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Administrative Review
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November 2, 2020

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 Results of the Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China; 2017

I. SUMMARY

The Department of Commerce (Commerce) has completed this administrative review of the countervailing duty (CVD) order on chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (China) for the period of review (POR) January 1, 2017 through December 31, 2017. This administrative review was conducted in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). The mandatory respondents are Hebei Jiheng Chemical Co., Ltd. (Jiheng), Heze Huayi Chemical Co., Ltd. (Huayi), and Juancheng Kangtai Chemical Co., Ltd. (Kangtai)[1] (collectively, the respondents). We find that the mandatory respondents received countervailable subsidies during the POR. We have analyzed the case briefs submitted by interested parties following the *Preliminary Results*,[2] and address the issues raised in the "Analysis of Comments" section below.

[1] *See* Petitioners' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Request for Fourth Administrative Review," dated November 30, 2018.
[2] *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review; 2017*, 85 FR 2701 (January 16, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

II. BACKGROUND

On January 16, 2020, Commerce published the *Preliminary Results* of this administrative review in the *Federal Register*, and invited comments from interested parties. On May 18, 2020, we received case briefs from the following interested parties: Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corporation (collectively, the petitioners); the Government of China (GOC), and Huayi and Kangtai (collectively, the respondents).[3] On May 26, 2020, Commerce received rebuttal briefs from the petitioners, the GOC, and the respondents.[4]

On April 24, 2020, Commerce tolled the due date for these final results by 50 days in response to operational adjustments due to COVID-19.[5] On May 1, 2020, Commerce explained that, irrespective of its prior stated intention to conduct verification in this review,[6] it would not conduct verification in this review due to the imposition of a Global Level 4 travel advisory preventing Commerce personnel from traveling.[7] On June 25, 2020, in accordance with section 751(a)(3)(A) of the Act, Commerce extended the period for issuing the final results of this review by 60 days, until September 2, 2020.[8] On July 21, 2020, Commerce tolled the due date for the final results an additional 50 days, until November 2, 2020, explaining that the limited operational conditions due to COVID-19 continued to exist.[9]

III. LIST OF COMMENTS FROM INTERESTED PARTIES

Comment 1: Whether the Natural Gas Market in China Is Distorted
Comment 2: Whether the Provision of Natural Gas for Less than Adequate Remuneration (LTAR) Is Specific
Comment 3: Whether Natural Gas Suppliers Are Government Authorities
Comment 4: Whether Commerce Should Select a Different Benchmark for Natural Gas for the Final Results

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[3] *See* Petitioners' Letter "Case Brief of Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corporation," dated May 18, 2020 (Petitioners' Brief); *see also* GOC's Letter, "GOC Case Brief – Fourth Administrative Review of the Countervailing Duty Order on Carbon and Alloy Steel Threaded Rod from the People's Republic of China (C-570-991)," dated May 18, 2020 (GOC's Brief), and Respondents' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Case Brief," dated May 18, 2020 (Respondents' Brief).

[4] *See* Petitioners' Letter, "Rebuttal Brief of Bio-Lab, Inc., Clearon Corp., and Occidental Chemical Corporation," dated May 26, 2020 (Petitioners' Rebuttal Brief); *see also* GOC's Letter, "GOC Rebuttal Brief: Fourth Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China (C-570-991)," dated May 26, 2020 (GOC's Rebuttal Brief), and Respondents' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Rebuttal Brief," dated May 26, 2020 (Respondents' Rebuttal Brief).

[5] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19," dated April 24, 2020 (First Tolling Memorandum).

[6] *See* Memorandum, "Verification and Briefing Schedule," dated January 27, 2020 (Briefing Schedule Memorandum).

[7] *See* Memorandum, "Cancellation of Verification and Revised Briefing Schedule," dated May 1, 2020 (Cancellation Memorandum).

[8] *See* Memorandum, "Chlorinated Isocyanurates from the People's Republic of China: Extension of Deadline for Final Results of Countervailing Duty Administrative Review, 2017," dated June 25, 2020.

[9] *See* Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020 (Second Tolling Memorandum).

Comment 5: Whether Commerce Should Apply Adverse Facts Available (AFA) to the Export Buyer's Credit Program (EBCP)
Comment 6: Selection of the AFA Rate for the EBCP
Comment 7: Whether the Income Tax Deduction for Research and Development (R&D) Expenses Program Is Specific
Comment 8: Whether Commerce Should Conduct Verification

IV. SCOPE OF THE ORDER

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

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.50.4000, 3808.94.5000, and 3808.99.9500 of the Harmonized Tariff Schedule of the United States (HTSUS). The tariff classification 2933.69.6015 covers sodium dichlorisocyanurate (anhydrous and dihydrate forms) and trichlorisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isocyanurates and other compounds including an unfused triazine ring. The tariff classifications 3808.50.4000, 3808.94.5000 and 3808.99.9500 cover disinfectants that include chlorinated isocyanurates. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

V. CHANGES SINCE THE PRELIMINARY RESULTS

Based on consideration of the arguments raised in the case briefs, and all supporting documentation, we made certain changes from the *Preliminary Results*, which are discussed in the "Analysis of Comments" section below.

VI. SUBSIDIES VALUATION INFORMATION

1. Allocation Period

   Commerce made no changes to the allocation period or the allocation methodology used in the *Preliminary Results*.[10]

2. Attribution of Subsidies

   Commerce has made no changes to the attribution of subsidies methodology applied in the *Preliminary Results.*[11]

[10] *See Preliminary Results* PDM at 17-18.
[11] *Id.* at 18-19.

3. Denominators

Commerce made no changes to the denominators used in the *Preliminary Results*.[12]

4. Benchmarks and Discount Rates

The petitioners, the GOC, and the respondents submitted comments regarding the benchmark used with respect to natural gas. Based on our review of these comments, we have revised the benchmark used to calculate the benefit from the provision of natural gas for LTAR. *See* Comment 4, below.

VII. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Commerce relied on "facts otherwise available," including AFA, for several findings in the *Preliminary Results*. Commerce has not made any changes to its determination to rely on facts otherwise available and AFA, as applied in the *Preliminary Results*.[13]

VIII. PROGRAMS DETERMINED TO BE COUNTERVAILABLE

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

1. Provision of Natural Gas for LTAR

In the *Preliminary Results*, Commerce found that this program provided a financial contribution and was specific, but that it provided no benefit. As discussed in Comment 4, we have made changes to the benchmark used to measure the adequacy of remuneration. The final subsidy rate for Huayi is 0.05 percent *ad valorem.* The final subsidy rate for Kangtai is 0.16 percent *ad valorem.*

2. Provision of Electricity for LTAR

As discussed in the Huayi Final Calculation Memorandum, we added a missing benchmark to the table used to calculate Huayi's benefit from this program.[14] As such, the final subsidy rate for Huayi is 1.37 percent *ad valorem.* We made no changes to the program rate for Kangtai. The final subsidy rate for Kangtai is 1.25 percent *ad valorem.*

[12] *Id.* at 19.
[13] *See Preliminary Results* PDM at 4-17.
[14] *See* Memorandum, "2017 Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Huayi Final Analysis Calculation Memorandum," dated concurrently with this memorandum.

3. Export Buyer's Credits from the Export-Import Bank of China (EXIMBC)

As discussed in Comments 5 and 6, Commerce made no changes to the program rate for both Huayi and Kangtai. The rate for both Huayi and Kangtai is 0.87 percent *ad valorem.* We did not change the AFA methodology for this program. *See* Comments 5 and 6.

4. Income Tax Deductions for R&D Expenses

We made no changes to the program rates for Huayi or Kangtai. The final subsidy rate for Huayi is 0.16 percent *ad valorem.* The final subsidy rate for Kangtai is 0.53 percent *ad valorem.*

5. Self-Reported Grant Programs

We made no changes to the program rates for Huayi or Kangtai. The final subsidy rate for Huayi's use of the "Market Development Fund for Middle-and-Small Sized Enterprise" program is 0.02 percent *ad valorem.* The final subsidy rate for Kangtai's use of the "Technology Bureau Enterprise Award" program is 0.20 percent *ad valorem.*

IX. PROGRAMS DETERMINED NOT TO BE USED OR NOT TO CONFER MEASURABLE BENEFITS DURING THE POR

1. Export Seller's Credits from EXIMBC
2. Export Credit Insurance from SINOSURE
3. Shandong Industrial Structure Adjustment Entrusted Loan
4. Import Tariff and Value Added Tax (VAT) Exemptions for Foreign Investment Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries.
5. VAT Exemptions on Equipment for Central Region
6. VAT TAX Rebate for Comprehensive Utilization of Resources
7. Grants for Export Credit Insurance
8. Special Fund for Energy Saving Technology Reform
9. Grants under the Haixing County Science and Technology Research & Development Plan Project
10. Special National Bonding Fund for Energy Conservation and Waste Recycling Projects
11. Land and Land Usage for FIEs in National Economic and Technological Zones at Preferential Rates
12. Income Tax Benefits for FIEs Based on Geographic Location
13. Corporate Income Tax Law Article 33: Reduction of Taxable Income for the Revenue Derived from the Manufacture of Products that are in Line with State Industrial Policy and Involve Synergistic Utilization of Resources
14. Enterprise Income Tax Reduction for High and New Technology Enterprises
15. VAT Refunds for FIEs on Purchases of Chinese-made Equipment
16. VAT Tax Rebate for Comprehensive Utilization of Resources

17. Preferential Direct Tax Treatment on Purchases of Domestically Produced Equipment for FIEs
18. Policy Loans Under the Chlor-alkali Industry Second Five Year Plan
19. Stamp Tax Exemption on Share Transfers Under Non-Tradable Share Reform
20. State Key Technology Renovation Project Fund
21. Shareholder loans (debt forgiveness)
22. Discounted Loans for Export-Oriented Enterprises
23. VAT Rebate on Domestically Produced Equipment
24. VAT Exemption on Imports by Encouraged Industries
25. Preferential Lending for Industrial Readjustment
26. Preferential Loans Provided by EXIMBC "Going-out" for Outbound Investments
27. Foreign Trade Development Fund
28. "Famous Brands" program
29. Preferential Policies to Attract Foreign Investment in Jiangsu Province
30. Outline of Light Industry Restructuring and Revitalization Plan in Jiangsu Province
31. Jiangsu Province Grants for Legal Fees in Foreign Trade Remedy Proceedings
32. Shandong Province: Grants to Enterprises Exporting Key Product
33. Grants for Export Credit Insurance
34. The Clean Production Technology Fund
35. Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically Owned Companies
36. Grants for the Application of Patents
37. Financial Incentives for Coal-to-Gas Conversion and Plant Relocation
38. Discounted Green Loans

X. ANALYSIS OF COMMENTS

Comment 1: Whether the Natural Gas Market in China Is Distorted

In the *Preliminary Results*, Commerce preliminarily determined, as AFA, that the domestic market for natural gas in China is distorted through the intervention of the GOC. We, therefore, relied on an external benchmark for determining the benefit from the provision of natural gas for LTAR, in accordance with 19 CFR 351.511(a)(2)(ii).[15]

GOC's Comments:

- For Commerce to apply AFA, it must identify a gap in the record, identify how the offending party failed to cooperate to the best of its ability, and explain how the application of AFA to each element of the subsidy analysis (*i.e.*, financial contribution, specificity, government authority, *etc.*) is supported by substantial evidence.
- An adverse inference cannot be applied unless it is appropriate to use facts otherwise available.

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

- Reliance on facts otherwise available is only appropriate to "fill gaps" in the record necessary for Commerce to complete its calculation.[16]
- In addition to showing that the information is missing from the record, Commerce must also show that the interested party "failed to cooperate by not acting to the best of its ability to comply with a request for information."[17]
- In determining whether a party cooperated to the best of its ability, the courts have held that Commerce cannot apply AFA for a "failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown."[18]
- The Court of Appeals for the Federal Circuit (CAFC) has confirmed that the purpose of the AFA provision "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."[19]
- Commerce's investigation into subsidy programs has two prongs: (1) the determination of how the program operates and whether it provides a countervailable subsidy; and (2) the determination of whether the respondent received a benefit from the program so as to establish usage.
- The two prongs of Commerce's investigation are independent of and distinct from one another, and the failure to obtain information relating to the first prong cannot be used to bootstrap an affirmative determination with respect to the second prong.[20]
- In the context of the application of AFA, the GOC's failure to respond to Commerce's questions regarding certain aspects of the subsidy analysis does not render responses as to the other portions of the program unusable or irrelevant.[21]
- The Court of International Trade (CIT) previously rejected Commerce's application of AFA in the CVD context, noting that Commerce failed to indicate the facts that it selected in order to make the requisite factual findings with respect to the programs at issue.[22]
- Commerce's AFA finding in the *Preliminary Results* that the natural gas market in China was distorted by government presence in the market ignored record evidence and should be reversed in the final results.
- The GOC's statements that it could not obtain value and production information for companies in which the GOC owns an interest are not contradicted on the record.

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[16] *See* GOC's Brief at 4 (citing *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1381 (CAFC 2003) (*Nippon Steel*); *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F. 3d 1247, 1255 (CAFC 2009); and *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F. 3d 1333, 1348 (CAFC 2011)).
[17] *Id.* (citing section 776(b) of the Act).
[18] *Id.* at 4-5 (citing *Nippon Steel*, 337 F. 3d at 1381; *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1326 (CIT 2018) (*Trina Solar Cells*); and *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1261, 1270 (CIT 2018) (*Guizhou Tyre I*)).
[19] *Id.* at 5 (citing *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027, 1032 (CAFC 2000) (*Martino*)).
[20] *Id.* (citing, *e.g.*, *Stainless Steel Sheet and Strip in Coils from France: Final results of Countervailing, Duty Administrative Review*, 67 FR 62098 (October 3, 2002), and accompanying Issues and Decision Memorandum (IDM) at Comment 1).
[21] *Id.* at 6 (citing, *generally*, *Nat'l Nail Corp. v United States*, 279 F. Supp. 3d 1372, 1379 (January 2, 2018)).
[22] *Id.* at 6-7 (citing *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1347–48 (CIT 2016) (*Trina Solar Products*)).

- The GOC clearly explained that it does not maintain production and consumption data on the basis of value, and that it only does so on the basis of volume. There is no evidence on the record that contradicts the GOC's statements.
- Production and consumption data are maintained by the State Statistical Bureau (SSB); Commerce has verified information provided by the SSB numerous times and is well aware that it does not maintain statistics on the basis of value.[23]
- The GOC also explained that it does not collect official data regarding the industries in China that purchase or consume natural gas.
- Commerce applied AFA because the GOC failed to provide the information requested regarding production by companies in which the GOC owns an interest, even though the GOC explained that it does not maintain such specific information "for statistical purposes" for companies in which the government maintains less than a majority ownership interest or controlling interest in management.[24]
- Commerce did not disprove the GOC's assertions, but nonetheless claims that the GOC should have obtained the requested information. The Courts have consistently held that Commerce cannot penalize a party for the inability to provide information that it does not have.[25]
- The CIT explained in *AK Steel Corp.* that "Commerce may not… characterize a party's failure to provide information that does not exist as a 'refusal' to provide data."[26]
- The CIT also found Commerce's application of AFA to be unlawful and punitive in *NSK Ltd.*, when a party reported the requested information to the best of its ability and there was "no factual showing that {it} is able to produce more specific data on {a} particular allocation."[27]
- There is no information on the record to suggest that the GOC has the information requested by Commerce and did not provide it.
- The GOC's response that it does not collect the type of information requested by Commerce has been consistent in every China CVD case. Nonetheless, Commerce repeatedly asked for this information without providing alternative options to provide the requested information (*e.g.*, from non-government, public sources).
- Any finding by Commerce that the GOC did not cooperate to the best of its ability is a conclusory statement without any basis in fact. The CIT has stated that the "Commerce may not simply provide the conclusory statement that a party 'has failed to cooperate by not acting to the best of its ability,' or repeat its findings with regards to {facts available}, in order to draw adverse inferences against it… Commerce must 'articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation."[28]

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[23] *Id.* at 8 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 FR 46904 (July 19, 2016) (*Solar Cells 2013*), and accompanying IDM).

[24] *Id.* (citing GOC's Letter, "GOC Supplemental Questionnaire Response: Fourth Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated December 13, 2019 (GOC Supplemental Response) at 25).

[25] *Id.* at 9 (citing *Olympic Adhesives, Inc. v. United States*, 899 F. 2d 1565, 1572 (CAFC 1990) (*Olympic Adhesives*)).

[26] *Id.* (citing *AK Steel Corp. v. United States*, 21 CIT 1204, 1223 (1997) (*AK Steel Corp.*)).

[27] *Id.* (citing *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1341 (CIT 2006) (*NSK Ltd.*)).

[28] *Id.* at 10 (citing *Citic Trading Co. v. United States*, 27 CIT 356, 372 (2003) (*Citic Trading*)).

- Similar to this review, in *Borusan*, Commerce twice requested information that Borusan argued was not legally necessary. The CIT overturned the application of AFA by Commerce, noting Commerce's investigatory "obligations to provide a better explanation of the 'nature of the deficiency' including explanation of the reasons why the information is 'necessary' and to reasonably attempt to work with respondents trying to abide by administrative deadlines."[29]
- In this case, the GOC believed in good faith that it was accurately and completely responding to Commerce's questions regarding market distortion to the best of its ability because it responded with accurate information from the SSB of a type that Commerce has verified in the past.
- Thus, when claiming that this response was deficient, Commerce is under a statutory obligation to explain why it is deficient and how it could be rectified. Simply repeating the question does not satisfy Commerce's obligations under section 782 of the Act.
- If Commerce knows how it wants the information to be provided, then it must ask whether it is possible to obtain value information in this manner, and if so, to request it. Failure to do so makes Commerce's finding in the *Preliminary Results* regarding market distortion untenable.
- The volume data provided by the GOC is sufficient for a market distortion analysis.
- The GOC fully responded to Commerce's requests for information, providing figures for total production, total consumption, the percentage of domestic consumption accounted for by domestic production, and the total volume and value of imports of natural gas.
- Based on the data provided by the GOC, almost half of all natural gas consumption is imported, clearly showing that the GOC's presence in the natural gas market cannot possibly be distortive.
- There is no statutory or regulatory requirement that Commerce must have both volume and value data to analyze market distortion, or that it must have ownership information for all companies in which the GOC owns an interest, however small.
- Commerce has based its market distortion analysis in China CVD cases solely on volume data in numerous cases. For instance, in *OTR Tires*, Commerce used only volume data where the GOC did not provide value data and found market distortion for the carbon black market, but not for the synthetic rubber market.[30]
- Volume data are generally what Commerce relies upon when analyzing the relative size of companies in an industry. For instance, Commerce typically relies on export volume when selecting mandatory respondents, ignoring value data.
- While it is Commerce, and not the respondents, that determines what information is needed, that authority is not without limits. For instance, in *Nippon Steel*, the CIT stated that "{a}n adverse inference may not be drawn merely from a failure to respond."[31]

[29] *Id.* at 10-11 (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1348-49 (CIT 2015) (*Borusan*)).
[30] *Id.* (citing, *e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2014*, 81 FR 71056 (October 14, 2016) (*OTR Tires*), and accompanying PDM at E).
[31] *Id.* (citing *Nippon Steel*, 337 F. 3d at 1383).

Instead, the information requested and missing from the record must be information that is "necessary" to Commerce's analysis.[32]

- Before Commerce can claim that value information is needed, it must reasonably explain why the analysis cannot simply be done with volume data alone. There are few situations where using the value data would result in materially different percentages than the volume data.
- As such, Commerce should use the volume data to analyze market distortion and refrain from applying AFA in the final results.

