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Investigation
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May 14, 2021

MEMORANDUM TO: Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations

FROM: Scot Fullerton
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of certain walk-behind lawn mowers and parts thereof (lawn mowers) from the People's Republic of China (China), as provided in section 705 of the Tariff Act of 1930, as amended (the Act).

The petitioner in this investigation is MTD Products, Inc. (the petitioner). The mandatory respondents subject to this investigation are Zhejiang Amerisun Technology Co. (Zhejiang Amerisun) and Ningbo Daye Garden Machinery Co., Ltd. (Ningbo Daye). As a result of our analysis, we made changes to the subsidy rate calculations for Zhejiang Amerisun and Ningbo Daye, as well as to the all-others rate.

Below is the complete list of issues in this investigation for which we received comments from interested parties.

Comment 1: Whether Individually-Owned Cold-Rolled Steel Input Suppliers are "Authorities"
Comment 2: Whether the Application of Facts Available is Warranted in Constructing Benchmark Inland Freight Charges Used for the Benefit Calculation for Zhejiang Amerisun under the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Program
Comment 3: Whether Commerce Committed a Ministerial Error in the Benefit Calculation for a Certain Subsidy Reported by Zhejiang Amerisun

Comment 4: Whether Commerce Should Remove Inland Freight and Value Added Tax from the Cold-Rolled Steel Benchmark under the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Program
Comment 5: Whether Commerce Improperly Found that Zhejiang Dobest was Uncreditworthy in 2017 and 2018
Comment 6: Whether Commerce Should Find the Export Buyers Credit Program to be Countervailable Based on Adverse Facts Available
Comment 7: Whether Certain Parties did not Receive Due Process and Whether Commerce Should Modify the Cash Deposit Rates for Certain Parties
Comment 8: Whether the Provision of Electricity for Less Than Adequate Remuneration Program is Specific
Comment 9: Whether Commerce's Selection of Inland Freight Benchmarks for Ningbo Daye Under the Cold-Rolled Steel for Less Than Adequate Remuneration Program Is Correct
Comment 10: Whether Commerce Should Include Negative Transaction Benefit Values in the Calculation of Benefits Under the Cold-Rolled Steel for Less Than Adequate Remuneration and Policy Loans Programs

II. BACKGROUND

A. Case History

On October 30, 2020, Commerce published the *Preliminary Determination* in the *Federal Register*.[1] In the *Preliminary Determination*, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we aligned the deadline of the final determination of this countervailing duty (CVD) investigation with that of the final determination of the companion antidumping duty (AD) investigation of lawn mowers from China.[2] On December 30, 2020, Commerce postponed the deadline of the final determination in the companion AD investigation of lawn mowers from China to May 14, 2021.[3]

Between December 11 and 22, 2020, respectively, interested parties Fujian Spring Machinery Co., Ltd. (Fujian Spring)/Masport Limited (Masport), and Power Distributors, LLC (Power Distributors) submitted case briefs, which Commerce rejected because they each contained untimely and unsolicited new factual information (NFI).[4] On December 15, 2020, Commerce

[1] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 68848 (October 30, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).
[2] *See Preliminary Determination* at "Alignment."
[3] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 86529 (December 30, 2020).
[4] *See* Fujian and Masport's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China," dated December 11, 2020; and Power Distributor's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China, Case No. C-570-130: Comment and Case Brief of Power Distributors, LLC on the Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination," dated

issued a memorandum declining to initiate an investigation with respect to new subsidy allegations filed by the petitioner prior to the *Preliminary Determination*.[5] On December 22, 2020, upon reviewing the petitioner's creditworthiness allegation filed prior to the *Preliminary Determination*,[6] Commerce initiated an investigation of the creditworthiness of Zhejiang Amerisun's subject merchandise producer Zhejiang Dobest Power Tools Co., Ltd. (Zhejiang Dobest) for the years 2017 through 2019 and of Ningbo Daye for the year 2018.[7] Between January 6 and 19, 2021, Commerce issued post-preliminary supplemental questionnaires concerning the creditworthiness of Zhejiang Dobest and Ningbo Daye, and received timely responses.[8] On March 5, 2021, Commerce issued its Post-Preliminary Determination in which it preliminarily found that Zhejiang Dobest and Ningbo Daye were uncreditworthy in the relevant years, as noted.[9]

On February 17, 2021, Commerce issued a questionnaire in lieu of verification to Zhejiang Amerisun,[10] to which Zhejiang Amerisun responded on February 26, 2021.[11] On March 5, 2021, Commerce issued a questionnaire in lieu of verification to Ningbo Daye,[12] to which Ningbo Daye responded on March 15, 2021.[13]

December 12, 2020; *see also* Commerce's Letters, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Rejection of Fujian Spring Machinery Co., Ltd. and Masport Limited's Case Brief and Opportunity for Resubmission," dated February 9, 2021 and "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Rejection of Power Distributors LLC's Case Brief and Opportunity for Resubmission," dated February 9, 2021. Thus, Commerce excluded these submissions from the subsidy analyses, but has retained a copy on the record for reference purposes only. *See* 19 CFR 351.104(a)(2)(ii)(A).

[5] *See* Memorandum, "New Subsidy Allegations," dated December 15, 2020.

[6] *See* Petitioner's Letter, "Countervailing Investigation on Certain Walk-Behind Lawn Mowers from the People's Republic of China: Petitioner's Uncreditworthy Allegation," dated September 17, 2020.

[7] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers from the People's Republic of China; Uncreditworthiness Allegation," dated December 22, 2020.

[8] *See* Commerce's Letters, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Uncreditworthy Investigation Supplemental Questionnaire," dated January 6, 2021; *see also* Zhejiang Amerisun's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic {of} China: Submission Zhejiang Dobest's Creditworthiness Response," dated January 19, 2021 (Zhejiang Dobest UCSQR); and Ningbo Daye's Letter, "Certain Walk-Behind Lawn Mowers {a}nd Parts Thereof {f}rom the People's Republic of China, Case No. C-570-130: Ningbo Daye's Creditworthiness Questionnaire Response," dated January 19, 2021.

[9] *See* Memorandum, "Analysis of Uncreditworthiness Allegations," dated March 5, 2021 (Post-Preliminary Determination).

[10] *See* Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: In Lieu of On-Site Verification Questionnaire," dated February 17, 2021.

[11] *See* Zhejiang Amerisun's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic {of} China: Submission Zhejiang Amerisun's Verification Response," dated February 26, 2021.

[12] *See* Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: In Lieu of On-Site Verification Questionnaire – Ningbo Daye Garden Machinery Co., Ltd.," dated March 5, 2021.

[13] *See* Ningbo Daye's Letter, "Certain Walk-Behind Lawn Mowers {a}nd Parts Thereof {f}rom the People's Republic of China, Case No. C-570-130: Ningbo Daye's Verification Questionnaire Response," dated March 15, 2021.

On March 25, 2020, the Government of China (GOC), Zhejiang Amerisun, Ningbo Daye, Power Distributors, Fujian Spring/Masport, submitted case briefs.[14] On April 1, 2021, the petitioner submitted a rebuttal brief.[15] On May 11, 2021, Commerce rejected Fujian Spring and Masport's case brief because we determined that it contained unsolicited or untimely NFI.[16] On May 12, 2021, Fujian Spring and Masport submitted a revised version of their case brief from which the untimely NFI was removed.[17]

B. Period of Investigation

The period of investigation (POI) is January 1, 2019, through December 31, 2019.

III. SCOPE COMMENTS

In the *Preliminary Determination*, we stated that due to an overlap between the scope of the AD and CVD investigations of certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines) from China and that of this proceeding, we would be setting aside a separate period of time for parties to comment on the issue of the overlap in the scopes of the lawn mowers and small vertical engines AD and CVD proceedings.[18] On November 6, 2020, we solicited comments from interested parties.[19] After receiving comments from various interested parties, on December 22, 2020, Commerce issued the Preliminary Scope Decision Memorandum in which it determined to modify the language of the scope by excluding from the scope of these investigations lawnmowers that contain an engine covered by the scope of the ongoing AD and CVD proceedings on small vertical engines from China to address the overlap in the scopes of these proceedings.[20] Subsequently, we received comments from interested parties regarding the Preliminary Scope Decision Memorandum; we address these comments in

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[14] *See* GOC's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Case Brief," dated March 25, 2021 (GOC Case Brief); Zhejiang Amerisun's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic {of} China: Submission Zhejiang Amerisun's Case Brief," dated March {25}, 2021 (Zhejiang Amerisun Case Brief); Ningbo Daye's Letter, "Certain Walk-Behind Lawn Mowers {a}nd Parts Thereof {f}rom the People's Republic of China, Case No. C-570-130: Ningbo Daye's Case Brief," dated March 25, 2021 (Ningbo Daye Case Brief); and Power Distributor's Letter, "Countervailing Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China, Case No. C-570-130: Extension Request – Re-submission of Case Brief of December 12, 2020 with Redaction," dated March {25}, 2021 (Power Distributors' Case Brief).

[15] *See* Petitioner's Letter, "Countervailing Duty Investigation on Certain Walk-Behind Lawn Mowers from the People's Republic of China: MTD Products Inc.'s Rebuttal Brief," dated April 1, 2021 (Petitioner Rebuttal Brief).

[16] *See* Commerce's Letter, "Rejection of Revised Case Brief in the Countervailing Investigation of Certain Walk Behind Lawn Mowers and Parts Thereof from the People's Republic of China," dated May 11, 2021; and Memorandum, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China; Reject Dower Distributors LLC, 's {sic.} Fujian Spring Machinery Co., Ltd.'s, and Masport Limited's Submission," dated May 11, 2021.

[17] *See* Fujian Spring and Masport's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Re-Submission of Case Brief," dated May 12, 2021 (Fujian Spring and Masport Case Brief).

[18] *See Preliminary Determination* PDM at 6-7.

[19] *See* Memorandum, "Request for Comments Regarding Scope Overlap," dated November 6, 2020.

[20] *See* Memorandum, "Antidumping and Countervailing Duty Investigations of Lawn Mowers from the People's Republic of China and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum," dated December 22, 2020 (Preliminary Scope Decision Memorandum).

the Final Scope Decision Memorandum.[21] As a result of our analysis, the scope of the investigation, as contained in the Preliminary Scope Decision Memorandum, remains unchanged.

IV. SCOPE OF THE INVESTIGATION

The merchandise covered by this investigation are lawn mowers. For a complete description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

V. SUBSIDIES VALUATION

A. Allocation Period

No interested parties submitted comments in their case briefs regarding the allocation period or the allocation methodology. We made no changes to the allocation period (10 years) and the allocation methodology used in the *Preliminary Determination*.[22]

B. Attribution of Subsidies

An interested party submitted comments in its case brief regarding the attribution methodology used in the *Preliminary Determination*.[23] For further discussion, *see* Comment 3. We made no changes to the attribution methodology applied in the *Preliminary Determination*. As explained in the *Preliminary Determination*, Zhejiang Amerisun is a trading company that exports, but does not produce, the subject merchandise, and during the POI, Zhejiang Amerisun exported to the United States subject lawn mowers that were produced only by Zhejiang Dobest.[24] Regardless of whether Zhejiang Amerisun and Zhejiang Dobest are affiliated, pursuant to 19 CFR 351.525(c), we continue to cumulate benefits from subsidies provided to Zhejiang Amerisun with benefits from subsidies provided to Zhejiang Dobest. Additionally, for Zhejiang Dobest, we continue to attribute subsidies received by Zhejiang Dobest to its own sales, in accordance with 19 CFR 351.525(b)(6)(i). With regard to Ningbo Daye, pursuant to 19 CFR 351.525(b)(6)(i), we continue to attribute subsidies received by Ningbo Daye to itself.

[21] *See* Memorandum, "Antidumping Duty and Countervailing Duty Investigations of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Scope Comments Decision Memorandum for the Final Determinations," dated concurrently with this memorandum (Final Scope Decision Memorandum).
[22] *See Preliminary Determination* PDM at 36-37.
[23] *Id*. at 37-39.
[24] *Id*. at 38-39.

C. Denominators

An interested party submitted comments in its case brief regarding the denominator used in calculating the subsidy rate for the provision of cold-rolled steel (CRS) for less than adequate remuneration (LTAR) program in the *Preliminary Determination*. For further discussion, *see* Comments 2, 4, and 9. We made no changes to the denominators used in the *Preliminary Determination*.[25]

D. Loan Interest Rate Benchmarks and Discount Rates

Interested parties submitted comments in their case and rebuttal briefs regarding the uncreditworthiness of Zhejiang Amerisun's subject merchandise producer Zhejiang Dobest, as reflected in the Post-Preliminary Determination. For further discussion, *see* Comment 5. Based on our determination that Zhejiang Dobest was uncreditworthy in the years 2017 and 2018, we revised the benchmark interest rates to reflect uncreditworthy premiums for the relevant years for this company.[26] In addition, based on our determination that Ningbo Daye was uncreditworthy in the year 2018, we revised the discount rate to reflect an uncreditworthy premium for the relevant year for this company.[27] We made no additional changes to, and interested parties raised no further issues regarding, the benchmarks used in the *Preliminary Determination*.[28]

E. Benchmarks for the Provision of Cold-Rolled Steel for LTAR

Interested parties submitted comments in their case and rebuttal briefs regarding the benchmarks used in the *Preliminary Determination*.[29] For further discussion, *see* Comments 2, 4, and 9. For the final determination, we revised the benchmarks used to calculate the program-specific countervailable subsidy rates for Zhejiang Amerisun's subject merchandise producer Zhejiang Dobest and Ningbo Daye.

VI. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

A. Cold-Rolled Steel Producers Are "Authorities"

In the *Preliminary Determination*, we found that the majority government-owned producers, as well as the non-majority government-owned domestic producers of the CRS from which Zhejiang Dobest and Ningbo Daye purchased CRS, were "authorities" within the meaning of section 771(5)(B) of the Act, and that a financial contribution from them in the form of a provision of a good, pursuant to section 771(5)(D)(iii) of the Act, was provided to benefit

[25] *Id*. at 39.
[26] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Zhejiang Amerisun Final Calculation Memorandum," dated concurrently with this final determination (Zhejiang Amerisun Final Calculation Memorandum).
[27] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Ningbo Daye Final Calculation Memorandum," dated concurrently with this final determination (Ningbo Daye Final Calculation Memorandum).
[28] *See Preliminary Determination* PDM at 39-42.
[29] *Id*. at 16-17 and 42-45.

respondents.[30] We also preliminarily determined that an adverse inference was warranted when selecting from among the facts otherwise available (AFA) pursuant to sections 776(a) and (b) of the Act and found that the non-majority government-owned domestic producers of the CRS purchased by Zhejiang Dobest and Ningbo Daye were "authorities" within the meaning of section 771(5)(B) of the Act and that a financial contribution from them in the form of a provision of a good, pursuant to section 771(5)(D)(iii) of the Act, was provided to benefit respondents.[31] An interested party submitted comments in its case brief regarding whether all CRS suppliers are "authorities" that provided a financial contribution, discussed below at Comment 1. Our findings from the *Preliminary Determination* remain unchanged. For further discussion, *see* Comment 1.

B. The Provision of Cold-Rolled Steel Is Specific

In the *Preliminary Determination*, we found that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, we found that an adverse inference was warranted in the application of facts available pursuant to section 776(b)(1) of the Act.[32] Drawing an adverse inference, we preliminarily found that the GOC's provision of CRS was specific within the meaning of section 771(5A)(D)(iii) of the Act. No interested parties submitted comments in their case briefs as to whether the provision of CRS is specific, and our findings from the *Preliminary Determination* remain unchanged.

C. The Cold-Rolled Steel Market Is Distorted

In the *Preliminary Determination*, we found that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, we found that an adverse inference was warranted in the application of facts available pursuant to section 776(b)(1) of the Act.[33] Accordingly, as AFA, we preliminarily determined that the GOC's involvement in the CRS market in China results in the significant distortion of the prices of CRS, such that they cannot be used as a tier one benchmark under 19 CFR 351.511(a)(2)(i), and hence, the use of external benchmarks, as described under 19 CFR 351.511(a)(2)(ii), was warranted to calculate the benefit for the provision of CRS for LTAR.[34] No interested parties submitted comments in their case briefs regarding whether the CRS market is distorted, and our findings from the *Preliminary Determination* remain unchanged.

D. The Benchmark Inland Freight Expense for the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Concerning Zhejiang Amerisun

In the *Preliminary Determination*, we determined that because Zhejiang Amerisun withheld necessary information with regard to Zhejiang Dobest's inland freight expenses for CRS during the POI, reliance on facts available was warranted, pursuant to section 776(a)(2)(A) of the Act.[35]

[30] *Id*. at 10-11.
[31] *Id*. at 12.
[32] *Id.* at 10-11.
[33] *Id*. at 13-16.
[34] *Id*. at 16.
[35] *Id*. at 17.

Interested parties submitted comments in their case and rebuttal briefs regarding the application of facts available to the benchmark inland freight expense used to calculate the program-specific countervailable subsidy rate for Zhejiang Dobest under the provision of CRS for LTAR program in the *Preliminary Determination*.

For the final determination, upon further review of the record, we determine that the use of an adverse inference when selecting from among the facts otherwise available (application of AFA) is appropriate regarding certain information used in the calculation of Zhejiang Dobest's benchmark inland freight expense for transporting CRS from the nearest port to Zhejiang Dobest, which is used in Zhejiang Dobest's benefit calculation under this program. For further discussion, *see* Comment 2.

E. The Benchmark Inland Freight Expense for the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Concerning Ningbo Daye

In the *Preliminary Determination*, we relied on data the petitioner provided for the inland freight distance and per-kilometer (KM), per-metric ton (MT) inland freight expense to calculate the inland freight benchmark for Ningbo Daye because Ningbo Daye's own freight expenses were not available.[36] Interested parties submitted comments in their case and rebuttal briefs regarding the selection of the benchmark inland freight expense used to calculate the program-specific countervailable subsidy rate for Ningbo Daye under the provision of CRS for LTAR program in the *Preliminary Determination*.

For the final determination, upon further review of the record, we have modified the inland freight calculation by using the distance as reported by Ningbo Daye, in combination with the petitioner's per-KM, per-MT freight expense data, as facts available, to construct an inland freight benchmark for Ningbo Daye. We determine that selection from among the facts otherwise available on the record is appropriate because actual, company-specific information regarding Ningbo Daye's inland freight expense for transporting CRS from the nearest port to Ningbo Daye is not available on the record, within the meaning of section 776(a) of the Act. For further discussion, *see* Comment 9.

