated November 5, 2018 (Canadian Solar's Benchmark Submission) at Exhibit 6; *see also* Jinko Solar's Letter, "Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules: Jinko's Benchmark Information," dated November 5, 2018 (Jinko Solar's Benchmark Submission) at Exhibit 5.

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

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

Section 776(c) of the Act also provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. However, Commerce is not required to corroborate any countervailing duty applied in a separate segment of the same proceeding.[18]

Under section 776(d) of the Act, Commerce may use as AFA a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[19]

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

Otherwise, consistent with section 776(d) of the Act and our established practice of the hierarchal methodology for selecting an AFA rate in reviews, for certain of the programs discussed below, as appropriate, we selected as AFA the highest calculated rate for the same or a similar program.[20] The AFA hierarchy for reviews has four steps, applied in sequential order. The first step is to apply the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the proceeding, or if the rate is *de minimis*, the second step is to apply the highest non-*de minimis* rate calculated for a cooperating company for a similar program (based on the treatment of benefit) within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within same proceeding, the third step is to apply the highest non-*de minimis* rate calculated for an identical or similar program in another countervailing duty proceeding involving the same country. If no such rate exists under the first through third steps, the fourth step is to apply the highest rate calculated for a cooperating company for any program from the same country that the industry subject to the investigation could have used.

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[18] *See* section 776(c)(2) of the Act.
[19] *See* section 776(d)(3) of the Act.
[20] *See*, *e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*), and accompanying IDM at 13; *see also Essar Steel Ltd. v. United States*, 753 F. 3d 1368, 1373-74 (Fed. Cir. 2014) (upholding "hierarchical methodology for selecting an AFA rate").

In the *Preliminary Results*, we relied on "facts otherwise available," including AFA, for several findings. With regard to the provision of electricity for LTAR, we relied on AFA to determine that the provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act, and is specific within the meaning of section 771(5A)(D) of the Act.[21] We also relied on an adverse inference to determine the existence and the amount of the benefit; we selected as our benchmark the highest electricity rates on the record for the applicable rate and user categories.[22] Because the rates were derived from information submitted during this review, they do not constitute secondary information and there is no requirement to corroborate pursuant to section 776(c) of the Act. As discussed below, we have not changed these AFA findings for these final results.

In the *Preliminary Results*, with regard to the Export Buyer's Credit Program, we also relied on AFA because the GOC did not provide information with respect to whether it uses third party banks to disburse/settle Export Buyer's Credits, among other necessary information.[23] Without this information, we are unable to fully analyze how the Export Buyer's Credits flow to/from foreign buyers and the China Export-Import Bank (China Ex-Im Bank) and found that the GOC had not cooperated to the best of its ability and, as AFA, found that Canadian Solar and Jinko Solar each used and benefited from this program, despite their claims of non-use and certifications of non-use from their customers.[24]

Due to the failure of the GOC to cooperate to the best of its ability, for the Export Buyer's Credit Program discussed below, we applied AFA. To select the AFA rate for this program, as discussed further below, we applied our well established AFA hierarchy for reviews and selected a rate from a similar program from a prior administrative review from this proceeding. Pursuant to section 776(c)(2) of the Act, we do not need to corroborate this rate because this countervailing duty rate was calculated in a separate segment of this proceeding.

X. PROGRAMS DETERMINED TO BE COUNTERVAILABLE

We made certain changes to the *Preliminary Results* with regard to the methodology used to calculate the subsidy rates for the following programs with respect to Canadian Solar and Jinko Solar. Where applicable, we revised certain program denominators and attribution methodologies to ensure we are properly calculating program benefits and subsidy rates in accordance with 19 CFR 351.525(b)(6). We also corrected certain clerical errors when calculating the subsidy rates as explained below. Issues raised by interested parties in their case briefs regarding these issues are discussed below in the section "Analysis of Comments." The final subsidy rates for Canadian Solar and Jinko Solar are as follows:

Canadian Solar:

1. Golden Sun Demonstration Program: 0.14 percent *ad valorem*
2. Preferential Policy Lending: 1.32 percent *ad valorem*

[21] *See Preliminary Results* PDM at 29-31 and at 41-42.
[22] *Id*. at 41-42.
[23] *Id.* at 34.
[24] *Id*.

3. Provision of Solar Grade Polysilicon for LTAR: 0.08 percent *ad valorem*
4. Provision of Aluminum Extrusions for LTAR: 0.29 percent *ad valorem*
5. Provision of Solar Glass for LTAR: 1.44 percent *ad valorem*
6. Provision of Land for LTAR: 0.24 percent *ad valorem*
7. Provision of Electricity for LTAR: 0.35 percent *ad valorem*
8. Enterprise Income Tax Law, R&D Program: 0.02 percent *ad valorem*
9. Preferential Tax Program for High or New Technology Enterprises: 0.07 percent *ad valorem*
10. Self-Reported Grants: 0.00 percent *ad valorem*
11. Self-Reported Tax Programs: 0.02 percent *ad valorem*
12. Export Buyer's Credit Program: 5.46 percent *ad valorem*
13. Export Seller's Program: 0.27 percent *ad valorem*

Jinko Solar:

1. Golden Sun Demonstration Program: 0.26 percent *ad valorem*
2. Preferential Policy Lending: 0.69 percent *ad valorem*
3. Provision of Solar Grade Polysilicon for LTAR: 0.88 percent *ad valorem*
4. Provision of Aluminum Extrusions for LTAR: 1.41 percent *ad valorem*
5. Provision of Solar Glass for LTAR: 1.33 percent *ad valorem*
6. Provision of Land for LTAR: 0.66 percent *ad valorem*
7. Provision of Electricity for LTAR: 0.40 percent *ad valorem*
8. Enterprise Income Tax Law, R&D Program: 0.28 percent *ad valorem*
9. Import Tariff and Value Added Tax (VAT) Exemptions for Use of Imported Equipment: 0.10 percent *ad valorem*
10. Preferential Tax Program for High or New Technology Enterprises: 0.48 percent *ad valorem*
11. VAT Rebates on Foreign-Invested Enterprises (FIEs) Purchases of Chinese-Made Equipment: 0.00 percent *ad valorem*
12. Self-Reported Grants: 0.78 percent *ad valorem*
13. Self-Reported Tax Programs: 0.00 percent *ad valorem*
14. Export Buyer's Credit Program: 5.46 percent *ad valorem*
15. Export Seller's Program: 0.03 percent *ad valorem*

XI. PROGRAMS DETERMINED TO BE NOT USED OR NOT TO CONFER A MEASURABLE BENEFIT DURING THE POR

1. The Two Free/Three Half Program for FIEs
2. Income Tax Reductions for Export-Oriented Enterprises
3. Income Tax Benefits for FIEs Based on Geographic Locations – Preferential Tax Programs for Western Development
4. Local Income Tax Exemption and Reduction Programs for "Productive" FIEs
5. Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises
6. Tax Reductions for High and New-Technology Enterprises Involved in Designated Projects
7. Preferential Income Tax Policy for Enterprises in the Northeast Region
8. Guangdong Province Tax Programs

9. VAT and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade and Development Fund Program
10. The Over-Rebate of VAT Program
11. Tax Reductions for FIE Purchases of Chinese-Made Equipment
12. VAT Refunds/Rebates for FIEs Purchasing Domestically-Produced Equipment
13. Export Credit Insurance from SINOSURE

XII. ANALYSIS OF COMMENTS

Comment 1: Export Buyer's Credit Program

Petitioner's Comments:

- Commerce should continue to apply total AFA to the Export Buyer's Credit Program. The GOC has been particularly uncooperative and unresponsive in Commerce's investigation of actionable subsidies, including this program, provided to Chinese solar producers during the POR.[25]
- Under U.S. law, responding companies and foreign governments involved in CVD cases must use their best effort to provide information requested by Commerce. Their failure to do so can and should result in serious consequences in order to ensure cooperation in future proceedings.[26]
- Commerce has investigated this program in earlier segments of this proceeding and in numerous other proceedings, and not once has the GOC been able to demonstrate that this program has been not used. The GOC, in effect, is a "repeat offender" with regard to its refusals to provide necessary information on this program.[27]
- The GOC submitted the Administrative Measures of Export Buyer's Credit of EXIM Bank, which requires that the business contract supported by the export buyer's credit be more than USD 2 million. As previously verified by Commerce, this is false; the GOC eliminated this requirement in 2013.[28]
- In the *Preliminary Results*, Commerce appropriately concluded that the GOC refused to provide requested information or any information concerning the 2013 revision of this program, which is necessary for Commerce to analyze how this program functions.[29]
- Information previously verified by Commerce and placed on the record of the instant administrative review indicates that the China Ex-Im Bank may disburse export buyer's credits directly or through third-party partner and/or correspondent banks.[30]
- As in prior administrative reviews of this CVD order, the GOC's failures again have prevented Commerce from investigating this program in the instant review. As the fact

[25] *See* Petitioner's Case Brief at 2.
[26] *Id*.
[27] *Id*. at 3.
[28] *Id*. at 4.
[29] *Id.* at 5.
[30] *Id*.

patter here is identical, Commerce should continue to apply AFA to this program in this review as it has in the past.[31]

- Section 776(a) of the Act states that Commerce "shall" use "facts otherwise available" if an interested party: (i) "withholds information that has been requested by Commerce; (ii) "fails to provide such information by deadlines for submission of the information or in the form and manner requested;" (iii) "significantly impedes a proceeding;" or (iv) provides information that "cannot be verified."[32]
- In selecting from the facts otherwise available, Commerce may make adverse inferences if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information."[33]
- The GOC refused to provide information that would allow Commerce to verify non-use of this subsidy program. As a result, the GOC's conduct qualifies for the application of total AFA under the statute with respect to this program.[34]
- In order to address recent Court of International Trade (CIT) decision, Commerce should make clear that it is making no findings on whether this subsidy program is a domestic or export subsidy.[35] Commerce is unable to make such a finding due to the lack of cooperation from the GOC.
- As AFA, Commerce should presume that the respondent companies benefitted from this program to the fullest extent possible.[36] Commerce's practice when selecting an adverse rate from among the possible sources of information is the ensure that the margin is sufficiently adverse to induce respondents to provide Commerce with complete and accurate information in a timely manner.[37]
- Given that Commerce has repeatedly investigated this subsidy program with the same result of non-cooperation by the GOC, it is clear that the adverse rate previously selected by Commerce has not induced the respondents to provide Commerce with complete and accurate information.[38] Therefore, the petitioner requests that Commerce select another, higher AFA rate in order to fulfill the purpose of the statute and to induce compliance by the GOC.
- Commerce should calculate the benefit that the respondents received from this program using the respondents' own information and make adverse assumptions in the calculations where information is missing from the record, as Commerce has done in past cases.[39]
- Buyer's credits from the China Ex-Im Bank provide preferential loans directly to customers to finance sales. Commerce should presume, as AFA, that: (1) all of the respondents' sales were financed through this program; (2) the China Ex-Im Bank

[31] *Id*.
[32] *Id*. at 6.
[33] *Id*. at 6 (citing section 776(b) of the Act).
[34] *Id.* at 6-7.
[35] *Id*. at 7 (citing *Changzhou Trina Solar Energy Co., v. United States*, Consol. Ct. No. 17-00199, Slip Op. 19-92 (CIT July 2019)).
[36] *Id.* at 7.
[37] *Id*.
[38] *Id*. at 8.
[39] *Id*.

provided interest-free export credits to the respondents' customers; and (3) the respondents' customers were uncreditworthy.[40]

- In the alternative, Commerce should assign an AFA rate previously calculated for a similar program.[41]
- Loan programs and debt forgiveness programs are both capital subsidy programs. While not "identical" they provide "similar" financial contributions under section 771(5)(d)(i) of the Act.[42]
- In *OTR Tires from China*, Commerce assigned a combined rate of 11.83 percent to the respondent for a debt forgiveness subsidy.[43] Should Commerce decline to calculate an AFA rate using the methodology described above, Commerce should assign the respondents a rate of 11.83 percent, in accordance with the statute.

GOC's Comments:

- The application of AFA was based on the GOC's refusal to provide: (1) the 2013 Administrative Measures revisions; and (2) a "list of domestic settlement banks and third-party financial institutions" through which users of this program can receive loan disbursements.[44]
- As a result of these perceived failures, Commerce found that information was missing from the record regarding countervailability and usage of this program, and that the GOC failed to cooperate to the best of its ability, necessitating the use of adverse inferences.[45]
- As the CIT has now found on four very recent occasions, including an appeal of the 2014 administrative review of this CVD order, Commerce's application of AFA for this program is unlawful and unreasonable and should be changed for these final results.[46]
- To be consistent with the law, Commerce's AFA finding must satisfy three criteria: (1) it must identify a gap in the record; (2) it must identify how the offending party failed to cooperate to the best of its ability; and (3) the overall AFA decision must be supported by substantial evidence. Commerce fails to satisfy these criteria here.
- The use of facts otherwise available is governed by section 776(a) of the Act, while the use of "adverse inferences" is governed by section 776(b) of the Act. An adverse inference cannot be applied unless it appropriate to use facts otherwise available.[47]

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[40] *Id*. at 9.
[41] *Id*. at 11.
[42] *Id*. at 12.
[43] *Id*. at 12 (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) (*OTR Tires from China*), and accompanying IDM at 19-20).
[44] *See* GOC's Case Brief at 2 (citing *Preliminary Results* PDM at 33).
[45] *Id.*
[46] *Id*. (citing *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018) (*Changzhou Trina Solar*); *Guizhou Tyre Co., Ltd. v. United States*, Slip Op. 19-49 (CIT May 15, 2019); *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (CIT 2019); and *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 126 (CIT 2018)).
[47] *Id.* at 3 (citing *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp 2d 1261, 1289 (CIT 2006)).

- Commerce is required to limit its application of AFA to only essential information that is missing from the record, and that missing information must affect Commerce's ability to conduct its analysis.[48]
- In addition to showing that information is missing from the record, Commerce is also required to show that an interested party "failed to cooperate by not acting to the best of its ability to comply with a request for information."[49]
- Commerce's investigation of the countervailability of any alleged subsidy program essentially has two separate prongs: (1) to determine how the program operates and whether the program could provide a countervailable subsidy as to determine countervailability; and (2) to determine whether the respondent received a benefit from the program as to establish usage.[50]
- In the context of the application of AFA, the failure by the GOC to respond to Commerce's questions regarding certain aspects of the subsidy analysis does not render responses to other portions of the program unusable or irrelevant.[51]
- The involvement of a government as a third party in the proceedings whose actions can impact the respondents has resulted in a modified application of AFA when directed at the government respondent. "{I}f information on the record indicates that the respondent did not use the program, the Department will find the program was not used, regardless of whether the foreign government participated to the best of its ability."[52]
- The courts have embraced this legal principle noting that: "{t}he application of AFA to the GOC under such circumstances may adversely impact a cooperating party, although Commerce should seek to avoid such impact if relevant information exists elsewhere on the record."[53]
- The Court has noted that it would be "inappropriate for Commerce to apply AFA for no reason other than to deter the {government's} non-cooperation in future proceedings when relevant evidence existed elsewhere on the record."[54]
- In this case, not only did the GOC conclusively establish that none of the respondents' U.S. customers used this program, but the respondents themselves placed substantial evidence on the record {customer certifications of non-application for or use of Export Buyer's Credit Program} establishing their non-use of the program.[55]
- These circumstances eliminate Commerce's perceived lack of necessary information concerning the usage of this program by the respondents, which requires Commerce to overturn its use of AFA in the final results.[56]

[48] *Id.* at 5 (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Circ. 2011)).
[49] *Id.* (citing section 776(b) of the Act).
[50] *Id.* at 6 (citing section 771(5) of the Act).
[51] *Id.* at 6 (citing *National Nail Corp. v. United States*, 41 CIT Slip Op. 18-1 at 12 (CIT January 2, 2018)).
[52] *Id.* at 7 (citing *Countervailing Duty New Shipper Review: Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran*, 73 FR 9993 (February 25, 2008) (*Pistachios from Iran*), and accompanying IDM at Comment 2).
[53] *Id.* at 9 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331 (CIT 2013)).
[54] *Id.* at 9 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1313 (CIT 2017)).
[55] *Id.* at 11.
[56] *Id*.

- Commerce explained that the information the GOC failed to provide was critical to its understanding on how the export buyer's credits flow to and from foreign buyers and the China Ex-Im Bank.[57]
- Even if the information was critical to this "understanding," the information was only critical to understanding the operation of the program and not for establishing usage of this program.[58]
- There is no gap in the record regarding usage because the GOC clearly stated that the respondents' customers did not use this program, which is similar to other statements of non-use for other programs, and the respondents submitted declarations of non-use from all of their U.S. customers.[59]
- In explaining the reasoning for its AFA application, Commerce first notes that its previous understanding of the Export Buyer's Credit Program was that there was a USD 2 million contract value threshold for usage and the 2013 program revisions may have eliminated this threshold.[60] However, if this is assumed to be true, Commerce has not used this USD 2 million threshold as the basis for finding non-use in the past and has never explored this threshold in the countless on-site verifications it has conducted at the China Ex-Im Bank as a means to determine non-use.[61]
- At verification, Commerce has always reviewed the China Ex-Im Bank's database, which would identify the users of this program.[62]
- Commerce notes that it requested the 2013 Administrative Measures Revisions, which were not provided. This is irrelevant as to whether Commerce could have established usage in the course of a verification at the China Ex-Im Bank.[63]
- The GOC explained in its questionnaire responses how the China Ex-Im Bank determined usage in this review, which is no different than the methods the Bank used to determine usage prior to the 2013 revisions to the Administrative Measures.[64]
- Commerce has never inquired about whether the 2013 revisions to the Administrative Measures impacted how the China Ex-Im Bank can determine usage; the GOC has stated that it does not. Thus, Commerce has failed to investigate whether the absence of this information on the record had any real impact on determining usage and whether it created a gap in the record that required the application of AFA.[65]
- The GOC explained that the requested information on the names of domestic settlement banks and third-party financial institutions through which the program could be indirectly disbursed by the China Ex-Im Bank was not necessary because the respondents' customers did not use this program, and this information was not relevant to determine usage.[66]

[57] *Id*. at 12 (citing *Preliminary Results* PDM at 34).
[58] *Id.*
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 12-13.
[63] *Id*. at 13.
[64] *Id*.
[65] *Id*.
[66] *Id*.

- The information that was not provided goes to the countervailability of the program and does not impact the evaluation or determination of usage.[67]
- Usage could be determined in this case by a review of statements of non-use from the GOC, and from the declarations of non-use from the respondents' U.S. customers.[68]
- Identical information was deemed sufficient by Commerce in a prior segment of this proceeding to establish non-use of this program, despite the fact that the GOC's actions regarding this program were deemed uncooperative. Commerce should follow the precedent established in *Solar Cells from China 2013 AR* and find the customer declarations sufficient to establish non-use of this program.[69]

Canadian Solar's Comments:

- Commerce's determination runs directly contrary to evidence establishing that Canadian Solar did not use this program during the POR and is unlawful.[70]
- Canadian Solar reported that none of its affiliated companies received assistance under this program and it also submitted declarations from its unaffiliated customers that they have never received any financial support from the GOC in any way.[71]
- No party submitted evidence challenging Canadian Solar's non-use declarations or the methodology for collecting them. Canadian Solar offered that certain of its affiliates were at Commerce's disposal for any questions and for verification and would do its best to encourage its unaffiliated customers to cooperate if Commerce intended to conduct verification.[72]
- There was nothing missing in the record that would justify Commerce's decision to use AFA against a cooperating Canadian Solar.[73]
- Commerce continues to wrongly correlate understanding the operation of the Export Buyer's Credit Program with the use of this program.[74]
- Commerce detailed that the GOC did not provide information that would allow it to understand "how export buyer's credits flow to/from foreign buyers and the China Ex-Im Bank." Specifically, Commerce maintains that the GOC did not provide the "2013 revisions to the administrative measures," and "a list of the partner/correspondent banks that are used to disperse funds through this program."[75]
- The CIT previously identified a flaw with Commerce's identical reasoning in the third administrative review of this proceeding.[76]

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[67] *Id*. at 14.
[68] *Id*. at 15.
[69] *Id*. at 15 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 FR 46904 (July 19, 2016) (*Solar Cells from China 2013 AR*), and accompanying IDM at Comment 1).
[70] *See* Canadian Solar's Case Brief at 6.
[71] *Id*. at 6-7.
[72] *Id*. at 7.
[73] *Id*. at 8.
[74] *Id*.
[75] *Id*. (citing *Preliminary Results* PDM at 34).
[76] *Id.* at 8 (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at 1326).