Petitioners' Rebuttal:

- The GOC did not respond to Commerce's requests for information, including a list of industries that purchase natural gas and the amounts (volume and value) purchased by each of the industries; the identity of the producers/importers of natural gas and whether the GOC maintains any ownership interest in these entities; information on the laws, plans, and policies addressing the pricing of natural gas; and an identification of all central and sub-central level industrial policies pertaining to the natural gas industry.
- The GOC provided false information when it stated that there "were no export or price controls on natural gas or any price or floor ceilings during the POR or in the previous two years,"[33] as the National Development and Reform Commission (NDRC) notices that were effective during the POR and the two previous years set price ceilings for natural gas.[34]
- The GOC did not cooperate to the best of its ability to provide any of the information requested by Commerce regarding the producer of the natural gas purchased by Huayi and Kangtai.
- Without the information Commerce requested regarding the producer of natural gas, Commerce is unable to fully analyze the natural gas industry in China and determine the degree of the GOC's distortive interference in the market.
- The GOC's claim that the requested production and consumption value that it failed to provide is not necessary to conduct a market distortion analysis, and that Commerce can instead rely solely on the volume of production and consumption, is incorrect. It is not acceptable for parties, including foreign governments, to declare that information is not necessary.
- "Cooperation," for purposes of section 776(b) of the Act, does not mean a unilateral refusal to respond to reasonable requests routinely made in CVD cases.
- An analysis of whether government intervention distorts a domestic market sector requires data regarding the volume and prices of sales in that sector.[35]

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[32] *Id.*, (citing *Jiangsu Zhongji Lamination Materials Co. v. United States*, 405 F. Supp. 3d 1317, 1333 (CIT 2019) (*Zhongli Lamination*)).

[33] *See* Petitioners' Rebuttal Brief (citing GOC's Letter, "GOC NSA Response: Fourth Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated September 26, 2019 (GOC NSA Response) at 5).

[34] *Id*. (citing Petitioners' Deficiency Comments (October 10, 2019) (Deficiency Comments) at Exhibits 5D and 5I).

[35] *Id*. at 18 (citing, *e.g.*, *Certain Glass Containers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 31141 (May 22, 2020) (*Glass Containers*), and accompanying IDM at Comment 10; *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Preliminary Affirmative Determination*, 80 FR 68843 (November 6, 2015), and accompanying

- The GOC's analogy to respondent selection when arguing that the value of sector sales is not needed is inapposite, as Commerce analyzes U.S. imports when selecting respondents.
- In a market distortion analysis, the issue is whether government intervention is distorting prices to benefit specific sectors, and, thus, Commerce requires price and volume data in the domestic market.
- Volume and value are essential to analyze the market structure and the government's effect on pricing within that structure.
- As the requested volume and value data are "necessary information" that "is not on the record," and as the GOC "withheld information necessary for Commerce to conduct a full investigation,"[36] Commerce should apply an adverse inference under section 776(b) of the Act and find that the natural gas market in China is distorted, and that domestic Chinese prices cannot serve as a benchmark to evaluate whether Huayi and Kangtai received a benefit.

Commerce's Position: We continue to find, as we did in the *Preliminary Results*, that the application of AFA is warranted in finding that the natural gas market in China is distorted. In the *Preliminary Results*, Commerce enumerated the list of standard questions asked of governments in CVD proceedings, questions that are used to determine whether a government's presence in the market for a particular good is distortive, and subsequently, the suitability of using a tier one benchmark, if available, in accordance with 19 CFR 351.511(a)(2). In the *Preliminary Results*, we explained that the requested information was necessary to our analysis of the GOC's role in, and impact on, the natural gas market in China, and that the absence of the requested information on the record rendered Commerce unable to conduct its analysis. The information on the record provided by the GOC was initially limited to the total production and consumption of natural gas, by volume alone, in China during the POR.[37] The remaining questions went unaddressed. Following our review of the GOC's initial questionnaire response, we again requested that the GOC provide responses to the questions unanswered and unaddressed in the initial questionnaire. In its subsequent supplemental response, the GOC finally acknowledged the questions that we had asked initially, in response either referencing the previously-provided production and consumption volume data or noting that the requested data were not collected by the GOC.

As stated, we continue to find for the final results that the application of AFA is warranted based on the absence of necessary information on the record. Under section 776(a) of the Act, determinations on the basis of facts available are warranted if necessary, information is not available on the record, or a respondent withholds requested information, fails to provide

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PDM at 16-17, unchanged in *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 1; and *Utility Scale Wind Towers from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 FR 33422 (June 6, 2012), unchanged in *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012), and accompanying IDM at Comment 12.

[36] *Id.* (citing *Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 58283 (September 23, 2013)).

[37] *See* GOC NSA Response at 4.

requested information in a timely manner, significantly impedes a proceeding, or provides information that cannot be verified. First, we find that information necessary to analyze distortion is not available on the record. In the *Preliminary Results*, we provided an exhaustive list of the questions to which we consider answers necessary to analyze the issue of distortion in the context of CVD investigations.[38] Among these questions, we ask governments to provide the number of producers of the good in question, the volume and value of the goods both produced and consumed in the country in question, the percentage of domestic consumption accounted for by domestic production, the total volume and value of imports of the goods in question, production information for companies in which the government in question owns more than 50 percent, production information for companies in which the government in question owns some, but less than 50 percent, and a discussion of laws and policies addressing the pricing of the goods in question.

The GOC argues that the limited responses it provided in response to these questions, namely the total production, total consumption, percentage of domestic consumption accounted for by domestic production, and the total volume and value of imports of natural gas, is sufficient for our analysis. We disagree. Leaving aside the issue that it is Commerce, and not respondents that determine what information is necessary to conduct its CVD analysis,[39] the limited information provided by the GOC does not lead us to the inevitable conclusion that the market for natural gas in China is not distorted by the GOC's presence in that market.

The GOC, for instance, has argued that domestic production and consumption volume data, without accompanying value data, was determinative in our market distortion analysis for two inputs in *OTR Tires*.[40] However, the GOC ignores that Commerce had available, and affirmatively relied upon, additional data in the final results of that administrative review. Notably, in *OTR Tires*, Commerce relied in its analysis upon data with respect to the total number of producers of the goods in question in China, the number of companies in which the GOC maintained a management or ownership interest, and the volume of production accounted for by those companies in which the GOC maintained a management or ownership interest.[41] This information, the GOC does not dispute, is not available on the record of this administrative review. Despite the SSB's ability to provide the total production of natural gas in China by volume during the POR, the GOC did not provide the total number of producers in the country in this review. The notion that the GOC maintains an aggregate production number for the entire country but does not possess any source documentation from the producers that make up this number by which the total number of producers could be identified, strains credulity. That Commerce was able, in *OTR Tires*, to cobble together a distortion analysis from piecemeal data, does not lead to the conclusion that we should be able to do so in this administrative review, with even less data at our disposal.

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[38] *See Preliminary Results* PDM at 9.
[39] *See Acciai Speciali Terni S.p.A. v. United States*, 26 CIT 148, 167 (2002); *see also PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360, 1367-1370 (CIT 2007).
[40] *See* GOC's Brief at 13.
[41] *See OTR Tires* PDM at 23-24, unchanged *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) (*OTR Tires*), and accompanying IDM.

Moreover, the GOC's characterization of its own role in the ownership or management of these producers as one of ignorance is not acceptable. In its NSA questionnaire response, the GOC simply ignored all questions related to the production of natural gas by producers in which it maintains a management or ownership role, regardless of the degree of that role.[42] When given a second opportunity to provide the requested information with respect to companies in which the GOC maintains a majority ownership or controlling management interest, the GOC dissembled in its response, noting merely that no "public" information was available.[43] Yet the GOC was clearly aware that Commerce accepts business proprietary information in response to its questionnaires, as the total production and consumption data provided by the SSB in its initial response were bracketed as non-public information.[44] For companies in which the GOC owns some, but less than a majority share, ownership or controlling management interest, the GOC stated that such information was not maintained. However, we note that Commerce has in the past 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 which is intended to bring clarity to companies registered in China.[45] Based on this experience, we are aware that this system is a national-level internal portal that holds certain information regarding any China-registered company. Among other information, we have found in the past that each company must upload its annual report, make public whether it is still operating, and update any changes in ownership.[46] Moreover, we have noted that in the past that Commerce has found this system maintains a profile of all companies operating within China, regardless of whether they are private or state-owned enterprises.[47] Therefore, we find that information related to the operation and ownership of companies within the chemical industry, and in particular the chlorinated isos industry, are in fact available to the GOC, and that the GOC failed in not acting to the best of its ability to provide the requested information.

This information is necessary on our record to understand the GOC's role in the industry as a whole, both in terms of the number of companies the GOC's controls completely, as well as those in which it may not own a controlling share, but may nonetheless have control through a managerial role or via the involvement of the Chinese Communist Party (CCP). This information, in turn, ties to another missing piece of information that we requested, namely, the total number of producers in the country, which are also essential data that should be available to the GOC. This information is essential to our distortion analysis because it allows us to understand the diversification of producers operating within in China. Using the requested data, we would be able to understand the position of GOC-controlled producers with respect to producers that are truly privately owned. An industry in which the GOC controls a substantial majority of all producers by number, even if not by volume, for instance, may still be distorted.

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[42] *See* GOC NSA Response at 4.
[43] *See* GOC Supplemental Response at 24.
[44] *See* GOC NSA Response at Exhibits N-2 and N-3.
[45] *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 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), and accompanying IDM at 24.
[46] *See, e.g.*, *Glass Containers* IDM at 7.
[47] *Id.*

Furthermore, with respect to the value information that the GOC has characterized as unnecessary, we disagree. The GOC has itself noted, in the context of respondent selection, that Commerce typically relies on volume data in analyzing production. However, we may also use value data for respondent selection purposes, in place of volume data, where information on the record indicates that volume data may be inaccurate or measured in varying units. Similarly, while we are not able to solely rely on the provided volume data, as discussed, the requested value data could, if necessary, serve as an alternative data source in the event that we find the volume data unusable, unreliable, or unverifiable. And while volume data may be preferable in analyzing the production of GOC-controlled companies vis-à-vis those companies that operate in accordance with market principles, value information permits Commerce to understand the role of the GOC in influencing the pricing of goods within China. Moreover, by stating that the remaining requested information is not relevant to Commerce's analysis, the GOC placed itself in the position of Commerce, and only Commerce can determine what is relevant to this administrative review.[48] Due to the GOC's failure to provide the information requested, we are unable to conduct this analysis.

The GOC has also argued that, given China's inability to meet its own demand for natural gas through domestic production, and the significant penetration of imports into the market, the GOC itself could not distort the market for natural gas in China.[49] We disagree with this assertion. The specific data regarding the total volume of production and consumption of natural gas in China is available as provided by the SSB, and from these data we can infer the percentage of domestic consumption that is satisfied by domestic production, and that remains to be satisfied by imports. While the results of this analysis, deduced from proprietary information, are not able to be made public, we do not consider the resultant figure to indicate that imports of natural gas into China are so overwhelming as to render the GOC's presence in the market non-distortive, given the proportion of natural gas that is produced domestically, as well as the GOC's failure to provide any information as to its management and ownership roles in the domestic production of natural gas in China. Put simply, the import volume of natural gas, alone, is not conclusive to our analysis of market distortion, particularly in the absence of corroborating information that was requested but not provided.

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[48] *See Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (*Ansaldo*) (stating that "{i}t is Commerce, not the respondent, that determines what information is to be provided"). The Court in *Ansaldo* criticized the respondent for refusing to submit information which the respondent alone had determined was not needed, for failing to submit data which the respondent decided could not be a basis for Commerce's decision, and for claiming that submitting such information would be "an unreasonable and unnecessary burden on the company."; *see also Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1298-99 (CIT 2010) (stating that "{r}egardless of whether Essar deemed the license information relevant, it nonetheless should have produced it {in} the event that Commerce reached a different conclusion" and that "Commerce, and not Essar, is charged with conducting administrative reviews and weighing all evidence in its calculation of a countervailing duty margin"); *NSK, Ltd. v. United States*, 919 F. Supp. 442, 447 (CIT 1996) ("NSK's assertion that the information it submitted to Commerce provided a sufficient representation of NSK's cost of manufacturing misses the point that 'it is Commerce, not the respondent, that determines what information is to be provided for an administrative review"); and *Nachi-Fujikoshi Corp. v. United States*, 890 F. Supp. 1106, 1111 (CIT 1995) ("Respondents have the burden of creating an adequate record to assist Commerce's determinations").

[49] *See* GOC's Case Brief at 12-13.

The GOC has characterized Commerce as having verified that the GOC, and the SSB in particular, do not maintain the specific types of information we requested.[50] We do not believe this characterization is correct. There are numerous instances in China CVD cases were we have considered and verified information provided by the SSB with respect to the number of producers of the goods in question, as well as the GOC's position in the industry in terms of both management and ownership.[51] Moreover, we note that, where such information was not available or routinely collected by the GOC, Commerce has in the past accepted and verified information from independent data sources within China. We do not find it plausible that the GOC is able to compile the total volume of natural gas production in China, as a matter of course, without maintaining underlying documentation regarding the producers of said natural gas, or without knowing the identities of, and being able to simply count, those producers. Nor do we consider the GOC's deflection of our inquiries, citing a lack of public information sources, as reasonable when the GOC itself provided nonpublic data from the SSB in response to questions regarding production and consumption data during the POR. The GOC is aware, as it has been in previous proceedings, that is it not prevented from providing proprietary data or data sourced from non-government sources, such as trade industry organizations.[52]

The failure to provide the requested information as described above also is within the parameters of section 776(a)(2) of the Act. As the CIT noted in *Nippon Steel*, when a respondent fails to provide requested information, it falls to Commerce to fill in the gaps with facts otherwise available.[53] The Court goes further in *Nippon Steel*, noting that the focus of section 776(a) "is a respondent's *failure to provide information*. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information – for any reason – requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination" (emphasis in original).[54] We find that the GOC withheld information necessary to our analysis of whether the GOC's presence in the natural gas market in China distorts said market. Specifically, without information regarding the size of the natural gas industry in China, in terms of total producers, as well as the GOC's managerial and ownership role in these producers, it is impossible to measure the impact and influence of the GOC on natural gas prices in China *vis-à-vis* companies that are operating independently and on market principles.

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

[50] *Id.* at 8.
[51] *See, e.g.*, *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 79 FR 33174 (June 10, 2014), and accompanying PDM at 14-15, unchanged in *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 from China*).
[52] *See, e.g.*, *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2013*, 80 FR 77318 (December 14, 2015), and accompanying IDM at Comment 2.
[53] *See Nippon Steel*, 337 F. 3d at 1381.
[54] *Id.*

had complied with the request for information. Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the CVD investigation, a previous administrative review, or other information placed on the record. Given the history described above, we find that the GOC has not acted to the best of its ability to provide requested information. Therefore, we continue to find, as we did in the *Preliminary Results*, that the GOC failed to act to the best of its ability to provide the requested information regarding its role in the Chinese natural gas market and that its failure to provide the requested information warrants the application of an adverse inference under section 776(b) of the Act in finding that the natural gas market in China is distorted. In selecting from among facts otherwise available, we take note of the price reductions that were put into place by the NDRC during the POR in making our finding that the GOC acts to prevent the natural gas market in China from operating solely on market principles.[55] Given our finding that the market for natural gas in China is distorted, we further find that the use of a tier one benchmark is not appropriate, and that a different benchmark should be used for determining a benefit from the provision of natural gas for LTAR, in accordance with 19 CFR 351.511(a)(2)(ii). For a discussion of the benchmark selected, *see* Comment 4.

Comment 2: Whether the Provision of Natural Gas for LTAR Is Specific

GOC's Comments:

- Commerce's reliance on the "Air Pollution Prevention Control Plan" (the 2013 Plan) to find the provision of natural gas for LTAR program *de jure* specific in the *Preliminary Results* is misplaced, as no such provision for natural gas exists.
- Other than providing a conclusory statement, Commerce ignores the record evidence and fails to address the GOC's arguments.
- The 2013 Plan has no legal effect or authoritative force, is purely an advocacy plan aiming to protect the air quality of China and cannot be regarded as the causation of an alleged program.
- Even if the 2013 Plan did create a program providing natural gas for LTAR, there is no evidence that it limits natural gas prices to a specific industry or location, or a specific plan or program as required by section 771(5A)(D)(i) of the Act. The GOC provided a listing demonstrating that there is no limitation on industries in China that consume and use natural gas.[56]
- The 2013 Plan for coal-to-gas conversion neither targets nor is specific to the chemical industry or Shandong Province as asserted by Commerce. All enterprises and industries can take advantage of the "so-called" preferential rates for natural gas.
- The petitioners' new subsidy allegations submission explains that "all industrial users… and others downstream who buy at government fixed prices" will benefit.[57]
- There is no record evidence of any reduction in price or that any reduction in natural gas prices is somehow linked to the 2013 Plan.
- The petitioners' allegation indicates that the reduction in natural gas prices was the result of "lower costs of gas pipeline transmission and adjusted added tax rate for natural

[55] *See* Petitioners' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Petitioners' Submission of a New Subsidy Allegation," dated June 11, 2019 (NSA Submission), at Exhibit 6.
[56] *See* GOC's Brief at 15 (citing GOC Supplemental Response at 27 and Exhibit S-1-15).
[57] *Id.* (citing NSA Submission at Exhibit 6).

gas,"[58] demonstrating that any reduction of prices was not based on the 2013 Plan but rather on the efficiencies in pipeline transmission.
- Due to significant imports of natural gas, prices are market-oriented, and the government has very little ability to control prices.
- The GOC's "Several Opinions of the CPC Central Committee and the State Council on Advancing the Pricing Mechanism Reform" clearly states that the GOC does not intervene in the pricing of natural gas.[59]

Petitioners' Rebuttal:
- The record fully supports Commerce's finding in the *Preliminary Results* that the provision of natural gas for LTAR is specific.
- The record shows that the GOC provided preferential natural gas prices specifically to the chemical industry through the end of 2017, despite the NDRC's natural gas price reform in 2015.[60]
- While the NDRC removed the preferential pricing offering of natural gas to the chemical fertilizer industry in its 2015 notice, the notice is silent with respect to the specialty chemicals segment, which includes chlorinated isos.
- The 2013 Plan identifies the chemical industry as a target industry for coal-to-gas conversion, and as such is in position to receive the preferential natural gas rates.
- Preferential natural gas prices have been provided specifically to the province in which Huayi and Kangtai are located, as the rate tables issued by the NDRC in 2015 and 2017 indicate the province of Shandong.[61]
- Shandong Province enjoyed preferential rates and was specifically targeted by the NDRC to receive this preferential pricing.

Commerce's Position: The record of this administrative review indicates that the 2013 Plan was designed to "promote the reform of the natural gas price formation mechanism,"[62] and was distributed by the State Council to the governments of all provinces, autonomous regions, and municipalities in China so that they might "implement it carefully."[63] Moreover, the 2013 Plan describes the GOC's plan to accelerate the utilization, increase the supply, and promote the use of natural gas, while reducing coal consumption,[64] while the 13th Five-Year Plan describes plans to promote the consumption of natural gas in place of coal, and targets six specific industries, including the chemical industry.[65] Information provided by the petitioners indicates that in 2015 the NDRC removed non-residential natural gas price controls "for the Direct Consumer category, including large industrial users, *except for the chemical industry*" (emphasis added).[66] Given that the focus of this program is limited to a small number of industries, including the chemical industry of which chlorinated isos producers are a part, we continue to find, as we did in the

[58] *Id.*
[59] *Id.* (citing GOC Supplemental Response at 25).
[60] *See* Petitioners' Rebuttal Brief (citing NSA Submission at Exhibit 1).
[61] *Id.* (citing Deficiency Comments at Exhibit 6).
[62] *See* NSA Submission at Exhibit 1, page 13.
[63] *Id.* at Exhibit 1, page 1.
[64] *Id.* at Exhibit 1, page 9.
[65] *Id.*; *see also id.* at Exhibit 3 at Box 16.
[66] *See* Deficiency Comments at Exhibit 6, page 396.

