C-570-980
Administrative Review
POR: 01/01/2017-12/31/2017
Public Document
E&C/VII: GHC

November 27, 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 Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, 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 crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China) for the period of review (POR) January 1, 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 JA Solar Technology Yangzhou Co., Ltd. (JA Solar) and Risen Energy Co., Ltd. (Risen Energy) (collectively, the company respondents). We find that the company respondents received countervailable subsidies during the POR. We have analyzed the case and rebuttal briefs submitted by interested parties following the *Preliminary Results*,[1] and address the issues raised in the "Analysis of Comments" section, below.

II. BACKGROUND

On February 11, 2020, Commerce published the *Preliminary Results* of this administrative review in the *Federal Register*, and invited comments from interested parties. Between March 12, 2020, and October 26, 2020, we received timely case briefs from the following interested parties: Trina Solar Co., Ltd. (formerly known as Changzhou Trina Solar Energy Co., Ltd.) (Trina Solar); the

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017*, 85 FR 7727 (February 11, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

Government of China (GOC); BYD Shangluo Industrial Co., Ltd. and Shanghai BYD Co., Ltd. (collectively, BYD Companies); JA Solar; Risen Energy; and SunPower Manufacturing Oregon LLC (SunPower) (the petitioner in the underlying CVD investigation).[2] On November 2, 2020, we received timely rebuttal briefs from the following companies: JA Solar; BYD Companies; and Risen Energy.[3] We did not conduct a public hearing in this administrative review.[4]

On April 24, 2020, Commerce tolled the due date for these final results by 50 days.[5] On July 21, 2020, Commerce tolled the due date for these final results an additional 60 days.[6] On September 25, 2020, Commerce extended the period for issuing the final results of this review by 60 days, until November 27, 2020.[7]

III. LIST OF COMMENTS FROM INTERESTED PARTIES

Comment 1: Whether Commerce Appropriately Applied the Use of Adverse Facts Available (AFA) Regarding Responses from the GOC

Comment 2: Whether Input Suppliers That Are Wholly Owned by Individuals Are "Government Authorities"

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[2] *See* Trina Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China: Letter in Lieu of Case Brief," dated March 12, 2020, which stated that Trina Solar concurs with and incorporates the arguments made by the company respondents; *see also* GOC's Letter, "GOC Administrative Case Brief – Sixth Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China (C-570-980)," dated October 26, 2020 (GOC's Case Brief); BYD Companies' Letter , "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China (2017 Review): Letter in Lieu of Case Brief," dated October 26, 2020, in which the BYD Companies stated that they agree with and incorporate the arguments made by the GOC and the respondent companies in their case briefs; JA Solar's Letter, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Case Brief," dated October 26, 2020 (JA Solar's Case Brief); Risen Energy's Letter, "Crystalline Silicon Photovoltaic Cells from the People's Republic of China: Case Brief," dated October 26, 2020 (Risen Energy's Case Brief); and SunPower's Letter, "Case Brief," dated October 26, 2020.

[3] *See* JA Solar's Letter, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Rebuttal Case Brief," dated November 2, 2020 (JA Solar's Rebuttal Brief); *see also* BYD Companies' Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China (2017) Review: Letter in Lieu of Rebuttal Brief," dated November 2, 2020, in which the BYD Companies stated that they disagree with the comments submitted by the petitioner in its case brief, and agree with and incorporate the comments made by the GOC and the respondent companies in their rebuttal briefs; and Risen Energy's Letter, "Crystalline Silicon Photovoltaic Cells from the People's Republic of China: Rebuttal Brief," dated November 2, 2020 (Risen Energy's Rebuttal Brief).

[4] *See* JA Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Withdrawal of Hearing Request," dated November 9, 2020; *see also* Risen Energy's Letter, "Crystalline Silicon Photovoltaic Cells from the People's Republic of China: Withdrawal of Hearing Request," dated November 16, 2020.

[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.

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

[7] *See* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Extension of Deadline for the Final Results of the Administrative Review," dated September 25, 2020.

Comment 3: Whether Commerce Should Apply AFA to the Export Buyer's Credit Program (EBCP)
Comment 4: The Provision of Electricity
Comment 5: Whether the Income Tax Deduction for Research and Development (R&D) Expenses is Specific
Comment 6: Whether Commerce Should Revise the Benchmark for the Provision of Aluminum Extrusions
Comment 7: The Benchmark for the Provision of Solar Glass
Comment 8: The Benchmark for the Provision of Land
Comment 9: The Benchmark for Ocean Freight
Comment 10: Commerce's Use of "Zeroing" in Benefit Calculations
Comment 11: Whether Commerce Should Correct Errors to Sales Denominators and the Attribution of Subsidies

IV. SCOPE OF THE ORDER

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

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

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

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS). Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding 10,000 mm^2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Additionally, excluded from the scope of this order are panels with surface area from 3,450 mm^2 to 33,782 mm^2 with one black wire and one red wire (each of type 22 AWG or 24 AWG not more than 206 mm in length when measured from panel extrusion), and not exceeding 2.9 volts, 1.1 amps, and 3.19 watts. For the purposes of this exclusion, no panel shall contain an internal battery or external computer peripheral ports.

Also excluded from the scope of this order are:

1) Off grid CSPV panels in rigid form with a glass cover, with the following characteristics:

(A) a total power output of 100 watts or less per panel;
(B) a maximum surface area of 8,000 cm^2 per panel;
(C) do not include a built-in inverter;
(D) must include a permanently connected wire that terminates in either an 8mm male barrel connector, or a two-port rectangular connector with two pins in square housings of different colors;
(E) must include visible parallel grid collector metallic wire lines every 1-4 millimeters across each solar cell; and
(F) must be in individual retail packaging (for purposes of this provision, retail packaging typically includes graphics, the product name, its description and/or features, and foam for transport); and

2) Off grid CSPV panels without a glass cover, with the following characteristics:

(A) a total power output of 100 watts or less per panel;
(B) a maximum surface area of 8,000 cm^2 per panel;
(C) do not include a built-in inverter;
(D) must include visible parallel grid collector metallic wire lines every 1-4 millimeters across each solar cell; and
(E) each panel is:
1. permanently integrated into a consumer good;
2. encased in a laminated material without stitching, or
3. has all of the following characteristics: (i) the panel is encased in sewn fabric with visible stitching, (ii) includes a mesh zippered storage pocket, and (iii) includes a permanently attached wire that terminates in a female USB-A connector.

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

Merchandise covered by this order is currently classified in the Harmonized Tariff System (HTS) of the United States under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.[8]

[8] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 77 FR 73018 (December 7, 2012); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Countervailing Duty Order*, 77 FR 73017 (December 7, 2012).

V. CHANGES SINCE THE PRELIMINARY RESULTS

Based on consideration of the arguments raised in the case and rebuttal briefs, and all supporting documentation, we made certain changes to the benefit calculations for the company respondents, which are discussed in the "Analysis of Comments" section, below.

VI. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

We made no changes to the allocation period or to the allocation methodology used in the *Preliminary Results*.

B. Cross-Ownership and Attribution of Subsidies

The respondent companies submitted comments regarding certain errors we made in attributing subsidies in the *Preliminary Results*. Based on our review of these comments, we have revised certain calculations to correct these errors.[9]

C. Denominators

The respondent companies submitted comments regarding certain errors in the *Preliminary Results* related to the selection of appropriate denominators. Based on our review of these comments, we have revised certain denominators to correct these errors.[10]

D. Benchmarks and Discount Rates

Commerce made no changes to the benchmarks and discount rates used in the *Preliminary Results*.[11]

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*.[12]

VIII. PROGRAMS DETERMINED TO BE COUNTERVAILABLE

We made certain changes since the *Preliminary Results* with regard to the methodology used to calculate the subsidy rates for the following programs with respect to JA Solar and Risen Energy. Where applicable, we revised certain program denominators and attribution methodologies to ensure that we are properly calculating program benefits and subsidy rates in accordance with 19 CFR 351.525(b)(6). We also corrected certain clerical errors when calculating the program

[9] *See* Comment 11.
[10] *Id.*
[11] *See Preliminary Results* PDM at 13-23.
[12] *Id.* at 24-41.

benefits and subsidy rates as explained below. Issues raised by interested parties in their case briefs regarding these issues are discussed in the "Analysis of Comments" section, below. The final rates for JA Solar and Risen Energy are as follows:

JA Solar

1. Preferential Policy Lending: 1.15 percent *ad valorem*
2. Provision of Solar Grade Polysilicon for LTAR: 0.13 percent *ad valorem*
3. Provision of Aluminum Extrusions for LTAR: 0.00 percent *ad valorem*
4. Provision of Solar Glass for LTAR: 5.01 percent *ad valorem*
5. Provision of Land for LTAR: 0.85 percent *ad valorem*
6. Provision of Electricity for LTAR: 1.02 percent *ad valorem*
7. Enterprise Income Tax Law, R&D Program: 0.15 percent *ad valorem*
8. Import Tariff and VAT Exemptions for Use of Imported Equipment: 0.00 percent *ad valorem*
9. VAT Refunds/Rebates for Foreign Invested Enterprises (FIEs) Purchasing Domestically-Produced Equipment: 0.00 percent *ad valorem*
10. Preferential Tax Program for High or New Technology Enterprises (HNTEs): 0.60 percent *ad valorem*
11. Other Reported Grants: 0.49 percent *ad valorem*
12. Export Buyer's Credit Program: 5.46 percent *ad valorem*

Risen Energy

1. Preferential Policy Lending: 0.92 percent *ad valorem*
2. Provision of Solar Grade Polysilicon for LTAR: 0.00 percent *ad valorem*
3. Provision of Aluminum Extrusions for LTAR: 0.01 percent *ad valorem*
4. Provision of Solar Glass for LTAR: 3.88 percent *ad valorem*
5. Provision of Land for LTAR: 0.29 percent *ad valorem*
6. Provision of Electricity for LTAR: 0.21 percent *ad valorem*
7. Enterprise Income Tax Law, R&D Program: 0.07 percent *ad valorem*
8. Import Tariff and VAT Exemptions for Use of Imported Equipment: 0.01 percent *ad valorem*
9. Preferential Tax Program for HNTEs: 0.47 percent *ad valorem*
10. Other Reported Grants: 0.28 percent *ad valorem*
11. Other Reported Taxes: 0.00 percent *ad valorem*
12. Export Buyer's Credit Program: 5.46 percent *ad valorem*
13. Export Seller's Credit Program: 0.08 percent *ad valorem*

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

1. Golden Sun Demonstration Program
2. The Two Free/Three Half Program for FIEs
3. Income Tax Reductions for Export-Oriented Enterprises
4. Income Tax Benefits for FIEs Based on Geographic Locations – Preferential Tax Programs for Western Development
5. Local Income Tax Exemption and Reduction Programs for "Productive" FIEs
6. Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises

7. Tax Reductions for High and New-Technology Enterprises Involved in Designated Projects
8. Preferential Income Tax Policy for Enterprises in the Northeast Region
9. Guangdong Province Tax Programs
10. VAT Refunds/Rebates for FIEs Purchasing Domestically-Produced Equipment
11. Export Credit Insurance from SINOSURE

X. *AD VALOREM* RATE FOR NON-SELECTED COMPANIES UNDER REVIEW

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

As indicated in the accompanying *Federal Register* notice of the final results, dated concurrently with this decision memorandum, we determine that JA Solar and Risen Energy each received countervailable subsidies that are above *de minimis*. For the companies for which a review was requested and for which we did not receive a timely request for withdrawal of review, and which we are not finding to be cross-owned with the respondent companies, we are basing the subsidy rate on a weighted average of the subsidy rates calculated for JA Solar and Risen Energy, using their publicly-ranged sales data for exports of subject merchandise to the United States during the POR. Accordingly, for each of these companies, we derived a final subsidy rate of 12.67percent *ad valorem*.[13]

XI. ANALYSIS OF COMMENTS

Comment 1: Whether Commerce Appropriately Applied the Use of AFA Regarding Responses from the GOC

GOC's Comments:

- Commerce applied AFA to the GOC for a number of issues but did not advise the GOC that its responses were deficient as required by section 776 of the Act.[14]
- These AFA findings were related to: (1) whether input producers are "authorities;" (2) whether the provision of electricity for LTAR is countervailable; (3) whether land provided to

[13] For a list of the non-selected companies, *see* the *Federal Register* notice, signed concurrently with this decision memorandum.
[14] *See* GOC's Case Brief at 2.

the respondents is specific to the solar products industry; and (4) whether export buyer's credits were used.[15]

- Commerce did not indicate that the GOC's initial questionnaire response with regard to any of these issues was deficient and did not issue a supplemental questionnaire to the GOC in this review.[16]
- Absent such a deficiency notification, Commerce cannot apply AFA under the Act.[17]
- Before applying AFA, Commerce has a statutory obligation to inform a party of any deficiencies in its submission to permit the party an opportunity to cure those deficiencies.[18]
- In this review, the GOC believed it fully responded to Commerce's initial questionnaire and did not believe its responses were deficient in any way. Specifically:
    - Input Producers – The GOC provided ownership information from the Enterprise Credit Information Publicity System (ECIPS), explaining that information from this system is evidence of the ownership structure of enterprises in China.[19]
    - Electricity – The GOC fully answered all questions regarding this program, but Commerce states that the GOC did not include Annex 1 of Notice 748 in its questionnaire response. Commerce did not provide the GOC with an opportunity to remedy this deficiency.[20] Commerce continues to ask for old GOC questionnaire responses regarding the old electricity system and focuses on provincial price proposals. When the GOC does not respond to these obsolete questions because they are not applicable, AFA is applied without an opportunity to correct deficiencies.
    - The Provision of Land for LTAR – Commerce stated that AFA is warranted because while the GOC provided some information, the submitted information did not sufficiently respond to Commerce's request. Despite this finding, Commerce did not provide the GOC an opportunity to correct this deficiency.
    - Export Buyer's Credits Program (EBCP) – Discussed in Comment 3, below.

- Without the statutorily required notification of deficiency, Commerce cannot legally apply AFA to the GOC for any of these issues.

The Respondent Companies' Comments:

- JA Solar and Risen Energy each commented on the application of AFA for the EBCP, and for the provision of electricity, which are discussed in Comments 3, and 4, respectively. Neither JA Solar nor Risen Energy commented directly on whether Commerce inappropriately applied AFA to the GOC with respect to the GOC's questionnaire responses.

No other interested party commented on this issue.

