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

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

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China

I. SUMMARY

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

General Issues

Comment 1: Whether it is Unlawful to Investigate Uninitiated Programs
Comment 2: Whether it is Appropriate to Collect Cash Deposits on Entries Subject to Preliminary Affirmative Critical Circumstances
Comment 3: Whether Commerce Must Consider 301 Duties in a Critical Circumstances Determination

Program-Specific Issues

Comment 4: Export Buyer's Credit (EBC) Program
4.a. Whether to Continue to Apply Adverse Facts Available (AFA) to the EBC Program
4.b. The Appropriate AFA Rate for the EBC Program
Comment 5: Provision of Monoethylene Glycol (MEG) and Purified Terephthalic Acid (PTA) for Less Than Adequate Renumeration (LTAR)
5.a. Whether MEG and PTA Producers are Authorities
5.b. Whether MEG and PTA Are Specific to the Polyester Textured Yarn Industry

II. BACKGROUND

A. Case History

On May 3, 2019, Commerce published its *Preliminary Determination*.[1] The selected mandatory respondents in this investigation are Fujian Billion Polymerization Fiber Technology Industrial Co., Ltd. (Fujian Billion), Jiangsu Shenghong Textile Imp & Exp Co. (Jiangsu Textile), Suzhou Shenghong Fiber Co., Ltd. (Shenghong Fiber), and Suzhou Shenghong Garmant Development Co (Suzhou Garmant). In the *Preliminary Determination*, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we aligned the final countervailing duty (CVD) determination with the final antidumping duty (AD) determination. On the same day, based on Nan Ya Plastic Corporation, America and Unifi Manufacturing, Inc.'s (collectively, the petitioners) new subsidy allegations (NSAs),[2] we initiated an investigation into two new programs and into an allegation of uncreditworthiness for Shenghong Fiber.[3] Following the *Preliminary Determination*, the petitioners submitted ministerial error allegations on May 6, 2019.[4] On May 30, 2019, Commerce released its analysis of the ministerial error allegations, finding that one of the errors alleged by the petitioners did not constitute a significant ministerial

[1] *See Polyester Textured Yarn from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 19040 (May 3, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).
[2] *See* Petitioners' New Subsidy Allegation, dated March 21, 2019.
[3] *See* Memorandum, "Decision Memorandum on New Subsidy Allegation sand Uncreditworthy Allegation," dated concurrently with the *Preliminary Determination*.
[4] *See* Petitioners' Letter, "Original Investigation of Polyester Textured Yarn from the People's Republic of China – Petitioners' Ministerial Error Comments," dated May 6, 2019.

error, and the other alleged error was methodological in nature.[5] Between June 21 and June 27, 2019, we conducted verification of the Government of China's (GOC), Fujian Billion's, and Billion Development (Hong Kong) Limited's (Billion Development) questionnaire responses and, on August 5, 2019, we released the verification reports.[6] On August 22, 2019, Commerce released its Post-Preliminary Analysis.[7]

Interested parties timely submitted case briefs concerning case-specific issues on August 30, 2019.[8] On September 11, 2019, the petitioner, the GOC, and Fujian Billion submitted rebuttal briefs.[9] On October 23, 2019, Commerce conducted a public hearing.[10]

B. Postponement of Final Determination

Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019.[11] The revised deadline for the final determination of this investigation was July 10, 2019. In the *Preliminary Determination*, Commerce aligned the final determination of this investigation with final determination of the companion AD investigation of yarn from China, which was September 9, 2019.[12] On July 1, 2019, Commerce postponed the deadline of the final determination to November 13, 2019.[13]

[5] *See* Memorandum, "Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China: Ministerial Error Allegations in the Preliminary Determination," dated May 30, 2019 (Ministerial Error Memorandum).
[6] *See* Memoranda, "Verification of the Questionnaire Responses of the Government of China"; and "Verification of the Questionnaire Responses of Fujian Billion Polymerization Fiber Technology Industrial Co., Ltd and Billion Development (Hong Kong) Limited" (Fujian Billion Verification Report), both dated August 5, 2019.
[7] *See* Memorandum, "Post-Preliminary Analysis of Countervailing Duty Investigation: Polyester Textured Yarn from the People's Republic of China," dated August 22, 2019 (Post-Preliminary Analysis).
[8] *See* GOC's Letter, "Polyester Textured Yarn from China; CVD Investigation GOC Case Brief" (GOC Case Brief); Fujian Billion's Letter, "Polyester Textured Yarn from the People's Republic of China – Billion Case Brief" (Fujian Billion Case Brief); Shenghong Fiber's Letter, "Polyester Textured Yarn from China; Case Brief" (Shenghong Fiber Case Brief); Fil Promptext Yarns, Inc., Antex Knitting Mills Div. Matchmaster Dye & Finishing, Inc., Chori America Inc., and CS America, Inc. (collectively, Yarn Importers) Letter, "Polyester Textured Yarn from the People's Republic of China: Countervailing Duty Case Brief" (Yarn Importers Case Brief); Petitioners' Letter, "Polyester Textured Yarn from the People's Republic of China: Petitioners' Case Brief" (Petitioners' Case Brief), all dated August 30, 2019.
[9] *See* Petitioner's Letter, "Polyester Textured Yarn from the People's Republic of China – Petitioners' Rebuttal Brief" (Petitioners' Rebuttal Brief); Polyester Textured Yarn from China; CVD Investigation GOC Rebuttal Brief" (GOC Rebuttal Brief), and; Fujian Billion's Letter, "Polyester Textured Yarn from the People's Republic of China – Billion Rebuttal Case Brief" (Fujian Billion's Rebuttal Brief), all dated September 11, 2019.
[10] *See* Commerce's Letter, "Polyester Textured Yarn from the People's Republic of China: Notice of Hearing," dated October 15, 2019.
[11] *See* Memorandum, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.
[12] *See Preliminary Determination* at "Alignment."
[13] *See Polyester Textured Yarn from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value: Postponement of Final Determination and Extension of Provisional Measures*, 84 FR 31297 (July 1, 2019).

C. Period of Investigation

The POI is January 1, 2017 through December 31, 2017.

III. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

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

Where Commerce determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that Commerce will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, Commerce may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from 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. In doing so, Commerce is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.[14] 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 countervailing duty investigation, a previous administrative review, or other information placed on the record.[15]

Section 776(c) of the Act provides that, in general, when Commerce relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[16] Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[17]

Finally, under section 776(d) of the Act, when using an adverse inference when selecting from the facts otherwise available, Commerce may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or if there is no same

[14] *See* section 776(b)(1)(B) of the Act.
[15] *See also* 19 CFR 351.308(c).
[16] *See also* 19 CFR 351.308(d).
[17] *See* Statement of Administrative Action, H.R. Doc. No. 316, 103rd Congress, 2d Session (1994) (SAA) at 870.

or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that Commerce considers reasonable to use.[18] The statute also makes clear that, when selecting from the facts otherwise available with an adverse inference, Commerce is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.[19]

Commerce relied on facts available, including AFA, for several findings in the *Preliminary Determination* and the Post-Preliminary Analysis. For a description of these decisions, *see* the *Preliminary Determination* and the Post-Preliminary Analysis.[20] Commerce has not made any changes to its preliminary decisions regarding the use of facts otherwise available and AFA. For a description of these decisions, *see* the *Preliminary Determination* and the Post-Preliminary Analysis. For further discussion regarding market distortion for MEG and PTA, *see* Comment 5. below. For further discussion of the AFA determination regarding electricity, *see* Comment 6. below. However, Commerce has made certain modifications to the calculated total AFA rate, as discussed below in Comment 9.

IV. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to the allocation period, eight years, and the allocation methodology used in the *Preliminary Determination*.[21] No issues were raised by interested parties in case briefs regarding the allocation period or the allocation methodology.

B. Attribution of Subsidies

Commerce made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies.[22]

C. Denominators

During verification, Fujian Billion reported minor adjustments to its total sales and total export sales of subject merchandise during the POI and AUL.[23] For the final determination, Commerce used these revised figures to calculate the countervailable subsidy rates for Fujian Billion.[24]

[18] *See* section 776(d)(1) of the Act.
[19] *See* section 776(d)(3) of the Act.
[20] *See* PDM at 5-24 ; *see also* Post-Preliminary Analysis at 3-13.
[21] *See* PDM at 27.
[22] *Id.* at 27-29.
[23] *See* Fujian Billion Verification Report at VE-1.
[24] *See* Memorandum, "Countervailing Duty Investigation of Polyester Textured Yarn from China: Final Determination Calculations for Fujian Billion," dated concurrently with this memorandum (Fujian Billion Final Calculation Memorandum).

D. Loan Interest Rate Benchmarks and Discount Rates

Commerce made no changes to the loan interest rate benchmarks and discount rates used in the *Preliminary Determination.*[25]

V. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

We made no changes to our *Preliminary Determination* and our Post-Preliminary Analysis with respect to the methodology used to calculate the subsidy rates for the following programs, except where noted below and for the incorporation of revised denominators for Fujian Billion, where appropriate.[26] For descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination* and the Post-Preliminary Analysis. Except where noted below, no issues were raised regarding these programs in the parties' case briefs. The final program rates are as follows:

1. *Export Buyer's Credit Program*

We have made no changes to our methodology for determining the AFA rate for this program for Fujian Billion. For further discussion, *see* Comment 4 below. The final subsidy rate for this program is 10.54 percent *ad valorem*.

2. *Provision of MEG for LTAR*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under this program.[27] The final subsidy rate for this program is 0.89 percent *ad valorem*.

3. *Provision of PTA for LTAR*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under this program.[28] The final subsidy rate for this program is 13.03 percent *ad valorem*.

4. *Provision of Electricity for LTAR*

As discussed in Comment 10, we made changes to include purchases of electricity from a third-party source in calculating the subsidy rate for this program for Fujian Billion. The final subsidy rate is 5.84 percent *ad valorem*.

[25] *See Preliminary Determination* PDM at 29-32.
[26] *See* Section IV.C., above.
[27] *See* Fujian Billion Final Calculation Memorandum.
[28] *Id.*

5. *Policy Loans to the Polyester Textured Yarn Industry*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under this program.[29] The final subsidy rate for this program is 0.62 percent *ad valorem*.

6. *Export Assistance Grants*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under this program.[30] The final subsidy rate for this program is 0.14 percent *ad valorem*.

7. *Income Tax Reductions for High- and New-Technology Enterprises (HNTEs)*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under this program.[31] The final subsidy rate for this program is 0.42 percent *ad valorem*.

8. *Income Tax Deduction for Research and Development Expenses Under the Enterprise Income Tax Law*

As discussed in Comment 11, we made changes to the methodology used to calculate the subsidy rate for Fujian Billion for this program. The final subsidy rate for this program is 0.05 percent *ad valorem.*

9. *"Other" Subsidies*

We made no changes to our methodology for calculating a subsidy rate for Fujian Billion under various self-reported programs.[32] The final subsidy rate for these programs is 0.65 percent *ad valorem*.

B. Programs Determined Not to Confer a Measurable Benefit to Fujian Billion

Commerce made no changes to its *Preliminary Determination* with regard to programs determined not to confer a measurable benefit to Fujian Billion during the POI.[33]

1. Special Fund for Energy Savings Technology Reform
2. Import Tariff and VAT Reductions for Foreign-Invested Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries
3. VAT Refunds for FIEs Purchasing Domestically-Produced Equipment
4. Certain Self-Reported Subsidy Programs

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *See Preliminary Determination* PDM at 41-42.

C. Programs Determined Not to Be Used by Fujian Billion

Commerce made no changes to its *Preliminary Determination* and its Post-Preliminary Analysis with regard to programs determined not to be used by Fujian Billion during the POI.[34]

1. State Key Technology Renovation Fund
2. Subsidies for Development of Famous Brands and China World Top Brands
3. Small and Medium Enterprise (SME) International Market Exploration and Development Fund
4. SME Technology Innovation Fund
5. Government Grants to Fujian Billion
6. Export Loans from State-Owned Banks
7. Export Seller's Credits
8. Land in Economic Development Zones for LTAR
9. Export Credit Guarantees

VI. ANALYSIS OF COMMENTS

General Issues

Comment 1: Whether it is Unlawful to Investigate Uninitiated Programs

GOC's Case Brief:

- Under the statute, Commerce may only investigate programs after sufficient evidence of financial contribution, specificity and benefit is found or presented. The petitioners did not demonstrate the elements of a countervailable subsidy, nor was there a lawful initiation by Commerce of additional "Other Subsidies." Under Commerce's regulations, it has no authority to investigate these new, purported "Other Subsidies."
- Articles 11.1 and 11.2 of the World Trade Organization (WTO) Subsidies and Countervailing Measures (SCM) Agreement provide that an investigation of any alleged subsidy may be initiated only upon written application that must include sufficient evidence of a subsidy, injury, and a causal link between the subsidy and alleged injury.

Petitioners' Rebuttal Brief:

- Commerce's investigation of respondents' other subsides is lawful and should be included in the final determination. The GOC's assertion that the 'other subsidies' were not included in initial questionnaires is contradicted clearly by the record[35] and the GOC refused to comply with requests for information regarding the other assistance reported by the respondents. Thus, the application of AFA in Commerce's *Preliminary Determination* is warranted.
- Commerce correctly applied U.S. law in its investigations into the other reported subsidies. The GOC's claim of unlawful investigation is unsubstantiated and Commerce's preliminary

[34] *Id.* at 43; *see also* Post-Preliminary Analysis at 16.

[35] *See* Petitioners' Case Brief at 69 (citing Commerce's Letter, "Investigation of Polyester Textured Yarn from the People's Republic of China: Countervailing Duty Questionnaire," dated December 11, 2018 (Initial Questionnaire), Section II, Program-Specific Questions at Question F).

determination regarding other subsidies was consistent with U.S. law, the agency's regulations and prior practice[36] and should be affirmed.

Commerce's Position: Commerce disagrees with the GOC's interpretation of the statute and Commerce's regulations regarding the requirements of lawful initiation of investigation of other subsidies and the scope of Commerce's authority. Section 775 of the Act states that if, during a proceeding, Commerce discovers "a practice that appears to provide a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition," Commerce "*shall* include the practice, subsidy, or subsidy program if the practice, subsidy or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding" (emphasis added). Thus, section 775 of the Act imposes an affirmative obligation on Commerce to "consolidate in one investigation … all subsidies known by petitioning parties to the investigation or by the {Commerce} relating to {subject} merchandise" to ensure "proper aggregation of subsidization practices."[37] Commerce's regulations carve out a limited exception to its obligation to investigate what "appear{}" to be countervailable subsidies: when Commerce discovers a potential subsidy too late in a proceeding, it may defer its analysis of the program until a subsequent review, if any.[38] Moreover, Commerce has broad discretion to determine which information it deems relevant to its determination, and to request that information.[39]

Thus, consistent with the CIT's holding in *Changzhou I*,[40] we find that Commerce's "other assistance" question enables Commerce to effectuate its obligation to investigate subsidies that it discovers that appear to be countervailable in the course of a proceeding and is consistent with its broad discretion to seek information it deems relevant to its determination.

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[36] *See* Petitioners' Rebuttal Brief at 69-70 (citing section 775 of the Act; and 19 CFR 351.311(b)); *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*), and accompanying Issues and Decision Memorandum (IDM) at 23 (citing *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 74), and *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).

[37] *See* S. Rep. No. 96-249, at 98 (1979); *see also Allegheny Ludlum Corp. v. United States*, 112 F. Supp. 2d 1141, 1150 n.12 (CIT 2000) (*Allegheny I*) ("Congress … clearly intended that all potentially countervailable programs be investigated and catalogued, regardless of when evidence on these programs became reasonably available.").

[38] *See* 19 CFR 351.311(c).

[39] *See Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1341 (CIT 2016) (*Changzhou I*) (holding that Commerce has "independent authority, pursuant to {section 775 of the Act}, to examine additional subsidization in the production of subject merchandise," and this "broad investigative discretion" permits Commerce to require respondents to report additional forms of governmental assistance); *see also*, *e.g.*, *Ansaldo Componeti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986); *Acciai Speciali Terni S.p.A.*, 26 CIT 148, 167 (2002).

[40] *See Changzhou I*, 195 F. Supp. 3d at 1346 ("Commerce's inquiry concerning the full scope of governmental assistance provided by the {Government of China} and received by the Respondents in the production of subject merchandise was within the agency's independent investigative authority pursuant to {sections 702}(a) and {775 of the Act}, this inquiry was not contrary to law.").

Further, under 19 CFR 351.311(b), Commerce will examine the practice, subsidy or subsidy program "if during a countervailing duty investigation… { } discovers a practice that appears to provide a countervailable subsidy with respect to the subject merchandise and the practice was not alleged or examined in the proceeding… {and} will examine that practice, subsidy, or subsidy program if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review." The law clearly provides for investigation or inclusion of subsidy programs during the investigation, which thereby determines whether the subsidy in question is countervailable.

As is common practice in every countervailing duty questionnaire, Commerce requested that the GOC detail "any other forms of assistance to producers or exporters" and "coordinate with the respondent companies to determine if they are reporting usage of any subsidy program(s)."[41] In response to Commerce's Initial Questionnaire, the respondents stated that they received other forms of assistance and provided a variety of documents, including financial statements and tax returns, substantiating the receipt of benefits under the programs. However, the GOC did not provide the requested information regarding any of these programs in response to the Initial Questionnaire. Following the issuance of several supplemental questionnaires to the respondents and the GOC seeking additional information on these programs, Commerce preliminarily determined that these programs constituted countervailable subsidies, based in part on AFA because of the GOC's failure to respond to questions concerning the financial contribution and specificity of these programs.[42] The decision to countervail these programs is consistent with the guidelines established under section 775 of the Act and 19 CFR 351.311(b) and Commerce's standard practice.

Additionally, as stated in 19 CFR 351.311(d), Commerce must notify the parties to the proceeding of any subsidy discovered in the course of an ongoing proceeding and state whether it will be included in the ongoing proceeding. Both respondents clearly had notice of these programs, as they self-reported the programs in their Initial Questionnaire responses. Moreover, the respondents and the GOC were notified of Commerce's investigation of these programs by Commerce's issuance of supplemental questionnaires concerning the programs. Respondents and the petitioners subsequently commented on these programs during the investigation period.

For the reasons discussed above, Commerce acted consistently with its statutory authority, and its practice, in investigating subsidy programs that came to light over the course of the investigation. Thus, because the GOC's interpretation of the statue is flawed and Commerce acted according to standard procedure and within its authority, we have made no changes to the *Preliminary Determination* with respect to "Other subsidies."

[41] *See* Initial Questionnaire, Sec. II, Program-Specific Questions.
[42] *See Preliminary Determination* PDM at 26.

Comment 2: Whether it is Appropriate to Collect Cash Deposits on Entries Subject to Preliminary Affirmative Critical Circumstances

Yarn Importers' Case Brief:

- Commerce must revise its instructions to CBP because it is not authorized to instruct CBP to require retroactive cash deposits.
- Following a preliminary affirmative critical circumstances determination, the countervailing duty statute only authorizes Commerce to order suspension of liquidation of subject entries.[43] Commerce is not authorized to require retroactive cash deposits pursuant to a valid preliminary finding of critical circumstances. Commerce must issue customs instructions consistent with U.S. law.
- Commerce cannot instruct CBP to collect retroactive cash deposits for entries made prior to the *Preliminary Determination* publication at this time. Commerce may only instruct the suspension of liquidation for entries of subject merchandise and collection of cash deposits (or other security) for entries made after the publication of the *Preliminary Determination*.
- Commerce's regulations under 19 CFR 351.206(d) also limit Commerce's affirmative critical circumstances determinations to the retroactive suspension of liquidation: "{i}f the Secretary makes an affirmative preliminary finding of critical circumstances, the provisions of section 703(e)(2) or section 733(e)(2) of the Act (whichever is applicable) regarding the retroactive suspension of liquidation will apply."[44]

Petitioners' Rebuttal Brief:

- Commerce rejected the same legal argument in *China Quartz*.[45] Commerce has explicitly and repeatedly affirmed its authority to instruct CBP to collect cash deposits retroactively when it reaches a preliminary affirmative critical circumstances determination and should do so again in the final determination.
- The authority to retroactively suspend liquidation of entries is authorized precisely so that deposits may be collected, and final duties assessed, at some point in the future.
- The CIT has acknowledged that the statute allows for the retroactive collection of cash deposits in connection with a preliminary affirmative critical circumstances determination.[46]
- Several additional cases demonstrate that Commerce's preliminary cash deposit instructions were consistent with its statutory directive, where Commerce issued refund instructions upon a negative critical circumstances determination made by the International Trade Commission (ITC).[47] The language in those notices demonstrates that Commerce preliminarily instructed

[43] *See* Yarn Importers' Case Brief at 11-12 (citing section 703(d) of the Act).
[44] *Id.* at 13.
[45] *See* Petitioners' Rebuttal Brief at 74 (citing *Certain Quartz Surface Products from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23767 (May 23, 2019) (*China Quartz*), and accompanying IDM at Comment 3).
[46] *Id.* at 76 (citing *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1315 n.19 (CIT 2013) ("Trade remedy duties are only imposed on goods imported after the date of a preliminary determination unless Commerce also finds that critical circumstances exist, in which case the duties may cover unliquidated entries or goods withdrawn from warehouse on or after the later of 90 days prior to the order to suspend liquidation or the publication date for the initiation.")).
[47] *Id.* at 77-79 (citing *Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan,*

CBP to collect cash deposits 90 days retroactively from the date of the preliminary determinations.

Commerce's Position: Commerce disagrees with the Yarn Importers' limited interpretation of the countervailing duty statute and Commerce's regulations regarding the intended result of suspending liquidation with regard to affirmative critical circumstances determinations.

Section 703(d)(1)(B) of the Act directs that Commerce "shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable." Section 703(d) of the Act provides the general rules for the suspension of liquidation, directing that Commerce "shall order the posting of a cash deposit…" when it makes an affirmative preliminary determination under section 703(b) of the Act.[48] Section 703(e)(2) of the Act provides the specific rule for the suspension of liquidation applicable to an affirmative preliminary determination of critical circumstances in a countervailing duty investigation – specifying that "any suspension of liquidation ordered under subsection (d)(2) shall apply."

Because an affirmative determination of critical circumstances affects the date of applicability of suspension of liquidation under section 703(d)(2) of the Act, the rule for collection of cash deposits is the same as in the event of an affirmative preliminary determination under 703(d)(1)(B) of the Act, *i.e.*, that Commerce "shall order the posting of a cash deposit… for each entry" in the case of an affirmative determination.