- Whether credit is extended by a third-party bank or the China Ex-Im Bank itself falls squarely within the realm of the operation of the Export Buyer's Credit Program and has no bearing on the usage of the program.[77]
- The items Commerce found to be missing on the record are irrelevant to Canadian Solar's actual usage, and Commerce did not provide an adequate explanation detailing the gap in the record that could justify ignoring Canadian Solar's affirmative statement of non-use and declarations of non-use from its customers.[78]
- Unlike verifying usage of a program, verifying non-use requires that Commerce examine why a particular loan was issued. Regardless of whether Commerce knew the exact banks participating in the Export Buyer's Credit Program, verification of the purpose of the loan can be achieved by examining sample loans from Canadian Solar's customers and verifying that they are not tied to this program.[79]
- Commerce's argument that it required a list of partner-banks is a vast overstatement because it must analyze the underlying loan documents regardless of whether it had a list of partner banks. All loans from a source tie to the respondent's audited financial statement, at least in the aggregate.[80]
- In this review, Commerce conducted verification and examined Canadian Solar's financial statements, chart of accounts, and even bank loans. Commerce had all information available to it to examine Canadian Solar's loans for purposes of verifying non-use of the Export Buyer's Credit Program.[81]
- Commerce did not conduct an examination regarding non-use of the Export Buyer's Credit Program but did review Canadian Solar's loans reported under other programs.[82]
- Although Commerce did not intentionally verify the Export Buyer's Credit Program, in verifying the Export Buyer's Seller's Program, Commerce learned that all loans are recorded in the same way and, in conducting its sampling, Commerce noted no instance where a loan related to the Export Buyer's Credit Program.[83]
- All of the information necessary to make a usage finding existed on the record. Commerce stated that its finding is "not contradicted by non-verifiable information," but Commerce failed to cite to any support for its conclusion.[84]
- The GOC confirmed that none of Canadian Solar's U.S. customers used this program during the POR, and the record established that use of this program cannot be implemented without the knowledge of the exporter.[85]
- In the second review of this CVD order, Commerce determined that respondent JA Solar did not participate in this program based on customer declarations that are substantively identical to those submitted in this review by Canadian Solar. The same reasoning should apply here.[86]

[77] *Id.* at 9 (citing *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1261, 1271 (CIT 2018)).
[78] *Id*.
[79] *Id.* at 10.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*. at 11.
[84] *Id*. (citing *Preliminary Results* PDM at 34).
[85] *Id* at 12-13.
[86] *Id*. at 15.

- As there is nothing missing from the record, Commerce should not have relied on facts otherwise available, let alone AFA.[87]
- Commerce continues to apply AFA against a cooperating party. Here, Commerce found that the GOC failed to cooperate to the best of its ability and, therefore, any adverse inference must be applied against the GOC alone and not Canadian Solar.[88]

Jinko Solar's Comments:

- The record demonstrates that Jinko Solar did not use the Export Buyer's Credit Program; accordingly, Jinko Solar could not have benefited from this program.[89] As such, there are no gaps in the record requiring the application of facts available let alone AFA.
- In deciding to apply AFA, Commerce relied on the fact that the GOC did not provide information related to the Export Buyer's Credit Program's 2013 Revised Administrative Measures, and therefore, according to Commerce, it did not have a "complete understanding of how this program is administered."[90]
- However, this justification has been repeatedly rejected by the CIT in recent cases and is not sufficient to support Commerce's application of AFA as it pertains to Jinko Solar because: (1) the alleged uncooperative party is the GOC and not Jinko Solar; (2) the information that was not provided relates to the operation and not the usage of the alleged program; and (3) evidence on the record consistently supports the conclusion of non-use.[91]
- When Commerce concluded that the GOC failed to cooperate, it applied AFA to determine that Jinko Solar "used and benefitted" from this program. However, the CIT explained that Commerce may not apply AFA "for no other reason other than to deter the GOC's non-cooperation in future proceedings" when record evidence otherwise precludes the use of AFA.[92]
- If Commerce determines that the government's response is deficient, it may be appropriate for Commerce to apply AFA to find that the government provided a financial contribution to a specific industry. However, Commerce still must calculate the benefit, to the extent possible, on the information supplied by the respondent company.[93]
- Only when a company respondent has failed to cooperate may it be appropriate for Commerce to find that the respondent used and benefitted from a program. Here, Jinko Solar did not fail to cooperate, and record evidence fails to support a finding of use or benefit.[94]

[87] *Id*. at 16 (citing section 776(a) of the Act).
[88] *Id*. at 16-17.
[89] *See* Jinko Solar's Case Brief at 5-6.
[90] *Id*. at 8 (citing *Preliminary Results* PDM at 34).
[91] *Id*. at 8.
[92] *Id*. (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d. 1312, 1319 (CIT 2017)).
[93] *Id.* at 9 (citing *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010)).
[94] *Id*.

- Commerce has not explained why it needs the Export Buyer's Credit Program's 2013 Revised Administrative Measures and a list of all partner or correspondent banks that are involved in dispersing funds through this program to assess Jinko Solar's non-use.[95]
- The CIT determined that Commerce cannot simply rely on the fact that the GOC did not provide this information to support an application of AFA related to the respondent's use of this program.[96]
- Jinko Solar submitted customer declarations from 53 of its 55 U.S. customers stating that these customers did not use this program or received support from the China Ex-Im Bank related to purchases of subject merchandise during the POR.[97]
- Commerce attempts to undermine the statements and certifications of non-use of this program by claiming that this information is not verifiable. This information is eminently verifiable.[98]
- Funds from this program are always transferred either to or from a China Ex-Im Bank account and program participation is approved by the China Ex-Im Bank. As a result, the China Ex-Im Bank is well positioned to attest to the identity of the firms that use its programs and informed the GOC that none of Jinko Solar's U.S. customers used this program during the POR.[99]
- The GOC explained that exporters and their customers are able to corroborate the China Ex-Im Bank's statements. Jinko Solar and its customers would be aware of using this program to finance shipments of subject merchandise, and each would have verifiable records of such use.[100]
- Jinko Solar certified that it did not assist its customers in obtaining any buyer's credits during the POR and confirmed that it was not aware of any unaffiliated customers using this program.[101]
- The certifications from Jinko Solar's U.S. customers attesting that they did not use this program during the POR are more than sufficient to allow Commerce to verify whether this program was used by Jinko Solar or its customers. No party has provided contrary evidence that Jinko Solar's customers used this program and Commerce has not cited to any such evidence.[102]
- Where Commerce determines that a respondent's questionnaire response is deficient, it must issue a supplemental questionnaire or conduct some other form of verification. Commerce did not ask Jinko Solar to provide additional information in a supplemental questionnaire.[103]
- Commerce verified the responses of Canadian Solar in this review, but elected not to verify Jinko Solar's responses, including the submitted certification regarding non-use of this program.[104]

[95] *Id*. (citing *Preliminary Results* PDM at 33).
[96] *Id.* at 10 and 14.
[97] *Id*.
[98] *Id*. at 11.
[99] *Id*. at 12.
[100] *Id*. at 13.
[101] *Id*.
[102] *Id*. at 14.
[103] *Id*.
[104] *Id*.

- Consequently, Commerce must rely on evidence on the record: certifications from the GOC, Jinko Solar, and Jinko Solar's customers.[105]
- Because Jinko Solar did not benefit from this program, Commerce must apply a zero percent CVD rate to this program, as it did in *Solar Cells from China 2013 AR*.[106]

Petitioner's Rebuttal Comments:

- Commerce should continue to apply AFA to the Export Buyer's Credit Program for the final results. The respondents have repeatedly failed to provide the information requested regarding this program.[107]
- The GOC is, in effect, a "repeat offender" with its refusals to provide necessary information regarding this program. Therefore, Commerce has appropriately determined that AFA must be applied to this program unless and until the GOC provides the information necessary to demonstrate whether this program was used during the relevant period.[108]
- Canadian Solar and Jinko Solar each argue that there is sufficient information on the record of this review for Commerce to find that their customers did not use this program during the POR. Commerce should reject these arguments.[109]
- Commerce has repeatedly found that the GOC maintains the information necessary to determine usage regarding this program. Commerce requested information from the GOC concerning the details of this program, but the GOC refused to fully and accurately provide this requested information.[110]
- While the respondents cite to recent precedent of the CIT on this issue including *Changzhou Trina Solar Energy Co. v. United States*, CIT No. 17-198, no final judgment has yet been entered in this case. Commerce maintained its finding with regard to this program on remand in that appeal, further explaining its reasoning.[111] For example, Commerce explained in detail why it is impossible for it to verify non-use of this program at the respondents, rather than the GOC.
- Accordingly, Commerce should continue to find that Canadian Solar and Jinko Solar used and benefitted from this program in the final results.[112]

GOC's Rebuttal Comments:

- AFA is not warranted regarding the use of this program. The Petitioner's claims are without merit and should be rejected.[113]

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[105] *Id*. at 15.
[106] *Id*.
[107] *See* Petitioner's Rebuttal Brief at 4.
[108] *Id*. at 5.
[109] *Id*. at 7.
[110] *Id*. at 8.
[111] *Id*. at 9.
[112] *Id*. at 10.
[113] *See* GOC's Rebuttal Brief at 1.

- The petitioner argues that the GOC is a "repeat offender," and that the rate selected in previous cases has not been sufficiently adverse to induce the respondents to provide Commerce with complete and accurate information. This argument was made and rejected in prior reviews and should be rejected here as well.[114]
- The GOC is a sovereign nation and not a company respondent motivated by the goal of achieving the lowest CVD rate. The GOC must comply with its WTO commitments as well as its own internal laws, regulations and rules. The GOC has explained to Commerce on multiple occasions that it believes it has cooperated with Commerce's review to the maximum extent possible.[115]
- The statute does not provide for different levels of AFA based on either intentional non-cooperation or repeated non-cooperation over the course of numerous proceedings.[116]
- There are numerous instances in Commerce's past practice where a failure to provide certain information with regard to one issue has not necessarily tainted all of the information provided.[117]
- Absent a "gap" or missing information in the record, Commerce lacks the authority to apply facts otherwise available under section 776(a) of the Act or any adverse inference under section 776(b) of the Act.[118]
- While to GOC may not have provided specific information regarding the mechanics of this program, this requested and missing information only goes to the countervailability of this program. In contrast, the GOC answered completely all questions regarding the use of this program.[119]
- Further, the company respondents submitted sworn declarations from each of their customers stating that they did not use this program. With this unimpeached evidence on the record, there is no gap in the record with regard to non-use.[120] Therefore, AFA cannot be applied to this information.[121]
- Even if Commerce wrongly chooses to overlook clear evidence on the record that AFA with regard to use is not warranted, the petitioner's proposed AFA rates are untenable and overly punitive.[122]
- The use of an uncreditworthy rate requires the assumption that all of the respondents' customers are uncreditworthy. There is no support for this on the record.[123]
- The constructed AFA rates proposed by the petitioner do not satisfy statutory requirements, nor are they consistent with Commerce's AFA hierarchy practice.[124]
- Commerce rejected these same arguments from the petitioner before.[125] Commerce should make the same finding here.

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[114] *Id*.
[115] *Id*. at 2.
[116] *Id*. (citing section 776(a) of the Act).
[117] *See* GOC's Rebuttal Brief at 3.
[118] *Id*. (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F. Supp. 3d 1333, 1348 (Fed. Cir. 2011)).
[119] *Id.* at 3-4.
[120] *Id*. at 4.
[121] *Id*. at 4 (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at 1326).
[122] *Id.* at 4-5.
[123] *Id*. at 5.
[124] *Id*. at 6.
[125] *Id*. (citing *SolarWorld Americas Inc. v. United States*, CIT. No. 15-00232 (CIT 2017)).

- Commerce should also reject the petitioner's argument that a debt forgiveness rate from *OTR Tires from China* should be used as the AFA rate for this program. Commerce has determined that the Export Buyer's Credit Program is "similar" to a policy lending program. Debt forgiveness is a completely different type of subsidy program.[126]

Canadian Solar's Rebuttal Comments:

- In the final results, Commerce must abandon its use of AFA in its calculation of this program and remove any benefit assigned to Canadian Solar.[127]
- Regardless of how the GOC supported administration of this alleged subsidy program, Canadian Solar provided documentary evidence establishing that it did not receive any benefit under this program, which is all Canadian Solar can be expected to do.[128]
- The CIT had made clear that Commerce is obligated to limit the impact of an AFA determination to the party that has failed to comply with Commerce's request for information.[129]
- Commerce's determination that the GOC has failed to cooperate is, therefore, irrelevant to the independent determination regarding whether Canadian Solar has used this program. As such, Commerce's application of AFA to Canadian Solar based on the GOC's failure to cooperate is improper and must be revised in the final results.[130]
- Commerce must decline to follow the petitioner's suggestion that it is making no findings as to whether the Export Buyer's Credit Program is a domestic or export subsidy. If Commerce were to remove its conclusion that this program is "tied to export performance," it would fail to make its statutorily required specificity finding and its determination for this entire program would be unlawful.[131]
- If Commerce continues to apply AFA, it may not use the enhanced AFA options proposed by the petitioner. Commerce must adhere to its statutorily mandated AFA hierarchy in the final results if it continues to apply AFA to Canadian Solar with respect to this program.[132]

Jinko Solar's Rebuttal Comments:

- The record demonstrates that Jinko Solar did not use this program and, therefore, could not have benefitted from it.[133]
- The petitioner's arguments ignore: (1) the well-established legal principle that Commerce must "seek to avoid" adversely impacting cooperating parties to penalize non-cooperating parties; (2) the overwhelming and consistent evidence demonstrating Jinko

[126] *Id.* at 6-7.
[127] *See* Canadian Solar's Rebuttal Brief at 2.
[128] *Id*.
[129] *Id*. (citing *Changzhou Trina Solar Energy Co., Ltd. et al. v. United States*, 352 F. Supp. 3d 1316 1325 (CIT 2018)).
[130] *Id.* at 3.
[131] *Id*. at 3-4.
[132] *Id*. at 4-12.
[133] *See* Jinko Solar's Rebuttal Brief at 4.

Solar's non-use of this program that leaves no gap in the record that is necessary for Commerce to complete its analysis; and (3) the fact that the evidence of Jinko Solar's non-use is fully verifiable.[134]

- The CIT has previously explained that while foreign governments are in the best position to provide information on the administration of their alleged subsidy programs, the respondent companies will have information regarding the existence and the amount of any benefit conferred on them by the program.[135]
- In instances when a respondent is fully cooperative, but Commerce determines that the foreign government failed to act to the best of its ability, Commerce's practice is to rely on, to the extent possible, the information supplied by the respondent firm.[136]
- Jinko Solar provided the requisite information related to the alleged benefit. Petitioner does not refute this fact and nothing on the record contradicts this information. Accordingly, Commerce cannot apply AFA to determine the benefit received by Jinko Solar solely on the basis of the GOC's alleged deficient response.[137]
- The petitioner never explains why the declarations of non-use from 53 of Jinko Solar's U.S. customers, Jinko Solar's certification that it did not assist any of its customers in submitting applications to the China Ex-Im Bank, and the GOC's corroboration that none of the respondent companies' U.S. customers used this program is insufficient to fill whatever gap was left by the GOC's non-compliance.[138]
- The evidence of non-use provided by Jinko Solar is verifiable.[139]
- In the event Commerce continues to improperly apply AFA with respect to this program, it should continue to apply the rate used in the *Preliminary Results*.[140]

Commerce's Position: We continue to find that the information provided to us by the GOC, or lack thereof, prevented Commerce from fully examining the Export Buyer's Credit Program with respect to usage, and as a result, we are continuing to apply AFA to the Export Buyer's Credit program, which is consistent with Commerce's decision in prior reviews of this proceeding.[141]

Solar Cells Initial Investigation of Export Buyer's Credit Program

Commerce first investigated and countervailed the Export Buyer's Credit Program in the 2012 CVD investigation of solar cells.[142] Our initiation was based on, among other information, the

[134] *Id*. at 4.
[135] *Id*. at 5 (citing *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010)).
[136] *Id.* (citing *Pistachios from Iran*; and *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010)).
[137] *Id.*.
[138] *Id*. at 6-7.
[139] *Id*. at 7.
[140] *Id*. at 8-11.
[141] *See*, *e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 FR 34828 (July 23, 2018) (*Solar Cells from China 2015 AR*), and accompanying IDM at Comment 2.
[142] *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 from China Investigation*), and accompanying IDM at 9 and Comment 18. Commerce's determination with respect to the Export Buyer's Credit Program was initially challenged but the case was dismissed.

China Export-Import Bank's (China Ex-Im Bank) 2010 annual report, demonstrating that the credits provided under this program are "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."[143] 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 intended to help Commerce understand the structure, operation, and usage of the program.[144]

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, and 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."[145] 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: "{t}he 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."[146] Although asked, the GOC provided no additional information concerning exactly how an exporter's financial and foreign exchange matters would be affected. Commerce then gave the GOC another opportunity to provide the information requested.[147] The GOC again refused to provide sample application documents, regulations, or manuals governing the approval process, and instead provided only a short description of the application process which gave no indication of how an exporter might be involved in the provision of export buyer's credits, how it might have knowledge of such credits, or how such credits might be reflected in a company's books and records.[148]

Based on the GOC's responses, Commerce's understanding was that, under this program, loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), with no involvement of third parties, such as exporters, or third-party banks. Accordingly, Commerce made clear its understanding that the only way to establish non-use of the program was through the GOC and not the respondent companies.[149] Additionally, Commerce concluded that even if the respondent company might have some knowledge of loans provided to its customers through its involvement in the application process, such information is not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

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[143] *See Solar Cells from China Investigation* IDM at 59.
[144] *Id*.
[145] *Id*.
[146] *Id*. at 60.
[147] *Id.* at 60-61.
[148] *Id.* at 61.
[149] *Id.*

> {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 the Department needs to examine in order to verify that the information is complete and accurate. For verification purposes, the Department must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as 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 the Department 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.[150]

Essentially, Commerce concluded that, without GOC cooperation, usage of the program could not be confirmed at the respondent exporters in a manner consistent with its verification methods,[151] which are primarily the methods of an auditor, *i.e.*, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, 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.[152]

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[150] *Id.* at 61-62.

[151] Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products*), and accompanying IDM at 93. This was affirmed by the Court in *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016) (*Changzhou I*). In *Changzhou Trina Solar Energy Co. v. United States*, Consol. Court No. 17-00198, Slip Op. 18-166, at 9-10 (CIT November 30, 2018) (*Changzhou II*), the Court noted that the explanation from *Solar Products* constituted "detailed reasoning for why documentation from the GOC was necessary" to verify non-use. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou II* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had "failed to show why a full understanding" of the program was necessary to verify non-use. *Id.* at 10 (citing *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), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 46760 (October 6, 2017), and accompanying IDM). The Court in *Guizhou Tyre Co., Ltd., et al. v. United States*, Consol Ct. No. 17-00101, Slip Op. 18-140 (CIT October 17, 2018) reached a similar conclusion concerning the 2014 review of tires from China. *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

[152] The Court agreed with Commerce in *RZBC Group*, following a remand, finding 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*

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 sheets, 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 (for example, "Account 201-02: Short-term lending, Industrial and Commercial Bank of China"), Commerce's third step would be to 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 the investigation of 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 program at the respondent exporters and instead attempted verification of usage of the program at the China Ex-Im 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."[153] 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."[154] However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.[155] Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

Chlorinated Isos Investigation of Export Buyer's Credit Program

Two years later, in the investigation of chlorinated isos,[156] 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

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Shareholding Co., Ltd. et al. v. United States, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC Group*) (concerning *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012*), and accompanying IDM at Comment 6).

[153] *See Solar Cells from China Investigation* IDM at 62.

[154] *Id.*

[155] *Id.*

[156] *See Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chloro Isos Investigation*), and accompanying IDM.