Commerce's Position: We continue to find, as we did in the *Preliminary Results*, that the application of AFA is warranted in finding that certain domestic producers that provided input

[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*. at 3.
[20] *Id*. at 4.

products (*i.e.*, solar grade polysilicon, aluminum extrusions, and solar glass) to the respondents are "authorities," within the meaning of section 771(5)(B) of the Act.[21] In the *Preliminary Results*, we explained that we requested information from the GOC regarding the specific companies that produced the input products that the company respondents purchased during the POR.[22] We explained that we requested information from the GOC that would allow us to determine whether those companies are "authorities" within the meaning of section 771(5)(B) of the Act.[23] Such information included, but was not limited to: information identifying members of the board of directors or senior managers who were either GOC or Chinese Communist Party (CCP) officials during the POR; articles of incorporation; capital verification reports; and articles of association.[24] Instead of providing the information requested, the GOC stated that information from the ECIPS constitutes a sufficient demonstration of the ownership status of the input producers, and that it failed to see how the items we requested would help Commerce to make a determination as to whether a producer is an authority.[25]

But despite Commerce's explicit requests, the GOC provided no information at all regarding the identification of owners, directors, or senior management of the input providers who were also GOC or CCP officials.[26] The GOC stated that there is no central database that contains such information even though its responses in prior proceedings demonstrate that it is able to gather the information that we requested.[27] The GOC further stated that our questions on this issue were "irrelevant" to this proceeding, and stated that if Commerce insisted on the necessity of this information, that Commerce should collect this information from the input producers, through the company respondents.[28] Leaving aside the issue that it is Commerce, and not respondents that determine what information is necessary to conduct its CVD analysis, the GOC is well aware that Commerce considers the information requested regarding whether GOC or CCP members are managers and/or directors of companies that supply company respondents with input products is information that Commerce considers necessary for it to determine whether input suppliers are "authorities" within the meaning of section 771(5)(B) of the Act.[29] As explained in the Public

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[21] *See Preliminary Results* PDM at 19.
[22] *Id*. at 25.
[23] *Id*.
[24] *Id*.
[25] *See* GOC's Letter, "GOC Initial CVD Questionnaire Response: Sixth Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled Into Modules, from the People's Republic of China (C-570-980)," dated December 30, 2019 (GOC's December 30, 2019 QR) at 35.
[26] *See* GOC's December 30, 2019 QR at 48.
[27] *See Preliminary Results* PDM at 27 (citing *High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) (*High Pressure Steel Cylinders from China*), and accompanying Issues and Decision Memorandum (IDM) at "Use of Facts Available and Adverse Inferences.").
[28] *See* GOC's December 30, 2019 QR at 48-49.
[29] *See*, *e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 FR 34828 (July 23, 2018) (*Solar Cells from China 2015 AR*) IDM at Comment 1; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent To Rescind the Review, in Part; 2016*, 84 FR 5051 (February 20, 2019) (*Solar Cells from China 2016 AR Preliminary*), unchanged in *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) (*Solar Cells from China 2016 AR*).

Bodies Memorandum, an entity with significant CCP presence on its board or in management or in party committees is controlled such that it possesses, exercises, or is vested with governmental authority.[30] Nevertheless, the GOC has made the unwarranted decision that these questions are irrelevant to Commerce's CVD proceedings involving China.

While the GOC claims that it fully answered all of our questions regarding the provision of electricity for LTAR, we disagree. In the *Preliminary Results*, we explained that the GOC failed to fully explain the roles and nature of the cooperation between the NDRC and the provincial authorities in deriving electricity price adjustments.[31] We also detailed that the GOC failed to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of the prices by the provinces themselves.[32] The GOC is aware from past CVD proceedings involving China that a full understanding of the interplay between the NDRC and the provincial governments is crucial to Commerce's understanding of how electricity prices are established in China, and is necessary for Commerce's financial contribution and specificity analysis.[33] However, in the instant administrative review, the GOC did not act to the best of its ability to provide information on this issue.

With respect to the GOC's questionnaire responses for our questions to determine whether the Provision of Land for LTAR is specific to the solar products industry, in our CVD questionnaire, we asked the GOC to identify all instances in which it provided land or land-use rights to the company respondents during the Average Useful Life (AUL) period, to answer questions regarding the eligibility for and the actual use of the assistance provided, and to provide at least one completed application and approval package (*i.e.*, agreements for the company respondents' land purchases). Instead of responding directly to these questions, the GOC referred to Chinese land laws and directed us to the questionnaire responses of the company responses. For example, the GOC explained that the provision of land is administered by natural resources departments at the municipal city level where the company respondents are located.[34] But when asked to provide the name and address of each of the government agencies that are responsible for administering the program, the GOC simply referred us to the company respondents' responses for the land locations.[35]

When we asked the GOC to provide information on whether the respondent companies applied for, received, claimed, accrued, or used assistance under this program during the AUL, the GOC

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[30] *See* Memorandum, "Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379," dated May 18, 2012 (Public Bodies Memorandum) at 33-36, placed on the instant record in the Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Placing Additional Documents on the Record," dated January 31, 2020 (Additional Documents Memorandum).

[31] *See Preliminary Results* PDM at 34.

[32] *Id*.

[33] *See*, *e.g.*, *Solar Cells from China 2015 AR* PDM at Comment 4; *see also Solar Cells from China 2016 AR Preliminary* PDM at 29-31, unchanged in *Solar Cells from China 2016 AR* at Comment 3.

[34] *See* GOC's December 30, 2019 QR at 63.

[35] *Id*.

again only referred us to the responses from the company responses.[36] Further, the GOC stated that the relevant government(s) (*i.e.*, the land authorities) keep the company-specific files (*e.g.*, the land use-right assignment contracts for a specific company). But when we asked the GOC to identify all instances in which assistance under the land program was provided to the respondent companies, the GOC, once again, simply referred us to the questionnaire responses of the company respondents without providing the requested information.[37] The GOC is well aware that the information requested regarding the provision of land and land-use rights to the mandatory respondents and the basis for which they were provided is crucial for our analysis to determine whether an alleged subsidy constitutes a financial constitution and is specific.[38] However, the GOC refused to provide this requested information, despite the fact that this type of information has been provided and verified in previous CVD proceedings involving China.[39]

The GOC argues that Commerce did not inform the GOC that its responses to our questions on the above-referenced issues were deficient and did not provide the GOC with respective opportunities to cure any deficiencies. However, by (1) contending that our request for information regarding the CCP was irrelevant; (2) directing us to request from the respondent companies information that the GOC maintains itself; and (3) failing to provide a full and complete response regarding the interaction between the NDRC and the provincial governments in explaining how electricity prices are established in China, we find that for each of these issues, any further attempts to request this information from the GOC would be futile and would also result in the GOC granting itself an unwarranted extension of the deadline to provide this requested information.[40] In each instance described above, the GOC's "response" was not merely deficient within the meaning of section 782(d) of the Act. Rather, it was a situation where the GOC refused to provide the requested information, and the GOC's conduct was more a "non-response" than a "response."[41]

Accordingly, for the issues discussed above, we find that section 782(d) of the Act was not triggered. We further find that necessary information is missing from the record, and that the GOC withheld information that was requested of it and significantly impeded this proceeding, pursuant to section 776(a)(1) and (a)(2)(A) and (C) of the Act. We further find that the GOC has failed to cooperate by not acting to the best of its ability with respect to our requests for information, and adverse inferences are warranted under section 776(b) of the Act. We discuss each of these issues in greater detail in the comments below.

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[36] *Id*. at 64.
[37] *Id*.
[38] *See*, *e.g.*, *Solar Cells from China 2016 AR Preliminary* PDM at 27, unchanged in *Solar Cells from China 2016*.
[39] *See*, *e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 72 FR 71360, 71363 (December 17, 2007) PDM at 10 ("we examined these companies' land-use rights agreements and discussed the agreements with the relevant government authorities"), unchanged in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008).
[40] *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338 (Fed. Cir. 2002) (finding no error under section 782(d) of the Act when further requests would be futile).
[41] *See Solar Cells from China 2015 AR* IDM at 12 and 15 (where Commerce previously declined to provide the GOC with opportunities to remedy what the GOC claimed were "deficiencies" in its questionnaire response).

Comment 2: Whether Input Suppliers That Are Wholly Owned by Individuals Are "Government Authorities"

GOC's Comments:

- Commerce applied AFA to the GOC in finding that all of {input suppliers that provided products to} the company respondents are government authorities.[42] Record evidence exists, however, to find any input suppliers that are wholly privately-owned by individuals are not "government authorities" within the meaning of the law.
- In circumstances where, as here, there is no record evidence that prices are controlled by the government and that the respondent company's input suppliers are privately owned, Commerce has never made a "government authority" finding except on the basis of facts otherwise available or AFA.[43]
- The GOC rejects Commerce's logic, analysis, and ultimate conclusion in the CCP Memorandum.[44] In China, the CCP is a political party, not a government authority. The GOC has emphasized that political parties in China are independent entities unrelated to any governmental functions.
- The existence of primary party organizations in a company does not establish government control. The Public Bodies Memorandum, like the CCP Memorandum, reflects a 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. At most, the Public Bodies Memorandum expresses uncertainty over the role of primary party organizations in private companies.[45]
- While the article in *The Economist* quoted in the Public Bodies Memorandum mentions that primary party organizations in private companies and in state-owned enterprises, it is unlikely that the statements in the article were intended to apply equally to primary party organizations in both types of entities.[46]
- There is no support for the conclusion in *The Economist* article that primary party organizations in private companies hold "shadow formal board meetings" and trump the decisions made within private organizations.[47]
- Under the CCP Constitution, a CCP primary organization within a company is required to maintain certain core tenets on behalf of the CCP. These "obligations" do not overlap or conflict with the producer entity's decision-making process.[48]
- CCP Officials are not entitled to intervene in the operations of input producers. The GOC explained in its responses that the *Company Law* regulates the company governance by stipulating the position and duty of the shareholder meetings, board of directors, managers,

[42] *See* GOC's Case Brief at 6.
[43] *Id*.
[44] *Id.* at 7 (citing Memorandum, "The relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be 'public bodies' within the context of a countervailing duty investigation," dated May 18, 2012 (CCP Memorandum), placed on the record in the Additional Documents Memorandum).
[45] *See* GOC's Case Brief at 7.
[46] *Id*. at 8 (citing the Public Bodies Memorandum at 35-36).
[47] *Id*.
[48] *See* GOC's Case Brief at 9.

and supervisors, but does not authorize CCP officials any position or power to take part in the management and operations of companies.[49]
- Commerce has never presented evidence to demonstrate that the provisions of the *Company Law* in China are superseded or invalidated by primary party obligations, nor has it provided evidence of a CCP official that is involved in a company.[50]
- Provisions in 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.[51]

No other interested party commented on this issue.

Commerce's Position: As explained in Comment 1 above, we are relying on facts available with an adverse inference to find that CCP officials are present in certain of the companies that supplied the company respondents with their input products (*i.e.*, solar grade polysilicon, aluminum extrusions, and solar glass) as individual owners, managers, and members of the board of directors.[52] As AFA, we find that this gives the CCP, as the government, meaningful control over these companies and their resources. As discussed in Comment 1, the Public Bodies Memorandum details that an entity with significant CCP presence on its board or in management or in party committees is controlled such that it possesses, exercises, or is vested with governmental authority.[53] Thus, we find that the companies, ostensibly private, that provided JA Solar and Risen Energy with their input products including ostensibly private entities, are "authorities" within the meaning of section 771(5)(B) of the Act.

In its questionnaire response, GOC stated that our questions regarding the role of CCP officials and organizations in the management of, and operations of, input suppliers are irrelevant and do not go to whether the suppliers at issue are public bodies for the purposes of Commerce's LTAR analysis.[54] However, we have explained at length our understanding of the CCP's involvement in China's economic and political structure.[55] Commerce has determined that "available information and record evidence indicates that the CCP meets the definition of the term 'government' for the limited purpose of applying U.S. CVD law to China.[56] Additionally, publicly available information indicates that Chinese law requires the establishment of CCP organizations "in all companies, whether state, private, domestic, or foreign-invested" and that such organizations may wield a controlling influence in the company's affairs.[57]

With regards to the GOC's claim that the *Company Law* prohibits the CCP officials from taking positions in private companies, Commerce has previously found that CCP officials "can, in fact,

[49] *Id*.
[50] *Id.* at 9-10.
[51] *Id*. at 10.
[52] *See Solar Cells from China 2015 AR* IDM at 12.
[53] *See* Public Bodies Memorandum at 33-36, placed on the instant record in the Additional Documents Memorandum.
[54] *See* GOC's December 30, 2019 QR at 39
[55] *See* CCP Memorandum.
[56] *See Preliminary Results* PDM at 26 (citing CCP Memorandum at 33).
[57] *See Preliminary Results* PDM at 26 (citing CCP Memorandum at 35-36 and sources therein).

serve as owners, members of the board of directors, or senior managers of companies."[58] In a prior proceeding, Commerce found that the GOC's basis for this assertion rests on the Executive Opinion of the Central Organization Department of Central Committee of CPC on Modeling and Trial Implementation of the Provisional Regulations of State Civil Servants on CCP Organs (ZHONG FA (1993) No. 8), which reflects the CCP's intent to model its personnel management system after the Civil Servant Law, including restrictions on enterprise employment.[59] However, it has been explained that this rule only applies to "staff of the administrative organs of the CCP and specified officials."[60] Thus, the rule only applies to a subset of party and government officials. The GOC has not defined the "specified officials" to which this rule applies, nor has it defined the officials to which this rule does not apply.[61]

This finding illustrates that CCP officials are able to serve as owners, members of the board of directors, or managers of input producers. With respect to this finding, we also note that the Public Bodies Memorandum plainly states that the CCP "may exert varying degrees of control {in private companies} in different circumstances."[62] Additionally, in *PC Strand from China*, Commerce determined that, "{i}n the instant investigation, the information on the record indicates that certain company officials are members of the Communist Party and National Party Conference as well as members of certain town, municipal, and provincial level legislative bodies."[63] Commerce understands "National Party Conference" to be a reference to the "National Party Congress," which is described in the Public Bodies Memorandum as "the highest leading body of the Party."[64] Commerce considers representatives of the National Party Congress to be relevant government officials for purposes of CVD law and an "authorities" analysis.[65]

We have found in prior cases that, when examining whether CCP officials are among a company's owners, senior managers, or directors, or if a CCP primary organization such as a party committee is embedded in the company's structure, the entity possessing direct knowledge of these facts is the CCP (or the GOC) itself.[66] In fact, in prior CVD proceedings involving China, we found that the GOC was able to obtain the information requested independently from the companies involved. We also found that statements from the companies, rather than from the GOC or from members of the CCP themselves, were not sufficient as a basis for determining whether CCP

[58] *See*, *e.g.*, *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9275 (March 5, 2018) IDM at 53.
[59] *See Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 52301 (September 3, 2014) (*OCTG from China*) IDM at Comment 7.
[60] *Id*.
[61] *Id*.; *see also Carbon and Alloy Steel Threaded Rod from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 8833 (February 18, 2020) (*Carbon and Alloy Threaded Rod from China*) IDM at 16.
[62] *See* Public Bodies Memorandum at 35-36.
[63] *See Pre-Stressed Concrete Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010) (*PC Strand from China*) IDM at 13.
[64] *See OCTG from China* IDM at Comment 7.
[65] *See Carbon and Alloy Threaded Rod from China* IDM at 16.
[66] *See 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 22, 2014) (*Citric Acid from China 2012 AR*) IDM at 4-6; *see also Carbon and Alloy Threaded Rod from China* IDM at 16.

officials were embedded in a company's structure as owners, senior managers, or directors.[67] Further, the GOC has been able to provide requested information on CCP involvement in input producers in a prior CVD investigation.[68]

For these reasons, we continue to find that it is reasonable to infer that GOC or CCP officials are present as owners, senior managers or directors of the ostensibly private input producers at issue, and that these producers are "authorities" within the meaning of section 771(5)(B) of the Act.