Preliminary Results, that the provision of natural gas for LTAR is *de jure* specific in accordance with section 775(5A)(d)(i) of the Act.

Comment 3: Whether Natural Gas Suppliers Are Government Authorities

GOC's Comments:

- The provision of natural gas for LTAR program is not countervailable because the financial contribution alleged was not provided by a government authority. Commerce's finding in the *Preliminary Results* is unsupported by substantial evidence and should be reversed in the final results.
- The record demonstrates that the input suppliers reported by the company respondents are wholly privately-owned by individuals, and consequently, are not "government authorities" within the meaning of the law.
- The company respondents purchased natural gas from wholly privately-owned companies based on negotiated contract prices.
- Where there is no record evidence that prices are controlled by the government, and the respondents' input suppliers are privately owned, Commerce has never found the input suppliers to be "government authorities" absent a finding of AFA.
- The GOC demonstrated that CCP officials and primary party organizations cannot control individually-owned companies.
- Record evidence demonstrates that, even if one of the owners or managers of individually-owned companies was part of the "nine entities" or if the companies had primary party organizations, this would not vest the company with government authority.
- Contrary to the findings in the Public Bodies Memorandum, the CCP is a political party, and not a government authority. Political parties in China are independent entities unrelated to any governmental functions.
- The allegation that "the {CCP} controls the formal institutions of government at the national level and below"[67] is inaccurate.
- Commerce's reliance on incorrect assertions and arbitrary conclusions in the Public Bodies Memorandum, without any concrete evidence, is unlawful.
- Commerce's reliance on the Public Bodies Memorandum as the primary basis for its determination is misguided and unreasonable, as it reflects a thorough misunderstanding of China's political and economic systems.
- The Public Bodies Memorandum does not state that the CCP exerts control over private companies through primary party organizations, instead plainly stating that "the role of this party presence {in private companies} is unclear; it may exert varying degrees of control in different circumstances," and that primary party organizations are "more than just a monitoring device" and "a kind of political insurance policy," but the reason for their presence in companies is not fully understood.[68]

[67] *See* GOC's Brief at 17 (citing Memorandum, "2017 Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Public Bodies Memorandum," dated January 9, 2020 (Public Bodies Memorandum) at Attachment 1, pages 7-8).
[68] *Id.* at 18 (citing Public Bodies Memorandum at Attachment 1, page 36).

- It is unlikely that the statements made in *The Economist* article quoted in the Public Bodies Memorandum were intended to apply equally to primary party organizations in both private companies and state-owned enterprises.[69]
- The vast majority of *The Economist* article is focused on the presence of primary party organizations in State-Owned Enterprises (SOEs) and their effect on such entities, not private companies.[70]
- There is no support for the conclusion, based on *The Economist* article, that primary party organizations in private companies "hold{} meetings that shadow formal board meetings and often trump their decisions."[71]
- No other statements in the article support Commerce's leap to the conclusion that the presence of CCP officials in a company vests an otherwise private company with government authority.
- The facts provided by the GOC on the record directly refute Commerce's finding in the *Preliminary Results*. The CCP cannot project direct authority over the operation of the company. The only direct action the CCP can take is refusing the appointment of a new party secretary of the private company party organization. The CCP has no other authority to interfere with the operation of private company.[72]
- While it may be possible for the primary party organization to make suggestions related to certain laws or certain state interests, the primary party organization has no ability to compel the company to do anything. The CCP, or the government, does not fund the enterprise or otherwise control any of the company's funds and the party organization cannot appoint or dismiss board members or managers.[73]
- The CCP Constitution plainly states that primary party organizations "exercise oversight overall {sic} Party members, including chief administrators who are party members, but do not direct the work of their units."[74]
- Under the CCP Constitution, a CCP primary organization within a company is required to maintain certain core tenets on behalf of the CCP as set forth in Article 31 of the CCP Constitution, but these obligations do not overlap or conflict with the producer entity's decision making process.[75]
- CCP organizations in the private sector "educate and promote private economy owners and {help} employees understand and support socialism and Party policy."[76]
- The record refutes the base premise that Commerce relies upon in requesting information regarding primary party organizations in the first place, as they cannot control companies.
- As this base premise is wrong, whether the GOC responded to these questions is irrelevant because the information is not "necessary" under the Act.
- Record evidence establishes that CCP officials have no legal authorization to intervene in or determine the outcome of any of the operations of the input producers, and, as a result,

[69] *Id.* (citing the Public Bodies Memorandum at Attachment 1, pages 35-36).
[70] *Id.*
[71] *Id.*
[72] *Id.* at 18-19 (citing GOC NSA Response at 8).
[73] *Id.*
[74] *Id.* at 19.
[75] *Id.*
[76] *Id.*

Commerce has no basis for finding that CCP officials are authorities. Thus, the finding in the *Preliminary Results* is unsupported by substantial evidence.

- There is no record evidence in this investigation indicating that the CCP participates in any way in the private company suppliers involved in this case that could conceivably support a conclusion that these companies are "authorities."
- The *Company Law* is the fundamental law regulating a company's organizational structure and its conduct.
- Article 36 of the *Company Law* stipulates that the shareholders' meeting of a limited liability company is the authority of the company and shall exercise its powers according to this Law.[77]
- Article 37 of the *Company Law* stipulates that the shareholders' meeting shall determine all the significant operational issues and plans for the company.[78]
- Article 46 of the *Company Law* stipulates that the board of directors shall be responsible for the shareholders' meeting and shall implement the resolutions made at the shareholders' meetings, as well as manage daily business operations.[79]
- Article 49 of the *Company Law* stipulates that the manager shall be responsible for the board of directors and oversee the daily management of the company.[80]
- Article 137 of the *Company Law* stipulates that "The directors, supervisors and senior managers shall comply with the laws, administrative regulations, and bylaw. They shall bear the obligations of fidelity and diligence to the company."[81]
- Commerce has never presented any evidence to demonstrate that the provisions of the *Company Law* in China are superseded or invalidated by primary party organization obligations.
- Commerce has never presented any evidence of a CCP official that is involved in a company.
- While a CCP organization within a private company is tasked with helping a company follow the law and undertake certain public responsibilities, private companies are still required to adhere to Chinese law, including the *Company Law*.
- The provisions of the *Company Law* dictate that a company's shareholders, directors and managers are solely responsible for the company's internal operations, and that it is unlawful for external organizations and authorities to interfere.
- Even if an owner, a director, or a manager of a supplier is a member or representative of any of these organizations, this circumstance would not render the management and business operations of the company in which he/she serves subject to any intervention by the GOC.

[77] *Id.* (citing GOC NSA Response at Exhibit N-IP-4).
[78] *Id.* at 20.
[79] *Id.*
[80] *Id.*
[81] *Id.*

Petitioners' Rebuttal:

- The record supports Commerce's finding in the *Preliminary Results* that the producer of the natural gas provided to Huayi and Kangtai is a government authority.
- SOEs are government authorities, and therefore the producer of the natural gas purchased by Huayi and Kangtai is controlled by a "government authority," within the meaning of the statute and Commerce practice.
- The producer's annual report identifies several GOC industrial-policy objectives aimed at the expansion of the use of natural gas, even at the expense of its corporate interest.[82]
- The natural gas producer has been selling natural gas at the NDRC-set city gate prices that are well below the natural gas prices at which the producer imports the natural gas.[83]
- The GOC offers no factual basis to depart from Commerce's conclusion in the *Preliminary Results* that the party that controls the producer of the natural gas purchased by Huayi and Kangtai is a government authority within the meaning of section 771(5)(B) of the Act.

Commerce's Position: In the *Preliminary Results*, we noted that "{t}he GOC reported that the producer of the natural gas purchased by Huayi and Kangtai is wholly owned by a government authority," and as a result found that "the producer is an 'authority' within the meaning of section 771(5)(B) of the Act, and that it provides a financial contribution under section 771(5)(D)(iii) of the Act."[84] The GOC's arguments regarding the role of the CCP in controlling the direct suppliers of natural gas to Huayi and Kangtai are inapposite to this finding. Our focus in this inquiry is the ultimate producer of the natural gas purchased by the company respondents, and no parties have disputed that the ultimate producer is wholly owned by the GOC.[85] Therefore, we continue to find that the producer of the natural gas purchased by Huayi and Kangtai is a "government authority" under section 771(5)(B) of the Act, and that this government authority provided a financial contribution under section 771(5)(D)(iii) of the Act.

Comment 4: Whether Commerce Should Select a Different Benchmark for Natural Gas for the Final Results

As noted above, in the *Preliminary Results*, Commerce preliminarily relied on an external benchmark for determining the benefit from the provision of natural gas for LTAR, in accordance with 19 CFR 351.511(a)(2)(ii).[86] Specifically, to measure the adequacy of remuneration for the provision of natural gas, we preliminarily relied on UN Comtrade data relating to import prices of natural gas in a gaseous state, provided by Huayi and Kangtai, to derive our benchmarks.[87]

Petitioners' Comments:

- In the *Preliminary Results*, Commerce inappropriately selected the UN Comtrade average price of natural gas imported into China as a benchmark.

[82] *See* Petitioners' Rebuttal Brief (citing Deficiency Comments at Exhibit 1, at page 13).
[83] *Id.* (citing Deficiency Comments at Exhibit 4, at page 5).
[84] *See Preliminary Results* PDM at 24.
[85] *See* GOC Supplemental Response at Exhibit S-1-11-A.
[86] *See Preliminary Results* PDM at 9.
[87] *Id*. at 19.

- The UN Comtrade prices for natural gas imports do not provide a usable or even reasonably accurate source for benchmark natural gas prices in this case. Thus, using the UN Comtrade as a benchmark produces a distorted comparison.
- The UN Comtrade prices are not expressed in the same units as the purchases reported by Huayi and Kangtai. There is not sufficient data to convert UN Comtrade prices, which are on a per-kilogram basis, to the per-cubic meter basis natural gas usage reported by the respondents.
- Converting natural gas in a gaseous state from one unit of measurement to another requires the density of the gas, as determined by the temperature, pressure, and chemical composition. Such information is not on the record, making an accurate conversion impossible.
- The natural gas consumed by Huayi and Kangtai is received through a pipeline in a gaseous state.
- Without knowing the density of the gas, it is not possible to convert the value of non-liquid natural gas in kilograms to cubic meters of non-liquid natural gas. Further, the essential information needed to make this conversion is not found in the conversion ratios supplied by the respondents.
- In *Rebar from Turkey I 2016*, Commerce rejected price data for natural gas as a benchmark when the prices could not be converted to the same basis at the respondents' usage rates because of the variable nature of the conversion.[88]
- Commerce should follow its precedent in *Rebar from Turkey I 2016* and reject the UN Comtrade world price data because there is no available conversion rate on this record that permits the conversion of the price of non-compressed natural gas (CNG) from cubic meters to kilograms.
- In addition, UN Comtrade prices do not reflect sales prices at the same level of trade as the natural gas purchased by Huayi and Kangtai.
- UN Comtrade import prices reflect direct import prices to a utility, whereas the prices received by Huayi and Kangtai reflect prices sold through a local distribution company to industrial end users.
- Because the natural gas prices reported in the UN Comtrade data are not comparable to those received by Huayi and Kangtai, they cannot be used as a benchmark to represent the market value of natural gas at this level of trade.
- In the recent remand determination in *Wire Rod Remand*, Commerce selected natural gas prices to end-user consumers, in preference to prices for imported natural gas prior to the sale to the ultimate consumer.[89]
- The UN Comtrade benchmark used in the *Preliminary Results* was based on Harmonized Tariff Schedule (HTS) subheading 2711.21, which is not limited to imports via pipeline.

[88] *See* Petitioners' Brief at 5 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review in Part*; *2016*, 83 FR 63472 (December 10, 2018), and accompanying PDM at 17, unchanged in *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016*, 84 FR 36051 (July 26, 2019) (*Rebar from Turkey I 2016*), *aff'd Rebar Trade Action Coalition v. United States*, 389 F. Supp. 3d 1371, 1382 (CIT 2019)).

[89] *Id.* at 6-7 (citing *Final Results of Redetermination Pursuant to Remand Order, Habaş Sinai ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States*, Court No. 18-00144, Slip Op. 19-144 (CIT 2019) (February 6, 2020) (*Wire Rod Remand*) at 20.

As such, the tariff category includes imports of CNG that are not in a liquid state which distort the data.

- Because the UN Comtrade data reflect prices paid by direct importers, these prices do not include costs incurred or charges added after the natural gas arrives at the port of entry and before it is resold to an end user such as Huayi or Kangtai.
- Many intermediate steps occur along the distribution chain between the port of entry and the consumer's gas access point, each step incurring additional expenses that are not included in the UN Comtrade price data, from storage of the natural gas in the appropriate conditions, to pressure and flow regulation along the distribution pipeline composed of varying diameter pipes to ensure the natural gas is delivered safely across the country to the consumer's destination.
- These additional expenses are not captured in the UN Comtrade data, were not provided by the respondents, and were not included in Commerce's benchmark calculation. The benchmark prices Commerce used in the *Preliminary Results* are, therefore, understated and not comparable to industrial consumer prices. As a result, they cannot be used as a tier two benchmark.
- Although the HTS category used by Commerce in the *Preliminary Results*, 2711.21, is exclusive of liquid natural gas, it is not limited to imports via pipeline. The tariff category, therefore, includes imports of CNG that distort the data.
- In *Wire Rod Remand*, Commerce rejected potential benchmarks due to concerns of such distortion, including UN Comtrade data under HTS subheading 2711.21, noting that "COMTRADE and Eurostat data on the record relate to HTS subheading 2711.21, *i.e.*, the subheading covering natural gas in its gaseous state. Therefore, although this HTS subheading is exclusive of liquified natural gas, it is unclear whether this heading also covers compressed natural gas."[90] Commerce instead relied on International Energy Agency (IEA) data.
- Applying the benchmark hierarchy in the regulations, the IEA Brazilian price data are the best benchmark for market-based natural gas prices.
- In the *Preliminary Results*, Commerce did not address the conversion or level of trade issues.
- Both UN Comtrade data and Global Trade Atlas (GTA) data share the same fundamental flaws, and Commerce recently reached the same finding in *Wire Rod Remand*, where Commerce observed that the UN Comtrade data offer no way to identify the extent to which the heading, and the shipments to the European Union covered by the customs data, *i.e.*, COMTRADE and Eurostat data, cover CNG.[91]
- GTA data reflect import prices, not prices to end users, and are based on an HTS category that includes natural gas that was not transmitted by pipeline.
- The record does not contain usable or reliable tier two data showing the world market price of imports of natural gas in its natural state that was "available" to purchasers in China.
- Pursuant to 19 CFR 351.511(a)(2)(iii), when a tier two benchmark is not available, Commerce measures the adequacy of remuneration by assessing whether the government price is "consistent with market principles."

[90] *Id.* at 8 (citing *Wire Rod Remand* at 26).
[91] *Id.* at 9 (citing *Wire Rod Remand* at 26).

- Under this approach, Commerce compares prices in China to market-based prices of the same good or service in a country of a comparable level of economic development, such as Brazil,[92] which is identified in Commerce's current surrogate country list for China.
- Brazilian prices do not present the same flaws that disqualify the UN Comtrade and GTA world market prices.
- The Brazilian prices of natural gas in a gaseous state are expressed on a per British Thermal Unit (BTU) basis. There is a standard ratio for conversion of natural gas from BTU to cubic meters that does not present the same challenges or variables as the conversion from kilograms to cubic meters that is required of the UN Comtrade data.
- Brazilian prices of natural gas are at the same level of trade as the transactions between a local distributor and Huayi or Kangtai. The IEA prices are actual industrial consumer prices of natural gas as sold to industrial end users.
- IEA data from Brazil do not reflect a composite price based in part based on sales of liquified natural gas (LNG), instead providing data representative of prices available to industrial end users.
- The Brazil IEA data reflect the purchase of pipeline gas from Bolivia, not LNG or CNG imported through other means, and indicate industrial user prices are not impacted by LNG or CNG prices.
- As such, the price paid by industrial end users is the price of piped natural gas, exclusive of LNG or CNG.

GOC's Rebuttal:

- Commerce properly relied on its hierarchy in selecting UN Comtrade data as a tier two benchmark in the *Preliminary Results*.
- There is nothing on the record that shows that the UN Comtrade price is not one that would be available to firms in China.
- The respondents' purchases of imported natural gas are not countervailable because the input is not produced by a Chinese producer. The natural gas purchased by the respondents is produced in foreign countries, and, therefore, cannot be subject of an LTAR program that is allegedly based on Chinese policies directed at Chinese natural gas producers and users.
- The petitioners' preferred Brazilian price data and the facts on the record do not establish the necessary conditions for the use of a tier three benchmark.
- The *CVD Preamble* to Commerce's CVD regulations explains that tier three benchmarks are appropriate where the government is the sole provider of a good, and no world market prices are available or accessible to the purchaser.[93]

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[92] *Id.* at 10 (citing *Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008) (*Sacks from China*), and accompanying IDM at 17; *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*), and accompanying IDM at 6 and Comment 11; and *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 21316 (April 11, 2016), and accompanying PDM at 13).

[93] *See* GOC's Rebuttal Brief at 3-4 (citing *Countervailing Duties; Final Rule*, 63 FR 65348, 65378 (November 25, 1998) (*CVD Preamble*)).

- World market prices are not unavailable, as Commerce used world market prices in the *Preliminary Results* from UN Comtrade which included the exact type of gas purchased by the respondents.
- Natural gas is not analogous to goods for which a tier two price could not possibly exist, such as the provision of land or electricity for LTAR.
- The GOC clearly established on the record that a significant amount of natural gas is imported into China from overseas. As such, world market prices in the form of exports to China exist and are on the record of this review.
- Furthermore, the GOC is not the sole provider of natural gas in China, as there are many privately-owned producers of natural gas in China.
- Before it can determine to use a tier three price, Commerce must undertake a comprehensive analysis of numerous factors within the target industry that go beyond the government's mere presence in the market.
- Elsewhere in their brief, the petitioners acknowledge that there are necessary prerequisites to using a tier three benchmark, such as the government's overwhelming presence in the market, and the widespread and documented deviation from the authorized methods of pricing and allocating the goods in question.[94] These standards are not met with respect to natural gas.
- In *Nucor*, the CIT stated that "Commerce only resorts to the tier three benchmark analysis when market prices outside of the government-controlled market are not available."[95]
- The petitioners' arguments that Commerce reject the UN Comtrade data are based purely on conversion and level of trade issues and are not sufficient to reject the data used in the *Preliminary Results*.
- The petitioners have not demonstrated that the conversion factor used by Commerce in the *Preliminary Results* is distortive in any way and provide no supporting information for their claim.
- Even if there is a conversion issue, as the petitioners claim, the Brazilian data proffered by the petitioners suffer from the same flaw.
- The petitioners do not reference any factual information on the record that indicates that UN Comtrade data reflect direct import prices by a utility, that the producer of the respondents' natural gas is a utility, or that the direct suppliers of the respondents were utilities.
- The petitioners do not provide any support for their claims that prices paid by the respondents do not include costs incurred or charges added after entry of the imported gas and before it is resold to the respondents, or that additional steps along the distribution chain involve additional expenses passed on to the end user.
- There is no actual evidence on the record regarding the petitioners' alleged additional import charges, if any, paid for natural gas by importers, or how natural gas is distributed throughout the country, nor any information regarding the role of importers, distributors and end users and how the prices differ at each step of the way.