F. Provision of Electricity for Less Than Adequate Remuneration

In the *Preliminary Determination*, we determined that the use of an adverse inference when selecting from among the facts otherwise available on the record (application of AFA) was warranted in determining the countervailability of the provision of electricity for LTAR program because the GOC did not provide the requested information necessary for Commerce to fully analyze this program.[37] Thus, we preliminarily determined that the GOC's provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act and is specific within the meaning of section 771(5A) of the Act.[38] We also preliminarily determined to use an adverse inference in selecting the benchmark for determining the existence

[36] *Id.* at 17.
[37] *Id*. at 17-24.
[38] *Id*. at 24.

and amount of the benefit.[39] In the *Preliminary Determination*, we relied upon electricity usage and rates paid as reported by the mandatory respondents during the POI to calculate their respective countervailable subsidy rates under the program.[40] An interested party submitted comments in its case brief regarding the specificity of the provision of electricity for LTAR program. Our findings from the *Preliminary Determination* remain unchanged. For further discussion, *see* Comment 8.

G. Export Buyers Credit Program

In the *Preliminary Determination*, we determined that the use of an adverse inference when selecting from among the facts otherwise available on the record (application of AFA) was warranted in determining the countervailability of the Export Buyers Credit program (EBCP) because the GOC did not provide the requested information needed for Commerce to analyze this program fully.[41] Thus, we preliminarily determined, as AFA, that the program constitutes a financial contribution pursuant to section 771(5)(D) of the Act and provides a benefit pursuant to section 771(5)(E) of the Act that is contingent on exports within the meaning of sections 771(5A)(A) and (B) of the Act.[42] Interested parties submitted comments in their case and rebuttal briefs regarding whether mandatory respondents benefited from this program. Our decision to apply AFA to this program remains unchanged. For further discussion, *see* Comment 6.

H. Policy Loans to the Walk-Behind Lawn Mower Industry

In the *Preliminarily Determination*, we found that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. Consequently, we found that the use of an adverse inference was warranted in the selection from among the facts otherwise available on the record pursuant to sections 776(b)(1) of the Act.[43] Using an adverse inference, we preliminarily found that the policy loans to the walk-behind lawn mower industry constitute a financial contribution within the meaning of section 771(5)(D) of the Act, and are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.[44] No interested parties submitted comments in their case briefs regarding these findings, and we have made no changes for the purposes of the final determination.

I. Other Subsidies

As explained in the *Preliminary Determination*, Zhejiang Dobest and Ningbo Daye reported in their questionnaire responses that they received certain "Other Subsidies" during the POI and over the AUL.[45] In the *Preliminary Determination*, we explained that the GOC failed to act to the best of its ability by not providing information necessary to perform our analyses of financial

[39] *Id*.
[40] *Id*. at 50-51.
[41] *Id.* at 24-29.
[42] *Id*. at 28.
[43] *Id*. at 35-36.
[44] *Id*. at 36.
[45] *Id*. at 36 and 51-52.

contribution and specificity for the other subsidy programs reported by the respondents.[46] Consequently, in the *Preliminary Determination*, we used an adverse inference in selecting from among the facts otherwise available on the record to find the other subsidy programs at issue that were self-reported by Zhejiang Dobest and Ningbo Daye constituted a financial contribution, pursuant to section 771(5)(D) of the Act, and were specific, within the meaning of section 771(5A) of the Act.[47] In the *Preliminary Determination*, we relied upon the benefit information reported by Zhejiang Dobest and Ningbo Daye for these programs.[48] No interested parties submitted comments in their case briefs regarding the findings related to financial contribution or specificity, and we have made no changes for the purposes of this final determination.

VII. ANALYSIS OF PROGRAMS

We made no changes to our *Preliminary Determination* and our Post-Preliminary Determination with respect to the methodology used to calculate the subsidy rates for the following programs, except where noted below. For descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination*, the Zhejiang Amerisun Preliminary Calculation Memorandum,[49] the Ningbo Daye Preliminary Calculation Memorandum,[50] the Post-Preliminary Determination, the Zhejiang Amerisun Final Calculation Memorandum, and the Ningbo Daye Final Calculations Memorandum. Except where noted below, no interested parties submitted comments regarding these programs in their case briefs. The final program rates are as indicated below for each program and respondent.

A. Programs Determined to Be Countervailable

1. Policy Loans to the Walk-Behind Lawn Mower Industry

We continue to find this program to be countervailable.[51] Consistent with the Post-Preliminary Determination and Comment 5, we added a risk premium to the interest rate benchmarks used to calculate the benefits from long-term loans granted to Zhejiang Dobest in 2017 and 2018. We made no changes to the Post-Preliminary Determination that Zhejiang Dobest was uncreditworthy. For further discussion, *see* Comment 5. In accordance with 19 CFR 351.525(c) and consistent with the *Preliminary Determination*,[52] we continue to cumulate the benefits to Zhejiang Amerisun and Zhejiang Dobest to determine a net subsidy rate for Zhejiang Amerisun. We made no further changes to our methodology for calculating a net subsidy rate for Zhejiang

[46] *Id*. at 36.
[47] *Id*.
[48] *Id*. at 51-53.
[49] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Zhejiang Amerisun Preliminary Calculation Memorandum," dated October 23, 2020 (Zhejiang Amerisun Preliminary Calculation Memorandum).
[50] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Preliminary Determination Calculation Memorandum for Ningbo Daye Garden Machinery Co., Ltd.," dated October 23, 2020 (Ningbo Daye Preliminary Calculation Memorandum).
[51] *See Preliminary Determination* PDM at 45-46.
[52] *Id*.

Amerisun under this program. Accordingly, the net countervailable subsidy rate for Zhejiang Amerisun is 4.11 percent *ad valorem*.[53]

With regard to Ningbo Daye, we made no changes to our methodology for calculating a subsidy rate under this program.[54] For further discussion, *see* Comment 10. Accordingly, the net countervailable subsidy rate for Ningbo Daye is 1.19 percent *ad valorem*.[55]

2. Export Buyers Credit Program

We continue to find this program to be countervailable and made no changes to our methodology for determining the AFA rate for this program.[56] For further discussion, *see* Comment 6, below. For both Zhejiang Amerisun and Ningbo Daye, we continue to select an AFA rate of 10.54 percent *ad valorem*.

3. Income Tax Reduction for High or New Technology Enterprises

We continue to find this program to be countervailable, and we made no changes to the subsidy rate calculated under this program.[57] The net countervailable subsidy rate for Zhejiang Amerisun is 0.14 percent *ad valorem*.[58] The net countervailable subsidy rate for Ningbo Daye is 0.56 percent *ad valorem*.[59]

4. Income Tax Deductions for Research and Development Under the Enterprise Income Tax Law

We continue to find this program to be countervailable, and we made no changes to the subsidy rate calculated under this program.[60] The net countervailable subsidy rate for Zhejiang Amerisun is 0.55 percent *ad valorem*.[61] The net countervailable subsidy rate for Ningbo Daye is 0.60 percent *ad valorem*.[62]

5. Provision of Cold-Rolled Steel for Less Than Adequate Remuneration

We continue to find this program to be countervailable.[63] We have made changes to our selected benchmark and the methodology to calculate the inland freight component of the benchmark price of CRS and the countervailable subsidy rate for Zhejiang Amerisun under this program.[64]

[53] *See* Zhejiang Amerisun Final Calculation Memorandum.
[54] *See Preliminary Determination* PDM at 45; *see also* Ningbo Daye Final Calculation Memorandum.
[55] *See Preliminary Determination* PDM at 45; *see also* Ningbo Daye Final Calculation Memorandum.
[56] *See Preliminary Determination* PDM at 46.
[57] *Id.* at 46-47.
[58] *Id*. at 47.
[59] *Id*.
[60] *Id*. at 47-48.
[61] *Id*. at 48.
[62] *Id*.
[63] *Id*. at 48-50.
[64] *See* Zhejiang Amerisun Final Calculation Memorandum.

For further discussion, *see* Comments 2 and 4, below. Accordingly, the net subsidy rate for Zhejiang Amerisun is 4.89 percent *ad valorem*.[65]

For Ningbo Daye, we also made changes to benchmark and methodology to calculate the inland freight component of the benchmark CRS price and the countervailable subsidy rate under this program.[66] For further discussion, *see* Comment 9, below. The net subsidy rate for Ningbo Daye is 0.56 percent *ad valorem*.[67]

6. Provision of Electricity for Less Than Adequate Remuneration

We continue to find this program to be countervailable and we made no changes to our methodology for calculating the subsidy rate for this program.[68] For further discussion, *see* Comment 8, below. Accordingly, the net countervailable subsidy rate for Zhejiang Amerisun is 0.14 percent *ad valorem*.[69] The net countervailable subsidy rate for Ningbo Daye is 0.06 percent *ad valorem*.[70]

7. Other Subsidies – Grants Self-Reported by Zhejiang Amerisun's Subject Merchandise Producer

We continue to find the following programs self-reported by Zhejiang Dobest to be countervailable and we made no changes to our methodology for determining the countervailable subsidy rate for each program.[71] For further discussion, *see* Comment 3, below. Accordingly, in accordance with 19 CFR 351.525(c), the net subsidy rates for the programs self-reported by Zhejiang Dobest and attributed to Zhejiang Amerisun remain unchanged.[72] The cumulative countervailable subsidy rate of the following programs is 0.61 percent *ad valorem* for Zhejiang Amerisun.[73]

- Subsidy for Factory Building – 0.16 percent *ad valorem*
- Rewards for R&D Expense – 0.08 percent *ad valorem*
- Subsidy for Foreign Trade Import and Export Business Qualification Enterprises – 0.37 percent *ad valorem*

8. Other Subsidies – Grants Self-Reported by Ningbo Daye

We continue to find the programs self-reported by Ningbo Daye to be countervailable.[74] However, in accordance with our post-preliminary determination regarding Ningbo Daye's creditworthiness, we made changes to the discount rate used to allocate non-recurring benefits

[65] *Id*.
[66] *See* Ningbo Daye Final Calculation Memorandum; s*ee also Preliminary Determination* PDM at 49-50.
[67] *See Preliminary Determination* PDM at 49; *see also* Ningbo Daye Final Calculation Memorandum.
[68] *See Preliminary Determination* PDM at 50-51.
[69] *Id*. at 51.
[70] *Id*.
[71] *Id*. at 51-52.
[72] *Id*. at 52; *see also* Zhejiang Amerisun Preliminary Calculation Memorandum.
[73] *See Preliminary Determination* PDM at 52.
[74] *Id*. at 52-53.

under this program.[75] The total net subsidy rate for Ningbo Daye for these programs is 0.66 percent *ad valorem*. For more information, *see* Ningbo Daye Final Calculation Memorandum.

B. Programs Determined to be Not Used or Not to Have Conferred Measurable Benefits During the Period of Investigation

Commerce made no changes to its *Preliminary Determination* with regard to programs determined to be not used or not to have conferred a measurable benefit.[76] For a list of the subsidy programs that were not used or were found not to have conferred a measurable benefit, for each respondent, *see* the Appendix attached to this memorandum.

VIII. ANALYSIS OF COMMENTS

Comment 1: Whether Individually-Owned Cold-Rolled Steel Input Suppliers are "Authorities"

The GOC Case Brief

- Commerce applied AFA to the GOC and found that all of the CRS producers identified by the respondents, including those producers that are owned by individuals, are "government authorities" within the meaning of section 771(5)(B) of the Act. However, record evidence shows that individually and privately-owned input suppliers are not "government authorities" within the meaning of the law.[77]
- In circumstances where, as here, there is no record evidence that prices are controlled by the government and that the respondent's input suppliers are privately owned, Commerce cannot make an adverse finding of government authorities because there is no missing information.[78] Nonetheless, Commerce found that the respondents received a financial contribution from government authorities even though the respondents purchased inputs from private companies or minority government-owned companies. This determination is unsupported by substantial evidence and should be reversed in the final determination.[79]
- Commerce's reasoning that information regarding the structure and role of the Chinese Communist Party (CCP) in managing the business affairs of companies that are not majority-owned by the government is necessary information because the CCP exerts significant control over economic activities in China is without merit. As the GOC has emphasized before, the CCP is a political party, not a government authority. Political parties in China are independent entities unrelated to governmental functions.[80]
- Commerce relied on incorrect assertions and arbitrary conclusions in the {Placing Documents on the Record Memorandum (also known as Public Bodies Memorandum)}, Commerce's own memorandum which was issued in 2012, and without any concrete

[75] *See* Ningbo Daye Final Calculation Memorandum at 1 and Attachment 2; *see also* Post-Preliminary Determination.
[76] *See Preliminary Determination* PDM at 53 and Appendix.
[77] *See* GOC Case Brief at 11 (citing GOC's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: GOC Section II Questionnaire Response," dated August 20, 2020 (GOC IQR) at Exhibits CRS-2 and CRS-3).
[78] *Id*. (citing section 776(a)).
[79] *Id*. at 12.
[80] *Id.* (citing GOC IQR at Exhibit CRS-1).

evidence.[81] The GOC explained in its responses that "it does not agree with the analysis and conclusions in the Public Bodies Memorandum, and the Public Bodies Memorandum does not state that the CCP exerts control over private companies through primary party organizations and it cannot be the sole basis for Commerce's position on this issue. At most, the Public Bodies Memorandum expresses uncertainty over the role of primary party organizations in private companies."[82]

- Commerce's characterization of the role that CCP party groups and committees, or primary party organizations, play in the management and operation of private companies as outlined in the Public Bodies Memorandum is incorrect. Further, there is no basis to claim missing information here because the GOC was responsive regarding the role of the CCP in managing the business affairs of companies that are not majority-owned by the government, which is none.[83] Commerce cannot claim that the record is missing information merely because the GOC's response suggests no control over individual private companies.[84]
- Commerce also faulted the GOC for not providing input suppliers' "company by-laws, annual reports, tax registration documents, and articles of association."[85] Yet, Commerce failed to explain the basis for requesting such voluminous documents for all of the respondents' CRS suppliers.[86]
- As the GOC explained, the Enterprise Credit Information Publicity System (ECIPS) was established pursuant to the *Circular of the State Council on Printing and Issuing the Reform Proposals for the Registered Capital Registration System (Guo Fa (2014) No. 7)* for the government to maintain basic information of enterprises and business entities in China.[87] The ECIPS is the authoritative evidence of the ownership structure of enterprises in China. As such, the information provided in Exhibits CRS-2 and CRS-3 is sufficient to demonstrate the ownership status of the respondents' CRS input suppliers during the POI. Record evidence sufficiently refutes that individually-owned input suppliers are "government authorities."[88]
- Where the ownership structure evidence clearly shows that a company is owned by private individuals, Commerce cannot speculate, even as AFA, that the company is government-owned. Commerce's request for a massive number of corporate documents was unreasonable and burdensome because these documents are not necessary information to make the key determination of GOC ownership.[89]
- As the GOC explained in its responses, the *Company Law of the People's Republic of China* (*Company Law*) regulates the corporate governance of companies in China.[90] The *Company*

[81] *See* GOC Case Brief at 12 (citing Memorandum, "Placing Documents on the Record," dated July 7, 2020 at Attachment 1 (containing 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, 2020) (Public Bodies Memorandum)).
[82] *Id*. at 12-13 (citing GOC IQR at Exhibit CRS-1 at CRS-11 and CRS-12).
[83] *Id*. at 13 (citing GOC IQR at Exhibit CRS-1 at CRS-9 and CRS-11 – CRS-15).
[84] *Id*. at 13-14.
[85] *Id*. at 14 (citing *Preliminary Determination* PDM at 10).
[86] *Id*. at 14.
[87] *Id*. (citing GOC IQR at Exhibit CRS-1 at CRS-1 and Exhibit GEN-11).
[88] *Id*. at 14.
[89] *Id*.
[90] *Id*. (citing GOC IQR at Exhibit CRS-1 at CRS-4 – CRS-5).

Law stipulates the position and duty of the shareholder meeting, board of directors, managers and supervisors, but does not confer upon CCP officials any position or power to take part in the management and operation of companies.[91] In other words, record evidence demonstrates that CCP officials have no legal authorization to intervene in or determine the outcome of any of the operations of the input producers when they are individually-owned.[92]

- The GOC not only submitted the *Company Law* but also directed Commerce to the specific provisions: Articles 36, 37, 46, 48 and 147 of the *Company Law*.[93] These provisions 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. Thus, even if an owner, a director, or a manager of a supplier is a member or representative of any of these organizations, it would not render the management and business operations of the company in which they serve subject to any intervention by the GOC.[94]
- There is no record evidence in this investigation indicating that the CCP participates in any way in the private input suppliers' business operations that could support a conclusion that these input suppliers are "authorities." Commerce's alleged "missing information," such as the articles of incorporation, capital verification reports and annual reports is not "necessary information" in determining whether the input suppliers are government authorities. The GOC submitted information on the record that directly establishes the input suppliers' private-ownership structure.[95]

No other parties commented on this issue.

Commerce's Position: For the reasons detailed below, for this final determination, we continue to find, as AFA, that the producers which supplied CRS to the respondents are "authorities" within the meaning of section 771(5)(B) of the Act and, thus, that such producers provided a financial contribution in supplying these inputs to the respondent within the meaning of section 771(5)(D)(iii) of the Act.

As discussed in the *Preliminary Determination* under "GOC – Whether Certain Input Producers Are 'Authorities,'" in order to analyze whether the non-majority government-owned domestic producers that supplied CRS to the respondents are "authorities" within the meaning of section 771(5)(B) of the Act, we sought information regarding the ownership of the input producers identified by the respondents. This information included articles of incorporation, capital verification reports, articles of groupings, company by-laws, annual reports, articles of association, business group registrations, business licenses, and tax registration documents.[96]

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[91] *See* GOC Case Brief at 14-15 (citing GOC IQR at Exhibit CRS-1 at CRS-6 – CRS-8).
[92] *Id*. at 15.
[93] *Id*. (citing GOC IQR at Exhibit CRS-1 at CRS-14).
[94] *Id*.
[95] *Id*.
[96] *See* Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Countervailing Duty Questionnaire," dated July 7, 2020 (Initial Questionnaire) at Input Producer Appendix: Cold-Rolled Steel; *see also* Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Request for Additional Information Regarding the Government of the People's Republic of China's Response to the July 7, 2020 Initial Questionnaire," dated September 1, 2020 (GOC First Supplemental Questionnaire) at 13.

Moreover, we requested information concerning whether any individual owners, board members, or senior managers involved with these producers were government or CCP officials and the role of any CCP primary organization within the producers.[97] Specifically, to the extent that the owners, managers, or directors of a producer are CCP officials or are otherwise influenced by certain CCP-related entities, Commerce requested information regarding the means by which the GOC may exercise control over company operations and other CCP-related information.[98] Commerce has explained its understanding of the CCP's involvement in China's economic and political structure in current and past China CVD proceedings,[99] including why Commerce considers the requested information regarding the CCP's involvement in China's economic and political structure to be relevant.