Comment 3: Whether Commerce Should Apply AFA to the EBCP

The GOC's Comments:

- Commerce's application of AFA to the EBCP is unlawful and is unsupported by substantial evidence. In the *Preliminary Results*, Commerce applied AFA regarding countervailability and to usage based on the GOC's failure to provide certain requested information.[69]
- Commerce specifically faulted the GOC for failing to provide: (1) original and translated copies of laws, regulations, or other governing documents regarding the 2013 Administrative Measures revisions; and (2) the list of partner banks involved in the disbursement of funds under the EBCP.[70]
- Commerce preliminarily found that information was missing from the record regarding countervailability and usage, and that the GOC failed to cooperate to the best of its ability by not providing this information, necessitating the use of adverse inferences.[71]
- As an adverse inference, Commerce concluded that the company respondents and their customers used this program and assigned an AFA rate of 5.46 percent.[72]
- The Court of International Trade (CIT) has ruled in at least 15 separate decisions under virtually identical circumstances that Commerce's application of AFA to this program "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 of the Act.[73]
- The present case notwithstanding, Commerce has been reluctantly changing its approach, but only after being chastised by the Court.[74] Commerce has reversed its finding on remand in every appealed case since *Guizhou Tyre* and has correctly found this program was not used based on the non-use declarations submitted by the respondent company's customers. Those certifications are virtually identical to the certifications submitted to Commerce in the instant

[67] *See Citric Acid from China 2012 AR* IDM at 61 ("{w}e requested the GOC to respond to the Input Producer Appendix because it is the party to the investigation which has in its possession verifiable information about the CCP's structure and functions that are relevant to {Commerce's} determination of whether producers of inputs are 'authorities' within the meaning of section 771(5)(B) of the Act."); *see also PC Strand from China* IDM at Comment 8, where it is discussed that {Commerce} requested and obtained from the GOC information which was verified at the GOC, on the ownership of an input producer and the involvement of a shareholder in the CCP.
[68] *See High Pressure Steel Cylinders from China* IDM at 13.
[69] *See* GOC's Case Brief at 12.
[70] *Id*.
[71] *Id*.
[72] *Id*. at 13.
[73] *Id*.
[74] *Id*.

review.[75] Commerce should make the same non-use determination in this administrative review.

- Any failures to provide information on the part of the GOC at most went to the issue of countervailability and not to use.
- To be consistent with the law, Commerce's AFA finding must satisfy three criteria: (1) there must be a gap in the record; (2) the offending party must have failed to cooperate to the best of its ability; and (3) the overall AFA decision must be supported by substantial evidence in the record. Commerce's decision in this administrative review fails to satisfy these criteria, rendering its resort to AFA for this program unlawful.[76]
- CVD proceedings are different from antidumping duty (AD) proceedings because of the involvement of the government of the country in question as a responding party in addition to the mandatory company respondents. The involvement of a government as a third party, the actions of which can impact the respondents, has resulted in a modified application of AFA when directed at the government respondent.[77]
- Commerce emphasized the point in *HRC from India*, rejecting a petitioner's argument for the application of AFA in circumstances where the Government of India failed to respond to a questionnaire regarding allegations of additional subsidies.[78] The Courts have embraced this legal principle.[79] 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."[80]
- In its discussion of AFA for this program, Commerce explained that the information the GOC failed to provide was necessary for Commerce's complete understanding of how the program operates. However, looking at each of the missing pieces of information identified by Commerce, it is difficult to see how Commerce reached this conclusion.[81]
- Even if the information was critical to Commerce's understanding, the information was only critical to understanding the operation of the program and has no bearing on establishing usage of the program or the ability to verify its usage.[82]
- In explaining the reasoning for its preliminary AFA application, Commerce noted that it requested the 2013 Administrative Measures Revisions to the EBPC program, which were not provided. However, this is irrelevant to whether Commerce could have established usage in

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[75] *Id*. (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*, CIT Consol. Ct. No. 17-00101, Slip Op. 19-114 (*Guizhou Tyre I*)).

[76] *See* GOC's Case Brief at 13-14.

[77] *Id*. at 14 (citing *Countervailing Duty New Shipper Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 FR 9993 (February 25, 2008) IDM at Comment 2).

[78] *See* GOC's Case Brief at 15 (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) IDM at Comment 6 (citing *Stainless Steel 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))).

[79] *See* GOC's Case Brief at 16 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331 (CIT 2013), 917 F. Supp. 2d 1331, 1342 (citing *Fine Furniture (Shanghai) Ltd. v United States*, 865 F. Supp. 2d 1254 (CIT 2012))).

[80] *See* GOC's Case Brief at 16 (citing *Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1313 (CIT 2017)).

[81] *See* GOC's Case Brief at 19.

[82] *Id*.

the course of a China Ex-Im Bank (EXIMBC) verification. The GOC explained in its questionnaire response how the EXIMBC determined usage in this case.[83]

- These methods were no different than the methods the EXIMBC has used to determine usage prior to the date of the 2013 Administrative Measures Revisions. Moreover, Commerce has never inquired into whether the 2013 Administrative Measures Revisions impacted how the EXIMBC can determine usage; the GOC has said that it does not.[84]
- 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.[85]
- Commerce explained that it requested information on the names of partner/correspondent banks and intermediary banks through which the program could be indirectly disbursed by the EXIMBC.[86] In response, the GOC explained that this information was not necessary because the company respondents' customers did not use this program and this information was not relevant to Commerce's usage determination.[87]
- Commerce failed to make a rational connection between the information requested (a list of third-party banks) and the conclusion (that without this information, Commerce cannot determine or verify usage).[88]
- The information that was not provided goes to the countervailability of this program and does not impact the evaluation of the program nor the determination of the program's usage.[89]
- Record evidence demonstrates that the EBCP was not used. Usage could be determined in this case in three corroborating ways: (1) the GOC stated that the respondents' customers did not use this program; (2) the respondents provided statements of non-use after confirmation with their U.S. customers; and (3) the respondents' customers submitted declarations {of non-use}.[90]
- If there was a failure for a gap in the record, it is Commerce's failure to review the reported non-use information and statements provided by the GOC and by the respondent companies and to ask the appropriate questions.[91]
- Commerce could have attempted to verify the claims of non-use at the offices of the respondents' U.S. customers but chose not to.[92]

JA Solar's Comments:

- The *Preliminary Results* wrongly imputes a benefit to JA Solar under the EBCP because it: (1) applies AFA against a cooperating JA Solar when no necessary information was missing on the record to make a usage finding; (2) refuses to verify JA Solar's customer declarations of

[83] *Id*. at 19.
[84] *Id*.
[85] *Id*. at 19-20 (citing *Guizhou Tyre Co., Ltd. v. United States*, Slip Op. 19-114 (August 21, 2019) (*Guizhou Tyre II*) and *Guizhou Tyre I*).
[86] *See* GOC's Case Brief at 20 (citing *Preliminary Results* PDM at 37).
[87] *See* GOC's Case Brief at 20.
[88] *Id*. at 20 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (explaining that agencies must "articulate a {} rational connection between the facts found and the choice made")).
[89] *See* GOC's Case Brief at 20.
[90] *Id*. at 21.
[91] *Id*. at 22.
[92] *Id*. at 23.

non-use; and (3) treats JA Solar differently than other respondents in the past two administrative reviews where Commerce found non-use of this program by all mandatory respondents under nearly identical records.[93]

- If information is missing from the record, Commerce may rely on "facts otherwise available." If Commerce makes a finding of noncooperation, then it may use an adverse inference in selecting from facts otherwise available against that non-cooperative party.[94]
- Commerce ignored evidence from the GOC, JA Solar, and from JA Solar's customers that established non-use of the EBCP.
- In the *Preliminary Results*, Commerce maintained that the GOC did not provide the "2013 revisions to the administrative measures" and a list of "partner/correspondent banks that are used to disperse funds through this program." Information concerning the operation of the EBCP is not necessary to determine that JA Solar did not use this program during the POR.[95]
- In the appeal of the third administrative review of the CVD order on solar cells from China, the CIT previously rejected identical reasoning relied on by Commerce here, finding that Commerce did not explain why the GOC's failure to explain this program was necessary to assess claims of non-use and why other information accessible to the respondents was insufficient to fill whatever gap was left by the GOC's refusal to provide internal bank records.[96]
- The GOC did not refuse to answer questions related to the operation of the EBCP but merely explained that such information was unnecessary because respondents did not use the program.[97]
- The items Commerce maintained are missing from the record are irrelevant to JA Solar's actual usage. JA Solar submitted certified statements that neither it, nor any of its unaffiliated customers received assistance under this program. JA Solar also submitted customer declarations from its unaffiliated customers and from its reseller stating that these parties did not receive any type of financing from this program. No party challenged these non-use declarations.[98]
- Commerce failed to provide an adequate explanation for why any alleged gap in the record concerning the administration of this program is relevant to an actual usage finding given JA Solar's affirmative statement of non-use and declarations of non-use from its customers.[99]
- Commerce violated its second statutory mandate under section 776(b) of the Act by applying AFA against a cooperating party when adequate information existed elsewhere on the record demonstrating JA Solar's non-use of this program.[100]
- Commerce made no attempt to verify JA Solar's customer declarations of non-use, arguing that it could not accept these declarations because it does not know enough about these certifications of non-use. The CIT mandated that Commerce cannot refuse to conduct

[93] *See* JA Solar's Case Brief at 5.
[94] *Id*. at 6 (citing section 776(a) and (b) of the Act).
[95] *See* JA Solar's Case Brief at 7 (citing *Preliminary Results* PDM at 37-38).
[96] *See* JA Solar's Case Brief at 7 (citing *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316, 1326-27 (CIT 2018) (*Trina Solar I*); *see also Clearon Corp. v. United States*, No. 17-00171 (CIT 2020); and *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1358-60 (CIT 2019)).
[97] *See* JA Solar's Case Brief at 8.
[98] *Id*. at 8-9.
[99] *Id*. at 9 (citing *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1315 (CIT 2018)).
[100] *See* JA Solar's Case Brief at 14.

verification on the basis that it lacks an understanding of the EBCP and must at least attempt to verify the declarations of non-use.[101]

- Commerce could have followed its normal verification by sampling loans and examining the underlying information, and it could have solicited additional information from JA Solar.[102]
- Since the release of the *Preliminary Results*, the CIT has rejected Commerce's use of AFA in prior reviews based on its alleged ability to verify another mandatory respondent's statements and declarations of non-use regarding the EBCP.[103] To avoid almost certain reversal at the CIT, Commerce must apply the same logic it followed in previous reviews to the current review and find that JA Solar did not benefit from the EBCP.

Risen Energy's Comments:

- Record evidence demonstrates that Risen Energy did not use or benefit from the EBCP. Risen Energy responded that it has never applied for any loans under this program for itself or for its customers, and it provided customer declarations of non-use from every customer it sold to during the POR.[104] Despite record evidence, Commerce still applied AFA to Risen Energy for this program.
- Commerce did not issue any supplemental questionnaires to Risen regarding this program. It is unconceivable that Risen Energy would not be aware of their existence as a beneficiary of this program. Nonetheless, Commerce found, as AFA, that Risen Energy benefitted from this program because the GOC did not provide a copy of the alleged internal guidelines from 2013 or supply a list of the alleged banks/third-party institutions.[105]
- Commerce's preliminary finding that Risen Energy benefitted from and used the EBCP is unsupported by the record and is in violation of the statute and case law precedents that prohibit the application of adverse inferences against cooperating respondents when no necessary information is missing from the record.[106]
- For any use of facts otherwise available to facts otherwise available with adverse inferences, Commerce must find that the gap in the record was caused by a respondent's failure to cooperate to the best of its ability.[107] Commerce has not identified any gap in the record with necessary information missing.
- The only missing information that Commerce states is missing is the EXIMBC's 2013 Revisions, which allegedly contains the identity of foreign banks to whom the EXIMBC could potentially disburse loans. The CIT has repeatedly found this to be irrelevant information.[108]
- In *Trina Solar I*, the CIT held that although Commerce can choose among facts available or AFA to fill the record, the "choice must fill in the information that is actually missing."[109]

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[101] *Id*. at 15 (citing *Preliminary Results* PDM at 38; *see also Changzhou Trina Solar Energy Co. v. United States*, No. 17-00198 (CIT 2019) (*Trina Solar II*)).
[102] *See* JA Solar's Case Brief at 16-17.
[103] *Id*. at 18 (citing *Trina Solar I*; *see also Trina Solar II*).
[104] *See* Risen Energy's Case Brief at 24.
[105] *Id*. at 24-25 (citing *Preliminary Results* PDM at 37-38).
[106] *See* Risen Energy's Case Brief at 25.
[107] *Id*. (citing section 776(b) of the Act; *see also Nippon Steel Corp. v. United States* 337 F.3d 1373, 1382 (Fed. Circ. 2003)).
[108] *See* Risen Energy's Case Brief at 25 (citing, *e.g.*, *Trina Solar I*; *see also Trina Solar II* and *Guizhou Tyre*, *et al*.)
[109] *See* Risen Energy's Case Brief at 27 (citing *Trina Solar I*).

- If Commerce were to claim that record evidence, such as importer's certification of non-use of the EBCP, is unverifiable, Commerce must "first reasonably show that such information is, in fact, unverifiable."[110]
- On remand, Commerce claimed that it would not be able to conduct an effective verification without the 2013 internal guidelines. The CIT, however, rejected Commerce's claims.[111]
- The rationale behind all of the previous court opinions on this issue is the same, *i.e.*, Commerce has failed to explain the need for thoroughly understanding every single detail of the program's operations, nor does it illustrate beyond a conclusory sentence as to why such understanding is necessary for verification.[112]
- In the instant proceeding, Commerce has closed its eyes on Risen Energy's and its customers' statements of non-use and focused solely on the information on what the GOC refused to supply, which is not "necessary information" to begin with. Commerce has not identified any "gap" on the record which would then trigger the lawful use of facts available or facts available with adverse inferences taking into account the information Risen Energy and the GOC supplied.[113]
- Commerce did not notify Risen Energy that it found any of its responses and information to be deficient or unsatisfactory. The record in this review provides Commerce with no basis upon which to apply AFA against Risen Energy and find that it benefited from the EBCP and, therefore, Commerce should find non-use of this program by Risen Energy in the final results.[114]

No other interested parties commented on this issue.

Commerce's Position: We continue to find that 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 EBPC, which is consistent with Commerce's decision in prior segments of this proceeding.[115] We next describe the evolution of Commerce's treatment of this program.

Solar Cells Initial Investigation of the EBCP

Commerce first evaluated and countervailed the EBCP in the 2012 CVD investigation of solar cells from China.[116] 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."[117] Commerce initially asked the GOC to

[110] *Id*.
[111] *See* Risen Energy's Case Brief at 27 (citing *Trina Solar II*).
[112] *See* Risen Energy's Case Brief at 28.
[113] *Id*. at 28-29.
[114] *Id*. at 29.
[115] *See, e.g.*, *Solar Cells from China 2015 AR* at Comment 2; *see also Solar Cells from China 2016 AR* at Comment 1.
[116] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Solar Cells from China Investigation*) IDM at 9 and Comment 18.
[117] *See Solar Cells from China Investigation* IDM at 59.

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.[118]

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, and simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."[119] 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."[120] 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.[121] The GOC again refused to provide sample application documents, regulations, or manuals governing the approval process, and instead provided only a short description of the application process which gave no indication of how an exporter might be involved in the provision of export buyer's credits, how it might have knowledge of such credits, or how such credits might be reflected in a company's books and records.

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.[122] Additionally, Commerce concluded that even if the respondent company might have some knowledge of loans provided to its customers through its involvement in the application process, such information is not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

> {E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that the Department needs to examine in order to verify that the information is complete and accurate. For verification purposes, the Department must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as well as to review supporting documentation for individual loans, grants, rebates, *etc.* If all a company received was a notification that its buyers received the export credits,

[118] *Id*.
[119] *Id*.
[120] *Id*. at 60.
[121] *Id.* at 60-61.
[122] *Id.*

> or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs the Department that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.[123]

Essentially, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its verification methods,[124] which are primarily the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, or other documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, provides no assurance to Commerce that it has seen all relevant information.[125]

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

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

[124] Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products*), and accompanying IDM at 93. This was affirmed by the Court in *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016). In *Changzhou Trina Solar Energy Co. v. United States*, Consol. Court No. 17-00198, Slip Op. 18-166 at 9-10 (CIT 2018) (*Changzhou II*), the Court noted that the explanation from *Solar Products* constituted "detailed reasoning for why documentation from the GOC was necessary" to verify non-use. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou II* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had "failed to show why a full understanding" of the program was necessary to verify non-use. *Id.* at 10 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017) (*Solar Cells from China 2014 AR*), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 46760 (October 6, 2017), and accompanying IDM). The Court in *Guizhou Tyre Co., Ltd., et al. v. United States*, Consol Ct. No. 17-00101, Slip Op. 18-140 (CIT 2018) reached a similar conclusion concerning the 2014 review of tires from China. *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

[125] 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).