Yarn Importers limit their narrow reading of the law to section 703 of the Act, and 19 CFR 351.206(d), and in doing so, they failed to acknowledge the unambiguous provisions under section 705(c)(4) of the Act, providing that:

> (4) If the determination of the administering authority under subsection (a)(2) is affirmative, then the administering authority shall,
>
> (A) in cases where the preliminary determinations by the administering authority under sections 703(b) and 703(e)(1) were both affirmative, continue the retroactive suspension of liquidation and the **posting of a cash deposit, bond, or other security previously ordered under section 703(e)(2)**; (emphasis added).

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and Antidumping Duty Orders, 81 FR 48390, 48392-93 (July 25, 2016) ("With regard to the ITC's negative critical circumstances determination on imports of subject merchandise from Italy, {Commerce} will instruct CBP to lift suspension and to refund any cash deposits made to secure payment of estimated antidumping duties with respect to entries of subject merchandise entered, or withdrawn from warehouse, for consumption by one respondent on or after March 4, 2016 {*i.e.*, 90 days prior to the date of publication of the final determination for Italy}, but before June 2, 2016, {*i.e.*, the date of publication of the final determination for Italy}"); and *Certain Potassium Phosphate Salts from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Inquiry*, 75 FR 30377, 30379 (June 1, 2010) ("We will {CBP} to terminate the suspension of liquidation and refund any cash deposits and release any bond or other security previously posted for all imports of subject merchandise entered, or withdrawn from warehouse, for consumption between December 16, 2009, which is 90 days prior to the date of publication of the *Preliminary Determination*, and March 15, 2010.")).

[48] *See* section 703(d)(1)(B) of the Act.

The law is quite clear that the intention of retroactively ordering the suspension of entries, in affirmative critical circumstances determinations, is *exactly* for the purpose of collecting cash deposits, by virtue of the inclusion of "previously ordered under section 703(e)(2)" within section 705(c)(4) of the Act.

The authority to impose retroactively a bond or cash deposit requirement is stated by implication in section 705(c)(4) of the Act. If Congress did not intend retroactive bonding or cash deposits, these provisions of the Act would be superfluous because there would be nothing to release or refund. As we recently determined in *China Quartz*:

> since section 735(c) of the Act contemplates either 1) continuation of retroactive suspension and posting of a cash deposit in case of an affirmative final determination by Commerce, or 2) the refunding of cash deposits in the case of a negative critical circumstances determination, then clearly Commerce has the authority to collect cash deposits on the retroactively suspended entries in the case of an affirmative preliminary circumstances determination under section 733(e) of the Act. This reading of the relevant provisions of the Act is also consistent with Commerce's long-established practice of instructing CBP to collect cash deposits during the entirety of the suspension of liquidation period.[49]

While *China Quartz* was a less-than-fair-value investigation, the parallel statutory provisions for countervailing duty investigations contain the same language and, therefore, should lead Commerce to the same conclusion that the retroactive collective of cash deposits is permissible. As explained, when read as a whole, the statute clearly directs Commerce to suspend liquidation *and* collect cash deposits when it reaches a preliminary affirmative determination of critical circumstances.[50] Thus, because Yarn Importers' argument (that Commerce has no authority to collect retroactive cash deposits in affirmative determinations of critical circumstances) is incorrect and without merit, and we are continuing to make an affirmative critical circumstances determination in the final determination, we have made no changes to the *Preliminary Determination* instructions with respect to the retroactive cash deposit instructions issued to CBP on the basis of this argument.

Comment 3: Whether Commerce Must Consider 301 Duties in a Critical Circumstances Determination

Yarn Importers' Case Brief:

- Commerce must consider the impact of Section 301 duties when conducting its critical circumstance analysis. Reasons unrelated to the countervailing duty investigation were the cause of increased exports. Specifically, the subject merchandise was subject to a 10 percent

[49] *See China Quartz* IDM at Comment 3; *see also Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014); and *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970 (June 5, 2008).
[50] *See China Quartz* IDM at Comment 3.

duty starting September 24, 2018, and increased to 25 percent on January 1, 2019. The results of these known duty increases resulted in increased imports.

Petitioners' Rebuttal Brief:

- Commerce should not consider the impact of the imposition of Section 301 duties when conducting its critical circumstance analysis. The highest monthly volume of subject merchandise that entered during the comparison period was imported during December 2018; however, it was publicly known on December 1, 2018 that the tariff increase would be further delayed until March 2019. Importers therefore had no need to mass import in December 2018 in advance of January 1, 2019, Section 301 duty increases, and thus the massive volumes brought into the United States were for the purposes of beating the deadline for the preliminary determination.

Commerce's Position: Section 703(e)(1) of the Act provides that Commerce, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that:

> (A) the alleged countervailable subsidy is inconsistent with the Subsidies Agreement, and
> (B) there have been massive imports of the subject merchandise over a relatively short period.

The factors Commerce considers in its critical circumstances analysis pertaining to whether imports of subject merchandise over a relatively short period are massive are set forth in 19 CFR 351.206(h)(1), and are enumerated as:

(i) The volume and the value of the imports;
(ii) Seasonal trends; and
(iii) The share of domestic consumption accounted for by the imports.

The effects of impending tariffs are absent in policy and therefore non-determinant in critical circumstances. Commerce has historically not considered this factor as part of its practice and it is not found in the enumerated list of factors in its regulations; analysis of outside market forces in general would undermine any practical ability to determine critical circumstances.[51] We have consequently not considered the section 301 tariffs in our analysis of critical circumstances for the final determination.

Comment 4: Export Buyers Credit (EBC) Program

4.a.: Whether to Continue to Apply AFA to the EBC Program

GOC's Case Brief:

- Commerce should reverse its *Preliminary Determination* and reach a determination of non-use of this program because the record evidence demonstrates that neither the mandatory respondent Fujian Billion nor its U.S. customers used the EBC program during the POI.

[51] *See China Quartz* IDM at Comment 10.

- The GOC responded fully to Commerce's questions and explained how it determined non-use of this program. Specifically, the GOC confirmed with the Chinese Export-Import Bank (Ex-Im Bank) using relevant searches and screenshots of the Ex-Im Bank's system to confirm that none of the mandatory respondents' U.S. customers used this program.[52] Neither Commerce nor the petitioner presented evidence to contradict this evidence.
- The mandatory respondent submitted confirmations from their U.S. customers confirming they did not use this program. Further, Fujian Billion noted in its response that it "has never assisted its customers in obtaining such export buyer's credits."[53] Assistance from the Chinese producer/exporter is a requirement if U.S. customers apply for this program and Fujian Billion provided definitive evidence of its non-use of this program by demonstrating that neither Fujian Billion nor its cross-owned affiliate has been involved with China Ex-Im Bank, or any other bank, or their export customers to assist in obtaining buyer credits under this program.
- Commerce erroneously discredited the GOC's record evidence in its *Preliminary Determination*, claiming that screenshots from the Ex-Im Bank system included several trading companies, which are ineligible for the programs.[54] The GOC submitted that the screenshots provided by the Ex-Im Bank cover *all* of Fujian Billion's customers, and if any of these customers ever received benefits under this program, it would need Fujian Billion's assistance in the process and the Ex-Im Bank system would have shown that they have an account with the Ex-Im Bank.
- Commerce unlawfully disregarded the non-use confirmations from Fujian Billion's customers because Commerce was unable to review the "2013 amendments" to this program and applied AFA with respect to financial contribution and Fujian Billion's benefit. In doing so, Commerce ignored several rulings of the Court of International Trade (CIT), which has ruled that when the evidence on the record shows that the EBC program was not used, Commerce cannot apply AFA in determining that it was used.[55]
- In other China CVD cases, Commerce has found non-use of the EBC program based on the respondent company's U.S. customer certifications stating that they did not use this program.[56] Commerce should do so here.

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[52] *See* GOC Case Brief at 5 (citing GOC's Letters, "Polyester Textured Yarn from China; CVD Investigation; GOC Initial Response," dated March 5, 2019 (GOC IQR) at 36; "Polyester Textured Yarn from China; CVD Investigation; GOC Supplemental Questionnaire Response," dated April 3, 2019 (GOC SQR), at 10 and Exhibit S-4; and "Polyester Textured Yarn from China; CVD Investigation; GOC 2nd Supplemental Questionnaire Response," dated May 31, 2019, at 2 and Exhibit S2-1).

[53] *Id.* at 6 (citing Fujian Billion's Letter, "Polyester Textured Yarn from the People's Republic of China, Billion Section III Response," dated February 26, 2019 (Fujian Billion IQR), at 12).

[54] *Id.* at 7 (citing *Preliminary Determination* PDM at 24).

[55] *Id.* at 8 (citing *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp. 3d 1261, 1271 (CIT 2018) (*Guizhou Tyre I*); and *Clearon Corp. v. United States*, No. 17-00171, WL 342719 (CIT 2019) ("Heze and the GOC provided a good deal of evidence that Heze's U.S. and non-U.S. customers did not use the Export Buyer's Credit Program---evidence that, in accordance with the Department's past practice, was sufficient to demonstrate non-use.")).

[56] *Id.* at 8-9 (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), and accompanying IDM at 11; *Chlorinated Isocyanurates From the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos Investigation*), and accompanying IDM at 15; and *Boltless Steel Shelving Units Prepackaged for Sale From the*

- Having chosen to forgo verification of the U.S. customer non-use declarations during its verification of the mandatory respondent in this investigation and verification of the GOC's questionnaire responses with respect to this program, Commerce must assume for purposes of its final determination that every factual statement submitted by the GOC and the mandatory respondent with respect to the EBC program is accurate. In *China Kingdom*, the CIT found "{a} deliberate refusal to subject certain factual information to a verification procedure is not the equivalent of a valid finding that … such information 'cannot be verified.'"[57] Accordingly, Commerce must conclude that the GOC's responses with respect to this program and the written confirmation of non-use are accurate.
- The GOC did not impede Commerce's understanding of how this program operates and did not fail to act to the best of its ability to cooperate. Moreover, the GOC has provided all the necessary information for Commerce to make a non-use determination for this program. Commerce based its AFA determination on the basis that the "2013 amendments" are not on the record, which Commerce considers crucial for Commerce to analyze. Commerce's reliance on the "2013 amendments" is premised on a misunderstanding of the GOC's questionnaire responses, and moreover, Commerce did not request that the GOC provide the 2013 amendments. Commerce cannot claim that the GOC withheld information Commerce never requested.
- The structure of loan disbursements for this program is clearly described in detail in the GOC's responses. No third-party banks are actively involved in the process of disbursement of the credits for this program, except for account opening services provided to the exporters and importers. Thus, the responses provided by the GOC provide more than sufficient facts to allow Commerce a complete understanding of how the program is administered in terms of the disbursement process. Further, as confirmed by the GOC, the regulations governing the disbursement process were not repealed or replaced in 2013 and continue to remain in effect.[58] Therefore, the 2013 amendments are not necessary for Commerce's ability to understand the disbursement process and operations of this program.
- If Commerce was convinced that the GOC's response to the information requested in its Standard Questions Appendix was deficient, Commerce had a legal obligation to notify the GOC of the deficiency and provide an opportunity to remedy that deficiency prior to applying any form of facts available.
- The GOC has noted repeatedly in this investigation and previous investigations, the China Ex-Im Bank has repeatedly advised the GOC that the 2013 amendments are internal to the bank, non-public, and not available for release.[59] Accordingly, it was not reasonable for Commerce to expect the GOC to provide the 2013 amendments because the Ex-Im Bank could not provide the information to the GOC and to the public due to its internal procedures.

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

[57] *Id.* at 10 (citing *China Kingdom Import & Export Co., Ltd. v. United States*, 507 F. Supp. 2d 1337, 1341 (CIT 2007) (*China Kingdom*)); *see also Boltless Shelving from China* and accompanying IDM at 45 n.253 ("In this investigation, the Department decided not to conduct verification of the GOC . . . . Without verification, the Department must assume for purposes of its determination that every factual statement submitted by the GOC is accurate" (citing *China Kingdom*, 507 F. Supp. 2d at 1341)).

[58] *Id.* at 16 (citing GOC IQR at Exhibit II.B.15 at 3).

[59] *Id.* at 18 (citing GOC IQR at Exhibit II.B.15 at 3).

Commerce cannot penalize a party for not being able to submit information that is clearly impossible to obtain.[60]

- Commerce cannot justify its *Preliminary Determination* using AFA in reaching the applicable determination -- the determination regarding "usage" of this program.[61] Commerce provided no explanation regarding the relevance of the 2013 amendments or other purportedly missing information to the usage determination of this program.
- The 2013 amendments and other purportedly missing information bear no relevance to the determination of usage of this program and certainly, the purportedly missing information regarding the changes of this program cannot constitute a "gap" of the record regarding the non-use of the EBC Program.
- Commerce is obligated to avoid the adverse impact of the application of AFA on a cooperating respondent if relevant information exists elsewhere in the record.
- Just as in *Changzhou II*,[62] the mandatory respondent in this proceeding submitted email correspondences confirming that none of its unaffiliated U.S. customers ever applied for, used or benefitted from this program during the POI.

Fujian Billion's Case Brief:

- Fujian Billion and the GOC submitted substantial evidence in its Section III response, including a list of all the customers to which Fujian Billion exported during the POI, email communications with all listed customers confirming they had never used EBC, an explanation from the GOC, and a search in China Ex-Im Bank's database of Fujian Billion's customers' names, to demonstrate that Fujian Billion "did not use or benefit from" the EBC Program.
- Commerce is erroneous in determining that the GOC's response failed to prove non-use because Fujian Billion and its customers were not a party to the benefits under the EBC Program; even if the borrowers under the EBC Program "are foreign banks and foreign importers and not simply trading companies,"[63] there was no seller or buyer party to the

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[60] *Id.* at 19 (citing *Shantou Red Garden Foodstuff Co. v. United States*, 815 F. Supp. 2d 1311, 1325 (CIT 2012) (reversing the Department's finding that a respondent did not act to the best of its ability to attain business records from its former owners which were not available to the respondent); *Olympic Adhesives, Inc. v. United States*, 899 F. 2d 1565, 1572 (CAFC 1990) (while Commerce has broad discretion in applying an adverse inference, it may not "characterize a party's failure to list and give details of sales as a 'refusal' or 'inability' to give an answer where, in fact, there are no sales"); *AK Steel Corp. v. United States*, 21 CIT 1204, 1223 (CIT 1997) ("Commerce may not, as plaintiffs argue, characterize a party's failure to provide information that does not exist as a 'refusal' to provide data"); *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1341 (CIT 2006) (finding Commerce's application of facts available unlawful and "punitive" when a party stated that it is reporting its adjustments to the best of its ability and there is "no factual showing that {it} is able to produce more specific data on the particular allocation of its billing adjustments")).

[61] *Id.* at 20-21 (citing section 776(a)(2)(A) of the Act; *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F. 3d 1333, 1348 (CAFC 2011) ("it is clear that Commerce can only use facts otherwise available to fill a gap in the record"); and *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1289 (CIT 2006) ("Absent a valid decision to use facts otherwise available, Commerce may not use an adverse inference.")).

[62] *Id.* at 24 (citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312, 1318 (CIT 2017) (*Changzhou II*) ("When 'relevant information exists elsewhere on the record,' such as JA Solar's customer's declarations here, Commerce should 'seek to avoid' adversely impacting a cooperating party. Moreover, it would have been inappropriate for Commerce to apply AFA for no reason other than to deter the GOC's noncooperation in future proceedings when relevant evidence existed elsewhere on the record.")).

[63] *See* Fujian Billion Case Brief at 4 (citing *Preliminary Determination* PDM at 24).

transactions receiving the benefits. Even if the benefit were dispersed by an intermediary bank, the importers had no knowledge "that they applied, were approved, or received the EBC benefits."

- Evidence on the record does not support Commerce's assessment that Fujian Billion used or received benefits from the EBC Program and is fully verifiable according to Commerce precedent, as customers certified they did not receive any financing from China Ex-Im Bank.[64]
- Commerce cannot justify its *Preliminary Determination* using AFA as "both Fujian Billion and the GOC have cooperated fully by providing relevant necessary information to Commerce's determination of non-use" of the EBC Program. For the use of facts otherwise available with adverse inferences, the respondent must fail to cooperate to the best of its ability.[65]
- The gap in information is insufficient to apply AFA, as Fujian Billion was able to verify it did not use the EBC Program. Commerce only identifies "the identity of foreign banks to whom the China Ex-Im Bank could potentially disburse loans to" as missing information. The "missing information" identified by Commerce is irrelevant[66] to determine use by the respondents and thus immaterial,[67] and Commerce is "fully capable of verifying the certifications of non-use."
- Commerce has no basis to apply AFA, as it failed to notify Fujian Billion that its responses and the information it provided were "deficient or unsatisfactory" and Fujian Billion's information "must be deemed accurate" as Commerce chose not to "attempt verification" of Fujian Billion's responses.

Petitioners' Rebuttal Brief:

- The GOC's and Fujian Billion's arguments fail to justify that AFA for the EBC Program is inappropriate due to the absence of information on the record regarding the operation of the EBC Program. This absence of information precluded Commerce from verifying Fujian Billion's claims of non-use.[68]

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[64] *Id.* at 7 (citing *Chlorinated Isos Investigation* IDM at 15).

[65] *Id.* at 5 (citing section 776 of the Act; and *Nippon Steel Corp v. United States*, 337 F.3d 1373, 1382 (CAFC 2003) (*Nippon Steel*)).

[66] *Id.* at 5 (citing *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (CIT 2019) (*Clearon*); *Guizhou Tyre I* at 1261; *Guizhou Tyre Co. v. United States*, 2019 Ct. Intl. Trade LEXIS 58, Slip Op. 19-59 (May 15, 2019) (CIT 2019) (*Guizhou Tyre II*); *Changzhou II*; *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018) (*Changzhou III*); *Changzhou Trina Solar Energy Co. v. United States*, LEXIS 179, Slip Op. 18-167 (November 30, 2018) (*Changzhou IV*); and *SolarWorld Ams., Inc. v. United States*, 229 F. Supp. 3d 1362 (CIT 2017)).

[67] *Id.* at 6 (citing *Changzhou IV* at 9-10 ("Commerce does not explain why it is necessary for it to fully understand the EBCP in order to ascertain claims of non-use. Further, Commerce does not point to information on the record that allows Commerce to reasonably conclude, even with appropriate adverse inferences, that Trina used the EBCP. Even when using AFA, Commerce must still explain what information is missing and what adverse inferences reasonably leads to its conclusion. Conclusory statements about a program's use cannot be sustained without an explanation."); and *Guizhou Tyre II* at 13-14).

[68] *See* Petitioners' Rebuttal Brief at 6 (citing *Countervailing Duty Investigation of Common Alloy Aluminum Sheet From the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Aluminum Sheet*), and accompanying IDM at Comment 4 ("Our complete understanding of the operation of this

- The GOC's failure to provide to the best of its ability[69] the full and complete content requested by Commerce justifies the application of AFA, as it is the purview of Commerce to determine the information needed to conduct its investigation[70] regardless of the GOC's opinion of its necessity.[71] By its failure to provide accurate and complete information despite repeated requests,[72] the GOC failed to meet its obligation to provide information and act to the best of its ability[73] and impeded Commerce's understanding of the EBC Program.
- The GOC shows a disregard for Commerce's investigation as it does not lack the "legal authority" to compel China Ex-Im Bank to provide the 2013 Administrative measures because the China Ex-Im Bank is a government policy bank and within the control of the GOC.
- Commerce applies section 776 of the Act consistently within the clear intent of the statute.[74]
- There are significant gaps in the record as the involvement of third-party banks are necessary and essential to Commerce's understanding and ability to verify usage of the EBC Program.[75] The GOC and Fujian Billion's claims of completeness of the record are flawed because they fail to recognize the understanding of the program operations as a "prerequisite" to the ability to verify claims of non-use.
- GOC failed or refused to provide enough information to verify non-usage, as banks other than China Ex-Im Bank distribute EBC funds for which China Ex-Im Bank conducts transactions[76] and GOC did not provide a necessary list of partner or correspondent banks that disbursed funds. GOC's use of China's Ex-Im Bank records of disbursement is therefore insufficient as transactions could "be recorded as funds received from the partner bank and not the China Ex-Im Bank, even if China Ex-Im Bank authorized the transfer of the funds."
- Commerce is unable to verify Fujian Billion's claims of non-use due to the lack of information provided to the record by Fujian Billion and the GOC. Without the names of partner banks, Commerce is unable to complete required reconciliation between a company's records with its audited financial statements and is unable to understand how the funds flow. Fujian Billion's notification of customer benefits under its program is insufficient to "verify that the information is complete and accurate."[77]
- The GOC's failure to provide the 2013 Administrative Measures into the record makes its explanation of how the EBC Program operates insufficient.[78]

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program is a prerequisite to our reliance on the information provided by the company respondents regarding non-use.")).

[69] *Id.* at 10 (citing *Nippon Steel* at 1382).

[70] *Id.* at 9 (citing *PPG Indus., Inc. v. United States*, 978 F. 2d 1232, 1238 (CAFC 1992); and *Hyundai Heavy Indus. Co v. United States*, Ct. No. 17-00054, Slip Op. 2019-104 at 13 n. 11 (CIT 2019) ("It is Commerce, not the respondents, that decides what information must be provided.")).

[71] *Id.* at 10 (citing *Shandong Huarong Gen. Group Corp v. United States*, 27 CIT 1568, 1585 (2003) ("It is incumbent upon parties that choose to participate in an antidumping duty investigation to accurately provide information to Commerce in the first instance.")).

[72] *Id.* at 10 (citing *Tung Mung Dev. Co., Ltd. v. United States*, 25 CIT 752, 788-89 (2001) (*Tung Mung*) (citing *Olympic Adhesives, Inc. v. United States*, 899 F. 2d 1565, 1571-72 (CAFC 1990))).

[73] *Id.* at 10 (citing *Nippon Steel*).

[74] *Id.* at 11 (citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1984)).

[75] *Id.* at 11 (citing *e.g.*, *Aluminum Sheet* IDM at Comment 4, and *Aluminum Foil* IDM at Comment 6).

[76] *Id.* at 13 (citing GOC IQR at Exhibit II.B.15 at 4-5).

[77] *Id.* at 13-14 (citing *Solar Cells from China Investigation* IDM at 61-62).

[78] *Id.* at 13 (citing *Aluminum Sheet* IDM at 30).