In its response, while the GOC provided ownership structure and basic registration information, it did not provide all the information requested in the Initial Questionnaire, including company by-laws, annual reports, tax registration documents, and articles of association.[100] The GOC stated that it "has provided … sufficient information."[101] Regarding the input producers identified by the respondents, we asked the GOC to provide information about the involvement of the CCP in each of these companies, including whether individuals in management positions are CCP officials, in order to evaluate whether the privately-owned input producers are "authorities" within the meaning of section 771(5)(B) of the Act. While the GOC provided a long narrative explanation of the role of the CCP, when repeatedly asked to identify any owners, directors, or managers of the input producers who were government or CCP officials during the POI, the GOC explained that "there is no government data system that can compile, keep, or upon request provide, data or information in regard to political attitude and/or party or organization affiliation of an individual businessman."[102] However, in prior CVD proceedings, we found that the GOC was able to obtain the information requested independently from the companies involved, and that statements from company respondents, rather than from the GOC, were not sufficient.[103] Despite Commerce's repeated requests for information, the GOC continued to refer to ownership structure and basic registration information it submitted in its initial response, and did not cure the defects of the original appendix, in which they failed to provide the requested articles of incorporation, capital verification reports, articles of groupings, company by-laws, annual reports, articles of association, business group registrations, business licenses, and tax registration documents.[104] Additionally, as stated above, the GOC did not identify the CCP officials within the input producers.[105] Further, the GOC repeatedly did not provide the requested information regarding the role of CCP officials and CCP committees in the

[97] *See* Initial Questionnaire at Input Producer Appendix: Cold-Rolled Steel; *see also* GOC First Supplemental Questionnaire at 14.
[98] *See* Initial Questionnaire at Input Producer Appendix; *see also* GOC First Supplemental Questionnaire at 13-14.
[99] *See*, *e.g.*, *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012 Final Results*), and accompanying Issues and Decision Memorandum (IDM) at Comment 5; *see also* Public Bodies Memorandum.
[100] *See* GOC IQR at Exhibits CRS-2 and CRS-3; *see also* GOC's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: GOC Supplemental Questionnaire Response," dated September 15, 2020 (GOC 1SQR) at 27.
[101] *See* GOC 1SQR at 27.
[102] *Id.* at 29.
[103] *See Citric Acid 2012 Final Results* IDM at Comment 5.
[104] *See Preliminary Determination* PDM at 10 (citing GOC 1SQR at 27.).
[105] *See* GOC 1SQR at 29.

management and operations within non-majority government owned suppliers/producers; instead it stated that it provided sufficient information and referred to the *Company Law*.[106] The GOC's response to our requests for information, or lack thereof, is also fully described in the *Preliminary Determination*.[107]

As explained in the *Preliminary Determination*, we understand that the CCP exerts significant control over economic activities in China.[108] Thus, Commerce continues to find, as it has in prior CVD proceedings,[109] that the information requested regarding the role of CCP officials and CCP committees in the management and operations of the privately-owned CRS producers that supply the respondents is necessary to its determination of whether these producers are "authorities" within the meaning of section 771(5)(B) of the Act. As explained above, however, the GOC failed to respond to Commerce's questions requesting information regarding the CCP's role in the ownership and management of the respondents' input producers. Therefore, Commerce continues to determine, in accordance with sections 776(a)(1), 776(a)(2)(A), and 776(a)(2)(C) of the Act, that necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding. Thus, we are continuing to rely on "facts available" in making our final determination. Moreover, we continue to determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to provide us with requested information regarding the CCP's role in the ownership and management of the respondents' input producers. Consequently, an adverse inference in selecting from among the facts otherwise available is warranted.

In addition, we disagree with the GOC that it provided Commerce with sufficient information to determine whether any of the respondents' input producers are privately-owned entities. We find that the GOC's responses to the Input Producer Appendix for the inputs being investigated were deficient, and that the information supplied from its ECIPS was not sufficient for our analysis of whether the input producers identified by the company respondents are authorities under the Act.[110] While the GOC asserted that the information provided from ECIPS was sufficient for our analysis, it is for Commerce, not the GOC, to determine what information is necessary in order

[106] *See* GOC 1SQR at 27-29.
[107] *See Preliminary Determination* PDM at 9-11.
[108] *Id.* at 11.
[109] *See*, *e.g.*, *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 11962 (February 28, 2020) (*Wooden Cabinets*) at Comment 6; *see also Citric Acid 2012 Final Results* and accompanying IDM at Comment 5.
[110] *See* Initial Questionnaire at Input Producer Appendix: Cold-Rolled Steel; *see also* GOC First Supplemental Questionnaire at 13. In the Initial Questionnaire and the GOC First Supplemental Questionnaire, Commerce requested certain information to be provided with respect to the non-majority government-owned CRS producers, including articles of incorporation, capital verification reports, articles of groupings, company by-laws, annual reports pertaining to the POI and the two proceeding years, articles of association, business group registration, business licenses, and tax registration documents. Despite Commerce's repeated request, in response, the GOC simply referred to its submission of ownership structure and the business registration information from ECIPS and stated it provided sufficient information. However, it did not cure the defects of the original appendix. *See* GOC IQR at Exhibit CRS-1 at CRS-2 and Exhibits CRS-2 – CRS-3; and GOC 1SQR at 27.

for Commerce to conduct a complete analysis.[111] For the reasons described above, we find that the GOC failed to provide information necessary for us to analyze whether the respondents' input producers are authorities.

Therefore, we find that, in accordance with sections 776(a)(1), 776(a)(2)(A), and 776(a)(2)(C) of the Act, necessary information is not available on the record, that the GOC has withheld information that was requested of it, and that the GOC significantly impeded this proceeding and thus, we must rely on facts available in conducting our analysis of the respondents' input producers.[112] Due to the GOC's failure to provide complete responses to Commerce's questionnaires, we find that the GOC failed to cooperate by not acting to the best of its ability to comply with our requests for information, within the meaning of section 776(b) of the Act. Consequently, we determine that an adverse inference is warranted in selecting from the facts otherwise available on the record.[113] As AFA, we find that CCP officials are present in each of the CRS producers that supply the respondents, as individual owners, managers, directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources, such that the CRS producers are controlled and possess, exercise, or are vested with governmental authority. As explained in the Public Bodies Memorandum, an entity with significant CCP presence on its board, or in management, or in party committees, may be controlled such that it possesses, exercises, or is vested with governmental authority.[114] Thus, for this final determination, we continue to find that the CRS producers which supplied the respondents are "authorities" within the meaning of section 771(5)(B) of the Act.

Comment 2: Whether the Application of Facts Available is Warranted in Constructing Benchmark Inland Freight Charges Used for the Benefit Calculation for Zhejiang Amerisun under the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Program

The GOC Case Brief

- Commerce should rely upon Zhejiang Dobest's own inland freight expenses in the final determination because Commerce's supplemental questionnaire did not identify a deficiency in Zhejiang Dobest's reporting and Zhejiang Dobest fully provided the requested information. Commerce erroneously presumed that the inland freight expenses reported by Zhejiang Dobest covered only two months of the POI.[115]
- Alternatively, even if facts available is warranted, Commerce should rely upon Zhejiang Dobest's inland freight expenses for the entire POI. The petitioner's submitted inland freight data, which Commerce used as facts available at the *Preliminary Determination*, are aberrational and unreasonable. The inland freight benchmark that is substantially higher than trans-pacific long-distance ocean freight cost is not commercially reasonable, not indicative

[111] *See ABB*, 355 F. Supp. 3d at 1222 ("Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.")
[112] *See* section 776(a)(2)(A) of the Act.
[113] *See* section 776(b) of the Act.
[114] *See, e.g.*, Public Bodies Memorandum at 33-36, and 38.
[115] *See* GOC Case Brief at 16-18.

of prevailing market conditions as required by section 771(5)(E)(iv) of the Act, and cannot be relied upon as a benchmark.[116]

- If Commerce insists on relying on the inland freight benchmark data provided by the petitioner, Commerce must adjust the data to be representative of prevailing market conditions if Zhejiang Dobest had imported CRS. At a minimum, Commerce should use the distance reported by Zhejiang Dobest between its nearest port and itself because the port of Shanghai and the port of Tianjin are not close to Zhejiang Dobest and Zhejiang Dobest would not import from these ports at commercially unreasonable prices.[117]
- Alternatively, Commerce should use the longer distance rate between Tianjin and Beijing and the distance between Zhejiang Dobest's nearby port and Zhejiang Dobest to calculate the inland freight benchmark because the Shanghai inland freight data are based on the short distance between the port of Shanghai and Shanghai, and the shorter distance price is proportionally too high if applying to long distance.[118]
- Using the petitioner's benchmark data for inland freight expenses and the distance between Zhejiang Dobest's nearby port and Zhejiang Dobest will result in a cost that is more expensive than the cost of shipping subject merchandise to the United States from China. This is also commercially unreasonable; thus, the only reliable source for Zhejiang Dobest's inland freight benchmark is its own data as reported.[119]

Zhejiang Amerisun Case Brief

- Commerce's decision to find that Zhejiang Amerisun withheld necessary information and to rely on facts available for inland freight is unjustified because Zhejiang Amerisun provided the requested inland freight information based on its subject merchandise producer Zhejiang Dobest's books and records.[120]
- Zhejiang Dobest has done its best to provide the requested information based on the books and records kept in the ordinary course of business. Zhejiang Dobest reported the delivery terms as "delivered" and explained that the supplier covers all costs such as freight. Because Zhejiang Dobest normally does not pay inland freight on purchases of CRS, it does not have an inland freight invoice or payment documents for such expenses. The only documents it maintains that can be used as supporting documents for calculating the inland freight expenses are the purchase contracts. Therefore, Zhejiang Dobest provided such contracts for two months of the POI along with the worksheet for the inland freight expense calculation, as requested by Commerce, in its initial questionnaire response.[121]
- When responding to Commerce's first supplemental questionnaire, Zhejiang Dobest did not fully understand why Commerce requested the inland freight expense calculation for each month or each purchase during the POI, because Zhejiang Dobest had already reported the delivery terms as "delivered" and explained the meaning of "delivered." Thus, no such requested information exists for the entire POI. Zhejiang Dobest further explained how it

[116] *See* GOC Case Brief at 18-19 (citing *Preliminary Determination* PDM at 17).
[117] *Id*. at 19-20.
[118] *Id.* at 20.
[119] *Id.* at 20, n 1.
[120] *See* Zhejiang Amerisun Case Brief at 7 (citing *Preliminary Determination* PDM at 17).
[121] *Id.* at 7-8 (citing Zhejiang Amerisun's Letter, "Certain Walk Behind Lawn Mowers and Parts Thereof from the People's Republic China: Submission Zhejiang Dobest's Section III Response," dated August 21, 2020 (Zhejiang Dobest IQR) at Exhibits 13-15).

calculated its reported freight expenses and referred to the supporting documents submitted in its initial questionnaire response. Due to lack of complete information for inland freight for each month during the POI, Zhejiang Dobest derived the freight cost from its purchase, which was the only available information with regard to inland freight held by Zhejiang Dobest.[122]

- If Commerce was still not satisfied with Zhejiang Dobest's response in its first supplemental questionnaire response, Commerce should have given Zhejiang Dobest an opportunity to provide other information or further instructions in a second supplemental questionnaire regarding the specific type of information that would have sufficed.[123]
- There is no basis to use the petitioner's inland freight benchmark when the record contains inland freight expenses actually paid and calculated by the respondent during the POI. In the final determination, Commerce should instead use the inland freight expenses calculated by Zhejiang Dobest and based on its sales contracts. The petitioner's data are unreasonable given that (1) Zhejiang Dobest responded to Commerce's requests with the information available to it and (2) the nearest port of Zhejiang Dobest is not the port of Tianjin or the port of Shanghai. On the contrary, Zhejiang Dobest's inland freight calculation, which is demonstrated by the sales contracts provided for four months during the POI, is based on market price and is the most accurate and reliable information.[124]
- If Commerce continues to use the petitioner's inland freight benchmark data, the inland freight benchmark should be recalculated using the distance from the nearest port of Wenzhou to Zhejiang Dobest.[125]

The Petitioner's Rebuttal Brief

- Zhejiang Amerisun withheld information from Commerce relating to inland freight expenses for each month of the POI for purposes of constructing the CRS benchmark price. Despite Commerce's clear, specific and repeated requests, Zhejiang Amerisun's responses continued to be incomplete because they did not cover each month of the POI; this created a gap in the record and foreclosed Commerce from constructing benchmarks. In absence of the requested company-specific inland freight expenses during each month of the POI, pursuant to section 776(a) of the Act, Commerce appropriately determined that Zhejiang Amerisun withheld the requested information and applied facts available to fill the gap in the record by relying on the petitioner's complete, publicly-available and credible benchmark information as a best alternative.[126]
- Despite the clear record in this case of a data deficiency/absence and deliberate withholding of information, Zhejiang Amerisun and the GOC nevertheless object to Commerce's application of facts available by claiming that Zhejiang Amerisun's responses were proper and complete. However, the record clearly shows that Zhejiang Amerisun refused to provide a complete response despite Commerce's repeated requests to obtain complete data for every

[122] *See* Zhejiang Amerisun Case Brief at 8-9 (citing Zhejiang Amerisun's Letter, "Certain Walk Behind Lawn Mowers and Parts Thereof from the People's Republic China: Submission Zhejiang Amerisun's First Supplemental Section III Response," dated September 22, 2020 (Zhejiang Amerisun 1SQR) at 23).
[123] *Id.* at 9.
[124] *Id.* at 9-10 (citing Zhejiang Dobest IQR at Exhibits 14-15; and Zhejiang Amerisun 1SQR at Exhibits S-20b and S-20e).
[125] *Id.* at 10-11.
[126] *See* Petitioner Rebuttal Brief at 1, and 9-13 (citing Zhejiang Dobest IQR at 22 and Exhibits 14-15; Zhejiang Amerisun 1SQR at 23; and *Preliminary Determination* PDM at 17).

month of the POI. Under this circumstance, Commerce was correct in relying on facts available and should affirm its conclusion for the final determination.[127]

- With regard to the respondents' claim that the petitioner's benchmark data produce unreasonable results and thus must be modified, the U.S. Court of International Trade (CIT) decision in *Nan Ya Plastics*, which establishes that any individual calculation conducted by Commerce is accurate and reflects commercial reality as a matter of law if it is consistent with the method provided in the statute, confirms that Commerce's inland freight calculation is reasonable. This CIT decision squarely contravenes the respondents' argument. The respondents do not cite to any statute, regulation, or case precedent that calls Commerce's methodology into question or otherwise supports their position.[128]
- Commercial unreasonableness that the respondents allege is not a valid legal basis to challenge Commerce's inland freight calculation. Commerce's application of facts available to the inland freight benchmark rates is accurate and reflective of commercial reality within the larger applicable statutory framework.[129]

Commerce's Position: In the final determination, as explained in more detail below, we find that the application of AFA is warranted to determine the per-MT, per-KM rates for benchmarking the inland freight expense to transport CRS from the nearest port to Zhejiang Dobest's factory as a component of the benchmark price of CRS, under the provision of CRS for LTAR program. For this purpose, we are relying on the data submitted by the petitioner, the only complete and usable data on the record. Nonetheless, upon further review of the information on the record, we find it reasonable to rely on the information provided by Zhejiang Dobest for the actual distance from its nearest port to its factory to calculate the per-MT benchmark inland freight expense.

The Application of AFA to the Per-MT, Per-KM Benchmark Inland Freight Rate

In the Initial Questionnaire, Commerce instructed the mandatory respondents to report inland freight expenses incurred on imports of CRS in the following manner:

> Please provide a worksheet that shows your firm's per-{MT} freight expenses for transporting cold-rolled steel from the nearest seaport to your firm's factory complexes for each month of the POI. Provide supporting documentation for the months of March and October.[130]

Commerce solicits this information in the Initial Questionnaire in the event it relies upon a company-specific tier-one or world market tier-two benchmark price under 19 CFR 351.511(a)(2)(i) and (ii), in which case it must account for the inland freight expenses that the company would incur to transport the input in question to the respondent's factory, as provided under 19 CFR 351.511(a)(2)(iv). Because we have determined in this investigation to rely upon a tier-two benchmark, the inclusion of an inland freight expense in the benchmark price is required.

[127] *See* Petitioner Rebuttal Brief at 13.
[128] *Id*. at 13-15 (citing *Nan Ya Plastics Corp. v. United States*, 810 F. 3d 1333, 1343 (CIT 2016) (*Nan Ya Plastics*)).
[129] *Id*. at 15.
[130] *See* Initial Questionnaire, section III at 14.

In its initial questionnaire response, Zhejiang Amerisun provided a worksheet showing the freight expenses for transporting the inputs from the nearest seaport to Zhejiang Dobest's factory as well as the sample purchase contracts showing the reported per-MT freight expenses.[131] The worksheet listed only one per-MT inland freight expense, which was shown in the sample purchase contracts provided for March and October.[132] Zhejiang Amerisun used this per-MT inland freight expense to calculate a single per-MT, per-KM, inland freight rate for transporting CRS from one steel mill to Zhejiang Dobest's factory.[133] Using this single per-MT, per-KM inland freight rate and the distance between the nearest port and Zhejiang Dobest's factory, Zhejiang Amerisun then calculated a single per-MT benchmark inland freight expense for transporting CRS from the nearest port to Zhejiang Dobest's factory.[134] However, Zhejiang Dobest identified other CRS suppliers from whom Zhejiang Dobest purchased CRS from during the POI.[135] Zhejiang Amerisun provided no transport cost data or supporting documentation related to these other CRS purchases. Additionally, Zhejiang Amerisun relied on the distance from one particular steel mill to Zhejiang Dobest to calculate a single per-MT, per-KM inland freight rate even though this particular steel mill was not the only mill it reported using.[136] As a result, we again requested Zhejiang Amerisun to provide the information for each month of the POI, as stated below:

> As requested in the Initial Questionnaire, please provide a worksheet that shows Zhejiang Dobest's per-{MT} freight expenses for transporting cold-rolled steel from the nearest seaport to Zhejiang Dobest's factory complexes for each month of the POI. If the unit freight expense varies per sale, please provide the per-{MT} freight expenses for each of its purchases of the POI.[137]

In its response, Zhejiang Amerisun stated that "{t}he freight calculation worksheet and the supporting documents have already been provided... ," while explaining again how it calculated the per-MT inland freight expense for transporting CRS from the nearest seaport to Zhejiang Dobest.[138] We twice requested Zhejiang Dobest to provide its per-MT benchmark inland freight expenses for transporting CRS from the nearest port to Zhejiang Dobest's factory for each month of the POI. However, Zhejiang Amerisun continued to provide the same single per-MT benchmark inland freight expense in the POI despite the fact that there were transactions with other suppliers and the particular steel mill was not the only mill it reported using.[139] As a result, we have determined that the per-MT benchmark inland freight expense information submitted by

[131] *See* Zhejiang Dobest IQR at 22 and Exhibits 14-15.
[132] *Id.* at Exhibits 14-15.
[133] *Id.* at Exhibit 14.
[134] *Id.*
[135] *Id*. at Exhibit 13.
[136] *Id.*
[137] *See* Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: First Request for Additional Information Regarding Zhejiang Amerisun Technology Co., Ltd.'s Section III Response," dated September 9, 2020 (Zhejiang Amerisun First Supplemental Questionnaire) at 10.
[138] *See* Zhejiang Amerisun 1SQR at 23.
[139] *See* Zhejiang Dobest IQR at Exhibits 13-14; *see also* Zhejiang Amerisun 1SQR at Exhibits S-20 and S-21.