[94] *Id.* at 5 (citing *Sacks from China* IDM at 17).
[95] *Id.* (citing *Nucor Corp. v. United States*, 286 F. Supp. 3d 1364, 1373 (CIT) (*Nucor*), *aff'd*, 927 F. 3d 1243 (CAFC 2019)).

- Commerce has continually held that it does "not require that benchmarks {be} identical to respondents' purchases in every respect…" and that while factors affecting comparability must be taken into account, the benchmark selected need not be entirely specific.[96]
- The petitioners' sample calculation for the natural gas benefit using a Brazilian natural gas price should be rejected, as it misstates the denominator by only using a portion of the respondents' sales during the year. For domestic subsidies that are not tied to particular products or markets, 19 CFR 351.525(b)(3) requires that Commerce allocate the benefit to the total sales of a company during the entire POR.

Huayi's and Kangtai's Rebuttal:

- The petitioners raised their arguments regarding the use of Brazilian IEA data prior to the *Preliminary Results*, but Commerce nonetheless chose to rely on Huayi's and Kangtai's submitted benchmarks.
- Commerce noted in the *Preliminary Results* that Huayi's and Kangtai's import prices of natural gas were the "only appropriate, available, world market prices for this input in question on the record to be used as a tier two benchmark."[97]
- Commerce properly rejected the petitioners' natural gas benchmark in the *Preliminary Results* because it is not a tier two benchmark. The petitioners' Brazilian price data are not world prices that would be available to purchasers in China (*i.e.*, tier two), and only represent what may be available domestically in Brazil.
- The UN Comtrade data serve as an appropriate tier two benchmark, and Commerce should not turn to a less representative tier three benchmark.
- Commerce properly found that the petitioners' data provided an unsuitable benchmark because the data were for a composite price based to an unknown degree on the price of LNG.
- Brazilian natural gas prices are distorted due to the pervasive market presence of a state-controlled company, Petrobras, which is responsible for producing approximately 80 percent of natural gas in Brazil and supplying more than 90 percent of the natural gas consumed in Brazil.
- This review is distinguished from *Wire Rod Remand* because the UN Comtrade data on the record of this case include a benchmark for natural gas in a gaseous state.
- Huayi and Kangtai provided UN Comtrade benchmark data under HTS numbers, 2711.11 and 2711.21, which cover, respectively, natural gas in a liquified state, and natural gas in a gaseous state. Likewise, Huayi and Kangtai also provided conversion factors typically relied upon by Commerce to convert kilograms to cubic meters.
- In contrast to the Brazilian data provided by the petitioners, which include pipeline costs, Commerce's regulations at 19 CFR 351.511(a)(2)(iv) indicate a preference for benchmark prices on a delivered basis.
- Commerce routinely adds international freight and import duties to world export prices reported on UN Comtrade. Huayi and Kangtai placed ocean freight data, as well as

[96] *Id.* at 7 (citing *High Pressure Steel Cylinders from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 83 FR 63471 (December 10, 2018) (*Steel Cylinders from China*), and accompanying IDM at 11).
[97] *See* Respondents' Rebuttal Brief at 1 (citing *Preliminary Results* PDM at 20).

import duties for natural gas, on the record. Given that ocean freight and import duties can be added to the UN Comtrade benchmarks, the data can be used to establish a delivered price benchmark.

Commerce's Position: In the *Preliminary Results*, Commerce found that the UN Comtrade data, provided by Huayi and Kangtai, was the appropriate information on the record for establishing a tier two benchmark used to measure the benefit under the natural gas for LTAR program. We further characterized the IEA data from Brazil, provided by the petitioners, as not appropriate, based on an understanding that that data were for a composite price based, in part, on LNG.[98] For the reasons identified below, we are changing this finding for these final results of review and are relying on the petitioners' IEA data as a tier three benchmark.

Commerce's regulations, at 19 CFR 351.511(a)(2)(i)-(iii), set forth the basis for identifying an appropriate market-determined benchmark for measuring the adequacy of remuneration for government-provided goods or services. These potential benchmarks are listed in order of preference, a comparison of government prices to: (1) market prices from actual transactions of the good within the country in question (*e.g.*, actual sales, actual imports, or competitively-run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country in question (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). Consideration of tier two or three data is only permissible if available record evidence data from the previous tier has been evaluated and excluded as unusable.

As provided in the regulations, the preferred benchmark in the hierarchy is an observed market price for the good at issue from actual transactions within the country in question. Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, if Commerce finds that the government provides the majority, or a substantial portion, of the market for a good or service, and the prices for such goods are not set in accordance with market principles, prices for such goods and services in the country will be considered significantly distorted and will not be an appropriate basis of comparison for determining the adequacy of remuneration.[99] In this administrative review, as discussed in Comment 1, above, we find that the domestic market for natural gas in China is distorted, and as such, tier one data of actual transaction prices (including import prices) within China are not suitable as a benchmark. Not addressed in this category of excluded tier one information in the *Preliminary Results* are additional data from the GTA provided by the petitioners covering imports of natural gas into China during the POR.[100] Because the prices in these data reflect import prices of natural gas into China that were actually available during the POR, they might

[98] *See Preliminary Results* PDM at FN83.

[99] *See, e.g.*, *Certain Quartz Surface Products from India: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, In Part*, 85 FR 25398 (May 1, 2020) (*Quartz from India*), and accompanying IDM at Comment 3; *see also Steel Concrete Reinforcing Bar From the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 FR 48583 (September 16, 2019) (*Rebar from Turkey II 2017 Preliminary Results*), and accompanying PDM at 10-11, unchanged in *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; 2017*, 85 FR 16056 (March 20, 2020) (*Rebar from Turkey II 2017*), and accompanying IDM at Comment 1.

[100] *See* Petitioners' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Benchmark Information," dated December 10, 2019 (Petitioners' Benchmark Submission), at Exhibit 3.

otherwise, in the absence of our distortion finding, be suitable as a tier one benchmark. Given that distortion finding, however, we continue to exclude these data from consideration for these final results of review, and we note that, in their pre-preliminary comments, the petitioners themselves argued against the selection of these data as a potential benchmark.[101]

With tier one benchmarks excluded from our analysis, we, therefore, turn to our analysis of available tier two benchmarks. This includes the UN Comtrade data provided by Huayi and Kangtai that Commerce relied upon in the *Preliminary Results*. At that time, we stated that the UN Comtrade data represented "the only available, world market prices for the input in question on the record to be used as a tier two benchmark."[102] These data remain the only world market prices available for the input on the record, but we no longer consider them appropriate because the prices are not available to purchasers within the country of investigation. Consistent with *Rebar from Turkey II 2017 Preliminary Results*, Commerce has previously found that the only applicable tier two benchmark price for natural gas in Turkey "would be the price which is valid in those countries that are connected to Turkey through natural gas pipelines."[103] The UN Comtrade data provided by Huayi and Kangtai consist of world market export prices that would not be available to purchasers in China.[104] Therefore in this administrative review, and contrary to our finding in the *Preliminary Results*, we find that UN Comtrade data are not suitable as a tier two benchmark because there is no information on the record indicating that it is the same type of natural gas, delivered via pipeline, as that which is purchased by the respondents.

Thus, we find that we have no natural gas prices on the record that may serve as tier two benchmarks within the meaning of 19 CFR 351.511(a)(2)(ii) and, thus, must turn to a tier three "market principles" analysis under 19 CFR 351.511(a)(2)(iii) to determine adequate remuneration for natural gas in China. To establish a tier three price, we must measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.[105] Commerce has in the past interpreted this regulation to call for the use of a proxy price based on market principles when government prices have been found to be not consistent with market principles.[106] As explained in Comment 1, above, because we have found the market for natural gas in China to be distorted, government prices in China are not suitable for a tier three analysis.

As noted above, we have UN Comtrade data, as well as an IEA price in Brazil[107] covering the POR, on the record. In order to establish a reliable benchmark, Commerce is required to convert the data to the unit in which Huayi and Kangtai reported their purchases. As noted above, both

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[101] *See* Petitioners' Letter, "Chlorinated Isocyanurates from the People's Republic of China (4th CVD Administrative Review): Pre-Preliminary Results Comments," dated December 10, 2019, at 7.
[102] *See Preliminary Results* PDM at 20.
[103] *See Rebar from Turkey II 2017 Preliminary Results* PDM at 10-11, unchanged in *Rebar from Turkey II 2017* IDM at Comment 1.
[104] *See* Respondents' Letter, "Chlorinated Isocyanurates from China: Benchmark Submission," dated December 10, 2019 (Respondents' Benchmark Submission), at Attachment 1.
[105] *See* 19 CFR 351.511(a)(2)(iii).
[106] *See, e.g.*, *Quartz from India* IDM at Comment 3; *see also Wire Rod Remand* at 9.
[107] This price is based on imports of natural gas from Bolivia, transported via pipeline, and is inclusive of taxes. *See* Petitioners' Benchmark Submission at Exhibits 5 and 6.

respondents reported purchasing non-LNG (gaseous form) in cubic meters of gas.[108] To make use of UN Comtrade data, it is necessary to convert those data, reported in kilograms, to a usable benchmark in cubic meters, the unit in which Huayi and Kangtai reported their purchases.[109] For this purpose, Huayi and Kangtai provided conversion data.[110] However, these conversion data, used in the *Preliminary Results*, was limited to converting LNG, by weight, to cubic meters of gas, without taking into the density of the gas.[111] Thus, using conversion factors for LNG and applying those to non-LNG resulted in a distorted benchmark, and we are unable to perform an accurate conversion of natural gas in kilograms to cubic meters absent a more accurate conversion factor.

Specifically, examination of the record evidence regarding the conversion factors provided by Huayi and Kangtai indicates that the conversions underlying the data table used in the *Preliminary Results* are inconsistent in their labeling, making it difficult to identify the type of gas used in the conversion. For instance, while the specific conversion factors used in the *Preliminary Results* were based on a ratio of LNG, by weight, to cubic meters, the underlying conversions listed in Table 2 identify "1 tonne of LNG" as being equal to 1,333 cubic meters at zero degrees Celsius, while also listing "1 tonne of gas" as being equal to 1,333 cubic meters.[112] A reading of Table 1 of the conversion chart indicates that "tonne" in this context refers to a metric ton, but it also equates one metric ton of "gas" (presumably non-LNG) to one metric ton of "LNG," as both types of natural gas are in turn equivalent to 1,333 cubic meters, depending on temperature. Yet the next table in the provided exhibit indicates varying measures of LNG, noting that while one cubic meter of LNG is indeed equal to one cubic meter of LNG, it is in turn equal to 584 cubic meters of "gas." This contrasts with the previous table, which identifies both "gas" and "LNG" as being equal to 1,333 cubic meters, depending on temperature. This makes no rational sense, as LNG is inherently denser, and thus heavier, than non-LNG, which would require a significantly higher volume than LNG to have the same weight. Moreover, the conversion tables provide no further descriptors or narrative that would resolve this uncertainty, and no information as to how temperature or density affects the volume of the natural gas. The inconsistent measurements used in the table, as well as the lack of clear identification of the substances measured, renders it unreliable for our conversion purposes. We have, in the past, found that inconsistent conversion factors are sufficient cause to reject a suggested benchmark.[113] Second, as petitioners have argued, without knowing the density of the gas, it is not possible to convert the value of non-LNG measured in kilograms to cubic meters of non-LNG. Finally, we agree with the petitioners that natural gas exports under HTS 2711.21 are exclusive of LNG, but that there is no indication that these export data also exclude CNG, which

[108] *See* Huayi's Letter, "Chlorinated Isocyanurates from China: Heze Huayi New Subsidy Allegation Questionnaire Response," dated September 12, 2019 (Huayi NSA Response), at Exhibit NSQ-1; *see also* Kangtai's Letter, "Chlorinated Isocyanurates from China: Kangtai New Subsidy Allegation Questionnaire Response," dated September 12, 2019 (Kangtai NSA Response), at Exhibit NSQ-1.
[109] *See* Respondents' Benchmark Submission at Exhibit 1; *see also* Huayi NSA Response at Exhibit NSQ-1; and Kangtai NSA Response at Exhibit NSQ-1.
[110] *See* Respondents' Benchmark Submission at Exhibit 2.
[111] *Id.*
[112] *See* Respondents' Benchmark Submission at Attachment 2.
[113] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 FR 23188 (May 22, 2017) (*Rebar from Turkey II*), and accompanying IDM at Comment 4; *see also Rebar from Turkey II 2017* IDM at Comment 1.

may cause distortions in establishing a benchmark because CNG, while remaining in a gaseous form, is nonetheless denser, and therefore heavier, than non-CNG of the same volume. This finding is consistent with recent Commerce practice on this matter.[114]

Further, we find that the use of an LNG-based conversion factor is inappropriate given our regulatory scheme under 19 CFR 351.511. Under the regulation and our practice, Commerce should, if possible, compare the prices paid by respondents to a benchmark consisting of the actual good purchased, in this case, natural gas transported via pipeline. The type of gas used to establish the conversion factor in the *Preliminary Results* was based on a ratio of LNG by weight to cubic meters, which is not the good purchased by Huayi and Kangtai. Commerce has determined in recent proceedings that natural gas (*e.g.*, gas in gaseous form) has inherent supply limitations because it can be transported only by pipeline and not shipped via canisters like the LNG or the non-LNG, possibly consisting of CNG, that is accounted for in the UN Comtrade data.[115] In a prior proceeding, Commerce considered whether a natural gas (gaseous) benchmark can be derived from LNG-derived pricing data and concluded that it cannot.[116] Commerce found that LNG pricing requires significant adjustments to serve as a benchmark for piped natural gas in a gaseous form.[117] While the company respondents in this administrative review provided data and conversions factors for making adjustments from LNG, by weight, to cubic meters, we find that the cumulative effect of making such adjustments risks, particularly in absence of a non-LNG to cubic meters conversion factor, introducing distortions to the UN Comtrade benchmark data, rendering them unusable as a tier three benchmark.

We find that those risks can be avoided by relying on a benchmark that is not encumbered by the same distortive conversion factors as the UN Comtrade data on the record, *i.e.*, the IEA data from Brazil. As explained below, we find that the natural gas pricing data from the IEA report, which cover non-LNG pricing, require only minimal conversion and constitute the best available information for constructing a natural gas benchmark under our tier three analysis.

In the *Preliminary Results*, we identified the IEA data from Brazil as an unsuitable tier two benchmark, given that the price data provided by the petitioners appeared to be a composite price, possibly including LNG.[118] However, tier two prices, as defined by 19 CFR 351.511(a)(2)(ii), are limited to those where it is reasonable to conclude that such a price would be available to purchasers in the country in question. This renders IEA data from Brazil unsuitable as a tier two benchmark, as piped natural gas available to industrial end users in Brazil would not actually be available to industrial end users in China.

We, therefore, turn to the IEA data from Brazil provided by the petitioners under a tier three analysis. The respondents argue that Petrobras, a state-controlled company, maintains a significant role in the Brazilian natural gas market, having a share of approximately 80 percent of total national gas production and supplying more than 90 percent of the gas consumed in

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[114] *See Wire Rod Remand* at 20.
[115] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015*, 83 FR 16051 (April 13, 2018), and accompanying IDM at 12; *see also Quartz from India* IDM at Comment 3.
[116] *See Rebar from Turkey I 2016* IDM at Comment 1.
[117] *Id.*
[118] *See Preliminary Results* PDM at 20.

Brazil.[119] However, after evaluating this issue, we find that that information on the record indicates that the natural gas market in Brazil operates under market principles.[120] Commerce has previously found that IEA benchmark data for natural gas are "thoroughly analyzed and annotated, and published and distributed as part of a comprehensive energy price report,"[121] and otherwise provide suitable benchmark information for natural gas programs.[122] In addressing respondents' argument, Commerce notes that the IEA report indicates that gas is sold by Petrobras to local distribution companies based on a fixed transmission tariff that is based on economic indices,[123] and that these local distribution companies are then responsible for supplying industrial end users.[124] Retail prices are further regulated by state governments in Brazil taking into account inflation, distribution margins, and the tariffs of gas distribution companies, but there is no federal regulation controlling natural gas prices.[125] State-level regulation permits natural gas distributors to pass on supply prices to end users and charge a distribution margin.[126] Based on the information on the record indicating that prices in Brazil are tied to economic indices and distribution margins, we find that the data provided in the IEA report on Brazil is based on market principles and, therefore, suitable for benchmark purposes.

Furthermore, we find that the natural gas that forms the basis of the IEA benchmark is more comparable to the natural gas purchased by Huayi and Kangtai, and, thus, more suited to a benchmark comparison. For instance, both Huayi and Kangtai reported purchasing gas through local distribution companies via pipeline.[127] The IEA benchmark provided by the petitioners also consists of gas provided to industrial users via pipeline gas imported from Bolivia under long-term contracts[128] and sold through local distribution companies. Moreover, we recognize the petitioners' argument that the benchmark for piped natural gas sold in Brazil is exclusive of LNG and CNG. The IEA report states that the benchmark identified by the petitioners represents a price to industrial end users,[129] and that "{w}hile industrial and residential baseload demand is met via pipeline gas imported from neighbouring Bolivia (under long-term contracts), large fluctuations in the level of gas used in power generation are predominantly addressed via LNG spot purchases."[130] In other words, LNG is primarily used in power generation, when demand cannot be met pursuant to other means, rather than in meeting the demands of industrial end users, which are satisfied by natural gas delivered via pipeline from Bolivia pursuant to long-term contracts. The petitioners have also pointed out that the non-LNG benchmark provided also excludes CNG, which carried higher prices than gas delivered via pipeline to industrial end users in Brazil during the POR.[131] We agree with this assessment, and taken together, it is apparent that the benchmark price provided in the IEA report consists of prices to industrial end users

[119] *See* Respondents' Rebuttal Brief at 2; *see also* Petitioners' Benchmark Submission at Exhibit 5, page 4.
[120] We note that Commerce has not previously addressed the issue of market distortion in the Brazilian natural gas market.
[121] *See Rebar from Turkey II* IDM at Comment 4.
[122] *See Rebar from Turkey II 2017* IDM at Comment 1.
[123] *Id.* at Exhibit 5, page 17.
[124] *Id.* at Exhibit 5, page 5
[125] *Id.* at Exhibit 5, page 17.
[126] *Id.*
[127] *See* Huayi NSA Response at 3; *see also* Kangtai NSA Response at 3.
[128] *See* Petitioners' Benchmark Submission at Exhibit 5, page 20.
[129] *Id.* at Exhibit 5, page 18.
[130] *Id.* at Exhibit 5, page 20-21.
[131] *Id.* at Exhibit 5, page 18.

purchasing pipeline gas from Bolivia, absent any distortive effects of LNG or CNG. This addresses and alleviates one of our chief concerns regarding the IEA data that we expressed in the *Preliminary Results*.[132] In addition, while the IEA data is provided in millions of BTUs (MBTUs), the petitioners provided a useable conversion factor for converting MBTUs to the cubic meters in which the respondents' purchases are measured,[133] creating an acceptable replacement for a benchmark rendered unusable by the nonfunctional conversion data associated with the UN Comtrade data.