- Commerce's preliminary finding of AFA was appropriate as GOC and Fujian Billion cited outdated Commerce precedent regarding the verification of non-use by customer declarations. Commerce previously conducted on-site verifications in order to confirm no loans were received under the EBC Program.[79] However, in subsequent proceedings, Commerce required an understanding of the program operations and "how to verify it with both the GOC and the respondent companies."[80] The administrative review of *Chlorinated Isos Investigation* cited by the GOC and Fujian Billion reached the same conclusions.[81] The description in Commerce's verification outlines of the steps required at verification also supports the requirement of a paper trail following the role of third-party banks.[82]
- Commerce should continue to apply AFA in the final determination as it is consistent with precedent in recent investigations and reviews. The recent CIT decisions regarding the EBC Program cited by the GOC and Fujian Billion[83] "do not having a binding, precedential effect" to the application of AFA in this investigation, as in each cited decision the court has remanded "some aspect of the EBC Program determination… for further examination."[84] Any final CIT decision is subject to further appeal. Furthermore, the cited CIT decisions are inapplicable given the GOC's "failure to provide information regarding the mechanics of the program" and the remanding of the determinations to Commerce over the absence of information from the record makes claims of non-use of the EBC Program unverifiable.[85]
- The GOC's claim of inability to obtain information from the China Ex-Im Bank does not withstand scrutiny as the GOC was able to provide certain measures issued by China Ex-Im Bank. Special distinction for the 2013 Administrative Measures is arbitrary and ignores Commerce's procedures for proprietary treatment of BPI materials. Therefore, legal precedent of a party's inability to provide information is not pertinent.
- Commerce has authority to determine information needed to conduct its investigation and determine gaps in the record. The GOC's position or "the possibility of drawing two inconsistent conclusions from the same record evidence," is immaterial to findings "supported by substantial evidence" and Commerce's application of AFA.[86]

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[79] *Id.* at 14-15 (citing *Chlorinated Isos Investigation* IDM at Comment 4).
[80] *Id.* at 15 (citing *Aluminum Sheet* IDM at Comment 4).
[81] *Id.* at 15 (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) (*Chlorinated Isos from China 2014*), and accompanying IDM at Comment 2 ("without a full and complete understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not reliable")).
[82] *Id.* at 15 (citing *Steel Propane Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 29159 (June 21, 2019) (*Propane Cylinders*), and accompanying IDM at Comment 1).
[83] *Id.* (citing, GOC Case Brief at 8, 21-24, Fujian Billion Case Brief at 5-7 (citing *Clearon*; *Changzhou III*; *Changzhou IV*; and *Guizhou Tyre I*)).
[84] *Id.* at 16 (citing *Clearon* at 1363; *Changzhou III* at 1327; and *Guizhou Tyre I* at 1280-81).
[85] *Id. at* 16-17 (citing *RZBC Group Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC Group*) "The court finds that the above determination is supported by substantial evidence and is consistent with both the law and this court's remand order. The $2 million threshold is ambiguous, and for that reason Commerce cannot ensure non-use of the Buyer's Credit program simply by examining the value of RZBC's contracts."; and *Changzhou I* (distinguish decision primarily on the basis of the sufficiency of the Department's explanation, not as a substantively wrong outcome; *see Clearon* at 1359; *Changzhou IV* at 1326)).
[86] *See* Petitioners' Rebuttal Brief at 19 (citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (CAFC 1992) and *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (Commerce has "authority to determine the extent of investigation and information it needs…")).

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 EBC Program with respect to usage, and as a result, we are continuing to apply AFA to the EBC Program.

Solar Cells Initial Investigation of EBC Program

Commerce first investigated and countervailed the EBC Program in the 2012 investigation of solar cells.[87] Our initiation was based on, among other information, the China Ex-Im Bank's 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."[88] Commerce initially asked the GOC to complete the "standard questions appendix" for the EBC 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.[89]

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, but simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."[90] In response to a request from Commerce for information concerning the operation of the EBC 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."[91] 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.[92] 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.[93]

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

[87] *See Solar Cells from China Investigation* 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.
[88] *See Solar Cells from China Investigation* IDM at 59.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 60.
[92] *Id.* at 60-61.
[93] *Id.* at 61.

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.[94] 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:

> {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 Commerce that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.[95]

On this basis, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its long-standing verification methods.[96] These methods are comparable to those of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be traced to audited financial statements, or other credible official company documents, such as tax returns, that provide a credible and

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[94] *Id.*

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

[96] 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 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 III* 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 I* 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.

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.[97]

This "completeness" test is an essential element of Commerce's verification methodology. If Commerce were attempting to confirm whether and to what extent a respondent exporter had received 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 examine subledgers or bank statements containing the details of all individual loans. Because Commerce could tie or trace 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 EBC Program lending in respondent exporters' books and records that could be tied to financial statements, tax returns, or other relevant company documents. 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 EBC Program {and} would have complete records of all recipients of export buyer's credits." We noted our belief that "{s}uch records could be tested by {Commerce} 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."[98] However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.[99] Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

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[97] 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* at 1201-02 (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).

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

[99] *Id.*

Chlorinated Isos Investigation of EBC Program

Two years later, in the investigation of chlorinated isos,[100] respondents submitted certified statements from all customers claiming that they had not used the EBC Program. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, it was Commerce's understanding that the EBC 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-use 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. customers 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 Ex-Im, … {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customer's accounting and financial records that no loans were received under this program."[101]

2013 Amendments to the EBC Program

Our understanding of the operation of the EBC 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.[102] 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 EBC Program, including changes in 2013 that eliminated the USD 2 million minimum business contract requirement.[103] In response, the GOC stated that there were three relevant documents pertaining to the EBC 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

[100] *See Chlorinated Isos Investigation*.
[101] *Id.* at 15.
[102] *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.").
[103] *See* GOC's IQR at Exhibit 48 (citing GOC's Letter, "Certain Amorphous Silica Fabric from the People's Republic of China; CVD Investigation; GOC 7th Supplemental Response," dated September 6, 2016 (Export Buyer's Credit Supplemental Questionnaire Response)).

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 Buyer's Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the Export-Import Bank of China.[104] 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-public, and not available for release."[105] The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."[106]

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

> Through its response to {Commerce's} supplemental questionnaire, the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for {Commerce} 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.
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> 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{Commerce'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 {Commerce's} ability to conduct its investigation of this program.[107]

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."[108]

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[104] *Id*.
[105] *Id.*
[106] *Id.*
[107] *See Silica Fabric Inv* and accompanying IDM at 12 (internal citations omitted).
[108] *Id.* at 62.

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 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 ACIT's declarations as submitted."[109]

The Instant Investigation

In this investigation, we initiated an investigation of the EBC Program based on information in the Petition indicating that foreign customers of Chinese exporters have received a countervailable subsidy in the form of preferential export loans from the China Ex-Im Bank.[110] In the Initial Questionnaire issued to the GOC, we requested that the GOC provide the information requested in the Standard Questions Appendix "with regard to all types of financing provided by the China Export-Import Bank { } under the Buyer Credit Facility."[111] The Standard Questions Appendix requested various information that Commerce requires in order to analyze the specificity and financial contribution of this program, including the following: translated copies of the laws and regulations pertaining to the program, a description of the agencies and types of records maintained for administration of the program, a description of the program and the program application process, program eligibility criteria, and program use data. Rather than respond to the questions in the Standard Questions Appendix, the GOC stated it had confirmed "none of the U.S. customers of Fujian Billion…used the alleged program during the POI. Therefore, the {standard questions} appendix is not applicable."[112] Further, in the Initial Questionnaire, we asked the GOC to "{p}rovide original and translated copies of any laws, regulations or other governing documents cited by the GOC in the Export Buyer's Credit Supplemental Questionnaire Response."[113] While the GOC provided two of the requested documents, the GOC did not provide the 2013 Revisions which were requested in the Export Buyer's Credit Supplemental Questionnaire Response.[114] In our first supplemental questionnaire to the GOC, we again asked the GOC to respond to all items in the Standard Questions Appendix.[115] Instead of providing the requested information, the GOC stated that our questions were "not applicable" because the mandatory respondents did not use this program.[116] In a second supplemental questionnaire, we asked the GOC to submit complete responses to "submit a fully complete response to all of the questions posed in the December 11, 2018, initial questionnaire for this program, regardless of the program's use by the mandatory respondent

[109] *Id.*
[110] *See* Memorandum, "Enforcement and Compliance Office of AD/CVD Operations Countervailing Duty Initiation Checklist: Polyester Textured Yarn from the People's Republic of China," dated November 7, 2018 (Initiation Checklist), at 10.
[111] *See* Initial Questionnaire at 5-6.
[112] *See* GOC IQR at 34.
[113] *See* Initial Questionnaire at 6 (referring to Export Buyer's Credit Supplemental Questionnaire Response).
[114] *See* GOC IQR at 36 and Exhibits II.B.14 and II.B.16.
[115] *See* Commerce's Letter, "Polyester Textured Yarn from the People's Republic of China: Countervailing Duty Investigation," dated March 18, 2019, at 6.
[116] *See* GOC SQR at 10.

companies."[117] In response, the GOC stated "…based on the information provided on the record by the GOC and the mandatory respondents for this program, Commerce should be able to conclude that the Chinese exporters/producers and their U.S. importers are involved in the application and disbursement processes, and therefore, Commerce certainly can verify the mandatory respondents for the usage of this program and relevant documentation at its will."[118] The GOC again did not submit the 2013 Revisions. Despite the GOC's contention to the contrary, Commerce requested the 2013 Revisions twice, once in the Initial Questionnaire and again in the Second GOC Supplemental.

Information on the record indicates that the GOC revised the EBC Program in 2013 to eliminate the requirement that loans under the program be a minimum of two million U.S. dollars.[119] Moreover, information on the record also indicates that the China Ex-Im Bank may disburse export buyer's credits either directly or through third-party partner and/or correspondent banks.[120] We asked the GOC to provide the 2013 Revisions, a list of all third-party banks involved in the disbursement/settlement of export buyer's credits, and a list of all partner/correspondent banks involved in disbursement of funds under the this program. As noted above, the GOC failed to provide the requested information. By failing to comply with Commerce's requests to provide this information, the GOC has deprived Commerce of the information necessary to fully understand the details of this program, including: the application process, internal guidelines and rules governing this program, interest rates used during the POI, and whether the GOC uses third-party banks to disburse/settle export buyer's credits.

The 2013 Revisions were especially significant because record evidence indicates the credits may not be *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, the identities of which were unknown to Commerce.[121] As noted above, in prior examinations of this program, we found that the China Ex-Im Bank, as a lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of this program following the 2013 Revisions, which is a prerequisite to Commerce's ability to verify non-use of the program.[122] Performing the verification steps outlined above to verify claims of non-use would require knowing the names of the intermediary banks. The names of these banks, not the name "China Ex-Im Bank," would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in the investigation of aluminum sheet:

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[117] *See* Commerce's Letter, "Polyester Textured Yarn from the People's Republic of China: Countervailing Duty Investigation, New Subsidy Allegations Questionnaire and Second Supplemental Questionnaire for the Government of the People's Republic of China," dated May 14, 2019 (Second GOC Supplemental), at 18.
[118] *See* GOC SQR at 3.
[119] *See* GOC IQR at Exhibit II.B.15.
[120] *Id.* at Exhibit II.B.14.
[121] *Id.*
[122] *See, e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016), and accompanying IDM at Comment 6; *see also Chlorinated Isos from China 2014* IDM at Comment 2 (concluding that "without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use").

> 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.[123]

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 Commerce cannot verify claims of non-use at the GOC,[124] having a list of the correspondent banks is critical to conducting a verification of non-use at the U.S. customers.

Furthermore, although Fujian Billion reported that its U.S. customers did not use the program, when we asked Fujian Billion to explain in detail the steps it took to determine non-use of the EBC Program for its customers, it responded that confirmation of non-use was based solely on mere emails received from its customers stating non-use.[125] Of Fujian Billion's 13 customers, 11 confirmed they did not use this program, one did not respond, and one customer's email appears incomplete.[126]

Despite Fujian Billion's assertion that its U.S. customers did not use the EBC Program, the customer email statements are, alone, insufficient to establish non-use. Rather, additional information is necessary for Commerce to make such a determination. Specifically, Commerce requires information necessary to fully understand the details and operation of this program, including: the application process, internal guidelines and rules governing this program, the types of goods eligible for export financing under this program, interest rates used during the POI, and whether the GOC uses third-party banks to disburse/settle export buyer's credits. As noted above, the GOC failed to provide the requested necessary information regarding the EBC program.[127] The GOC asserts that the screenshots it provided from the China Ex-Im Bank covering all Fujian Billion's customers indicated that none of Fujian Billion's U.S. customers and non-U.S. customers are the clients of any of China Ex-Im Bank's accounts.[128] However, Commerce cannot verify claims of non-usage, whether originating with the respondents or their U.S. customers, if it does not know the names of the intermediary banks that might appear in the books and records of the recipient of the credit (*i.e.*, loan) or the cash disbursement made pursuant to the credit. As explained above, there will not necessarily be an account in the name

[123] *See Aluminum Sheet* IDM at 30 (internal citations omitted).
[124] Commerce no longer attempts to verify usage of the EBC program with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 revisions to the administrative rules. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017), and accompanying IDM at Comment 1.
[125] *See* Fujian Billion IQR at 11 and Exhibit 12.
[126] *Id.*
[127] *See* GOC IQR at 35-38.
[128] *See* GOC's Case Brief at 6 (citing GOC SQR at Exhibit S-4).

"China ExIm Bank" or "Ex-Im Bank" in the books and records (*e.g.*, subledger, tax return, bank statements) of either the exporter or the U.S. customer.

Without such necessary information, Commerce would have to engage in an unreasonably onerous examination of the business activities and records of Fujian Billion's customers without any guidance as to which loans or banks to subject to scrutiny for each company. The GOC refused to provide a list of all correspondent banks involved in the disbursement of credits and funds under the program. A careful verification of Fujian Billion's non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Because Commerce does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (no correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a subset 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 EBC 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.[129] 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. Suppose, for example, that one of the correspondent banks is HSBC. Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the 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 China Ex-Im Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of China Ex-Im Bank involvement. As explained above, the GOC failed to provide Commerce with any of this

[129] In this investigation, our questionnaire stated: "Provide a sample application for each type of financing provided under the Buyer Credit Facility, the application's approval, and the agreement between the respondent's customer and the China Ex-Im Bank that establish the terms of the assistance provided under the facility." *See* Initial Questionnaire at 5. The GOC responded "…no agreements between the mandatory respondents and the reported affiliated companies and the China EX-IM Bank or between the U.S. customers and the China EX-IM Bank exist. A sample credit application is not available because no fixed format for such document exists, which are prepared by the borrowers autonomously." *See* GOC IQR at 35.

information. Thus, even were Commerce to attempt to verify respondent's non-use of the EBC Program notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks by examining each loan received by each of the respondent's U.S. customers, Commerce would still not be able to verify which loans were normal loans versus EBC Program loans due to its lack of understanding of what underlying documentation to expect, 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.

For all the reasons describe above, Commerce requires the 2013 EBC Program Revisions, as well as other necessary information concerning the operation of the EBC 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 necessary "roadmap" for the verifiers by which they can conduct an effective verification, perform a "completeness test" and confirm whether the programs was not used as claimed by the respondent.

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

As explained in the *Preliminary Determination*, necessary information from the GOC is missing from the record, and the GOC withheld the requested information described above, which is necessary to determine whether Fujian Billion's U.S. customers actually used the EBC Program during the POI.[130] The GOC's withholding of this necessary information prevents us from fully understanding and analyzing the operation of this program, thereby impeding this proceeding. Accordingly, we find that we must rely on the facts otherwise available, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, to determine whether this program was used by Fujian Billion and conferred a benefit.

Furthermore, pursuant to section 776(b) of the Act, we continue to find that the GOC, by virtue of its withholding of information and significantly impeding this proceeding, failed to cooperate with Commerce by not acting to the best of its ability.[131] As noted above, the GOC did not provide the requested information needed to allow Commerce to analyze this program fully. As a result, the GOC did not provide information that would permit us to make a determination as to whether this program confers a benefit. Moreover, absent the requested information, we are unable to rely on the GOC's and Fujian Billion's claims of non-use of this program. The GOC

[130] *See Preliminary Determination* PDM at 24-25.
[131] *Id.* at 25.

has not provided information with respect to whether it uses third-party banks to disburse/settle export buyer's credits from the China Ex-Im Bank. Such information is essential to understanding how export buyer's credits flow to/from foreign buyers and the China Ex-Im Bank. Absent the requested information, the GOC's and Fujian Billion's claims of non-use of this program are not verifiable. We requested the 2013 Revisions because information indicates that the 2013 Revisions implemented important program changes. For example, record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.[132] Specifically, the record indicates that: 1) customers can open loan accounts for disbursements through this program with third-party banks; 2) the funds are first sent to the importer's account, which could be at the China Ex-Im Bank or third-party banks; and 3) these funds are then sent to the exporter's bank account.[133] Because of the complicated structure of loan disbursements for this program, Commerce's complete understanding of how this program is administered is necessary to confirm whether Fujian Billion's customers obtained loans under the program.

Thus, as discussed above, the GOC's refusal to provide the 2013 Revisions, setting internal guidelines for how this program is administered by the China Ex-Im Bank, and a list of partner/correspondent banks that are used to disburse funds through this program, constitutes a failure to cooperate to the best of the GOC's ability. Therefore, as AFA, we find that Fujian Billion used and benefited from this program, despite its claims that its U.S. customers had not obtained export buyer's credits from the China Ex-Im Bank during the POI.[134]

Finally, relying on AFA because we do not have complete information, Commerce finds the EBC Program to be an export subsidy for this final determination.[135] Although the record regarding this program suffers from significant deficiencies, we note that the GOC's description of the program and supporting materials (albeit ultimately found to be deficient) demonstrates that through this program, state-owned banks, such as the China Ex-Im Bank, provide loans at preferential rates for the purchase of exported goods from China.[136] Moreover, the program was alleged by the petitioners as an example of a possible export subsidy.[137] Furthermore, Commerce has found this program to be an export subsidy in the past.[138] Thus, taking all such

[132] *See* GOC IQR at Exhibit II.B.14.
[133] *Id.*
[134] *See* Fujian Billion IQR at 11 and Exhibit 12.
[135] *See Preliminary Determination* PDM at 25.
[136] *See, e.g.*, GOC IQR at Exhibit II.B.14 ("The export buyer's credit {program} managed by {China Ex-Im Bank} is an intermediate and long-term credit to foreigners, used for importers making payment at sight for goods to Chinese exporters, which may promote export of goods and technical services."); *see also* GOC IQR at Exhibit II.B.16 at 9-10 ("{T}he borrower {under the EBC Program} must be an importer or a bank approved by the China Ex-Im Bank {and} the {China} Ex-Im Bank lending contract requires the buyer (importer) and seller (exporter) to open accounts with either the {China} Ex-Im Bank or one of its partner banks."); and GOC IQR at II.B.14 at 1 ("{The EBC Program provides} support for the export of China's sets of equipment, ships, and other mechanical and electronic products.").
[137] *See* Petitioner's Letter, "Polyester Textured Yarn from India and the People's Republic of China," dated October 18, 2018 (Petition), Volume III, at 30-31 and Exhibit CVD-PRC-36.
[138] *See, e.g.*, *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 17382 (April 25, 2019) (*Tires from China*), and accompanying IDM at Comment 16.

information into consideration indicates the provision of the export buyer's credits is contingent on exports within the meaning of section 771(5A)(B) of the Act. Moreover, we find that under EBC Program, the GOC bestowed a financial contribution pursuant to section 771(5)(D) of the Act.

We disagree with Fujian Billion's assertion that Commerce should not substitute an AFA determination regarding use of the EBC Program for alleged record evidence of non-use in the form of customer declarations. In this investigation, and as discussed above, we have information on the record indicating that the 2013 Revisions and the involvement of third-party banks, which were not present on the record of *Chlorinated Isos Investigation* where Commerce determined that AFA was warranted because the GOC did not cooperate to the best of its ability in responding to Commerce's request for additional information regarding the operations of the EBC Program.[139] As such, we find Fujian Billion's reliance on *Chlorinated Isos Investigation* to be unpersuasive.

We also disagree with Fujian Billion's argument that Commerce may not allow adverse inferences based on a party's failure to cooperate to adversely affect a cooperating respondent. Court precedent allows an adverse inference against a government to impact an otherwise cooperative respondent, when the government is the holder of the missing necessary information.[140] The CIT has recognized that "if a foreign government fails to cooperate in a countervailing duty case, Commerce may apply AFA even if the collateral effect is to 'adversely impact a cooperating party.'"[141] This is because the foreign government is in the best position to provide information regarding the operation of a subsidy program. Obviously, this has an effect on the respondent company, but this does not mean that Commerce's application of AFA was unlawful. The CIT has also stated that Commerce should avoid such collateral effects if relevant information exists elsewhere on the record.[142] However, as explained above, the claims of non-use on the record cannot be verified.