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, *etc.* Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the 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 the Department to check whether the U.S. customers of the company respondents had received export buyer's credits, and such records could then be tied to the {EXIMBC's} financial statements."[126] However, the GOC refused to allow Commerce to query the databases and records of the EXIMBC.[127] Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

Chlorinated Isocyanurates Investigation of the EBCP

Two years later, in the investigation of chlorinated isocyanurates,[128] the 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

[126] *See Solar Cells from China Investigation* IDM at 62.
[127] *Id.*
[128] *See Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014), IDM (*Chlorinated Isos from China Investigation*).

selected customers' accounting and financial records that no loans were received under this program."[129]

2013 Amendments to the EBCP

Our understanding of the operation of the EBCP began to change after the chlorinated isocyanurates 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.[130] In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the *Silica Fabric from China* investigation,[131] 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.[132] 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 the Export-Import Bank of China" which were issued by the EXIMBC on September 11, 2005 (referred to as "*1995 Implementation Rules*"); (2) "Rules Governing Export Buyer's Credit of the Export-Import Bank of China" which were issued by the EXIMBC on November 20, 2000 (referred to as "*2000 Rules Governing Export Buyers' Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the Export-Import Bank of China.[133] 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."[134] The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."[135]

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

[129] *Id.* at 15.
[130] *See Citric Acid 2012* IDM at Comment 6 ("{N}otwithstanding the non-use claims of the RZBC Companies and the GOC, we find that the GOC's refusal to allow the verifiers to examine the EXIM Bank database containing the list of foreign buyers that were provided assistance under the program during the POR precluded the Department from verifying the non-use claims made by the RZBC Companies and the GOC.")
[131] *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 from China*), and accompanying IDM.
[132] *See* GOC's Initial Questionnaire Response, "GOC CVD Response to the Initial Questionnaire: Third Administrative Review of the Countervailing Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated April 5, 2018 (GOC's April 5, 2018 Initial Questionnaire Response) at Exhibit II-F-1 (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)).
[133] *Id.*
[134] *Id.*
[135] *Id.*

> 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 the Department to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the GOC impeded the Department's understanding of how this program operates and how it can be verified.
>
> Additional information in the GOC's supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the {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.[136]

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}."[137]

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."[138]

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.[139] The GOC failed to respond to Commerce's request, and instead stated that it believed that none of the respondents under review applied for, used, or benefitted from this program. The GOC further

[136] *See Silica Fabric* IDM at 12 (internal citations omitted).
[137] *Id.* at 62.
[138] *Id.*
[139] *See Preliminary Results* PDM at 36-37.

stated that whether or not the EXIMBC uses a partner bank in African infrastructure project, for example, is irrelevant to this case.[140] Additionally, the GOC refused to answer our question specific to the interest rates established during the POR for this program, and instead stated that at that stage of the proceeding it believed that none of the respondents under review applied for, used, or benefitted from this program and, therefore, this question was not applicable.[141]

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.[142] Though the GOC provided some information, it was ultimately unresponsive to the request and failed to even reference the EXIMBC's 2013 revision of this program, as referenced in the GOC's September 6, 2016, Silica Fabric Questionnaire Response, in which the GOC stated that the EXIMBC adopted certain internal guidelines in 2013, which may have eliminated the USD 2 million minimum requirement.[143] The GOC's failure to provide this requested information prevented Commerce from fully analyzing the operation of this program, as discussed below.

Our CVD Questionnaire requested the GOC documents related to the administration of this program and that the GOC identify whether the respondent companies used the program.[144] The GOC reported that it believed that none of the respondent companies applied for, used, or benefitted from this program.[145] Additionally, JA Solar and Risen Energy each reported that their customers did not use the EBCP during the POR and provided declarations from their U.S. customers indicating that their customer did not obtain financing through the program.[146]

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 from China*, where we asked the GOC about amendments to the EBCP,[147] we continue to find that the GOC has refused to provide the requested information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions. From past segments of this proceeding, the GOC has been made aware that Commerce considers the 2013 program revisions are necessary and crucial for its understanding regarding how this program is administered.[148] Specifically, the 2013 program 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

[140] *See* GOC's December 30, 2019 QR at 125-126.
[141] *Id*.
[142] *See* Commerce's Letter, "Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Countervailing Duty Questionnaire," dated November 5, 2019 (CVD Questionnaire) at II-27.
[143] In the CVD Questionnaire, we asked the GOC to provide original and translated of copies of laws, regulations, or other governing documents cited by the GOC in its supplemental questionnaire response in the GOC's September 6, 2016, Silica Fabric Questionnaire Response, which includes references to the 2013 administrative revisions.
[144] *See* CVD Questionnaire at II-26 – II-27.
[145] *See* GOC's December 30, 2019 QR at 125-128.
[146] *See* JA Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Countervailing Duty Questionnaire Response – Section III Response," dated December 30, 2019 (JA Solar's December 30, 2019 QR) at vol. I, page III-39; *see also* Risen Energy's Letter, "Crystalline Silicon Photovoltaic Cells, from the People's Republic of China: Section III Questionnaire Response," dated December 31, 2019 (Risen Energy's December 31, 2019 QR) at 28.
[147] *See Silica Fabric from China* IDM.
[148] *See Solar Cells from China 2015 AR* at Comment 2; *see also Solar Cells from China 2016 AR* at Comment 1.

USD 2 million minimum business contract requirement identified in the 2000 *Administrative Measures*.[149]

The 2013 program revisions are necessary and crucial to our understanding of the program and for any determination of whether the "manufacture, production, or export" of JA Solar's and Risen Energy'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 program revisions, Commerce has well-established rules governing the handling of business proprietary information in its proceedings.[150]

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 from China*, 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.[151] Thus, Commerce asked the GOC to provide the same information it provided in the *Silica Fabric from China* investigation regarding the rules implementing the EBCP, as well as any other governing documents (discussed above).[152]

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 simply referred us to the responses from the company respondents.[153] When asked to provide interest rates that were applicable during the POR, the GOC again dismissed the question, stating "at this stage, the GOC *believes* that none of the respondents under review applied for, used, or benefitted from the alleged program. Therefore, this question is not applicable."[154] (Emphasis added.) Thus, in responding to this question, the GOC appears to have merely speculated that the company respondents did not use this program, and made the unwarranted decision that this question was not applicable to Commerce's examination of this program. As we stated in our position to Comment 1, above, it is Commerce, and not the respondents that determine what information is necessary with respect to Commerce's CVD analysis.

[149] *See Silica Fabric from China* IDM at 12 and 16.
[150] *See* section 777(c)(1)(B) of the Act; *see also* 19 CFR 351.105(c).
[151] *See Silica Fabric from China* IDM at 12.
[152] *See* CVD Questionnaire at II-26 – II-27.
[153] *See* GOC's December 30, 2019 QR at 125.
[154] *Id*. at 125-126.

We continue to find the GOC's responses are 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 JA Solar's and Risen Energy'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 isocyanurates investigation. Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the EXIMBC.[155] 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.[156] 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.[157] Thus, the GOC's refusal to provide the 2013 program 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 a full investigation of this program and to confirm the claims of non-use by JA Solar's and Risen Energy'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 isocyanurates 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.[158] However, based on our more recent understanding of the program in this segment of the proceeding as discussed above, performing the verification steps outlined above to make a determination of whether the "manufacture, production, or export" of JA Solar's and Risen Energy's merchandise has been subsidized would, 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

[155] *See* GOC's December 30, 2019 QR at Exhibit II F.3 (containing the GOC's September 6, 2016 Silica Fabric Questionnaire Response) at 4-5.
[156] *Id*.
[157] *Id*.
[158] *See Chlorinated Isos from China Investigation* IDM at 15.

> 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.[159]

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,[160] 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.

Without such explanation and evidence, it would be unreasonably onerous for Commerce to comb through the business activities of both JA Solar's and Risen Energy'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 JA Solar's and Risen Energy'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 program 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,

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[159] *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*) IDM at 30.
[160] *Id.* at Comment 2. 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.

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 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 JA Solar's or Risen Energy'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 past segment of this proceeding.[161] 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.[162] 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, "{b}ased on the information available to the GOC at this stage, the GOC believes that none of the respondents under review applied for, used, or benefited from the alleged program."[163] The GOC explained that to make this determination, the GOC, based on the list of the company respondents' U.S. customers that were provided by them, contacted the EXIMBC, which confirmed that none of the U.S. customers of the company respondents used the EBCP

[161] *See Solar Cells from China 2015 AR* at Comment 2; *see also Solar Cells from China 2016 AR* at Comment 1.
[162] *See* GOC's December 30, 2019 QR at 125-128 and at Exhibits II F.1, II F.2, and II F.3
[163] *See* GOC's December 30, 2019 QR at 125-126.

from the EXIMBC during the POR.[164] The GOC went on to note that whether a foreign buyer received a loan through this program normally can be confirmed by the Chinese exporter. According to the GOC, normally, the Chinee exporter is aware of the buyer's receipt of the loans and is involved in the loan evaluation proceeding, and, in particular, is involved in the post-lending loan management that is conducted by the EXIMBC.[165] The GOC further stated that this can be evidenced by the relevant requirements for application for export buyer's credits and after-loan management as set forth in the *Administrative Measures*.[166]

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 JA Solar, Risen Energy, nor the GOC, provided enough information for Commerce to understand this interaction or how it was reflected, if at all, in JA Solar's Risen Energy's, or their customers' books and records. 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 JA Solar and Risen Energy. Moreover, we find that, without a thorough understanding of how the program functions, it is impossible to confirm non-use of the program. As we explained in the *Preliminary Results*:

> We note that Commerce has reviewed this program in the most recently completed administrative review of this CVD order, in which we explicitly questioned the GOC about the 2013 revisions {sic} and on whether funds from this program may be disbursed through third-party banks.[167] Thus, the GOC's refusal to even reference the 2013 revisions to the administrative measures,[168] which provide internal guidelines for how this program is administered by the {EXIMBC}, and a list of partner/correspondent banks that are used to disperse funds through this program, constitutes withholding necessary information and impeded Commerce's ability to conduct its investigation of this program.[169]

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, or to other documents such as income 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 JA Solar's and Risen Energy'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 JA

[164] *Id*. at 126-127.
[165] *Id*. at 127.
[166] *Id*. at 127 and at Exhibit II. F.1.
[167] Citing *Solar Cells from China 2016 AR Preliminary* PDM at 33-36, unchanged in *Solar Cells from China 2016 AR*.
[168] Citing the GOC's December 30, 2019 QR at Exhibit II F.3.
[169] *See Preliminary Results* PDM at 38.

Solar's, Risen Energy's, their customers', and/or the GOC's participation in the program. 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 JA Solar's and Risen Energy'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 JA Solar and Risen Energy 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.[170] Without cooperation from the EXIMBC and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to JA Solar's and Risen Energy's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

Further, we conclude that it is not possible to determine whether export buyer's credits were received with respect to the export of solar cells, because the potential recipients of export buyer's credits are not limited to the customers of JA Solar and Risen Energy as they be may be received by other third-party banks and institutions. Again, Commerce would not know what indicia to look for in searching for usage or 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) of the Act, with the exporters, U.S. customers, or at the EXIMBC itself given the refusal of the GOC to provide the 2013 program 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.

[170] *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) IDM at 31 (confirming that the GOC solely owns the EXIMBC).

In particular, in *Trina Solar Products*,[171] 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..."[172]

Moreover, Commerce disagrees with JA Solar's and Risen Energy's arguments that Commerce does not need the information requested from the GOC to determine non-use. As an initial matter, we cannot simply rely on the GOC's assurances that it has checked its records. We have no way of verifying such statements without the GOC providing us with the requested documents which would allow us to then properly examine its claims of non-use. Further, given the constraints on Commerce resulting from the GOC's failure to provide all of the necessary information to fully understand the program's operation, Commerce would be unable to examine each and every loan obligation of each of JA Solar's or Risen Energy'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 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 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

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[171] *See Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1347-48 (CIT 2016) (*Trina Solar Products*), 195 F. Supp. 3d at 1355 (citing *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 79 FR 33174 (June 10, 2014) 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*)).

[172] *Id*.

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.

JA Solar and Risen Energy each argue that Commerce could have had a clear path to find non-use by either accepting JA Solar's and Risen Energy's customers' declarations or by verifying the declarations.[173] 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.[174] 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.[175] Moreover, the idea of searching through JA Solar's and Risen Energy'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 on the record because the GOC withheld information that we requested that was reasonably available to it, which significantly impeded the proceeding. In addition, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act, because the GOC failed to cooperate by not acting to the best of its ability to comply with Commerce's request for information. With respect to the GOC's argument that Commerce did not inform the GOC of any deficiencies in its questionnaire response and did not provide the GOC an opportunity to remedy any deficiencies, as detailed above, and given the history of the GOC's failure in other CVD proceedings to provide the requested information on this program that would enable Commerce to attempt to understand how this program is administered, we conclude that any further attempts to request the missing information from the GOC would be futile and would also result in the GOC granting itself an unwarranted extension of the deadline to provide this requested information. In the situation described above regarding the EBCP, the GOC's "response" was not merely deficient within section 782(d) of the Act. Rather, the GOC refused to provide the requested information at all. 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.

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[173] *See* JA Solar's Case Brief at 15; *see also* Risen Energy's Case Brief at 28.

[174] *See*, *e.g.*, *Chlorinated Isos from China Investigation* IDM at 15 ("While {Commerce} was unable to conduct a complete verification of non-use of this program at the {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 the {EXIMBC}.").

[175] *See*, *e.g.*, *Trina Solar Products*, 195 F. Supp. 3d at 1355 ("{Commerce} cannot typically look at the contents of a filing cabinet or binder and determine whether it includes everything that it's supposed to include.").

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 the 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 4: The Provision of Electricity

JA Solar's Comments:

- Commerce's benefit analysis in the *Preliminary Results* is flawed because the program is not specific to a region. Relying on AFA, Commerce determined that the GOC's National Development and Reform Commission (NDRC) in Beijing arbitrarily sets different prices in different regions in the provinces without commercial or market considerations.[176] Accordingly, Commerce preliminarily found that the electricity program was regionally specific under section 771(5A)(D)(iv) of the Act.
- The facts in the instant review are distinguishable from the third and fourth administrative reviews in this proceeding where the CIT upheld Commerce's use of AFA to find that the electricity program was specific.[177]
- In particular, the alleged gap in the record that Commerce identified as its basis for relying on AFA in the third and fourth administrative review is no longer applicable because the NDRC has delegated its price-setting authority to the local provinces. Even if Commerce wrongly continues to find that a gap exists, the record nonetheless demonstrates that no particular geographic regions receive a preferential rate under this program.[178]
- Before applying AFA, Commerce must find that the information is missing on the record as the result of a party's noncooperation. While the statute allows Commerce to use adverse inferences "in selecting from facts otherwise available," and provides various sources from which the information can be derived, the statute does not provide Commerce with the authority to skip important elements of its analysis because of an adverse inference.[179]

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[176] *See* JA Solar's Case Brief at 23 (citing *Preliminary Results* PDM at 34-35, and at 47).
[177] *See* JA Solar's Case Brief at 23 (citing *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00198 (CIT 2020); *see also Canadian Solar Inc. v. United States*, No. 18-00184 (CIT 2020)).
[178] *See* JA Solar's Case Brief at 23.
[179] *Id*. at 24 (citing sections 776(b)(1)(A) and (b)(2) of the Act; *see also Trina Solar I*, 352 F. Supp. at 1342; and *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1349 (CIT 2016) (rejecting Commerce's finding that various programs "are "specific in accordance with {section 771(5A) of the Act}," because Commerce's determination was a "sweeping legal conclusion lacking any factual foundation")).