Comment 5: Whether Commerce Should Apply AFA to the EBCP

In the *Preliminary Results*, Commerce preliminarily determined that the use of AFA is warranted in determining the countervailability of the EBCP because the GOC did not provide the requested information needed to allow Commerce to analyze this program. Thus, we preliminarily found that the GOC impeded this review and also did not cooperate to the best of its ability. [134]

Petitioners' Comments:

- As in the previous administrative review of chlorinated isos, the GOC has failed to provide information requested by Commerce.[135]
- Despite the information provided by respondents, there is insufficient information on the record for Commerce to assess the use of the EBCP; this deficiency is compounded by the GOC's continued unwillingness to supply the requested information.
- Commerce found in prior segments of this proceeding that the EBCP is countervailable, and that the information on the record did not support finding non-use of the EBCP by Huayi and Kangtai.[136] This has not changed in the current review.
- While Huayi, Kangtai, and the GOC have all claimed in their questionnaire responses that the EBCP was not used, the record does not show whether export buyer's credits were received by downstream customers of Huayi or Kangtai.[137]
- Kangtai and Huayi attempted to demonstrate that the EBCP was not used by providing customer declarations to that fact. However, this program provides credits to "foreign importers" as well as banks and other financial institutions, so the recipient of EBCP loans does not have to be a respondent's customer or the "importer" as defined by U.S. law. These declarations do not establish whether other intermediaries or ultimate

[132] *See Preliminary Results* PDM at FN83.
[133] *See* Petitioners' Benchmark Submission at Exhibit 6.
[134] *See Preliminary Results* PDM at 12-13.
[135] *See* Petitioners' Brief at 12 (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 37267 (August 1, 2019) (*Chlorinated Isos 2016*), and accompanying IDM).
[136] *Id.* (citing *Chlorinated Isos 2016*).
[137] *Id.* at 12-16 (citing GOC's Letter, "GOC CVD Response to the Initial Questionnaire: Fourth Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated May 22, 2019 (GOCs Initial Response), at 26-29 and Exhibits II-F-1, II-F-2, II-F-3, and II-F-4; Huayi's Letter, "Chlorinated Isocyanurates from the People's Republic of China Huayi Section III Questionnaire Response," dated May 22, 2019 (Huayi Initial Response), at 14-16 and Exhibit 13; and Kangtai's Letter, "Chlorinated Isocyanurates from the People's Republic of China Kangtai Section III Questionnaire Response," dated May 22, 2019 (Kangtai Initial Response), at 13-15).

customers in the United States received credits. The declarations submitted by Kangtai and Huayi at best allege that some named customers did not receive credits and are, therefore, not dispositive.[138]

- It is not sufficient to rely only on declarations from a respondent's customers. Other companies or financial institutions may have received benefits tied to the exportation of subject merchandise. It follows that additional information is needed to "understand fully the operation of" the EBCP; this information is necessary to determine if any benefits paid to "export buyers" were associated with the exportation of chlorinated isos.[139]
- Further, the GOC claims that the search of customer names by the EXIMBC in its database is sufficient to show non-use of the EBCP. However, it cannot be determined from the record whether the companies are in fact the only recipients of a benefit from this program. Because the GOC failed to submit complete information concerning EBCP, it cannot be determined whether the declarations submitted by Huayi and Kangtai were issued by the relevant "foreign importers."
- Huayi is not a "foreign importer" and is not otherwise an eligible borrower or recipient of credits. Therefore, the absence of payments from the EXIMBC in Huayi's accounts receivables has no bearing on whether it received a benefit under the EBCP.
- Recent remand orders by the CIT have questioned why Commerce deems it necessary to have complete information and documentation from the GOC regarding the operation of the EBCP. The CIT has ruled that a complete response from the GOC might not be necessary unless the missing information "relates to the 'manufacture, production, or export'" of the subject merchandise. Apart from whether such a narrow interpretation of section 776(a) of the Act is correct, the missing information in this case is directly relevant to determine whether the "export" of chlorinated isos triggered the payment of credits. Without identification of the recipients of the export buyer's credits, it is not possible to verify that those credits were not paid with respect to chlorinated isos.[140]

GOC's Comments:

- Commerce's application of AFA to the EBCP is unlawful and unsupported by substantial evidence.[141]
- CVD proceedings are different from antidumping duty proceedings due to the involvement of the government of the target country as a responding party. Because the government's actions can impact the respondents, there is a modified application of AFA when directed at the government respondent.[142]
- Commerce emphasized the point in *HRC from India*, rejecting another petitioner's argument for the application of AFA in circumstances where the Government of India failed to respond to an NSA questionnaire.[143] The Courts have embraced this legal

[138] *Id.* at 13 (citing Huayi Initial Response at 16 and Exhibit 11; and Kangtai Initial Response at 15 and Exhibit 13).
[139] *Id.* at 17 (citing *Trina Solar Cells*, 352 F. Supp. 3d at 1326).
[140] *Id.* at 16-17 (citing *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (CIT 2019) (*Clearon Corp.*); *Trina Solar Cells*; and *Guizhou Tyre Co. v. United States*, Slip Op. 18-140 (CIT 2018)).
[141] *See* GOC's Brief at 25-38.
[142] *Id.* at 27 (citing *Countervailing Duty New Shipper Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 FR 9993 (February 25, 2008), and accompanying IDM at Comment 2).
[143] *Id.* at 28 (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Final results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008), and accompanying IDM at Comment 6 (citing *Stainless Steel*

principle.[144] Specifically, the CIT has noted that it would be "inappropriate for Commerce to apply AFA for no reason other than to deter the {government's} non-cooperation in future proceedings when relevant evidence existed elsewhere on the record."[145]

- In this case, Commerce applied AFA with regard to both the countervailability and usage of the EBCP based upon the GOC's failure to provide certain requested information.[146] As a consequence of these perceived shortcomings, Commerce preliminarily found that the GOC failed to cooperate to the best of its ability, necessitating the use of AFA.[147]
- The CIT has now ruled, in at least 13 separate decisions under virtually identical circumstances, that Commerce's application of AFA to the EBCP "is nothing more than an attempt by Commerce to manufacture a conclusion that is not supported by record evidence and in violation of the applicable statute, {section 776(a) of the Act}."[148]
- Based on essentially the same facts presented here, Commerce in a recent remand redetermination reversed its AFA finding for the EBCP and correctly found the program was not used based on the non-use declarations submitted by respondent's customers.[149] Those non-use certifications are virtually identical to the certifications presented to Commerce by respondents in this review.[150] Commerce should make the same non-use determination in this case.[151]
- Any failures to provide information on the part of the GOC at most relate to the issue of countervailability, not use.[152]
- Commerce's decision here fails to satisfy the criteria for finding AFA, rendering its resort to AFA for the EBCP program unlawful. In this case, not only did the GOC conclusively establish that none of the respondents' U.S. customers used the EBCP program, but the respondents themselves placed substantial verifiable evidence on the record establishing their non-use of the program.[153]

Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 72 FR 51615, 51617-18 (September 10, 2007), unchanged in *Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 73 FR 2456 (January 15, 2008))).

[144] *Id.* (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331 (CIT 2013), 917 F. Supp. 2d, 1331, 1342 (*Archer Daniels*) (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254 (CIT 2012))).

[145] *Id.* at 29 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1313 (CIT 2017); *Guizhou Tyre I*; and *Guizhou Tyre Co., Ltd. v. United States*, Slip Op. 19-59 (May 15, 2019) (*Guizhou Tyre II*)).

[146] *Id.* at 25.

[147] *Id.*

[148] *Id.* at 26 (citing *Changzhou Trina Solar Energy Co., Ltd. v. United States*, Ct. No. 17-00246, 2019 WL 6124908, at 4 (CIT 2019) (*Trina Solar Energy*); *Changzhou Trina Solar Energy Co. v. United States*, Ct. No. 17-00198, 2019 WL 5856438, at 2 (CIT November 8, 2019); *Zhongji Lamination*, 405 F. Supp. 3d at 1334; and *Guizhou Tyre Co., Ltd. v. United States*, Slip Op. 19-114 (August 21, 2019) (*Guizhou Tyre III*) (rejecting Commerce's EBCP remand determination from *Guizhou Tyre I*); *Guizhou Tyre II*; and *Clearon Corp*).

[149] *Id.* at 26 (citing *Guizhou Tyre III*).

[150] *Id.* at 25 (citing Final results of Redetermination Pursuant to Court Remand: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, *Guizhou Tyre Co., Ltd., v. United States*, U.S. Court of International Trade, Consol Ct. No. 17-00101, Slip Op. 19-114).

[151] *Id.* at 25.

[152] *Id.* at 26-31.

[153] *Id.* at 25-32 (citing *Trina Solar Energy*).

- None of the information Commerce deems as "missing" actually creates a material gap in the record concerning usage. Commerce explained that the information the GOC failed to provide was "necessary for Commerce to analyze how the program functions."[154] However, looking at each of the missing pieces of information Commerce identifies, it is difficult to determine how Commerce could reach this conclusion. Even if the information was critical to Commerce's understanding, the information was only critical to understanding the operation (*i.e.*, the functioning) of the program, and has no bearing on establishing usage of the program or the ability to verify its usage.[155]
- Commerce noted that it requested the 2013 Administrative Measures Revisions to the EBCP program, which were not provided. However, this is irrelevant to whether Commerce could have established usage in the course of an EXIMBC verification.
- The GOC explained in its questionnaire responses how the EXIMBC determined usage in this case and provided screenshots of searches from the EXIMBC's database. These methods were no different than the methods the EXIMBC has used to determine usage prior to the effective date of the 2013 Administrative Measures Revisions. Moreover, Commerce has never inquired whether the 2013 Administrative Measures Revisions impacted how the EXIMBC can determine usage; the GOC has said that it does not.
- The information that was not provided goes to the countervailability of the EBCP. It neither impacts the evaluation of the program nor the determination of usage of the program. Thus, Commerce failed to investigate whether the absence of this information on the record had any real impact on the usage determination and whether it in fact created a gap in the record that required the application of AFA.[156]
- Commerce's request for the names of partner/correspondent banks and intermediary banks through which the program could be indirectly disbursed by the EXIMBC was not necessary because the respondents' customers did not use this program; thus, this information was not relevant to Commerce's determination.
- Regardless of whether the loans could be disbursed through Bank of America in the United States, usage could still be determined through the EXIMBC's system in China. Indeed, the screenshots provided include any instances where the EBCP was disbursed through partner/correspondent banks.
- Asking the EXIMBC to identify every partner or correspondent bank/third party in the entire world is unnecessary. The identification of partner banks in other countries is irrelevant to whether companies in the United States are using this program. At most, Commerce should ask the exporter's U.S. customers to indicate the entities through which they received loans and then ask the EXIMBC if any EBCP loans have ever been issued through these entities. It is unreasonable to make onerous requests for irrelevant information.[157]

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[154] *Id.* at 32 (citing *Preliminary Results* PDM at 13).

[155] *Id.* (citing *Guizhou Tyre III*, again remanding the EBCP issue in *Guizhou Tyre II* (finding with respect to the EBCP, "Once again, Commerce has failed to demonstrate how knowledge of the 2013 revisions -whatever they may be - is integral to their ability to verify claims of non-use at all"); and *Guizhou Tyre I*, 348 F. Supp. 3d at 1271; and *Clearon Corp.*, 359 F. Supp. 3d at 1360).

[156] *Id.* at 33 (citing *Guizhou Tyre II* at 7 (finding "Commerce has failed to demonstrate why information about EBCP and the 2013 rule change is relevant to verifying demonstrative claims of non-use," citing *Clearon Corp.*, 359 F. Supp. 3d at 1349 ("At no point, including in the Post-Preliminary Memorandum, did Commerce say why it needed this information or connect its request with respondents, respondents' products, or their customers")).

[157] *Id.* (citing, *e.g.*, *Guizhou Tyre II* at 10, n.2).

- Commerce's *Preliminary Results* failed to make a rational connection between the information requested (a list of third-party banks) and the conclusion made (that without this information, Commerce cannot determine or verify use).[158]
- Based on a substantially similar record regarding this program, the Court's analysis in *Guizhou Tyre I* applies here: "the only gap of information on the record are facts regarding certain aspects of the operation of the Program. In turn, the only factual issues potentially appropriate for facts otherwise available, {section 776(a) of the Act}, and adverse inferences, {section 776(b) of the Act}, are those that concern the operation of the Program, factors entirely irrelevant to Guizhou's apparent non-use."[159]
- Notwithstanding the above, usage could be determined in this case in three corroborating ways. The GOC stated that the respondents' customers did not use this program and provided screen shots of the database search yielding that conclusion.[160] The GOC explained how this is verifiable, that this database search covered any export credit loans that may have been issued through partner banks, and it detailed the steps it took to obtain this information.[161] The respondents provided statements of non-use in their initial responses after confirmation with their U.S. customers and submission of customer declarations.
- Although Commerce was fully aware of the GOC's and the respondents' explanations of non-use, it nonetheless concluded that "{w}ithout the requested information on the record, there is no basis to determine that claims of non-use are actually verifiable."[162]
- Commerce has rarely considered and accepted similar customer declarations of non-use, and this tenuous analysis is in line with its general practice.[163]
- Commerce's determination to continually ignore such declarations and to stubbornly adhere to an analysis that has been so roundly criticized by the Courts is indefensible.

Huayi's and Kangtai's Comments:

- The respondents did not use or benefit from the EBCP and Commerce cannot use AFA against respondents to assume otherwise.[164]
- The CAFC has found that applying AFA to cooperating respondents was improper.[165]
- The CIT has also stated in *Guizhou Tyre I* that when a foreign government fails to respond to the best of its ability, and the application of AFA adversely impacts a cooperating party, Commerce should seek to avoid such impact when relevant information exists on the record.[166]

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[158] *Id.* at 34 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (explaining that agencies must "articulate all rational connection between the facts found and the choice made")).
[159] *Id.* at 34 (citing *Guizhou Tyre I*; and *Clearon Corp.*, 359 F. Supp. 3d at 1360 ("While Commerce is, no doubt, curious as to all of the inner workings of many Chinese programs, mere curiosity is not enough. Commerce must either provide an adequate answer as to why the information it seeks "to fully understand the operation of the program" is necessary to fill a gap as to Huayi's products and their sale or rely on the information it has on the record")).
[160] *Id.* at 35 (citing GOC Initial Response at 26 and Exhibit II.F.1).
[161] *Id.*
[162] *Id.* at 36 (citing *Preliminary Results* PDM at 14).
[163] *Id.* at 37 (citing, *e.g.*, *Solar Cells 2013* IDM at Comment 1).
[164] *See* Respondents' Brief at 6-10 (citing *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1276 (CIT 2009)).
[165] *Id.* at 7 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F. 3d 1365 (CAFC 2014)).
[166] *Id.* at 8 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1270-71).

- Commerce's normal practice, where the respondents respond fully to Commerce's requests for information but the GOC does not, is to apply AFA to the information requested from the GOC but use the respondents' own data to measure the benefit received.[167]
- Accordingly, Commerce must use Huayi's and Kangtai's own data in determining whether and in what amount Huayi and Kangtai used and benefitted from the EBCP.
- Huayi and Kangtai have cooperated fully with Commerce's request for information; the record and the *Preliminary Results* suggest that Commerce would have no need or basis to apply AFA.
- Commerce does not need to determine whether the program was amended in 2013 to determine that respondents did not use the program.[168]
- Huayi's and Kangtai's record evidence that they and their customers did not use or benefit from the program is fully verifiable.

Petitioners' Rebuttal:

- Because the GOC failed to provide all the information that was requested, the record lacks key information needed to analyze the program and prevents Commerce from determining either whether the program is countervailable or whether benefits were bestowed.[169]
- Commerce rejected the same arguments in the immediately preceding three reviews.[170] Commerce found that "China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation" needed to determine whether the program was used. As a result, Commerce found that "the GOC withheld necessary information that was requested" regarding the EBCP.[171]
- Without complete information from the GOC, it is not possible to verify non-use of the program from the books and records of Huayi or Kangtai or to validate the claims made in the various declarations that have been submitted by importers.
- Even if the customers of Huayi or Kangtai involved the producers in the application process, none of the funds provided under the EBCP are provided to Huayi or Kangtai. Hence, it is not possible to trace payment or receipt of the funds through the accounts of the two respondents.[172]

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[167] *Id.* (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination: 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos 2012*), and accompanying IDM at 21).
[168] *Id*. at 9 (citing *Preliminary Results* PDM at 12).
[169] *See* Petitioners' Rebuttal Brief at 3-17.
[170] *Id.* (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 2014*), and accompanying IDM at Comment 2; *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2015*, 83 FR 26954 (June 11, 2018) (*Chlorinated Isos 2015*), and accompanying IDM at Comment 1; and *Chlorinated Isos 2016*).
[171] *Id.*, (citing *Chlorinated Isos 2014* IDM at 14; *Chlorinated Isos 2015* IDM at 11; and *Chlorinated Isos 2016* IDM at 27).
[172] *Id.*, (citing Draft Results of Redetermination Pursuant to Court Remand, issued pursuant to the decision and remand order in *Guizhou Tyre I* at 7).

- The potential recipients are not limited to the customers of Kangtai and Huayi that provided certifications. Therefore, even assuming that the customer declarations are accurate, it is not possible to determine whether credits were received with respect to the export of chlorinated isos.
- Huayi and Kangtai claim that their U.S. customers are unable to fulfill the requirements of the program, and, therefore, could not have received benefits. This is limited to the same customers that certified non-use of the program.
- AFA should be applied to value the benefit awarded under the EBCP, pursuant to section 776(b) of the Act, consistent with Commerce's findings in prior segments.[173]

GOC's Rebuttal:

- Commerce should reject the petitioners' arguments. The respondents identified all unaffiliated U.S. companies to which they directly exported during the POR (*i.e.*, the buyers and/or importers), as requested by Commerce.[174] Whether unaffiliated customers of the respondents' customers, or institutions not issuing credits to either the respondents or their U.S. customers, used this program is irrelevant.[175]
- Commerce did not request that the GOC provide the screenshots and database searches for unknown entities; thus, there is no missing information. Even had Commerce requested this information, it could not refute the record evidence that the respondents' customers did not use or benefit from the program. Therefore, listing all beneficiaries of the ECBP does not disprove the information submitted by respondents or the GOC.[176]
- None of the missing information relates to usage of the program. The petitioners' arguments merely and "substitute facts derived from the record with {their} own unsupported conclusions."[177] There is a limited universe of entities that could have received a countervailable benefit (*i.e.*, the direct U.S. export customers, all of which have been identified), and Commerce focus on them.
- All of the possible countervailable scenarios are covered by information on the record. Therefore, consistent with Court precedent, Commerce has a "clear path to find non-use" and should follow it here.[178]

Huayi's and Kangtai's Rebuttal:

- The petitioners ignore the basic principles of U.S. trade law when hypothesizing that some U.S. bank or manufacturer for some product related to water and pool cleansing may have theoretically benefitted from the EBC program.[179]
- *Delverde* stands for the proposition that Commerce may not *per se* apply AFA to hypothetical subsidies when record evidence shows, like here, that the respondents received no benefit.[180]

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[173] *See Chlorinated Isos 2014* IDM at 14–15; *Chlorinated Isos 2015* IDM at 10; *Chlorinated Isos 2016* IDM at 11.
[174] *See* GOC's Rebuttal Brief at 10 (citing Huayi Initial Response at Exhibit 13; and Kangtai Initial Response at Exhibit 14).
[175] *Id.*
[176] *Id.* at 12-13 (citing *Clearon Corp.*, 359 F. Supp. 3d at 1360).
[177] *Id.* at 15.
[178] *Id.* at 15 (citing *Guizhou Tyre I*).
[179] *See* Respondents' Rebuttal Brief at 4.
[180] *Id.* at 5 (citing *GPX Int'l Tire Corp. v. United States*, (CIT January. 7, 2013) 893 F. Supp. 2d at 1296 (citing *Delverde, SrL v. United States*, 202 F. 3d 1360, 1367 (CAFC February 2, 2000) (*Delverde*))).

- The petitioners' argument that potential EBCP recipients include all U.S. banks and U.S. manufacturers of cleaning products violates the specificity principle in U.S. CVD law.[181] Where no relationship exists between the alleged subsidy and the respondents, as here, the EBCP cannot be specific as to Huayi and Kangtai.[182]

Commerce's Position: We continue to find that the information provided by the GOC, or lack thereof, prevented Commerce from fully examining the EBCP with respect to usage, and, as a result, we are continuing to apply AFA to the EBCP, which is consistent with Commerce's decision in the first, second, and third administrative reviews of chlorinated isos.[183] We next describe the evolution of Commerce's treatment of this program.