With regard to the GOC's reliance on *Changzhou II*, we find that Commerce's decision not to apply AFA in that case was predicated on Commerce's inadequate understanding of the EBC Program before additional information became available to Commerce regarding the program in subsequent proceedings. Specifically, as noted above, we have information regarding the 2013 Revisions and the involvement of third-party banks on the record of this case.[143] In *Changzhou II*, we did not have such information on the record. Because the GOC has withheld critical

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[139] *See Chlorinated Isos from China 2014* IDM at Comment 2 (concluding that " "without the GOC's necessary information, the information provided by respondent companies is incomplete for reaching a determination of non-use").
[140] *See KYD, Inc. v. United States*, 607 F. 3d 760 (CAFC 2010) (*KYD Inc.*) (finding that a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper); *see also Fine Furniture (Shanghai) Ltd. v. United State*s, 748 F. 3d 1365, 1372 (CAFC 2014) (*Fine Furniture*) (affirming Commerce's application of adverse inferences when the GOC did not provide requested information despite the respondents' cooperation).
[141] *See Changzhou III* at 1325 (quoting *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013) (*Archer Daniels*)).
[142] *Id.*
[143] *See* GOC IQR at Exhibit II.B.15.

information with respect to the 2013 Revisions, we are unable to determine how the program now operates, and, thus, we cannot verify the respondent company's customers' certifications of non-use.[144]

4.b. The Appropriate AFA Rate for the EBC Program

GOC's Case Brief:

- If Commerce continues to find this program was used, then it must revise the AFA rate and use the rate calculated for preferential lending in this investigation because it is unlawful to rely on a rate that is from a significantly different industry and from a case that is now more than seven years old. The AFA rate for this program has little probative value because it is not based on a "same or similar" program and is neither "reliable" nor "relevant" to this program or this investigation, nor does it take into account the "situation that resulted in an adverse inference."[145]
- The 10.54 percent rate used as AFA is based on a policy lending rate calculated in *Coated Paper from China 2010*.[146] The policy lending program is neither similar nor relevant to the Export Buyer's Credit program, as shown by the evidence on this record as to the nature, purpose, implementation and administration of the Export Buyer's Credit program.
- The AFA rate for this program is over nine years old, is from a different industry, and is derived from a distinct set of facts. In *Coated Paper from China 2010*, Commerce relied on Chinese plans and policies specific to that case. None of the Chinese plans or policies, some more than 13 years old, have relevance to the polyester textured yarn industry in 2017.
- In *Photovoltaic Cells from China*, Commerce relied upon the calculated subsidy rate for preferential lending as the facts available rate for the Export Buyer's Credit program. Commerce defended this approach before the CIT in *Solar World Remand Redetermination*, finding that it is reasonable to assume that programs that are similar because they confer similar benefits are likely to be used similarly in the same industry.[147]

Petitioners' Rebuttal Brief:

- Commerce has no "obligation" to prevent collateral impact on a cooperating party under AFA. The Federal Circuit has affirmed that a government's failure to cooperate is a "legitimate basis to apply an adverse inference that nonetheless affects a cooperating

[144] *See Changzhou II*; *see also Solar Products* IDM at Comment 11.
[145] *See* GOC Case Brief at 25-26 (citing section 776(d) of the Act).
[146] *Id.* at 25 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 FR 70201, 70202 (November 17, 2010) (*Coated Paper from China 2010*) (identifying a revised *ad valorem* subsidy rate of 10.54 percent under "Preferential Lending to the Coated Paper Industry").
[147] *Id.* at 28 (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; 2012*, 80 FR 41003 (July 14, 2015) (*Photovoltaic Cells from China*), and accompanying IDM at 18 and 44; Final Results of Redetermination Pursuant to Remand in *SolarWorld Americas, Inc., v. United States*, Consol. Court No. 15-00232 (CIT 2017) at 6 (*Solar World Remand Redetermination*)).

respondent" and thus the application of the AFA as determined in the preliminary investigation was appropriate.[148]

- Commerce followed its standard practice of calculating an AFA rate in accordance with its established hierarchy[149] and as analyzed in *Coated Paper from China 2010* and should affirm the use of the 10.54 percent AFA program rate rather than revise it as the GOC proposes.
- The GOC's argument that a 10.54 percent rate relates to a program that is not a "same or similar program" to the EBC Program is immaterial as Commerce's selection of an AFA rate for the EBC Program is not tied to industry but Commerce's expanded authority to apply AFA.[150] Commerce further rejected GOC's argument regarding program similarity in previous investigations.[151]
- The GOC's argument of the lack of contemporaneity in the assigned AFA rate is immaterial as Commerce has the discretion to apply the highest rate for a similar program.[152]
- The GOC's argument regarding the administrative review of *Photovoltaic Cells from China* is misplaced as Commerce relies upon distinct methodologies in investigations and administrative reviews. The issue before the court in *SolarWorld* therefore involved the use of a different hierarchy.[153]
- Commerce's use of the applied AFA rate for the EBC program has been previously affirmed and only need to be a "reasonably accurate estimate… with some built in increase intended as a deterrent to noncompliance."[154]

Commerce's Position: As explained in the section "Use Of Facts Otherwise Available And Adverse Inferences," in the *Preliminary Determination*,[155] in selecting an AFA rate, Commerce applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, Commerce uses the highest non-*de minimis* rate calculated for the identical program in another CVD proceeding involving the same country.

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[148] *See* Petitioners' Rebuttal Brief at 20-21 (citing *Archer Daniels* at 1342 ("absent alternative satisfactory evidence on the record, it is in accord with the law for Commerce to apply AFA to the GOC even though a cooperating party may be adversely impacted."); *Fine Furniture* at 1372 ("collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper" (citing *KYD Inc.* at 768; *see also RZBC Group* at 1208-09 ("Commerce has authority to apply AFA when, as here, a government is uncooperative but a respondent is cooperative" (citing *Fine Furniture* at 1373) ("A remedy that collaterally reaches {a cooperating party benefiting from government subsidies} has the potential to encourage the government… to cooperate so as not to hurt its overall industry.")).

[149] *Id.* at 21-22 (citing *Aluminum Sheet* IDM at Comment 4; *Aluminum Foil* IDM at Comment 6).

[150] *Id.* at 22 (citing *Aluminum Foil* IDM at Comment 6; and section 776 of the Act (Commerce "is not required to determine, or make any adjustments to, a countervailable subsidy rate… based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.")).

[151] *Id.* at 23 (citing *Aluminum Sheet* IDM at 33 ("'there is no evidence on the record from the Government of China that indicates that the Government Policy Lending program from Coated Paper from China is dissimilar to the Export Buyer's Credit program.") (citing *Coated Paper from China 2010*)).

[152] *Id.* at 23 (citing section 776 of the Act (not required "to demonstrate that the countervailable subsidy rate… reflects an alleged commercial realty of the interested party")).

[153] *Id.* at 24 (citing *Photovoltaic Cell from China* IDM; *SolarWorld Ams., Inc. v. United States*, 220 F. Supp. 3d 1362, 1365 (CIT 2017)).

[154] *Id.* at 25 (citing *RZBC Group* at 1208).

[155] *See Preliminary Determination* PDM at 5-6.

If no such rate is available, Commerce will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-*de minimis* subsidy rate calculated for a similar program, Commerce applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.[156]

In this investigation, we are unable to find an identical program in the investigation. The GOC's suggestion that we use a policy lending rate from the instant investigation as the AFA rate for the EBC program does not follow the AFA hierarchy for an investigation, because the policy lending program, while similar in terms of treatment of the subsidy (*i.e.*, relates to loans), is not identical, to the EBC program. Thus, we have examined other Chinese CVD proceedings and selected the 10.54 percent *ad valorem* rate calculated in *Coated Paper from China 2010* for "Government Policy Lending," a program that provides assistance in the form of preferential interest rates on various types of loans sourced from Chinese-owned financial institutions.[157] Consistent with Commerce's practice and AFA hierarchy, this is the highest non-*de-minimis* rate for a similar program in a Chinese CVD proceeding.

The GOC argues that the AFA rate selected for the EBC program is not the same or similar to the preferential lending to another industry, the coated paper industry, and there is no evidence that this lending program is similar to the EBC program, based upon the information submitted by the GOC regarding the EBC program. Recently, Commerce rejected this argument in *Aluminum Sheet*, noting that that due to the GOC's failure to cooperate there is no evidence on the record from the GOC that indicates that the Government Policy Lending program from *Coated Paper from China 2010* is dissimilar to the EBC program.[158] Similar to *Aluminum Sheet*, there is no evidence on the record of this investigation demonstrating the Government Policy Lending program from *Coated Paper from China 2010* is dissimilar to the EBC program.

Additionally, we disagree with the GOC's argument that the rate from *Coated Paper from China 2010* is outdated. We note the statute does not require contemporaneity when selecting AFA rates.[159] Rather, Commerce has the discretion to apply the highest rate and is not required "to demonstrate that the countervailable subsidy rate . . . reflects an alleged commercial reality of the interested party" when adverse inferences are warranted.[160] In this investigation, we followed our investigation hierarchy to, absent a calculated rate for an identical program, select the highest calculated subsidy rate for any similar/comparable program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.

Also, we disagree that *Solar World Remand Redetermination* is applicable in this case. As an initial matter, we note that *Solar World Remand Redetermination* dealt with explaining the difference in Commerce's AFA rate selection hierarchy between investigations and

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[156] *See Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (October 2, 2008) and accompanying IDM at 2-5; *see SC Paper Final* and accompanying IDM at 30.
[157] *See Coated Paper from China 2010.*
[158] *See Aluminum Sheet* IDM at 33.
[159] *See* generally, section 776(d) of the Act.
[160] *See* section 776(d)(3)(B) of the Act.

administrative reviews. Specifically, in an administrative review, if there is no identical program above *de minimis*, Commerce will "determine if there is a similar/comparable program (based on the treatment of the benefit) and apply the highest calculated rate for a similar/comparable program from the proceeding at issue."[161] The CIT found the differences between the hierarchies of investigations and administrative reviews reasonable.[162] Moreover, the CIT has affirmed the 10.54 percent AFA rate of the EBC program.[163] Therefore, in accordance with our practice, we made no changes to the criteria used to select the AFA rate for the EBC program and continue to apply the 10.54 percent AFA rate for the final determination.

Comment 5: Provision of Monoethylene Glycol (MEG) and Purified Terephthalic Acid (PTA) for LTAR

5.a. Whether MEG and PTA Producers are Authorities

GOC's Case Brief:

- There are no GOC programs to provide MEG and PTA to polyester textured yarn producers and Chinese producers of these inputs are not government "authorities." Further, these inputs are used in numerous other industries and are not specific. However, if Commerce continues to find that MEG and PTA are sold at LTAR, Commerce unlawfully resorted to benchmarks outside of China.
- In the *Preliminary Determination*, Commerce incorrectly asserted that the MEG and PTA business information submitted through China's Enterprise Credit Information Publicity System (ECIPS) is insufficient to accurately determine whether the producers constitute "authorities." The GOC provided information regarding the input producers, including information regarding shareholders and records of shareholder changes as well as information with respect to key personnel. However, because Commerce choose not to verify this information, Commerce must conclude that the business information submitted through ECIPS is accurate. Accordingly, Commerce must find that all the input producers that are owned by private enterprises and individuals are not government authorities.
- Record evidence contradicts Commerce's finding that, as AFA, all non-government-owned producers of MEG and PTA are "authorities" because the GOC failed to provide complete responses with respect to the ownership or management by Chinese Communist Party (CCP) officials. The record demonstrates that the CCP is a political party and not a government authority. CCP members do not legally or factually have authority to direct business operations.
- The *Company Law of China* and the *Civil Servant Law* stipulate the company shall operate independently without being subject to any governmental intervention and explicitly prohibit government officials from concurrently holding a position in an enterprise or any other profit-making organization.[164] Commerce should find that CCP officials and committees have no decision-making authority in privately-owned enterprises.
- Commerce's reliance on *PC Strand from China* does not support the proposition that CCP officials are permitted to serve as owners, members of the board of directors, or senior

[161] *See Photovoltaic Cells from China* IDM at 18.
[162] *See SolarWorld Americas, Inc. v. United States*, 229 F.Supp.3d 1362, 1370 (CIT 2017) (*Solar World*).
[163] *See RZBC Group* at 1208.
[164] *See* GOC Case Brief at 33 (citing GOC IQR at 90 and Exhibit II.E.4).

managers of companies because *PC Strand from China* does not address the issue of whether Chinese law permits owners, members of the board of directors and managers of companies to be CCP officials. Further, in *PC Strand from China*, Commerce found that membership in the CCP or National Party Conference was insufficient to find that the relationships between individual owners and the GOC or CCP evince government control.[165]

- Commerce has not explained, and has not provided any evidence, to support its assertion that CCP affiliations or activities are relevant to its "government authorities" analysis of producers of PTA and MEG.
- Determining whether business owners, board members or managers are CCP officials is unreasonably burdensome. The GOC did not "refuse" to provide the requested information; the GOC provided detailed efforts it undertook to try to obtain the requested information. Commerce cannot penalize the GOC by resorting to AFA in this regard, because the GOC has responded to Commerce's questionnaires to the best of its ability.[166]

Petitioners' Rebuttal Brief:

- Fujian Billion failed to identify all input producers that provide MEG and PTA as a result of the GOC's failure to provide complete corporate ownership information. The GOC's claim that ownership information is sufficient to find input producers not to be government authorities is insufficient because they failed to comply to the best of their ability and provide the additional corporate information requested by Commerce.[167]
- The GOC's position that the CCP officials and entities in China do not constitute government authority has been repeatedly rejected by Commerce[168] and is undermined by record evidence. Commerce has previously dismissed GOC's contention that the *Company Law of China* and the *Civil Servant Law* require companies to operate independently without government intervention.[169] Commerce's policy with respect to government authorities in China is well established and the GOC's assumption otherwise resulted in a failure to collect the information requested by Commerce. The GOC's assertion that the information was not "necessary" is not relevant and the GOC therefore failed to provide the necessary information or act to the "best of its ability."
- Commerce should maintain its past practice that the *Company Law of China* provides that Chinese companies should accept the supervision of the government and promote development of the socialist market economy and therefore, the GOC's conclusion that CCP officials have no decision-making authority in privately-owned enterprises is false.

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[165] *Id.* at 33-34 (citing *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying IDM at Comment 8).

[166] *Id.* at 36-37.

[167] *See* Petitioners' Rebuttal Brief at 41 (citing section 776 of the Act; and *QVD Food Co. v. United States*, 658 F. 3d 1318, 1324 (CAFC 2011) ("the burden of creating an adequate record lies with interested parties and not with Commerce")).

[168] *Id.* at 42 (citing *Aluminum Foil* IDM at Comment 18; *see also* Memorandum, "Public Bodies Analysis Memoranda," dated April 26, 2019, at Attachment I (Public Bodies Memorandum) and at Attachment III (CCP Memorandum)).

[169] *See Aluminum Foil* IDM at Comment 18 (citing *Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review;2012*, 79 FR 52301 (September 3, 2014) and accompanying IDM).

- The GOC has shown the ability to access information regarding individual owners, members of the boards of directors, and senior managers as government or CCP officials in prior CVD investigations[170] and misrepresents the burden of the request for information in this case. Regardless, Commerce has the discretion to determine the information it needs to conduct its investigation.

Commerce's Position: For purposes of the final determination, we continue to find, based on AFA, that the domestic input producers that supplied MEG and PTA to Fujian Billion are "authorities" within the meaning of section 771(5)(B) of the Act and, thus, that such producers provided a financial contribution in supplying MEG and PTA to Fujian Billion.

As discussed in the *Preliminary Determination*, in order for Commerce to analyze whether the domestic producers that supplied MEG and PTA to Fujian Billion are "authorities" within the meaning of section 771(5)(B) of the Act, we sought information regarding whether any individual owners, board members, or senior managers were government or CCP officials and the role of any CCP primary organization within these domestic producers.[171] Specifically, to the extent that the owners, managers, or directors of a producer are CCP officials or otherwise influenced by certain CCP-related entities, Commerce requested information regarding the means by which the GOC may exercise control over company operations and other CCP-related information.[172] Commerce explained its understanding of the CCP's involvement in China's economic and political structure in current and past China CVD proceedings, including why it considers the information regarding the CCP's involvement in China's economic and political structure to be relevant.[173]

The GOC stated that certain companies which it identified as producers of the MEG and PTA purchased by Fujian Billion and Shenghong Billion during the POI were privately owned.[174] Regarding these input producers, we asked the GOC to provide information about the involvement of the CCP in these companies, including whether individuals in management positions are CCP members, in order to evaluate whether the allegedly privately-owned input suppliers are "authorities" with the meaning of section 771(B) of the Act.[175] While the GOC provided a long narrative explanation of the role of the CCP, when asked to identify any owners, members of the board of directors, or managers of the input suppliers who were government or CCP officials during the POI, the GOC explained that there is "no central government database to search for the requested information."[176] In a supplemental questionnaire, we again requested information regarding government or CCP officials. The GOC referred us to its IQR.[177]

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[170] *Id.* at 44 (citing *High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) (*High Pressure Cylinders*), and accompanying IDM at 13)).
[171] *See Preliminary Determination* and accompanying PDM at 18 (citing Initial Questionnaire at 9-15 and Input Producer Appendix).
[172] *See* Initial Questionnaire at Input Producer Appendix.
[173] *See Citric Acid 2012* IDM at Comment 5; *see also* Public Bodies Memorandum; and CCP Memorandum.
[174] *See* GOC IQR at Exhibits II.E.1-2 and Exhibits II.E.15-16
[175] *See* Initial Questionnaire, Section II, Input Producer Appendix
[176] *See* GOC IQR at 94 and 115.
[177] *See* GOC SQR at 20 and 23.

The GOC has objected to Commerce's questions regarding the role of CCP officials and organizations in the management and operations of raw material suppliers. However, we have explained our understanding of the CCP's involvement in China's economic and political structure.[178] Commerce has determined that "available information and record evidence indicates that the CCP meets the definition of the term 'government' ... for the limited purpose of applying the U.S. CVD law to China."[179] Additionally, publicly available information indicates that Chinese law requires the establishment of CCP organizations "in all companies, whether state, private, domestic, or foreign-invested" and that such organizations may wield a controlling influence in the company's affairs.[180] With regard to the GOC's claim that Chinese law prohibits GOC officials from taking positions in private companies, we have previously found that this particular law does not pertain to CCP officials.[181] The GOC's argument is also contradicted by past Commerce findings that CCP officials can, in fact, serve as owners, members of the board of directors, or senior managers of companies.[182] More broadly, Commerce has found that, even in non-state-owned enterprises, "CCP primary organizations...ensure those entities 'carry out social responsibilities,' {and} maintain and implement the Party's (*i.e.*, the government's) line and principles."[183]

We have found in prior cases that, when examining whether CCP officials are among a company's owners, senior managers, or directors, or if a CCP primary organization such as a party committee is embedded in the company's structure, the entity possessing direct knowledge of these facts is the CCP (or the GOC) itself.[184] In fact, in prior CVD proceedings, we found that the GOC was able to obtain the information requested independently from the companies involved, and that statements from companies, rather than from the GOC or CCP themselves, were not sufficient.[185] Further, with respect to the GOC's claim that it would be "unreasonably burdensome" to supply Commerce with information regarding CCP involvement in the management and operations of MEG and PTA suppliers, we note that the GOC has been able to provide this information in prior CVD investigations.[186]

In addition, we disagree with the GOC that it provided Commerce with sufficient information to determine that all of Fujian Billion's input supplier companies are privately-owned entities. It is for Commerce, not the GOC, to determine what information is necessary in order for Commerce

[178] *See* CCP Memorandum.
[179] *Id*. at 33.
[180] *Id*. at 35.
[181] *See, e.g.*, *Certain Uncoated Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 81 FR 3110 (January 20, 2016), and accompanying IDM at 16.
[182] *See, e.g.*, *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010), and accompanying IDM at Comment 8 ("In the instant investigation, the information on the record indicates that certain company officials are members of the Communist Party and National Party Conference as well as members of certain town, municipal, and provincial level legislative bodies."); and *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Countervailing Duty Administrative Review and Rescission in Part; 2012-2013*, 80 FR 69638 (November 10, 2015).
[183] *See Citric Acid 2012* IDM at Comment 1.
[184] *See, e.g.*, *Citric Acid 2012* IDM at 4-6.
[185] *See Citric Acid 2012* IDM at Comment 5.
[186] *See High Pressure Cylinders* IDM at Comment 13

to complete its proceedings.[187] Further, we disagree with the GOC's assertion that the information submitted through China's ECIPS is sufficient to accurately determine whether the producers constitute "authorities." With respect to those MEG and PTA producing enterprises that the GOC identified as majority government-owned,[188] we note that Commerce made multiple requests for the GOC to provide the articles of incorporation and capital verification reports of all of these enterprises.[189] With respect to those MEG and PTA entities that were reported as being non-majority government-owned enterprises that produced MEG and PTA purchased by Fujian Billion during the POI, although the GOC provided website screenshots of certain business registrations for some of the input producers, the GOC did not provide other documentation requested by Commerce, including company by-laws, annual reports, tax registration documents, and articles of association.[190] Additionally, although Commerce made attempts to obtain ownership and management information for all of the respondents' MEG and PTA producers, the GOC did not provide the requested information. For instance, in its IQR, the GOC refused to provide Commerce with requested CCP information regarding the MEG and PTA producers.[191] In response to Commerce's supplemental questionnaire, in which Commerce reiterated the same requests for information, the GOC again refused to provide a complete response with regard to all requested documentation for producers of MEG and PTA in China.[192] For the reasons described above, we find that the GOC failed to provide information necessary for us to analyze whether Fujian Billion's input suppliers are authorities.

Therefore, we find that the GOC withheld necessary information that was requested of it and that Commerce must rely on facts available in conducting our analysis of Fujian Billion's input suppliers.[193] As a result of incomplete responses to Commerce's questionnaires, we also find that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information. Consequently, we determine that an adverse inference is warranted in selecting from the facts available.[194] As AFA, we find that CCP officials are present in each of Fujian Billion's privately-owned input suppliers as individual owners, managers and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources. As explained in the Public Bodies Memorandum, an entity with significant CCP presence on its board or in management or in party committees may be controlled such that it possesses, exercises or is vested with governmental authority.[195] Thus, for the final determination, we continue to find that the MEG and PTA input suppliers which supplied Fujian Billion are "authorities" within the meaning of section 771(5)(B) of the Act.

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[187] *See ABB Inc. v. United States*, 355 F. Supp. 3d 1206, 1222 (CIT 2018) ("Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record."); *see also Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (1986) (holding that "it is Commerce, not the respondent, that determines what information is to be provided").
[188] *See* GOC IQR at 80-82, 106-108, and Exhibits II.E.1., II.E.2, II.E.15, and II.E.16; *see also* GOC SQR at 18-26 and Exhibits S-7, S-8, S-9, and S-10.
[189] *See* GOC SQR at 18-20, 22-23.
[190] *See* GOC IQR at 80-82 and 106-108.
[191] *Id.* at 86-92, and 113-114.
[192] *See* GOC SQR at 20 and 23.
[193] *See* section 776(a)(2)(A) of the Act.
[194] *See* section 776(b) of the Act.
[195] *See* Public Bodies Memorandum at 33-36, 38.

5.b. Whether MEG and PTA are Specific to the Polyester Textured Yarn Industry

GOC's Case Brief:

- The provision of MEG and PTA are not specific to the polyester textured yarn industry because MEG is used by a wide variety of industries that involve a diverse array of products and consumers.
- "Polyester" comprises a broad array of industries and products and is not the same as "polyester textured yarn." Further, MEG is an intermediate input to produce the polyester.
- In *Chlorinated Isos Investigation*, Commerce determined that, although the agricultural sector consumed 70 percent of urea production, the provision of urea was not specific because urea was used in nine other industries.[196] Here, Commerce should conclude that MEG and PTA are used across too broad an array of diverse industries to be considered specific.

Petitioners' Rebuttal Brief:

- GOC acknowledges that the polyester fiber sector accounted for 76.2 percent of MEG consumption in 2016 and accounting for three-fourths of consumption demonstrates predominant use.[197]
- Contrary to the statement of the GOC, *Chlorinated Isos Investigation* supports Commerce's preliminary finding of *de facto* specificity in this investigation. Commerce should continue to find that the provision of inputs of MEG and PTA for LTAR is specific.