Zhejiang Amerisun for transporting CRS from the nearest port to Zhejiang Dobest's factory is ultimately incomplete, unrepresentative, and unreliable for our benchmarking purposes.

In its case brief, Zhejiang Amerisun explained that: (1) the only supporting documents Zhejiang Dobest maintains that can be used to calculate the inland freight expenses are the purchase contracts; therefore it provided these contracts; (2) because of the delivery terms (*i.e.*, "delivered," with the supplier covering inland transport cost), Zhejiang Dobest did not have inland freight information for the entire POI; and (3) due to the lack of complete information for inland freight for each month during the POI, it derived the freight cost from its purchases, which is the only available information with regard to inland freight held by Zhejiang Dobest.[140] However, prior to the *Preliminary Determination*, Zhejiang Amerisun did not provide any explanation of why the information it submitted in response to our requests was the only information available.[141] Thus, Zhejiang Amerisun failed to provide adequate notice to Commerce of the difficulties with regard to providing the requested information and to explain fully why it was unable to submit the information in the form and manner requested.[142]

Zhejiang Amerisun argues that it did not fully understand why Commerce requested the inland freight expense calculation for each month during the POI because it had already reported the delivery terms as "delivered" and had explained the meaning of "delivered."[143] Zhejiang Amerisun also argues that Commerce should have provided another opportunity to respond if Commerce was not satisfied with Zhejiang Amerisun's first supplemental questionnaire response.[144] We disagree. As an initial matter, if a respondent did not understand Commerce's request, it could have requested clarification and Commerce, in turn, would have provided clarification. The CIT and the U.S. Court of Appeals for the Federal Circuit (CAFC) have stated that the burden of creating an accurate and complete record is on respondents, not on Commerce.[145] Also, as detailed above, Commerce requested the specific information twice; however, on both occasions, Zhejiang Amerisun did not provide the information as requested by Commerce and did not provide adequate notice to Commerce of why it was unable to provide the information as requested.

The GOC argues that Commerce did not identify a deficiency in the respondent's reporting.[146] We disagree. Section 782(d) of the Act directs Commerce to inform respondents of the deficiency if Commerce determines that a response does not comply with Commerce's request. Here, Commerce informed Zhejiang Amerisun of the deficiency by stating that "{a}s requested in the Initial Questionnaire, please provide a worksheet that shows Zhejiang Dobest's per-{MT} freight expenses for transporting cold-rolled steel from the nearest seaport to Zhejiang Dobest's factory complexes for each month of the POI" and that "{i}f the unit freight expense varies per

[140] *See* Zhejiang Amerisun Case Brief at 8-9.
[141] *See* Zhejiang Dobest IQR at 22 and Exhibits 14-15; *see also* Zhejiang Amerisun 1SQR at 22.
[142] *See* section 782(c)(1) of the Act.
[143] *See* Zhejiang Amerisun Case Brief at 8.
[144] *Id*. at 9.
[145] *See, e.g.*, *QVD Food Co., v. United States*, 658 F. 3d 1318 (Fed. Cir. 2011) at 1324 ("{T}he burden of creating an adequate record lies with {interested parties} and not with Commerce,"); *see also Societe Nouvelle de Roulements v. United States*, 910 F. Supp. 689 (CIT 1995) at 694 ("Respondents 'must submit accurate data' and 'cannot expect Commerce, with its limited resources, to serve as a surrogate to guarantee the correctness of submission.'").
[146] *See* GOC Case Brief at 17.

sale, {the company should} provide the per-{MT} freight expenses for each of its purchases of the POI."[147] Commerce would not have made this second and more detailed request if it had determined earlier that Zhejiang Amerisun provided complete and accurate information.

The GOC further argues that Commerce erroneously presumed that the inland freight expenses Zhejiang Dobest reported covered only the two months of the POI for which Commerce requested information, and that Zhejiang Dobest was fully responsive to Commerce's request for the POI freight expenses.[148] This argument is misplaced because we did not make such an assumption. As noted above, Zhejiang Amerisun provided no transport cost data or supporting documentation related to its purchases from the other suppliers. Further, whether we assumed so or not does not affect our finding that the respondent's reporting is incomplete and unreliable. For the reasons detailed above, we have determined that the per-MT, per-KM benchmark inland freight rate data reported by Zhejiang Amerisun on behalf of Zhejiang Dobest are incomplete, unrepresentative and, thus, unreliable.

Therefore, we continue to find that, in accordance with sections 776(a)(1), (2)(A), and (2)(B) of the Act, that necessary information is missing from the record, Zhejiang Amerisun withheld necessary information that was requested of it, and Zhejiang Amerisun failed to provide the requested information in the manner requested. As such, we continue to find that we must rely on facts available in this final determination. Moreover, based on our analysis detailed above, we determine that Zhejaing Amerisun failed to cooperate by not acting to the best of its ability to comply with our request for complete and accurate information, in accordance with section 776(b) of the Act. Accordingly, the use of an adverse inference is warranted in the selection of facts otherwise available for this final determination.[149] As AFA, we are relying on the petitioner's benchmark data to establish the per-MT, per-KM inland freight rate.[150]

Lastly, both the GOC and Zhejiang Amerisun argue that the petitioner's data are aberrational, unreasonable, and inappropriate to be used as a benchmark. Contrary to their argument, because we are applying AFA to Zhejiang Dobest's per-MT, per-KM, benchmark inland freight expense, we need not comport our findings with any purported commercial reality of the respondent, pursuant to section 776(d)(3)(B) of the Act. In addition, the petitioner's data are the only complete and reliable facts otherwise available on the record to use to establish the per-MT, per-KM, inland freight rate for inclusion in the CRS benchmark price applicable to Zhejiang Dobest.

The Reliance on Zhejiang Dobest's Reported Distance

In the *Preliminary Determination*, in order to calculate Zhejiang Dobest's per-MT benchmark inland freight expense for transporting CRS from the nearest port to Zhejiang Dobest's factory, we relied on the petitioner's distance data (*i.e.*, the distance between the port of Shanghai to Zhejiang Dobest and the distance between the port of Tianjin to Zhejiang Dobest).[151] However,

[147] *See* Zhejiang Amerisun First Supplemental Questionnaire at 10.
[148] *See* GOC Case Brief at 18.
[149] *See* section 776(b) of the Act.
[150] *See* Petitioner's Letter, "Countervailing Investigation on Certain Walk-Behind Lawn Mowers from the People's Republic of China: Petitioner's Benchmark Submission," dated September 23, 2020 (Petitioner Benchmark Submission) at Attachments 5; and Zhejiang Amerisun Final Calculation Memorandum.
[151] *See Preliminary Determination* PDM at 17.

in the final determination, we find that we should use the distance that Zhejiang Dobest reported from its nearest port to its factory for purpose of constructing Zhejiang Dobest's per-MT benchmark inland freight expense. Because Zhejiang Amerisun reported the actual distance between Zhejiang Dobest and its nearest port (*i.e.*, Wenzhou port),[152] we are using this distance along with the per-MT, per-KM rate discussed above to yield the per-MT benchmark inland freight expense for calculating the benefit under the program.[153] This approach is consistent with 19 CFR 351.511(a)(2)(iv), which directs Commerce to adjust the delivered price for freight "to reflect the price a firm actually paid or would pay if it imported the product."

Comment 3: Whether Commerce Committed a Ministerial Error in the Benefit Calculation for a Certain Subsidy Reported by Zhejiang Amerisun

Zhejiang Amerisun Case Brief

- In the *Preliminary Determination*, when cumulating benefits from subsidies received by Zhejiang Dobest (*i.e.*, the supplier of subject merchandise) to Zhejiang Amerisun (*i.e.*, the exporter of subject merchandise), Commerce included 0.37 percent, calculated for an export subsidy as reported in other grants received by Zhejiang Dobest. Because Zhejiang Dobest did not export any subject merchandise to the United States during the POI, either this benefit should not be cumulated to Zhejiang Amerisun or it should be included in Zhejiang Amerisun's export subsidy.[154]

No other parties commented on this issue.

Commerce's Position: We disagree that we made an error in our benefit calculation. In the *Preliminary Determination*, as AFA, we found this particular program (*i.e.*, Subsidy for Foreign Trade Import and Export Business Qualification Enterprises) to be specific and countervailable.[155] Because Zhejiang Amerisun exported to the United States subject merchandise produced by Zhejiang Dobest, Zhejiang Amerisun was in a trading company relationship with Zhejiang Dobest during the POI. Accordingly, in the *Preliminary Determination*, we cumulated benefits from subsidies provided to Zhejiang Dobest with benefits from subsidies provided to Zhejiang Amerisun, pursuant to the trading company rule at 19 CFR 351.525(c).[156] Zhejiang Amerisun's argument that because Zhejiang Dobest did not export any subject merchandise to the United States during the POI, this subsidy rate should either not be cumulated with Zhejiang Amerisun or it should be included in Zhejiang Amerisun's "export subsidy," is misplaced and reflects a misunderstanding of Commerce's attribution rules. Whether Zhejiang Dobest itself exported subject merchandise during the POI to the United States is immaterial to the application of the trading company rule. Because all of the subject merchandise produced by Zhejiang Dobest was exported through Zhejiang Amerisun, we cumulated all subsidies received by Zhejiang Dobest, including from the program at issue, with

[152] *See* Zhejiang Dobest IQR at Exhibits 14-15; *see also* Zhejiang Amerisun 1SQR at 23; and Zhejiang Amerisun Case Brief at 10.
[153] *See* Zhejiang Amerisun Final Calculation Memorandum.
[154] *See* Zhejiang Amerisun Case Brief at 11.
[155] *See Preliminary Determination* PDM at 36 and 52.
[156] *Id*. at 38-39.

the subsidies received by Zhejiang Amerisun for purposes of determining the total *ad valorem* subsidy rate applicable to Zhejiang Amerisun.

Furthermore, because the GOC did not respond to our request for information regarding this program, including information to properly determine specificity,[157] we determined the program to be specific on an AFA basis,[158] but we did not find the subsidy in question to be an export subsidy. We are not changing that decision for this final determination.

Comment 4: Whether Commerce Should Remove Inland Freight and Value Added Tax from the Cold-Rolled Steel Benchmark under the Provision of Cold-Rolled Steel for Less Than Adequate Remuneration Program

Zhejiang Amerisun Case Brief

- In the *Preliminary Determination*, when determining the benefit from the provision of CRS for LTAR, Commerce compared the benchmark price, which contains inland freight and value added tax (VAT), to the price paid. This resulted in a benefit which is also inclusive of freight and VAT. Commerce then divided the aggregated benefit by the total free-on-board (f.o.b.) sales value to get a program-specific rate. This is not an appropriate comparison because the denominator excludes VAT and does not include inland freight while the numerator is inclusive of both VAT and inland freight.[159]
- Commerce should remove the inland freight and VAT from the benchmark prices and compare them with the prices that were paid by Zhejiang Dobest. Alternatively, Commerce should add VAT and inland freight to the total sales value used as the denominator for calculating the subsidy rate.[160]
- The VAT a seller collects from its sales of goods will be offset by the VAT it pays on the purchase of goods. The VAT paid on purchases is not a cost and should not be considered as delivery charges or import duties pursuant to 19 CFR 351.511(a)(iv).[161]

No other parties commented on this issue.

Commerce's Position: We disagree with Zhejiang Amerisun. As an initial matter, Zhejiang Amerisun's argument is misplaced to the extent it imputes a false equivalence between calculation of the benefit and calculation of the *ad valorem* subsidy rate resulting from the receipt of the benefit.

To determine the benefit from the provision of CRS for LTAR, we compared the price that Zhejiang Dobest paid for its CRS purchases with a benchmark selected in accordance with 19 CFR 351.511. In the *Preliminary Determination*, because we found that the CRS market in China is distorted by pervasive government involvement, we relied on "tier two" (world market)

[157] *See* Zhejiang Amerisun 1SQR at Exhibit S-26.
[158] *See Preliminary Determination* PDM at 36.
[159] *See* Zhejiang Amerisun Case Brief at 11-12.
[160] *Id*. at 12.
[161] *Id*. (citing *Certain Collated Steel Staples from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination and Extension of Provisional Measures*, 85 FR 882 (January 8, 2020) (*Staples from China Preliminary Determination*), and accompanying PDM).

prices as benchmarks for the provision of CRS for LTAR, pursuant to 19 CFR 351.511(a)(2)(ii).[162] Additionally, in the *Preliminary Determination*, we stated that "consistent with 19 CFR 351.511(a)(2)(iv), we added to the monthly, weighted-average benchmark prices for CRS the applicable import duty and VAT for imports of CRS, as provided by the GOC."[163]

Under 19 CFR 351.511(a)(2)(iv), when calculating a tier-two world market price, "Commerce will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product" and "{t}his adjustment will include delivery charges and import duties." The *CVD Preamble* also provides that "in determining the adequacy of remuneration, {Commerce} will adjust comparison prices to reflect the price a company would pay if it imported the good or service" and that "{t}his adjustment will account for delivery charges and import duties."[164] Both the *CVD Preamble* and 19 CFR 351.511(a)(2)(iv) instruct Commerce to use adjusted prices which include delivery charges such as inland freight expenses as the comparison price. Thus, Zhejiang Amerisun's argument that Commerce should remove inland freight expenses from the benchmark price is without merit.

With respect to VAT, Zhejiang Amerisun's argument that we should remove VAT from the benchmark (because VAT is not a cost) does not comport with the directions in 19 CFR 351.511(a)(2)(iv) to use "delivered prices" as the comparison price. The "delivered price" under 19 CFR 351.511(a)(2)(iv) is simply the nominal price at the point of delivery. Thus, whether a firm recovers VAT subsequent to delivery of the input is immaterial to the delivered price that Commerce must use as the comparison price under 19 CFR 351.511(a)(2)(iv). Further, both the *CVD Preamble* and 19 CFR 351.511(a)(2)(iv) direct Commerce to adjust the benchmark price to reflect the price a company would pay if it imported the product. As long as the inclusion of the VAT is reflective of what an importer – and not necessarily the respondent specifically – would have paid, then it is appropriate to include the VAT in our benchmark. Consistent with 19 CFR.511(a)(2)(iv) and our practice,[165] we continue to include VAT in the benchmark prices at the rates that the GOC reported.[166]

The record also shows that the prices Zhejiang Dobest actually paid for its CRS purchases are inclusive of VAT,[167] and are delivered prices. For its CRS purchases, Zhejiang Dobest reported its delivery terms as "delivered" and explained that these terms mean "the goods are delivered by the supplier to the place of the buyer covering all costs such as freight."[168] Zhejiang Amerisun further explained that, under Zhejiang Dobest's delivery terms, the CRS supplier covers the inland freight expenses and Zhejiang Dobest does not separately pay the inland freight for purchasing its input.[169] Accordingly, the adjustments that Commerce makes under 19 CFR 351.511(a)(2)(iv) ensure that in measuring the benefit through a comparison of the purchase

[162] *See Preliminary Determination* PDM at 43.
[163] *Id*. at 44.
[164] *See Countervailing Duties, Final Rule*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*) at 65378.
[165] *See*, *e.g.*, *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014), and accompanying IDM at 44-46.
[166] *See* GOC IQR at 32.
[167] *See* Zhejiang Dobest IQR at Exhibit 13; *see also* Zhejiang Amerisun Case Brief at 12.
[168] *Id*.; *see also* Zhejiang Amerisun 1SQR at 22; and Zhejiang Amerisun Case Brief at 7-8.
[169] *See* Zhejiang Amerisun Case Brief at 8.

price with a suitable benchmark, both sides of the equation reflect the same basis, resulting in the apples-to-apples comparison that Zhejiang Amerisun calls for in its argument. Removing import duties and VAT from the benchmark would negate this comparison. Moreover, and contrary to Zhejiang Amerisun's argument, by ensuring that both the benchmark price and the actual purchase prices paid include VAT and freight charges, we are also ensuring that the resulting benefit represents the extent to which the actual prices paid reflect LTAR and is not overstated by the amount of VAT or freight charges.

However, the apples-to-apples equivalence we apply to calculating the value of the benefit (which is the difference between the purchase price and the benchmark price) does not apply to deriving the *ad valorem* subsidy rate resulting from that benefit. To calculate the *ad valorem* subsidy rate, we divide the benefit amount by the applicable sales value. To do this, Commerce uses the value of respondents' sales, on an FOB basis, pursuant to 19 CFR 351.525(a). The *CVD Preamble* also provides that in the case of products that are exported, Commerce determines sales value on an FOB (port) basis while determining sales value on an FOB factory basis in the case of products that are sold for domestic consumption.[170] The *CVD Preamble* further provides that "there is no compelling reason for allocating subsidy benefits over sales values that include freight and other shipping costs," because "{a}lthough there may be rare instances where the movement component of a transaction is subsidized, {Commerce} can deal with those instances on a case-by-case basis."[171] In this proceeding, we are not confronted with subsidies provided to support the movement of goods. As such, we do not find a reason to use as the denominators for determining the *ad valorem* subsidy rate sales values that include freight expenses. Further, as Commerce has stated in past cases, Commerce does not include taxes such as VAT in the FOB sales value that it uses as the denominator of the subsidy calculation because these taxes are not part of a company's sales revenue.[172] This is consistent with 19 CFR 351.525(b)(6)(i), which states that Commerce "normally will attribute a subsidy to the *products* produced by the corporation that received the subsidy" (emphasis added).

Thus, we find we are not permitted by the regulations, for purposes of calculating the benefit from the provision of goods for LTAR, to exclude from the benchmark the VAT or freight charges as Zhejiang Amerisun argues we should; neither are we permitted by the regulations to include VAT or freight expenses in the sales values to which we are attributing subsidy benefits for purposes of calculating the *ad valorem* subsidy rate. As such, we are not making the calculation changes that Zhejiang Amerisun advocates for the final determination.