- In the *Preliminary Results*, Commerce believes the GOC failed to provide provincial price proposals and information confirming the relationship between the NDRC and the provinces in setting price tariff schedules.[180] Commerce maintained that it required this information to understand the "nature of cooperation between the NDRC and the provinces in deriving price adjustments," going on to state that it could not confirm whether variances in prices among the provinces are "in accordance with market principles or cost differences."[181]
- The CIT sustained as reasonable Commerce's use of AFA in the third administrative review of solar cells because it concluded that Commerce supported its argument that the NDRC maintains some control over electricity prices in the provinces and that adjustments made by the NDRC may not comport with market principles.[182]
- The facts in the instant review are distinguishable from prior reviews based on the later publication of subsequent notices demonstrating that the NDRC has delegated its price-setting authority to the provinces.[183]
- The GOC explained that "the responsibility for setting electricity sales prices in within each Province has moved from the NDRC to the Provincial Governments" and a "competitive system has been established to create price that are tied to market fluctuations in the coal market and other market influences."[184] The relevant provincial pricing authorities are required to take into account overall demand and supply in their respective electricity markets as well as the costs of electricity generation and transmission.[185]
- Despite the information in Notices 3105, Notice 748, and the Guangdong Province Price Catalog, Commerce concluded that "the NDRC continues to play a major role in setting and adjusting price{s}."[186]
- Commerce wrongly relied on AFA, based on the GOC's alleged refusal to provide information related to the NDRC's price-setting role, as the record demonstrates that the NDRC no longer possesses the authority to "direct" price changes.[187]
- The GOC explained that according to *Central Pricing Catalogue* the specific price of electricity shall be set by the provincial pricing departments, and that this new structure eliminated the need for provincial price proposals that had been used by the NDRC to set prices for each province.[188]
- The GOC clarified that the NDRC is "in charge of setting guidelines for electricity pricing," while leaving the provincial pricing authorities to "implement those guidelines and to formulate the specific price levels for different kinds of electricity users within their relevant jurisdictions."[189]
- The GOC explained that the NDRC's Notice 3169 ultimately related to "fluctuations in thermal coal prices which are decided by the market," and Article 3 of Notice 3169 states that

[180] *See* JA Solar's Case Brief at 24 (citing *Preliminary Results* PDM at 47).
[181] *See* JA Solar's Case Brief at 24 (citing *Preliminary* Results PDM at 34 and 46).
[182] *See* JA Solar's Case Brief at 24 (citing *Changzhou Trina Solar Energy Co. v. United States*, No. 17-00198 (CIT 2020) (*Trina Solar III*)).
[183] *See* JA Solar's Case Brief at 25.
[184] *Id*. (citing GOC's December 30, 2019 QR at 73).
[185] *See* JA Solar's Case Brief at 25.
[186] *Id*. (citing *Preliminary Results* PDM at 34).
[187] *See* JA Solar's Case Brief at 25.
[188] *Id*. at 26 (citing GOC's December 30, 2019 QR at 74).
[189] *See* JA Solar's Case Brief at 26 (citing GOC's December 30, 2019 QR at 76).

"specific electricity price levels of all kinds of electric power users should be formulated according to local actual situation by provincial-level price competent department and should be published to the society for implementation."[190]

- Commerce rejected this evidence claiming that "record information such as Notices 748 and 3105, and the Guangdong Province Price Catalog" provide that pricing determinations must be "reviewed and approved" by both the Provincial Government and the NRDC."[191]
- Commerce focuses on the fact that the GOC failed to provide Annex 1 of Notice 748, but Notice 748 "only dealt with the elimination of the preferential electricity price of fertilizer production."[192] Notice 748, therefore, did not have a broad impact on pricing authority delegated to the provinces.
- Commerce incorrectly focuses on the fact that Notice 3105 provides that the provinces formulate prices in accordance with an "average regulation standard regulated in the appendix {of Notice 3105}."[193] However, the GOC clarified that this document "provides the most basic principles of electrical adjustment" and that "it is up to the individual province to set its own specific adjustment price."[194]
- These basic guidance levels are not binding upon the provinces. The primary focus of Notice 3105 is ensuring that the provincial agencies report any adjustment they make in electricity tariffs to the NDRC.[195]
- Commerce need not provide a perfect explanation for its finding, but its decision must be reasonably discernable.[196] This is not the case in the instant review where, at most, the NDRC provides general guidelines that are not binding upon the provinces and the record demonstrates that the NDRC no longer possesses the authority to direct price changes.
- Given that the NDRC has now delegated its price-setting authority to the provinces, Commerce's use of AFA based on missing provincial price proposals is baseless because the GOC cannot provide information that does not exist.[197]
- Commerce failed to connect the facts it identified as missing on the record to its use of AFA. Commerce focuses on the fact that "electricity prices vary from province to province," which is undisputed, and presumes that the "prices are set by authorities of the central government in Beijing."[198] From there, Commerce makes an unjustified illogical leap to determine that "there is in fact a regionally specific subsidy program, because the central Beijing authority is setting different prices in different provinces without explanation."[199]
- Commerce failed to explain how its inference that certain regions are given subsidized electricity prices follows from the alleged gap created by the GOC's failure to provide information on provincial proposals. The information requested by Commerce was not

[190] *See* JA Solar's Case Brief at 26-27 (citing GOC's December 30, 2019 QR at 76).
[191] *See* JA Solar's Case Brief at 27 (citing *Preliminary Results* PDM at 33-34).
[192] *See* JA Solar's Case Brief at 27 (citing GOC's December 30, 2019 QR at 75).
[193] *See* JA Solar's Case Brief at 27 (citing *Preliminary Results* PDM at 33).
[194] *See* JA Solar's Case Brief at 27 (citing GOC's December 30, 2019 QR at 75).
[195] *See* JA Solar's Case Brief at 27 (citing GOC's December 30, 2019 QR at 75 and at Exhibit II E.22).
[196] *See* JA Solar's Case Brief at 28 (citing *NMB Sing v. United States*, 557 F.3d 1316 (Fed. Circ. 2009)).
[197] *See* JA Solar's Case Brief at 28 (citing GOC's December 30, 2019 QR at 74).
[198] *See* JA Solar's Case Brief at 29 (citing *Preliminary Results* PDM at 46).
[199] *Id*.

necessary; rather, an analysis of the record demonstrates that the GOC is not subsidizing a single region or group of regions with preferential electricity prices.[200]

- Even if Commerce continues to wrongly apply AFA based on its conclusion that the NDRC has not delegated its price-setting authority, Commerce's preliminary filing of the alleged gap in the record remains unlawful because it failed to identify the inferred subsidized region.[201]
- Regarding an analysis of record information, Commerce could have examined the actual electricity schedules for every province to see that there is no single lowest subsidized region or province.[202] The record shows that the lowest (*i.e.*, hypothetically subsidized) electricity price varies greatly depending on user category and illustrates that there is no single province or geographic regions that is receiving subsidized electricity rates.[203]
- Commerce's specificity determination regarding the electricity program is unsupported by the record because there is no single province or geographic region that Commerce can infer is receiving subsidized electricity rates.
- Commerce must correct the errors in the electricity benefit calculation for JA Solar's affiliate JA Yangzhou from April to June 2017.

No other interested party commented on this issue.

Commerce's Position: For the final results, and based upon the application of facts otherwise available with an adverse inference,[204] we continue to find that the GOC did not provide the necessary information Commerce requested pertaining to whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D)(iii) of the Act, whether such a provision provided a benefit within the meaning of section 771(5)(E)(iv) of the Act, and whether such a provision was specific within the meaning of section 771(5A) of the Act.[205]

We explained in the *Preliminary Results*, that in order for Commerce to analyze the financial contribution and specificity of this program, we requested that the GOC provide information regarding the roles of the provinces and the NDRC, and information explaining the cooperation between the provinces and the NDRC in electricity price adjustments.[206] Specifically, Commerce requested that the GOC provide detailed explanations to questions including, but not limited to: (1) how increases in the cost elements in the price proposals led to retail price increases for electricity; (2) how increases in labor costs, capital expenses, and transmission and distribution costs are factored into the price proposals for increases in electricity rates; and (3) how the cost element increases in the price proposals and the final increases were allocated across the province and across tariff end-user categories.[207] We stated that we requested this information in order to determine the process by which electricity prices and price adjustments are derived, to identify the

[200] *See* JA Solar's Case Brief at 29.
[201] *Id*. at 30.
[202] *Id*.
[203] *Id*. at 32.
[204] *See* sections 776(a) and (b) of the Act.
[205] *See Preliminary Results* PDM at 34.
[206] *Id*. at 32.
[207] *Id*. (citing CVD Questionnaire at Electricity Appendix).

entities that manage and impact the price adjustment process, and to examine the cost elements included in the derivation of electricity prices in effect throughout China during the POR.[208]

There is no dispute that electricity prices vary from province to province in China.[209] What has been at issue in Commerce's numerous determinations countervailing the provision of electricity is why prices vary from province to province and who makes the decision – ultimately – to set or allow distinct prices in each province. Insofar as provincial governments are solely responsible for setting prices, it is possible that there is no basis for finding the program regionally specific under section 771(5A)(D)(iv) of the Act, because all recipients within the jurisdiction of the price setting authority would be paying the same prices; thus, there would be no price discrimination on the part of the authority granting the subsidy. However, insofar as the varying prices are set by authorities of the central government in Beijing, and insofar as the GOC is unable to demonstrate that such variances are in accordance with market principles or cost differences, we find there is, in fact, a regionally specific subsidy program, because the Beijing authority is setting different prices in different provinces without explanation.

The GOC has claimed:

> Since 2015, a number of market reforms have occurred in China's electricity market. Most importantly, the responsibility for setting electricity sale prices within each Province has moved from the NDRC to the Provincial governments. In addition, a competitive system has been established to create prices that are tied to market fluctuations in the coal market and other market influences. Now, the relevant provincial pricing authorities are required to take into account the overall demand and supply present in their respective electricity markets, as well as the costs of electricity generation and transmission. The retail prices of electricity consist of four parts: purchasing costs, transmission prices, transmission losses, and governmental surcharges. The differences in these costs as well as other costs like coal prices, among others, are analyzed mainly on a provincial basis, and the provincial government plays a key role in collecting cost information and formulating electricity prices from the provincial area under its jurisdictions respectively.[210]

The GOC also claimed that beginning January 1, 2016, all of the provincial governments were given the authority to prepare and to publish electricity tariff rates in their own jurisdictions, and that notices regarding the adjustment of electricity prices issued by the NDRC have since required provincial government pricing authorities to set specific prices and to report the electricity tariff after adjustment to the NDRC for the record.[211] According to the GOC, this new structure eliminated the need for the provincial price proposals that were previously used by the NDRC to set the prices for each province.[212] Therefore, the GOC argued, Commerce's question requesting

[208] *See Preliminary Results* PDM at 32.
[209] *See* GOC's December 30, 2019 QR at Exhibit II E.24 (the electricity tariff schedules of all provinces in China during the POR).
[210] *See* GOC's December 30, 2019 QR at 73.
[211] *Id*. at 74.
[212] *Id*.

the GOC to provide the provincial price proposals for each province in which a mandatory respondent was located during the POR was no longer applicable.[213]

However, the GOC refused to provide key information that would allow Commerce to confirm its claims. Specifically, the GOC did not provide the provincial price proposals for each of the relevant provinces that might demonstrate that the provinces are the authorities setting prices or that there are market – or cost-based reasons underlying the variation in prices among provinces.[214] We note that Article 6 of Notice 748 requires provincial price departments to develop and issue a "specific adjustment *plan* of electricity price and sales price" and to report this plan to the NDRC for the record.[215] This contradicts the GOC's claims in it questionnaire response and JA Solar's arguments in its case brief that there are no longer "proposals" that can be provided to Commerce, unless the GOC and JA Solar are splitting hairs over the distinction between a plan and a proposal. Thus, there is information that we requested from the GOC that it failed to provide, resulting in a "gap" in the record.

Consistent with the *Preliminary Results*, we continue to find that the record does not support the GOC's and JA Solar's claims that the relevant provincial pricing authorities determine and issue electricity prices within their own jurisdictions. Record information such as Notices 748, 3105,[216] and the Guangdong Province Price Catalog,[217] supports the conclusion that the NDRC is still the price-setting authority. For example, the NDRC's Notice 748 is based on consultations between the NDRC and the State Energy Bureau. Article 1 of Notice 748 states that prices for electricity uploaded to the electrical grid from coal powered plants "are to be lowered nationwide for about 2 cents per kilowatt on average... The average adjustment standards of provinces (autonomous regions and municipalities) and adjusted coal-fired power grid benchmark price see in Annex I." Article I of the NDRC's Notice 3105 lowers the nationwide coal-fired electricity on-grid prices and general by "about 0.03Yuan" kilowatt hour.[218] Article II of Notice 3105 lowers the nationwide general industrial and commercial sales price by about 0.03Yuan per kilowatt hours on average, and states that the price authority in each province shall formulate specific on-grid price and sales price within the province according to the average regulation standard stated in the Appendix to Article 3105 (this Appendix lists coal-fired electricity on-grid price regulation and general commercial electricity price regulation within each province). Once the provinces formulate their prices, they are to report their prices to the NDRC for filing.[219] Finally, the Guangdong Price Catalog, which states this document is the basis of the provincial government's electricity price regulation,[220] states that this document was reviewed and approved by the

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[213] *Id*.
[214] *Id*.
[215] *See* GOC's December 30, 2019 QR at Exhibit II E.23, "Notice of National Development and Reform Commission on Adjustment Schedule of Coal-fired Power Generation Grid Purchase Price and Sale Price of Industrial and Commercial Electricity of Each Province (District or City), FaGai JiaGe No. (2015) 748" (Notice 748).
[216] *See* GOC's December 30, 2019 QR at Exhibit II. E.22, "Notification on Lowering Coal-Fired Electricity On-grid Price and General Industrial and Commercial Electricity Price, FGJF {2015} No. 3105" (Notice 3015).
[217] *See* GOC's December 30, 2019 QR at Exhibit II E.38, "Notice of the Issuance of Pricing Catalogue of Guangdong Province (2015), Yueguban {2015} No. 42," (Guangdong Price Catalog).
[218] *See* Notice 3015.
[219] *Id*.
[220] *See* Guangdong Price Catalog; *see also* the GOC's December 30, 2019 QR at 76 (explaining that the Guangdong Provincial Government regulates electricity prices in Guangdong Province).

Provincial Government and the NDRC, the attachment for which includes notes and comments regarding the establishment of electricity prices in Guangdong Province.[221] Note 1 of the Guangdong Price Catalog states:

> The above pricing catalogue does not include pricing contents of central pricing. All pricing items and contents shall be subject to central pricing (from {NDRC} and other Departments of State Council) once involved in it.

Based on the totality of the instant record, Commerce concludes that the GOC's central government continues to be the price-setting authority. Moreover, the GOC still has within its possession documentation that it could have provided in response to Commerce's requests indicating how exactly the varying provincial prices are established under the direction of the NDRC – whether prices are set in accordance with normal market and commercial considerations and to what extent the NDRC might actually allow the provinces the discretion to set prices beyond Notice 748 and Notice 3105.