Commerce's Position: Based on the facts on the record in this case, we continue to find the provision of MEG and PTA for LTAR to be specific. The GOC states that the main sectors using MEG are: (1) polyester fiber (76.2 percent), (2) polyester bottle (17.6 percent), (3) polyester film (5.2 percent), and (4) engineering plastic (1 percent).[198] Moreover, the GOC states on the record that "…the polyester industry consumed 12.6 million MT, accounting for 92.1% of apparent consumption of MEG."[199] With respect to PTA, the GOC reported that PTA is mainly used in the polyester industry, with 76 percent of the polyester used to produce polyester fiber in the China market.[200] Further, the GOC reports that domestic consumption of PTA accounts for 100 percent of domestic production during 2017.[201]

The GOC's contention that the broad range of applications for MEG and PTA undermines a finding of specificity is not persuasive. Commerce previously considered, and rejected, the arguments here made by the GOC. For instance, in *Steel Sinks from China*, Commerce noted that simply because an input is consumed by multiple industries, does not undermine a finding of

[196] *See* GOC Case Brief at 41 (citing *Chlorinated Isos Investigation* IDM at 39).
[197] *See* Petitioners' Rebuttal Brief at 47 (citing section 771(5A)(D)(iii)(II) of the Act).
[198] *See* GOC IQR at 101.
[199] *See* Petition at Exhibit III-9.
[200] *See* GOC IQR at 101.
[201] *Id.* at 119.

specificity.[202] There, Commerce explained that where "potential users of stainless steel products fall into 20 or 32 different industry classifications using ISIC {International Standard Industry Classification} and Chinese national economy industry classifications {'NEIC'}," the stainless steel input could still be considered specific to the industry in question.[203] Similarly, in *Citric Acid from China*, Commerce considered whether sulfuric acid, steam coal, and calcium carbonate were specific to the industry under consideration.[204] As it does here, the GOC argued then that these inputs "are sold to a broad spectrum of industries for a wide variety of uses." The GOC argued that this undermines a finding of specificity.[205] However, Commerce rejected that argument in *Citric Acid from China*, stating that a number of broad industry classifications were predominant users of such inputs. For example, with respect to sulfuric acid, Commerce found that fertilizer producers and the "chemical industry" were predominant users of the input; accordingly, Commerce found that sulfuric acid was specific to the industry in question.[206] In the instant investigation, the percentage of MEG (76 percent) used in the polyester industry, and the fact that 92 percent of PTA is used to produce MEG, demonstrates that these inputs are predominately used by the polyester industry, of which polyester textured yarn is a part, consistent with section 771(5A)(D)(iii)(II) of the Act.

The SAA instructs Commerce to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies that truly are broadly available and widely used throughout an economy. As the SAA states, "the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy."[207] However, here, the GOC has provided no evidence that the use of subsidized MEG or PTA is spread widely throughout the Chinese economy.

Consistent with these cases and the SAA, the evidence as described above shows that, regarding the provision of MEG and PTA, the polyester industry and polyester fiber industry are predominant users. Accordingly, we continue to determine that the GOC's provision of MEG and PTA is specific within the meaning of section 771(5A)(D)(iii)(II) of the Act.[208]

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[202] *See Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 FR 46717 (August 6, 2012) (*Steel Sinks from China*), unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013).
[203] *Id.*
[204] *See Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2013*, 80 FR 77318 (December 14, 2015) (*Citric Acid from China*), and accompanying IDM at Comment 1.
[205] *Id.*
[206] *Id.* at Comment 1.A.
[207] *See* SAA at 930.
[208] *See also Preliminary Determination* PDM at 33-34.

5.c. Whether Commerce used the Correct Benchmark to Determine Remuneration for MEG and PTA

GOC's Case Brief:

- Commerce should revise the benchmarks used to calculate the adequacy of remuneration for MEG and PTA in China ("tier one") benchmarks, because Commerce's finding that the Chinese MEG and PTA industry and market are distorted based on AFA is plainly contradicted by the record evidence. Moreover, Commerce provided no analysis regarding the prevailing market conditions in China.
- Commerce claims, as a basis for its decision, that the GOC did not provide information regarding the MEG and PTA industries for 2015 and 2016. However, the GOC has provided production and consumption information.[209] Additionally, Commerce verified this information compiled by the State Statistics Bureau of China (SSB) and Commerce should be able to confirm based on the SSB data that the Chinese PTA and MEG markets are not distorted by government interference.
- Commerce's use of a "tier-two" benchmark is inconsistent with its WTO obligations and contradicted by the record evidence.[210] Based on the WTO findings, Commerce must determine that the MEG and PTA markets are distorted based on an analysis of the specifics of these input markets.
- In determining benchmarks, Commerce must take into account the prevailing transportation costs for these goods that are generally applicable to all purchasers in China. Commerce must limit any adjustment that includes ocean freight and import duties to a representative level consistent with prevailing market conditions in China for the goods in question; it cannot simply determine to apply freight costs and import duties without more reasoning. Here, Commerce should apply a domestic-to-import supply ratio to the duty or freight adjustment, which in this proceeding, is a ratio of 65 percent based on the numbers reported by the GOC.[211]

Petitioners' Rebuttal Brief:

- Commerce should reject the GOC's suggested revision and affirm its preliminary benchmarks on the basis that the GOC failed to provide information requested. The GOC, despite its assertion, failed to report PTA production figures for companies with less than majority government-ownership and MEG and PTA production figures for companies with less than RMB 20 million in income.
- Facts on the record beyond market share indicate that the Chinese government has significantly intervened in the MEG and PTA markets. Commerce preliminarily found the GOC implemented a policy to support the development of the Chinese polyester textured yarn industry and have therefore encouraged the supply of productive inputs.

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[209] *See* GOC's Case Brief at 42 (citing GOC's IQR at 96-98 and 100; and GOC SQR at 20 for the MEG industry, and GOC IQR at 117-120 and GOC SQR1 at 24 for the PTA industry).
[210] *Id*. at 43 (citing Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R (July 14, 2014), para. 4.62 "{e}vidence relating to government ownership of *SOEs* and their respective market shares does not, in and of itself, provide a sufficient basis for concluding that in-country prices are distorted.").
[211] *Id*. at 45.

- Commerce is not bound by WTO Appellate Body rulings[212] and therefore the WTO ruling regarding government ownership and market distortion is non-binding. Other record evidence indicates distortion in the Chinese domestic input markets. Accordingly, Commerce should rely on tier two, world market prices, to measure the adequacy of remuneration in the final determination.
- Commerce should reject outright the proposed GOC adjustment for the ocean freight and import duty. Commerce assesses the adequacy of renumeration by comparing the price paid on a specific input purchase from a government authority to the price the company would have paid if the input was purchased from another source. The appropriate comparison occurs on a transaction-by-transaction basis and imported MEG would incur and reflect the full costs of both ocean freight and import duties. The GOC offers no legal basis nor case precedent to support this proposal.

Commerce's Position: We disagree with the GOC. For the final determination, we are continuing to incorporate international freight and duty costs in our tier two benchmark prices. We are relying on tier two benchmarks for MEG and PTA because we have determined, based on AFA, that the Chinese markets for these inputs are distorted because of the GOC's involvement in these markets.[213] According to 19 CFR 351.511(a)(2)(iv), world market prices must be adjusted to include delivery charges and import duties "to reflect the price that a firm actually paid or would pay if it imported the product." The courts have upheld our application of these adjustments as lawful and in compliance with our regulations.[214]

The GOC stated that it does not maintain records on the MEG and PTA industries whose state ownership is less than 50 percent,[215] and as such, was unable to identify the producers in which the GOC maintains an ownership or management interest. We provided the GOC with another opportunity to provide additional information regarding the MEG and PTA industries in our supplemental questionnaire.[216] In its supplemental questionnaire response, the GOC refused to provide this information.[217]

Given the lack of information, Commerce was unable to perform a complete analysis of the MEG and PTA industries in China. On this basis, we preliminarily determined that the GOC, having failed to provide such data, has withheld information that was requested of it, and that the use of facts available is warranted, pursuant to section 776(a)(2)(A) of the Act.[218] Further, we found the application of AFA pursuant to section 776(b) of the Act to be warranted.[219]

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[212] *See* Petitioners' Rebuttal Brief at 49 (citing *Dongbu Steel Co. v. United States*, 635 F. 3d 1353, 1368 (CAFC 2011) ("We have repeatedly indicated that adverse WTO decisions have no bearing on the reasonableness of Commerce's actions"); and *Corus Staal BV v. Department of Commerce*, 395 F. 3d 1343, 1349 (CAFC 2005)).
[213] *See Preliminary Determination* PDM at 21.
[214] *See Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1372-75 (CIT 2015); *see also Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 929 F. Supp. 2d 1324, 1327 (CIT 2013); and *Essar Steel Ltd. v. United States*, 678 F. 3d 1268, 1274 (Fed. Cir. 2012) (finding that "Commerce's decision to add these charges to benchmark prices is consistent with the relevant statute and regulation and is supported by substantial evidence").
[215] *See* GOC IQR at 96-97 and 120-121.
[216] *See* GOC SQR at 20-26.
[217] *Id.*
[218] *See Preliminary Determination* PDM at 21.
[219] *Id.*

Nevertheless, evidence on the record indicates that the GOC's involvement in the market is distortive.[220] Therefore, we preliminarily determined, relying on AFA, that the domestic market for MEG and PTA was distorted through the intervention of the GOC, and we relied on an external benchmarks to determine the benefit from the provision of MEG and PTA at LTAR, in accordance with 19 CFR 351.511(a)(2)(ii).[221]

We disagree with the GOC's contention that it provided the necessary production and consumption information to determine that the MEG and PTA markets are not distorted. Specifically, we requested industry-specific data, including: (1) MEG industry data for 2015 and 2016; (2) the number of Chinese MEG producers with main business income of less than 20 million RMB that are not accounted for in the SSB data; (3) production figures for PTA producers with less than majority government ownership; and (4) the number of Chinese PTA producers with main business income of less than 20 million RMB that are not accounted for in the SSB data.[222] As detailed in the *Preliminary Determination*, the GOC has demonstrated in other instances that such information is likely available.[223] The GOC has previously provided, and Commerce has verified, information from other government databases concerning the value and volume of production by enterprises producing input products.[224] Moreover, Commerce has verified the operation of the GOC's "Enterprise Credit Information Publicity System," which requires that the administrative authorities release detailed information of enterprises and other entities and is intended to bring clarity to companies registered in China.[225] Based on this experience, Commerce is aware that this system is a national-level internal portal that holds certain information regarding any China-registered company.[226] Among other information, each company must upload its annual report, make public whether it is still operating, and update any changes in ownership. The GOC has stated that all companies operating within China maintain a profile in the system, regardless of whether they are private or a state-owned enterprise (SOE). Therefore, we determine that information related to the operation and ownership of companies within the MEG and PTA industries are in fact available to the GOC.

Thus, we continue to find that the GOC withheld the information necessary for our analysis such that we must rely on facts available under section 776(a) of the Act, and also that the GOC did not cooperate to the best of its ability. Consequently, in making our distortion finding, an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act.

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[220] *See* Petition at Exhibits CVD-PRC-47 (*Petrochemicals Industrial Adjustment and Promotion Plan*) and CVD-PRC-28 (*Chemical Fiber Industry 'Thirteenth Five-Year' Directive Opinion'*).
[221] *Id.*
[222] *See* GOC SQR at 20-26.
[223] *See Preliminary Determination* PDM at 21.
[224] *See, e.g.*, *Citric Acid from China*.
[225] *See Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 46643 (July 18, 2016), and accompanying PDM at 21-22, unchanged in *Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 9714 (February 8, 2017).
[226] *See also Preliminary Determination* PDM at 21.

As in our *Preliminary Determination*, we find that it is appropriate to use world market prices as benchmarks for evaluating the adequacy of remuneration for purchases of MEG and PTA inputs and, therefore, we must adjust such prices as required by our regulations.[227] We are calculating a delivered price that includes freight and import duties, which would be the price that a company would pay if it imported the inputs in question. Whether a respondent actually imported the inputs and paid international freight and/or duties is not relevant for the purpose of determining an appropriate benchmark.[228]

We also find that the use of a supply ratio would not be appropriate in light of the AFA finding that the domestic producers of the inputs purchased by Fujian Billion are authorities. This finding means that we use only Fujian Billion's import prices for MEG and PTA, not its domestic prices, in deriving a tier two benchmark. We note that using a supply ratio, which would include Fujian Billion's domestic purchases, to construct a weighted-average benchmark, would distort the benchmark which includes duty and ocean freight payments, as applicable. Accordingly, we continue to include the company's actual ocean freight and import duties in its benchmark calculations for MEG and PTA and decline to apply the suggested ratio to these payments.

Additionally, consistent with section 771(5)(E) of the Act, we have, in fact, considered the prevailing conditions of the country in question in our analysis. To compute benchmark prices, for the final determination, we used Maersk ocean freight charges, actual inland freight charges as reported by the respondent, and actual Chinese import duties for the specific inputs we are examining.[229] Therefore, the various freight and duty costs reflect prices and rates applicable to the Chinese market, and thus relate directly to prevailing market conditions in China.

Comment 6: Provision of Electricity for LTAR

6.a. Whether the Provision of Electricity is Countervailable

GOC's Case Brief:

- Commerce may not countervail the provision of electricity because this alleged program constitutes general infrastructure and is not a financial contribution. Further, there is no evidence that this provision is specific to the polyester textured yarn industry.
- In *Carbon Steel Wire from Saudi Arabia*, Commerce found that basic infrastructure is not countervailable if access to the infrastructure is equally accessible by all. Here, Commerce did not find the GOC placed restrictions on who may use the power grid or that the power

[227] *See Preliminary Determination* PDM at 21.
[228] *See, e.g.*, *Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 80 FR 34888 (June 18, 2015), and accompanying IDM at Comment 3; *see also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d at 1374 (explaining that "the Federal Circuit has upheld Commerce's practice of ignoring a particular respondent's conditions of purchase when calculating tier-two benchmark prices and found that adding these charges to a benchmark price, even where the respondent did not incur these costs, 'is consistent with the relevant statute and regulation'").
[229] *See* Fujian Billion's Final Calculation Memorandum.

grid was built solely for the polyester textured yarn industry.[230] Moreover, the record evidence also fails to demonstrate that the GOC has given polyester textured yarn producers preferential rates or greater access to the power grids.

Petitioners' Rebuttal Brief:

- Commerce should reject the GOC's claims because the provision of electricity for LTAR is not a general infrastructure program. Commerce has recently affirmed that the provision of electricity is not "general infrastructure" within countervailing duty law in *Hot-Rolled Steel from Thailand* and "does constitute a financial contribution."[231] Furthermore, the GOC is erroneous in its conclusions as the electricity itself is not considered general infrastructure, only the physical plant or power grids. The countervailable subsidy is in the consumable electricity rather than the power grid.
- Commerce's finding of specificity based upon AFA was correct and consistent with case precedent.[232] The GOC failed to provide requested information on the record that established that the electricity tariffs are not set to benefit select industries within the province or account for the electricity differences between provinces.

Commerce's Position: We agree with the petitioners. This issue was unequivocally addressed in *Hot-Rolled Steel from Thailand*, and the CIT affirmed Commerce's determination in *Royal Thai.*[233] While the GOC cites *Carbon Steel Wire from Saudi Arabia* in arguing that the program involves basic infrastructure, Commerce has consistently found the provision of electricity to be a provision of a good, not to be general infrastructure.[234] Also, Commerce's regulations explicitly categorize electricity within the provision of countervailable goods and services.[235] As detailed in Comment 6.b. below, in this proceeding we determined that the provision of electricity by the GOC is specific and provides a financial contribution on the basis of AFA, and thus the GOC's arguments regarding the specificity of this program are addressed below.

6.b. Whether the Record Supports Applying AFA to Find Electricity for LTAR

GOC's Case Brief:

- Commerce's application of AFA with respect to electricity is contradicted by the record evidence. The GOC acted to the best of its ability to provide Commerce with the information it requested, particularly with respect to providing information on the role of the National

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[230] *See* GOC Case Brief at 46-47 (citing *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod from Saudi Arabia*, 51 FR 4206 (February 3, 1986) (*Carbon Steel Wire from Saudi Arabia*); and *Bethlehem Steel Corporation v. United States*, 223 F. Supp. 2d 1372 (CIT 2002)).
[231] *Id.* at 52 (citing *Royal Thai Gov't v. United States*, 441 F. Supp. 2d 1350, 1357 (CIT 2006) (*Royal Thai*) quoting *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR50410 (October 3, 2001) (*Hot-Rolled Steel from Thailand*) at 35).
[232] *Id.* at 54 (citing *e.g.*, *Aluminum Foil* IDM at Comment 23).
[233] *See Royal Thai*, 441 F. Supp. 2d at 1357.
[234] *See, e.g.*, *Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012) (*Steel Wheels*), and accompanying IDM at 64 and Comment 20 ("The Department has consistently found the provision of electricity to be the provision of a good, and not to be general infrastructure.").
[235] *See Countervailing Duties*, 63 FR 65348, 65377-78 (November 25, 1998).

Development and Reform Commission (NDRC) in the electricity price setting in China and the provinces and in deriving electricity price adjustments.

- While Commerce concluded that the NDRC continues to play a role in setting and adjusting electricity prices, Commerce has not explained how the NDRC explicitly mandates specific electricity tariffs for the provinces or alters the Provincial Price Proposals.[236]
- The GOC has proactively promoted electricity market reform since 2015; prices in China are based on market principles that take into account overall demand and supply present in the electricity market, as well as the costs of electricity generation and transmission. Moreover, the GOC confirmed that the provincial authority independently publishes its own electricity schedules.
- Commerce should not draw an adverse inference in selecting the benchmark for determining the existence and amount of the benefit. Commerce should determine the adequacy of remuneration by examining whether respondents received a preferential rate compared to those entities receiving a rate by the standard pricing mechanism.[237] The record evidence indicates that in all the provinces in which the mandatory respondent and its reported cross-owned affiliate are located, all large-scale industrial enterprise users enjoy the same electricity tariff rates.

Petitioners' Rebuttal Brief:

- The GOC failed to provide Commerce the requested information regarding the applicable tariff schedules during the POI and failed to support or corroborate its assertion that the provinces are responsible for electricity tariffs rather than the NDRC. The GOC's "record evidence" cited in the case brief is undermined by the supporting documentation. The record evidence as well as similar determinations by Commerce[238] support the continued application of AFA.
- Commerce was unable to set a benchmark due to the GOC's failure to submit information and therefore adverse inference should apply to Commerce's finding as is consistent with Commerce procedure and prior investigation precedent.

Commerce's Position: We continue to find that the GOC did not act to the best of its ability to provided requested information. As explained in the *Preliminary Determination*, the GOC did not provide complete responses to Commerce's questions regarding the alleged provision of electricity for LTAR.[239] In the original questionnaire, Commerce requested information from the GOC that was needed to determine whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D) of the Act and whether such a provision was specific within the meaning of section 771(5A) of the Act. The GOC did not provide this information. Consequently, in the *Preliminary Determination*, we relied on facts available pursuant to section 776(a)(1) and (2)(A) and (C) of the Act because necessary information was missing from the record and because the GOC withheld information that was requested of it for our analysis and significantly impeded the proceeding. Furthermore, we applied AFA pursuant

[236] *See* GOC Case Brief at 49.
[237] *Id.* at 51-52 (citing *Maverick Tube Corporation v. United States*, Slip Op. 17-146, at 20 (CIT 2017)).
[238] *See* Petitioners' Rebuttal Brief at 57 (citing *Fine Furniture* 748 F.3d 1365, 1368, 1372; and *Hebei Jiheng Chemicals Co. v. United States*, 161 F. Supp. 3d 1322, 1326-33 (CIT 2016)).
[239] *See Preliminary Determination* PDM at 21-24.

to section 776(b) of the Act because the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information.[240] Consistent with the Act and our practice, Commerce is continuing to apply AFA with respect to the provision of electricity for this final determination.

Commerce requested information regarding the derivation of electricity prices at the provincial level, the procedure for adjusting retail electricity tariffs, and the role of the NDRC and the provincial governments in this process.[241] Specifically, we asked how increases in cost elements led to retail price increases, the derivations of those cost increases, how cost increases were calculated, and how cost increases impacted final prices.[242] Additionally, we requested that the GOC explain, for each province in which a respondent or cross-owned company is located, how increases in labor costs, capital expenses, and transmission and distribution costs are factored into Provincial Price Proposals, and how cost element increases and final price increases were allocated across the province and across tariff end-user categories.[243]

As explained in detail in the *Preliminary Determination*, the GOC failed to fully explain the roles and nature of the cooperation between the NDRC and the provincial governments in deriving electricity price adjustments. As a result of the GOC's refusal to provide the requested information and unwillingness to cooperate, Commerce was unable to evaluate whether the electricity rates included in the electricity schedules submitted by the GOC were calculated based on market principles.[244] Accordingly, Commerce applied facts available with an adverse inference to the determination of the appropriate benchmark.[245] Specifically, because the GOC provided the provincial electrical tariff schedules, Commerce relied on this information for the application of facts available and, in making an adverse inference, Commerce identified the highest rates amongst these schedules for each reported electrical category and used those rates as the benchmarks in the benefits calculations.[246]

The GOC argues that its electricity tariffs are not specific because the same price is charged to each type of end-user within a province, but Commerce's analysis and its specificity determination are not based on the conclusion that different end-users receive different rates within the province. Rather, given the GOC's failure to cooperate fully, Commerce must rely on the facts available on the record, with appropriate adverse inferences, in making both our specificity and benchmark determinations. As we explained in the *Preliminary Determination*, we attempted to obtain information on how Chinese provincial electricity rate schedules are calculated and why they differ; this information could have contributed to Commerce's analysis of an appropriate benchmark for the benefit calculation for this program.[247] The GOC's failure to provide complete responses to our questions regarding this program is the reason Commerce is applying AFA in this case with respect to the selection of an electricity benchmark. The GOC's refusal to answer Commerce's questions completely with respect to the roles and nature of

[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*

cooperation between the NDRC and the provinces in deriving electricity price adjustments and failure to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by the provinces themselves, leaves Commerce unable to carry out a specificity analysis. The GOC has failed to explain the reason for these differences in this and previous cases, claiming without support that the provincial governments set the rates for each province in accordance with market principles.