Solar Cells Initial Investigation of EBCP

Commerce first investigated and countervailed the EBCP in the 2012 investigation of solar cells.[184] Our initiation was based on, among other information, the EXIMBC'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."[185] Commerce initially asked the GOC to complete the "standard questions appendix" for the EBCP. 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.[186]

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."[187] In response to a request from Commerce for information concerning the operation of the EBCP 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."[188] 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.[189] The GOC again refused to provide sample application

[181] *Id.* at 6.
[182] *Id.* (citing sections 771(5)(A) and (D) of the Act and *RZBC Group Shareholding Co. v. United States*, 100 F. Supp. 3d 1288 (CIT 2015)).
[183] *See Chlorinated Isos 2014* IDM at Comment 2; *see also Chlorinated Isos 2015* IDM at Comment 1.
[184] *See Solar Cells from China* IDM at 9 and Comment 18.
[185] *Id.* at 59.
[186] *Id*.
[187] *Id*.
[188] *Id*. at 60.
[189] *Id.* at 60-61.

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.[190]

Based on the GOC's responses, Commerce's understanding was that, under this program, loans were provided directly from the EXIMBC to the borrowers (*i.e.*, a respondent's customers), with no involvement of third parties, such as exporters, or third-party banks. Accordingly, Commerce made clear its understanding that the only way to establish non-use of the program was through the GOC and not the respondent companies.[191] 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 {Commerce} needs to examine in order to verify that the information is complete and accurate. For verification purposes, {Commerce} must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, 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.[192]

Essentially, 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,[193] which

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[190] *Id.* at 61.
[191] *Id.*
[192] *Id.* at 61-62.
[193] Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Solar Products from China* IDM at 93. This was affirmed by the Court in *Trina Solar Products*. In *Trina Solar Cells*, 352 F. Supp. 3d at 1326, the Court noted that the explanation from *Solar Products from China* 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 *Trina Solar Cells* 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

are comparable to those of an auditor, attempting to confirm usage or claimed non-usage by examining books and records that can be reconciled to audited financial statements, or other credible official company documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, provides no assurance to Commerce that it has seen all relevant information.[194]

This "completeness" concept is an essential element of Commerce's verification methodology. If Commerce were attempting to confirm whether a respondent exporter had received any loans from a state-owned bank, for example, its first step would be to examine the company's balance sheets to derive the exact amount of lending outstanding during the period of examination. Second, once that figure was confirmed, Commerce would then begin examining subledgers or bank statements providing the details of all individual loans. Because Commerce could tie the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, it could be assured that the subledgers were complete and that it therefore had the entire universe of loan information available for further scrutiny. After examining the subledgers for references to the state-owned banks (for example, "Account 201-02: Short-term lending, Industrial and Commercial Bank of China"), Commerce's third step would be to select specific entries from the subledger and request to see underlying documentation, such as applications and loan agreements, in order to confirm the accuracy of the subledger details. Thus, confirmation that a complete picture of relevant information is in front of the verification team, by tying relevant books and records to audited financial statements or tax returns, is critical.

In the investigation of solar cells, however, despite Commerce's repeated requests for information, the GOC failed to offer any guidance as to how Commerce could search for EBCP 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 EXIMBC itself because it "possessed the supporting records needed to verify the accuracy of the reported non-use of the EBCP {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 {EXIMBC} financial statements."[195] However, the GOC refused to allow Commerce to query the databases and records of the EXIMBC.[196] Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

FR 46760 (October 6, 2017) (*Solar Cells 2014*), and accompanying IDM). The Court in *Guizhou Tyre I* reached a similar conclusion concerning the 2014 review of tires from China. *See OTR Tires* IDM.

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

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

[196] *Id.*

Chlorinated Isos Investigation of EBCP

Two years later, in the investigation of chlorinated isos,[197] respondents submitted certified statements from all customers claiming that they had not used the EBCP. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, was under the impression that the EBCP provided medium and long-term loans and that those loans were provided directly from the EXIMBC to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-usage appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the EXIMBC to the U.S. customer pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at EXIMBC, … {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customers' accounting and financial records that no loans were received under this program."[198]

2013 Amendments to the EBCP

Our understanding of the operation of the EBCP 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 EXIMBC 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.[199] In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the *Silica Fabric* investigation,[200] conducted in 2016-2017, based on what we had learned in *Citric Acid 2012*, we asked the GOC about certain changes to the EBCP, including changes in 2013 that eliminated the U.S. dollar (USD) 2 million minimum business contract requirement.[201] In response, the GOC stated that there were three sets of relevant documents pertaining to the EBCP: (1) "Implementing Rules for the Export Buyer's Credit of

[197] *See Chlorinated Isos 2012* IDM.
[198] *Id.* at 15.
[199] *See Citric Acid* 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 {EXIMBC} database containing the list of foreign buyers that were provided assistance under the program during the POR precluded {Commerce} from verifying the non-use claims made by the RZBC Companies and the GOC.").
[200] *See Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric*), and accompanying IDM.
[201] *See* GOC Initial Response at Exhibit II-F-2 (GOC's Letter, "Certain Amorphous Silica Fabric from the People's Republic of China; CVD Investigation; GOC 7th Supplemental Response," dated September 6, 2016 (GOC's September 6, 2016, Silica Fabric Questionnaire Response)).

the Export-Import Bank of China" which were issued by the EXIMBC on September 11, 1995 (referred to as "*1995 Implementation Rules*"); (2) "Rules Governing Export Buyer's Credit of the Export-Import Bank of China" which were issued by the EXIMBC on November 20, 2000 (referred to as "*2000 Rules Governing Export Buyers' Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the EXIMBC.[202] 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."[203] The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."[204]

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 effected {sic} 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 Commerce to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the GOC impeded Commerce's understanding of how this program operates and how it can be verified.
>
> Additional information in the GOC's supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the {EXIMBC}. 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 {EXIMBC} to the importer's account, which could be at the {EXIMBC} 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 {EXIMBC}, impeded {Commerce}'s ability to conduct its investigation of this program.[205]

[202] *Id*.
[203] *Id.*
[204] *Id.*
[205] *See Silica Fabric* IDM at 12 (internal citations omitted).

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 {EXIMBC}."[206]

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."[207]

This 2017 Administrative Review

As stated in the *Preliminary Results*, we requested, from the GOC, a list of all partner/corresponding banks involved in the disbursement of funds under the EBCP.[208] The GOC failed to respond to Commerce's request, and instead stated that neither of the mandatory respondents used the program.[209] Additionally, the GOC refused to answer questions specific to the interest rates established during the POR for this program and instead stated that the request for information was not applicable because none of the respondents' customers used the program.[210] Moreover, we requested that the GOC provide original and translated copies of any laws, regulations or other governing documents regarding the 2013 revision to the EBCP.[211] Though the GOC provided some information, it was ultimately unresponsive to the request, identifying the 2013 revisions as "internal to the bank, non-public, and not available for release."[212] preventing Commerce from analyzing the function of the program, as discussed below.

Our initial questionnaire requested that the GOC submit any revisions to the program and to identify whether the respondent companies used the program.[213] The GOC reported that none of the respondents' customers applied for or used EXIMBC's EBCP during the POR, and thus, there were no loans to report.[214] We also requested documents related to the administration of the program.[215] Additionally, Huayi and Kangtai reported that their only customers during the POR did not use the EBCP during the POR, and provided declarations from their U.S. customers indicating that their customers did not obtain financing through the program.[216]

We continue to find that the GOC's responses with respect to the EBCP are deficient in two key respects. First, as we found in *Silica Fabric*, where we asked the GOC about the amendments to

[206] *Id.* at 62.
[207] *Id.*
[208] *See Preliminary Results* PDM at 13-14.
[209] *See* GOC Initial Response at 1-3.
[210] *See Preliminary Results* PDM at 13-14.
[211] *Id*.
[212] *See* GOC Initial Response at Exhibit II-F-2.
[213] *See* Commerce's Letter, "Chlorinated Isocyanurates from the People's Republic of China: Countervailing Duty Questionnaire for 4th Administrative Review," dated April 8, 2019 (Initial Questionnaire), at "Standard Questions Appendix."
[214] *See* GOC Initial Response at 25-29 and Exhibits II-F-3 and II-F-4.
[215] *See* Initial Questionnaire at "Standard Questions Appendix."
[216] *See* Huayi Initial Response at 14-15 and Exhibit 13; *see also* Kangtai Initial Response at 14-15 and Exhibit 14.

the EBCP,[217] we continue to find that 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 all documents related to revisions to the program, including the 2013 revisions, because our prior knowledge of this program demonstrates that the 2013 revisions effected important program changes.[218] Specifically, the 2013 revisions (which the GOC refers to as "internal guidelines") appear to be significant and have impacted a major condition in the provision of loans under the program, *i.e.*, by eliminating the USD 2 million minimum business contract requirement identified in the 2000 *Administrative Measures*.[219]

The 2013 Revisions are necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Huayi's and Kangtai's merchandise has been subsidized. For instance, if the program continues to be limited to USD 2 million contracts between a mandatory respondent and its customer, this is an important limitation to the universe of potential loans under the program and can assist us in targeting our verification of non-use. However, if the program is no longer limited to USD 2 million contracts, this increases the difficulty of verifying loans without any such parameters, as discussed further below. There is no information on this administrative record to indicate either way. Therefore, by refusing to provide the requested information, and instead providing unverifiable assurances that other rules regarding the program remained in effect, the GOC impeded Commerce's understanding of how this program operates and how it can be verified. Further, to the extent the GOC had concerns regarding the non-public nature of the 2013 revisions, Commerce has well-established rules governing the handling of business proprietary information in its proceedings.[220]

Second, Commerce's understanding of the EBCP changed after Commerce began questioning the GOC's earlier indication that loans provided pursuant to the EBCP were between the GOC and the borrower *only*, essentially a *direct* deposit from the EXIMBC to the foreign buyer. In particular, in *Silica Fabric*, Commerce identified that the rules implementing the EBCP appeared to indicate that the EXIMBC's payment was instead disbursed to U.S. customers via an intermediary Chinese bank, thereby contradicting the GOC's response otherwise.[221] Thus, Commerce asked the GOC to provide the same information it provided in the *Silica Fabric* investigation regarding the rules implementing the EBCP, as well as any other governing documents (discussed above).[222]

Although the GOC provided certain of the requested implementation rules (discussed above), the GOC dismissed many of Commerce's specific questions. For instance, when asked to provide sample applications, the GOC stated that the question was "{n}ot applicable. None of the respondents' U.S. customers applied for or used China Ex-Im's Export Buyer's Credit program during the POR and, thus, there are no loans or applications/approvals to report."[223] When asked

[217] *See Silica Fabric* IDM.
[218] *See Preliminary Results* PDM at 13-14.
[219] *See Silica Fabric* IDM at 12 and 61.
[220] *See* section 777(c)(1)(B) of the Act; *see also* 19 CFR 351.105(c).
[221] *See Silica Fabric* IDM at 12.
[222] *See* Initial Questionnaire at II-5.
[223] *See* GOC Initial Response at 26.

to provide interest rates that were applicable during the POR, the GOC again dismissed the question, stating that it was "{n}ot applicable. None of the respondents' U.S. customers applied for or used China Ex-Im's Export Buyer's Credit program during the POR and, thus, there are no relevant interest rates to report."[224] The GOC also refused to provide a list of partner/correspondent banks, stating that the question was "{n}ot applicable. None of the respondents' U.S. customers applied for or used China Ex-Im's Export Buyer's Credit program during the POR."[225]

We continue to find the GOC's responses deficient and unresponsive to our request for necessary information with respect to the operation of the program. This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Huayi's and Kangtai's merchandise has been subsidized. As noted above, information on the record of this segment of the proceeding altered Commerce's understanding of how the EBCP operated (*i.e.*, how funds were disbursed under the program) from Commerce's understanding of this same program in the chlorinated isos investigation. Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the EXIMBC.[226] For instance, it appears that (1) customers can open loan accounts for disbursements through this program with other banks; (2) the funds are first sent from the EXIMBC to the importer's account, which could be at the EXIMBC or other banks; and (3) that these funds are then sent to the exporter's bank account.[227] Given the complicated structure of loan disbursements, which can involve various banks for this program, Commerce's complete understanding of how this program is administrated is necessary to verify claims of non-use.[228] Thus, the GOC's refusal to provide the 2013 revisions, which provide internal guidelines for how this program is administrated by the EXIMBC, as well as other requested information, such as key information and documentation pertaining to the application and approval process, interest rates, and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to confirm the claims of non-use by Huayi's and Kangtai's customers.

This missing information was especially significant because the available record evidence indicates that the credits were *not direct* transactions from the EXIMBC to U.S. customers of the respondent exporters, but, rather, that there were intermediary banks involved, the identities of which were unknown to Commerce. As noted above, in the chlorinated isos investigation, based on our understanding of the program at that time, verification of non-usage appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans *provided directly from the EXIMBC to the U.S. customer*, pursuant to verification steps similar to the ones described above.[229] However, based on our more recent understanding of the program in this segment of the proceeding discussed above, performing the verification steps outlined above to make a determination of whether the "manufacture, production, or export" of Huayi's and Kangtai's merchandise has been subsidized would,

[224] *Id.*
[225] *Id.* at 27.
[226] *See* GOC Initial Response at Exhibit II-F-2 (containing the GOC's September 6, 2016, Silica Fabric Questionnaire Response) at 4-5.
[227] *Id.*
[228] *Id.*
[229] *See Chlorinated Isos 2012* IDM at 15.

therefore, require knowing the names of the intermediary banks; it would be the intermediary banks, not the "EXIMBC," that would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in *Aluminum Sheet from China*:

> Record evidence indicates that the loans associated with this program are not limited to direct disbursements through the {EXIMBC}. 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 {EXIMBC} or other banks, and that these funds are then sent to the exporter's bank account.[230]

In other words, there will not necessarily be an account in the name "EXIMBC" in the books and records (*e.g.*, subledger, tax return, bank statements) of the U.S. customer. Thus, if we cannot verify claims of non-use at the GOC, [231] having a list of the correspondent banks is critical for us to confirm use or non-use of the EBCP based on the books and records of the U.S. customers.

Furthermore, although Huayi and Kangtai reported that its U.S. customers did not use the program,[232] when we asked Huayi and Kangtai to explain in detail the steps it took to determine non-use of the EBCP for their customers, their responses hinged on assertions with respect to the operation of the program – information that Commerce needed and sought directly, but did not receive, from the GOC. According to Huayi and Kangtai, their customers "do not meet the criteria of the Buyer's Credit program" for various reasons, including:

> To apply for the buyer's credit, the value of the commercial contract must be more than USD 2 million. None of {Huayi's or Kangtai's} purchase orders/sales contract reached such a large amount….
>
> {A}ccording to the mechanism of the buyer's credit program, the loan from China Ex-Im, if any, would be directly released to the Chinese exporter, *i.e.* {Huayi or Kangtai}, as a kind of proceeds payment. {Huayi and Kangtai} went through its payments and account receivables and confirmed that it has never received any funds from China Ex-Im. Rather, {Huayi and Kangtai} received the payments from the customer directly. This is another way to demonstrate non-use of this program by {Huayi's and Kangtai's} customers in the POR.[233]

However, Huayi's and Kangtai's assertion that the value of commercial contracts is limited to USD 2 million is contradicted by evidence that the 2013 amendments may have eliminated this

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[230] *See Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Aluminum Sheet from China*), and accompanying IDM at 30.

[231] Commerce no longer attempts to verify usage with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 revisions to the administrative rules. *Id*. at Comment 2.

[232] *See* Huayi Initial Response at 14-16; *see also* Kangtai Initial Response at 13-15.

[233] *See* Huayi Initial Response at 16; *see also* Kangtai Initial Response at 15.

minimum requirement,[234] and has not been addressed by the GOC. Likewise, Huayi's and Kangtai's assertion that the payments would be issued directly from EXIMBC is contradicted by evidence that third party banks may be involved in the disbursement of funds,[235] evidence that also has not been addressed by the GOC. Thus, the explanation and evidence (or lack thereof) on the record from the GOC, Huayi, and Kangtai has failed to support the claim that the program was not used.

Without such explanation and evidence, it would be unreasonably onerous for Commerce to comb through the business activities of both Huayi's and Kangtai's customers without any guidance as to how to simplify the process or any guidance as to which loans or banks to examine in detail as part of a verification for each company. A careful verification of Huayi's and Kangtai's customers' non-use of this program without the identity of the intermediary banks would be unreasonably burdensome, if not impossible. Because we do not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*i.e.*, by examining whether there were any correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a sub-set of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan—*i.e.*, whether the loan was provided from the EXIMBC via an intermediary bank. This would be an unreasonably onerous undertaking for any company that received more than a small number of loans.

Furthermore, 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 EBCP. 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 EXIMBC, discussed above. Commerce would simply not know what to look for behind each loan in attempting to identify a loan provided by the EXIMBC via a correspondent bank.

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. For instance, assuming that one of the correspondent banks is HSBC, Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the EXIMBC. 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 EXIMBC financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of EXIMBC involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even

[234] *See* GOC Initial Response at Exhibit II-F-2 (containing the GOC's September 6, 2016, Silica Fabric Questionnaire Response) at 1; *see also Silica Fabric* IDM at 12.
[235] *See Silica Fabric* IDM at 12 (citing GOC's September 6, 2016, Silica Fabric Questionnaire Response).

were Commerce to attempt to verify respondents' non-use of the EBCP, notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks, Commerce still would not be able to verify which loans were normal loans versus EBCP loans due to its lack of understanding of what underlying documentation to review, and whether/how that documentation would indicate EXIMBC involvement. In effect, companies could provide Commerce with incomplete loan documentation and Commerce would have no knowledge that the loan documentation was incomplete. Even if the documentation was complete and identified EXIMBC involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

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

Thus, Commerce finds it would not be able to *accurately and effectively* verify usage at Huayi's or Kangtai's customers, even were it to attempt the unreasonably onerous examination of each of the customers' loans. To conduct verification of the customers without the information requested from the GOC would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found.

The GOC responses in this review essentially mirror the GOC responses in the solar cells and tires[236] from China proceedings. Although Commerce requested information about the amendments to and the current inner workings of the program as it is currently administered, the GOC provided no additional information concerning exactly how an exporter's financial foreign exchange matters would be affected.[237] Based on the GOC's responses, Commerce understood that under this program, loans were provided either directly from the EXIMBC to the borrowers (*i.e.*, a respondent's customers), or through an intermediary third party bank, and that a respondent might have knowledge of loans provided to its customers through its involvement in the application process.

According to the GOC, "{N}one of the respondents' U.S. customers applied for or used China Ex-Im's Export Buyer's Credit program during the POR and, thus, there are no loans to report."[238] The GOC explained that to make this determination, the GOC took the following steps:

> "(1) First, the GOC contacted the receiving the customer lists, the GOC transmitted the lists to the EXIM Bank for the bank to review its database. The EXIM Bank officer entered the name of each customer in the "Credit Management System", the

[236] *See OTR Tires* IDM; *see also Solar Cells from China* IDM.
[237] *See* GOCs Initial Response at 25-29 and at Exhibits II-F-1, II-F-2, II-F-3 and Exhibit II-F-4.
[238] *Id.* at 26.