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 China Ex-Im Bank to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-usage appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customer pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' 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."[157]

2013 Amendments to the Export Buyer's Credit Program

Our understanding of the operation of the Export Buyer's Credit Program began to change after the chlorinated isos investigation had been completed in September 2014. In *Citric Acid 2012*, Commerce began to gain a better understanding of how the Ex-Im Bank issued disbursement of funds and the corresponding timeline; however, Commerce's attempts to verify the program's details and statements from the GOC concerning the operation and use of the program were thwarted by the GOC's non-cooperation.[158] In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the silica fabric investigation conducted in 2016-2017, based on what we had learned in *Citric Acid 2012*, we asked the GOC about certain changes to the Export Buyer's Credit Program, including changes in 2013 that eliminated the USD 2 million minimum business contract requirement.[159] In response, the GOC stated that there were three sets of relevant documents pertaining to the Export Buyer's Credit Program: (1) "Implementing Rules for the Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on September 11, 2005 (referred to as "*1995 Implementation Rules*"); (2) "Rules Governing Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on November 20, 2000 (referred to as "*2000 Rules Governing Export Buyers' Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the Export-Import Bank of China.[160] According to the GOC, "{t}he Export-Import Bank of China has confirmed to the GOC that its 2013 guidelines are internal to the bank, non-

[157] *Id.* at 15.
[158] *See Citric Acid 2012* IDM at Comment 6 ("{N}otwithstanding the non-use claims of the RZBC Companies and the GOC, we find that the GOC's refusal to allow the verifiers to examine the EXIM Bank database containing the list of foreign buyers that were provided assistance under the program during the POR precluded the Department from verifying the non-use claims made by the RZBC Companies and the GOC."); *see also* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Placing Information on the Record: China Ex-Im Bank," dated December 12, 2018 (China Ex-Im Bank Additional Information).
[159] *See* China Ex-Im Bank Additional Information.
[160] *Id*.

public, and not available for release."[161] The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."[162]

However, we found the GOC's responses incomplete and unverifiable, explaining:

> Through its response to the Department's supplemental questionnaire, the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for the Department to analyze how the program functions.
>
> We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013 Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking the Department to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the GOC impeded the Department's understanding of how this program operates and how it can be verified.
>
> Additional information in the GOC's supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the EX-IM Bank. Specifically, the GOC stated that customers can open loan accounts for disbursements through this program with other banks. The funds are first sent from the EX-IM Bank to the importer's account, which could be at the EX-IM Bank or other banks, and that these funds are then sent to the exporter's bank account. Given the complicated structure of loan disbursements for this program, the Department's complete understanding of how this program is administrated is necessary. Thus, the GOC's refusal to provide the most current 2013 Revisions, which provide internal guidelines for how this program is administrated by the EXIM Bank, impeded the Department's ability to conduct its investigation of this program.[163]

Further, we determined that we could not rely on declarations from customers claiming non-use of the program because "we are unable to verify the accuracy of these documents as the primary entity that possesses such supporting records is the Export Import Bank of China."[164] Additionally, we explained that "we now have information on the record that demonstrates the GOC updated certain measures of the program, but the GOC refused to provide the updated

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[161] *Id.*
[162] *Id.*
[163] *See Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric Inv*), and accompanying IDM at 12 (internal citations omitted).
[164] *Id.* at 62.

measures{,}" and "{b}ecause the GOC withheld critical information regarding this program, we are unable to determine how the program now operates, and, thus, we cannot verify {the respondent's} declarations as submitted."[165]

This 2016 Administrative Review

As stated in the *Preliminary Results*, we requested a list of all partner/correspondent banks involved in the disbursement of funds under the Export Buyer's Credit Program.[166] Instead of providing the requested information, the GOC stated that our question is not applicable.[167] We also asked the GOC to submit the Administrative Measures that were revised in 2013, but the GOC stated that our request for this information is not applicable because none of the U.S. customers of the respondents used export buyer's credits from the China Ex-Im Bank during the POR.[168] Though the GOC provided some information, it was unresponsive to the request, preventing Commerce from analyzing the function of the program, as discussed below.

In our initial Questionnaire and supplemental questionnaire to the GOC, we requested that the GOC answer all the questions in the Standard Questions Appendix and other specific questions relating to the China Ex-Im Bank's Export Buyer's Credit Program, which are necessary for Commerce to analyze how the program is administered and how it functions.[169] In response, the GOC stated that none of the company respondents' U.S. customers used export buyer's credits from the China Ex-Im Bank during the POR,[170] and provided the Administrative Measures of Export Buyer's Credit of EIBC (implemented in 2000) (Administrative Measures).[171] The GOC also stated that the exporter itself is the entity that actually receives the money from the China Ex-Im Bank, and that the Chinese exporter and the U.S. importer can verify usage.[172] However, information on the record indicates that the GOC revised the Administrative Measures regarding this program in 2013. This information provides that the China Ex-Im Bank may disburse export buyer's credits directly or through third-party partner and/or correspondent banks.[173] We asked the GOC to submit the Administrative Measures that were revised in 2013,[174] however, the GOC responded that our request for this information is not applicable because none of the U.S. customers of the respondents used export buyer's credits from the China Ex-Im Bank during the POR.[175] Additionally, Canadian Solar and Jinko Solar each reported non-use for themselves and

[165] *Id.*
[166] *See Preliminary Results* PDM at 33.
[167] *Id*.
[168] *Id*.
[169] *See* GOC June 19, 2018 Questionnaire Response (QR); and December 19, 2018 QR.
[170] *See* GOC June 19, 2018 QR at 126.
[171] *Id*. at Exhibit II.F.2.
[172] *Id*. at 128-129.
[173] *See* China Ex-Im Bank Additional Information.
[174] *See* Commerce's Letter, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2016: Supplemental Questionnaire," dated December 12, 2018 (GOC December 12, 2018 Supplemental Questionnaire), at 1.
[175] *See* GOC December 19, 2018 QR at 1.

for their U.S. customers, and they each provided declarations from their U.S. customers indicating that these customers did not obtain financing through the program.[176]

We continue to find that the GOC's responses with respect to the Export Buyer's Credit Program are deficient in two key respects.

First, as we found in the silica fabric investigation that was conducted in 2016-2017, where we asked the GOC about the amendments to the Export Buyer's Credit Program,[177] we continue to find that the GOC has refused to provide the requested information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions. We requested information regarding the 2013 revisions to the Administrative Measures, and information on the partner/correspondent banks that are involved in the disbursement of funds under this program, because our prior knowledge of this program demonstrates that the 2013 revisions effected important program changes.[178] Specifically, the 2013 revisions (which the GOC refers to as "internal guidelines") appear to be significant and have impacted a major condition in the provision of loans under the program, *i.e.*, by eliminating the USD 2 million minimum business contract requirement.[179]

This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Canadian Solar's and Jinko Solar's merchandise has been subsidized. For instance, if the program continues to be limited to USD 2 million contracts between a mandatory respondent and its customer, this is an important limitation to the universe of potential loans under the program and can assist us in targeting our verification of non-use. However, if the program is no longer limited to USD 2 million contracts, this increases the difficulty of verifying loans without any such parameters, as discussed further below. Therefore, by refusing to provide the requested information, and instead providing unverifiable assurances that other rules regarding the program remained in effect, the GOC impeded Commerce's ability to understand how this program operates and how it can be verified. Further, to the extent the GOC had concerns regarding the non-public nature of the 2013 revisions, Commerce has well-established rules governing the handling of business proprietary information in its proceedings.

Second, Commerce's understanding of the Export Buyer's Credit Program changed after Commerce began questioning the GOC's earlier indication that loans provided pursuant to the Export Buyer's Credit Program were between the GOC and the borrower *only*, essentially a *direct* deposit from the China Ex-Im Bank to the foreign buyer. In particular, in the silica fabric investigation, Commerce identified that the rules implementing the Export Buyer's Credit Program appeared to indicate that the China Ex-Im Bank's payment was instead disbursed to U.S. customers via an intermediary Chinese bank, thereby contradicting the GOC's response otherwise.[180] Thus, Commerce asked the GOC to provide the same information it provided in

[176] *See* Canadian Solar's June 19, 2018 QR Vol. II at 30-31; *see also* Jinko Solar's June 19 QR Vol. II at 27-29.
[177] *See* China Ex-Im Bank Additional Information at Attachment II (containing the GOC's September 6, 2016, Silica Fabric QR at 4-5).
[178] *See* GOC December 12, 2018 Supplemental Questionnaire at 1.
[179] *Id.*; *see also Silica Fabric Inv* IDM at 12 and 61.
[180] *See Silica Fabric Inv* IDM at 12.

the silica fabric investigation regarding the rules implementing the Export Buyer's Credit Program, as well as any other governing documents (discussed above). Commerce also asked a series of questions regarding the method of transferring funds from the China Ex-Im Bank to Chinese exporters on behalf of U.S. customers via the credits at issue:

- Please submit the Administrative Measures that were revised in 2013 with respect to this program.[181]
- Provide a sample buyer's credit application along with the application's approval and the agreement between the respondent's customer and the bank, which establish the terms of the assistance provided under the facility.[182]
- Provide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program.[183]

Although the GOC provided certain of documents,[184] the GOC provided non-responsive answers to Commerce's specific questions, stating in response to our request for the 2013 revised Administrative Measures: "Since none of the U.S. customers of the respondents used the Export Buyer's Credit from or through the China Export-Import Bank during the POR, this question is not applicable."[185] The GOC provided the same response regarding our request for a list of partner/correspondent banks that are involved in the disbursement of funds through the program.[186]

We note that in the instant review, the GOC has provided requested information for other programs even though it considered this information to be not applicable to the issue under examination. For example, regarding the Provision of Electricity for Less Than Adequate Remuneration (LTAR) Program, we requested that the GOC provide information from GOC's 2009 questionnaire response in the CVD investigation of kitchen appliance shelving and racks from China:

> Provide the Public Version of "Response of the Government of China to the U.S. Department of Commerce's Supplemental Questionnaire on Electricity filed in Certain Kitchen Appliance Shelving and Racks from the People's Republic of China on March 11, 2009, including Exhibits S2-1, S2-2, and S2-6. Furthermore, include and English translation of Exhibit II.S2-1.[187]

The GOC stated that the requested information was "no longer applicable," but still provided the information:

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[181] *See* GOC December 19, 2018 QR at 1.
[182] *See* GOC June 19, 2018 QR at 126.
[183] *See* GOC December 19, 2018 QR at 1.
[184] *See* GOC June 19, 2018 QR at 128; *id.* at exhibit II.F.1, "The Administrative Measures of Export Buyer's Credit of EIBC," dated November 20, 2000; *id.* at exhibit II F.2, "The implementing Rules for the Export Buyer's Credit of the Export-Import Bank of China," dated July 16, 2010.
[185] *See* GOC December 19, 2018 QR at 1.
[186] *Id*.
[187] *See* GOC June 19, 2018 QR at 69.

> The GOC provides the requested document at Exhibit II.E.20. However, we note that due to the changes that occurred in the electricity regime in China, the information contained in this old GOC response is no longer applicable.[188]

The GOC also provided requested information in another instance, even though it concluded this information was not applicable to our review:

> Provide the Public Version of the submission of the Government of China, dated March 11, 2009, titled "Paper on China's Electricity System: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China – CVD Investigations, including Exhibits 1 through 15.[189]

Thus, the GOC provided requested information that it concluded was not applicable to our examination of the Provision of Electricity for LTAR Program but did not act in the same way regarding our request for the 2013 revised Administrative Measures for the Export Buyer's Credit Program, thus demonstrating that the GOC is capable of providing information for certain programs despite its position that such information is "not applicable" to Commerce's examination.

Accordingly, we continue to find the GOC's responses deficient and unresponsive to our request for necessary information with respect to the operation of the Export Buyer's Credit Program. This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Canadian Solar's and Jinko Solar's merchandise has been subsidized. As noted above, information on the record of this segment of the proceeding altered Commerce's understanding of how the Export Buyer's Credit Program operated (*i.e.*, how funds were disbursed under the program) from Commerce's understanding of this same program in the chlorinated isos investigation. Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.[190]

For instance, it appears that: (1) customers can open loan accounts for disbursements through this program with other banks; (2) the funds are first sent from the China Ex-Im Bank to the importer's account, which could be at the China Ex-Im Bank or other banks; and (3) that these funds are then sent to the exporter's bank account.[191] Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce's complete understanding of how this program is administrated is necessary to verify claims of non-use.[192] Thus, the GOC's refusal to provide the 2013 revisions, which provide internal guidelines for how this program is administrated by the China Ex-Im Bank, as well as other requested information,

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[188] *Id*.
[189] *Id.* at 70.
[190] *See* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Placing Information on the Record: China Ex-Im Bank," dated December 12, 2018 at Attachment II (containing the GOC's September 6, 2016, Silica Fabric QR at 4-5).
[191] *Id.*
[192] *Id.*

such as key information and documentation pertaining to the application and approval process, and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to verify the claims of non-use by the respondents' customers.

This missing information was especially significant because the available record evidence indicates that under the Export Buyer's Credit Program, credits are not direct transactions from the China Ex-Im Bank to U.S. customers of the respondent exporters, but rather, that there can be intermediary banks involved,[193] the identities of which the GOC has refused to provide to Commerce. As noted above, in the chlorinated isos investigation, based on our understanding of the program at that time, verification of non-usage appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans *provided directly from the China Ex-Im Bank to the U.S. customer*, pursuant to verification steps similar to the ones described above.[194] However, based on our more recent understanding of the program in this review discussed above, performing the verification steps outlined above to make a determination of whether the "manufacture, production, or export" of Canadian Solar's and Jinko Solar's merchandise has been subsidized would therefore 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 China Ex-Im 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 China Ex-Im Bank or other banks, and that these funds are then sent to the exporter's bank account.[195]

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, [196] having a list of the correspondent banks is critical for us to perform verification at the U.S. customers.

Furthermore, although Canadian Solar and Jinko Solar each reported that their U.S. customers did not use the program, neither company explained in detail the steps they took to determine the non-use of the Export Buyer's Credit Program for their customers. Rather, their responses (specifically Jinko Solar) hinged on their assertions with respect to the operation of the program – information which Commerce needed and sought directly from the GOC. The explanation and evidence (or lack thereof) on the record from the GOC and the respondent companies have therefore failed to support the claims that the program was not used.

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[193] *See* China Ex-Im Bank Additional Information at Attachment II.
[194] *See Chloro Isos Investigation* IDM at 15.
[195] *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), and accompanying IDM at 30.
[196] Commerce no longer attempts to verify usage 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. *Id*. at Comment 2.

Without such explanation and evidence, it would be unreasonably onerous for Commerce to comb through the business activities of both Canadian Solar's and Jinko Solar's customers without any guidance as to how to simplify the process or any guidance as to which loans or banks to subject to scrutiny as part of a verification for each company. A careful verification of Canadian Solar's and Jinko Solar's customers' 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 (*i.e.*, by examining whether there were any 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 China Ex-Im 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 China Ex-Im Bank, discussed above. Commerce would simply not know what to look for behind each loan in attempting to identify a loan provided by the China Ex-Im Bank via a correspondent bank.

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. For instance, assuming 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 China Ex-Im 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 Ex-Im Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of Ex-Im Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even were Commerce to attempt to verify respondents' 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 respondents' U.S. customers, Commerce still would 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 to review, and whether/how that documentation would indicate China Ex-Im Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete.

Even if it were complete and identified China Ex-Im 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 Measures, 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 Canadian Solar's or Jinko Solar's customers, even were it to attempt the unreasonably onerous examination of each of the customers' loans. To conduct verification of the 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.

The GOC responses in this review essentially mirror the GOC responses in the prior solar cells and tires[197] from China proceedings. Although Commerce requested information about the amendments to and the current inner workings of the program as it is currently administered, the GOC provided no additional information concerning exactly how an exporter's financial foreign exchange matters would be affected.[198] Based on the GOC's responses, Commerce understood that under this program loans were provided either directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), or through an intermediary third-party bank, and that a respondent might have knowledge of loans provided to its customers through its involvement in the application process. Commerce gave the GOC an opportunity to provide the 2013 revisions regarding the Administrative Measures, which the GOC refused to provide.[199] The GOC also refused to provide a requested sample application, providing instead its statement that none of the U.S. customers of the respondent companies used the export buyer's credits from the China Ex-Im Bank during the POR.[200]

According to the GOC, "none of the Respondent Companies' U.S. customers used the Export Buyer's Credits from the China Export-Import Bank during the POR."[201] The GOC explained that to make this determination, it contacted the China Ex-Im Bank for information on this matter, and based on the list of Canadian Solar's and Jinko Solar's customers that were provided to it, the China Ex-Im Bank confirmed that none of the U.S. customers of Canadian Solar or Canadian Solar used credits from the Bank during the POR. The GOC's response indicated that exporters would know whether there was an interaction between the China Ex-Im Bank and the borrowers (*i.e.*, the respondents' U.S. customers, who are not participating in this proceeding),

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[197] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.
[198] *See* GOC June 19, 2018 QR at 125-129; and GOC December 19, 2018 QR at 1.
[199] *See* GOC December 19, 2018 QR at 1.
[200] *See* GOC June 19, 2018 QR at 125-129; and GOC December 19, 2018 QR at 1.
[201] *See* GOC June 19, 2018 QR at 126.

but neither the GOC, nor the respondent companies, provided enough information for Commerce to understand this interaction or how this information would be reflected in the respondent companies' or their U.S. customers' books and records. As a result, the GOC failed to respond to Commerce's request, and instead claimed that neither of the company respondents' U.S. customers used this program based on selectively provided, incomplete information. As determined in the *Preliminary Results*, we continue to find that Commerce could not verify non-use of export buyer's credits by the customers of Canadian Solar and Jinko Solar. Furthermore, the lack of information concerning the operation of the Export Buyer's Credit Program prevents an accurate assessment of usage at verification:

> In prior proceedings in which we have examined this program, before the 2013 amendments, we have found that the China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of the program which is prerequisite to Commerce's ability to verify the accuracy of the program. Because the program changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the EX-IM Bank limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million, and whether it uses third-party banks to disburse/settle Export Buyer's Credits. Such information is critical to understanding how Export Buyer's Credits flow to and from foreign buyers and the EX-IM Bank and forms the basis of determining countervailability. Absent the requested information, the GOC's claims that the respondent companies did not use this program are not verifiable. Moreover, without a full understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not verifiable.[202]

We continue to find that usage of the Export Buyer's Credit Program could not be verified at Canadian Solar or Jinko Solar in a manner consistent with Commerce's verification methods because Commerce could not confirm usage or claimed non-use by examining books and records which can be reconciled to audited financial statements[203] or other documents, such as tax returns. Without the GOC providing bank disbursement information, Commerce could not tie any loan amounts to banks participating in this program in Canadian Solar's or Jinko Solar's U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, is insufficient for Commerce to verify any bank disbursement or loan amount pertaining to Canadian Solar's, Jinko Solar's, their customers, and/or the GOC's participation in the program.[204] Commerce needed to have a better understanding of the program before it could verify it because it did not know what documents to request to review at verification or what information in the books and records to tie to the respondents', such as Jinko Solar's, reported information from its questionnaire responses. Therefore, we found it necessary to have had this information prior to verification in order to ensure the information we would have received was complete and

[202] *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2015*, 82 FR 57209 (December 4, 2017), and accompanying PDM at 16-17.
[203] *Id.*
[204] *Id*.

accurate to fully analyze and calculate the benefits Canadian Solar and Jinko Solar received under this program during the course of the POR.

In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the Export Buyer's Credit Program. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China Ex-Im Bank, which is a government-controlled bank.[205] Without cooperation from the China Ex-Im Bank and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to Canadian Solar's and Jinko Solar's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

Additionally, Commerce finds that it is not possible to determine whether export buyer's credits were received with respect to the export of solar cells, because the potential recipients of export buyer's credit are not limited to the customers of Canadian Solar and Jinko Solar as they be may be received by other third-party banks and institutions. Again, Commerce would not know what indicia to look for in searching for usage or even what records, databases, or supporting documentation we would need to examine to conduct the verifications (*i.e.*, without a complete set of laws, regulations, application and approval documents, and administrative measures, Commerce would not even know what books and records the China Ex-Im Bank maintains in the ordinary course of its operations). Essentially, Commerce is unable to verify in a meaningful manner what little information there is on the record indicating non-usage (*e.g.*, the claims of the GOC and certifications from U.S. customers), pursuant to section 776(a)(2)(D) of the Act, with the exporters, U.S. customers, or at the China Ex-Im Bank itself given the refusal of the GOC to provide the 2013 Revision and a complete list of correspondent/partner/intermediate banks.