For the reasons stated above, we continue to find this program countervailable and to rely on our findings in the *Preliminary Determination* that the GOC's provision of electricity confers a financial contribution and is specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. The GOC failed to provide certain requested information regarding the relationship (if any) between provincial tariff schedules and cost, as well as requested information regarding cooperation (if any) in price setting practices between the NDRC and provincial governments. Therefore, for the final determination, we continue to apply facts available with an adverse inference with regard to this program, including in our selection of the benchmark for determining the existence and amount of the benefit.[248]

Comment 7: Whether the GOC Provided Countervailable Policy Loans During the POI

GOC's Case Brief:

- The industrial policies Commerce relied on in the *Preliminary Determination* are overly broad and are not specifically pertinent to the polyester textured yarn industry. Commerce's practice is to find that a policy lending program exists that is *de jure* specific to the named industry. However, Commerce failed to establish a link between the alleged government policy to "encourage" the polyester textured yarn industry and the bank loans received by the mandatory respondent. Further, the GOC confirmed that no loans to the mandatory respondent in this investigation were issued pursuant to an industrial policy.
- Evidence on the record demonstrates that the People's Bank of China deregulated China's interest rates and enlarged the floating range of interest rates to further the market-oriented reform of the Chinese banking sector. Commerce arbitrarily ignored the numerous regulatory initiatives commercializing the banking sector provided by the GOC in this investigation.
- Commerce provided no independent analysis in the *Preliminary Determination* regarding whether loans from Chinese banks are from "authorities," instead relying on decisions from previous investigations which fails to satisfy U.S. obligations under the WTO SCM Agreement.[249]
- Commerce made an unfounded presumption that ownership alone indicates that the entity is a "government entity," and there is nothing on the record which indicates that Chinese state-owned commercial banks or policy banks act as "government authorities."
- Commerce's use of external interest rates instead of a Chinese domestic market interest rate benchmark is contrary to Commerce's regulations and past case precedents.

[248] *See* Section 776(a)-(b) of the Act.

[249] *See* GOC' Case Brief at 56 (citing *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007); and *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011)).

- Commerce should abandon its flawed attempt to construct a third-country basket benchmark interest rate for China and use instead the actual interest rates on comparable bank loans in China, as its own regulations require. The multi-country, short-term interest rate benchmark computations in the *Preliminary Determination*, which rely on a regression analysis based on World Bank governance indicators and lending rates as published by the International Monetary Fund for dozens of upper and lower middle-income countries, are fundamentally flawed.

Petitioners' Rebuttal Brief:

- Record evidence indicates the GOC's support for the polyester textured yarn industry. In the *Preliminary Determination*, Commerce linked GOC guidelines and the industrial promotion of the Government of Fujian province specifically to the chemical fiber industry, which encompasses the polyester textured yarn industry. The GOC's claim that the industrial policies are not specific to the industry is flawed.
- The polyester textured yarn industry has additionally benefited from financial support from the GOC through the "decision of the State Council on Promulgating the Interim Provision on Promoting Industrial Structure Adjustment."[250] The GOC is incorrect in their statement that the Chinese government's industrial policies do not target directives at the industry and Commerce's preliminary decision was correct.
- Commerce correctly established the link between the government's policy to promote the polyester textured yarn industry and state-owned commercial banks' (SOCBs) lending. This link has consistently been established by Commerce in prior investigations.[251]
- The GOC's substantiation of deregulation and market-value interest rates is contradicted by evidence on the record. However, in the Financial System Memo,[252] Commerce correctly concluded that China's interest rates are not yet market-determined in a large review of the Chinese financial system, and there is substantial evidence on the record to support Commerce's finding that China's financial system does not operate under market principles.[253] Commerce should reject the GOC's arguments and affirm its preliminary determination.
- Commerce was correct in its preliminary determination that SOCBs are Chinese government authorities that provided a financial contribution to Fujian Billion through preferential loans. The GOC has not presented any information proving the SOCBs that provided loans to Fujian Billion are not government-controlled and the GOC refused to provide the requested loan documentation from the largest loan extended by a SOCB during the POI. The GOC's argument has no basis in U.S. law, and Commerce has reached a determination consistent with prior conclusions regarding the Chinese financial system.

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[250] *See* Petitioners' Rebuttal Brief at 61 (citing *Preliminary Determination* PDM at 37-38 (citing GOC QR at Exhibit II.B.11 at Article 12)).
[251] *Id.* at 62 (citing *Countervailing Duty Investigation of Fine Denier Polyester Staple Fiber from the People's Republic of China: Final Affirmative Determination*, 83 FR 3120 (January 23, 2018) and accompanying IDM at 6; *Silica Fabric Inv* IDM at Comment 19).
[252] *Id.* at 63 (citing Memorandum, "Review of China's Financial System Memorandum," dated April 26, 2019, at Attachment 1 (Financial System Memo) at 2).
[253] *Id.* at 63 (citing *Shandong Huarong Gen. Corp v. United States*, 159 F. Supp. 2d 714, 723 (CIT 2001) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563) (CAFC 1984))).

- Commerce was correct in utilizing external interest rates for the benchmark. The GOC provides no substantive rebuttal to Commerce's prior findings in the Financial System Memo and fails to mention the reference rates for lending published by the People's Bank of China in its case brief or questionnaire response.
- Commerce should reject the GOC's claim that the regression analysis used to derive interest rate benchmarks in the investigation is flawed. The GOC found no concrete evidence of error[254] and failed to support its claims. Commerce has previously determined the GOC has insufficient evidence to warrant reconsideration[255] and should reach the same finding in this proceeding and continue to use external interest rate benchmarks in the final determination.

Commerce's Position: We disagree with the GOC's position that it did not provide countervailable policy loans during the POI. Evidence on the record in this investigation indicates that GOC policy considerations are a significant factor in lending decisions. The 11th and 12th Five-Year Outline of Guidelines for the National Economic Development of the People's Republic of China describes support for the chemical fiber industry and "high-tech fibers and compound materials." The Outline of the 11th Five-Year Plan for National Economic and Social Development for Fujian Province promotes the yarn industry amongst other key industrial sectors.[256] Under section 771(5A)(D)(i) of the Act, which defines a subsidy "specific as a matter of law" if the subsidy is specific to an industry or a group of industries, the polyester textured yarn industry is clearly encompassed in both the chemical fiber industry and the textile industry, and is thus a beneficiary in a specific group of industries.[257]

Further, record evidence indicates that financial support was directed specifically toward certain encouraged industries, including yarn. The "*Decision of the State Council on Promulgating the Interim Provisions Promoting Industrial Structure Adjustment for Implementation* (Guo Fa {2005} No. 40)" (Decision 40) states in the preamble that "{a}ll relevant administrative departments shall speed up the formulation and amendment of policies on public finance, taxation, credit, land, import and export, *etc.*, effectively intensify the coordination and cooperation with industrial policies, and further improve and promote the policy system on industrial structure adjustment."[258] Decision 40 further indicates that projects in "encouraged" industries, such as "high-performance differential fiber" shall be provided credit support in compliance with credit principles."[259] The "Directory Catalogue on Readjustment of Industrial Structure (Version 2005)" includes as "encouraged" production of "all kinds of differential, functional chemical fiber, high-tech fiber" and "fiber and new non-fiber polyester (polyethylene terephthalate, polydiacid glycol ester, PTB, *etc*.)."[260] Several support options, including financing, are outlined in Decision 40, which establishes eligibility for certain benefits from the central government and also uses the Catalogue to give provincial and local authorities

[254] *Id*. at 67 (citing GOC Case Brief at 58-59).
[255] *Id*. at 68 (citing *Aluminum Extrusions from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 81 FR 92778 (December 20, 2016), and accompanying IDM at Comment 10) (*Aluminum Extrusions from China 2014 AR*).
[256] *See* GOC IQR at Exhibit II.B.6 at Chapter 2, Section 2.
[257] *Id.* at Exhibit II.B.9 at Category I, Chapter XVII, Sections 3 and 4.
[258] *See* GOC IQR at Exhibit II.B.11.
[259] *Id.*
[260] *Id.*

impetus and discretion to implement their own policies to promote the development of favored industries.

Commerce has previously found, and continues to find, that commercial banks in China follow the "guidance" of central planning authorities, and thus the encouragement of the government to lend to the polyester textured industry is significant. Specifically, "Article 34 of Law of the People's Republic of China on Commercial Banks (Banking Law) states that banks should carry out their loan business 'under the guidance of the state industrial policies.' … {Therefore} the Banking Law, in some measure, stipulates that lending procedures be based on the guidance of government industrial policy."[261] A clear and documented connection exists between the GOC's industrial policies and lending practices.

Contrary to the GOC's arguments, Commerce's findings are not solely based upon government ownership. The *Coated Paper from China 2010* investigation clearly explains why SOCBs have been treated as "authorities" within the meaning of sections 771(5)(B) and 771(5)(D)(i) of the Act. Commerce has repeatedly found that "the PRC's banking system remains under State control and continues to suffer from the legacies associated with the longstanding pursuit of government policy objectives. These factors undermine the SOCBs ability to act on a commercial basis and allow for continued government control resulting in the allocation of credit in accordance with government policies. The banking system continues to be affected by the legacy of government policy objectives, which continue to undermine the ability of the domestic banking sector to act on a commercial basis, and allows continued government involvement in the allocation of credit in pursuit of those objectives."[262] The GOC has presented no new evidence against well-established precedent in this case that warrants reconsideration in the investigation; therefore, we continue to find that SOCBs are authorities capable of providing a direct financial contribution to the respondents.

Because Commerce continues to find that the policy lending market is distorted, we continue to rely on external benchmarks to determine the respondent's benefit from loan programs. "Commerce has previously fully addressed the arguments raised by the GOC regarding the calculation of Commerce's benchmark interest rate, including the use of certain rates published by the International Monetary Fund (IMF), Commerce's practice with respect to certain negative inflation-adjusted rates, its regression analysis based on a composite governance factor, and adjustment of rates based on the spread between U.S. short and long-term "BB" bond rates."[263]

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[261] *See Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China*, 81 FR 75037 (October 2016), and accompanying IDM at Comment 16; *Solar Cells* IDM at Comment 14; *Steel Wheels* IDM at Comment 22; *Aluminum Extrusions from China 2014 AR* IDM at Comment 3; *Certain Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comment 21.

[262] *See Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination*, 81 FR 75037 (October 28, 2016) (citing *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011), and accompanying IDM at Comment 7); *see also* Memorandum, "Review of China's Financial System Memorandum," dated April 26, 2019, at Attachment 1.

[263] *Id.* (citing *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009), and accompanying IDM at Comments 8, 12, and

Because the GOC failed to provide a concrete statement of error or present additional evidence or arguments other than those previously examined by Commerce, we find that none of these arguments warrant reconsideration. The external rates given by Commerce are consistent with section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a).

Finally, Commerce has previously fully addressed the arguments raised by the GOC regarding the calculation of Commerce's benchmark interest rate. The issues raised by the GOC – use of rates published by the IMF, the use of regression analysis based on a composite governance factor, and the adjustment of rates based on the spread between U.S. short and long-term "BB" bond rates – are reiterations of the same arguments made previously in different proceedings before Commerce.[264] Accordingly, given the lack of any newly presented argument or information that would warrant reconsideration of Commerce's position on the matter, we find such arguments to be without merit.

We continue to find that loans provided to the respondents are specific within the meaning of section 771(5A)(D)(i) of the Act. We also continue to find that lending from SOCBs constitutes a financial contribution, pursuant to sections 771(5)(B) and 771(5)(D)(i) of the Act, and that the PRC lending market is distorted and external benchmarks should be used to determine any benefits from this program. Thus, we have made no changes to the findings for this program in the *Preliminary Determination*.

Comment 8: Whether the Application of AFA for Shenghong Fiber is Warranted

Shenghong Fiber's Case Brief:

- Commerce applied total AFA to Shenghong Fiber in the *Preliminary Determination*, claiming that Shenghong Fiber failed to cooperate in this investigation. Commerce should reverse this decision because Shenghong Fiber did cooperate at all times in the proceeding by filing questionnaire responses that were accurately reported, properly certified, and timely filed.
- Shenghong Fiber has provided substantial evidence throughout the course of the investigation proving that, while Jiangsu Shenghong Textile Imp & Exp Co. (Jiangsu Textile) was an affiliated company, it was not cross-owned by Jiangsu Textile's successor company, Jiangsu Huahui Import and Export Co., Ltd (Jiangsu Huahui).[265] Commerce should accept this information regarding its affiliates in the final determination and not use it as a basis for an AFA determination.
- In its respondent selection comments, Shenghong Fiber reported that it was affiliated with Jiangsu Textile, but in its Section III response, it noted that Shenghong Fiber was affiliated with Jiangsu Huahui through a familial relationship.
- Jiangsu Huahui does not appear in Shenghong Fiber's corporate structure chart, due to there being no cross-shareholdings between Shenghong Fiber and Jiangsu Huahui. Therefore,

13; *Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014), and accompanying IDM at Comment 8).

[264] *See Aluminum Extrusions from China 2014 AR* IDM at Comment 10.

[265] *See* Shenghong Fiber's Case Brief at 2-3.

while there is a basis for Commerce to find Jiangsu Huahui affiliated with Shenghong Fiber, Commerce should not find them to be cross-owned.

- The record lacks substantial evidence that Jiangsu Textile, Jiangsu Huahui Textile Import and Export Co., Ltd (Jiangsu Huahui Textile) or Jiangsu Huahui had any involvement in the production or sale of subject merchandise during the POI. Jiangsu Textile and Jiangsu Huahui Textile did not exist during the POI and Jiangsu Huahui's business scope does not include the production or sale of polyester textured yarn in either the domestic market or U.S. market.[266]
- The U.S. Customs and Border Protection (CBP) entry data used for respondent selection indicated that Jiangsu Textile was listed as an exporter for some import entries.[267] However, Shenghong Fiber's affiliate, Jiangsu Shenghong Science and Technology Co. Ltd. (Shenghong Science), contacted the U.S. importer and discovered that the importer used the incorrect manufacturer identification code in the entry documents, using the code for Jiangsu Textile instead of the correct code for Shenghong Science. Commerce is wrong for holding Shenghong Fiber responsible for errors made by the U.S. importer and should reverse its finding of uncooperativeness for allegedly failing to explain the non-existent role of Jiangsu Textile in the production and sale of subject merchandise during the POI.[268]
- Commerce does not have unlimited authority to apply AFA. The CIT explained that Commerce "may select from the facts available in a manner adverse to the respondent, if the gap in the record was caused by the failure of the respondent to cooperate to the best of its ability." Further, the Court explained that Commerce may impose AFA only where it has first made a finding, pursuant to section 776(a) of the Act, that information is missing from the record for an enumerated reason, followed by a separate finding under section 776(b) of the Act that there has been a failure to cooperate.[269]
- Commerce only provided limited information to resolve the issue of U.S. importers mis-identifying the manufacturer on the U.S. entry documentation. Shenghong Fiber was able to provide explanations for a few entries using the limited entry-specific information provided by Commerce. However, it is disingenuous for Commerce to state that Shenghong Fiber was only able to provide an explanation for a small number of entries with the erroneous manufacturer code, when Commerce only released information to Shenghong Fiber's counsel for a small number of entries. If Commerce had released more information about the remaining shipments at issue, then Shenghong Fiber and/or Shenghong Fiber's counsel might have been able to address the remaining entries in the CBP respondent selection data.[270]
- Once parties have commented on the CBP data used for respondent selection and the mandatory respondents selected, CBP information should have no further significance in the investigation, particularly because the CBP information is sourced in many cases from unaffiliated importers, subject to limited—or no—access under the Administrative Protective

[266] *Id.* at 5.
[267] *Id.* at 5 (citing Memorandum, "Polyester Textured Yarn from the People's Republic of China Countervailing Duty Petition: Release of Customs Data from U.S. Customs and Border Protection," dated November 6, 2018 (CBP Data)).
[268] *Id.* at 6.
[269] *Id.* at 7-8 (citing *JSW Steel Ltd. v. United States*, Ct. No. 16-00165, Slip. Op. 18-51 at 5 (CIT 2018)).
[270] *Id.* at 9 (citing Commerce's Letter, "Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China: Supplemental Questionnaire," dated April 2, 2019, at Attachment II).

Order (APO). It is wrong to hold Shenghong Fiber responsible for factual gaps in CBP data which should never have been used for the subsidy analysis.

Yarn Importers' Case Brief:[271]

- Commerce should reverse the AFA finding it applied to Shenghong Fiber because Commerce did not consider the totality of the circumstances and the record shows that Shenghong Fiber cooperated to the best of its abilities.
- Commerce's claims that "Shenghong Fiber provided contradictory and incomplete answers regarding the number of shipments imported into the United States from Jiangsu Textile that are recorded in the CBP data,"[272] are entirely conclusory, unsupported by adequate explanation or substantial evidence.[273]
- Commerce was made aware of problems with the CBP entry data and acknowledged that Shenghong Fiber provided evidence of the deficiencies in the government's information.[274] Commerce refused to seek further information and rectify the situation, instead Commerce relied on information it knew was incomplete and inaccurate.
- Only Commerce had the ability to investigate the confidential CBP data and interested parties, such as Shenghong Fiber, did not have access to the CBP data to address this issue. Commerce may not apply adverse inferences because a company cannot access the same information available to Commerce, information which Commerce chose to ignore. Countervailing duty determinations must be based upon fact, not mere conjecture or supposition.
- Shenghong Fiber provided Commerce with full and complete answers to all inquiries. Commerce provides an insufficient rationale why Shenghong Fiber has not put forth the "best of its ability."[275]
- The focus of section 776(b) of the Act is respondent's failure to cooperate to the best of its ability, not its failure to provide requested information. Further, *Nippon Steel* is factually distinct from the issues in this proceeding.

Petitioners' Rebuttal Brief:

- Shenghong Fiber did not comply with Commerce's requests to the best of its ability because its questionnaire responses contain numerous inaccuracies and inconsistencies. Shenghong Fiber's initial affiliation response failed to mention Jiangsu Textile, nor did it include any

[271] Yarn Importers support and incorporate by reference any argument set forth by Shenghong Fiber regarding: (1) affiliation and ownership facts related to Jiangsu Textile and Jiangsu Huahui; and (2) errors in the use of manufacturer identification codes for Jiangsu Textile by U.S. importer's customs brokers. *See* Yarn Importers' Case Brief at 6.

[272] *See* Yarn Importers' Case Brief at 3-4 (citing *Preliminary Determination* PDM at 8).

[273] *Id*. (citing *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v United States*, 716 F.3d 1370, 1378 (CAFC 2013) (determining that Commerce may not "explain the absence of evidence by invoking procedural difficulties that were at least in part a creature of its own making").

[274] *Id*. (citing Shenghong Fiber's Letter, "Polyester Textured Yarn from China; Resubmission of Third Supplemental Questionnaire Response," dated April 15, 2019.

[275] *Id*. at 4 (citing *Nippon Steel* at 1382 ("Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the 'best of its ability' standard is determined by assessing whether *respondent has put forth its maximum effort* to provide Commerce with full and complete answers to all inquiries in an investigation)).

response to "Former Owners/Changes in Ownership" that would indicate a relationship with the affiliate.

- Shenghong Fiber further provided inconsistent records by claiming names changes from Jiangsu Textile; however, the supporting documentation did not reconcile the information. The dates and names under which certain affiliates began and ceased operations is unclear.
- Shenghong Fiber was unclear on the operations and ownership of Jiangsu Huahui Import and Export Co., Ltd during the POI.
- Shenghong Fiber's factual inconsistencies demonstrate the inaccuracy of the conclusion that there is no cross-ownership between Shenghong Fiber, Jiangsu Textile, and Jiangsu Huahui Import and Export Co., Ltd. Yarn Importer's assertion that Shenghong Fiber submitted all requested information ignores the need for full and verifiable responses. Compliance to the best of its ability requires full and complete answers without concealment or inaccurate reporting.[276] Shenghong Fiber's responses failed to meet the standard.
- Commerce is not responsible for inaccuracies in the CBP data. Commerce did not ignore errors, and it is the responsibility of the parties that submitted the underlying documents to correct any errors that may exist.
- Shenghong Fiber did not audit its records on shipments to the United States. It was aware of the CBP data and had the opportunity to correct and clarify the data to be reviewed. Shenghong Fiber found that Shenghong Science and Technology exported to the United States during the POI despite its original contention to the contrary.
- Shenghong Fiber's responses showed numerous inaccuracies and call into question Commerce's ability to rely on the information presented.
- Jiangsu Textile had an obligation to respond to Commerce's questionnaire after being named as a mandatory respondent and failed to provide and full and complete response. It is the responsibility of the responding company, not Commerce, to develop the record.[277] Commerce properly applied the total AFA rate assigned to companies that fail to respond in the *Preliminary Determination*.

Commerce's Position: We continue to find that it is appropriate to apply AFA to Jiangsu Textile and Shenghong Fiber. In the *Preliminary Determination*, we found that we are missing necessary information regarding the full universe of Shenghong Fiber's affiliates for determining cross-ownership, which was exacerbated by Shenghong Fiber's failure to cooperate to the best of its ability, as well as Jiangsu Textile's failure to cooperate based on its non-response to our Initial Questionnaire. Accordingly, we found as AFA, first, that Jiangsu Huahui is the successor-in-interest to Jiangsu Textile. Furthermore, we found, as AFA, that Shenghong Fiber and Jiangsu Textile/Jiangsu Huahui are cross-owned. Finally, we relied on AFA in determining the estimated net countervailable subsidy rate for Shenghong Fiber and its cross-owned companies, which includes Jiangsu Textile/Jiangsu Huahui.[278] A chronological summary of the events which led us to make these preliminary conclusions follows below.

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[276] *See* Petitioners' Rebuttal Brief at 31 (citing *Nippon Steel*).

[277] *Id.* at 33 (citing *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1340 (CIT 2009) ("A respondent has 'a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce" (quoting *Tung Mung* at 758 (2001)); *Shandong Huarong Gen. Group Corp. v. United States*, 27 C.I.T. 1568, 1590-91 (2003))).