Therefore, as AFA, Commerce determines that the provision of electricity is a countervailable subsidy program whereby the Chinese government, through the NDRC in Beijing, sets different prices in different regions under its authority (*i.e.* the provinces) without commercial or market considerations, but instead for development purposes. The amount of the subsidy we infer to be the difference between what the respondent companies paid, and the highest tariffs set for any province. The facts support the inference that there is a regionally specific program wherein prices are set differently within the jurisdiction of the authority providing the subsidy. As described above, the key directives of the price-setting system still originate with the NDRC (pursuant to Notices 748 and 3105), and, in fact, the Appendix to the NDRC's Notice 3105 lists coal-fired electricity on-grid "price regulation" and general commercial electricity "price regulation" within each province. Therefore, as AFA, we infer from the fact that the NDRC is significantly involved in the setting of electricity prices that the NDRC is the authority providing the subsidy. Moreover, the schedules submitted by the GOC constitute a clear factual basis for the inference that the NDRC has subsidized electricity consumers in certain regions by arbitrarily setting different prices across the provinces.[222]

With regard to JA Solar's comment that we should correct certain errors in the electricity benefit calculation for JA Solar's affiliate JA Yangzhou from April to June 2017, we examined the record and we agree with JA Solar. As a result, we have revised JA Solar's benefit calculation for the final results.[223]

Comment 5: Whether the Income Tax Deduction for R&D Expenses is Specific

The GOC's Comments:

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[221] *See* Guangdong Price Catalog.
[222] *See* GOC's December 30, 2019 QR at Exhibit II E.24.
[223] *See* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Analysis Memorandum for JA Solar Technology Yangzhou Co., Ltd.," dated concurrently with this IDM (JA Solar's Calculations Memorandum).

- In the *Preliminary Results*, Commerce found that this program is *de facto* specific because it is limited to "those with R&D in eligible high-technology sectors."[224] However, this program is a widely available tax deduction that is not specific to certain industries or sectors and, therefore, is not countervailable.
- Article 2.1(b) of the WTO SCM Agreement states that where the granting authority, or the legislation pursuant to which the granting authority operates, establish objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist.[225]
- This program provides for a tax deduction for certain R&D expenses pursuant to Article 30 of the Enterprise Income Tax Law of China (Enterprise Income Tax Law) and Article 95 of the Implementing Regulations of the Enterprise Income Tax Law of China, effective January 1, 2008.[226]
- Under this program, eligible R&D expenditures for new technologies, new products, or new manufacturing methods are expensed and not capitalized as intangible assets, an additional 50 percent on top of the actual expense accrual may be deducted from taxable income. If the expenditures are capitalized into intangible assets, the amortization of those assets shall be based upon 150 percent of the actual cost.[227]
- According to Article 1 the Enterprise Income Tax Law, this methodology is applicable to all legal person enterprises within China without any bias as to enterprise type, industrial sector, or geographic location.[228] This program is not limited to high-technology sectors.
- Given the nature of this deduction, it is not *de facto* specific. There is no reasonable scenario where this program would only be used by a limited number of companies in China. Therefore, Commerce should find this program to be not specific, and therefore, not countervailable, for the final results.[229]

JA Solar's Comments:

- Commerce must remove the benefits assigned to JA Solar's affiliates JA Donghai and Jing Hai Yang under this program. JA Donghai carried forward losses from prior years to offset taxes due on the income tax return filed during the POR, and Jing Hai Yang operated at a tax loss as reflected on the company's income tax loss that was filed during the POR. As a result, neither company received a tax savings as a result of this program for the period applicable to the POR because the amount of income tax each firm paid would have been the same with or without the deduction.[230]

No other interested parties commented on this issue.

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[224] *See* GOC's Case Brief at 11 (citing *Preliminary Results* PDM at 51).
[225] *See* GOC's Case Brief at 11 (citing Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (SCM Agreement); *see also* section 771(5A)(D)(ii) of the Act (stating that there will be no specificity where the criteria is "objective," "automatic," "strictly followed," and "clearly set forth" in the law)).
[226] *See* GOC's Case Brief at 11 (citing GOC's December 30, 2019 QR at 12).
[227] *See* GOC's Case Brief at 11.
[228] *Id*. at 11-12 (citing GOC's December 30, 2019 QR at Exhibit II.B.2).
[229] *See* GOC's Case Brief at 12.
[230] *See* JA Solar's Case Brief at 56-59.

Commerce's Position: In *Solar Cells from China Investigation*, Commerce found this program to be *de jure* specific, stating that "the income tax deduction afforded by this program is limited as a matter of law to certain enterprises, *i.e*., those with R&D in eligible high-technology sectors, and, thus, is specific under section 771(5A)(D)(i) of the Act."[231] As we stated in the *Preliminary Results*, no new evidence regarding specificity was presented by the GOC. In accordance with our practice, as affirmed by the Court of Appeals for the Federal Circuit, Commerce does not revisit a specificity determination made in one segment of a proceeding in a later segment of that same proceeding, absent new evidence.[232] Accordingly, because no new evidence was presented, in the *Preliminary Results*, we stated that "the income tax deduction afforded by this program is "limited as a matter of law to certain enterprises, *i.e.*, those with R&D in eligible high-technology sectors and, thus, is specific under section 771(5A)(D)(i) of the Act."[233]

We continue to find that no new evidence has been presented that warrants reversal of our original finding. The GOC's argument regarding section 771(5A)(D)(ii) of the Act does not constitute new evidence. As we stated in *Solar Cells from China Investigation*, the tax deductions under this program are only available to certain industries enumerated in the lists and circulars implementing the program.[234] The GOC has not demonstrated that the criteria for eligibility for this program are automatic or strictly followed or clearly set forth, as required under section 771(5A)(D)(ii) of the Act. In short, the GOC's arguments do not lead us to conclude that revising our countervailability determination is warranted.

Regarding JA Solar's comments, we have examined the record and conclude that we should remove the benefit for its affiliates from this program. The record demonstrates that JA Solar's affiliates would have paid the same amount in income tax with or without this tax deduction (*i.e.*, the tax deduction provided no benefit to JA Solar's affiliated companies), and we have revised JA Solar's benefit calculations for this program accordingly.[235]

Comment 6: Whether Commerce Should Revise the Benchmark for the Provision of Aluminum Extrusions

JA Solar's Comments:

- In the *Preliminary Results*, Commerce added import duties to the aluminum extrusions benchmark price when calculating the benefit received by JA Solar under the provision of aluminum extrusions program.[236]
- Section 351.511(a)(2)(iv) states that "the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.[237]

[231] *See Solar Cells from China Investigation* IDM at 26.
[232] *See Magnola Metallurgy, Inc. v. United States*, 508 F.3d 1349, 1355-56 (Fed. Cir. 2007).
[233] *See Preliminary Results* PDM at 51.
[234] *See Solar Cells from China Investigation* IDM at 79-80.
[235] *See* JA Solar's Calculations Memorandum.
[236] *See* JA Solar's Case Brief at 20 (citing *Preliminary Results* PDM at 46).
[237] *See* JA Solar's Case Brief at 20.

- Similarly, as noted in the *CVD Preamble*, "{Commerce} will adjust comparison prices to reflect the price a company would pay if it imported the good or service."[238]
- In interpreting the phrase "that a firm actually paid or would pay" in 19 CFR 351.511(a)(2)(iv), the CIT has found that a respondent's 'actual experience' is relevant in determining what such a firm would pay in making that determination, unless the evidence for {what a respondent}'s 'would pay' experience is found atypical."[239]
- In the *Preliminary Results*, Commerce disregarded evidence submitted by JA Solar demonstrating its actual experience importing the aluminum frames it uses in the production of subject merchandise.[240] Specifically, JA Solar submitted a Chinese customs ruling and declaration detailing that the Harmonized Tariff Code of the aluminum frames used by JA Solar is 8541.9000, which corresponds to an import duty of zero percent.[241]
- Commerce, therefore, should not have adjusted its benchmark price to include import duties for JA Solar's aluminum frames because such an adjustment does not reflect the "price a company would pay if it imported the good or service."[242]
- In the final results, Commerce must remove its adjustment regarding import duties when calculating its benchmark price for the provision of aluminum extrusions or face a possible remand on this issue.[243]
- JA Solar notes that the benefit assigned to JA Solar under this program in the *Preliminary Results* is zero, and that it submits this argument for consideration in case Commerce makes any changes to JA Solar's benefit calculation for this program for the final results.[244]

No other interested party commented on this issue.

Commerce's Position: JA Solar notes that it submitted comments on this issue in case Commerce makes any changes to JA Solar's benefit calculation for this program. Given that Commerce has made no change to JA Solar's benefit calculation for this program for the final results, this issue is moot.

Comment 7: The Benchmark for the Provision of Solar Glass

SunPower's Comments:

- SunPower's January 13, 2020 benchmark submission explained that the GOC has distorted world market prices for glass through a range of support measures that, in the case of solar glass, caused massive oversupply.[245]

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[238] *Id*. (citing *Countervailing Duties*, 63 FR 65348, 65401 (November 25, 1998) (*CVD Preamble*).
[239] *See* JA Solar's Case Brief at 20 (citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1341 (CIT 2015) (*Borusan*)).
[240] *See* JA Solar's Case Brief at 21 (citing JA Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Rebuttal Benchmark," dated January 23, 2020 (JA Solar's Rebuttal Benchmark)).
[241] *Id*.
[242] *See* JA Solar's Case Brief at 21 (citing *CVD Preamble*, 63 FR at 65378).
[243] *See* JA Solar's Case Brief at 21.
[244] *See* JA Solar's Case Brief at 20.
[245] *See* SunPower's Case Brief at 1 (citing SunPower's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Submission of Benchmark Information," dated January 13, 2020 (SunPower's Benchmark Submission)).

- In order to derive an actual market price that would obtain in the absence of these distortions, *i.e.*, a world market price that would have been available to respondents, SunPower submitted information on the European Union (EU) export price of solar glass, adjusted to a 2017 level using annual growth rates. The resulting 2017 solar glass benchmark is $1.92/kg.[246]
- In the *Preliminary Results*, Commerce rejected this suggested methodology without explanation, and it appears that Commerce misunderstood the underlying factual information stating that it reflected tempered glass when, in fact it was specific to solar glass.[247]
- The benchmark Commerce used, drawn from monthly prices published by Greentech Media and PV Insights, ignored the broader distortion in the glass market and the under-stated subsidy provided in this segment through the provision of solar glass. In the final results, Commerce should reconsider and use the benchmark that was submitted by SunPower.[248]

JA Solar's Comments:

- In the *Preliminary Results*, Commerce incorrectly applied the same glass benchmark price to each of JA Solar's affiliates' glass purchases during the POR. To ensure the benefit calculations for each of JA Solar's affiliates for this program are as accurate as possible, Commerce must correct this error for the final results.[249]

Risen Energy's Comments:

- Commerce relied on {an average of} the glass prices from PV Insights and from Greentech Media when calculating its glass benchmark in the *Preliminary Results*.[250] The Greentech Media prices were only available for the first seven months of the POR. For the remaining five months of the POR, Commerce relied solely on the prices from PV Insights.
- However, 19 CFR 351.511(a)(2)(ii) states that "{w}here there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability."[251]
- To better follow the regulation and to arrive at a more reflective commercial value, Commerce should use {an average} of both sources during the entire POR.
- As evidenced by the PV Insights prices, the price of glass was fairly steady during the POR, dropping slightly at the end of the POR. Therefore, relying on the Greentech Media average price from the first seven months of the POR for the remaining five months is a reasonable benchmark for glass.[252]
- Moreover, Commerce frequently relies on annual benchmarks to measure the adequacy of remuneration, therefore relying on a reasonable POR average Greentech price for the last few months of the POR is not unreasonable.[253]
- Commerce must rely on benchmarks that are most reflective of world market prices. Solely relying on PV Insights for the end of the POR is less reflective than relying on two sources

[246] *Id.* at 1-2.
[247] *Id*. at 2 (citing *Preliminary Results* PDM at 20-21).
[248] *See* SunPower's Case Brief at 2.
[249] *See* JA Solar's Case Brief at 22.
[250] *See* Risen Energy's Case Brief at 20.
[251] *Id*.
[252] *Id*. at 21.
[253] *Id*. (citing *Preliminary Results* PDM at 46 (where Commerce relied on annual HTS benchmark for the provision of aluminum extrusions)).

particularly given the difference in the pricing between the two sources. Further, Commerce has relied solely on Greentech Media to value solar glass in past reviews.[254]

JA Solar's Rebuttal Comments:

- In the *Preliminary Results*, Commerce relied on Greentech Media and PV Insights data submitted by JA Solar to calculate its benchmark price for solar glass.[255] SunPower now proposes that Commerce should have used the EU export data it submitted on the record to calculate the benchmark price for solar glass.
- In measuring adequate remuneration using a two-tier world price source, such as the benchmark price calculation for solar glass, Commerce "will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question."[256]
- When choosing from two available benchmark sources, Commerce makes allowances for factors affecting comparability and averages world market prices where more than one is available.[257]
- When considering comparability, Commerce's practice is to rely on data that is input specific and presented in a monthly fashion, and "bear a reasonable resemblance to the importing market's reality."[258]
- In the final results, Commerce must continue to rely on the Greentech Media and PV Insights data to calculate its solar glass benchmark because they represent world market prices for solar glass that are specific to the solar glass purchased by JA Solar and are presented on a monthly basis.[259] The EU data does not meet both of Commerce's stated requirements regarding specificity and contemporaneity, and must be rejected for use in the final results.
- In the *Preliminary Results*, Commerce followed its preference for benchmark data that it established in prior reviews by selecting Greentech Media and PV Insights data, explaining that the two data sources provide monthly prices that are specific to solar glass.[260]
- The EU data submitted by SunPower does not represent a world market price that is comparable to the solar glass purchased by JA Solar and is an average price for exports of solar glass from the EU from 2009. Through various calculations, SunPower allegedly accounts for oversupply in the market from Chinese production.[261]
- The EU data cannot constitute a world market price because it only includes data for European prices and is missing information from major glass producers. As such, the EU data cannot serve as an accurate world market price.[262]

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[254] *See* Risen Energy's Case Brief at 21.
[255] *See* JA Solar's Rebuttal Brief at 2 (citing *Preliminary Results* PDM at 21).
[256] *See* JA Solar's Rebuttal Brief at 2 (citing 19 CFR 351.511(a)(2)(ii)).
[257] *See* JA Solar's Rebuttal Brief at 2 (citing *United States Steel Corp v. United States*, 33 CIT 1935, 1943 n.8 (2009)).
[258] *See* JA Solar's Rebuttal Brief at 3 (citing *Preliminary Results* PDM at 21; *see also Borusan*).
[259] *See* JA Solar's Rebuttal Brief at 3.
[260] *Id*. at 5.
[261] *Id*. at 6-7 (citing SunPower's Benchmark Submission at Exhibit 1).
[262] *See* JA Solar's Rebuttal Brief at 7 (citing 19 CFR 351.511(a)(2)(ii)).