[170] *See CVD Preamble* 63 FR at 65399.
[171] *Id.*
[172] *See*, *e.g.*, *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Final Results of Countervailing Duty Administrative Review*, 76 FR 22868 (April 25, 2011), and accompanying IDM at Comment 3 (citing *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (December 21, 2001), and accompanying IDM at Comment 14).

Comment 5: Whether Commerce Improperly Found that Zhejiang Dobest was Uncreditworthy in 2017 and 2018.

Zhejiang Amerisun Case Brief

- Commerce improperly found that Zhejiang Dobest was uncreditworthy in 2017 and 2018 by weighing factors found to be indicative of an inability to pay short-term debts (such as quick and current ratios from 2015-2017) while discounting factors indicating that Zhejiang Dobest was fully able to cover its long-term liabilities. Commerce acknowledged but discounted significant indicators of financial health (*i.e.*, profit, return on equity, retained cash flow, debt-to-equity ratio, a percentage of total assets that were financed by creditors, and EBITDA (*i.e.*, earnings before interest, taxes, depreciation, and amortization) ratio) which demonstrate Zhejiang Dobest was not-over-leveraged, had adequate assets to pay its long-term obligations, and realized positive net income after expenses.[173]
- Despite these various indicators of a healthy company, Commerce emphasized the quick and current ratios which reflected an inability to cover current liabilities with current assets and the accounts receivable turnover in days. However, considering the entire financial outlook of the company, including both short and long-term ability to repay debt, on balance, Zhejiang Dobest was financially healthy overall. Commerce should not focus solely on the short-term ability to repay debt when other indicators suggest a healthy company with significant assets to cover its liabilities.[174]

The Petitioner's Rebuttal Brief

- Commerce applied its standard creditworthiness analysis to Zhejiang Dobest's financial position and determined that, pursuant to the applicable benchmarks for assessing financial health, Zhejiang Dobest was uncreditworthy in 2017 and 2018. The CIT upheld Commerce's current practice with respect to assessing creditworthiness as reasonable, and the respondent did not present any evidence or argument to justify deviation from that analysis. Accordingly, Commerce should affirm its determination that Zhejiang Dobest was uncreditworthy in 2017 and 2018.[175]
- The respondent's arguments are only grounded in Commerce's analysis of Zhejiang Dobest's prior financial health pursuant to the assessment criteria enumerated under 19 CFR 351.505(B)-(C). The CIT assessed a similar objection to Commerce's creditworthiness analysis in *Trina Solar* and upheld the reasonableness of Commerce's analysis.[176]
- The facts in the present proceeding militate more strongly in favor of an uncreditworthiness determination because, for 2017 and 2018, Zhejiang Dobest's current and quick ratios were below Commerce's thresholds; its retained cash flow experienced volatility or decreased; and the debt-to-equity ratio experienced volatility or was below Commerce's threshold for risk.[177]
- Accordingly, Zhejiang Dobest's financial health indicators, which were assessed pursuant to Commerce's standard and CIT-vindicated creditworthiness analysis, demonstrate that Zhejiang Dobest was uncreditworthy in 2017 and 2018. Commerce's uncreditworthiness

[173] *See* Zhejiang Amerisun Case Brief at 12-13.
[174] *Id.* at 13-14.
[175] *See* Petitioner Rebuttal Brief at 15 (citing Post-Preliminary Determination, in general).
[176] *Id*. at 15-18 (citing Zhejiang Amerisun Case Brief at 12 and *Changzhou Trina Solar Energy Co. v. United States*, 264 F. Supp. 3d 1325, 1339 (CIT 2017) (*Trina Solar*)).
[177] *Id*. at 18.

finding is therefore supported by substantial evidence and should be reaffirmed in the final determination.[178]

Commerce's Position: We make no changes to our post-preliminary determination that Zhejiang Dobest was uncreditworthy in 2017 and 2018.[179] Commerce examines a respondent's creditworthiness pursuant to 19 CFR 35l.505(a)(4). Commerce's practice is to evaluate the totality of the circumstances when determining whether a company is uncreditworthy.[180] In the Post-Preliminary Determination, we detailed our examination of all the relevant financial information Zhejiang Amerisun provided on behalf of Zhejiang Dobest. We also detailed our conclusion that the low quick and current ratios, its unfavorable retained cash flow, and an unfavorable trend of its return-on-equity ratios, considered together, indicated that Zhejiang Dobest was uncreditworthy in the relevant time periods.[181] While Zhejiang Amerisun argues that Commerce emphasized the quick and current ratios while discounting other significant factors, our analysis is based on reasonable and logical inferences drawn from the totality of information, consistent with normally accepted financial principles. Low quick (both unadjusted and adjusted) and current ratios indicate that a company is not generating enough revenue to service short-term, operational debt. Unfavorable retained cash flow raises concerns with creditors regarding a company's ability to meet its costs and fixed obligations with its cash flow. Unfavorable return-on-equity ratios also cast doubt on a company's ability to realize an adequate return on its assets. In addition, in support of our uncreditworthiness determination, we highlighted Zhejiang Dobest's unfavorable trends of accounts receivables turnover and cash flow-to-total liability ratios for the relevant time periods.[182] An unfavorable trend of collecting accounts receivables indicates the company is having difficulty collecting payment from its customers. Moreover, an unfavorable trend of cash flow-to-total liabilities ratios raises liquidity issues for the company in terms of its ability to repay its debts. Our analysis here is consistent with the analysis Commerce conducted in, *e.g.*, *Solar Cells Final Determination* and *Wooden Cabinets*; the financial information prescribed under 19 CFR 351.505(a)(4)(i)(B)-(C) provides highly relevant indicators of a firm's financial health and its ability to meet its costs and fixed financial obligations with cash flow.[183]

Additionally, we disagree with Zhejiang Amerisun that we discounted other significant indicators of financial health. As the CIT acknowledged in *Trina Solar*, Commerce's creditworthiness analysis is based on the totality of the circumstances using specific information on the record to evaluate several indicators of financial health.[184] In the Post-Preliminary

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[178] *Id*.
[179] *See* Post-Preliminary Determination.
[180] *See*, *e.g.*, *Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 86 FR 14071 (March 12, 2021), and accompanying IDM at 38; *see also Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 86 FR 1993 (January 11, 2021), and accompanying IDM at 30-31.
[181] *See* Post-Preliminary Determination at 7 and 10.
[182] *Id.* at 5-6 and 8-9.
[183] *See*, *e.g.*, *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 Final Determination*), and accompanying IDM at Comment 17; and *Wooden Cabinets* IDM at Comment 10.
[184] *See Trina Solar*, 264 F. Supp. 3d 1325, 1339 (CIT 2017).

Determination, we comprehensively analyzed other financial information including Zhejiang Dobest's profit, sales revenue, adjusted quick ratios, debt-to-equity ratios, debt-to-assets ratios, and EBITDA ratios. Even though we noted that certain information provides varying indications during the examined time periods, on balance, we determined that Zhejiang Dobest was uncreditworthy in 2017 and 2018, based on the company's low quick and current ratios and other unfavorable factors considered (*i.e.*, retained cash flow and return-on-equity).[185] In its case brief, Zhejiang Amerisun merely referred to the analyses contained in the Post-Preliminary Determination, and did not identify any record evidence that they believe we have not considered.[186]

Additionally, to make a determination that a company was uncreditworthy over a period of time, Commerce need not find that every individual piece of evidence is an indicator, by itself, that a company is uncreditworthy. As with other issues, Commerce must weigh the relevant information for and against such a finding. In this instance, while certain record facts may lead to a different conclusion, as detailed in the Post-Preliminary Determination, we determined that in considering the totality of the evidence, the negative factors outweighed other factors and that, on balance, the record supports a conclusion that Zhejiang Dobest was uncreditworthy during 2017-2018.

Consequently, we are relying on the uncreditworthy interest rate benchmarks which include risk premiums for purposes of determining the benefit from Zhejiang Dobest's long-term loans granted in 2017 and 2018 for the final determination.[187]

Comment 6: Whether Commerce Should Find the Export Buyers Credit Program to be Countervailable Based on Adverse Facts Available

GOC Case Brief

- In the *Preliminary Determination*, Commerce found that the GOC did not provide a complete response to its questions regarding the EBCP.[188]
- Commerce's decision to apply AFA is not based on substantial evidence or is otherwise not in accordance with law, because the GOC confirmed that the respondent's customers did not apply for the program, and this is corroborated by the respondents' customers' declarations.[189]
- Ningbo Daye and Zhejiang Amerisun each responded that it did not provide any kind of assistance to help their U.S. customers obtain a loan under the EBCP and submitted affidavits of non-use of this program.[190]

[185] *See* Post-Preliminary Determination at 7 and 10.
[186] *See* Zhejiang Amerisun Case Brief at 12-13.
[187] *See* Zhejiang Amerisun Final Calculation Memorandum.
[188] *See* GOC Case Brief at 2 (citing *Preliminary Determination* PDM at 24-28).
[189] *Id.* at 1.
[190] *Id.* at 2 (citing Ningbo Daye's Letter, "Certain Walk-Behind Lawn Mowers And Parts Thereof from the People's Republic of China, Case No. C-570-130: Ningbo Daye's Initial Questionnaire Response," dated (Ningbo Daye IQR) at 16-17; and Exhibit A-2, and Zhejiang Amerisun's Letter, "Certain Walk Behind Lawn Mowers and Parts Thereof from the People's Republic China: Submission Zhejiang Amerisun's Section III Response," dated (Zhejiang Amerisun IQR) at 13-14 and Exhibit 8).

- Commerce summarily dismissed the record evidence of non-use and applied AFA, claiming that information concerning the 2013 Revisions, and the partner/correspondent banks is necessary for Commerce to analyze how the program functions.[191]
- Commerce's AFA determination is in violation of the statute and case law precedents that prohibit the application of AFA against cooperating respondents when no necessary information is missing from the record.[192]
- The CIT held repeatedly that the 2013 Revisions[193] and identities of partner/correspondent banks do not consist of "necessary information."[194] The rationale behind these opinions is the same, *i.e.*, Commerce failed to explain the need for thoroughly understanding every single detail of program's operations, nor does it illustrate beyond a conclusory sentence as to why such understanding is necessary for verification.[195] However, Commerce's statement that it must completely understand how this program is administered is directly contradicted by the case law.[196]
- In *Changzhou Trina I*, the Court held that although Commerce may choose among facts available or AFA to fill in the record, the "choice must fill in the information that is actually missing."[197] In *Changzhou Trina I*, the Court also held that if Commerce claims that record evidence is unverifiable, Commerce must "first reasonably show that such information is, in fact, unverifiable."[198] On remand, Commerce claimed that without the 2013 Revisions, "effective verification is stymied, if not completely impeded, as Commerce would be unable to effectively sort through and identify potentially-suspect transactions given the size of the respondent companies."[199] However, the Court rejected Commerce's claims saying "{i}n order to avoid unnecessarily impacting cooperating parties because of the GOC's failure to cooperate, Commerce needs to at least attempt to verify the certifications of non-use in this

[191] *Id.* at 2-3 (citing *Preliminary Determination* PDM at 26-27); *see also* the 2013 *Administrative Measures* Revisions or 2013 Guidelines (2013 Revisions), which the GOC had discussed in its September 6, 2016 Seventh Supplemental Questionnaire Response in the CVD investigation of certain amorphous silica fabric from China.
[192] *Id.* at 3 (citing *Preliminary Determination* PDM at 26-27).
[193] *See* GOC Case Brief at Exhibit Export-1 and GOC 1SQR at 10.
[194] *Id.* at 3-4 (citing *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (CIT 2018) (*Changzhou Trina I*); *Changzhou Trina Solar Energy Co. v. United States* (CIT 2019), Slip Op. 2019-137 (November 8, 2019) (*Changzhou Trina II*); *Canadian Solar, Inc. v. United States*, (CIT 2020), Slip Op. 2020-23 (February 25, 2020) (*Canadian Solar*); *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1261, 1270 – 71 (CIT 2018) (*Guizhou Tyre I*); *Guizhou Tyre Co. v. United States*, 399 F. Supp. 3d 1346 (CIT 2019) (*Guizhou Tyre II*); *Guizhou Tyre Co. v. United States*, 389 F. Supp. 3d 1315 (CIT 2019) (*Guizhou Tyre III*); *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1335 (CIT 2019) (*Guizhou Tyre IV*); *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1402 (CIT 2019) (*Guizhou Tyre V*); *Guizhou Tyre Co. v. United States*, 447 F. Supp. 3d 1373, 1375 (CIT 2020) (LEXIS 86; Slip Op. 2020-81 (June 5, 2020)); (*Guizhou Tyre VI*); *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344 (CIT 2019) (*Clearon I*); C*learon Corp. v. United States*, Ct. No. 17-00171, Slip Op. 20-141 (October 8, 2019) (*Clearon II*); *Yama Ribbons & Bows Co. v. United States*, 419 F. Supp. 3d 1341 (CIT 2019) (*Yama Ribbons*); *Jiangsu Zhongji Lamination Materials Co. v. United States*, 405 F. Supp. 3d 1317 (CIT 2019) (*Jiangsu Zhongji I*); and *Jiangsu Zhongji Lamination Materials Co. v. United States* (CIT 2020), Ct. No. 18-00089, Slip Op. 20-39 (March 24, 2020) (*Jiangsu Zhongji II*) at 5.
[195] *See* GOC Case Brief at 6.
[196] *Id.* at 6 (citing *Preliminary Determination* PDM at 25).
[197] *Id.* at 4 (citing *Changzhou Trina I*, 352 F. Supp. 3d at 1327).
[198] *Id.* at 4-5 (citing *Changzhou Trina I*, 352 F. Supp. 3d at 1327).
[199] *Id.* at 5 (citing *Changzhou Trina II*, Slip Op. 2019-137 at 6 (quoting Commerce's remand redetermination)).

case."[200] In support, the Court cited *Archer Daniels Midland*, where the Court noted that Commerce should "seek to avoid" adversely impacting a cooperating party.[201]

- In *Guizhou Tyre I*, the Court found that while the Commerce "did note that information as to the functioning of the program was missing, this finding was rendered immaterial by responses from both Guizhou and the GOC as to the program's use."[202]
- In *Clearon*, the Court found that "{a}lthough Commerce, in the Remand Results, takes the {C}ourt through why it wanted this information, as has been found in other cases in this Court, it is not clear that any of the missing information was "necessary" to Commerce's central statutory inquiry, *i.e.*, to determine whether the EBCP provided a benefit to Heze."[203] The court further stated "{Commerce} has assumed the conclusion—that a gap in the record exists as a result of [China's] failure to cooperate—without addressing what 'constitutes a "gap" in the record, ' and by pointedly closing its eyes on the evidence provided by {Heze} that would 'fairly detract{ } from its ultimate conclusion."[204]
- After taking into account the information the respondents and the GOC have supplied, Commerce has not identified any "gap" in the record which would then trigger the lawful use of facts available or facts available with adverse inferences.[205]
- Furthermore, Commerce could have verified respondents' U.S. customers' non-use.[206] But as Commerce chose not to attempt verification of respondents' U.S. customers' non-use declarations, and as the record contains no evidence to the contrary, respondents' and the GOC's responses, as well as respondents' customers declarations, must be accepted as accurate and Commerce must find non-use of the EBCP.[207]

Ningbo Daye Case Brief

- Commerce's decision to apply AFA with respect to the EBCP, as a result of the GOC's alleged failure to respond, is unwarranted and unlawful.[208]
- Ningbo Daye provided significant record evidence that it did not participate in the program, including affidavits from each of its U.S. customers certifying that they did not use the EBCP during the POI.[209]
- The GOC confirmed that none of Ningbo Daye's U.S. customers was provided with loans under the EBCP.[210]
- The GOC explained that it received a list of U.S. customers from the respondents. The GOC also explained that the China Export-Import (Ex-Im) Bank searched its records to confirm that these customers did not receive credits under the EBCP.[211]

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[200] *Id.* (citing *Changzhou Trina II*, Slip Op. 2019-137 at 11).
[201] *See Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013) (*Archer Daniels Midland*).[201]
[202] *See* GOC Case Brief at 5 (citing *Guizhou Tyre I at 1270*).
[203] *See* GOC Case Brief at 5 (citing *Clearon*, Slip Op. 2020-141 at 32-33).
[204] *Id.* at 5 (citing *Clearon*, Slip Op. 2020-141 at 33).
[205] *Id.*
[206] *Id.* at 5-6.
[207] *Id.* at 1.
[208] *See* Ningbo Daye Case Brief at 1-2.
[209] *Id.* at 3 (Citing Ningbo Daye IQR at 16).
[210] *Id.* at 4 (citing GOC IQR at 11).
[211] *Id.* (citing Ningbo Daye IQR at 13 and 15-16).

- The GOC also advised that Chinese exporters can normally confirm the existence of any sales contracts that were supported by the EBCP because generally, the Chinese exporter is involved in the loan evaluation proceeding and in the post-lending loan management and must provide an overview of the export project, a project feasibility analysis, and an economic benefit analysis as well as the exporter's credit record.[212]
- The GOC reported that the Ex-Im Bank carries out an investigation, which may be conducted on-site, to verify the performance capability and credit level of the Chinese exporters.[213]
- The GOC provided the *Rules Governing Export Buyers Credit of the Export-Import Bank of China*, issued by China Ex-Im on November 20, 2000 (*Administrative Measures*), which explain that the Ex-Im Bank must investigate and verify the performance capability of the Chinese exporters in its loan evaluation and approval proceeding, that the Ex-Im Bank "pays great attention" to the exporter's credit level, and that the Ex-Im Bank may contact the exporters after issuance of loans to understand whether the loans are appropriately used.[214]
- Commerce completely bypassed this critical evidence and simply stated that it determined on the basis of AFA that Ningbo Daye benefitted from this program.[215]
- Despite the clear record evidence, the *Preliminary Determination* nevertheless states that "necessary information is missing from the record for {Commerce} to have a clear understanding of how this program operates and to be able to verify purported claims of non-use of the program."[216] However, the issue is not whether Commerce has a clear understanding of the program but rather, as the CIT has held, whether the respondent did or did not use or benefit from that program.[217]
- In applying AFA to find that Ningbo Day benefited from this program, Commerce ignored numerous recent holdings by the CIT, which has consistently held that certifications are sufficient evidence to demonstrate non-use of the EBCP.[218]
- In addition, as Ningbo Daye explained in its IQR, the CIT has consistently held that when record evidence indicates that the EBCP was not used, Commerce cannot apply AFA to find that it was used.[219]
- The CIT has held when Commerce invokes AFA, "the agency must still make the necessary factual findings to satisfy countervailability" and "even when using {AFA}, Commerce must point to actual information on the record to make required factual determinations."[220]
- Commerce claims that information obtained in a prior CVD proceeding "indicates that the GOC revised this program in 2013" and that the GOC's failure to provide the 2013 Revisions

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[212] *Id.* (citing GOC IQR at 13-14 and Exhibit Export-3).
[213] *Id.* (citing GOC IQR at 14-15).
[214] *See* Ningbo Daye Case Brief at 4 (citing GOC IQR at 13-14 and Exhibit Export-2).
[215] *Id.* at 1-4 (citing *Preliminary Determination* PDM at 28 and 46).
[216] *Id.* at 7-8 (citing *Preliminary Determination* PDM at 27).
[217] *Id.* at 8 and 10 (citing *Yama Ribbons*, 419 F. Supp. 3d at 1347-1348; Final Results of Redetermination Pursuant to Court Remand, *Yama Ribbons & Bows Co. v. United States*, 2020 WL 4386773 (Ct. Int'l Trade July 31, 2020) (No. 18-00054), ECF No. 37; *Guizhou Tyre III*, 389 F. Supp. 3d at 1321; *Guizhou Tyre IV*, 415 F. Supp. 3d 1335, 1341-43; *and Guizhou Tyre VI*.
[218] *Id.* at 1-2 and 5-6.
[219] *Id.* at 5-6 and 9-10 (citing *Changzhou Trina I*, *Guizhou Tyre I*, 348 F. Supp. 3d at 1270; Yama Ribbons, 419 F. Supp. 3d at 1350; and *Clearon IIII*).
[220] *Id.* at 6 (citing *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1350 (CIT 2016) (*Changzhou Trina 2016*); *Yama Ribbons*; *Guizhou Tyre III*; *Guizhou Tyre V*; and *RZBC Grp. Shareholding Co. v. United States*, No. 15-00022, 2016 WL 3880773 at *5 (CIT June 30, 2016) (*RZBC*), and section 776(a)-(c) of the Act.)