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

On November 6, 2018, we released the CBP data for comment for purposes of respondent selection.[279] On November 28, 2018, we received CBP data comments from Shenghong Fiber.[280] In Shenghong Fiber's respondent selection comments, it stated that Jiangsu Textile is affiliated with Shenghong Fiber.[281] On December 11, 2018, we selected both Jiangsu Textile and Shenghong Fiber as mandatory respondents, based on the CBP data.[282] Jiangsu Textile never provided a response to our Initial Questionnaire. On February 4, 2019, Shenghong Fiber submitted its Affiliation Response.[283] In its Affiliation Response, Shenghong Fiber made no mention of Jiangsu Textile as an affiliate, nor did Shenghong Fiber indicate that it would submit a section III response for Jiangsu Textile as it is required to for each of its cross-owned companies.[284] On March 5, 2019, Shenghong Fiber submitted its Initial Questionnaire response, and Jiangsu Textile was not identified in this response.[285] On March 13, 2019, we issued a supplemental questionnaire to Shenghong Fiber requesting that it explain its affiliation with Jiangsu Textile and Jiangsu Textile's role in exporting the subject merchandise such that Jiangsu Textile is identified in the CBP data.[286] In its supplemental questionnaire response, Shenghong Fiber explained that Jiangsu Textile changed its name to Jiangsu Huahui Textile Imp & Exp Co. in 2006 and to Jiangsu Huahui Import and Export Co., Ltd (Jiangsu Huahui) in 2013.[287] Shenghong Fiber provided the business licenses for Jiangsu Huahui, which allegedly demonstrated that it is the successor company of Jiangsu Textile.[288] However, Jiangsu Huahui's business license indicates that it was established well before the year it claims the name change occurred.[289]

Shenghong Fiber further explained that Jiangsu Huahui is controlled by a relative of Mr. Miao Hagen (Shenghong Fiber's legal representative),[290] that Jiangsu Huahui is not cross-owned with Shenghong Fiber, and that it did not produce or sell subject merchandise to Shenghong Fiber or export the subject merchandise during the POI.[291] However, Shenghong Fiber did not explain how or why Jiangsu Textile appeared in the CBP data, such that it was chosen as a mandatory respondent, or Jiangsu Textile's role in exporting the subject merchandise. Accordingly, on

[279] *See* CBP Data.
[280] *See* Shenghong Fiber's Letter, "Polyester Textured Yarn from China: Respondent Selection Comments," dated November 28, 2018.
[281] *Id.* at 2.
[282] *See* Memorandum, "Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China: Respondent Selection," dated December 11, 2018, at 6.
[283] *See* Shenghong Fiber's Letter, "Polyester Textured Yarn from China; Response to Section III Regarding Affiliated Companies," dated February 4, 2019 (Shenghong Fiber Affiliation Response).
[284] *Id.* at 2 and Exhibits 1 and 2.
[285] *See* Shenghong Fiber's Letter, "Polyester Textured Yarn from China; Countervailing Duty Questionnaire Responses," dated March 5, 2019 (Shenghong Fiber IQR).
[286] *See* Commerce's Letter, "Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China: Initial Questionnaire Response Supplemental Questionnaire for Attachments A-E," dated March 13, 2019, at 3.
[287] *See* Shenghong Fiber's Letter, "Polyester Textured Yarn from China; First Supplemental Response," dated March 28, 2019 (Shenghong Fiber SQR), at Attachment at 1.
[288] *Id.* at Attachment A, 1 and Exhibit 1.
[289] *See* Shenghong Fiber SQR at Attachment A, Exhibit 1.
[290] *Id.* at Attachment A, 1; *see also* Shenghong Fiber IQR at Attachment A, Exhibit 6.
[291] *See* Shenghong Fiber SQR at Attachment A, 1.

April 2, 2019, we issued a second supplemental questionnaire requesting that Shenghong Fiber provide the previously requested information regarding Jiangsu Textile, as well as responses to questions related to Shenghong Fiber's affiliation with Jiangsu Textile, the reason that Jiangsu Textile was not reported in the Affiliation Response, the location of Jiangsu Textile and whether it shares facilities with Shenghong Fiber's other cross-owned affiliates, and documentation demonstrating Jiangsu Textile's main business operations during the POI.[292]

In response, Shenghong Fiber reiterated that Jiangsu Textile/Jiangsu Huahui did not have any role in the production or sale of subject merchandise during the POI.[293] Shenghong Fiber further explained that Jiangsu Huahui was owned by Mr. Miao Hagen's wife's sister and her son and subsequently became wholly-owned by a member company of the Shenghong Group.[294] Shenghong Fiber also provided information about the ownership structure of Jiangsu Huahui's parent companies, which differed from that depicted in the affiliation chart submitted with its Affiliation Response.[295] Specifically, Mr. Miao Hagen's ownership of a parent company of Jiangsu Textile changed from an overwhelming majority in the initial response to a minority ownership in the latter response, which would suggest that Jiangsu Textile and Shenghong Fiber are not cross-owned.[296]

We disagree with Shenghong Fiber and Yarn Importers that the record is clear with respect to Jiangsu Textile/Jiangsu Huahui affiliation/cross-ownership with Shenghong Fiber. Commerce has previously stated that disclosure of the universe of corporate affiliates is required in the very first questionnaire response because it is essential to determine whether any affiliate meets the requirements for cross-ownership outlined in 19 CFR 351.525 to ensure that the subsequent questionnaire responses are complete and to allow us to calculate accurate subsidy rates.[297] Here, we were required to issue multiple supplemental questionnaires to determine the universe of Shenghong Fiber's corporate affiliates and whether each affiliate should be required to file a section III questionnaire response. In response, Shenghong Fiber provided contradictory and incomplete answers regarding its affiliation and cross-ownership with Jiangsu Textile/Jiangsu Huahui. Specifically, as noted above, Shenghong Fiber initially indicated that it was affiliated with Jiangsu Textile, despite no acknowledgment of this fact in subsequent submissions. Further, in Shenghong Fiber's Affiliation Response, it provided information that demonstrated that Mr. Miao Hagen held a large majority ownership in a parent company of Jiangsu Textile.[298] It was only after subsequent questioning that Shenghong Fiber revised its ownership information of Jiangsu Textile's parent company to a minority ownership, thus suggesting that Shenghong Fiber was only affiliated with Jiangsu Textile and that these two companies are not cross-

[292] *See* Commerce's Letter, "Countervailing Duty Investigation of Polyester Textured Yarn from the People's Republic of China: Supplemental Questionnaire," dated April 2, 2019 (Shenghong Fiber Third Supp).
[293] *See* "Polyester Textured Yarn from China; Resubmission of Third Supplemental Questionnaire Response," dated April 15, 2019 (Shenghong Fiber 3SQR), at Attachment I, 1.
[294] *Id.* at 4.
[295] *Id.* at Exhibit 3; *see also* Shenghong Fiber Affiliation Response at Exhibit 2.
[296] *Id.*; *see also* Shenghong Fiber Affiliation Response at Exhibit 2.
[297] *See, e.g.*, *Large Diameter Welded Pipe from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 84 FR 6369 (February 27, 2019), and accompanying IDM at Comment 1.
[298] *See* Shenghong Fiber Affiliation Response at Exhibit 2.

owned.[299] Shenghong Fiber provided no information which substantiates or supports this critical change in ownership nor did Shenghong Fiber explain why they made this revision. Further, while Jiangsu Textile/Jiangsu Huahui claims that Jiangsu Textile changed its name to Jiangsu Huahui in 2013,[300] Jiangsu Huahui's business license contradicts this claim.[301] As a result, instead of a clear understanding of the relationship between Jiangsu Textile/Jiangsu Huahui and Shenghong Fiber, Commerce is left with inconsistent and contradictory statements and evidence which is demonstrative of Jiangsu Textile's and Shenghong Fiber's inability to act to the best of their abilities and provide full and complete answers with respect to Jiangsu Textile/Jiangsu Huahui's possible affiliation/cross-ownership with Shenghong Fiber. Consequently, we continue to find that Jiangsu Textile/Jiangsu Huahui and Shenghong Fiber withheld information and failed to provide such information in the form or manner requested, and significantly impeded the proceeding, within the meaning of section 776(a)(2)(A)-(C) of the Act. Accordingly, we continue to find it appropriate to use facts available, pursuant to section 776(a) of the Act.

As noted in the *Preliminary Determination*, Shenghong Fiber claimed that its "U.S. importer's customs broker erroneously used the manufacturer identification code for Jiangsu Textile, but input the correct name and address for Jiangsu Shenghong Science and Technology Co., Ltd. (Jiangsu Science) as this was the company identified on the sales invoice."[302] As reported by Shenghong Fiber, Jiangsu Science is a cross-owned affiliate of Shenghong Fiber which produces subject merchandise.[303] Shenghong Fiber also provided an exhibit with a list of the affected shipments during the POI provided by the U.S. importer.[304] However, the list of shipments provided by Shenghong Fiber only covered a small portion of the shipments attributed to Jiangsu Textile as indicated in the CBP data placed on the record by Commerce for respondent selection purposes.[305] Shenghong Fiber did not provide an explanation for the vast majority of the shipments that were not accounted for in its exhibit but appear in the CBP data.

We disagree with Shenghong Fiber's and Yarn Importers' contention that parties did not have access to the CBP data, which, as noted above, was placed on the record November 6, 2018.[306] This information was accessible to all parties with an administrative protective order (APO), including Jiangsu Textile and Shenghong Fiber. Further, we disagree with Shenghong Fiber and Yarn Importers regarding Shenghong Fiber's inability to contest the CBP Data because Shenghong Fiber did not have APO access to the CBP Data. Aware that Jiangsu Textile was selected as a mandatory respondent, it was well within Shenghong Fiber's purview to provide a reconciliation of exports to the United States to support its allegation that Jiangsu Textile did not export to the United States during the POI. However, it did not submit such a reconciliation. Moreover, we disagree with Shenghong Fiber's assertion that CBP Data has no further use past the respondent selection stage. Commerce often relies on CBP Data after the respondent

[299] *Id.*; *see also* Shenghong Fiber 3SQR at Exhibit 3.
[300] *See* Shenghong Fiber's Case Brief at 4 (citing Shenghong Fiber SQR at Attachment A, 1).
[301] *See* Shenghong Fiber SQR at Attachment A, Exhibit 1.
[302] *See* Shenghong Fiber 3SQR at Attachment I, 2.
[303] *See* Shenghong Fiber Affiliation Response at 2.
[304] *See* Shenghong Fiber 3SQR at Exhibit 6.
[305] *See* CBP Data at Attachment.
[306] *See* CBP Data.

selection phase in making determinations regarding whether exporting companies had shipments during the investigation/review period or reconciling a respondent's entries with its U.S. sales.[307]

Further, we disagree with Shenghong Fiber and Yarn Importer's claim that Commerce withheld information with respect to impacted entries and importer names. As an initial matter, no parties submitted comments at the respondent selection phase with respect to the CBP Data. On April 2, 2019, Commerce issued a third supplemental questionnaire to Shenghong Fiber which included certain CBP information which identified manufacture identification numbers (MID) and the exporter locations associated with that MID.[308] Commerce placed this information on the record in an attempt to clarify the locations of the various Shenghong Fiber exporting entities.[309] At no time did Commerce request that Shenghong Fiber use the MID information as a means to explain entries made by Jiangsu Textile. Rather, Shenghong Fiber and Yarn Importers mis-characterize Commerce's request to clarify exporter locations as Commerce requesting entry information with respect to the MID information. As we note below, Shenghong Fiber is the entity which had the ability to conduct a reconciliation of its sales to the United States to rebut or clarify the CBP Data. As Commerce has noted in other proceedings, it is incumbent upon respondents to provide information for the administrative record.[310]

Nonetheless, the CBP Data made Jiangsu Textile and Shenghong Fiber well aware of all its affiliated/cross-owned entities which had entries during the POI long before it was required to submit its affiliation response. We disagree with Shenghong Fiber and Yarn Importers that Shenghong Fiber acted to the best of its ability to clarify whether Jiangsu Textile had entries during the POI. While Shenghong Fiber clarified that certain entries exported by Jiangsu Textile were exported by Jiangsu Science, a Shenghong Fiber cross-owned affiliate, as noted above, the clarification provided by Shenghong Fiber only covered a small portion of the total entries made by Jiangsu Textile.[311] As noted by the CIT, respondent parties have the responsibility to ensure that the record is complete and accurate.[312] Commerce made multiple requests to Jiangsu Textile and Shenghong Fiber to explain why Jiangsu Textile appears in the CBP Data.[313] However, neither Jiangsu Textile or Shenghong Fiber, nor any of Shenghong Fiber's cross-owned companies, made any attempt to explain the steps they took to reconcile the CBP entries with the U.S. sales made during the POI. Instead, Shenghong Fiber provided contradictory and incomplete answers regarding the number of shipments imported into the United States from

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[307] *See, e.g.*, *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 84 FR 56765 (October 23, 2019), and accompanying IDM at Section V; and *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 77 FR 40854 (July 11, 2012), and accompanying IDM at Comment 6.
[308] *See* Shenghong Fiber Third Supp at Attachment II.
[309] *Id.* at 3 and Attachment II.
[310] *See Essar Steel Ltd. v. United States*, 678 F. 3d 1268, 1277 (Fed. Cir. 2012); *QVD Food Co. v. United States*, 658 F. 3d 1318, 1324 (Fed. Cir. 2011) (brackets, quotation marks and citations omitted) (explaining that in antidumping proceedings "the burden of creating an adequate record lies with interested parties and not with Commerce").
[311] *See* Shenghong Fiber 3SQR at Exhibit 6; *see also* CBP Data.
[312] *See Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d1325,1340 (CIT 2009) ("A respondent has 'a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce.'") (quoting *Tung Mung* at 758 (2001)); *Shandong Huarong Gen. Group Corp. v. United States*, 27 C.I.T. 1568, 1590-91 (2003) (Commerce should not be required to reconstruct the record)(citation omitted)).
[313] *See* Shenghong Fiber SQR; and Shenghong Fiber 3SQR.

Jiangsu Textile that are recorded in the CBP data.[314] Accordingly, we continue to find that neither Jiangsu Textile nor Shenghong Fiber acted to the best of its ability in responding to requests for information by Commerce.[315]

We also disagree with Yarn Importers' assertion that Shenghong Fiber acted to the best of its ability and put forth "maximum effort" in complying with Commerce's requests for information.[316] Yarn Importers mischaracterize their reading of *Nippon Steel*. Contrary to the Yarn Importers' claim, the standard established in *Nippon Steel* supports our *Preliminary Determination* as the facts in that case are not analogous to this investigation. As noted in the quotation from *Nippon Steel* included in Yarn Importers' case brief, the respondent in that proceeding repeatedly failed to provide the requested information and then was able to provide it.[317] Here, as noted above, Jiangsu Textile and Shenghong Fiber were only able to provide *some* of the requested information when it was discovered that Jiangsu Science was the exporter for entries identified as exports made by Jiangsu Textile. However, neither Jiangsu Textile nor Shenghong Fiber put forth the maximum effort in acting to the best of their abilities to provide Commerce with full and complete responses with respect to our requests for clarification on ownership information or its claims that Jiangsu Textile made no entries during the POI.

Therefore, we continue to find that the record is missing key information about the full universe of Shenghong Fiber's affiliates for determining cross-ownership, which is exacerbated by Shenghong Fiber's failure to cooperate to the best of its ability, as well as Jiangsu Textile's failure to cooperate based on its non-response to our Initial Questionnaire. Accordingly, we are finding, as AFA, first, that Jiangsu Huahui is the successor-in-interest to Jiangsu Textile. Furthermore, we are finding, as AFA, that Shenghong Fiber and Jiangsu Textile/Jiangsu Huahui are cross-owned. Finally, we are relying on AFA in determining the estimated net countervailable subsidy rate for Shenghong Fiber and its cross-owned companies, which include Jiangsu Textile/Jiangsu Huahui, for this final determination.

Comment 9: Whether Commerce's Calculation of the AFA Rate is Unreasonable

Shenghong Fiber's Case Brief:

- Should Commerce continue to apply AFA to Shenghong Fiber, then its choice of AFA rate must be appropriate, with a reasonable linkage to the situation presented in this investigation.
- While Commerce has broad discretion in determining AFA, that discretion is not unlimited.[318] Further, when selecting an AFA rate, Commerce must ensure that: (1) the

[314] *See* Shenghong Fiber 3SQR at Exhibit 6.
[315] *See Nippon Steel* at 1382.
[316] *See* Yarn Importers' Case Brief at 5 (citing *Nippon Steel* at 1382 ("Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.")).
[317] *See* Yarn Importers' Case Brief at 5-6 (citing *Nippon Steel* at 1382 (("NSC later explained that it never asked the actual factories for information, and once it did, it was able to provide that information to Commerce.")).
[318] *See* Shenghong Fiber's Case Brief at 11 (citing *Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1355-56 (CIT 2018) (*Hyundai Steel*)).

AFA rate selected is not punitive, and (2) the AFA rate selected is supported by substantial evidence (*i.e.*, not aberrational). This is because the application of AFA is intended to be remedial and not punitive.[319]

- While Section 776(d)(2) of the Act sets forth a hierarchy for selecting the AFA rate and to examine the circumstances, it does not direct or oblige Commerce to select the highest rate possible.[320]
- Commerce's choice of AFA rate at 459.98%, which is more than 14 times higher than the calculated rate for the other mandatory respondent, is not only aberrational, it is unnecessary to achieve the statutory purposes of AFA. This high AFA rate is achieved by assuming Shenghong Fiber received a benefit from virtually every subsidy program in China. An overwhelming majority of these programs involve one-time-only grants and have no logical link to Shenghong Fiber or its industry.[321]

Yarn *Importers' Case Brief:*

- Commerce's AFA rate is contrary to law, unsupported by the administrative record, absurdly high and punitive in nature. While Commerce has discretion in applying AFA, this discretion is not unfettered.[322]
- The statute requires Commerce to corroborate AFA margins by demonstrating their reasonableness.[323] Commerce failed to corroborate the rate, as required by law.
- Commerce applied an AFA rate that is 14 times higher than the calculated rate. This rate contradicts the record and also ignores and fails to address record evidence demonstrating the unreasonable nature of the rate applied. In *Hyundai Steel*, the CIT explained that Commerce may not assign aberrational AFA rates.[324]
- While Commerce claims it corroborated the AFA rate, the administrative record demonstrates otherwise. Commerce did not "to the extent practicable, examine the reliability and relevant of the information to be used,"[325] as it picked the highest rates in other proceedings that related to very different products and industries.
- Commerce's discretion in assigning AFA rates is not unbounded.[326] The Federal Circuit confirmed these limits explaining that secondary information used as AFA must reflect a reasonably accurate estimate of the respondent's actual rate albeit with some built-in increase intended as a deterrent to non-compliance.[327]

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[319] *Id.* (citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Ct. No. 17-00246, 2018 WL 6271653, at *4 (CIT 2018) (citing *F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032-33 (CAFC 2000) (*de Cecco*))).
[320] *Id.* at 12 (citing *POSCO v. United States*, 296 F. Supp. 3d 1320, 1349 (CIT 2018)).
[321] *Id*. at 13 (citing *Chlorinated Isos from China 2014*).
[322] *See* Yarn Importers' Case Brief at 6 (citing *Hyundai Steel* at 1355-56).
[323] *Id*. at 7 (citing section 776 of the Act; and *de Cecco* at 1032).
[324] *Id*. (citing *Hyundai Steel* at 1355-56).
[325] *Id*. at 9 (citing *Preliminary Determination* PDM at 16).
[326] *Id*. (citing *de Cecco* at 1032 (("{T}he purpose of section1677e(b) is to provide respondents with an incentive to cooperate not to impose punitive, aberrational, or uncorroborated margins.")).
[327] *Id*. (citing *de Cecco* at 1032; and *Nan Ya Plastics v. United States*, 810 F. 3d 1333, 1342 (CAFC 2016)).

- The Court has confirmed that "accuracy" and "commercial reality" "represent reliable guideposts for Commerce's determinations.[328] Further, the courts have rejected exceptionally high AFA rates imposed by Commerce due to the lack of evidence.[329]

Petitioners' Rebuttal Brief:

- As previously detailed, Shenghong failed to cooperate to the best of its ability and therefore the application of an AFA rate was appropriate.
- Commerce applied its AFA hierarchy consistently with the statute in the preliminary determination. Shenghong and Yarn Importers' position that Commerce should deviate from its established hierarchy because of the high total AFA rate in comparison to Fujian Billion would result in an "arbitrary and outcome-drive practice."
- Yarn Importers and Shenghong's use of court precedent is misplaced because the quoted cases *Hyundai Steel*[330] and *Gallant Ocean*[331] were both antidumping duty proceedings and the Court's finding of an antidumping transaction as "aberrational" has no relevance to a countervailing duty investigation.
- Congress has revised legislation that Commerce is not required "to demonstrate that the countervailable subsidy rate… used by the administering authority reflects an alleged commercial reality of the interested party,"[332] and thus Commerce is not required to evaluate commercial reality.
- Shenghong misapplies the Court's decision in *Changzhou III*,[333] as the Court affirmed Commerce's standard practice. Thus, Commerce's standard hierarchy, which was appropriately applied in this investigation, resulted in an accurately applied AFA rate in this investigation.
- Commerce need not prove that the selected facts available are the best alternative information and "is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an 'alleged commercial reality' of the interested party."[334]
- Commerce's application of its established hierarchy to assign AFA rates has been affirmed by the Courts,[335] even if many times higher than the actual subsidy rate or not reflective of a company's commercial reality due to Commerce's limited ability to corroborate information needed to calculate the AFA rate.

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[328] *Id*. at 10 (citing *Nan Ya Plastics* at 1342).
[329] *Id*. (citing *Baoding Mantong Fine Chemistry Co. v. United States*, 113 F. Supp. 3d 1332, 1339 (CIT 2015); and *Dongguan Sunrise Furniture Co. v. United States*, 997 F. Supp. 2d 1330, 1335 (CIT 2014)).
[330] *See* Petitioners' Rebuttal Brief at 36 (citing Shenghong Case Brief at 11-12; and Yarn Importers Case Brief at 6-7 (citing *Hyundai Steel*)).
[331] *Id.* (citing Yarn Importers Case Brief at 10 (citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F. 3d 1319, 1324 (CAFC 2010)).
[332] *Id.* at 37 (citing section 776 of the Act).
[333] *Id.* at 37 (citing *Changzhou IV* ("the court is simply not convinced that Commerce's established hierarchy in setting an AFA rate is an unreasonable way of effectuating the statue")).
[334] *Id.* at 37-38 (citing section 776(d) of the Act).
[335] *Id.* at 38-39 (citing *Fengchi Imp. & Exp. Co. of Haicheng City v. United States*, 59 F. Supp. 3d 1386, 1395 (CIT 2015); and *Essar Steel, Ltd. v. United States*, 753 F. 3d 1368, 1374 (CAFC 2014)).