> specific database is the "Full-covered Account Management System", in which covers all programs that the EXIM Bank offers. Therefore, if any company has signed a contract with the EXIM Bank regarding any program, not only the Export Buyer's Credit Program, it would show the corresponding results. However, after the bank officer inputted the respondents' U.S. customers' name, the results showed "No records!" (3) Finally, the EXIM Bank provided the screenshots of the search results to the GOC. Thus, the GOC confirms that none of the respondents' U.S. customers applied for or used this program."[239]

The GOC's response indicated that exporters would know whether there was an interaction between the EXIMBC and the borrowers (*i.e.*, the respondents' U.S. customers, who were not participating in the proceeding) but neither Huayi nor Kangtai, nor the GOC, provided enough information for Commerce to understand this interaction or how it was reflected, if at all, in Huayi's, Kangtai's, or their customers' books and records. Additionally, the GOC claims the evidence it provided in the form of screenshots from EXIMBC's database is unimpeached by any of the allegedly missing information on the record demonstrating that, with regard to use, there is no gap in the record.[240] However, although the GOC provided us the requested screenshots of their purported search of the EXIMBC system,[241] we find this information to be insufficient because it was incomplete and, without the additional information we requested, unusable. Specifically, the GOC provided us with screenshots (not fully translated) that did not contain any information tying the database to the EBCP, did not provide a trace showing the step-by-step process that the GOC took to obtain information showing that the respondents' customers did not participate in the EBCP, did not show how the companies listed in the screenshots are related to purchases from either of the respondents, and did not explain how the screenshots would be dispositive to show that the companies participated in the EBCP. As a result, the GOC failed to adequately respond to Commerce's request for information, and instead continued to merely claim that neither of the mandatory respondents, or their respective customers, used the program based on selectively provided, incomplete information. As determined in the *Preliminary Results*, we continue to find that the GOC's failure to provide the information requested regarding this program leads us to the conclusion, based on an adverse inference, that the program was used by the customers of Huayi and Kangtai. Moreover, we find that, without a thorough understanding of how the program functions, it is impossible to confirm non-use of the program. As explained in the *Preliminary Results*:

> In prior proceedings in which we have examined this program, before the 2013 amendments, we have found that the China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of the program which is prerequisite to Commerce's ability to verify the accuracy of the program. Because the program changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the {EXIMBC}limits the provision of Export Buyer's Credits to business contracts exceeding USD 2 million, and whether it uses third-

[239] *Id.* at 26 and Exhibit II-F-1.
[240] *See* GOC's Case Brief at 35.
[241] *See* GOC Initial Response at Exhibit II-F-1.

> party banks to disburse/settle Export Buyer's Credits. Such information is critical to understanding how Export Buyer's Credits flow to and from foreign buyers and the {EXIMBC}and forms the basis of determining countervailability. Absent the requested information, the GOC's claims that the respondent companies did not use this program are not verifiable. Moreover, without a full understanding of the involvement of third-party banks, the respondent companies' (and their customers') claims are also not verifiable.[242]

We continue to find that usage of the EBCP would not be verifiable in a manner consistent with Commerce's regular verification methods because Commerce would not be able to confirm usage or claimed non-use by examining books and records that can be reconciled to audited financial statements,[243] or other documents, such as tax returns. Without the GOC providing bank disbursement information, Commerce would not be able to tie any loan amounts to banks participating in this program in Huayi's or Kangtai's U.S. customers' books and records, and, therefore, would not be able verify the claims of non-use. A review of ancillary documents, such as applications, the interest rates used during the POR, correspondence, emails, *etc.*, are insufficient for Commerce to verify any bank disbursement or loan amount pertaining to Huayi's, Kangtai's, their customers', and/or the GOC's participation in the program.[244] Commerce would need to have a better understanding of the program before it could verify use or non-use of the program because we do not know what documents to request to review at verification or what information in the books and records to tie to the respondents' information reported in its questionnaire responses. Additionally, we note that the requested information such as the interest rates available to Huayi's and Kangtai's customers during the POR is not only necessary for understanding the program during any verification but also necessary for calculating a benefit. Therefore, this information would be necessary prior to any verification in order to ensure the information received was complete and accurate and to fully analyze and calculate the benefits Huayi and Kangtai received under this program during the course of the POR.

In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the EXIMBC, we would not know what to look for in attempting to identify which loan was provided by the EXIMBC via a correspondent bank under the EBCP. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the EXIMBC, which is a government-controlled bank.[245] Without cooperation from the EXIMBC and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to Huayi's and Kangtai's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

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[242] *See Preliminary Results* PDM at 16-17.
[243] *Id.*
[244] *Id*.
[245] *See Countervailing Duty Investigation of 1,1,1,2 Tetrafluoroethane from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 24, 2014), and accompanying IDM at 31 (confirming that the GOC solely owns the EXIMBC).

Further, we agree with the petitioners' argument that it is not possible to determine whether export buyer's credits were received with respect to the export of chlorinated isos, because the potential recipients of export buyer's credit are not limited to the customers of Kangtai and Huayi as they be may be received by other third-party banks and institutions.[246] Again, Commerce would not know what indicia to look for in searching for usage or what records, databases, or supporting documentation we would need to examine to conduct the verifications (*i.e.*, without a complete set of laws, regulations, application and approval documents, and administrative measures, Commerce would not know what books and records the EXIMBC maintains in the ordinary course of its operations). Essentially, Commerce is unable to verify in a meaningful manner what little information there is on the record indicating non-usage (*e.g.*, the claims of the GOC and certifications from U.S. customers), pursuant to section 776(a)(2)(D), with the exporters, U.S. customers, or at the EXIMBC itself given the refusal of the GOC to provide the 2013 Revision and a complete list of correspondent/partner/intermediate banks.

Commerce finds that missing information concerning the operation and administration of the EBCP is necessary, as it demonstrates why usage information provided by the GOC and the respondents cannot be verified and why there is, therefore, a gap in the record concerning usage. Commerce has explained how the gap in the record (*i.e.*, missing information concerning the operation of the EBCP) prevents complete and effective verification of the customer's certifications of non-use. A very similar rationale has been accepted by the Court in prior reviews. In particular, in *Trina Solar Products*,[247] given similar facts, the Court found Commerce reasonably concluded it could not verify usage of the EBCP at the exporter's facilities absent an adequate explanation from the GOC of the program's operation; *i.e.*, "absent a well-documented understanding of how an exporter would be involved in the application of its customer for an export buyer credit and what records the exporter might retain, we would have no way of knowing whether the records we review at a company verification necessarily include any applications or compliance records that an exporter might have…".[248]

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

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins verification, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC's failure to provide complete

[246] *See* Petitioners' Brief at 5.
[247] *See Trina Solar Products*, 195 F. Supp. 3d at 1355 (citing *Solar Products from China* IDM at 91-94).
[248] *Id*.

information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example, regarding the VAT and import duty exemptions, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative. Therefore, Commerce knows what documents it should examine when VAT and import duties are paid and when they are exempted. In other words, Commerce knows when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow under the program. Commerce can also simply ask to see a VAT invoice or a payment to the Chinese customs service to verify whether VAT and duties were charged and paid. By contrast, we simply do not know what to look for when we look at a loan to determine whether the EXIMBC was involved or whether a given loan was provided under the EBCP, for the reasons explained above. Similarly, when Commerce is verifying non-use of an income tax rebate or exemption, it relies on information gathered from the GOC during meetings with the relevant tax authorities at the national and local levels. Commerce would expect the GOC officials to provide blank tax forms indicating where the rebate would be recorded, including the specific line item on the form. Commerce would then know precisely which documentation to ask for when verifying the company respondent and would also know with certainty whether the company should have this document. For the reasons explained above, such documentation is insufficient without being able to tie it to the company's books and records.

Huayi and Kangtai argue that Commerce could have had a clear path to find non-use by either accepting Huayi's and Kangtai's customers' declarations or by verifying the declarations.[249] Commerce, however, has already explained in past proceedings why it cannot verify non-usage at the exporters given similar deficiencies with the GOC's explanation of the operation of the program.[250] Commerce specifically explained how verification methods require examining books and records that can be tied to audited financial statements, tax returns, *etc.* to ensure a complete picture of the company's activities rather than searching through filing cabinets, binders, *etc.*, or looking for what may or may not be a complete set of application documents.[251] Moreover, the idea of searching through Huayi's and Kangtai's cash accounts in an effort to find evidence that certain funds may have been deposited pursuant to the EBCP is similarly onerous as searching through the details of the customer's borrowings to find such evidence.

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

[249] *See* Respondents' Brief at 4.
[250] *See, e.g.*, *Chlorinated Isos 2012* IDM at 15 ("While the Department was unable to conduct a complete verification of non-use of this program at {EXIMBC}, both Jiheng and Kangtai in their questionnaire responses provided statements from each of their U.S. customers in which each customer certified that they did not receive any financing from {EXIMBC}.").
[251] *See, e.g.*, *Trina Solar Products*, 195 F. Supp. 3d at 1355 ("The Department cannot typically look at the contents of a filing cabinet or binder and determine whether it includes everything that it's supposed to include.").

776(b) of the Act, because the GOC failed to cooperate by not acting to the best of its ability to comply with Commerce's request for information. As AFA, we determine that this program provides a financial contribution, is specific, and provides a benefit to the company respondents within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E), specifically, of the Act.

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

For all the reasons explained above, we continue to find that necessary information is missing from the record, the GOC withheld information that was requested, and significantly impeded the proceeding, pursuant to sections 776(a)(1), (2) of the Act, and that the GOC has failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. Commerce's resort to the use of an adverse inference when selecting from among the facts otherwise available is reasonable and supported by substantial evidence on the record.

Comment 6: Selection of the AFA Rate for the EBCP

Petitioners' Comments:

- In the first, second, third, and current administrative review of chlorinated isos, Commerce applied an AFA rate of 0.87 percent to the EBCP, based upon the rate for the Export Seller's Credit Program rate from the investigation.[252]
- The 0.87 percent net subsidy rate has utterly failed to induce any cooperation by the GOC over the past four administrative reviews. Any rate lower than the 10.54 percent rate applied in other cases is irrational and contrary to the purpose of section 776(b) of the Act.
- The GOC is currently rewarded by Commerce's application of a 0.87 percent rate.[253] The EBCP benefit should be calculated using an AFA rate that reflects a comparable program and creates an actual incentive to comply.[254]
- Although Commerce has in prior segments found that the EBCP is similar to the Export Seller's Credit Program, there is no record evidence to support that conclusion.
- Without the legal framework within which the program operates, a full description of the program, the process according to which it operates, the credit granting criteria, the pool of intended/targeted recipients, *etc.*, all of which the GOC refused to provide, there is no record evidence on which Commerce can find that Export Seller's and Export Buyer's Credits are "similar."

[252] *See* Petitioners' Brief at 17-18 (citing *Preliminary Results* PDM at 16, *Chlorinated Isos 2016* IDM at 13; *Chlorinated Isos 2012* IDM at 13-14; and *Chlorinated Isos 2014* IDM at Comment 2).
[253] *Id.* at 20.
[254] *Id.* at 12-21.

- The decision in *Clearon Corp.* does not require Commerce to continue equating the Export Buyers Credits with the Export Sellers Credits.
- In *Clearon Corp.*, the Court upheld the use of a 0.87 percent rate as AFA because the Court found that the 0.87 percent rate was sufficiently "adverse" as it essentially doubled the total subsidy rate applied to Huayi. However, this only addresses the deterrent effect as to Huayi, not the impact of the 0.87 percent rate on the GOC.
- It is not Huayi that failed to cooperate. It is the GOC that has refused in this case, and in more than a dozen other cases, to provide complete information concerning the EBCP. The Court's decision, thus, is not logical.
- There is a growing history, in this proceeding and many other proceedings, in which the GOC steadfastly refuses to disclose information on Export Buyer's Credits. At some point, it is reasonable for Commerce to change course recognizing the GOC's steadfast refusal to cooperate with respect to this issue.
- The CIT affirmed the conclusion that Export Buyer's Credits and Export Sellers' Credits were "similar" on narrow, legal grounds under the standard of review, affirming that this finding was "not unreasonable."[255]
- The CIT's decision, however, does not mean that any other conclusion is unreasonable, and, in fact, the heart of the substantial evidence standard is the recognition that more than one interpretation may be "reasonable."[256]
- The past decisions in this proceeding establish that Export Buyer's Credits and Export Seller's Credits differ in several respects: the recipients differ, the currencies for payment differ, and the standards for eligibility differ.[257] Commerce should "consider the extent to which {the GOC} benefits from its own lack of cooperation."[258] *Nan Ya* indicates that the extent to which the GOC benefits by its record of intransigence is "one factor" that should be considered when applying AFA under section 776(b) of the Act.
- Considering this factor and the history of non-cooperation by the GOC, Commerce should select a different benchmark.

GOC's Rebuttal:

- The petitioners' argument is striking in its complete failure to cite to or even acknowledge Commerce's AFA rate selection hierarchy for CVD cases.
- Contrary to the petitioners' argument, Commerce followed the same AFA rate selection hierarchy that it has followed in countless administrative reviews that have involved the EBCP. In each of those cases, Commerce has selected the highest calculated rate for a loan program, using step two of the hierarchy. This is the step that Commerce used here and there is no reasonable or lawful basis to change it.

[255] *Id.* at 21 (citing *Clearon Corp.*).
[256] *Id.* (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).
[257] *Id.* at 21 (citing *Chlorinated Isos 2012*; *Chlorinated Isos 2014*; *Chlorinated Isos 2015*; *Chlorinated Isos 2016*; *Clearon Corp.*; and *Bio-Lab, Inc., v. United States*, 435 F. Supp. 3d 1361, 1371 (CIT 2020) (*Bio-Lab*).
[258] *Id.* at 21-22 (citing *Nan Ya Plastics Corp., Ltd., v. United States*, 810 F. 3d 1333, 1347-48 (CAFC 2016) (*Nan Ya*) (citing Statement of Administrative Action, H. Doc. No. 103-316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4199)).

- The use of step two in selecting the AFA rate for the EBCP is consistent with other cases.[259]
- The petitioners still attempt to argue that step two is not appropriate here because the Export Seller's Credit is not a "similar" program to the EBCP. What the petitioners ignore, however, is that "similarity" for a program is based on treatment of the benefit.
- None of the differences that the petitioners list impact how the benefit for the program is calculated for either the Export Seller's Credit program or the EBCP.
- The benefit for the Export Seller's Credit program is calculated in exactly the same manner as the benefit for every other loan program Commerce analyzes in CVD cases.
- The petitioners further argue that the 0.87 percent AFA rate should not be used because it is not sufficiently adverse and that the Court's decision in *Clearon Corp.* is not dispositive, despite that Court having rejected these same arguments. The petitioners cite no legal precedent that would require Commerce to ignore its AFA rate selection hierarchy because the selected rate is not sufficiently adverse.
- The AFA rate selection hierarchy is intended to establish rates that are sufficiently adverse by selecting the highest rate ever calculated within each of the steps. This AFA rate represents over 50 percent of each respondent's entire CVD rate for this review, and a 100 percent increase from its actual rate.
- In the *Truck and Bus Tires from China*, in contrast, the 10.54 percent AFA rate for the EBCP represented between 16 percent and 27 percent of the respondents' total CVD rate for the investigation. In that case, the 10.54 percent AFA rate was less adverse than the 0.87 percent AFA rate in this review. This clearly demonstrates that if "adverseness" is at all relevant to AFA selection, then the specific facts of the case must be taken into account. The facts of this case show that a 0.87 percent AFA rate is extremely adverse.
- Finally, the petitioners argue that *Clearon Corp.* is not applicable because the Court only addressed the deterrent effect as to Huayi and as to the GOC. What the petitioners ignore in making this argument is the unique circumstance of a government respondent in CVD cases.
- A government respondent in these cases is not assigned a CVD calculated rate and, thus, the "adverseness" of a rate can only be evaluated by its impact on a company respondent. In CVD cases, the level of harm to the company respondent is the level of harm to the government, and vice versa.

Huayi's and Kangtai's Rebuttal:

- Commerce's reliance on the 0.87 percent rate for the EBCP, if a benefit was conferred at all, is supported by substantial evidence.[260]
- In this case, Huayi and Kangtai both cooperated to the fullest extent, and the record of the underlying administrative review contains substantial, verifiable evidence that they did

[259] *Id.* at 17 (citing *Steel Cylinders from China* IDM at Comment 9; *Solar Cells 2014* IDM at Comment 2; *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42792 (September 12, 2017), and accompanying IDM at Comments 11 and 12; and *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42287 (September 7, 2017), and accompanying PDM at 24).

[260] *See* Respondents' Rebuttal Brief at 7-16.

not benefit from the EBCP. Thus, any CVD rate for the EBC program is sufficiently adverse to Huayi and Kangtai.[261]

- In addition, the courts have consistently found that, even when a foreign government is found to be uncooperative, Commerce should avoid adversely impacting the cooperating parties.[262]

Commerce's Position: For these final results, as in the Preliminary Results, Commerce has applied its CVD AFA hierarchy for administrative reviews to determine an AFA rate for the EBCP. We have found that the use of AFA is warranted in determining the countervailability of the EBCP because the GOC did not provide the requested information needed to allow Commerce to analyze this program, thereby impeding this review; therefore, the GOC did not cooperate to the best of its ability.[263] Commerce continues to decline to deviate from our CVD AFA review hierarchy in this segment, because selecting a different rate from another proceeding would upset the balance between relevancy and inducement that Commerce seeks when it applies its CVD AFA hierarchy to non-cooperating respondents. Furthermore, consistently applying our CVD AFA hierarchy provides predictability and administrative transparency to parties involved in administrative proceedings.

Consistent with section 776(d) of the Act and our established practice, we applied our CVD hierarchy to determine the AFA rate for the EBCP.[264] Under the first step of Commerce's CVD AFA hierarchy for administrative reviews, Commerce applies the highest non-*de minimis* rate calculated for a cooperating respondent for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is *de-minimis*, under step two of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for a cooperating company for a similar program within any segment of the same proceeding. If there is no non-*de minimis* rate calculated for a similar program within the same proceeding, under step three of the hierarchy, Commerce applies the highest non-*de minimis* rate calculated for an identical or similar program in another CVD proceeding involving the same country. Finally, if there is no non-*de minimis* rate calculated for an identical or similar program in another CVD proceeding involving the same country, under step four, Commerce applies the highest calculated rate for a cooperating company for any program from the same country that the industry subject to the investigation could have used.[265]

Our examination of the results of all the segments of this proceeding leads us to conclude that there are no calculated rates for this program in this proceeding - and thus no rates are available under step one of the CVD AFA hierarchy.[266] Because we have not calculated a rate for an identical program in this proceeding, we then determine, under step two of the hierarchy, if there

[261] *Id.* at 7.
[262] *Id.* at 8 (citing *Clearon Corp.* (citing *Archer Daniels*, 917 F. Supp. 2d at 1342)).
[263] *See, e.g.*, *Chlorinated Isos 2012*; *see also Chlorinated Isos 2016* at Comment 2.
[264] *See Essar Steel Ltd. v. United States*, 753 F. 3d 1368, 1373-1374 (CAFC 2014) (upholding Commerce's "hierarchical methodology for selecting an AFA rate for an uncooperative respondent").
[265] *See* section 776(d) of the Act; *see also SolarWorld Americas, Inc. v. United States*, CIT No. 15-00232 (CIT 2017) (*SolarWorld*) (sustaining Commerce's CVD AFA hierarchy and selection of AFA rate for CVD reviews).
[266] *See* section 776(d)(1)(A) of the Act.

is a calculated rate for a similar/comparable program (based on the treatment of the benefit) in any segment of the same proceeding, excluding *de minimis* rates.[267]

When Commerce selects a similar program, it looks for a program with the same type of benefit. For example, it selects a loan program to establish the rate for another loan program, or it selects a grant program to establish the rate for another grant program.[268] Consistent with our hierarchy, upon examination of the available above *de minimis* programs from this proceeding, Commerce selected the rate calculated for the Export Seller's Credit Program in the investigation because it confers the same type of benefit as the EBCP, as both programs are subsidized loans from the EXIMBC.[269] On this basis, we are applying an AFA rate of 0.87 percent *ad valorem*, the highest rate determined for a similar program in any segment of this proceeding as the rate for this program, to both respondent companies. This is consistent with our finding in the previous segment of this proceeding, in which the petitioners made similar arguments regarding the selection of the applicable AFA rate, and where we applied the AFA rate of 0.87 percent *ad valorem*.[270]

Regarding the petitioners' arguments that Commerce should apply a different rate for a similar program from another proceeding, we disagree. Commerce has an established practice for selecting an adverse facts available rate in CVD proceedings with different hierarchical methodologies for investigations versus administrative reviews. These hierarchical methodologies for countervailing duty proceedings have been upheld by the courts.[271] Specifically, the *SolarWorld* court evaluated, and sustained, Commerce's application of its CVD AFA review methodology in the first administrative review regarding the EBCP, where Commerce selected a similar program with an AFA rate of 5.46 percent, rather than using the CVD AFA investigation hierarchy advocated by petitioners, which would have resulted in a 10.54 percent rate.[272] The Court noted that, in developing and applying its hierarchies, Commerce seeks a rate that serves its "dual goals" of relevancy and inducing cooperation from respondents, and that Commerce seeks to achieve relevancy by attempting to select an AFA rate that "best approximates how the non-cooperating respondent likely used the subsidy

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[267] *Id.*

[268] *See, e.g.*, *Solar Cells* IDM at 14 and 44; *Narrow Woven Ribbons With Woven Selvedge from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78036 (December 29, 2014), and accompanying IDM at 5; and *Large Residential Washers from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2012-2013*, 80 FR 55336 (September 15, 2015), and accompanying IDM at 5.