"hindered Commerce's understanding of how this program operates and how it can be properly verified and, thus, impeded Commerce's ability to conduct its investigation of this program."[221] However, as the CIT has held, these revisions do not impact whether the program was used.[222]

- Before applying AFA Commerce must establish that "necessary information is not available on the record." However, there is no necessary information missing from the record. The record is clear that the EBCP was not used by Ningbo Daye, and none of Ningbo Daye's U.S. customers applied for, used, or benefitted from this program during the POI.[223]
- By failing to credit this substantial evidence of non-use, and instead applying AFA, Commerce has acted contrary to this unbending line of CIT authority.[224]
- Commerce has an obligation to try to avoid penalizing Ningbo Daye because of another party's response.[225]
- In *Guizhou Tyre I* the Court stated that Commerce's "obligation when drawing an adverse inference based on a lack of cooperation by a foreign government is to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information."[226] Here the "replacement information" is the certifications provided by each of Ningbo Daye's customers confirming that they did not use this program, and, just as in *Guizhou Tyre I*, Commerce "chose {} a more convoluted route in substituting facts derived from the record with its own unsupported conclusions.[227]
- In *Clearon I*, the Court stated that where the application of AFA "may adversely impact a cooperating party," Commerce should "seek to avoid such impact if relevant information exists elsewhere on the record."[228]

Zhejiang Amerisun Case Brief

- Commerce's decision to apply AFA to the EBCP is not supported by substantial evidence and is otherwise contrary to law, because Commerce impermissibly attributed to Zhejiang Amerisun usage of the EBCP, contrary to the record evidence. But Commerce failed to provide any reasonable rationale for why the GOC was required to answer detailed questions about the administration of a program for which there is substantial evidence of non-use and for which there is no record evidence that the program was used.[229]
- Commerce's AFA determination rests solely on the basis that the GOC withheld information about the EBCP and did not respond to the Standard Questions Appendix concerning the program. However, the GOC did not respond because the GOC searched the Ex-Im Bank's records and confirmed that "none of the responding companies' U.S. customers applied for, used, or benefitted from this program during the POI" and Zhejiang Amerisun also reported that neither it nor its sole customer have ever received benefits under the program.[230]

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[221] *Id.* at 9 (citing *Preliminary Determination* PDM at 25-26)
[222] *Id.* at 7 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1270; *and Guizhou Tyre IV*, 415 F. Supp. 3d at 1405).
[223] *Id.* at 9 (citing section 776(a-b) of the Act).
[224] *See* Ningbo Daye Case Brief at 1-2 and 5-6.
[225] *Id.* at 2 and 11-12.
[226] *Id.* at 11 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1271).
[227] *Id.* at 11-12 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1271).
[228] *Id.* at 12 (citing *Clearon I* at 1355 and *Archer Daniels Midland* at 1342).
[229] *See* Zhejiang Amerisun Case Brief at 2 and 5-7.
[230] *Id.* at 1-2, 4, and 6-7 (citing *Preliminary Determination* PDM at 27 and GOC IQR at 12).

- Zhejiang Amerisun stated that its "sole customer is an affiliated U.S. company, Amerisun, Inc., which has never received any EBCs from the China Import-Export Bank." Amerisun, Inc. also provided a sworn affidavit that it had never received buyers' credits from the China Ex-Im Bank.[231]
- Commerce improperly invoked Section 776(a) and (b) of the Act and imposed a CVD on Zhejiang Amerisun without a proper finding of fact that Zhejiang Amerisun benefited from the EBCP.[232]
- Commerce stated it was "unable to verify the scant information on the record indicating non-usage … in a manner that would satisfactorily establish the non-use of this program." However, Commerce was not permitted to disregard the record evidence that did establish that neither Zhejiang Amerisun nor its sole U.S. customer used or benefitted from the EBCP during the POI.[233]
- The CIT has ruled, on virtually identical facts, that Commerce acts unlawfully when it includes the EBCP rate in the overall subsidy rate of a cooperating respondent that did not use or benefit from the program, based on AFA stemming from Commerce's finding that the GOC was not a cooperating party.[234]
- Commerce is required to evaluate objectively all data on the record and must justify its decisions.[235] The Act authorizes Commerce to impose a CVD only upon a finding that a financial contribution was provided to Zhejiang Amerisun such that a benefit was thereby conferred.[236]
- Commerce did not make the requisite finding based on substantial evidence to support its decision to disregard Zhejiang Amerisun's claims of non-usage of the EBCP.[237]
- Instead of finding that a financial contribution was provided, and a benefit conferred to Zhejiang Amerisun, as required by the Act, Commerce placed the respondent in the position of proving a negative – that it did not use the EBCP. Commerce then declined to consider the record evidence provided by the respondent and the GOC's claim that it confirmed respondent did not use or benefit from the program.
- As in *Yama Ribbons*, Commerce again "appears to have lost sight of the issue"—which is not whether Commerce had a full understanding of the EBCP—"but whether {the respondent} did, or did not, use or benefit from that program."[238]
- As the court found in *Yama Ribbons*, Commerce must "tread carefully when its use of an adverse inference would injure {a respondent} which Commerce did not find to have failed to cooperate to in responding" to Commerce's questionnaires.[239] Further, as the Court found in *Changzhou Trina I*, when applying AFA, Commerce, should "seek to avoid such impact if relevant information exists elsewhere on the record."[240]

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[231] *Id.* at 2 and 4 (citing Zhejiang Amerisun IQR at 14 and Exhibit 8).
[232] *Id.* at 3 (citing section 771(5)(B) and section 776(a) and (b) of the Act).
[233] *See* Zhejiang Amerisun Case Brief at 3 (citing *Preliminary Determination* PDM at 28).
[234] *Id.* at 3-4 (citing *Yama Ribbons*).
[235] *Id.* at 4-5 (citing *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1302 (CIT 2006)).
[236] *Id.* at 4 (citing *Yama Ribbons* and section 771(5)(B) of the Act).
[237] *Id.* at 3-4 (citing *Jinan Yipin Corp. v. United States*, 637 F. Supp. 1183, 1192 (Ct. Int'l Trade 2009)).
[238] *Id.* at 5 (citing *Yama Ribbons*, 419 F. Supp. 3d at 1348 (CIT 2019)).
[239] *Id.* (citing *Yama Ribbons*, 419 F. Supp. 3d at 1348 (CIT 2019); and *Changzhou Trina I*, 352 F. Supp. 3d 1316 (CIT 2018).
[240] *Id.* at 5 (citing *Changzhou Trina I*, 352 F. Supp. 3d 1316 (CIT 2018); and *Archer Daniels Midland* at 1342).

- Commerce may not exert its authority in an arbitrary and capricious manner. However, Commerce's decision to require the GOC to complete the Standard Questions Appendix for a non-used program was arbitrary and capricious.[241]
- Commerce's general instructions in the initial questionnaire indicated that the GOC was not required to complete the Standard Questions Appendix for non-used programs. However, Commerce arbitrarily required the GOC to provide detailed information for the EBCP, even though substantial evidence on the record established that the program was not used.[242]
- As the Court stated in *Yama Ribbons*, "even if it is presumed that the elimination of {certain requirements of the EBCP} actually occurred in 2013… such a presumption would not establish that {the respondent} benefitted from {the EBCP}."[243]
- Commerce has, yet again, "erred in treating the issue of whether {the requirement} was in effect during the {POI} as a justification" for its attribution of benefits from the program to Zhejiang Amerisun as an adverse inference.[244]
- Should Commerce continue to infer usage of the EBCP to Zhejiang Amerisun improperly, Commerce should not select the highly punitive rate of 10.54 percent given that Zhejiang Amerisun was a fully cooperative respondent.[245]

Fujian Spring and Masport Case Brief

- Commerce's use of AFA to determine that the mandatory respondents Ningbo Daye and Zhejiang Amerisun used and benefitted from EBCP is neither supported by substantial evidence on the record nor in accordance with the law.[246]
- The respondents were fully cooperative, provided the information requested, including providing complete export customer lists and explaining how non-use was determined. The respondents also submitted affidavits from their customers certifying that they did not use the EBCP during the POI. Zhejiang Amerisun also stated that its sole customer provided a table of bank lending information indicating that no EBCs were received during the POI.[247]
- The GOC confirmed that it had provided the respondents' U.S. customer lists to the China Ex-Im Bank, which searched its records to confirm that none of these customers received EBCP credits during the POI The GOC also confirmed that the EBCP's *Administrative Measures* require Chinese exporters to have a significant role in the EBCP loan process. For this reason, the GOC stated that Chinese exporters can verify existence of any sales contracts that were supported by the EBCP.[248]
- The GOC provided much of the other information requested regarding the operation of the program, with the exception of: the 2013 Revisions; the interest rate(s) established under the program; and a list of partner or correspondent banks.[249]
- Despite this, Commerce applied AFA to determine that the respondents used and benefitted from the EBCP on the basis that the GOC failed to cooperate by providing necessary

[241] *Id.* at 5-6 (citing Tung Mung Dev. Co. v. United States, 354 F.3d 1371, 1378 (Fed. Cir. 2004)).
[242] *Id.* at 6 (citing Commerce's Initial Questionnaire at Part II-2)).
[243] *See* Zhejiang Amerisun Case Brief at 6 (citing *Yama Ribbons*, 419 F. Supp. 3d 1341, 1345)); *see also* GOC IQR at Exhibit Export-1 at 1-2.
[244] *Id.* at 7 (citing *Yama Ribbons*, 419 F. Supp. 3d 1341, 1345)).
[245] *Id.*
[246] *See* Fujian Spring and Masport Case Brief at 1.
[247] *Id.* at 5 (citing Ningbo Daye IQR at 14-15; and Zhejaing Amerisun IQR at 12-13).
[248] *Id.* at 5-6 (citing GOC IQR at 12 -13; and *Preliminary Determination* PDM at 24-25).
[249] *Id.* (citing *Preliminary Determination* PDM at 25-26).

information.[250] In numerous previous cases, Commerce has found that declarations by a company's U.S. importers supported a determination of non-use of the EBCP.[251]
- Commerce has not established that the information sought from and withheld by the GOC about the operation of the EBCP was necessary or that the absence of it created an information gap critical to determining the respondents' use (or otherwise) of the EBCP.[252]
- Commerce has not established that confirmation of the interest rate(s) offered or a list of all partner or correspondent banks involved in disbursement of funds under the EBCP is necessary information.[253]
- Section 782(e) of the Act requires Commerce to consider all information submitted by an interested party that is necessary to the determination, so long as the information is: submitted by the deadline established; capable of being verified; not so incomplete as to be unreliable; capable of being used without undue difficulties; and the interested party acted to the "best of its ability" in providing the information.[254]
- Commerce must find that neither respondent used nor benefitted from the EBCP and must recalculate each respondent's overall subsidy rate and the "all-others rate" accordingly.[255]

Power Distributors' Case Brief
- Commerce's use of AFA to determine that the mandatory respondents Ningbo Daye and Zhejiang Amerisun used and benefitted from EBCP is neither supported by substantial evidence on the record nor in accordance with the law.[256]
- To apply AFA, Commerce must first support a finding that necessary information is missing from the record; or that a party has withheld or failed to provide such information by the deadlines or in the form and manner requested, significantly impeded the proceeding, or provided information which cannot be verified. Second, Commerce must support a finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information."[257]
- In this case, the EBC program's use, not its operation, is relevant. Commerce's duty is to determine whether the EBCP provided a benefit to the respondents, and as numerous judgments by the CIT on this matter make clear, this determination requires a finding of whether "a specific financial contribution occurred, and a benefit was therefore conferred."[258]
- CIT case law bars Commerce from applying AFA where there exists relevant information otherwise available on the record about the respondents' non-use of the EBCP.[259]

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[250] *Id.* (citing *Preliminary Determination* PDM at 27-28).
[251] *Id.* at 11 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China Final Results of Countervailing Duty Administrative Revie*w; 2013, 81 FR 46904 (July 19, 2016) (*China Solar 2016*), and accompanying IDM at 11).
[252] *See* Fujian Spring and Masport Case Brief at 9-10.
[253] *Id.* 10 (citing *Preliminary Determination* PDM at 7-8 and 25-28).
[254] *See Geo Specialty Chemicals, Inc v United States*, Ct. No. 08—00046, Slip Op. 09-13 (February 19, 2009) (*Geo Specialty Chemicals*) at 6; *Guizhou Tyre 2018* at 1270; *Guizhou Tyre 2019* at 1343; *Clearon II* at 11; and section 782(e) of the Act.
[255] *See* Fujian Spring and Masport Case Brief at 2 and 16.
[256] *See* Power Distributors' Case Brief at 1-2, 5-6 and 10 (citing *Clearon I*).
[257] *Id.* at 3 (citing section 776(a)(1)-(2)(A) of the Act.).
[258] *Id.* at 5 (citing *Clearon II* at 10; *Guizhou Tyre* Ct. No. 18-00100, Slip Op.19-155 (December 10, 2019) (*Guizhou Tyre 2019*) at 1342; and section 771(5) of the Act).
[259] *Id.* at 1 and 5 (citing *Clearon I* at 1359, and section 776(a)(1)-(2)(A) of the Act).

- The Court in *Changzhou Trina 2018* further held that Commerce had not established why the GOC's failure to explain the EBCP fully was necessary to assess the claims of non-use and why other information accessible to respondents was insufficient to fill in whatever gap was left by the GOC's refusal to provide internal bank records.[260]
- Commerce has again failed to establish that information sought from and withheld by the GOC about the operation of its EBCP was necessary for its determination of non-use of the EBCP by the respondents.[261]
- The Court has specifically rejected Commerce's claims that information about the operation of the EBCP is necessary to verify a respondent's not-use.[262]
- In *Clearon II*, the CIT noted that despite objecting to the Court's decisions in *Guizhou Tyre I and the Changzhou Trina* and *Jiangsu Zhongji* cases preceding *Clearon II*, the United States had elected not to appeal the Court's decisions regarding Commerce's AFA determinations with respect to the EBCP.[263]
- As the Court found in *Guizhou Tyre 2019*, where "record that squarely detracts from Commerce's inference that Plaintiffs used and benefited from the EBCP," Commerce "may not simply declare that the evidence cannot be verified and therefore, a gap exists. Rather, "Commerce must attempt verification in order to conclude that a gap exists related to that inquiry."[264]
- The Court in *Guizhou Tyre 2019*, considering a very similar fact pattern, warned that "{Commerce's} (flawed) reasoning has remained unwavering-despite now eleven decisions from this Court urging Commerce to correct the repeated blatant deficiencies in its AFA analyses of the EBCP."[265]
- There is no gap of necessary information in this case. Moreover, the respondents fully cooperated.[266]
- The GOC's responses corroborate the respondent's claims of non-use, explain the steps the China Ex-Im Bank performed in order to confirm respondents' non-use, and explain that Chinese exporters, including respondents, are able to confirm non-use.[267]
- The GOC provided much of the information requested by Commerce. The GOC's submissions also corroborate and contextualize the non-use of the EBCP by the respondents.[268]

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[260] *See* Power Distributors' Case Brief at 7 (citing *Changzhou Trina Solar Energy Co. v. United States*, Ct. No. 16-00157 Slip Op. 18-167 (November 30, 2018) (*Changzhou Trina 2018*)).
[261] *Id.* at 1, 5, and 7-8 (citing *Preliminary Determination* PDM at 6 and 25-28, and section 771(a)(1)-(2)(A) of the Act).
[262] *Id.* at 6-8 and 10 (citing *Guizhou Tyre 2018 at 1270*, *Clearon I at 1350-1351*, and *Clearon II* at 9 and 11-12).
[263] *Id.* at 10 (citing *Clearon II* at 21 and Footnote 13); *see also Guizhou Tyre I*; *Changzhou Trina I*; *Changzhou Trina II*; *Jiangsu Zhongji I*; and *Jiangsu Zhongji II*).
[264] *Id.* (citing *Guizhou Tyre 2019* at 1343).
[265] *Id.* at 7 (citing *Guizhou Tyre 2019*; *Changzhou Trina 2017*; *Changzhou Trina 2018-2*; *Changzhou Trina 2018*; *Changzhou Trina I*; *Changzhou Trina II*; *Changzhou Trina 2019*; *Guizhou Tyre 2018*; *Guizhou Tyre II*; *Guizhou Tyre III*; *Clearon I*; *Jiangsu Zhongji I*; and *Solar World Ams., Inc. v. United States*, Ct. No. 15-00232 Slip Op. 17-67 (June 7, 2017)).
[266] *Id.* at 1, 3-5, and 9 (citing GOC IQR at 12-13; Ningbo Daye IQR at 16 and 17; and Zhejiang Amerisun IQR at 14).
[267] *Id.* at 1 and 3-4 and 9-10 (citing *Preliminary Determination* PDM at 13 and 24-26).
[268] *Id.* (citing *Preliminary Determination* PDM at 24-26).