- The CIT has criticized similar deficiencies noting that the lack of data from major producers of solar glass producers in another dataset undermines its use in constructing a solar glass benchmark.[263]
- The EU prices submitted by SunPower represent an annual figure that is over a decade old and do not account for changing market conditions since 2009 (indexed to the POR),[264] Commerce has a practice of using contemporaneous data presented in a monthly format to account for price fluctuations. The Greentech Media and PV Insights data are both monthly prices that are specific to solar glass.
- Commerce must reject the EU prices for constructing its solar glass benchmark because these prices do not present world market prices for solar glass and are not presented in a monthly format.[265]

Risen Energy's Rebuttal Comments:

- SunPower's benchmark price for solar glass is from 2009 and is not contemporaneous. Relying on a price from eight years prior to the POR and inflating it is not indicative of prevailing market prices during the POR.[266]
- The price is also only on an annual basis, rather than on a monthly basis, and the source is not only outdated, but it is not a world price.[267]
- The EU price is only based on European exports. Commerce is directed to rely on a "world market price."[268]
- While Commerce may have relied on this source in the underlying investigation and in the first administrative review of this proceeding, at such time the source was far less outdated and was the only benchmark specific to solar glass. In subsequent reviews, the record contained contemporaneous world solar glass prices such as the Greentech Media data, and Commerce has relied upon this data instead.[269]
- Commerce properly found in the *Preliminary Results* that it would not be appropriate to rely on the EU prices for solar glass because the data was calculated using a 2009 price for solar glass indexed to 2017, where the solar glass prices from PV Insights and Greentech Media are monthly prices that are contemporaneous to the POR. Commerce also stated that its practice is to rely on inflated non-contemporaneous prices when there are no other contemporaneous prices on the record.[270]
- The Greentech Media and PV Insights prices provide world prices (excluding China) as directed by Commerce's regulations. Commerce has no reason to depart from this practice and should continue to rely on the contemporaneous world solar glass benchmark prices it

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[263] *See* JA Solar's Rebuttal Brief at 7 (citing *Trina Solar II*; *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China: Final Results of Countervailing Duty Expedited Review*, 83 FR 34115 (July 20, 2018) (*CTL Plate from China*) IDM at Comment 5 (rejecting Xeneta ocean freight prices in favor of Maersk ocean freight prices because the Xeneta prices are specific to Asian routes and did not reflect broader prices from global routes reflected in the Maersk prices)).

[264] *See* JA Solar's Rebuttal Brief at 8 (citing SunPower's Benchmark Submission at Exhibit 1).

[265] *See* JA Solar's Rebuttal Brief at 10.

[266] *See* Risen Energy's Rebuttal Brief at 1 (citing *Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1374 (CIT 2015) (*Beijing Tianhai*)).

[267] *See* Risen Energy's Rebuttal Brief at 1.

[268] *Id*. (citing 19 CFR 351.511(a)(2)(ii)).

[269] *See* Risen Energy's Rebuttal Brief at 2.

[270] *Id*. at 2 (citing *Preliminary Results* PDM at 30.

relied on in the *Preliminary Results*. Commerce should not adopt SunPower's argument to rely on an EU solar glass price from 2009.[271]

Commerce's Position: In the *Preliminary Results*, we relied on solar glass prices from Greentech Media and from PV Insights when constructing a tier two benchmark for the provision of solar glass.[272] We stated that the data published by these two sources provide monthly prices specific to solar glass during 2017, contemporaneous with the POR. SunPower's arguments for replacing the Greentech Media and PV Insights data with 2009 prices from the EU are not persuasive. These data consist of annual solar glass prices from 2009 which would require indexing across eight years to 2017.[273] When constructing its tier two benchmarks, Commerce has established a practice in this proceeding of finding contemporaneous prices reported on a monthly basis (*i.e.* the Greentech Media and PV Insights prices) to be preferable to prices reported on an annual basis (*i.e.*, the EU prices) because monthly prices reflect fluctuations that may occur over the POR.[274] Commerce sees no reason to deviate from its past practice on this issue in the instant review.

With respect to SunPower's argument that the Greentech Media and PV Insights prices do not account for market distortions in the global glass market due to a range of support measures enacted by the GOC that, in the case of solar glass, caused massive oversupply, our review of SunPower's Benchmark Submission shows that SunPower relied on a 2014 news article from the market researcher IHS to make the argument.[275] This news article is three years prior to the POR and states that after falling from 2009 through 2014, prices for solar glass were expected to rebound starting in 2015. As such, we do not see how this information would be probative for global market conditions in the 2017 POR with respect to solar glass.

We disagree with Risen Energy's comment that we should revise the solar glass benchmark to use an average of the Greentech Media an average price from the first seven months of the POR for the remaining five months for which Greentech Media prices are unavailable, *i.e.*, August through December 2017. The only set of monthly prices available for these five months of the POR are from PV Insights, whose monthly prices are available for the entire POR. Section 351.511(a)(2)(ii) of Commerce's regulations directs Commerce to average prices where there is more than one price available. Accordingly, since the record only has the monthly prices from PV Insights for August through December 2017, relying solely on those prices for those months is consistent with 19 CFR 351.511(a)(2)(ii) and with our past practice in this proceeding. As such, we are not revising the solar glass benchmark for the final results.

Comment 8: The Benchmark for the Provision of Land

JA Solar's Comments:

- Commerce must use the CBRE and Nexus data submitted by JA Solar to calculate the land benchmark. Commerce relied on a decade old report, the Asian Marketview Report by CB Richard Ellis (2010 CBRE Report) as the tier three land benchmark in the *Preliminary*

[271] *See* Risen Energy's Rebuttal Brief at 2.
[272] *See Preliminary Results* PDM at 20-21.
[273] *See* SunPower's Benchmark Submission at Exhibit 1.
[274] *See*, *e.g.*, *Solar Cells from China 2016 AR Preliminary* PDM at 20-21, unchanged in *Solar Cells from 2016 AR*.
[275] *See* SunPower's Benchmark Submission at Exhibit 1.

Results.[276] Commerce explained that consistent with its past practice, it relied on a tier three land benchmark for calculating a benefit for the land program.

- Commerce must revise its benchmark determination and rely on the updated 2016-2017 CBRE Report as submitted by JA Solar.[277] In the alternative, if Commerce continues to rely on a tier three benchmark, it must rely on the 2018 MarketBeat Bangkok Industrial Reports compiled by Nexus Innovative Real Estate Solutions (Nexus Report) submitted by JA Solar.[278]
- The 2010 CBRE Report relied on by Commerce in the *Preliminary Results* consists of outdated data that is distorted by using a price inflator.[279] By contrast, the 2016-2017 CBRE Report includes a broad, world-wide market average price for the purchase of land similar to the type of land purchased by JA Solar.[280]
- A tier three benchmark requires Commerce to select a third-country price, in this case Thailand, that serves as a reasonable alternative to China despite such prices not being available to a purchaser in China.[281]
- Commerce's reasoning for selecting the 2010 CBRE Report instead of the 2016-2017 CBRE Report is nonsensical because the former data suffers to a greater extent from the fault Commerce identified in the later source submitted by JA Solar. Commerce rejected the 2016-2017 CBRE Report, stating the report does not include data that allows Commerce to evaluate the locations' economic comparability with respect to China.[282]
- Although the 2016-2017 CBRE Report does not include data for Thailand, it does include information for Mexico and for Brazil, both of which are included in Commerce's surrogate country list in the parallel AD review.[283] The inclusion of Mexico and Brazil by Commerce in its surrogate country list is relevant here as Commerce develops it surrogate country list based on its determination that certain countries are economically comparable to China.
- The data included in the 2010 CBRE Report is not economically comparable because it is outdated. Commerce's preference is to use contemporaneous data in calculating its benchmarks to best reflect the market conditions faced by respondents.[284]
- Commerce's selection of the outdated 2010 CBRE Report forced it to rely on a consumer price index (CPI) inflator to adjust the data to reflect the POR, which introduces inaccuracies into Commerce's benchmark calculation.[285] In declining to use the 2016-2017 CBRE Report, Commerce noted that JA Solar did not provide information that would allow it to compare the

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[276] *See* JA Solar's Case Brief at 38 (citing *Preliminary Results* PDM at 18).
[277] *See* JA Solar's Case Brief at 39 (citing JA Solar's Letter, "Crystalline Silicon Photovoltaic Cells from the People's Republic of China: Benchmark Submission," dated January 13, 2020 (JA Solar's Benchmark Submission) at Exhibit 6 (2016-2017 CBRE Report)).
[278] *See* JA Solar's Letter, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Land Benchmark Information," dated February 18, 2020 (Nexus Report).
[279] *See* JA Solar's Case Brief at 40 (citing *Preliminary Results* PDM at 18).
[280] *See* JA Solar's Case Brief at 40 (citing JA Solar's Benchmark Submission at 4-5 and at Exhibit 6A-6B).
[281] *See* JA Solar's Case Brief at 40-41 (citing *Royal Thai Gov't v. United States* 441 F. Supp. 2d 1350, 1359 (CIT 2006)).
[282] *See* JA Solar's Case Brief at 41 (citing *Preliminary Results* PDM at 18).
[283] *See* JA Solar's Case Brief at 41 (citing JA Solar's Benchmark Submission at Exhibits 6A and 6B; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016-2017*, 83 FR 67222 (December 28, 2018) (*Solar Cells from China 2016 AD AR*) PDM at 17).
[284] *See* JA Solar's Case Brief at 42.
[285] *Id.* at 43 (citing *Preliminary Results* PDM at 18).

economic comparability of the locations in the report to the economic comparability with respect to China.[286]

- A CPI index like the one relied on by Commerce in its benchmark calculation reflects the average change in the price of all consumer goods and not just industrial land prices in Thailand. As a result, the greater extent to which Commerce relies on indexing, the more likely it is that the benchmark will not represent actual land prices in Thailand.[287]
- Given that the outdated 2010 CBRE Report suffers to a greater extent from any concerns regarding the data's comparability to land prices in China, Commerce must use the regulatory preferred tier-two source, the 2016-2017 CBRE Report, to calculate its land benchmark for the final results.[288]
- If Commerce continues to rely on a tier three source to calculate its land benchmark, it must rely on the Mexico and Brazil data contained in the 2016-2017 CBRE Report. In the alternative, Commerce must use the information in the Nexus Report.[289] These reports provide average monthly costs for factories and warehouses in Thailand for eight different provinces across Thailand.[290]
- Although the 2016-2017 CBRE Report represents a world market tier two source, Commerce could extract certain data in the report to rely on it as a tier three source. Commerce maintained that it cannot rely on the report because it provides land prices for locations such as Warsaw, Poland; Stockholm, Sweden, and Atlanta, Georgia.[291] However, Commerce could rely on the data supplied in these reports as a tier two source by only relying on pricing information provided for either Brazil or for Mexico.[292]
- Commerce has already determined that both Brazil and Mexico are economically comparable to China in the parallel administrative reviews of the AD order.[293]
- In the alternative, the Nexus Report provides land price information for factories and warehouses in Thailand and could be used as a tier three benchmark.[294] The Nexus Report is superior to the 2010 CBRE Report because it only needs to be indexed back one year where the 2010 CBRE Report must be indexed for seven years.
- Commerce must correct certain errors regarding the benefit calculations regarding JA Solar's affiliated companies. In the *Preliminary Results*, Commerce incorrectly included a reported refund for land purchases as a grant; relied on a contract price instead of the price actually paid for a parcel of land; and inadvertently used an incorrect benchmark for calculating the benefit for certain JA Solar affiliated companies.

Risen Energy's Comments:

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[286] *Id*.
[287] *See* JA Solar's Case Brief at 43-44.
[288] *Id*. at 44.
[289] *Id*.
[290] *Id*. (citing Nexus Report).
[291] *See* JA Solar's Case Brief at 45 (citing *Preliminary Results* PDM at 18).
[292] *See* JA Solar's Case Brief at 45 (citing JA Solar's Benchmark Submission at Exhibits 6A and 6B).
[293] *See* JA Solar's Case Brief at 45 (citing *Solar Cells from China 2016 AD AR; see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017-2018* 85 FR 7531 (February 10, 2020) (*Solar Cells from China 2017 AD AR*) IDM at 15).
[294] *See* JA Solar's Case Brief at 46 (citing Nexus Report).

- Commerce should rely on the 2016-2017 CBRE Report submitted by JA Solar. These values are contemporaneous with the POR and provide prices for a larger, more representative period of time, and do not follow an inflation index.[295]
- Commerce used prices from Thailand only, which is no longer considered economically comparable to China.[296]
- Commerce must correct the sales denominator for Risen Energy's affiliate Jiangsu Sveck when calculating this affiliate's land benefit. Jiangsu Sveck is the parent company of cross-owned affiliate Sveck New Material and Sveck Photovoltaic, which supplies inputs to cross-owned input producers. The benefit from this program should not be allocated to Jiangsu Sveck's individual sales, but to the consolidated sales of Jiangsu Sveck and all of its subsidiaries (as well as the Risen Energy producers of subject merchandise) in accordance with 19 CFR 351.525(b)(6)(iii) and (iv).[297]

No other interested parties commented on this issue.

Commerce's Position: Pursuant to 19 CFR 351.511(a), when determining whether or not a benefit from the provision of a good for less than adequate remuneration exists, Commerce will first compare the government's price to market prices in the country in which the transactions in question occurred ("tier one benchmarks").[298] Where market-specific prices are not available, Commerce will use a world market price where "it is reasonable to conclude that such price would be available to purchasers in the country in question" ("tier two benchmarks").[299] If a world market price is not available to the purchasers in question, Commerce will normally measure the adequacy of remuneration by "assessing whether the government price is consistent with market principles" ("tier three benchmarks").[300]

We explained in the *Preliminary Results* that we cannot rely on tier one or tier two benchmarks to assess the benefits from the provision of land in China CVD cases. We stated that in prior CVD cases involving China, we determined that "Chinese land prices are distorted by the significant government role in the market," and hence, no usable tier one benchmarks exist.[301] We also explained that tier two world market prices are not appropriate,[302] because land in other countries is not available in China to a purchaser located in China. As a result, we stated that consistent with our past practice, we were resorting to a tier three benchmark based on the 2010 CBRE Report land prices in Thailand, indexed to the POR, to assess adequate remuneration for land in China.[303]

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[295] *See* Risen Energy's Case Brief at 22.
[296] *Id*. (citing *Solar Cells from China 2017 AD AR* IDM at 15).
[297] *See* Risen Energy's Case Brief at 12.
[298] *See* 19 CFR 351.511(a)(2)(i).
[299] *See* 19 CFR 351.511(a)(2)(ii).
[300] *See* 19 CFR 351.511(a)(2)(iii).
[301] *See Preliminary Results* PDM at 17 (citing *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Determination*, 74 FR 67893, 67906-08 (December 3, 2007) (*Sacks from China*)).
[302] *Id*.
[303] *See Preliminary Results* IDM at 18.

With respect to arguments that we should rely on the 2016-2017 CBRE Report submitted by JA Solar, we continue to find that although JA Solar submitted CPI data to aid in comparing the 2010 CBRE Report with the 2016-2017 CBRE Report, JA Solar's Benchmark Submission did not include information that would allow us to examine factors of comparability (such as national income levels, population density, and producers' perceptions that Thailand is a reasonable alternative to China as a location for Asian production) with respect to the locations listed in the 2016-2017 CBRE Report.[304]

Regarding arguments that we could rely on land pricing from Mexico and Brazil for land prices because Commerce is currently using these two countries as surrogate countries in the parallel AD reviews of solar cells from China, we have stated in a prior segment of this proceeding that because AD and CVD reviews are different proceedings for different purposes operating under different provisions of the statute and Commerce's regulations, it is not unexpected or illogical that surrogate values or countries used in an AD proceeding would differ from those used in deriving a benchmark in a CVD proceeding.[305]

In the *Preliminary Results*, we stated that we would continue to examine land benchmark prices on a case-by-case basis, and that we would consider the extent to which proposed benchmarks represent prices in a comparable setting (*e.g.*, a country proximate to China; the proposed country's level of economic development, *etc.*) and invited parties to submit alternative benchmark data that is consistent with the guidance provided in *Sacks from China*.[306] Based on this invitation, JA Solar submitted the Nexus Report as an alternative land benchmark.[307] Our examination of the Nexus Report indicates that this information is not suitable for deriving a benchmark for land prices in China. Although the Nexus Report contains 2018 prices and thus is more contemporaneous with the POR than the 2010 CBRE Report prices for industrial land in Thailand,[308] the prices in the Nexus Report are for rental rates for "Ready Built Factories" and "Ready Built Warehouses" in Thailand, and does not include sales prices for industrial land.[309] Because the Nexus Report does not contain industrial land prices, we find that it would not be appropriate to rely on this information as a benchmark for valuing industrial land.