[269] *See Chlorinated Isos 2016* IDM at Comment 2.

[270] *Id.*; *see also Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2016*, 84 FR 38221 (August 6, 2019), and accompanying IDM at Comment 5 (applying, as AFA, a rate of 0.95 percent that was calculated for a policy lending program); and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2016*, 84 FR 45125 (August 28, 2019), and accompanying IDM at Comment 1 (applying, as AFA, a rate of 5.46 percent that was calculated for a preferential lending program).

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

[272] *See SolarWorld* at 1368.

program."[273] Indeed, the use of the same 0.87 percent rate we applied to this program in the *Preliminary Results* was recently upheld by the CIT following *Chlorinated Isos 2015*, with the Court saying that "Commerce did not err by using its hierarchy to determine an AFA rate for the Export Buyer's Credit Program in the Final Results."[274] Commerce continues to decline to deviate from our CVD AFA review hierarchy in this segment. Accepting the petitioners' argument and selecting a different rate from another proceeding in this segment would be a change in practice and would upset the balance between relevancy and inducement that Commerce seeks when it applies its CVD AFA hierarchy to noncooperating respondents. Furthermore, consistently applying our CVD AFA hierarchies provides predictability and administrative transparency to parties involved in administrative proceedings before Commerce. Accordingly, we decline to step outside of our CVD AFA review hierarchy in this proceeding and continue to apply the second step of the review hierarchy, which results in the AFA rate of 0.87 percent for the EBCP.

Lastly, we disagree with the petitioners that the 0.87 percent AFA rate should be revised because it is not sufficiently adverse. As noted above, we are following Commerce's hierarchy and, therefore, decline to deviate from our CVD AFA review methodology as a result. As stated in *Clearon Corp.*, "whether a rate is sufficient to encourage cooperation in the future is based on Commerce's consideration of the facts."[275] Here, the 0.87 percent AFA rate for the EBCP constitutes more than one-quarter of Kangtai's final rate of 3.01 percent, and over one-third of Huayi's 2.46 percent rate. We find that these rates "reasonably emphasize accuracy over deterrence without undercutting the cooperation-promoting goal of the AFA statute."[276] As a result, we are making no changes to the AFA rate selected in the *Preliminary Results* and we will continue to apply this rate to the program for these final results of administrative review.

Comment 7: Whether the Income Tax Deduction for R&D Expenses Program Is Specific

In the *Preliminary Results*, Commerce applied AFA to the GOC with respect to the Income Tax Deduction for R&D Expenses program because it found that "the GOC provided no information that is necessary for our *de facto* specificity analysis, such as the number of companies in China that used this tax deduction, or the usage of the program on an enterprise or industry basis."[277]

GOC's Comments:

- Commerce should not apply AFA to the GOC for the income tax deduction for R&D expenses program.
- The GOC stated that it does not have the information requested and otherwise demonstrated that this widely-available tax deduction is not specific and, therefore, not countervailable.
- In determining whether a party cooperated to the best of its ability, Commerce cannot apply AFA for the mere failure to respond, but rather under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been

[273] *Id.* at 1367-68.
[274] *See Bio-Lab*, 435 F. Supp. 3d at 1371.
[275] *See Clearon Corp.*, 359 F. Supp. 3d at 1362.
[276] *See Bio-Lab*, 435 F. Supp. 3d at 1374.
[277] *See Preliminary Results* PDM at 16.

made and under circumstances which provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.[278]

- It is well established that Commerce cannot penalize a party for its inability to provide information it does not have.[279]
- There is no information on the record to suggest that the GOC has this information and did not provide it. Indeed, the GOC's response that it does not collect this type of information has been consistent in every China CVD case.
- Commerce cannot find that the GOC failed to act to the best of its ability when it does not have the requested information in its possession,[280] and thus any finding by Commerce that the GOC did not cooperate to the best of its ability is without any basis in fact.[281]
- The Standard Question Appendix's generic questions do not apply to this type of tax program and the GOC does not maintain the generic information that was requested. Just because the GOC cannot respond to the Standard Question Appendix does not mean that AFA is appropriate.
- Not only has Commerce discounted the GOC's unimpeached statements that it does not have the information Commerce is seeking regarding *de facto* specificity, but Commerce also failed to indicate that the GOC's statements were deficient. Commerce has a statutory obligation to inform parties of deficiencies in their submissions and to permit them an opportunity to cure those deficiencies before AFA can be applied.[282]
- Further, Commerce has sufficient information to find this tax deduction is not specific and, therefore, not countervailable due to the nature of the deduction, its availability to all companies in China, and the clear and objective criteria for obtaining the deduction.
- Given the nature of this deduction and its availability to all companies, it is unnecessary to undertake a *de facto* specificity analysis. There is no reasonable scenario where this program would only be used by a limited number of companies in China.
- For the final results, Commerce should find this program not to be specific and, therefore, not countervailable.

Petitioners' Rebuttal:

- Commerce should continue to apply AFA in finding the income tax deduction for R&D expenses program *de facto* specific. The GOC's failure to submit evidence showing whether the R&D tax deduction is widely-available is not a defense.
- Both Huayi and Kangtai reported receiving tax deductions for R&D expenses, and Commerce has previously found this program to be *de jure* specific in numerous prior cases.[283]

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[278] *See* GOC's Brief at 21 (citing *Nippon Steel*, 337 F. 3d at 1381; *Trina Solar Cells*, 352 F. Supp. 3d at 1326; *Guizhou Tyre I*; and *Martino*, 216 F. 3d at 1032).
[279] *Id.* (citing *Olympic Adhesives*, 899 F. 2d at 1572; *AK Steel Corp.*, 21 CIT at 1223; and *NSK Ltd.*, 416 F. Supp. 2d at 1341).
[280] *Id.* at 22 (citing GOC Supplemental Response at 10 and 16).
[281] *Id.* (citing *Citic Trading*, 27 CIT at 372).
[282] *Id.* at 23 (citing section 782(d) of the Act; and *Borusan*, 61 F. Supp. 3d at 1348-49).
[283] *See* Petitioners' Rebuttal Brief at 23 (citing *Countervailing Duty Investigation of Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175 (December 11, 2017), and accompanying IDM at Comment 10; and *Vertical Metal File Cabinets From the People's Republic of China:*

- Commerce should continue to find any R&D deductions in this case to be countervailable.
- Whether the program is specific depends on the analysis of facts that the GOC failed to supply. To determine whether these deductions are specific, Commerce requested that the GOC provide the number of companies that used the program or the usage of the program on an enterprise or industry basis. The GOC provided no information.
- The statute requires Commerce to consider "the actual recipients," whether any recipients are "predominant users," whether any industry receives a "disproportionately large amount" of the subsidy, and the "manner in in which the authority providing the subsidy has exercised discretion…."[284] These factors are not optional. Commerce, following the language of the statute, reasonably sought information from the GOC to address each of these statutory criteria, but the GOC did not respond.
- Commerce correctly applied AFA and found that the program was *de facto* specific. Commerce should determine that the Income Tax Deduction for R&D Expenses program provides a financial contribution under section 771(5)(D)(ii) of the Act.

Commerce's Position: Both Huayi and Kangtai reported receiving tax deductions under the Income Tax Deduction for R&D Expenses program.[285] However, in response to our request for information regarding this program, the GOC provided none of the information that is necessary for our *de facto* specificity analysis, such as the number of companies in China that used this tax deduction, or the usage of the program on an enterprise or industry basis.[286]

We disagree with the GOC's argument that the information requested in the Standard Question Appendix does not apply to this type of tax program. As discussed in the *Preliminary Results*, in order to conduct the analysis of whether a program is specific under section 771(5A) of the Act, it is essential that the government provide a complete response to the questions in the Standard Questions Appendix so that Commerce may conduct its statutory analysis to determine if an alleged program is countervailable.[287] To that end, government cooperation is essential, because the government has sole access to the information required for a complete analysis of specificity with respect to government subsidy programs.

By failing to provide complete responses to the Standard Questions Appendix as requested, Commerce finds that the record is missing necessary information because the GOC withheld necessary information and significantly impeded this administrative review within the meaning of sections 776(a)(1), 776(2)(A), and 776(2)(C) of the Act and also failed to cooperate by not acting to the best of its ability to comply with our requests within the meaning of section 776(b) of the Act. Based on the application of AFA regarding this program, we continue to find that the Income Tax Deduction for R&D Expenses program is *de facto* specific under section 771(5A)(D)(iii) of the Act.

Preliminary Affirmative Countervailing Duty Determination, 84 FR 37622 (August 1, 2019), and accompanying PDM at 21, unchanged in *Vertical Metal File Cabinets from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 57394 (October 25, 2019)).

[284] *Id.* (citing section 771(5A)(D)(iii) of the Act).

[285] *See* Huayi Initial Response at 10 and Exhibit 15; *see also* Kangtai Initial Response at 9 and Exhibit 16.

[286] *See* GOC Supplemental Response at 15-16.

[287] *See Preliminary Results* PDM at 16.

Comment 8: Whether Commerce Should Conduct Verification

Petitioners' Comments:

- Pursuant to section 782(i) of the Act and 19 CFR 351.307(b)(1)(v), Commerce will verify information submitted by a respondent in an administrative review if a domestic interested party submits a timely written request for verification and Commerce has not verified the respondent's information in either of the two immediately preceding administrative reviews.
- Huayi has never undergone verification, and while Kangtai's responses were verified in the investigation, it has not undergone verification in the past three administrative reviews.
- The petitioners submitted a timely request that Huayi's and Kangtai's responses be verified in this administrative review.[288]
- Because neither Huayi nor Kangtai have undergone verification in either of the two immediately preceding administrative reviews, pursuant to section 782(i)(3) of the Act such a verification is mandatory.
- In accordance with 19 CFR 351.307(b)(1)(v), Commerce will conduct verification where it decides that good cause for verification exists.
- The petitioners' NSAs identified three new subsidy programs, the provision of natural gas for LTAR, financial incentives for coal-to-gas conversion and plant relocations, and discounted green loans.
- Commerce based its finding in the *Preliminary Results* that the financial incentives for coal-to-gas conversion and plant relocations, and discounted green loans programs, were not used based solely on Huayi's and Kangtai's claims of non-use of these programs.
- Huayi's and Kangtai's claims of non-use of these programs have not been subject to verification or validated by any company books and records, and, as such, good cause exists for Commerce to verify the respondents' non-use claims.
- Verification is necessary, as it commonly disproves statements of non-use submitted by respondents or uncovers incomplete responses. This is the very reason the statute requires verification in an investigation, when Commerce is investigating a company's use of subsidy programs for the first time.
- Commerce announced in January 2020 that it planned to conduct verifications and suspended the briefing schedule until after it had conducted verifications.
- It was not until May 2020 that Commerce announced its decision to cancel verification due to travel bans imposed in response to the COVID-19 pandemic, four months before it was obligated to issue its final results.
- Travel bans may be lifted prior to the due date for the fully extended final results, allowing Commerce to fulfill its legal and regulatory obligations to verify the information provided by Huayi and Kangtai in this administrative review.

Commerce's Position: Due to the ongoing global situation regarding the Covid-19 pandemic, Commerce officials were unable to verify the information provided by the GOC, Huayi, and

[288] *See* Petitioners' Letter, "Chlorinated Isocyanurates from the People's Republic of China: Request for Verification," dated May 17, 2019.

Kangtai in their questionnaire responses. On January 27, 2020, Commerce placed a memorandum on the record of this administrative review clarifying our intention to conduct verification in this proceeding and postponing the briefing schedule for the final results until after the completion of verification.[289] However, in the subsequent Cancellation Memorandum, we noted that, due to the imposition of a Global Level 4 travel advisory being put into place by the U.S. Department of State, Commerce officials were prevented from traveling to conduct verification. At the time the Cancellation Memorandum was issued, the final results of this administrative review were scheduled to be completed by July 6, 2020, in accordance with the First Tolling Memorandum. Commerce, therefore, set a date at that time for the submission of briefs and rebuttal briefs as May 15 and 22, 2020, respectively.[290]

Although we twice more postponed the date for the final results of this administrative review,[291] we have not accepted any more information on the record. While Commerce has in the past left briefing opportunities open to late developing issues, the open-ended nature of the Global Level 4 travel advisory made such long-term planning impossible.[292] Indeed, the Global Level 4 travel advisory was not lifted until August 6, 2020, and afterwards China remained, and still remains, subject to a Level 3 travel advisory that makes official travel for verification purposes impossible.

Pursuant to section 776(a)(2)(D) of the Act, in situations where information has been provided but the information cannot be verified, Commerce will use "facts otherwise available" in reaching the applicable determination. Accordingly, as we are unable to proceed to verification in this review for reasons beyond our control, we have continued to rely on the information submitted on the record, as facts available, in reaching our final results of review.

[289] *See* Briefing Schedule Memorandum.
[290] *See* Memorandum, "Extension of Briefing Schedule," dated May 6, 2020.
[291] *See* Extension Memorandum and Second Tolling Memorandum, which postponed the final results until September 4, 2020 and November 2, 2020, respectively.
[292] *See* Cancellation Memorandum.

RECOMMENDATION

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

☒	☐
Agree	Disagree

11/2/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

APPENDIX

AFA Rate Calculation

Program Name	Rate	Source
Preferential Lending		
Policy Loans Under the Chlor-alkali Industry Second Five Year Plan	10.54%	*See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 70201 (November 17, 2010) (*Coated Paper from China Investigation*)
Shareholder Loans (Debt Forgiveness)	10.54%	*Coated Paper from China Investigation*
Discounted Loans for Export-Oriented Enterprises	10.54%	*Coated Paper from China Investigation*
Preferential Lending for Industrial Readjustment	10.54%	*Coated Paper from China Investigation*
Preferential Loans Provided by China ExIm "Going-out" for Outbound Investments	10.54%	*Coated Paper from China Investigation*
Discounted Green Loans	10.54%	*Coated Paper from China Investigation*
Shandong Industrial Structure Adjustment Entrusted Loan	0.13%	*Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos Investigation*).
Export Credit Subsidies		
Export Buyer's Credits from the Export-Import Bank of China	0.87	*Chlorinated Isos Investigation*
Export Seller's Credits from the Export-Import Bank of China	0.87	*Chlorinated Isos Investigation*
Export Credit Insurance from SINOSURE	10.54%	*Coated Paper from China Investigation*
Provision of Goods and Services for Less Than Adequate Remuneration (LTAR)		
Provision of Electricity for LTAR	1.25%	Calculated - Kangtai
Provision of Natural Gas for LTAR	0.16%	Calculated - Kangtai
Direct Tax Exemptions and Reductions		

Income Tax Benefits for Foreign-Invested Enterprises (FIEs) Based on Geographic Location	1.68%	*Certain Steel Grating from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 32362, June 8, 2010 (*Steel Grating Investigation*).
Income Tax Credits on Purchases of Domestically Produced Equipment by Domestically Owned Companies	1.68%	*Steel Grating Investigation*
Article 30 Income Tax Deduction for Research and Development (R&D) Expenses	25%	
Corporate Income Tax Law Article 33: Reduction of Taxable Income for the Revenue Derived from the Manufacture of Products that are in Line with State Industrial Policy and Involve Synergistic Utilization of Resources		
Enterprise Income Tax Reduction for High and New Technology Enterprises		
Indirect Tax Exemptions and Reductions		
VAT Exemptions on Equipment for Central Region	9.71%	*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 AR1*)
VAT TAX Rebate for Comprehensive Utilization of Resources	9.71%	*OTR Tires from China*
VAT Refunds for FIEs on Purchases of Chinese-made Equipment	9.71%	*OTR Tires from China*
VAT Tax Rebate for Comprehensive Utilization of Resources	0.06%	*Isos Investigation*
Preferential Direct Tax Treatment on Purchases of Domestically Produced Equipment for FIEs	9.71%	*OTR Tires from China*
VAT Rebate on Domestically Produced Equipment	9.71%	*OTR Tires from China*
VAT Exemption on Imports by Encouraged Industries	9.71%	*OTR Tires from China*

Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries.	9.71%	*OTR Tires from China*
Stamp Tax Exemption on Share Transfers Under Non-Tradable Share Reform	9.71%	*OTR Tires from China*
Grants		
Technology Bureau Enterprise Award	0.62%	*Chlorinated Isos AR1*
Market Development Fund for Middle-and-Small Sized Enterprise	0.62%	*Chlorinated Isos AR1*
Grants for Export Credit Insurance	0.09%	*Chlorinated Isos AR1*
Special Fund for Energy Saving Technology Reform	0.62%	*Chlorinated Isos AR1*
Grants under the Haixing County Science and Technology Research & Development Plan Project	0.02%	*Chlorinated Isos Investigation*
Special National Bond Fund for Energy Conservation and Waste Recycling Projects	0.03%	*Chlorinated Isos Investigation*
Land and Land Usage for FIEs in National Economic and Technological Zones at Preferential Rates	13.36%	*Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008) (*Sacks from China*)
State Key Technology Renovation Project Fund	0.62%	*Chlorinated Isos AR1*
Foreign Trade Development Fund	0.62%	*Chlorinated Isos AR1*
"Famous Brands" program	0.62%	*Chlorinated Isos AR1*
Preferential Policies to Attract Foreign Investment in Jiangsu Province	0.62%	*Chlorinated Isos AR1*
Outline of Light Industry Restructuring and Revitalization Plan in Jiangsu Province	0.62%	*Chlorinated Isos AR1*
Jiangsu Province Grants for Legal Fees in Foreign Trade Remedy Proceedings	0.62%	*Chlorinated Isos AR1*
Shandong Province: Grants to Enterprises Exporting Key Product	0.62%	*Chlorinated Isos AR1*
Grants for Export Credit Insurance	0.62%	*Chlorinated Isos AR1*
The Clean Production Technology Fund	0.62%	*Chlorinated Isos AR1*

Grants for the Application of Patents	0.62%	*Chlorinated Isos AR1*
Financial Incentives for Coal-to-Gas Conversion and Plant Relocation	0.62%	*Chlorinated Isos AR1*
	Total	**377.60%**