- Commerce failed to consider or attempt to verify relevant facts otherwise available on the record concerning respondents' non-use and applied AFA and determining that the respondents used and benefited from the EBCP."[269]
- Had Commerce considered or attempted to verify relevant information otherwise available on the record, it would not be difficult for Commerce to conclude that there is substantial evidence demonstrating the non-use of the EBCP of the respondents.[270]
- Commerce failed to establish why the information sought from and withheld by the GOC about the operation of its EBCP was necessary to find non-use of the EBCP by the respondents because there was no gap of necessary information on the record warranting their use. As such, neither the GOC nor the respondents failed to cooperate, and Commerce has failed to meet the condition precedent for the application of AFA.[271]
- Commerce failed to consider or attempt to verify relevant information otherwise available on the record about the respondents' non-use of the EBCP.[272]
- Commerce must refrain from applying AFA to the extent proposed in the preliminary determination, as it would adversely impact the cooperative Respondents (and "all-other" exporters/producers).[273]
- Commerce must either verify the respondent's claims of non-use or Commerce must find that neither respondent used nor benefitted from the EBCP and must recalculate each respondent's overall subsidy rate and the "all-others rate" accordingly.[274]

The Petitioner's Rebuttal Brief

- The GOC's choice to deliberately and repeatedly withhold necessary information from the record significantly impeded the investigation and constituted a failure to cooperate and made verification of non-use of the EBCP impossible.[275]
- The GOC repeatedly refused to respond to Commerce's requests for the 2013 Revisions three times: the first time in response to Commerce's requests for "any laws, regulations or other governing documents cited by the GOC in the 2016 response and twice more when Commerce asked the 2013 Revisions by name.[276]
- The 2013 Revisions are necessary to Commerce's benefit determination because the GOC's prior admissions suggest that the 2013 Revisions eliminate the 2 million U.S. dollar (USD) contract minimum associated with the lending program and that loans given through this program are no longer limited to direct disbursements through the China Ex-Im Bank (meaning that customers may be able to open loan accounts through this program with other banks).[277]

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[269] *Id.* at 1, 3-4, and 9-10 (citing *Preliminary Determination* PDM at 25-28; *Geo Specialty Chemicals* at 6; *Guizhou Tyre 2018* at 1271; and section 776(m)(e) of the Act).
[270] *See* Power Distributors' Case Brief at 1 and 10 (citing *China Solar 2016* IDM at 11.
[271] *Id.* at 1-2, 5-6, and 11.
[272] *Id.* at 1-2.
[273] *Id.* at 11-12 (citing *Bio-Lab Inc et al. v United States*, Ct. No. 18-00155, Slip Op. 20-45 (April 7, 2020) at 1368; *Archer Daniels Midland* at 769; *Clearon I at 1355*; *Clearon II* at 3, 8, and 12; *Changzhou Trina 2017* at 7; and *Guizhou Tyre 2018* at 1270 and 1271).
[274] *Id.* at 3 and 10.
[275] *Id.* at 2 (citing *Preliminary Determination* PDM at 24-29 and section 776(a)-(b) of the Act).
[276] *See* Petitioner Rebuttal Brief at 3-4 (citing GOC IQR at 12 and Exhibit Export-1 at 1-3; *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017); GOC 1SQR at 10; and GOC 2SQR at 4).
[277] *Id.* (citing *Preliminary Determination* PDM at 26-27); *see also* GOC IQR at Exhibit Export-1 at 1-3).

- The GOC repeatedly denied Commerce's requests for explanation of the interest rates under the EBCP, and for a list of all partner/correspondent banks involved in disbursement of funds.[278]
- In accordance with Commerce's prior practice and applicable case law, Commerce should continue to apply AFA, finding that the respondents used the EBCP.[279]
- Zhejiang Amerisun, Ningbo Daye, and the GOC claim that Commerce can select from facts otherwise available only when "necessary information" has been withheld, creating a gap of necessary information in the record. However, Commerce has consistently found that the 2013 Revisions or other like evidence, is necessary, and the CIT has affirmed Commerce's finding.[280]
- The respondents argue that there is no gap of necessary information in the record because regardless of the GOC's failure to provide requested information, respondents submitted declarations and other documentation by their customers as evidence of non-use. However, Commerce has repeatedly deemed customer declarations, including sworn declarations, to be insufficient to demonstrate non-use.[281]
- Commerce's refusal to rely on customer declarations alone is reasonable; if declarations alone were enough to demonstrate non-use, there would be no need for documentation regarding any aspect of its investigation.[282]
- The respondents also cite cases purporting to show that the requested information relating to the EBCP is not necessary; however, the cited cases do not speak to the inherent nature of the information in question, but rather Commerce's occasional failure to adequately explain why the information was in fact necessary.[283]
- As a general principle, the CIT defers to Commerce's authority to "determine the extent of the investigation and information it needs."[284]
- In this case Commerce has gone to great lengths to explain why the requested information is necessary, and the explanation set out above is closely comparable with the explanation the CIT held to be sufficient in *Changzhou Trina I*.[285]

Commerce's Position: Consistent with the *Preliminary Determination* and Commerce's past practice, we continue to find that the record of this investigation does not support a finding of non-use of the EBCP. Below we discuss the evolution of Commerce's treatment of this program.

[278] *Id.* at 3-4 (citing GOC IQR at 12; GOC 1SQR at 9-10; and GOC 2SQR at 4-5).
[279] *See* Petitioner Rebuttal Brief at 3-4 (citing *Preliminary Determination* PDM at 27).
[280] *Id.* at 5-6 (citing *Staples from China Preliminary Determination* PDM at 17-21; and *Changzhou Trina I*).
[281] *Id.* at 8 (citing *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 31141 (May 22, 2020), and accompanying IDM at 26).
[282] *Id.* at 8.
[283] *Id.* at 6-7 (citing *Changzhou Trina 2016*; *Changzhou Trina I*; Zhejiang Amerisun Case Brief at 5; GOC Case Brief at 3; and Ningbo Daye Case Brief at 8).
[284] *Id.* at 7 (citing *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Circ. 1992).
[285] *Id.* at 7-8 (citing *Preliminary Determination* PDM at *27-28*; *Changzhou Trina I*; and *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 Final Determination*), and accompanying IDM at Comment 16)).

Solar Cells Initial Investigation of Export Buyers Credit Program

Commerce first investigated the EBCP and found it countervailable in the *Solar Cells Investigation*.[286] Our initiation was based on, among other information, the China Ex-Im Bank's 2010 annual report, demonstrating that the credits provided under this program are "medium and long-term loans, and have preferential, low interest rates. Included among the projects that are eligible for such preferential financing are energy projects."[287] Commerce initially asked the GOC to complete the Standard Questions Appendix for the EBCP. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant records the government maintains, the identification of the relevant laws and regulations, and a description of the application process (along with sample application documents). The Standard Questions Appendix is intended to help Commerce understand the structure, operation, and usage of the program.[288]

The GOC provided none of the information requested by Commerce in the ensuing investigation, despite being given multiple opportunities to do so, but simply stated that "{n}one of the respondents or their reported cross-owned companies applied for, used, or benefited from the alleged programs during the POI."[289] 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."[290] 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.[291] 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 EBCs, how it might have knowledge of such credits, or how such credits might be reflected in a company's books and records.[292]

Based on the GOC's responses, Commerce's understanding was that, under this program, loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), with no involvement of third parties, such as exporters, or third-party banks. Accordingly, Commerce made clear its understanding that the only way to establish non-use of the program was through the GOC and not through the respondent companies.[293] 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

[286] *See Solar Cells Final Determination* IDM at Comment 18. While Commerce's determination with respect to the EBCP was initially challenged, the case was dismissed.
[287] *Id*. at 59.
[288] *Id*.
[289] *Id.*
[290] *Id*. at 60.
[291] *Id*. at 60-61.
[292] *Id*. at 61.
[293] *Id.*

not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

> {E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that {Commerce} needs to examine in order to verify that the information is complete and accurate. For verification purposes, {Commerce} must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as well as to review supporting documentation for individual loans, grants, rebates, *etc.* If all a company received was a notification that its buyers received the export credits, or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs Commerce that it has no binder (because its customers have never applied for EBCs), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.[294]

On this basis, Commerce concluded that usage of the program could not be confirmed by the respondent exporters in a manner consistent with its long-standing verification methods.[295] These methods are comparable to those of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be traced to audited financial statements, or other credible official company documents, such as tax returns, that provide a credible and 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.[296]

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[294] *See Solar Cells Final Determination* IDM at 61-62.

[295] Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Solar Products Final Determination* IDM at 93. This was affirmed by the Court in *Changzhou I*. In *Changzhou II*, the Court noted that the explanation from *Solar Products Investigation* 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 Trina Solar Energy Co., Ltd. v. United States*, 352 F. Supp. 3d 1316, 1326 (CIT 2018) (*Changzhou III*) was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had "failed to show why a full understanding" of the program was necessary to verify non-use. *Id.* at 10 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017) (*Solar Cells 2014 Review Final Results*) (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) (*Solar Cells 2014 Review Amended Final Results*), and accompanying IDM). The CIT in *Guizhou Tyre I* reached a similar conclusion concerning the 2014 review of tires from China; *see also 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).

[296] The Court agreed with Commerce in *RZBC Group Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*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 Citric Acid 2012 Final Results* IDM at Comment 6).

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

In the investigation of solar cells, however, despite Commerce's repeated requests for information, the GOC failed to offer any guidance for how Commerce could search for EBCP lending in respondent exporters' books and records that could be tied to financial statements, tax returns, or other relevant company documents. Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the China Ex-Im Bank 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 EBCs."[297] We noted our belief that "{s}uch records could be tested by {Commerce} to check whether the U.S. customers of the company respondents had received EBCs, and such records could then be tied to the {China} Ex-Im Bank's financial statements."[298] However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.[299] Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

[297] *See Solar Cells Final Determination* IDM at 62.
[298] *Id*.
[299] *Id*.

Chlorinated Isos Investigation of Export Buyers Credit Program

Two years later, in the *Chlorinated Isos Final Determination*[300] 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, based on the limited information provided by the GOC in earlier investigations, it was Commerce's understanding that the EBCP provided medium – and long-term loans and that those loans were provided directly from the China Ex-Im Bank to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-use appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customers pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at China Ex-Im,…{w}e conducted verification... in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customer's accounting and financial records that no loans were received under this program."[301]

2013 Amendments to the Export Buyers Credit Program

Our understanding of the operation of the EBCP began to change after the *Chlorinated Isos Final Determination* had been completed on September 22, 2014. In *Citric Acid 2012 Final Results*, Commerce began to gain a better understanding of how the Ex-Im Bank issued disbursement of funds and the corresponding timeline; however, Commerce's attempts to verify the program's details and statements from the GOC concerning the operation and use of the program were thwarted by the GOC.[302] In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the silica fabric investigation[303] conducted in 2016-2017, based on what we had learned in *Citric Acid 2012 Final Results*, we asked the GOC about certain changes to the EBCP, including changes in 2013 that eliminated the U.S. dollar two million minimum business contract requirement.[304] In response, the GOC stated that there were three relevant documents pertaining

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

[301] *See Chlorinated Isos Final Determination* IDM at 15.

[302] *See Citric Acid 2012 Final Results* 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 Ex-Im 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.")

[303] *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 Final Determination*), and accompanying IDM at Comment 17.

[304] *See* GOC IQR at Exhibit Export-1 (September 16, 2016 Supplemental Questionnaire Response in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China ((2016 Silica Fabric EBCP Supplemental Questionnaire Response)).

to the EBCP: (1) *Implementing Rules for the Export Buyers Credit of the Export-Import Bank of China* which were issued by China Ex-Im on September 11, 1995 (*1995 Implementing Rules*); (2) *Administrative Measures*; and (3) 2013 internal guidelines of China Ex-Im.[305] 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."[306] The GOC further stated that "those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect."[307]

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

> Through its response to {Commerce's} supplemental questionnaire, the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for {Commerce} to analyze how the program functions.
>
> We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013 Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking Commerce to rely upon unverifiable assurances that the *2000 Rules Governing Export Buyers Credit* remained in effect, the GOC impeded Commerce's understanding of how this program operates and how it can be verified.
>
> Additional information in the GOC's supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the Ex-Im Bank. Specifically, the GOC stated that customers can open loan accounts for disbursements through this program with other banks. The funds are first sent from the Ex-Im Bank to the importer's account, which could be at the Ex-Im Bank or other banks, and that these funds are then sent to the exporter's bank account. Given the complicated structure of loan disbursements for this program {Commerce's} complete understanding of how this program is administrated is necessary. Thus, the GOC's refusal to provide the most current 2013 Revisions, which provide internal guidelines for how this program is administrated by the Ex-Im Bank, impeded {Commerce's} ability to conduct its investigation of this program.[308]

Further, we determined that we could not rely on declarations from customers claiming non-use of the program because "we are unable to verify the accuracy of these documents as the primary entity that possesses such supporting records is the Export Import Bank of China."[309]

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[305] *Id*.
[306] *Id*.
[307] *See* GOC IQR at Exhibit Export-1
[308] *See Silica Fabric Final Determination* IDM at 12.
[309] *Id.* at 62.

Additionally, we explained that "we now have information on the record that demonstrates the GOC updated certain measures of the program, but the GOC refused to provide the updated measures{, }" and "{b}ecause the GOC withheld critical information regarding this program, we are unable to determine how the program now operates, and, thus, we cannot verify ACIT's declarations as submitted."[310]

This Investigation

In this proceeding, we initiated an investigation of the EBCP based on information in the Petition indicating that foreign customers of Chinese exporters receive a countervailable subsidy in the form of preferential export loans from the China Ex-Im Bank.[311] In the Initial Questionnaire, we asked the GOC to respond to the Standard Questions Appendix "with regard to all types of financing provided by the China Ex-Im Bank under the Buyer Credit Facility."[312] The Standard Questions Appendix requested various types of information that Commerce requires in order to analyze the specificity and financial contribution of this program, including: the date the program was established, the name and address of government agencies and authorities administering the program, translated copies of the laws and regulations pertaining to the program, copies of reports pertaining to the program, an identification of the types of records regarding the program that are maintained by the government, a description of the program and the program application process, program eligibility criteria, and program use data.[313] In the Initial Questionnaire, we also asked the GOC to report the interest rate(s) established during the POI for the Buyer Credit Facility for all types of financing provided; to provide a list of all partner/correspondent banks involved in the disbursement of funds under the EBCP; to provide a copy of the September 6, 2016, GOC Seventh Supplemental Response in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China; and to provide original and translated copies of any laws, regulations, or other governing documents cited by the GOC in the 2016 Silica Fabric EBCP Supplemental Questionnaire Response, including the *1995 Implementing Rules*, the *Administrative Measures* and the 2013 Revisions.[314]

The GOC provided the GOC Seventh Supplemental Response in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China, the *Administrative Measures*, and the *1995 Implementing Rule.*[315] The GOC also explained how it claimed to have determined non-use of the program by cross referencing the respondents' customer lists with China Ex-Im Bank records.[316] However, rather than responding to the remaining questions, including requests to identify the interest rates under the program, the partner/correspondent banks administering the program, and providing the 2013 Revisions, the GOC repeatedly stated that "GOC confirms that {} none of the U.S. customers of the respondents used the alleged program during the POI.."[317]

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[310] *Id*.
[311] *See* Initiation Checklist: "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China," dated June 15, 2020 (Initiation Checklist) at 24-25.
[312] *See* Initial Questionnaire at Section II, page 4-5.
[313] *Id.* at Standard Questions Appendix.
[314] *Id*. at Section II at 5.
[315] *See* GOC IQR at 16 and Exhibit Export-1.
[316] *Id.* at 13 and GOC 1SQR at 8.
[317] *Id.* at 11-15.

In the first supplemental questionnaire, we again asked the GOC to provide the requested program information regardless of its non-use statements.[318] Rather than providing the requested information, the GOC reiterated its statement that "none of the responding companies' U.S. customers applied for, used, or benefited from this {EBC} program during the POI, therefore this question is not applicable."[319] In Commerce's GOC 2SQR, we again specifically asked for the 2013 Revisions, interest rates under the program, and partner/correspondent banks.[320] Furthermore, while the GOC described the steps it took to confirm the respondents' U.S. customer lists, the GOC failed to identify the official documents, databases, accounts, or any other official records that were examined to determine non-use by the customers.[321] The 2016 Silica Fabric EBCP Supplemental Questionnaire indicates that the GOC revised the EBCP in 2013 to eliminate the requirement that loans under the program be a minimum of USD 2 million.[322] The 2016 Silica Fabric EBCP Supplemental Questionnaire Response also indicates that the China Ex-Im Bank may disburse EBCs either directly to the borrower or through third-party partner and/or correspondent banks.[323]

Information on the 2013 Revisions and the role of third-party banks is necessary and critical to Commerce's understanding of the EBCP and for any determination of whether the "manufacture, production, or export" of a respondent'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.[324] Therefore, by refusing to provide the requested information, and instead providing unverifiable assurances for the program, the GOC impeded Commerce's ability to understand how this program operates and how it can be verified.

Additionally, the 2013 Revisions are significant because, as noted, the 2016 Silica Fabric EBCP Supplemental Questionnaire Response indicates that the credits may not be direct transactions from the China Ex-Im Bank to U.S. customers of the respondent exporters, but rather, that there can be intermediary banks involved, the identities of which remain unknown to Commerce, because the GOC has not identified them. As discussed above, in prior examinations of this program, Commerce found that the China Ex-Im Bank, as a lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of this program following the 2013 Revisions, which is a prerequisite to Commerce's ability to verify non-use of the program.[325]

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[318] *See* GOC 1SQR at 7-10.
[319] *Id.*
[320] *Id.* at 4-5.
[321] *See* GOC IQR at 21, GOC 1SQR at 7-10, and GOC 2SQR at 4-5.
[322] *Id.* at Exhibit Export-1.
[323] *Id*.
[324] The GOC is the only party which could provide the identities of the correspondent banks that the China Ex-Im Bank utilizes to disburse funds under the EBC Program. There is no indication on the record that other parties had access to information regarding the correspondent banks utilized by the China Ex-Im Bank.
[325] *See, e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's*

Performing the verification steps outlined above to verify claims of non-use would require knowing the names of the intermediary banks. It is the names of these banks, not the name "China Ex-Im Bank," that would appear in the subledgers of the U.S. customers if they received the credits. As explained recently in the *Aluminum Sheet Final Determination*:

> Record evidence indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank. Specifically, the record information indicates that customers can open loan accounts for disbursements through this program with other banks, whereby the funds are first sent to... the importer's account, which could be at the China Ex-Im Bank or other banks, and that these funds are then sent to the exporter's bank account.[326]

In other words, there will not necessarily be an account in the name "China Ex-Im Bank" in the books and records (*e.g.*, subledger and bank statements) of the U.S. customer. Thus, if Commerce cannot verify claims of non-use at the GOC,[327] having a list of the correspondent banks is critical to conducting a verification of non-use by the U.S. customers.