Commerce's Position: In the *Preliminary Determination*, we followed our AFA hierarchy to determine the appropriate rate to assign to each program used to determine the AFA rate, which included certain "self-reported" programs from Fujian Billion and Shenghong Fiber.[336]

With regard to whether the high AFA rate is punitive, we agree with the petitioners that while the total AFA rate may be high, such a rate is not unlawfully punitive, as contended by Shenghong Fiber and Yarn Importers.[337] First, several of the cases relied upon by Shenghong Fiber and Yarn Importers are based on the prior version of the Act, before the amendments enacted by the Trade Preferences Extension Act of 2015 (TPEA). Further, the TPEA explicitly does not require Commerce to demonstrate that the particular countervailable subsidy rate "reflects an alleged commercial reality of the interested party."[338] *POSCO* also makes it clear that *De Cecco* does not speak to the issue of whether Commerce's reliance on its AFA hierarchy results in impermissibly punitive or uncorroborated rates.[339] With regard to *Hyundai Steel* and *Gallant Ocean*, we agree with the petitioners that the issues raised in those cases are irrelevant to this instant investigation as they are related to antidumping proceedings and aberrational transactions which are not applicable in the instant investigation.[340] Additionally, *POSCO* rejected the contention that Commerce must corroborate the aggregate subsidy rate in addition to corroborating individual program-specific rates.[341]

While Shenghong Fiber and Yarn Importers suggest that *Changzhou IV* supports their position regarding Commerce's selection of AFA rates, the CIT confirmed Commerce's standard practice in *Changzhou IV*, "{f}inally, the court is simply not convinced that Commerce's established hierarchy in setting an AFA rate is an unreasonable way of effectuating the statute."[342]

On remand, in *POSCO II*, Commerce justified its selection of the highest rates, explaining that within each prong of the AFA hierarchy, Commerce strikes a balance between inducement, industry relevancy, and program relevancy.[343] Further, Commerce explained that section 776(d)(2) of the Act constitutes an exception to the selection of AFA under section 776(d)(1) of the Act, such that after an "evaluation by the administration authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available,"[344] Commerce may decide that given the facts on the record, the highest rate may or may not be appropriate. Commerce's explanation was upheld by the CIT - unopposed by any party – which stated that "Commerce explained, with citations to supporting

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[336] *See Preliminary Determination* PDM at 15-17; *see also* Memorandum, "AFA Calculation Memorandum for the Preliminary Determination in the Investigation of Polyester Textured Yarn from China," dated April 29, 2019, at Attachment I.
[337] *See* Shenghong Fiber' Case Brief at 11; and Yarn Importers' Case Brief at 7 (both citing *de Cecco* 216 F. 3d 1032).
[338] *See* section 776(d)(3)(B) of the Act.
[339] *See POSCO v. United States*, 296 F. Supp. 3d 1320, 1352 n. 47 (CIT 2018) (*POSCO*)).
[340] *See* Petitioners' Rebuttal Brief at 36 (where the issues were based on aberrational transactions in antidumping duty cases).
[341] *See POSCO*, 296 F. Supp. 3d at 1352 and n.47.
[342] *See Changzhou IV* at 5 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984)).
[343] *See POSCO, et al. v. United States*, 335 F. Supp. 3d 1283, 1286 (CIT 2018) (*POSCO II*).
[344] *See* section 776(d)(2) of the Act.

evidence, why this case did not merit a deviation from the highest calculated rate selected pursuant to Commerce's hierarchical methodology."[345] In this instant investigation, no mandatory respondent has provided unique or unusual facts or justifications that would lead Commerce to deviate from selecting the highest calculated rate pursuant to our hierarchical methodology. In the *Preliminary Determination*, we clearly evaluated the situation that led us to apply AFA, namely that Shenghong Fiber and Textile failed to cooperate to the best of their ability and Garmant did not participate as a mandatory respondent.[346] For the same reasons detailed in the *Preliminary Determination*, we have continued to utilize our AFA hierarchy to determine the AFA rate applicable to the non-cooperating mandatory respondents.

With respect to Shenghong Fiber's argument that certain programs used in the AFA rate have no applicability to Shenghong Fiber, we agree. It is our practice not to include company-specific subsidy programs in AFA rates applied to other companies.[347] For the final determination, we have removed from the AFA rate applied to Shenghong Fiber and Garmant the program "Grants to Fujian Billion" as it is specific to Fujian Billion, and the program "Equity Infusion into Guowang by China Development Bank" from the AFA rate applied to Garmant as it is specific to Guowang, an affiliate of Shenghong Fiber.[348] Because the remaining programs used in the AFA rate are not company-specific, we will continue to use the non-company specific programs in the AFA rates calculated for Shenghong Fiber and Garmant.[349]

Comment 10: Calculation of Fujian Billion's Benefit of Electricity for LTAR

Petitioners' Case Brief:

- In its *Preliminary Determination*, Commerce did not include the purchase of electricity, derived from solar panels, from a third-party source in its benefit calculation of Fujian Billion's purchase of electricity for LTAR.[350]
- It is undisputed that this third-party source is an SOE.[351] Commerce has consistently found that majority ownership by the government is sufficient to find the supplier to be a government authority.[352]

[345] *See POSCO II* at 1287.
[346] *See Preliminary Determination* PDM at 10-11.
[347] *See Certain Steel Wheels from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 11744 (March 28, 2019), and accompanying IDM at Comment 1.
[348] *See* Memorandum, "Decision Memorandum on New Subsidy Allegations and Uncreditworthy Allegation," dated April 26, 2019 at 5.
[349] *See* Memorandum, "AFA Calculation Memorandum for the Final Determination in the Investigation of Polyester Textured Yarn from China," dated concurrently with this memorandum.
[350] *See* Petitioners' Case Brief at 2-3 (citing Fujian Billion Preliminary Calculation Memorandum).
[351] *Id.* at 3 (citing Fujian Billion Verification Report).
[352] *Id.* at 7 (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), and accompanying IDM at 10 and Comment D.2); *see also Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009), and accompanying IDM at 14 and Comment 4.

- Fujian Billion and the third-party source assert that the solar panels supplying the third-party electricity are not connected to the State Grid, but the contract between Fujian Billion and the third-party source provides evidence that this is not true.[353]
- Evidence on the record establishes that the GOC's role in the Chinese electricity market can extend beyond the State Grid and into agreements and contracts between two parties.[354] As an example, in its *Preliminary Determination*, Commerce preliminarily countervailed purchases of electricity by Fujian Billion from reported private power generators.[355]
- If Commerce decides to find that the purchase of electricity from the third-party source should not be considered part of the overall GOC control of the Chinese electricity market, Commerce should find these purchases as countervailable subsidies discovered during the course of the investigation.[356]
- The third-party source is an SOE, which, according to 771(5)(D)(iii) of the Act constitutes a financial contribution. The provision of electricity was provided for less than adequate remuneration, pursuant to 771(5)(E)(iv) of the Act, thereby conferring a benefit. Finally, Fujian Billion was the only recipient of electricity from the third-party source, establishing specificity within the meaning of section 771(5A)(D)(i) of the Act.[357] All three prongs necessary to determine a program to be countervailable are therefore present, and Commerce should include these purchases of electricity in its final benefit calculation of Fujian Billion's electricity purchases in the final determination.[358]

Fujian Billion Rebuttal Brief:

- Commerce properly understood the purchases of electricity from the third-party source in its *Preliminary Determination* and properly excluded them from the subsidy calculation for the Electricity for LTAR program.[359]
- As verified by Commerce, the electricity transmitted by the third-party source to Fujian Billion does not go through the State Grid of Fujian and is not connected to the State Grid of Fujian.[360]
- Given that the electricity supplied by the third-party source is not connected to the State Grid of Fujian, the third-party source had control over the electricity it supplied to Fujian Billion.[361]
- The prices set in the contract between Fujian Billion and the third-party source provides evidence that the prices differ from those set by the State Grid of Fujian. Given this, even though the third-party source is an SOE, there is no evidence that the GOC had any power to influence pricing.[362]

[353] *Id.* at 4 (citing Fujian Billion SQR at Exhibit SQR-19).
[354] *Id*. at 6.
[355] *Id*. (citing Fujian Billion Calculation Memorandum).
[356] *Id*. at 6-7 (citing 19 CFR 351.311(b)).
[357] *Id.* at 7 (citing Fujian Billion IQR at Exhibit 18-1; and Fujian Billion SQR at Exhibit SQR-19).
[358] *Id.*
[359] *See* Fujian Billion Rebuttal Brief at 1.
[360] *Id.* (citing Fujian Billion Verification Report at 8).
[361] *Id*. at 2-3.
[362] *Id*.

- Commerce should continue to exclude purchases of electricity from the third-party source in its subsidy calculation for Fujian Billion for the Electricity for LTAR program.[363]

GOC's Rebuttal Brief:

- In its *Preliminary Determination*, Commerce stated that it relied on the electricity used and fees paid by Fujian Billion for all of its purchases of electricity subject to the Provision of Electricity for LTAR program, indicating Commerce preliminarily determined that purchases from the third-party source should be not included in the benefit calculation for the program.[364]
- The terms and prices of electricity between Fujian Billion and the third-party source were established in a direct contract, without GOC or NDRC pricing guidance.[365]
- The solar panels that supply electricity from the third-party source to Fujian Billion are not connected to the State Grid of Fujian Province.[366]
- The contract between the third-party and Fujian Billion provides no evidence that the pricing schedule was established pursuant to NDRC guidance, nor does it provide the evidence that the solar power station was connected to the State Grid of Fujian.[367]
- In its response, Fujian Billion noted that the electricity in question was purchased directly from the third-party's power instead and was never transmitted by the State Grid of Fujian.[368]
- China's 2015 electricity reform resulted in the current laws and regulations governing China's electricity market, and consumers are now encouraged to enter into contracts and negotiate with the power generation company and the grid company directly.[369]
- The GOC regulates the electricity market at the macro level, and there is no evidence that the GOC was involved in the contract negotiation between Fujian Billion and the third-party source.[370]
- Article 30 does not mandate that an electricity power generation company abide by any regulatory obligations when it is selling electricity, negotiated in a contract, directly to a consumer.[371]
- The purchases of electricity from the third-party source were not "discovered" during the course of the investigation, nor were they self-reported by Fujian Billion as a subsidy program. Under 19 U.S.C. 1671a(a) and 19 U.S.C. 1671a(b), Commerce only has authority to commence after sufficient evidence of financial contribution, benefit, and specificity is found. In this case, therefore, Commerce has no authority to investigate this purported new subsidy program.[372]
- In its analysis of whether MEG or PTA input producers are an "authority", Commerce states that it needs to conduct a complete analysis of a supplier's ownership structure, corporate

[363] *Id.* at 3.
[364] *See* GOC Rebuttal Case Brief at 2 (citing the *Preliminarily Determination* PDM at 3-4).
[365] *Id.* at 3.
[366] *Id.* at 5 (citing Fujian Billion IQR at 11; and Fujian Billion Verification Report at 8).
[367] *Id*. at 3-5 (citing Fujian Billion SQR at Exhibit SQR-19).
[368] *Id.* at 5 (citing Fujian Billion SQR at 11).
[369] *Id.* at 6 (citing GOC IQR at 128-140 and Exhibits II.E.20-II.E.22; and GOC SQR at 26-36 and Exhibits S-12 through S-15).
[370] *Id*. at 7.
[371] *Id.* at 7-8 (citing GOC IQR at Exhibit II.E.30).
[372] *Id*. at 8-9.

registration, *etc.*[373] Commerce's determination if an input supplier is an "authority" is then now solely based on ownership of the supplier.[374]
- The notion that government ownership is enough to find an entity as a "government authority" does not comply with U.S. WTO obligations.[375]
- The price for electricity from the third-party source to Fujian Billion was set out in the contract and made pursuant to market principles.[376] Therefore, Commerce should find that Fujian Billion did not receive a benefit from the purchases of electricity from the third-party source.[377]
- Commerce should continue to exclude purchases from the third-party source in calculating the subsidy rate for Fujian Billion for the Electricity for LTAR program.[378]

Commerce's Position: We agree with the petitioners that we should include Fujian Billion's third-party sourced electricity in the Electricity for LTAR benefit calculation. The record is clear that the third-party source providing the electricity to Fujian Billion is an SOE and is wholly government owned.[379]

As discussed in the *Preliminary Determination*, we determined that, as AFA, the GOC's provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act. Further, as explained in the Public Bodies Memorandum, majority government-owned SOEs in China possess, exercise, or are vested with governmental authority.[380] Thus, we find that electricity provided by this third-party source, which is a SOE, constitutes a financial contribution within the meaning of 771(5)(D) of the Act. Additionally, as the electricity provided by the third-party source was sold via a contract only with Fujian Billion, we find that it is *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act because it is a contract between an authority of the GOC and Fujian Billion.[381] Finally, as the electricity provided by the third-party source is being provided at LTAR, we find there to be a benefit pursuant to section 771(5)(E)(iv) of the Act.[382]

We disagree that it is necessary for the power-generator to be connected with the State Grid of Fujian in order for it to be considered an authority. As noted above, the third-party source is an "authority" under section 771(5)(D)(iii) of the Act. As an authority, it provides a financial contribution to Fujian Billion. While Fujian Billion and the GOC contend that the electricity rates charged to Fujian Billion were set in a contact between Fujian Billion and the SOE electricity generator, we find that any contracts negotiated with an SOE in China are irrelevant

[373] *Id*. at 9 (citing *Preliminary Determination* PDM at 18; and GOC IQR at 80).
[374] *Id*.
[375] *Id*. (citing *Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011), paragraph 319).
[376] *Id.* at 10.
[377] *Id*.
[378] *Id*. at 11.
[379] *See* Fujian Billion SQR at 10 and Exhibit SQR-18.
[380] *See* Public Bodies Memorandum.
[381] *See* Fujian Billion SQR at 10-11 and Exhibit SQR-19.
[382] *Id.*; and Fujian Billion Final Calculation Memorandum.

because Commerce has determined that SOEs in China are authorities.[383] While Fujian Billion and the SOE entered a contract regarding electricity rates, as we note in the *Preliminary Determination*, the NDRC continues to play a role in setting and adjusting electricity prices.[384]

Additionally, we do not need to characterize this purchase of electricity as discovered in the course of the investigation, as suggested by the petitioners. The information necessary to determine the amount of electricity purchased by Fujian Billion from the third-party source was provided in Fujian Billion's IQR.[385] Moreover, we initiated on the provision of electricity for LTAR program at the outset of this investigation.[386] Further, we disagree with the GOC that all three criteria necessary to find a program to be countervailable are not present. As noted above, we find that the electricity provided to Fujian Billion is specific, from an "authority" providing a financial contribution, and we have calculated a benefit. Accordingly, we have included the provision of electricity from the third-party source in the benefit calculation of Fujian Billion's Electricity for LTAR program for this *Final Determination*.

Comment 11: Calculation of Fujian Billion's Benefit for Tax Deduction for R&D Expenses

Petitioners' Case Brief:

- Commerce's practice is to calculate the benefit of an income tax program from the difference between the amount the company paid and the amount the company would have paid in taxes, absent the benefit of the tax program.[387]
- Commerce has in previous cases not considered a company's benefit from other tax programs in determining benefit from a different and separate countervailable tax program.[388]
- Commerce has previously used the standard 25 percent income tax rate in determining benefit, regardless if the responding company benefited from a different countervailable tax program.[389]
- Commerce should revise the calculation for Fujian Billion and use the 25 percent income tax rate in determining benefit for the Income Tax Deduction for R&D Expenses program.[390]

Fujian Billion Rebuttal Brief:

- The petitioners raised the issue in their ministerial error allegations after the *Preliminary Determination*, and Commerce stated in its Ministerial Error Memorandum that it was a

[383] *See* Public Bodies Memorandum.
[384] *See Preliminary Determination* PDM at 23.
[385] *See* Fujian Billion IQR at 29 and Exhibit 18-1.
[386] *See* Initiation Checklist.
[387] *See* Petitioners' Case Brief at 9 (citing 19 CFR 351.509(a)(1)).
[388] *Id*. at 9 (citing *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9774 (March 5, 2018), and accompanying IDM at 7 and Comment 21; *Countervailing Duty Investigation of Certain Polyethylene Therephthalate Resin from the People's Republic of China: Final Affirmative Determination*, 81 FR 13337 (March 14, 2016), and accompanying IDM at 40-44 (*Pet Resin from China*); and *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012), and accompanying IDM at 17-19 (*Wind Towers from China*)).
[389] *Id.* at 10 (citing *Pet Resin from China*; and *Wind Towers from China*).
[390] *Id*.

purposeful and methodological choice in using the preferential corporate tax rate of 15 percent in its calculations.[391] Additionally, the applicable tax rate for Fujian Billion is the preferential corporate income tax rate.[392] Therefore, Commerce used the correct methodology in its *Preliminary Determination* and should not adjust its methodology in its final determination.[393]

GOC's Rebuttal Brief:

- In its Ministerial Error Memorandum, Commerce stated that it intentionally chose the 15 percent preferential corporate income tax rate to calculate the benefit of this program.[394] Commerce should continue to calculate the benefit for this program using the methodology it used in its *Preliminary Determination*.[395]

Commerce's Position: We agree with the petitioners that we should use the 25 percent tax rate to calculate the benefit for this program rather than the 15 percent tax rate used in the *Preliminary Determination*. In the *Preliminary Determination*, we used the effective tax rate that Fujian Billion would have paid on its R&D expenses absent this program, which would be 15 percent. However, 19 CFR 351.503(e) indicates that when calculating the benefit, "we will not consider the tax consequences of the benefit." Fujian Billion's corporate tax rate would be 25 percent absent the "Income Tax Reductions for HNTEs" program. Therefore, consistent with past proceedings,[396] we are not taking into consideration the "Income Tax Reductions for HNTEs" program, which reduces the corporate tax rate from 25 to 15 percent. As stated in the preamble to the regulations, "the impact of the benefit under one subsidy program should not be considered in calculating the benefit under a separate program."[397] Accordingly, pursuant to Commerce's regulation, we have revised the benefit calculation and used the 25 percent tax rate to calculate the benefit for Fujian Billion's Income Tax Deductions for R&D Expenses program.

Comment 12: Calculation of the Benefit for Fujian Billion's Import Tariff and VAT Exemptions on Imported Equipment

Petitioners' Case Brief:

- Commerce should adjust the calculation of VAT exemption benefits on imported equipment provided to Fujian Billion.[398] Commerce's preliminary calculations did not account for the impact of the import tariff exemption on the total amount of VAT due.[399] VAT in China is paid inclusive of import duties,[400] and the amount of exempted import duty should be added

[391] *See* Fujian Billion Rebuttal Brief at 3.
[392] *Id*. at 3 (citing Fujian Billion IQR at 17-21).
[393] *Id*.
[394] *See* GOC Rebuttal Brief at 11-12 (citing Ministerial Error Memorandum).
[395] *Id.*
[396] *See Aluminum Foil* IDM at Comment 21.
[397] *See Countervailing Duties*, 63 FR 65348, 65362 (November 25, 1998).
[398] *See* Petitioners' Case Brief at 11-12.
[399] *Id*. at 12 (citing Fujian Billion Preliminary Calculation Memorandum).
[400] *Id*. (citing GOC IQR at 71).

to the value of the imported equipment to determine benefit of the VAT exemption amount.[401]

Fujian Billion Rebuttal Brief:

- In its Ministerial Error Memorandum, Commerce stated that the benefit was calculated as intended, with the import tariff exemption and the VAT exemption benefit calculated separately and aggregated together to find total benefit for each purchase. Commerce should continue to calculate the benefit for this program as was done in the *Preliminary Determination.*[402]

GOC's Rebuttal Brief:

- Commerce, in its Ministerial Error Memorandum, stated that it calculated the benefit as intended in the *Preliminary Determination*, and Commerce should not revise its methodology for calculating the benefit of this program in its *Final Determination*.[403]

Commerce's Position: We disagree with the petitioners. Under this program, Fujian Billion received two benefits: one in the form of exempted import duties, and the second in the form of exempted VAT. In the *Preliminary Determination*, we calculated a benefit for this program by calculating the duty and VAT benefit separately and then aggregating them to find the total benefit for the program, consistent with our practice.[404] Under the methodology suggested by the petitioners, however, we would create a compounding effect whereby we would be adding an additional amount to the exempted VAT calculation because the exempted duty creates a lower VAT liability than it would have been if import duties had not been exempted. The petitioners argue that the reduced price (for which a benefit has already been calculated) results in a lower tax burden that should also be considered a benefit. Essentially, the petitioners want to apply a VAT to the duty benefit. However, 19 CFR 351.503(e) clearly states that "{in}calculating the amount of a benefit, the Secretary will not consider the tax consequences of the benefit;" thus, the petitioners' suggested methodology is contrary to regulatory language. Therefore, in accordance with our regulations and past precedent,[405] we will continue to calculate the benefits of this program as in the *Preliminary Determination.*

In our *Preliminary Determination*, we inadvertently calculated a VAT benefit for all purchases reported in the AUL, regardless of the year of purchase.[406] However, we are examining VAT rebates only to the extent they were provided prior to 2009.[407] Effective 2009, China's VAT regime transformed from a "production-based" system into a "consumption-based" system,

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[401] *Id*. at 12-13.
[402] *See* Fujian Billion Rebuttal Brief at 4.
[403] *See* GOC Rebuttal Brief at 12-13.
[404] *See* Fujian Billion Preliminary Calculation Memorandum.
[405] *See Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China: Amended Final Results of Countervailing Duty Expedited Review*, 83 FR 42638 (August 23, 2018), and accompanying IDM at 30 and Comment 8 (*CTL Plate from China AR*).
[406] *See* Fujian Billion Preliminary Calculation Memorandum.
[407] *See* Initiation Checklist at 14-15.

which is the world-norm for countries that have a VAT.[408] Under the production-based system, China did not allow VAT paid on purchases of capital goods and fixed assets to be credited when remitting VAT to the tax authorities.[409] Therefore, firms receiving rebates of VAT on capital goods before 2009 were relieved from a tax otherwise payable. However, Commerce has found that under a consumption-based VAT system, "the company merely conveys the VAT to the government, ultimately paying nothing because it is the final consumer who actually shoulders the tax burden."[410] Given no year before the VAT regime change is within the AUL period of this investigation, we have excluded VAT from all benefit calculations from January 1, 2009, onward, consistent with past practice.[411]

VIII. RECOMMENDATION

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

☒	☐
Agree	Disagree

11/13/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[408] *See, e.g.*, *Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Countervailing Duty Determination*, 78 FR 33346 (June 4, 2013), and accompanying PDM at "Benchmarks and Discount Rates," unchanged in *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013), and accompanying IDM at 31, footnote 104.
[409] *See Forged Steel Fittings from the People's Republic of China: Initiation of Countervailing Duty Investigation*, (October 25, 2017), and accompanying Initiation Checklist at 17, footnote 37.
[410] *See Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012).
[411] *See CTL Plate from China AR*.