Commerce finds that required missing information concerning the operation and administration of the Export Buyer's Credit Program is necessary, as it demonstrates why usage information provided by the GOC and the respondents cannot be verified and why there is therefore a gap in the record concerning usage. Commerce has explained how the gap in the record (*i.e.*, missing information concerning the operation of the Export Buyer's Credit Program) prevents complete and effective verification of the customer's certifications of non-use. A very similar rationale has been accepted by the Court in a prior review of this order. Specifically, in *Changzhou I*,[206] given similar facts, the Court found Commerce reasonably concluded it could not verify usage of the Export Buyer's Credit Program at the exporter's facilities absent an adequate explanation from the GOC of the program's operation; *i.e.*, "absent a well-documented understanding of how an exporter would be involved in the application of its customer for an export buyer credit and

[205] *See Countervailing Duty Investigation of 1,1,1,2 Tetraflouroethane from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 24, 2014), and accompanying IDM at 31 (confirming that the GOC solely owns the China Ex-Im Bank).
[206] *See Changzhou I*, 195 F. Supp. 3d at 1355 (citing *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014), and accompanying IDM at 91-94).

what records the exporter might retain, we would have no way of knowing whether the records we review at a company verification necessarily include any applications or compliance records that an exporter might have…."[207]

Moreover, Commerce disagrees with Canadian Solar's and Jinko Solar's arguments that Commerce does not need the information requested from the GOC to determine non-use. As an initial matter, we cannot simply rely on the GOC's assurances that it has checked its records. We have no way of verifying such statements without the GOC providing us with the requested documents which would allow us to then properly examine its claims of non-use. Further, given the constraints on Commerce resulting from the GOC's failure to provide all of the necessary information to fully understand the program's operation, Commerce reasonably determined that it would be unable to examine each and every loan obligation of each of Canadian Solar's or Jinko Solar's customers and that, even if such an undertaking were possible, it would be meaningless, as Commerce would have no idea as to what documents it should look for or what other indicia there might be within a company's loan documentation regarding the involvement of the China Ex-Im Bank.

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins verification, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC's failure to provide complete information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example, regarding the VAT and import duty exemptions, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative.[208] Therefore, Commerce knows what documents it should see when VAT and import duties are paid and when they are exempted. It knows, in other words, when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow under the program. Commerce can also simply ask to see a VAT invoice or a payment to the Chinese customs service to verify whether VAT and duties were charged and paid.

By contrast, we simply do not know what to look for when we look at a loan to determine whether the China Ex-Im Bank was involved or whether a given loan was provided under the Export Buyer's Credit Program, for the reasons explained. Another example is when Commerce is verifying non-use of an income tax rebate or exemption, it relies on information gathered from the GOC during meetings with the relevant tax authorities at the national and local levels. Commerce would expect the GOC officials to provide blank tax forms indicating where the rebate would be recorded, including the specific line item on the form. Commerce would then know precisely which documentation to ask for when verifying the company respondent and would also know with certainty whether the company should have this document. For the

[207] *Id*. at 1355.
[208] *See*, *e.g.*, *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 10, "At the verification of Princeway's questionnaire responses . . .the GOC presented corrections regarding the reported exempted import duties for imported equipment . . ."

reasons explained above, such documentation is insufficient without being able to tie it to the company's books and records.

Canadian Solar and Jinko Solar each argue that Commerce could have had a clear path to find non-use by either accepting Canadian Solar's and Jinko Solar's customers' declarations or by verifying the declarations.[209] Commerce, however, has already explained in past proceedings why it cannot verify non-usage at the exporters given similar deficiencies with the GOC's explanation of the operation of the program.[210] Commerce specifically explained how verification methods require examining books and records that can be tied to audited financial statements, tax returns, *etc.* to ensure a complete picture of the company's activities rather than searching through filing cabinets, binders, *etc.* looking for what may or may not be a complete set of application documents.[211] Moreover, the idea of searching through Canadian Solar's and Jinko Solar's cash accounts in an effort to find evidence that certain funds may have been deposited pursuant to the Export Buyer's Credit Program is similarly onerous as searching through the details of the customer's borrowings to find such evidence.

With respect to arguments that AFA should not be applied to this program, we continue to find that the GOC withheld necessary information that was requested of it and significantly impeded the proceeding. Accordingly, Commerce must rely on facts otherwise available in issuing these final results, pursuant to sections 776(a)(1), (2)(A) and (C) of the Act. Specifically, necessary information was not the record because the GOC withheld information that we requested that was reasonably available to it which significantly impeded the proceeding. In addition, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. As AFA, we determine that this program provides a financial contribution, and provides a benefit to the company respondents within the meaning of sections 771(5)(D), and 771(5)(E), respectively, of the Act.

Commerce has considered all information on the record of this proceeding, including the statements of non-use provided by the respondent companies (*i.e.*, declarations of non-use from respondents' customers); however, as explained above, we are unable to rely on information provided by respondent companies due to Commerce's lack of a complete and reliable understanding of the program, which is a prerequisite to our reliance on information provided by the respondent companies regarding non-use. Thus, without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use.

For all reasons explained above, we continue to find that necessary information is missing from the record, the GOC withheld information that was requested, and significantly impeded the proceeding, pursuant to sections 776(a)(1), (2) of the Act, and that the GOC has failed to

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[209] *See*, *e.g.*, Jinko Solar's Case Brief at 11

[210] *See*, *e.g.*, *Chlorinated Isocyanurates From the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014), and accompanying IDM at 15 ("While the Department was unable to conduct a complete verification of non-use of this program at China ExIm, both Jiheng and Kangtai in their questionnaire responses provided statements from each of their U.S. customers in which each customer certified that they did not receive any financing from China ExIm.").

[211] "The Department cannot typically look at the contents of a filing cabinet or binder and determine whether it includes everything that it's supposed to include." *See Changzhou I*, 195 F. Supp. 3d at 1355.

cooperate to the best of its ability, pursuant to section 776(b) of the Act. Commerce's resort to the use of an adverse inference when selecting from among the facts otherwise available is reasonable and supported by substantial evidence on the record.

With respect to the selection of the AFA rate to apply to this program, we have reviewed comments from interested parties and we are continuing to apply our CVD AFA hierarchy to assign a rate of 5.46 percent *ad valorem* to this program, consistent with the *Preliminary Results*.[212] When selecting AFA rates for an administrative review, we first determine if there is an identical program from any segment of the proceeding and use the highest calculated rate for the identical program (excluding *de minimis* rates). If no such identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) within the same proceeding and apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates. If no such similar program exists within the same proceeding, we then determine if there is an identical or similar/comparable program (based on the treatment of the benefit) in another countervailing duty proceeding involving the same country and apply the highest calculated rate, excluding *de minimis* rates. When there is no comparable program, we apply the highest calculated rate from any non-company-specific program in any CVD case involving the same country, but we do not use a rate from a program if the industry in the proceeding cannot use that program. Applying our hierarchy to this proceeding, we determine that there are no rates calculated for the Export Buyer's Credit program in any segment of this proceeding. Accordingly, the selected rate of 5.46 percent *ad valorem* was calculated for company respondent Lightway Green New Energy Co., Ltd.'s usage of a similar/comparable program, the Preferential Policy Lending to the Renewable Energy Industry Program, in the 2012 administrative review of this proceeding.[213] In the instant review, we conclude that the Export Buyer's Credit Program provides loan support through export buyer's credits.[214] Based on the description of the Export Buyer's Credit Program, we find that the Preferential Policy Lending program and the Export Buyer's Credit Program are similar/comparable programs as both programs provide access to loans.

Regarding arguments from interested parties that we should apply a different AFA rate for this program, we note that the CIT sustained our application of this 5.46 percent rate for this program in a prior segment of this proceeding.[215] Specifically, the Court evaluated, and sustained, Commerce's application of its CVD AFA review hierarchy in the first administrative review of this proceeding. The Court noted that, in developing and applying its AFA hierarchies (for CVD investigations and reviews), Commerce seeks a rate that serves its "dual goals" of relevancy and inducing cooperation from respondents, and that Commerce seeks to achieve relevancy by attempting to select an AFA rate that "best approximates how the non-cooperating respondent likely used the subsidy program."[216] Importantly, as the CIT sustained Commerce's

[212] *See Preliminary Results* PDM at 35.
[213] *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; 2012*, 80 FR 41003 (July 14, 2015) (*Solar Cells from China 2012 AR*), and accompanying IDM at 27-28.
[214] *See* GOC June 19, 2018 QR at 125-129.
[215] *See SolarWorld Americas, Inc. v. United States*, CIT No. 15-00232 (CIT 2017), sustaining Commerce's CVD AFA hierarchy and selection of AFA rate for CVD reviews.
[216] *Id*. at 9-10.

determination not to deviate from its hierarchies by applying AFA rates on a case-by-case basis,[217] we decline to deviate from our CVD AFA review hierarchy in this segment. Accepting arguments from interested parties and selecting a different AFA rate for this program would upset the balance between relevancy and inducement that Commerce seeks when it applies its CVD AFA hierarchy to non-cooperating respondents; furthermore, consistently applying our CVD AFA hierarchies provides predictability and administrative transparency to parties involved in administrative proceedings before Commerce.[218] Finally, the use of the highest subsidy rate from a similar program in this proceeding is specifically authorized by section 776(d) of the Act, and based on our evaluation of the situation in this administrative review, this is the most appropriate rate to use. Therefore, we are applying the rate of 5.46 percent as the AFA rate for this program.

In accordance with section 776(c)(2) of the Act, we do not need to corroborate this 5.46 percent rate, applied under AFA in this segment of the proceeding, because this rate was calculated in a separate segment of this proceeding.

Finally, with regard to the petitioner's argument that Commerce should not find that this program is an export subsidy due to the GOC's lack of cooperation, relying on AFA because we do not have complete information, we are finding the Export Buyer's Credit Program to be an export subsidy for these final results. Although the instant record regarding this program suffers from significant deficiencies, we note that the final determination of the underlying CVD investigation describes this program (based on the investigation record, which includes the petition's description of the program and supporting materials, as well as the GOC's description of the program and supporting materials (albeit ultimately found to be deficient)) as follows: "{t}hrough this program, the EX-IM Bank provides loans at preferential rates for the purchase of exported goods from the PRC."[219] Further, Commerce has previously found this program to be contingent upon export performance during this proceeding.[220] Thus, taking all such information into consideration indicates that the provision of export buyer's credits from the China Ex-Im Bank is contingent on export performance, and therefore specific, within the meaning of section 771(5A)(B) of the Act.

Comment 2: Provision of Aluminum Extrusions for LTAR

Canadian Solar's Comments:

- The Aluminum Extrusions for LTAR Program is not specific. To be specific, the actual recipients of the subsidy, whether considered on an enterprise or industry basis, must be limited in number.[221]

[217] *Id*.
[218] *See*, *e.g.*, *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017) (*Solar Cells from China 2014 AR*), and accompanying IDM at Comment 2.
[219] *See Solar Cells Investigation* IDM at 20.
[220] *See Solar Cells from China 2012 AR* IDM at 33.
[221] *See* Canadian Solar's Case Brief at 18 (citing section 771(5A)(D)(iii)(I) of the Act).

- In determining whether a particular industry fits within the statutory term "limited," the *CVD Preamble* explains that Commerce's analysis is not necessarily dependent on the number of enterprises involved but instead is "focused on the makeup of the users."[222]
- In the instant review, the GOC reported that there are a vast number of uses for aluminum extrusions, the industries that purchase and use aluminum extrusions are not limited, and that the solar industry in China is not a disproportionate or predominant consumer of aluminum extrusions.[223]
- Commerce ignored the GOC's affirmative statement that aluminum purchases are not limited to the solar industry and instead relied on the GOC's response from the third administrative review that the following six industries consumed aluminum extrusions: building and construction; transportation; electrical; machinery and equipment; consumer durables; and other industries.[224]
- Based on the GOC's statement, Commerce preliminarily determined that the "recipients of aluminum extrusions are limited in number."[225]
- The CIT set forth *Changzhou Trina Solar Co. v. United States*, 352 F. Supp. 3d 1316, 1326 (CIT 2018) that Commerce is not required to examine the "shared characteristics" among industries that receive or are eligible to receive a subsidy, but Commerce is "under an obligation to compare the industries receiving the subsidy to the industry makeup of the country at issue as a whole."[226]
- Commerce claimed that the GOC provided none of the information requested concerning the amounts consumed by individual industries, but this information was not needed to analyze the broad application of this program. A facial analysis of the GOC's response shows that these categories represented numerous and diverse industries.[227]
- Common sense provides that "building and construction" and "transportation" alone make up countless robust sub-industries, yet Commerce failed to recognize the depth of these industries.[228]
- Under Commerce's approach, "other industries" could be used to justify a specificity finding in any Chinese CVD case. This flies in the case of the statutory requirement that the subsidy be limited to a specific industry.[229]
- Aluminum extrusions are widely used across broad swaths of the Chinese and global economy. Commerce's reliance of the six industry categories alone as support for its specificity finding fell far short of its obligation under section 771(5A)(D)(iii)(I) of the Act to determine whether a particular industry fits within the statutory term of "limited" based on the makeup of the users.[230]
- Commerce must reverse its preliminary finding that the provision of aluminum extrusions is specific.

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[222] *Id.* (citing *Countervailing Duties; Final Rule*, 63 FR 65348, 65357 (November 25, 1998) (*CVD Preamble*)).
[223] *Id*.
[224] *Id*. at 18-19.
[225] *Id*. at 19 (citing *Preliminary Results* PDM at 41).
[226] *Id.*
[227] *Id*.
[228] *Id*. (citing *Preliminary Results* PDM at 40).
[229] *Id.* (citing section 771(5A)(D)(iii) of the Act).
[230] *Id.* at 19-20.

- In the *Preliminary Results*, Commerce relied on an average of the Comtrade data and the data compiled by IHS Technology (IHS Markit) when constructing the benchmark for this program, stating that each contains "strengths and flaws."[231]
- Commerce found the Comtrade data to be preferable because it contains "monthly values," while acknowledging that this data does not reflect the "narrowest category of products encompassing the input product."[232] An unrepresentative dataset, such as the Comtrade data, cannot be salvaged by more data points that arise from monthly presentation.
- The CIT stated that not all flaws in data are equally problematic. While some degree of non-specificity is tolerable, a flaw in a dataset that is vastly overinclusive of products that are not covered by the relevant CVD order is not equivalent to the flaw in an otherwise product-specific dataset arising from its annual average.[233]
- The Comtrade data does not reflect a representative world-market price for aluminum because it contains flaws and does not represent Canadian Solar's inputs.[234]
- The Comtrade data includes shipments from the European Union (EU)-27 countries, despite also containing separate data for the individual EU countries themselves. This effectively double counts the same data from the EU countries and is not reflective of the world price.[235]
- The commodity codes included in the Comtrade data are over-inclusive because they are presented at a six-digit level covering merchandise under a "basket" category. Specifically, the Comtrade data shows import data under HTS commodity codes, 7604.21; 7604.29; and 7610.10.[236]
- An HTS code at the six-digit level is inherently problematic because classifications at such a level covers an array of products that are not specific to the manufacturing of solar cells.[237]
- In the 2014-2015 administrative review of the companion antidumping duty (AD) case, Commerce recognized the overly-broad nature of six-digit HTS codes in the context of aluminum frames when it decided to use a six-digit HTS code for the aluminum surrogate value. Commerce reached the same conclusion in the 2015-2016 AD review. Commerce's decision to select HTS 7604.29.90001 as the surrogate value for aluminum frames in the production of solar cells was upheld by the CIT.[238]
- The Comtrade data is not reflective of the inputs used by Canadian Solar. Commerce's requirement to select input-specific benchmark data is firmly rooted in its requirement to select LTAR benchmark data that represents "the good or service being provided."[239]
- Here, the Comtrade data includes imports under HTS code 7610.10, which covers aluminum doors, windows, and their frames and thresholds for doors, which Canadian

[231] *Id*. at 20 (citing *Preliminary Results* PDM at 22).
[232] *Id*.
[233] *Id.* at 20-21 (citing *Changzhou Trina Solar Co. v. United States*, 352 F. Supp. 3d 1316, 1326 (CIT 2018)).
[234] *Id.* at 21.
[235] *Id*. at 21-22.
[236] *Id*. at 22-23.
[237] *Id*. at 23.
[238] *Id*. at 23 (citing *Changzhou Trina Solar Energy Co. v. United States*, 359 F. Supp. 3d 1329, 1334-35 (CIT 2019)).
[239] *Id.* at 24 (citing section 771(5)(E)(iv) of the Act, and 19 CFR 351.511(a)(2)(i)).

Solar did not purchase. Commerce rejected this data as a surrogate value source in the companion AD case because it "does not specify the types of aluminum frames used in solar cells modules."[240]

- By contrast, the IHS Market data represents the "price for aluminum frames."[241]
- In the second administrative review of this CVD order, Commerce correctly relied on the IHS Markit data alone for the aluminum frames benchmark, even when presented with HTS-based import data, and Commerce should have returned to its prior practice in the current review.[242]
- The inclusion of the HTS code 7610.10 in the Comtrade data, combined with the additional flaws cited above, render the entire dataset unusable. The record contains "otherwise-product specific" IHS Markit data and Commerce must rely on this dataset alone for the final results.[243]
- At a minimum, if Commerce continues to average the Comtrade and IHS Markit data for the final results, it must remove the EU-27 data to avoid double-counting and also remove the HTS code 7610.10 data because it is not representative of the inputs used by Canadian Solar.[244]

Jinko Solar's Comments:

- Commerce incorrectly determined that Jinko Solar's purchases of aluminum are specific. Commerce concluded that solar industry was the beneficiary of an indirect subsidy in the purchase of aluminum frames on the basis of industry information that the GOC provided in a prior administrative review.[245]
- This information indicates that there are six categories of industries that use aluminum extrusions in China: building and construction; transportation; electrical; machinery and equipment; consumer durables; and other industries. The CIT found that Commerce's reliance on this same information demonstrated a lack of specificity.[246]
- An analysis of these six categories of industries demonstrates that, in total, they make up a significant portion of all Chinese industries, and thus any alleged subsidy to these industries is non-specific.[247]
- Because these six categories "appear to represent a large swath of industries that could be further broken down into numerous sub-industries," Commerce must explain how subsidizing these broad industries amounts to a specific {subsidy to the solar industry} rather than a general subsidy."[248]
- Accordingly, Commerce must find that this program is not countervailable.[249]

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[240] *Id*.
[241] *Id*. (citing *Preliminary Results* PDM at 22).
[242] *Id.* (citing *Solar Cells from the PRC 2013 AR*).
[243] *Id.* at 25 (citing *Changzhou Trina Solar*, 352 F. Supp. 2d at 1332).
[244] *Id*.
[245] *See* Jinko Solar's Case Brief at 17 (citing *Preliminary Results* PDM at 40).
[246] *Id.* (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at1326).
[247] *Id*.
[248] *Id*. at 18 (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at 1331).
[249] *Id*.

- If Commerce determines that this program is countervailable, the benchmark should be composed solely of the IHS Markit data. The IHS Markit data generates the only proposed benchmark that includes products comparable to the aluminum inputs that Jinko Solar uses.[250]
- If Commerce continues to average the IHS Markit and Comtrade data, it must exclude products under HTS code 7610.10 from the benchmark.[251]

Petitioner's Rebuttal Comments:

- Commerce should reject the arguments from the respondents and continue to find that the Provision of Aluminum Extrusions for LTAR Program provides a specific financial contribution to Chinese solar producers.[252] Commerce has consistently found this program is specific and has considered and rejected the same arguments that the respondents are now raising. Nothing has changed in this review.
- Despite Commerce's requests, the GOC has failed to provide any information concerning the consumption of aluminum extrusions by individual industries since the third review of this CVD order. As a result, Commerce has no choice but to find that the recipients of aluminum extrusions are limited in number to the industries identified by the GOC in the third review.[253]
- The respondents' arguments that the Comtrade data is not a precise match to their domestic purchases is flawed.[254]
- While there may not be a precise match between goods traded on the world market and domestic purchases, Commerce has the discretion to determine the best match.[255]
- In past segments of this proceeding and in the *Preliminary Results*, Commerce has relied on export data from Comtrade under various HTS headings to measure various subsidy programs. Commerce has specifically addressed and dismissed respondents' arguments in prior segments of this proceeding.[256]
- While the respondents cite *Changzhou Trina Solar Energy Co. v. United States*, CIT No. 17-198 as support for its argument, on remand, Commerce has continued to rely on Comtrade data to derive the benchmark for aluminum extrusions, providing additional information as to why the Comtrade data was an appropriate benchmark source. The petitioner notes that the CIT has not yet ruled on Commerce's remand results.[257]
- For example, Commerce explained that it was examining purchases of a type of aluminum extrusion and reasonably concluded that the Comtrade data labeled "global exports of aluminum extrusions" raised no issues concerning comparability such that

[250] *Id*.
[251] *Id*. at 18-22.
[252] *See* Petitioner's Rebuttal Brief at 10.
[253] *Id*. at 11.
[254] *Id*.
[255] *Id*. at 12.
[256] *Id*.
[257] *Id*.