Comment 9: The Benchmark for Ocean Freight

JA Solar's Comments:

- Commerce relied on an average of Descartes data submitted by SunPower and Xeneta data submitted by JA Solar to calculate its ocean freight benchmark in the *Preliminary Results*.[310] Commerce did not address JA Solar's argument in its rebuttal benchmarks that Commerce

[304] *Id*.
[305] *See Crystalline Silicon Photovoltaic Cells, Whether of 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) IDM at Comment 4.
[306] *See Preliminary Results* PDM at 18.
[307] *See* Nexus Report.
[308] *See* Memorandum, "Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; Asian Marketview Report," dated January 31, 2020.
[309] *See* Nexus Report.
[310] *See Preliminary Results* PDM at 23.

should disregard the Descartes data as non-representative of a world market price and is unnecessary to capture freight data from the United States.[311] Commerce must rely on the Xeneta data alone in calculating the ocean freight benchmark.

- In using a tier-two world price source such as the Descartes and Xeneta datasets, Commerce will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such a price would be available to purchasers in the country in question.[312] When choosing from two available benchmark sources, Commerce must make due allowance for factors affecting comparability. Commerce's ocean freight benchmark must bear a reasonably realistic resemblance to the importing market's reality or it will not be in accordance with the statute.[313]
- In this case, the Xeneta data placed on the record by JA Solar meets Commerce's regulatory benchmark standard of representing a world-market price that a firm actually paid or would pay. The Xeneta data presents data from origin ports across the globe to destination ports in China. By contrast, the Descartes data submitted by SunPower only includes information from origin points in the United States to destination points in China.[314]
- Because the Descartes data merely consists of information from United States ports, it cannot represent a "world-market price" that a firm "actually paid" or would pay" for ocean freight. Commerce incorrectly averaged the Xeneta and Descartes datasets when calculating its ocean freight benchmark because the latter suffers from significant comparability concerns as it cannot represent a valid world-market price by only including data from U.S. ports to China.[315]
- Commerce has previously rejected ocean freight benchmarks that fail to present information representing a world market price. In the expedited review of the CVD order of certain carbon alloy steel cut-to-length plate from China, Commerce rejected a Xeneta dataset as a benchmark source for ocean freight partially on the basis that it did not represent world market prices.[316]
- In rejecting the Xeneta data, Commerce noted that they "are specific to Asian routes and d{id} not reflect the broader data from the global routes reflected in the Maersk data.[317] Here too, the Descartes data does not represent global routes by only including data concerning freight rates from U.S. ports to China.
- The facts here can be distinguished from Commerce's CVD investigation of glass containers from China. In that case, Commerce agreed with the petitioner to average the Xeneta and Descartes prices partially based on the petitioner's argument that "{i}ncluding shipping from the United States {in the Descartes data}," when "the Xeneta data only includes freight charges specific to Asian routes," provides a more accurate reflection of the price Chinese firms would expect to pay for ocean freight by importing inputs from a global market."[318]

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[311] *See* JA Solar's Case Brief at 51.
[312] *Id*. at 52 (citing 19 CFR 351.511(a)(2)(ii)).
[313] *See* JA Solar's Case Brief at 53 (citing *Borusan*); *see also* section 771(5)(E)(iv) of the Act.
[314] *See* JA Solar's Case Brief at 53.
[315] *See* JA Solar's Case Brief at 53-54 (citing *Trina Solar I*, 352 F. Supp. 3d at 1332-35); *see also Borusan*, 61 F. Supp. 3d at 1341-1342.
[316] *See* JA Solar's Case Brief at 54 (citing *CTL Plate from China* IDM at Comment 5).
[317] *Id*.
[318] *See* JA Solar's Case Brief at 54 (citing *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 31141 (May 22, 2020) (*Glass Containers from China*) IDM at Comment 9).

- In other words, the Descartes data was necessary to capture price data for shipping routes from the United States to China that was not included in the Xeneta data. In the instant review, the Xeneta data submitted by JA Solar includes data from a U.S. port, namely Los Angeles.[319] Therefore, the Descartes data are not necessary to capture these shipping routes in developing a world market price.

Risen Energy's Comments:

- Commerce should rely solely on the Xeneta data for an ocean freight benchmark. Generally, when Commerce uses a tier two benchmark it considers whether it is getting a world benchmark that would be comparable to what purchasers in China would obtain.[320]
- While Commerce relied on world ocean freight prices, it failed to properly rely on ocean freight prices that are reasonably reflective of the price Risen Energy paid or would pay for imported inputs (*i.e.*, solar glass, aluminum extrusions, and solar grade polysilicon). The Xeneta data alone is reasonably reflective of world market prices, while the Descartes prices are not reasonable commercial prices that Risen Energy would pay for freight to import such materials.[321]
- In the alternative, Commerce must adjust the manner that it averaged the two sources to be more reflective of world prices.
- Xeneta is an actual world ocean freight benchmarking source. The company gathers several hundred thousand rates per month for the purpose of providing reliable benchmarks for the cost of ocean freight.[322] The Xeneta benchmark data on the record is reflective of thousands of datapoints per month and contains benchmark rates for eight major routes.
- The Descartes data is only based on routes from the United States to China, are based on only a few carrier's prices, and are representative of one repeated datapoint for the entire POR for each standalone rate. SunPower only provided one Descartes datapoint for the glass ocean freight, three Descartes datapoints for aluminum, and two Descartes datapoints for polysilicon for the entire POR.[323] Thus, the Descartes data is not representative of commercial freight rates during the POR, and is not representative of a "world market price" in accordance with 19 CFR 351.511(a)(2)(ii).
- Commerce must rely on available world market freight rates to be demonstrative of the ocean freight costs that a Chinese respondent would pay to import inputs from around the world. The combination of United States to China ocean freights and worldwide input prices are not reflective of commercial reality and what would be available to Chinese respondents in the world market.[324]
- The Descartes data also has further deficiencies. For solar glass, although the benchmark summary provides seven different routes, the routes are all from the west coast of the United States to Fuzhou, China and are actually the same rate. The prices provided are only one actual rate from one company that has not been updated to consider prevailing market conditions. As a result, it is uncertain when this rate first became effective.[325] The prices are

[319] *See* JA Solar's Case Brief at 55 (citing SunPower's Benchmark Submission at Exhibit 6).
[320] *See* Risen Energy's Case Brief at 14 (citing 351.511(a)(2)(iv)); *see also Borusan*; and *Beijing Tianhai*.
[321] *See* Risen Energy's Case Brief at 14.
[322] *Id*. at 15 (citing JA Solar's Benchmark Submission at Exhibit 7).
[323] *See* Risen Energy's Case Brief at 14-15.
[324] *Id*. at 16.
[325] *Id*. at 16-17 (citing SunPower's Benchmark Submission at Exhibits 5-8).

for less than a container load, are not commercial shipments, and are more expensive than commercial loads.

- Although the benchmark for aluminum extrusions provides seven different routes, six of the routes are from the west coast of the United States to Shanghai, and one is from Chicago to Shanghai.[326] Five of these routes are the same rate. SunPower did not provide the "Rate Details" for these routes, so it is uncertain when the rate first became effective. Regardless, the prices do not take into account contemporaneous conditions (*i.e.*, no price changes from month to month) and is not indicative of multiple routes or freight forwarders.
- The ocean freight price for aluminum extrusions is from Murrieta, California via the Long Beach Port to Shanghai. Therefore, this rate also includes inland transportation costs. This rate is for a 40-foot container, rather than a 20-foot container. Shipping a 45-foot container is more expensive and is not reflective of normal shipping conditions.[327]
- The solar grade polysilicon freight rates have the same issues as the solar glass and aluminum extrusion rates.[328] In sum, the Descartes rates do not present prevailing market conditions for worldwide costs to ship to China during the POR, and fail to be a "worldwide" benchmark. It would be inappropriate to add the Descartes prices to the Xeneta prices to construct the ocean freight benchmark.
- The combination of a "worldwide" price for inputs plus ocean freight to ship the inputs from only one country to China are not worldwide prices that are available to Chinese respondents, and thus fail the criteria to be used as a benchmark.[329]
- If Commerce continues to rely on the Descartes data, it must adjust the manner in which it averaged the Descartes data with the Xeneta data. Commerce should consider the Descartes data as only one route and average it as one route, *i.e.*, average the nine routes together rather than giving the Descartes data equal weight with the Xeneta data in the average.[330] Risen Energy provided an adjusted average for Commerce's examination, and also provided an adjustment to the Descartes aluminum extrusions rates, which are based on 40-foot containers rather than 20-foot containers.[331]

No other interested party commented on this issue.

Commerce's Position: As discussed in the *Preliminary Results*, Commerce relied on an average of the Descartes data submitted by SunPower and the Xeneta data submitted by JA Solar as a tier two benchmark for ocean freight.[332] Commerce notes that it has relied on both sources for benchmarking ocean freight in recent CVD proceedings.[333] The factors relied upon by Commerce when determining appropriate benchmarks depend on the facts surrounding the data/information placed on the record of the proceeding and, therefore, must be evaluated on a case-by-case

[326] *Id*.
[327] *See* Risen Energy's Case Brief at 18.
[328] *Id*.
[329] *Id*. at 18-19.
[330] *Id*. at 19-20.
[331] *Id*. at 20 and Attachment 2.
[332] *See Preliminary Results* PDM at 23.
[333] *See Solar Cells from China 2016 AR* IDM at 6 (for Xeneta); *see also High Pressure Steel Cylinders from China* IDM at Comment 5 (for Descartes).

basis.[334] JA Solar and Risen Energy argue that the Descartes ocean freight prices are flawed and should not be used in constructing the ocean freight benchmark. In particular, the respondents argue that the Descartes prices only represent a single shipping route, *i.e.*, from the United States to China and, therefore are not indicative of a "world market price" that would be available to them as required under 19 CFR 351.511(a)(2)(ii). Commerce's regulations at section 351.511(a)(2)(ii) do not define a "world market price." The regulations state that Commerce will "seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." Although JA Solar and Risen Energy argue that the Descartes prices are not commercial prices that they would pay to ship the input items under examination, we conclude that the Descartes shipping prices (*i.e.*, prices to ship inputs from the United States to China) constitute "world market prices" that "would be available" to JA Solar and to Risen Energy as stated in the regulations. Therefore, and in accordance with 19 CFR 351.511(a)(2)(ii), we find that it is appropriate to include the Descartes' shipping rates in the ocean freight benchmark for the final results. And, while JA Solar and Risen Energy argue that the Descartes shipping rates are more expensive than rates that they would pay to ship the inputs in question, the regulations do not require that Commerce must match the particular commercial reality of the companies in question when considering its benchmarks.

Further, because there is more than one ocean freight data source on the instant record, we will continue to use a simple average of the rates of all shipping routes for the ocean freight benchmark. And although Risen Energy suggests that Commerce should consider the Descartes data as only one route and average it as one route, *i.e.*, average the nine Descartes U.S. routes together rather than giving the Descartes data equal weight with the Xeneta data in the average, we decline to do so for these final results. We will, however, adjust the Descartes ocean freight benchmark for the aluminum extrusions payload to convert the shipping prices from a 40-foot container to a 20-foot container, which is consistent with the Xeneta prices.[335]

Comment 10: Commerce's Use of "Zeroing" in Benefit Calculations

Risen Energy's Comments:

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[334] *See*, *e.g.*, *Solar Cells from China 2014 AR* at Comment 4. [334] *Id*.
[334] *See* Risen Energy's Case Brief at 18.
[334] *Id*.
[334] *Id*. at 18-19.
[334] *Id*. at 19-20.
[334] *Id*. at 20 and Attachment 2.
[334] *See Preliminary Results* PDM at 23.
[334] *See Solar Cells from China 2016 AR* IDM at 6 (for Xeneta); *see also High Pressure Steel Cylinders from China* IDM at Comment 5 (for Descartes).
[334] *See*, *e.g.*, *Solar Cells from China 2014 AR* at Comment 4
[335] *See* JA Solar's Calculations Memorandum; *see also* Memorandum, "Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Analysis Memorandum for Risen Energy Co., Ltd.," dated concurrently with this IDM (Risen Energy's Calculations Memorandum) (collectively, Calculations Memoranda).

- Commerce made an error in zeroing benefits. In comparing Risen Energy's purchases under all of the LTAR program, Commerce set negative benefits (*i.e.*, where Risen Energy's purchase value exceeded the benchmark) to zero.[336] This calculation is contrary to the statutory and regulatory requirements to determine the overall benefits from all government sales of the goods in question.
- Section 771(5)(E) of the Act states that "{a} benefit shall normally be treated as conferred where there is a benefit to the recipient, including... in the case where goods... are provided, if such goods... are provided for {LTAR}..."[337]
- Section 351.511(a)(1) of Commerce's regulations states that "In the case where goods... are provided, a benefit exists to the extent that such goods... are provided for less than adequate remuneration."[338]
- The legal provisions' use of "benefit" in the singular and "goods" in the plural indicates that Commerce must determine the overall benefit derived from all government sales of the goods. This requirement is violated if government sales that generate negative benefits are disregarded through "zeroing."[339]
- Therefore, Commerce improperly zeroed these benefits for Risen Energy and must correct this methodology by taking into account the gross benefit of all purchases of the raw material under LTAR investigation in the aggregate.[340]

No other interested party commented on this issue.

Commerce's Position: We disagree with Risen Energy's arguments that Commerce should account for "negative" values in the benefit calculations to offset the overall benefit. The LTAR benefit and benchmark methodology applied in the *Preliminary Results* is consistent with Commerce's regulations and practice.[341] In a subsidy analysis, a benefit from a transaction constituting a financial contribution is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions. There is no offsetting credit for transactions that did not provide a subsidy benefit. Such an adjustment is not contemplated under the statute and is inconsistent with Commerce's practice.[342] Therefore, we have made no modifications to the final results regarding alleged "negative" benefits.

Comment 11: Whether Commerce Should Correct Errors to Sales Denominators and the Attribution of Subsidies

JA Solar's Comments:

[336] *See* Risen Energy's Case Brief at 23.
[337] *Id.* (citing section 771(5)(E) of the Act).
[338] *See* Risen Energy's Case Brief at 23 (citing 19 CFR 351.511(a)(1)).
[339] *See* Risen Energy's Case Brief at 23.
[340] *Id*.
[341] *See* 19 CFR 351.511(a)(2)(ii); *see also*, *e.g.*, *Solar Cells from China 2015 AR* IDM at Comment 10.
[342] *See*, *e.g.*, *Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada*, 70 FR 56640 (September 28, 2005) IDM at Comment 6.

- Commerce applied the incorrect cross-ownership standards to JA Solar when calculating sales denominators for its reporting affiliates and must correct a ministerial error concerning the total export sales of affiliate JA Solar Technology Yangzhou.[343]

Risen Energy's Comments:

- Commerce made certain calculation errors in the *Preliminary Results* with respect to certain sales values and attribution of denominators with respect to Risen Energy.[344]

Commerce's Position: In the *Preliminary Results*, we made certain inadvertent errors when calculating the company respondents' subsidy benefits. We have corrected these errors for the final results, which are discussed in the Calculations Memorandum.

XII. RECOMMENDATION

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

☒ ☐

Agree Disagree

11/27/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[343] *See* JA Solar's Case Brief at 2-4.
[344] *See* Risen Energy's Case Brief at 7-13.