Commerce should abandon its preference for monthly benchmark data when available – a strength the Comtrade data provides that the annual IHS Markit data does not.[258]

- Commerce should continue to rely on the Comtrade data to value aluminum extrusions for the final results.[259]

Commerce's Position: In addressing our questions on specificity in the instant review, the GOC stated that "{t}here are a vast number of uses for aluminum extrusions. The industries that purchase/use aluminum extrusions are not limited, and the solar panel industry in China is not a disproportionate or predominant consumer of aluminum extrusions."[260] However, the GOC provided none of the information we requested concerning amounts consumed by individual industries. In *Solar Cells from China 2013 AR*, the GOC reported six industries consuming aluminum extrusions: building and construction, transportation, electrical, machinery and equipment, consumer durables, and other industries.[261] However, the GOC has not provided such information since the 2013 administrative review, and it did not provide this information in the instant review.

While the GOC indicates aluminum extrusions are used in a variety of industries and sectors across China, we continue to find, consistent with the most recently completed review, that the industries within those sectors that actually consume aluminum extrusions are limited in number. The statute notes that the term "enterprise or industry" "includes a group of such enterprises or industries."[262]

Despite being used in a variety of industries and sectors across China, we find the number and nature of the users (as identified by the GOC) are limited compared to the overall structure of the Chinese economy. The record of the instant review indicates that manufacturers in China produce at least the following products (the majority of which do not appear to use aluminum extrusions as an input): foods, beverages, tobacco, textiles, apparel, leather products, furniture, paper and paper products, recording media, articles for culture, education and sports activities, raw chemical materials and chemical products, medicines, chemical fibers, rubber, plastics, mineral products, and machinery for cultural activity and office work, and artwork.[263]

The fact that the limited users reported by the GOC happen to be classified within varied sectors of the Chinese economy, while not entirely irrelevant, is not dispositive of whether a subsidy is specific; what matters most is whether or not the users can be considered something akin to the whole of the Chinese economy.

Accordingly, for the final results, we continue to find that users of aluminum extrusions do not make up something akin to the whole of the Chinese economy, and we continue to find that the

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[258] *Id*. at 12-13.
[259] *Id*. at 13.
[260] *See* GOC June 19, 2018 QR at 80.
[261] *See Solar Cells from China 2014 AR* IDM at Comment 3.
[262] Section 771(5A)(D) of the Act.
[263] *See* Memorandum "Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Documents for the Record, dated February 12, 2019 at Attachment A, "Excerpts from the China Statistical Yearbook from the National Bureau Statistics of China."

provision of aluminum extrusions for LTAR is *de facto* specific within the meaning of 771(5A)(D)(iii)(I) of the Act because the actual recipients of the subsidy are limited in number.[264] We also determine as adverse facts available that the producers of the aluminum extrusions purchased by Canadian Solar and Jinko Solar are "authorities" within the meaning of section 771(5)(B) of the Act and, as such, that the provision of aluminum extrusions constitutes a financial contribution under section 771(5)(D)(iii) of the Act.[265] A benefit is conferred to the extent that aluminum extrusions are being provided for LTAR.

As discussed in the *Preliminary Results*, we determined that China's aluminum extrusions market is distorted and that it is necessary to rely on "tier two" world market price data for the benchmark for the provision of aluminum extrusions for LTAR.[266] In this case, we received two possible sets of world market price data: (1) monthly Comtrade covering merchandise classified under HTS classifications, 7604.21, 7604.29, and 7610.10, and (2) IHS Markit data providing average annual prices for aluminum frames. In evaluating each set of data, we continue to find that neither source is ideal, but that the deficiencies are not so serious that either data set should be rejected in its entirety. Because Commerce's practice calls for the use of monthly values in assessing the benefits from the provision of inputs for LTAR, the monthly Comtrade data is preferable to the annual IHS Markit value.[267] However, Commerce's practice is normally to rely on data reflecting the narrowest category of products encompassing the input product, which, in this case, would be the IHS Markit data (which reflects prices for aluminum frames) over the Comtrade data (which encompasses a broader range of aluminum products). Accordingly, we have averaged the annual IHS Markit value with the monthly Comtrade average unit values to derive monthly benchmarks that reflect, in part, the value for aluminum extrusions. This is consistent with our prior practice in this proceeding.[268]

Regarding Canadian Solar's argument that six-digit HTS classifications are overly broad, we note that there is nothing on the record indicating how, if at all, the products purchased by the respondents differ from the products imported under HTS subheadings 7604.21 and 7604.29. Instead, we find the descriptions of products covered by 7604.21 (alloyed aluminum hollow profiles) and 7604.29 (alloyed aluminum bars, rods, and profiles, other than hollow profiles), are comparable to the aluminum extrusions inputs purchased by the respondents, and no parties argue that the HTS codes do not cover such aluminum extrusions inputs.

With respect to the Comtrade data, after further evaluation, and in a change from the *Preliminary Results*, we are no longer relying on HTS subheading 7610.10 in the Comtrade component of the benchmark for aluminum extrusions. Commerce has rejected this HTS subheading for purposes of valuing aluminum solar frames in the companion AD context because this subheading "does

[264] *Id*.
[265] *See Preliminary Results* PDM at 40.
[266] *Id*. at 13 and 17-18; *see also* 19 CFR 351.511(a)(2)(i).
[267] *See Solar Cells from China 2014 AR* at Comment 4. Monthly data reflects price fluctuations over the course of the POR.
[268] *See Preliminary Results* PDM at 21-22; *see also Solar Cells from China 2015 AR* IDM at Comment 8

not specify the types of aluminum frames used in solar cell modules."[269] We note in the instant review, the GOC stated that during the POR aluminum solar frames were imported (at least into China) under HTS headings 76.04 and 7616.9910, which include the headings 7604.21 and 7604.29, but not 7610.10.[270] Therefore, we conclude that in the interest of maintaining product comparability between the benchmark and the products purchased by Canadian Solar and Jinko Solar, it is appropriate to remove 7610.10 from the benchmark and to calculate the Comtrade component of the benchmark on 7604.21 and 7604.29 exclusively.

Finally, we agree with Canadian Solar that we should remove the EU-27 entries from the Comtrade component of the benchmark.

> Since the sources of the data of all individual EU countries are the national authorities of each of the 27-member states and since the source of the EU-27 is Eurostat, there can be differences between reconstructed EU-27 from individual country data in UN Comtrade and the combined EU-27 from Eurostat. You must however always keep in mind that Intra-EU trade needs to be deducted from trade reported by the EU member states.[271]

Accordingly, to avoid double-counting with respect to the Comtrade data, we find that it is appropriate to remove prices with respect to the EU-27 entries from the benchmark.

Comment 3: Provision of Electricity for LTAR

Canadian Solar's Comments:

- Commerce's benefits analysis for the provision of electricity is flawed because the program is not specific to a region or industry.[272]
- In the *Preliminary Results*, Commerce used benchmarks from multiple provinces to measure the benefit received by a factory in a single location. In response to Commerce's questions regarding the roles of provinces and the National Development and Reform Commission (NDRC) in electricity price adjustments, the GOC stated that there are no Provincial Price Proposals nor a review by the NDRC.[273]
- Commerce found the GOC's statement to be contrary to record evidence that the GOC continues to control electricity prices through the NDRC.[274]

[269] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012), and accompanying IDM at Comment 16.
[270] *See* GOC June 19, 2018 QR at 95-96.
[271] *See* Canadian Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Rebuttal Benchmark Submission," dated November 15, 2018 at exhibit 13, (citing "United Nations International Trade Statistics Knowledgebase; EU-27 in UN Comtrade").
[272] *See* Canadian Solar's Case Brief at 28.
[273] *Id*. at 29.
[274] *Id*. at 30 (citing *Preliminary Results* PDM at 30).

- Regardless of the GOC's cooperation, Commerce's use of AFA in its benchmark calculation nonsensically imputes electricity rates from six different provinces to the same Canadian Solar facility.[275]
- Commerce did not make any of the necessary findings for classifying a domestic subsidy as "specific" under section 771(5A)(D) of the Act. Even though Commerce has the authority to make determinations using AFA where a responding party has failed to cooperate, Commerce must actually make a determination.[276]
- The GOC did not fail to respond to any questions addressing whether electricity rates are generally applicable within the provinces, regardless of how the rates are determined.[277]
- Commerce failed to explain how any of the information it found to be missing from the record related to Provincial Price Proposals and the NDRC's role in setting prices connects to the gap in the record. Therefore, there is no basis for Commerce to conclude otherwise, even under AFA.[278]
- Commerce's reference to the information that the petitioner submitted in the initial investigation allegedly showing that the subsidy is limited to "priority industries" possibly indicates that Commerce may be making a specificity finding for this program under section 771(5A)(D)(iii)(I) of the Act. Under this section of the Act, Commerce may find a domestic subsidy to be "specific as a matter of fact" if the actual recipients of the subsidy are limited in number.[279]
- In order to be upheld as a proper use of AFA, Commerce must show how missing information would directly lead to a finding that subsidies are provided to a limited number of enterprises or industries under section 771(5A)(D)(iii)(I) of the Act.[280]
- Commerce's adverse inference that the solar industry alone or as part of a limited group of industries that received a *de facto* benefit in the form of lower electricity prices does not logically flow from the record facts or the designated gap in the record. The only gap in the record has to do with variation among provinces.[281]
- Commerce can reference the actual electricity schedules for every province to see that not one single power supplier prices electricity on the basis of industry or product.[282]
- Commerce's citation to the initiation checklist in the initial investigation is meaningless. The purpose of an initiation checklist is to check whether the petitioner has met a minimum threshold for a subsidy allegation that Commerce will then fully investigate.
- If Commerce continues to find that this program is specific in the final results, it can remedy its improper use of AFA by using neutral facts available to determine the electricity benchmark in the form of an average of the electricity rates provided by the GOC.[283]

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[275] *Id*.
[276] *Id*. (citing *Changzhou Trina Solar Energy Co. v. United States*, 264 F. Supp. 3d 1325, 1330 (CIT 2017)).
[277] *Id.* at 33.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*. at 34.
[283] *Id*. at 37.

- Commerce erred in including an electricity benefit to Canadian Solar after January 1, 2016, because at that point the NDRC delegated its authority to determine prices to the provinces.[284]
- Commerce found that the GOC failed to cooperate to the best of its ability by failing to provide proposals along with various information related to the NDRC's role in price setting and, therefore, an adverse inference was warranted. The GOC, however, reported that after January 1, 2016, that there were no Provincial Price Proposals. Commerce cannot require an entity to provide information that does not exist.[285]
- The record shows that the NDRC does not possess the authority to direct price changes. The GOC explained that the State Council is "in charge of setting guidelines for electricity pricing" while leaving the provincial pricing authorities to implement those guidelines and to formulate the specific price levels for the various kinds of electricity users within their jurisdictions.[286]
- Article III of Notice 3169 states that "specific electricity price level of all kinds of electric power users should be formulated according to local actual situation by provincial-level price competent department and should be published to the society for implementation."[287]
- Instead, Commerce reasoned that "neither Notice 748 nor Notice 3105 explicitly stipulates that relevant provincial pricing authorities determine and issue electricity prices within their own jurisdictions" and that "the NDRC continues to play a seminal role in setting and adjustment electricity prices."[288]
- Notice 748 only applies to the elimination of preferential electricity prices for fertilizer production and Notice 3105 only requires that the relevant provincial agencies provide their final adjusted electricity price schedules to the NDRC for its records.[289]
- As there is no gap in the record (the GOC cannot provide information that does not exist), Commerce failed to make the factual findings to implement AFA. Accordingly, Commerce must remove any electricity benefit assigned to Canadian Solar for the final results.[290]
- Commerce must remove electricity rates from Tibet from the electricity benchmark as these are seasonal rates that are not normally included in Commerce's electricity benchmarks.[291]

[284] *Id*. at 38.
[285] *Id*. at 38-39 (citing *Maverick Tube Corp. v. United States*, 847 F. 3d 1372 (Fed. Cir. 2017)).
[286] *Id.* at 39.
[287] *Id*.
[288] *Id*. at 40 (citing *Preliminary Results* PDM at 30).
[289] *Id.* at 40.
[290] *Id*. (citing section 776(a) of the Act).
[291] *Id*.

Petitioner's Rebuttal Comments:

- Commerce's benefit analysis is not flawed because the Provision of Electricity for LTAR Program was found to be regionally specific as AFA. Accordingly, Canadian Solar's arguments should be rejected.[292]
- In the *Preliminary Results*, Commerce reasonably applied AFA in its calculation of this program because the GOC failed to cooperate to the best of its ability with regard to this program.[293]
- Canadian Solar's entire argument regarding region specificity is irrelevant given the GOC's refusal to participate in this administrative review. It is fully reasonable for Commerce to presume as AFA that Canadian Solar paid the highest provincial rates in China, even if a Canadian Solar facility was not located in the province where that rate applies, because the GOC has never disclosed to Commerce how the national adjustments are made.[294]
- Commerce appropriately found, as AFA, that the GOC continued to set electricity prices.[295] As there has been no new information submitted that would change this conclusion, Commerce should continue to countervail the electricity subsidies for the final results.

Commerce's Position: For the final results, we continue to find that the GOC did not provide the necessary information Commerce requested pertaining to whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D)(iii) of the Act, whether such a provision provided a benefit within the meaning of section 771(5)(E)(iv) of the Act, and whether such a provision was specific within the meaning of section 771(5A)(D) of the Act.[296]

As explained in the *Preliminary Results*, in order to analyze the financial contribution and specificity of this program, we requested that the GOC provide information regarding the roles of provinces, the NDRC, and cooperation between the provinces and the NDRC in electricity price adjustments. Specifically, we requested, *inter alia*: Provincial Price Proposals for the province in which mandatory respondents or any companies "cross-owned" with those respondents are located for applicable tariff schedules that were in effect during the POR; all original NDRC Electricity Price Adjustment Notice(s) that were in effect during the POR; the procedure for adjusting retail electricity tariffs and the role of the NDRC and the provincial governments in this process; the price adjustment conferences that took place between the NDRC and the provinces, grids and power companies with respect to the creation of all tariff schedules that were applicable to the POR; the cost elements and adjustments that were discussed between the provinces and the NDRC in the price adjustment conferences; and how the NDRC determines that the provincial-level price bureaus have accurately reported all relevant cost elements in their price proposals with respect to generation, transmission and

[292] *See* Petitioner's Rebuttal Brief at 13.
[293] *Id*. at 13-14.
[294] *Id*. at 15.
[295] *Id*. at 16-17 (citing *Preliminary Results* PDM at 30-31).
[296] *See Preliminary Results* PDM at 41.

distribution.[297] We requested this information in order to determine the process by which electricity prices and price adjustments are derived, identify entities that manage and impact price adjustment processes, and examine cost elements included in the derivation of electricity prices in effect throughout China during the POR.

We explained in the *Preliminary Results* that we found that both Notice 3105 and the Notice of National Development and Reform Commission on Adjusting Schedule of Coal-fired Power Generation Grid Purchase Price and Sale Price of Industrial and Commercial Electricity of Each Province (District or City) (Notice 748) specifically direct provinces to reduce prices and to report the enactment of those changes to the NDRC.[298] Article 1 of Notice 748 stipulates a lowering of the on-grid sales price of coal-fired electricity by an average amount per kilowatt hour.[299] Further, NDRC Notice 3105 also directs additional price reductions, and stipulates at Articles II and X, that local price authorities shall implement the price reductions included in its Annex, and must report resulting prices to the NDRC.[300]

Our review of record information leads us to conclude that neither Notice 748 nor Notice 3105 explicitly stipulates that relevant provincial pricing authorities determine and issue electricity prices within their own jurisdictions, as the GOC states to be the case.[301] Rather, both notices indicate that the NDRC continues to play a seminal role in setting and adjusting electricity prices by mandating average price adjustment targets with which the provinces are obligated to comply in setting their own specific prices.[302] The notices do not explicitly eliminate Provincial Price Proposals and do not define distinctions in price-setting roles between national and provincial pricing authorities. Moreover, while Article IV of Notice 3169 (Notice of the NDRC on Completing Price Linkage Mechanism Between Coal and Electricity) indicates that "local government and relevant departments should not designate the transaction price," Articles 2 and 3 of Notice 3169 also make clear that the NDRC stipulates the formula by which prices are to be adjusted.[303]

While the GOC provided numerous documents, none of these documents are helpful in understanding why, exactly, prices vary, nor are they otherwise helpful in understanding whether preferential prices might be limited to certain industries or enterprises. Instead, the GOC provided information requested by Commerce concerning the regulation of the electricity industry and rates in China, and the requested price schedules.[304] The former does not allow Commerce to connect the dots between specific cost elements and price variations. The latter information merely establishes that there are such price variations.

Therefore, despite the fact that the GOC provided some information, there are significant remaining gaps in the record due to the GOC's failure to cooperate to the best of its ability. We

[297] *Id.* at 29.
[298] *Id.* at 30.
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *See* GOC June 19, 2018 QR at Exhibit II.E.19.
[304] *Id.* at Exhibits II E.19 –II E.24.

continue to find that this warrants the use of AFA. As AFA, we determine that the provision of electricity is a countervailable subsidy program. Regarding financial contribution and specificity, we have placed information on the record of this review that was originally placed on the record of the underlying investigation, stating that central, provincial, and local governments established policies to provide preferential electricity rates to solar cell producers and, that the subsidy is limited to priority industries, such as the solar power industry.[305] Thus, we continue to find on the basis of AFA that there is a financial contribution within the meaning of section 771(5A) of the Act in the form of the provision of electricity by central, provincial, and local governments, and that the program is *de facto* specific under section 771(5A) of the Act.

Further, we find that the fact that Commerce countervailed the provision of electricity in past segments of this proceeding weighs in favor of continuing to countervail it here. In *Magnola Metallurgy, Inc. v. United States*, the Federal Circuit affirmed that Commerce need not make a *de novo* specificity determination in each successive administrative review after finding a program specific in a prior segment of the proceeding.[306] Rather, Commerce can properly require new evidence before changing a prior affirmative specificity determination.[307] This follows from section 751(a)(1)(B) of the Act, which states that the purpose of an administrative review is to "review and determine the amount of any net countervailable subsidy," not to determine whether there is a countervailable subsidy in the first place.[308] Here, the GOC presented no evidence that would call into question our earlier finding of specificity.

The respondent companies each reported that they purchased electricity during the POR. The amount of the subsidy we infer is the difference between what the respondents paid for their electricity and the highest tariffs set for any province. Therefore, we continue to find that the provision of electricity constitutes a countervailable subsidy program.

Regarding Canadian Solar's argument regarding the benchmark applied as AFA, we find that we appropriately identified the highest rates amongst the reported electricity schedules for each reported electrical category and used those rates as the benchmarks in the benefit calculations. We find that following Canadian Solar's proposition of using an average of the electrical rates across provinces would be the equivalent of applying neutral facts available, which would not provide the appropriate adverse inference based on the GOC's non-cooperation. Furthermore, without sufficient record information on how the different electrical rates were determined, Commerce considers it plausible that a respondent in China could have been subject to the highest electrical rates in China, regardless of its location.

Although Canadian Solar asserts that the only gap in the record has to do with variation among provinces, we find that such variation can lead to a specific subsidy because the central government, in coordination with the provinces, may take into account the significance of the

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[305] *See* Memorandum, "Import Administration Office of AD/CVD Operations, Countervailing Duty Investigation Initiation Checklist," dated November 8, 2011 (public version) (Initiation Checklist) at the section, "Government Provision of Power for LTAR," which we placed on the record of the instant administrative review.
[306] *See Magnola Metallurgy, Inc. v. United States*, 508 F. 3d 1349 (Fed. Cir. 2007).
[307] *Id.* at 1354-55; *see also Solar Cells from China 2012 AR* IDM at 27 n.130 ("In a CVD administrative review, we do not revisit past determinations of countervailability made in the proceeding, absent new information.").
[308] *Compare* section 751(a)(1)(A) of the Act *to* section 705(a)(1) of the Act.

presence of such industries within each province in setting the varying rates. Without the requested information regarding how the prices are set or why they vary, we cannot know.

We also disagree with Canadian Solar's argument that we cannot rely on the Initiation Checklist as facts available. An initiation checklist, if indicating initiation for an alleged program, requires that the petitioner's allegations are supported by adequate and accurate information that was reasonably available to it. Therefore, we find that the Initiation Checklist presents facts otherwise available upon which Commerce may rely.

Finally, we agree with Canadian Solar that we inadvertently included a seasonal electricity rate in the electricity benchmark, which was contrary to our intent.[309] Accordingly, we have revised the electricity benchmark with respect to this issue for the final results.

Comment 4: Solar Grade Polysilicon Benchmark

Canadian Solar's Comments:

- Commerce should use Canadian Solar's own market-economy purchases as a polysilicon benchmark for the final results. Commerce relied on facts otherwise available to find that the GOC's involvement in China's solar grade polysilicon market was distorted and relied on a tier-two benchmark. There was no information missing from the record to justify the use of a tier-two benchmark.[310]
- The GOC provided data for the entire polysilicon market demonstrating the total output of polysilicon by companies in which the GOC maintains an ownership interest.[311] By ignoring this highly relevant information on the overall market, Commerce failed to consider all information filed by interested parties.
- Even if Commerce continues to ignore record evidence that established that China's polysilicon prices were not distorted, any alleged distortions cannot impact the pricing of an arms-length import transaction between Canadian Solar and a market economy seller.[312]

Petitioner's Rebuttal Comments:

- Pursuant to 19 CFR 351.511(a)(2)(ii), Commerce is precluded from using Canadian Solar's import prices because import prices are considered to be domestic prices. This is because importers are forced to lower prices in order to compete with the domestic market.[313]
- Thus, to the extent that the domestic market is distorted through government interference, so are products that are imported into that market.[314]

[309] *See Preliminary Results* PDM at 42.
[310] *See* Canadian Solar's Case Brief at 25.
[311] *Id*. at 26.
[312] *Id*. at 27.
[313] *See* Petitioner's Rebuttal Brief at 17.
[314] *Id*.

- The GOC failed to provide information specific to solar grade polysilicon, including key information such as the portion of state-invested enterprises that are involved in the solar grade polysilicon industry. Commerce had no choice by to find that domestic prices in China are distorted.[315]
- For the final results, Commerce should continue to use an offshore, world market price to construct the polysilicon benchmark.[316]

Commerce's Position: We have previously addressed the argument raised by Canadian Solar regarding the use of what it claims to be "market-economy purchases" as the polysilicon benchmark,[317] and continue to find its arguments to be unavailing. For measuring the adequacy of remuneration for purchases of solar grade polysilicon, we declined to use the actual transactions from the respondents because we determined, pursuant to the facts available, that the GOC's intervention in China's solar grade polysilicon market leads to significantly distorted prices for solar grade polysilicon in China.[318] We disagree with Canadian Solar's argument that there is no information missing from the record. In response to our questions concerning its role in the production of solar grade polysilicon, the GOC provided no information that was specific to "solar grade" polysilicon, which is necessary to determine whether the solar grade polysilicon market is distorted due to the GOC's involvement.[319] Information on the overall polysilicon market is not sufficient, because the solar grade polysilicon market may be distorted even if such distortion is not evident in data for the polysilicon market overall. As such, we are not relying on domestic prices in China's solar grade polysilicon market, which include "actual imports."[320] Because we continue to find, as facts available, that the GOC's intervention in China's solar grade polysilicon market leads to significantly distorted prices of this input in China, it would not be appropriate to rely on Canadian Solar's imports into China as the benchmark to measure the adequacy of remuneration for its domestic purchases of solar grade polysilicon. This is not only consistent with our regulation, but also consistent with our past practice in this proceeding.[321] As a result, for these final results, we continue to rely on a simple average of world market prices for solar grade polysilicon published by Bloomberg, Energy Trend, and Greentech media to construct our solar grade polysilicon benchmark.[322]

Canadian Solar challenges Commerce's use of a tier two benchmark, arguing that all of its polysilicon purchases were imported from market-economy suppliers and so were not affected by the GOC's market interference. We agree with the petitioner's argument that importers are forced to lower prices in order to compete with the domestic market in China. Therefore, to the extent that the domestic market is distorted through government interference, so are the products imported into that market. This is a basic economic inference drawn from the logic of a competitive marketplace. For example, why would a Chinese consumer pay $5.00 for an imported product when the identical product is available from a Chinese supplier for $4.00?

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[315] *Id*.
[316] *Id*. at 18.
[317] *See Solar Cells from China 2015 AR* IDM at Comment 6.
[318] *See Preliminary Results* PDM at 19-20 and 23-29.
[319] *See* GOC June 19, 2018 QR at 45.
[320] *See* 19 CFR 351.511(a)(2)(i).
[321] *See Solar Cells from China 2014 AR* IDM at Comment 6.
[322] *See Preliminary Results* PDM at 32.

There is, in this regard, no indication that the imported crystalline polysilicon is different that the Chinese origin crystalline silicon, and we do not see on the record information indicating that imports and domestic purchases of this input are not fungible.

We note that our inference regarding price competition is especially reasonable when imports account for less of the domestic consumption than domestic producers as the case is here. The record indicates that imports of solar grade polysilicon accounted for 35.18 percent of domestic grades of domestic consumption of all grades of polysilicon.[323] Therefore, we reasonably conclude that government interference distorting the domestic solar grade polysilicon market makes Canadian Solar's import prices unsuitable as a benchmark for this input. We further note that this conclusion is consistent with the normal operation of 19 CFR 351.511(a)(2), which treats "actual imports" as transactions in the country under examination. Accordingly, we find that it is appropriate to use world market prices to measure the benefit from this program.

Comment 5: Solar Glass Benchmark

The Petitioner's Comments:

- In the *Preliminary Results*, Commerce did not use world market prices for solar glass as disseminated from Comtrade or from the Global Trade Information Services' Global Trade Atlas (GTA). Instead, Commerce relied upon data published by Greentech Media.[324]
- According to Commerce, Comtrade and the GTA data provide monthly prices but include prices for tempered glass, which is a broader category of glass that includes solar glass. Thus, Commerce relied solely on the data from Greentech Media.[325]
- Commerce's use of the Greentech Media data when other at least equally, if not more, suitable sources are available was improper.[326]
- Commerce typically will remove the calculation of the benchmark value those prices that are relevant to the country under investigation. As the solar glass prices in question include Chinese pricing, Commerce should not rely on the Greentech Media prices to value solar glass.[327]
- Commerce should not reject the Comtrade and GTA data because solar glass is a form of tempered glass, and Commerce has previously found means to limit any "distortion" found in the pricing for solar glass. In a prior review of this CVD order, Commerce utilized Comtrade pricing and revised it to include only prices from solar glass producing companies.[328] There is no reason why Commerce could not repeat the same process in this proceeding.

[323] *See* GOC June 19, 2018 QR at 44-46.
[324] *See* Petitioner's Case Brief at 12 (citing *Preliminary Results* PDM at 16-17).
[325] *Id.* at 13.
[326] *Id*.
[327] *Id*. at 14.
[328] *Id*. (citing *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).

Canadian Solar's Rebuttal Comments:

- In the previous administrative review of this CVD order, Commerce relied on the Greentech Media data in lieu of the Comtrade data to calculate its benchmark for solar glass.[329]
- Commerce must continue to follow its same approach from the previous administrative review and use the Greentech Media data because it meets Commerce's established criteria for calculating a benchmark. The Greentech Media data is specific to the input purchased by Canadian Solar and is presented on a monthly basis.[330]
- The petitioner argues that the Greentech Media data includes Chinese pricing, but this argument is contradicted by the record. Commerce very clearly excluded Chinese prices from the benchmark in the *Preliminary Results*.[331]
- Tempered glass cannot be completely reflective of the price for solar glass because it includes a variety of other products.[332]
- As the Greentech Media data provides global monthly prices that are specific to solar glass, and the petitioner provides no compelling reason why Commerce should now accept the flawed Comtrade data, Commerce must continue to calculate its solar glass benchmark on the Greentech Media data alone.[333]

Commerce's Position: We addressed similar arguments in the most recently completed review in this proceeding, in which we relied solely on Greentech Media data for the solar glass benchmark because this pricing data provides a monthly global price specifically for solar glass.[334] While the petitioner submitted pricing data published by the Global Trade Atlas (GTA) and the United Nations Comtrade Database (Comtrade) for Commerce to consider when constructing the solar glass benchmark, we find the pricing data published by Greentech Media preferable to the GTA and Comtrade data because the GTA and Comtrade data have drawbacks that the Greentech Media data do not. Specifically, the GTA and Comtrade sources provide monthly prices, but represent prices for tempered glass, which is a broader category of glass that includes solar glass but also non-solar glass products.[335] As such, because the data published by Greentech Media provides global monthly prices that are specific to solar glass, we find that it is appropriate to rely solely on the Greentech Media data when constructing the solar glass benchmark for the final results.

The petitioner contends that the Greentech Media data contains prices from China, which would distort the examination for measuring the adequacy of remuneration regarding purchases of solar glass from China, the country in question. However, when constructing our solar glass

[329] *See* Canadian Solar's Rebuttal Brief at 12 (citing *Solar Cells from China 2015 AR* IDM at Comment 6).
[330] *Id.* at 12-13.
[331] *Id*. at 13.
[332] *Id*. at 15.
[333] *Id*. at 16.
[334] *See Solar Cells from China 2015 AR* IDM at Comment 6.
[335] *See* Petitioner Benchmark Submission.

benchmark, we removed solar glass prices from the Chinese market in order to avoid such distortions referenced by the petitioner.[336]

Comment 6: Land Benchmark

Canadian Solar's Comments:

- In the *Preliminary Results*, Commerce detailed that it could not rely on either a tier-one or tier-two benchmark to calculate its land benchmark. As such, Commerce preliminarily determined to use a tier-three benchmark to value Canadian Solar's land from "Asian Marketview Reports" by CB Richard Ellis (CBRE) for Thailand 2010.[337]
- Canadian Solar submitted CBRE reports published in 2016 and 2017 that represent a broad, world-market average of properties similar to the type of land used by Canadian Solar, which represents a "world market price" that would be available to purchasers in the country in question.[338]
- As a preferred tier-two benchmark, Commerce must use these two CBRE reports to calculate Canadian Solar's land benchmark in its final results.[339]
- Commerce did not address Canadian Solar's submitted benchmark in the *Preliminary Results*. Commerce is obligated by its governing statute to consider relevant arguments raised by interested parties.[340]
- Commerce maintains that it cannot use a tier-two benchmark because "land is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market."[341] This statement stands in contrast to Commerce's reasoning for selecting its benchmark. Specifically, Commerce found that "Thailand is a reasonable alternative to China as a location for Asian production."[342]
- Given that Commerce's benchmark suffers from the same comparability flaw as Canadian Solar's, a world-wide dataset of {land} prices is otherwise superior because it is far more representative as compared to a dataset for a single country that is almost a decade old. Consequently, Commerce must rely on the dataset in the CBRE reports submitted by Canadian Solar for the final results.[343]

Petitioner's Rebuttal Comments:

- Commerce should continue to use Thailand land pricing to determine the adequacy of remuneration under a tier three methodology for the final results.[344]

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[336] *See* Excel spreadsheets regarding the respondents' benefit calculations for the final results.
[337] *See* Canadian Solar's Case Brief at 41 (citing *Preliminary Results* PDM at 17).
[338] *Id.* (citing 19 CFR 351.511(a)(2)(ii)).
[339] *Id.* at 41.
[340] *Id*. at 42 (citing section 777(i)(3)(A) of the Act).
[341] *Id.* at 42 (citing *Preliminary Results* PDM at 18).
[342] *Id*.
[343] *Id.* at 43.
[344] *See* Petitioner's Rebuttal Brief at 23 (citing section 771(5)(E)(iv) of the Act; and 19 CFR 351.511(a)(2)).

- Canadian Solar has confused Commerce's practice with regard to benchmarking. Commerce has selected industrial areas in Thailand as an appropriate benchmark under a tier three benchmark. As a result, Canadian Solar's arguments should be rejected, and Commerce should continue to use Thailand land pricing as its benchmark for the final results.[345]

Commerce's Position: In the *Preliminary Results*, we stated that we cannot rely on the use of tier one or tier two benchmarks to assess the benefits from the provision of land for LTAR in China.[346] We explained that in *Sacks from China*, we determined that "Chinese land prices are distorted by the significant government role in that market," and hence, no usable tier one benchmarks exist.[347] We also explained that tier two benchmarks (*i.e.*, world market prices) are also inappropriate to value land in China. As a result, and consistent with other CVD proceedings involving China, we relied on benchmark information to value land from "Asian Marketview Reports" by CBRE for Thailand 2010.[348] We stated that this benchmark, appropriately indexed, is a suitable benchmark for valuing land in China after considering a number of factors, such as national income levels, population density, and producers' perceptions that Thailand is a reasonable alternative to China as a location for Asian production.[349]

We also stated in the *Preliminary Results* that we will continue to examine land benchmark prices on a case-by-case basis, and that we will consider the extent to which proposed land benchmarks represent prices in a comparable setting (*e.g.*, a country's location relative to its location to China, the proposed country's level of economic development, *etc.*).[350] Canadian Solar submitted 2016 and 2017 world-wide market average prices for properties it considers to be similar to the type of land used by Canadian Solar.[351] After examining Canadian Solar's proposed land benchmark, we conclude that the world market prices (*i.e.*, tier two) submitted by Canadian Solar are not appropriate for valuing land in China with respect to CVD examinations.

We explained in the Land Benchmark Analysis Memorandum, that in selecting a tier two world market price, "Commerce examines the facts on the record regarding the nature and scope of the market for that good to determine if that market price would be available to an in-country

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[345] *Id.* at 23-24.
[346] *See Preliminary Results* PDM at 17 (citing, *e.g.*, *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 74 FR 67893, 67906-08 (December 3, 2007), unchanged in *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008) (*Sacks from China*)).
[347] *Id*.
[348] *See Preliminary Results* PDM at 17-19.
[349] *Id*.
[350] *Id*. at 19.
[351] *See* Canadian Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Benchmark Submission," dated November 5, 2018 (Canadian Solar Benchmark Submission) at Exhibit 5.

purchaser."[352] We went on to conclude that "since land is generally not simultaneously 'available to an in-country purchaser' while located and sold out-of-country on the world market, the facts of a given record generally do not permit Commerce to apply a second-tier benchmark for land-use rights. Thus, Commerce finds that land, as an *in situ* property, does not normally lend itself to be considered under this tier."[353]

In determining to use an external benchmark for valuing land in China, we stated that Commerce relied on two important factors in determining whether a country's land prices were suitable benchmarks: (1) the country's geographic proximity to China; and (2) the level of economic development comparable to China.[354] Canadian Solar's proposed land benchmark contains world market prices from locations such as, *e.g.*, Warsaw, Poland; Stockholm, Sweden; and Atlanta, Georgia.[355] We find that locations such as these are not reasonable alternatives to China as locations for Asian production. And while Canadian Solar included consumer price index data collected by the World Bank in its benchmark submission, its submission does not include data that allows us to evaluate these locations' economic comparability with respect to China. For these reasons, we find that it is appropriate to rely on the indexed 2010 Thailand prices from CBRE to value land-use rights in China for the final results.

Comment 7: Ocean Freight Benchmark

- Commerce elected not to rely on the Xeneta ocean freight prices in the *Preliminary Results*, concluding that this data does not consistently include terminal handling charges.[356] As a result, Commerce relied solely on the Maersk ocean freight prices submitted by the petitioner.
- As seen in the Xeneta data, it is clear that the Xeneta ocean freight prices include terminal handling charges.[357]
- Where there is more than one commercially available world market price, Commerce will average these prices to the extent practicable. Accordingly, Commerce must include the Xeneta data in its ocean freight benchmark for the final results.[358]
- Commerce must rely on the Xeneta data alone because the Maersk data contains significant flaws. The Xeneta data is based on actual freight rates based on a large sample of monthly completed contracts, while the Maersk data is comprised of price quotes that have not been finalized or actually agreed upon between parties.[359]
- The Maersk data includes quotes covering only three months of the POR with the petitioner using a Deep-Sea Freight Producer Price Index to calculate the rates for the

[352] *See* Memorandum, "Benchmark Analysis of the Government Provision of Land-Use Rights in China for Countervailing Duty Purposes," dated October 2, 2018 (Land Benchmark Analysis Memorandum) at 27.
[353] *Id*.
[354] *Id*. at 30 (citing *Sacks from China*).
[355] *See* Canadian Solar Benchmark Submission at exhibit 5.
[356] *See* Canadian Solar's Case Brief at 43 (citing *Preliminary Results* PDM at 22).
[357] *Id.* at 44.
[358] *Id*.
[359] *Id*. at 44-45.

remaining months. The CIT has addressed this issue, concluding that Commerce should only use price inflators when there is "not contemporaneous data on the record."[360]

- The Maersk data does not include a single Asian port in its benchmark despite the fact that this is an investigation of Chinese companies.[361] The Maersk data, therefore, is not reflective of the shipment paths of inputs used to produce solar cells.
- The Maersk data is not reflective of the inputs used by Canadian Solar. The Maersk prices for polysilicon defines this commodity as "ores," but polysilicon does not fall within this definition. The Maersk shipping rates for solar glass define this commodity as "glass, glassware," but glassware is not comparable to solar glass.[362]
- The Xeneta freight rates are the best choice for an ocean freight benchmark and Commerce must rely on this data alone for its final results.[363]

Jinko Solar's Comments:

- Commerce erred by relying exclusively on ocean freight data that does not correspond with the actual price of ocean freight during the POR. Commerce discarded the Xeneta ocean freight prices stating that terminal handling charges are not consistently included in the Xeneta shipping rates. Commerce had no other complaints about the quality or credibility of the Xeneta data.[364]
- The Xeneta data satisfies Commerce's regulatory standards. The data is based on the commercial experience of a broad range of importers and is the most contemporaneous data on the record.[365]
- The Maersk data is constructed of estimates based on the commercial experience of one freight forwarder and is based solely on price quotes. Commerce has stated it has a strong preference not to rely on price quotes as they do not represent actual prices.[366]
- The Maersk data is further flawed because it only includes price quotes for three of the 12 months of the POR. For the nine months of the POR for which the Maersk price quotes are missing, the petitioner adjusted this data based on a Deep-Sea Freight Producer Price Index.[367]
- Commerce previously argued, and the CIT agreed, that Commerce only uses price inflators/deflators when there is not contemporaneous data on the record.[368]
- Commerce must use the Xeneta data alone for the final results as it is the only data on the record that is contemporaneous and reflects a commercially available world market price.[369]

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[360] *Id*. at 46 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1323 (CIT 2017)).
[361] *Id.* at 46.
[362] *Id*. at 47.
[363] *Id*.
[364] *See* Jinko Solar's Case Brief at 22.
[365] *Id*. at 22-23.
[366] *Id*. at 24 (citing *Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010), and accompanying IDM at Comment 5).
[367] *See* Jinko Solar's Case Brief at 24-25.
[368] *Id*. at 25 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1323 (CIT 2017)).
[369] *See* Jinko Solar's Case Brief at 26.

- If Commerce continues to use the Maersk data, it should use a blend of the Maersk and Xeneta data to determine the ocean freight benchmark. In averaging the two data sources, Commerce should only use the Maersk data for the three months for which the actual data are on the record.[370]

Petitioner's Rebuttal Comments:

- Canadian Solar and Jinko solar argue that the Xeneta data is a more reliable source than the Maersk data. The respondents' arguments that Commerce should only rely on the Xeneta ocean freight prices should be rejected.[371]
- It is Commerce's longstanding practice to utilize Maersk freight quotes in constructing benchmarks.[372] The courts have upheld Commerce's use of Maersk shipping quotes.[373]
- The respondents argue that some of the Maersk quotes were calculated using the monthly Deep-Sea Freight Producer Price Index. However, this index is designed to track monthly pricing changes specifically for international shipping on a monthly basis, which is precisely what Commerce is attempting to do in constructing monthly international freight prices in the benchmark.[374]
- The petitioner used this price index for certain months because the Maersk website was down. However, this methodology is the best way to capture all shipping charges the respondents should have paid had the input product actually been imported, pursuant to Commerce's regulations, because the Maersk quotes include all shipping charges.[375]
- Accordingly, Commerce should reject the respondents' arguments and continue to use the Maersk shipping quotes in the final results.[376]

Commerce's Position: The petitioner, Canadian Solar, and Jinko Solar each provided POR information to value ocean freight. The petitioner provided international rates for Maersk 40-foot containers, while the respondent companies each provided international rates for 20-foot containers provided by Xeneta. In the *Preliminary Results*, we declined to use an average of the Maersk and Xeneta shipping rates and relied solely on shipping rates from Maersk, concluding that the Xeneta rates did not consistently include terminal handling charges.[377] After further review of the Xeneta rates, we conclude that these shipping rates do consistently include terminal handling charges.[378] As a result, because we now find that we have more than one commercially available world market price on the record to value ocean freight, we are now including the Xeneta rates as a component of the ocean freight benchmark for the final results.[379]

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[370] *Id*. at 26-27 (citing 19 CFR 351.511(a)(2)(ii)).
[371] *See* Petitioner's Rebuttal Brief at 19.
[372] *Id*. at 20 (citing *Solar Cells from China 2012 AR* IDM at 12).
[373] *See* Petitioner's Rebuttal Brief at 20 (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at 1339).
[374] *See* Petitioner's Rebuttal Brief at 20.
[375] *Id*. at 20-21 (citing 19 CFR 351.511(a)(2)(iv)).
[376] *Id.* at 21.
[377] *See Preliminary Results* PDM at 22. Section 351.511(a)(2)(ii) instructs Commerce to average world market prices in LTAR benchmarks when there is more than one commercially available world market price on the record.
[378] *See*, *e.g.*, Canadian Solar Benchmark Submission at Exhibit 6B.
[379] *See* 19 CFR 351.505(a)(2)(ii).

With respect to Jinko Solar's argument that the Maersk shipping rates submitted by the petitioner contained prices for only three months of the POR and that the prices for the remaining months were calculated using a price index, we agree with Jinko Solar that in averaging the Maersk and Xeneta prices, we should only use the Maersk prices for the three months for which there is actual data (*i.e.*, non-inflated shipping prices) on the record and rely on the Xeneta data for the remaining months. While Commerce has used properly inflated non-contemporaneous data in prior proceedings, Commerce has only done so when no contemporaneous data existed on the record.[380] In this review, there are actual ocean freight rates on the record from Xeneta for the months that the Maersk rates have been inflated. Accordingly, and to be consistent with our past practice, to value ocean freight for the final results we will average the Maersk and Xeneta rates for the months where there are actual Maersk prices, and rely solely on the Xeneta data for the months where the Maersk prices are inflated by the price index.

Comment 8: Commerce's Use of "Zeroing" in Benefit Calculations

Canadian Solar's Comments:

- Commerce's decision to "zero" negative benefits is inconsistent with the Act and the Commerce's regulations and must be corrected in the final results.[381]
- Commerce must determine whether a respondent received "a benefit" from the government's provision of goods and/or services. The use of "benefit" in the singular and "goods" in the plural indicates that Commerce must determine the overall benefit derived from all government sales of goods.[382]
- Commerce failed to calculate an overall benefit when it disregarded certain government sales that were priced higher than its chosen benchmark. By failing to measure the true difference between Canadian Solar's prices paid and the benchmark prices for all sales, including those made at higher than the benchmark levels, Commerce's calculation fails to reflect to actual market conditions under which Canadian Solar's input purchases and loan payments were made.[383]
- Commerce's current methodology operates under the false assumption that a benefit is either conferred or not conferred. This reasoning would be logical if a respondent only made a single input purchase and a single sale of finished goods. The provision of inputs for LTAR, however, represents hundreds of transactions.[384]
- Commerce's current methodology leads to the over-collecting of countervailing duties.[385]
- Canadian Solar is not requesting an impermissible offset under section 771(6) of the Act, which sets forth the exclusive list of allowable offsets.[386] Canadian Solar seeks to have

[380] *See Changzhou Trina Solar Energy Co., Ltd. v. United States*, Slip Op. 17-106 Consol. Court No. 16-00157 (CIT 2017).
[381] *See* Canadian Solar's Case Brief at 50.
[382] *Id*. (citing section 771(5)(E)(iv) of the Act; and 19 CFR 351.511(a)(1)).
[383] *Id.* at 51.
[384] *Id*.
[385] *Id*. at 52.
[386] *Id*. at 53 (citing *Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F. 3d 1163, 1174 (Fed. Cir. 1998)).

any alleged benefit it received accurately valued by measuring the true difference between Canadian Solar prices paid and the benchmark prices for those sales.

Petitioner's Rebuttal Comments:

- Commerce should reject Canadian Solar's argument that the agency should refrain from zeroing negative benefits in calculating the subsidy rate for LTAR program. Commerce properly considers the failure to zero such comparisons to be an "impermissible offset" that is not permitted under the statute.[387]
- Canadian Solar argues that the statute's and Commerce's regulations' use of the term "benefit" in the singular and "goods" in the plural "indicates that Commerce must determine the overall benefit derived from all government sales of goods," which requires an offset for any government sales priced higher than chosen benchmarks.[388]
- The use of the terms "benefit" and "goods" in no way requires the offset alleged. An item that is produced for sale, even when represented on a single invoice or as a single item it commonly referred to in the plural as "goods." Canadian Solar attributes a meaning to this term that is in no way required or suggested by the term's usage.[389]
- Under Canadian Solar's logic, if Commerce were investigating the provision of two separate types of goods for LTAR, the agency would be obligated to calculate a single "benefit" that offset any benefit received on one item by any "negative benefit" incurred on the item as both could be considered "goods.[390]
- This would change the operation of the CVD laws, and there is no indication that such an interpretation was intended by the statute.[391]
- Denying Canadian Solar's request is consistent with Commerce's established practice and should be rejected for the final results.[392]

Commerce's Position: We addressed and rejected Canadian Solar's argument in the most recently completed review of this proceeding,[393] and we continue to disagree with Canadian Solar on this issue. The LTAR benefit methodology applied in the *Preliminary Results*, which is to compare the actual input purchases made by the respondents to a world market price, is consistent with the regulations and is Commerce's practice.[394] In a subsidy analysis, a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be asked

[387] *See* Petitioner's Rebuttal Brief at 18 (citing *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017) (*Supercalendered Paper from Canada Expedited Review*), and accompanying IDM at 91-92).
[388] *Id.* at 18 (citing Canadian Solar's Case Brief at 50-51).
[389] *Id.*
[390] *Id*.
[391] *Id*. at 18-19.
[392] *Id*. at 19 (citing, *e.g.*, *Supercalendered Paper from Canada Expedited Review* IDM at Comment 26).
[393] *See Solar Cells from China 2015 AR* IDM at Comment 10.
[394] *See* 19 CFR 351.511(a)(2)(ii); *see also*, *e.g.*, *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42792 (September 12, 2017) (*Solar Products from China 2014-2015 AR*), and accompanying IDM at Comment 9.

by "negative benefits" from other transactions.[395] There is no offsetting credit for transactions that did not provide a subsidy benefit. Such an adjustment is not contemplated under the statute and is inconsistent with Commerce's practice.[396] Therefore, we have made no modifications to the benefit calculations for the final results regarding alleged "negative" benefits.

Comment 9: Creditworthiness

Canadian Solar's Comments:

- In the *Preliminary Results*, Commerce found that five Canadian Solar affiliates were uncreditworthy from 2014 through 2016.[397] Since the *Preliminary Results*, Commerce issued its standard creditworthiness questionnaire to Canadian Solar, which demonstrates that all of the Canadian Solar affiliates in question were creditworthy during this period.
- When examining a company's creditworthiness, Commerce looks to the following factors under 19 CFR 351.505(a)(4)(i):
    - The receipt by the firm of comparable commercial long-term loans;
    - The present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;
    - The firm's recent and past and present ability to meet its costs and fixes financial obligations with its cash flow; and
    - Evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.[398]
- In the third administrative review of this CVD order, Commerce found that Canadian Solar was creditworthy in the years 2010 and 2014 based on the loan received in 2010 and the long-term convertible notes it issued to large institutional investors in the United States in 2014.[399]
- In its creditworthiness questionnaire response in the instant review, Canadian Solar demonstrated that it issued long-term convertible senior notes in 2014 on the NASDAQ exchange.[400] Canadian Solar also demonstrated that it received comparable commercial loans in 2014 as defined under 19 CFR 351.505(a)(4)(i). Following its reasoning in *Solar Cells from China 2014 AR*, Commerce must reverse its preliminary finding and find that all five Canadian Solar entities to be creditworthy in 2014 because it similarly issued long-term notes and received long-term commercial loans.[401]
- In 2015, Canadian Solar received credit ratings from Moody's Investors Service (Moody's), Standard & Poor's Rating Services (S&P), and Fitch Ratings (Fitch).[402]

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[395] *See*, *e.g.*, *Solar Products from China 2014-2015 AR* IDM at Comment 9.
[396] *Id.*; *see also Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015*, 83 FR 27750 (June 14, 2018), and accompanying IDM at Comment 2.
[397] *See* Canadian Solar's Case Brief at 48.
[398] *Id*.
[399] *See Solar Cells from China 2014 AR* IDM at Comment 11.
[400] *See* Canadian Solar's Case Brief at 48-49.
[401] *Id*. at 49.
[402] *Id*.

Canadian Solar also received a comparable commercial loan in 2015. Both of these facts demonstrate Canadian Solar's creditworthiness during 2015.[403]

- In 2016, certain Canadian Solar entities received long-term loans from certain banks.[404]
- Commerce's regulations "directs Commerce to analyze the loan recipient's ability to repay," and the *CVD Preamble* sets for the general principle that "an uncreditworthy firm is one which could not have obtained long-term financing from conventional sources."[405]
- It is irrelevant whether a loan is made to a co-owned affiliate examined in this review or another related Canadian Solar entity. Placing itself in the position of a bank, Commerce must also find all five Canadian Solar entities to be creditworthy during 2016 because a loan to any related Canadian Solar entity indicates that a bank considers the company to be creditworthy.[406]

Petitioner's Rebuttal Comments:

- Certain Canadian Solar affiliates were uncreditworthy in 2014, 2015, and 2016. Canadian Solar makes the argument that certain other affiliates obtained long-term financing from commercial sources during this time period and, therefore, the other affiliate must have been creditworthy. Specifically, Canadian Solar argues that its other entities received commercial lending during the time periods in question.[407]
- Commerce should reject this argument and continue to find certain Canadian Solar affiliates to be uncreditworthy.[408]
- In the original investigation, Commerce explained that the provision of long-term financing from other affiliates is not dispositive that individual affiliates in China are creditworthy.[409]
- In the *Preliminary Results*, Commerce followed this practice and examined the individual creditworthiness of each Chinese entity. Commerce followed its standard methodology and came to the correct conclusion that these entities were not creditworthy and should continue to do so for the final results.[410]

No interested party commented on the creditworthiness of Jinko Solar.

Commerce's Position: Based on an allegation, and financial information regarding the respondent companies, from the petitioner, in the *Preliminary Results*, we found that certain Canadian Solar and Jinko Solar companies to be uncreditworthy within the meaning of 19 CFR 351.505(a)(4)(i)(A) during 2014 through 2016.[411] Commerce's creditworthiness analysis is

[403] *Id*.
[404] *Id*. The identity of these certain Canadian Solar firms and the sources of these long-term loans received in 2016 is business proprietary in nature and are identified in the memorandum regarding the final calculations for Canadian Solar.
[405] *See* Canadian Solar's Case Brief at 49-50 (citing 19 CFR 351.505(a)(4)(i); and *CVD Preamble*, 63 FR at 65366).
[406] *See* Canadian Solar's Case Brief at 50.
[407] *See* Petitioner's Rebuttal Brief at 25 (citing Canadian Solar's Case Brief at 48-50).
[408] *Id*.
[409] *Id*. (citing *Solar Cells from China Investigation* IDM at 56-57).
[410] *See* Petitioner's Rebuttal Brief at 26.
[411] *See Preliminary Results* PDM at 14-17.

conducted pursuant to 19 CFR 351.505(a)(4), and considers a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources.

Our analysis is guided by four regulatory factors: (1) the receipt by the firm of comparable commerce long-term loans; (2) the present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts; (3) the firm's recent and past present ability to meet its costs and fixed financial obligations with its cash flow; and (4) evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.[412]

With respect to our preliminary findings, after we issued the *Preliminary Results*, we provided the company respondents an opportunity to provide financial information regarding their creditworthiness.

Canadian Solar

The petitioner submitted allegations with respect to the creditworthiness of five Canadian Solar cross-owned affiliates (*i.e.*, CS Luoyang; CSI Cells CSI Solar Power; CSI New Energy; and CSI Yancheng) covering the years 2014 through 2016.[413] In the *Preliminary Results*, we stated that as Commerce found CS Luoyang; CSI Cells; CSI Solar Power; and CSI New Energy to be creditworthy based on a previous finding of creditworthiness for these companies during the 2014 administrative review.[414] As a result, with respect to the Canadian Solar companies, we stated that our creditworthiness analysis covers CSI Yancheng for 2014, and all five of the Canadian Solar companies alleged to be uncreditworthy for 2015 through 2016.[415] With respect to CSI Yancheng's creditworthiness for 2014, our analysis of the benefits reported for this company lead us to conclude that CSI Yancheng did not receive any long-term loans or non-recurring benefits to apply an uncreditworthiness discount rate as directed under 19 CFR 351.505(a)(4)(iv). As such, we conclude that a finding on the creditworthiness of CSI Yancheng for 2014 would be moot for the purpose of the instant administrative review. As a result, we focused our analysis on all five of the Canadian Solar companies for 2015 and 2016.

With respect to our analysis covering 2015, Canadian Solar submitted credit rating reports from Fitch, Moody's, and S&P.[416] Under 19 CFR 351.505(a)(4)(i)(A)-(D), Commerce may rely on evidence of the firm's future financial position, such as market studies and country/industry economic forecasts (*e.g.*, credit rating reports) when examining a firm's creditworthiness. Fitch assigned Canadian Solar a rating of "BB," stating that the rating outlook is "stable." Moody's assigned the company a rating of "Ba2," and also stated that the outlook is "stable." Finally, S&P assigned Canadian Solar a rating of "BB" and assessed Canadian Solar's liquidity

[412] *See* 19 CFR 351.505(a)(4)(i)(A)-(D).
[413] *See Preliminary Results* PDM at 14.
[414] *Id*. at 15.
[415] *Id*.
[416] *See* Canadian Solar March 26, 2019 QR at Exhibit 5.

to be "adequate." Moody's stated that it expected the "long-term fundamentals of the solar industry to remain favorable," stated that Canadian Solar's "solar project assets enhance its operating stability and financial flexibility."[417] Moody's went on to say that it expected the "long-term fundamentals of the solar industry to remain favorable, supported by the global drive for clean energy generation and the gradual costs to generate solar power." S&P stated that Canadian Solar "has a strong market position, a good cost position, and operating efficiency that enables rapid growth." S&P also stated that it expected Canadian Solar to continue to grow its market share. Based on the analysis contained in these three credit ratings reports, we find that Canadian Solar was creditworthy during 2015, as these ratings reports lead us to conclude that the company had a "stable" financial outlook in 2015, with "adequate" liquidity to cover its short-term financial obligations. Accordingly, we will adjust any applicable 2015 discount rates for Canadian Solar for the final results.

With respect to Canadian Solar's creditworthiness for 2016, Canadian Solar reported that certain of its affiliates received comparable commercial long-term loans,[418] which would be dispositive evidence of Canadian Solar's creditworthiness under 19 CFR 351.505(a)(4)(i). However, based on our past practice, we find that we cannot rely on these loans to demonstrate the creditworthiness of Canadian Solar as they were not issued to companies within the cross-owned entity.[419] Canadian Solar did not provide any credit rating reports for 2016 for us to consider, so we must analyze the company's reported financial indicators as calculated from its financial statements and accounts.[420]

Our analysis of Canadian Solar's financial indicators leads us to conclude that between 2012 and 2016, Canadian Solar's current ratios ranged between 0.94 and 1.19, with a ratio of 1.02 in 2016. The company's quick ratios for this same period ranged from 0.54 to 0.71, with a ratio of 0.38 in 2016.[421] For this period, Canadian Solar's current and quick ratios (*i.e.*, measures of Canadian Solar's ability to meet its short-term financial obligations) were below Commerce's respective typical benchmarks of 2.0 and 1.0.[422] We note that Canadian Solar's quick ratio, which is more of a liquidity indicator than the current ratio, decreased from 0.61 in 2015 to 0.38 in 2016.[423] This indicates that Canadian Solar experienced increasing difficulties in meeting its short-term obligations during this period. We have found in prior reviews in this proceeding that current and quick ratios below Commerce's benchmarks indicate that a firm could not meet its short-term obligations (including existing short-term loan obligations) without resorting to additional short-term borrowing.[424] The company's cash flows ranged from negative $141.5 million in

[417] *Id*.
[418] *See*, *e.g.*, Canadian Solar's Case Brief at 49.
[419] *See Solar Cells from China 2014 AR* IDM at 44, "With respect to Canadian Solar, although it reported what appears to be long-term commercial loans from non-PRC banks, we note that several of these loans were issued to Canadian Solar affiliates that were not reported as, nor found to be, cross-owned companies in accordance with 19 CFR 351.525(b)(6)(vi). Because such loans were not issued to cross-owned affiliates, we are not including these loans in our creditworthiness analysis."
[420] *See* Canadian Solar's March 26, 2019 QR at Exhibit 2; *see also* 19 CFR 351.505(a)(4)(i)(B)-(C).
[421] *See* Canadian Solar's March 26, 2019 QR at Exhibit 2.
[422] *See*, *e.g.*, *Solar Cells from China 2012 AR* IDM at 53, explaining Commerce's benchmarks for current and quick ratios.
[423] *See* Canadian Solar's March 26, 2019 QR at exhibit 2.
[424] *Id*.

2012 to USD $1.1 billion in 2016. Canadian Solar's retained cash flows were negative $202 million in 2012, increased to a high of $321.3 million in 2014, decreased to $3.5 million in 2015, and decreased further to negative $33.1 million in 2016. Retained cash flow is a measure of a firm's remaining cash after it uses its cash to pay for expenses and debt obligations.

Based on our analysis of Canadian Solar's quick ratio and the companies cash flows, coupled with the fact that they show a deteriorating financial position from 2015, we continue to find that Canadian Solar was uncreditworthy during 2016 within the meaning of 19 CFR 351(a)(4)(i). With respect to the quick ratio, we continue to emphasize the relevance of this ratio under 19 CFR 351(a)(4)(i)(B)-(C) because it is an indicator of a firm's health and its ability to meet its costs and fixed obligations with cash flow.[425] Unlike some of the other information that we consider for this analysis, the meaning of this ratio is clear: either the respondent has liquid funds to cover its upcoming obligations, or it does not. If it does not, the firm has no choice but to accumulate new debt in order to cover existing debt.[426]

Jinko Solar

With respect to Jinko Solar, based on the information provided in the petitioner's allegation, we found that cross-owned affiliates Jinko Solar Co., Ltd. (Jinko Jiangxi) and Jinko Solar Shanghai Management Co., Ltd. (Jinko Shanghai) were uncreditworthy during 2014 through 2016.[427] After we issued the *Preliminary Results*, we provided Jinko Solar an opportunity to submit information regarding its creditworthiness. In its response, Jinko Solar reported that it did not receive ratings from any credit rating agency during 2014 through 2016,[428] nor do we see evidence that the company received comparable commercial loans, as described under 19 CFR 351.505(a)(4)(i), during this period. While Jinko Solar did not report receiving any comparable commercial loans, the record shows that the cross-owned parent company, Jinko Solar Holding Co., Ltd. (Jinko Holding), issued long-term convertible notes on the New York Stock Exchange (NYSE) in 2014, and also entered into a two-year credit agreement with Wells Fargo Bank.[429] We have previously found that the issuance of long-term convertible notes to large institutional investors in the United States to be dispositive evidence of a firm's creditworthiness for that year.[430] In *Solar Cells from China Investigation*, we stated that such notes (which were issued by the cross-owned parent company of the respondent companies) "essentially functioned as long-term commercial loans issued to private, market economy lenders."[431] Therefore, based on our reasoning that we applied in *Solar Cells from China Investigation*, in the instant review we find that the long-term convertible notes that Jinko Holding issued on the NYSE in 2014 is dispositive evidence of Jinko Solar's creditworthiness in 2014. As such, we will revise any applicable 2014 discount rates for the final results.

[425] *See Solar Cells from China Investigation* IDM at 56.
[426] *Id*.
[427] *See Preliminary Results* PDM at 17.
[428] *See* Jinko Solar's March 26, 2019 QR at 9.
[429] *Id*. at Exhibit CR-10 at page 390.
[430] *See Solar Cells from China Investigation* IDM at 55.
[431] *Id*.

As stated above, Jinko Solar stated that it did not receive ratings from any credit rating agency for the period in question, and (other than the long-term convertible notes that were issued in 2014 as described above) the record does not demonstrate that the firm received any long-term loans from conventional sources. Therefore, we must analyze the firm's reported financial indicators as calculated from its financial statements and accounts.[432] Our examination of these financial indicators, both on an individual basis for Jinko Jiangxi and Jinko Shanghai, and on a consolidated basis for the cross-owned parent company Jinko Holding, leads us to conclude that none of these companies met Commerce's typical benchmarks of 2.0 and 1.0 for current and quick ratios, respectively, during 2015 and 2016.[433] While the cash flows for these three companies were all positive for 2015 through 2016, again, we continue to emphasize the importance of the current and quick ratios as these ratios are indicative of whether a firm has the liquidity to meet its upcoming financial obligations. As such, based on Jinko Solar's poor current and quick ratios, we continue find that Jinko Solar was uncreditworthy pursuant to 19 CFR 351.505(a)(1)(4)(i) during 2015 and 2016.

Comment 10: Calculation Methodology for Canadian Solar's Subsidy Rate

Canadian Solar's Comments:

- Commerce must make various corrections to the *Preliminary Results* based on the minor corrections Canadian Solar submitted at verification.[434]
- Commerce made various changes to its methodology for calculating Canadian Solar's subsidy rate from the previous administrative review that improperly inflate Canadian Solar's subsidy rate. Commerce must explain its rationale for changing its methodology.[435]
- Commerce determined that "the companies reported by Canadian Solar are cross-owned in accordance with 19 CFR 351.525(b)(6)(iv)." In the preliminary calculations, however, Commerce failed to accurately apply its cross-ownership determination to the selection of the appropriate sales denominator for various programs.[436]
- Specifically, Commerce calculated Canadian Solar's subsidy rates for certain programs by separately summing the benefits received by each individual affiliate for a program then dividing that amount by that individual affiliate's total sales. Commerce then added these percentages together to get a total subsidy rate for each program.[437]
- Commerce detailed that it attributed "any subsidy received by these companies to the combined sales of these companies, excluding intercompany sales, in accordance with 19 CFR 351.525(b)(6)(ii).[438]

[432] *See* Jinko Solar's March 26, 2019 QR at Exhibits CR-5, CR-6, and CR-11.
[433] *Id*. The values for Jinko Jiangxi and Jinko Shanghai are business proprietary in nature.
[434] *See* Canadian Solar's Case Brief at 2.
[435] *Id*.
[436] *Id*. at 3 (citing *Preliminary Results* PDM at 8-9).
[437] *Id*. at 3. We note that while Canadian Solar bracketed Commerce's methodology as business proprietary in its case brief, the methodology Commerce used to calculate Canadian Solar's subsidy rates is not business proprietary information.
[438] *See* Canadian Solar's Case Brief at 3.

- By contrast, in the most recently completed administrative review, Commerce added the total benefits received by every Canadian Solar affiliate and then divided this amount by Canadian Solar's total sales during the POR. Here, Commerce provided no explanation for its change in methodology, nor would any explanation be rational because Commerce's new method inflates Canadian Solar's subsidy rate.[439]
- In the most recently completed administrative review, Commerce properly used Canadian Solar's total sales to calculate the subsidy rate for each program. Commerce provided no explanation for this shift in methodology and must return to its calculation method to use total sales as its denominator.[440]

No other interested party commented on this issue.

Commerce's Position: At the start of the verification of Canadian Solar's questionnaire responses, we accepted corrections to its questionnaire responses as we considered these corrections to be "minor."[441] As such, we agree with Canadian Solar that for the final results we will calculate Canadian Solar's final subsidy margins based on the minor corrections we examined at verification.

Regarding Canadian Solar's argument that we changed our standard methodology from the prior review when calculating Canadian Solar's subsidy rates, we agree with Canadian Solar that we inadvertently deviated from our past practice. Where appropriate, we have made corrections to both Canadian Solar's and Jinko Solar's subsidy calculations with respect to this issue for the final results.[442]

Comment 11: Canadian Solar's Denominator for the Golden Sun Program

Canadian Solar's Comments:

- In the *Preliminary Results*, Commerce used the total sales for producers as the denominator to calculate Canadian Solar's margin for the Golden Sun Program. Grants from this program, however, are beneficial to both producers and their input suppliers. Commerce should have used to total sales for all Canadian Solar affiliates for the denominator.[443]
- Commerce's regulations dictate that "{i}f a subsidy is tied to the production or sale of a particular product; the Secretary will attribute the subsidy only to that product."[444]
- This is not the case where funds from the Golden Sun Program "are provided to promote the development of China's photovoltaic power industries (which includes the

[439] *Id*. at 5.
[440] *Id*. at 6.
[441] *See* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Verification of the Questionnaire Responses Submitted by Canadian Solar Inc., dated July 22, 2019.
[442] *See* Canadian Solar's and Jinko Solar's calculations for the final results.
[443] *Id*. at 54.
[444] *Id*. (citing 19 CFR 351.525(b)(5)(i)).

development of solar cells)," and consequently these funds were best classified as policy-oriented grants.[445]

- At the verification of Canadian Solar's questionnaire responses, "Company officials stated that this program regards solar demonstration projects in remote areas without access to an electrical grid." Commerce, however, mistakenly viewed this program as tied to the production of solar-powered project{s}, rather than the broader goal of supporting the development of China's photovoltaic power industries.[446]
- Policy-oriented grants, unlike product specific grants, are much broader and encompass anything that supports the goal of the underlying policy. The CIT previously found that "creating photovoltaic power generation necessitates the production of solar cells." Input suppliers, therefore, also benefitted because as an untied subsidy, grants from this program benefited all production related to photovoltaic power generation.[447]
- The CIT recognized "the current benefit of an untied subsidy will be attributed to the firm's total sales."[448] Therefore, Commerce must use the total sales of all of Canadian Solar's affiliates for its denominator to calculate Canadian Solar's subsidy rate for the final results.[449]

No other interested party commented on this issue.

Commerce's Position: We addressed and rejected Canadian Solar's argument on this issue in *Solar Cells from China 2015 AR*,[450] and Canadian Solar has provided no new argument that would make us reconsider our finding in that review. Canadian Solar is correct that in *Solar Cells from China 2015 AR*, we stated that funds from the Golden Sun program are provided to promote the development of photovoltaic power industries in China (including the development of solar cells), and we found that funds from this program are not tied solely to solar power generation projects.[451] As a result, we stated that subsidy is untied and attributable to Canadian Solar's total sales.[452]

However, in *Solar Cells from China 2015 AR*, we also stated in that review that we disagreed with Canadian Solar's argument that we should attribute subsidies from this program across the sum of the total sales of Canadian Solar's cross-owned producers and input suppliers with respect to this program.[453] In the instant review, similar to *Solar Cells from China 2015*, we have found certain producers of subject merchandise and input producers that are affiliated with

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[445] *See* Canadian Solar's Case Brief at 54 (citing *Solar Cells from China 2015 AR* IDM at Comment 9); *see also* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Verification of the Questionnaire Responses Submitted by Canadian Solar Inc." dated (July 22, 2019) (Canadian Solar's Verification Report).
[446] *See* Canadian Solar's Case Brief at 54 (citing Canadian Solar's Verification Report at 5-6; and *Preliminary Results* PDM at 46).
[447] *See* Canadian Solar's Case Brief at 54-55 (citing *Changzhou Trina Solar*, 352 F. Supp. 3d at 1326).
[448] *Id*.; *see also Essar Steel v. United States*, 678 F. 3d at 1274.
[449] *See* Canadian Solar's Case Brief at 55.
[450] *See Solar Cells from China 2015 AR* IDM at Comment 9.
[451] *Id*.
[452] *Id*.
[453] *Id*.

Canadian Solar to be cross-owned, as defined by 19 CFR 351.525(b)(6)(vi).[454] Consistent with the requirements of 19 CFR 351.525(b)(6), for the reported producers of subject merchandise, we attributed any subsidy received by these companies to the combined sales of these companies, excluding intercompany sales, as instructed by 19 CFR 351.525(b)(6)(ii).[455] For input producers, we attributed subsidies received by the input producers to the combined sales of the input and downstream products produced by the input producer and the downstream producer, pursuant to 19 CFR 351.525(b)(6)(iv).[456] As such, our calculation of the benefit that Canadian Solar received under this program is consistent with Commerce's regulations. Canadian Solar ignores the fact that that the grants from this program were not made to Canadian Solar's input suppliers.

We note that although a subsidy to a producer may indirectly benefit its input supplier through increasing the demand or market for the inputs, Commerce does not attribute subsidies on this indirect basis. As such, we conclude that it would not be appropriate to adjust the denominator for this program as argued by Canadian Solar.

Comment 12: Entered Value Adjustment Regarding Canadian Solar

- In the *Preliminary Results*, Commerce failed to make an entered value adjustment to the subsidy rate denominator as requested by Canadian Solar.[457] Commerce must make this adjustment because Canadian Solar's sales to the United States were made through an affiliated company, which then resold the subject merchandise at a marked-up price to unaffiliated customers in the United States.[458]
- Commerce has a practice of making this adjustment after satisfying itself that:
  1. The price on which the alleged subsidy is based differs from the U.S. invoiced prices;
  2. The exporters and the party that invoices the customer are affiliated;
  3. The U.S. invoice establishes the customs value to which CVD duties are applied;
  4. There is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment;
  5. The merchandise is shipped directly to the United States; and
  6. The invoices can be tracked as back-to-back invoices that are identical except for price.[459]
- During the POR, Canadian Solar's sales of subject merchandise to the United States were via an affiliated company, which resold the subject merchandise to unaffiliated customers in the United States. Canadian Solar satisfies each of the six criteria listed above and an entered value adjustment is appropriate.[460]

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[454] *See Preliminary Results* PDM at 8.
[455] *Id*. at 8-9.
[456] *Id*. at 9.
[457] *See* Canadian Solar's Case Brief at 55.
[458] *Id*.
[459] *Id.* at 56 (citing *Multilayered Wood Flooring from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 64313 (October 18, 2011), and accompanying IDM at 7-8).
[460] *Id.* at 56-57.

- Commerce refused to grant Canadian Solar this adjustment on the basis that Canadian Solar did not demonstrate that there is a higher customs value for sales made through its affiliated exporter.[461]
- Commerce cites to *Aluminum Foil from China* as support for its claim that Canadian Solar must be able to demonstrate a mark-up on all of its sales. Commerce is correct that it first expanded its one-to-one correlation requirement to apply to all sales in *Aluminum Foil from China*.[462] However, there are faults in Commerce's reasoning in that case and this issue is currently on appeal before the CIT.[463]
- In *Aluminum Foil from China*, Commerce did not list the requirement that the mark-up must apply to every sale in the six criteria it examined based on its past practice. Commerce instead added this requirement on as an additional requirement without citing to any legal authority in support of its change in practice.[464] Commerce must explain its rationale for changing its methodology, and that rationale must be reasonable.[465]
- In *Coated Free Sheet Paper from China*, Commerce elected to make an entered value adjustment noting that the value of the subject merchandise entering the United States was greater than the sales revenue due to a mark-up charged by the affiliated, third-country exporter of the merchandise to the United States, and the sales value to which the Chinese subsidies being attributed did not include the mark-up. Commerce noted that the failure to make the adjustment in *Coated Free Sheet Paper from China* would result in the collection of countervailing duties that exceeded the subsidy.[466]
- This is the exact situation here, where, regardless of whether individual transactions were not marked up, the total value of subject merchandise entering the United States is greater than the revenue received by Canadian Solar due to the mark-up by its affiliated exporter.[467]
- If Commerce continues to include the additional {requirement} that all sales include a mark-up, Canadian Solar met Commerce's test to establish that there was a mark-up on all sales as set forth by Commerce in the most recently completed administrative review.[468]
- In the instant review, Commerce merely found that Canadian Solar failed to demonstrate a mark-up on all sales because it only submitted documentation for one sample sale.[469] Commerce did not mention that it required additional supporting documentation to show that all sales were marked-up in the previous review. It is unreasonable for Commerce to expect Canadian Solar to submit sales documentation for every sale.

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[461] *Id*. at 57.
[462] *Id*. at 57-58 (citing *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9274 (March 5, 2018) (*Aluminum Foil from China*), and accompanying IDM at Comment 14).
[463] *Id.* at 58 (citing *Jiangsu Zhongji Lamination Materials Co., Ltd. et al. v. United States*, CIT No. 18-00089).
[464] *See* Canadian Solar's Case Brief at 58 (citing *Aluminum Foil from China* IDM at Comment 14).
[465] *Id.* (citing *NMB Singapore Ltd. v. United States*, 557 F. 3d 1136 (Fed. Cir. 2009)).
[466] *Id.* at 58-59 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 59212 (September 27, 2010) (*Coated Free Sheet Paper from China*), and accompanying IDM at Comment 32).
[467] *Id.* at 59.
[468] *Id*.
[469] *Id*. (citing *Preliminary Results* PDM at 11).

- If Commerce found Canadian Solar's explanation to be deficient, it was required to ask additional supplemental questions as required by section 782(d) of the Act.[470] Commerce made no effort to clarify this information, nor did it attempt to verify Canadian Solar's claims.
- The facts on the record of demonstrate that all of the factors that Commerce regularly considers weigh in favor of Commerce making an entered value adjustment.[471]

Petitioner's Rebuttal Comments:

- Commerce should deny Canadian Solar's request for an adjustment to the sales denominator in its subsidy rate calculation. Commerce's longstanding practice is to use the FOB sales value for the denominator in the subsidy calculation.[472]
- While Commerce has, in the past, made the adjustment requested by Canadian Solar, Commerce has done so only in limited circumstances. Canadian Solar has provided insufficient information to meet Commerce's high standard.[473]
- Commerce's regulations only allow for an offset related to subsidies for movement expenses.[474]
- The *CVD Preamble* describes a similar adjustment that Commerce attempted to use in the past, where Commerce would "adjust the calculated *ad valorem* subsidy rate based on a ratio of the invoice value of exports to the United States to the f.o.b. value of exports to the United States."[475] Only one respondent had the necessary information to do so and Commerce reverted to its standard FOB practice.[476]
- No adjustment is warranted here. Canadian Solar cites only to investigations in its case brief. Once respondents are under an order and participating in administrative review, the standard for respondents to demonstrate that an adjustment is warranted must necessarily be even higher because of the potential for manipulation.[477]
- Canadian Solar failed to demonstrate that the adjustment is warranted in an administrative review and submitted only one sales tract to justify the adjustment.[478]
- Canadian Solar submitted the same information it did in the prior administrative review of this CVD order and Commerce rejected it. Commerce should continue to do so in this administrative review.[479]

Commerce's Position: We addressed and rejected a similar argument from Canadian Solar in the most recently completed review of this proceeding.[480] Commerce's practice is to use the

[470] *Id.* at 60.
[471] *Id*.
[472] *See* Petitioner's Rebuttal Brief at 21.
[473] *Id*.
[474] *Id*. (citing 19 CFR 351.525(a)).
[475] *Id.* (citing *CVD Preamble*, 63 FR at 64348, 65399).
[476] *Id*.
[477] *Id.* at 22.
[478] *Id*.
[479] *Id.* at 22-23 (citing *Solar Cells from China 2015 AR* IDM at Comment 12).
[480] *See Solar Cells from China 2015 AR* IDM at Comment 12.

FOB sales value for the denominator in its subsidy calculations.[481] However, in limited circumstances, Commerce has adjusted the calculation of the subsidy rate when the sales value used to calculate that subsidy rate does not match the entered value of the subject merchandise, *e.g.*, where subject merchandise is exported to the United States with a mark-up from an affiliated company, and where the respondent can demonstrate that: 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; 2) the exporters and the party that invoices the customer are affiliated; 3) the U.S. invoice establishes the customs value to which the CVD duties are applied; 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; 5) the merchandise is shipped directly to the United States; and 6) the invoices can be tracked as back-to-back invoices that are identical except for price.[482]

Commerce's practice of granting a sales adjustment is limited to instances where a respondent can demonstrate that all of its sales to the United States met the six criteria listed above. This is to satisfy Commerce that the sales value adjustment properly reflects an upward adjustment to the sales value of all merchandise that entered the United States, and on which Customs and Border Protection assessed dutiable value.[483]

In *Aluminum Foil from China*, we denied granting an entered value adjustment to one of the responding companies stating that, among the other criteria listed, in order to qualify for an adjustment to its sales denominator, a respondent must be able to demonstrate that there is a higher customs value for *all* of its U.S. sales.[484] Canadian Solar contends that it qualifies for this adjustment because it satisfies each of the six criteria listed above.[485] However, our review of the information Canadian Solar submitted to support its claim leads us to conclude otherwise. Generally, Canadian Solar has not demonstrated that there is a higher customs value for all of its U.S. sales. Specifically, Canadian Solar submitted only one sample sale to support its claim that it qualifies for this adjustment. Canadian Solar has provided no new information for us to consider in its case brief for granting this adjustment for the final results.

With respect to Canadian Solar's argument that we should have issued a supplemental questionnaire to allow Canadian Solar to address deficiencies in its response, as instructed by section 782(d) of the Act, we note that this section of the Act regards information that is requested by Commerce:

> If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency . . .

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[481] *See* 19 CFR 351.525(a).
[482] *See*, *e.g.*, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 59212 (September 27, 2010), and accompanying IDM at Comment 32; *see also Aluminum Foil from China* IDM at Comment 14.
[483] *See Aluminum Foil from China* IDM at Comment 14.
[484] *Id.* (emphasis added).
[485] *See* Canadian Solar's Case Brief at 55.

We note that we did not request the information Canadian Solar submitted regarding its request for an entered value adjustment and, therefore, section 782(d) of the Act does not apply in this instance.

Comment 13: Clerical Errors in Canadian Solar's Benefit Calculations

- Commerce must correct sales values for certain Canadian Solar affiliates, calculations for certain loan benefits, and benefit calculations for certain land-use rights.[486]

No other interested party commented on this issue.

Commerce's Position: In the *Preliminary Results*, we made certain inadvertent clerical errors when calculating Canadian Solar's subsidy benefits. We have corrected these errors for the final results, which are discussed in Canadian Solar's final calculations memorandum.

XIII. 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 results in the *Federal Register*.

☒ Agree ☐ Disagree

8/19/2019

X

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[486] *Id.* at 62.

Appendix

Non-Selected Companies Under Review

1. Baoding Jiasheng Photovoltaic Technology Co., Ltd.
2. Baoding Tianwei Yingli New Energy Resources Co., Ltd.
3. Beijing Tianneng Yingli New Energy Resources Co., Ltd.
4. Canadian Solar (USA) Inc.
5. Changzhou Trina Solar Energy Co., Ltd.
6. Changzhou Trina Solar Yabang Energy Co., Ltd.
7. Chint Solar (Zhejiang) Co., Ltd.
8. Dongguan Sunworth Solar Energy Co., Ltd.
9. ERA Solar Co. Limited
10. ET Solar Energy Limited
11. Hainan Yingli New Energy Resources Co., Ltd.
12. Hangzhou Sunny Energy Science and Technology Co., Ltd.
13. Hengdian Group DMEGC Magnetics Co., Ltd.
14. Hengshui Yingli New Energy Resources Co., Ltd.
15. JA Solar Technology Yangzhou Co., Ltd.
16. JA Technology Yangzhou Co., Ltd.
17. Jiangsu High Hope Int'l Group
18. Jiawei Solarchina (Shenzhen) Co., Ltd.
19. Jiawei Solarchina Co., Ltd.
20. JingAo Solar Co., Ltd.
21. Jinko Solar (U.S.) Inc.
22. Jinko Solar International Limited
23. Lightway Green New Energy Co., Ltd.
24. Lixian Yingli New Energy Resources Co., Ltd.
25. Luoyang Suntech Power Co., Ltd.
26. Nice Sun PV Co., Ltd.
27. Ningbo Qixin Solar Electrical Appliance Co., Ltd.
28. Risen Energy Co., Ltd.
29. Shanghai BYD Co., Ltd.
30. Shanghai JA Solar Technology Co., Ltd.
31. Shenzhen Glory Industries Co., Ltd.
32. Shenzhen Topray Solar Co., Ltd.
33. Sumec Hardware & Tools Co., Ltd.
34. Systemes Versilis, Inc.
35. Taizhou BD Trade Co., Ltd.
36. tenKsolar (Shanghai) Co., Ltd.
37. Tianjin Yingli New Energy Resources Co., Ltd.
38. Toenergy Technology Hangzhou Co., Ltd.
39. Trina Solar (Changzhou) Science & Technology Co., Ltd.
40. Wuxi Suntech Power Co., Ltd.
41. Yancheng Trina Solar Energy Technology Co., Ltd.
42. Yingli Energy (China) Co., Ltd.

43. Yingli Green Energy Holding Company Limited
44. Yingli Green Energy International Trading Company Limited
45. Zhejiang Era Solar Technology Co., Ltd.
46. Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company