Despite the respondents' assertion that their U.S. customers did not use the EBCP, and the customer declarations and other customer records they provided, customer declarations and sample documents are, alone, insufficient to establish non-use. Rather, additional information is necessary for Commerce to make such a determination. Specifically, Commerce requires information necessary to fully understand the details and operation of the program, including the application process, internal guidelines and rules governing this program, the types of goods eligible for export financing under this program, interest rates used during the POI, and whether the GOC uses third-party banks to disburse/settle EBCs. As noted above, the GOC failed to provide the requested necessary information regarding the EBCP.[328] Commerce cannot verify claims of non-usage, whether originating with the respondents or their U.S. customers, if it does not know the names of the intermediary banks that might appear in the books and records of the recipient of the loan or the cash disbursement made pursuant to the credit. As explained above, there will not necessarily be an account in the name "China Ex-Im Bank" or "Ex-Im Bank" in the books and records (*e.g.*, subledger and bank statements) of either the exporter or the U.S. customer

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Republic of China: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination, in Part, 81 FR 35308 (June 2, 2016), and accompanying IDM at Comment 6; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466, (June 15, 2017), and accompanying IDM at Comment 2 (concluding that "without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use").

[326] *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 Final Determination*), and accompanying IDM at 30.

[327] Commerce no longer attempts to verify usage of the EBC program with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC's refusal to provide the 2013 Revisions. *See Solar Cells 2014 Review Final Results* IDM at Comment 1 (amended by *Solar Cells 2014 Review Amended Final Results* IDM).

[328] *See* GOC IQR at 11-15.

Without such necessary information, Commerce would have to engage in an unreasonably onerous examination of the business activities and records of the respondents' customers without any guidance regarding which loans or banks to subject to scrutiny for each company. The GOC refused to provide a list of all correspondent banks involved in the disbursement of credits and funds under the program. A careful verification of the respondents' non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Because Commerce does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*i.e.*, no correspondent banks in the subledger). Nor could the second step be used to narrow the examination of the company's borrowing to a subset of loans likely to be the EBCs (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without the identities of the correspondent banks would require Commerce to review the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan, *i.e.*, whether the loan was provided from the China Ex-Im Bank via an intermediary bank. This would be an unreasonably onerous undertaking for any company that received more than a small number of loans.

Furthermore, the third step of Commerce's typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation, such as applications and loan agreements) likewise would be of no value. This step might serve merely to confirm whether banks were correctly identified in the subledger—not necessarily whether those banks were correspondent banks participating in the EBCP. This is especially true given the GOC's failure to provide other requested information, such as the 2013 Revisions, a sample application, and other documents making up the "paper trail" of a direct or indirect export credit from the China Ex-Im Bank.[329] Commerce would simply not know what to look for behind each loan in attempting to identify a loan provided by the China Ex-Im Bank via a correspondent bank.

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. Suppose, for example, that one of the correspondent banks is HSBC. Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the China Ex-Im Bank. In order to do this, Commerce would need to know what underlying documentation to look for in order to determine whether particular subledger entries for HSBC might actually be China Ex-Im Bank financing, such as, specific applications, correspondence, abbreviations, account numbers, or other indicia of China Ex-Im Bank involvement. However, as noted, the GOC failed to provide Commerce with any of this information. Thus, even if Commerce were to attempt to verify respondents' non-use of the EBCP notwithstanding its lack of knowledge of which banks are intermediary or correspondent banks by examining each loan received by each of the respondents' U.S. customers, Commerce would still be unable to verify which loans were EBCP loans and which were not due to its lack of understanding of what underlying documentation to expect, and whether/how that

[329] In this investigation, our questionnaire stated: "Provide a sample application for each type of financing provided under the Buyer Credit Facility, the application's approval, and the agreement between the respondent's customer and the China Ex-Im Bank that establish the terms of the assistance provided under the facility." The GOC responded that this question was "not applicable." *See* GOC IQR at 11-12.

documentation would indicate China Ex-Im Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete. Even if it were complete and identified China Ex-Im Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

Thus, because the GOC failed to provide Commerce with information necessary to identify a paper trail of direct or indirect export credits from the China Ex-Im Bank, we would not know what to look for behind each loan in determining which loan was provided by the China Ex-Im Bank 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 China Ex-Im Bank, which is a government-controlled bank.[330] Without cooperation from the China Ex-Im Bank and/or the GOC, we cannot know the banks that could have disbursed EBCs to a company respondent's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

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

Commerce finds that the missing information concerning the operation and administration of the EBCP is necessary because its absence prevents complete and effective verification of the customers' certifications of non-use. This rationale has been accepted by the CIT in its review of *Solar Products Investigation*. Specifically, in *Changzhou I*,[331] given similar facts, the CIT found that 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 …").[332]

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[330] *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 20, 2014), and accompanying IDM at 31 (confirming that the GOC solely owns the China Ex-Im Bank).
[331] *See Changzhou I*, 195 F. Supp. 3d at 1355 (citing *Solar Cells Investigation* IDM at 91-94).
[332] *Id*.

As such, we disagree with the GOC that Commerce has not identified any gap in the record resulting from missing information. 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 then to properly examine the claims of non-use. Further, given the constraints on Commerce resulting from the GOC's failure to provide all of the necessary information to fully understand the program's operation, Commerce reasonably determined that it would be unable to examine each and every loan obligation of the mandatory respondents' customers and that, even if such an undertaking were possible, it would be meaningless, as Commerce would have no idea as to what documents it should look for, or what other indicia there might be within a company's loan documentation, regarding the involvement of the China Ex-Im Bank.

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins verification, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC's failure to provide complete information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify a needle if it finds one.

As an illustrative example, in the context of a VAT and import duty exemption, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative.[333] Therefore, Commerce knows what documents it should see when VAT and import duties are paid and when they are exempted. It knows, in other words, when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow pursuant to 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 examine a loan to determine whether the China Ex-Im Bank was involved, or whether the given loan was provided under the EBCP, for the reasons explained above. For all the reasons described above, Commerce requires the 2013 Revisions, as well as other necessary information concerning the operation of the EBCP, in order to verify usage. Understanding the operation of the program is not, therefore, solely a matter determining whether there is a financial contribution or whether a subsidy is specific. A complete understanding of the program provides a necessary "roadmap" for the verifiers by which they can conduct an effective verification of program usage or non-usage.

As explained in the *Preliminary Determination*, necessary information from the GOC is missing from the record, and the GOC withheld the requested information described above, which is necessary to determine whether the respondents' U.S. customers actually used the EBCP during

[333] *See, e.g.*, *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 FR 70971, 70975 (November 24, 2008), unchanged in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009), and accompanying IDM at 10 ("At the verification of Princeway's questionnaire responses … the GOC presented corrections regarding the reported exempted import duties for imported equipment.")

the POI.[334] The GOC's withholding of this necessary information prevents us from fully understanding and analyzing the operation of this program, thereby impeding this proceeding. Accordingly, we find that we must rely on the facts otherwise available, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, to determine whether this program was used by the respondents and conferred a benefit.

Furthermore, pursuant to section 776(b) of the Act, we continue to find that the GOC, by withholding information and significantly impeding this proceeding, failed to cooperate with Commerce by not acting to the best of its ability.[335] As noted above, the GOC did not provide the requested information needed to allow Commerce to analyze this program fully. As a result, the GOC did not provide information that would permit Commerce to make a determination as to whether this program confers a benefit. Moreover, absent the requested information, we are unable to rely on the GOC and the respondents' claims of non-use of this program. The GOC has not provided information with respect to how it uses third-party banks to disburse/settle EBCs from the China Ex-Im Bank. Such information is essential to understanding how EBCs flow to/from foreign buyers and the China Ex-Im Bank. Absent the requested information, the GOC and the respondents' claims of non-use of this program are not verifiable. Thus, as discussed above, the GOC's refusal to provide the 2013 Revisions, setting internal guidelines for how this program is administered by the China Ex-Im Bank, and a list of partner/correspondent banks that are used to disburse funds through this program, constitutes a failure to cooperate to the best of the GOC's ability. Therefore, as AFA, we find that the respondents used and benefited from this program, regardless of their claims that their U.S. customers did not obtain EBCs from the China Ex-Im Bank during the POI.

Finally, relying on AFA because we do not have complete information, Commerce continues to find the EBCP to be an export subsidy for this final determination.[336] Although the record regarding this program suffers from significant deficiencies, we note that the GOC's description of the program, the GOC's and supporting materials (although ultimately found to be deficient) demonstrate that through this program, state-owned banks, such as the China Ex-Im Bank, provide loans at preferential rates for the purchase of exported goods from China.[337] Moreover, the program was alleged by the petitioner as a possible export subsidy.[338] Furthermore, Commerce has found this program to be an export subsidy in the past.[339] Thus, taking all such information into consideration indicates the provision of EBCs is contingent on exports within the meaning of section 771(5A)(A) and (B) of the Act. Moreover, we find that under EBCP, the GOC bestowed a financial contribution pursuant to section 771(5)(D) of the Act.

[334] *See Preliminary Determination* PDM at 27-28.
[335] *Id.* at 26-27.
[336] *Id.* at 28.
[337] *See* GOC IQR at Exhibits Export-1, Export-2 and Export-3.
[338] *See* Initiation Checklist at 11.
[339] *See, e.g.*, *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 17382 (April 25, 2019), and accompanying IDM at Comment 16.

Comment 7: Whether Certain Parties did not Receive Due Process, and Whether Commerce Should Modify the Cash Deposit Rates for Certain Parties

Fujian Spring and Masport Case Brief

- Commerce failed to notify Fujian Spring and Power Distributors of the initiation of this investigation, contrary to its obligation to notify all known interested parties.[340] Under World Trade Organization (WTO) rules,[341] this obligation is not met by publishing a notice of initiation of the investigation. Commerce's failure to notify Fujian of the initiation of this investigation constitutes a fundamental breach of the company's due process rights, which prevented Fujian Spring and Masport from participating in the preliminary stages of this investigation and defending their interests fully.[342]
  - According to Article 22.1 of the *SCM Agreement*, when an investigating authority is satisfied that there is sufficient evidence to justify the initiation of an investigation, "the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given."[343]
  - Article 12.1.3 of the SCM Agreement provides that "where the number of exporters involved is particularly high," Commerce is only required to provide the petition "to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned." However, this exception, which is reflected in 19 CFR 351.203(c)(2), relates solely to the distribution of the petition and does not override Commerce's notification obligations.[344]
  - By failing to notify Fujian Spring of the initiation of this investigation, Fujian Spring was prejudiced in that it was denied an opportunity to submit timely comments on respondent selection,[345] and that it was denied the opportunity to comment on the scope of the investigation.[346]
- In light of Commerce's failure to notify Fujian Spring of the initiation of the investigation, Commerce should have granted Fujian Spring's request for voluntary respondent treatment, which was submitted at a point when sufficient time remained for the company's information to be individually examined during the course of the investigation.[347]

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[340] *See* Fujian Spring and Masport Case Brief at 17 (citing Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 U.N.T.S. 201 (AD Agreement) at Article 12.1). Fujian Spring notes that the since text of Article 22 of the WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*) largely mirrors the text of Article 12 of the *AD Agreemen*t, it is standard practice for the WTO Appellate Body and WTO Panels to rely on jurisprudence relating to either of these articles to interpret the other.

[341] *See* Fujian Spring and Masport Case Brief at 17 (citing Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R (April 22, 2003) at para. 7.133).

[342] *Id.* at 17-21 and 35.

[343] *Id.* at 18 (citing *SCM Agreement* at Article 22.1).

[344] *Id.* at 21 (citing *SCM Agreement* at Article 12.1.3)

[345] *Id.* at 18.

[346] *Id.*

[347] *Id.* at 17-18, 21-24, and 26; *see also* Fujian Spring's Letter "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China, Case No. A-570 129 and C-570-130: Request for Voluntary Respondent Treatment," dated September 10, 2019 (Fujian Spring Voluntary Respondent Treatment Request).

- On September 10, 2020, Fujian Spring filed a request for voluntary treatment. Commerce denied this request because requests for voluntary treatment were due on July 21, 2020.[348]
- As Article 6.10.2 of the *AD Agreement* provides that Commerce should "determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation."[349]
- Commerce is required by Article 12.1of the *SCM Agreement* to give interested parties "ample opportunity to present {} evidence which they consider relevant" and "full opportunity to defend their interests."[350]

- In light of its failure to notify Fujian Spring of the initiation of the investigation, Commerce has a legal obligation to give due consideration to NFI presented in Fujian Spring and Masport Case Brief.[351]
- Commerce's decision to restrict its examination to the two respondents has produced a skewed sample of the known exporters being individually assessed and an inappropriately high "all-others rate," which must be moderated.[352]
- Commerce should not impose CVD rates on an interested party which is able to demonstrate non-use of programs but was denied the opportunity to do so because of Commerce's procedural failings.[353]
- Because Commerce deprived Fujian Spring and Masport of their due process rights by failing to notify them of the initiation of the investigation, Commerce must either:
  - exclude Fujian Spring and Masport's products from the scope of the investigation;
  - calculate an individual countervailable subsidy rate for Fujian based on the NFI presented in this case brief; or
  - modify the "all-others" rate in accordance with the information and arguments presented in Fujian Spring and Masport Case Brief.[354]

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[348] *Id.* at 23.
[349] *See* Fujian Spring and Masport Case Brief at 2 and 21-24 (citing *AD Agreement* at Article 6.10.2; 19 CFR 351.201; and section 782 of the Act).
[350] *Id.* at 25 (citing *SCM Agreement* at Article 12.1; Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (November 29, 2004) at para. 241-242; and Appellate Body Report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice*, WT/DS295/ AB/R (November 29, 2005) at para. 291-292).
[351] *Id.* at 3 and 25-28 (Commerce rejected NFI contained in Fujian Spring and Masport Case Brief on December 11, 2020. Fujian Spring and Masport filed a redacted version of their case brief on March 25, 2021 (*see* Fujian Spring and Masport Case Brief)); *see also* Fujian Spring and Masport's Letter, "Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Extension Request – Submission of New Factual Information," dated February 18, 2021 (Fujian Spring's NFI Request).
[352] *Id.* at 3, 10, and 31-35 (citing *Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 85 FR 37426 (June 15, 2020) (*Initiation Notice*); Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Respondent Selection," dated July 6, 2020 (Respondent Selection Memorandum); GOC IQR at 7-8; and *Preliminary Determination* PDM at 2 and 27).
[353] *Id.* at 35.
[354] *Id.*

Power Distributors' Case Brief

- Power Distributors agrees with and incorporates by reference the case brief submitted by Fujian Spring and Masport.[355]

Commerce's Position: We disagree that Commerce violated Fujian Spring's, Masport's, or Power Distributors' due process rights. Under U.S. law, publication of a document in the *Federal Register* is sufficient to give notice of the contents of the document to a person affected by it. Specifically, 44 U.S.C. § 1507 states:

> A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption--
>
> (1) that it was duly issued, prescribed, or promulgated;
> (2) that it was filed with the Office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;
> (3) that the copy contained in the Federal Register is a true copy of the original; and
> (4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.[356]

Thus, under 44 U.S.C. § 1507, publication of the initiation notice in the *Federal Register* constituted sufficient notification to Fujian Spring that Commerce had initiated this investigation. Furthermore, the CIT has upheld this understanding of 44 U.S.C. § 1507. In *Huaiyang Hongda*,[357] the CIT stated, "{a}s a general matter, publication in the *Federal Register* is sufficient to give notice of the contents of the document to a person subject to or affected by it. 44 U.S.C.S. § 1507."

The CIT later upheld this principle in *Suntec*.[358] In *Suntec*, a respondent had not been served with the petitioner's request for an administrative review of an order, but Commerce nonetheless initiated an administrative review of the respondent, and published the initiation in the *Federal Register*. Because the respondent did not submit a separate rate application, it was made part of the China-wide entity in the final results. The respondent appealed the decision to the CIT on grounds that it had not received notice of the initiation of the review. Commerce argued before the CIT that the respondent received adequate notice of the initiation of the review when

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[355] *See* Power Distributors's Case Brief at 14.
[356] *See* 44 USC 1507.
[357] *See Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 C.I.T. 1944 (CIT 2004) (*Huaiyang Hongda*).
[358] *See Suntec Industries v. United States*, 951 F. Supp. 2d 1341, 1348 (2013) (*Suntec*).

Commerce published the initiation notice in the *Federal Register*, and as a matter of law the respondent is charged with knowledge of the constructive notice provided by the *Federal Register*.[359] The CIT upheld Commerce, stating,

> Neither the regulation nor the statute at issue in this case places an independent legal duty on Commerce to provide notice of the contents of a notice of initiation to {the respondent} by any other means than through publication in the *Federal Register*. Thus, the petitioner's failure to provide actual notice of the review request did not render the constructive notice of the *Initiation* provided by Commerce to {the respondent} "insufficient in law" under {44 U.S.C. § 1507}.[360]

The CAFC later upheld the CIT's *Suntec* decision, saying, "Congress intended a proper publication in the *Federal Register* to be considered reasonable public notice unless otherwise provided by statute."[361]

Fujian Spring and Masport cite to Articles 12.1.3 and Article 22.1 of the *SCM Agreement* to argue that Commerce's alleged obligation under WTO law to inform all known interested parties of the initiation of an investigation is not met by publishing a notice of initiation in the *Federal Register*. However, Fujian Spring's citation to the *SCM Agreement* is also unavailing. Commerce's determination here is governed by U.S. law, and for reasons set forth above, Commerce has acted in accordance with U.S. law. Because U.S. law is consistent with our international obligations, we disagree that Commerce's determination conflicts with the WTO rules. In addition, Commerce has stated:

> {A}s a general matter, under U.S. law, any application of the Uruguay Round Agreements that is inconsistent with any law of the United States shall have no effect. *See* {19 USC 3512(a)(1)}. This includes panel decisions, except to the extent that U.S. law provides for the implementation of such decisions.[362]

The CAFC has also held that WTO decisions are not binding on the United States. Specifically, it has stated:

> WTO decisions are "not binding on the United States, much less this court." Further, "no provision of any of the Uruguay Round Agreements … nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a) (2000). Neither the GATT nor any enabling international agreement outlining compliance therewith … trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.[363]

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[359] *Id.*, 951 F. Supp. 2d at 1348.
[360] *See Suntec Industries v. United States*, 951 F. Supp. 2d at 1352; *see also Transcom, Inc. v. United States*, 294 F. Supp. 3d 1371 (Fed. Cir. 2002) (*Transcom*) ("Constructive notice of initiation was sufficient to give reasonable notice of review and accordingly constitutional due process requirements were satisfied.")
[361] *Id.*, 857 F. 3d 1363, 1370 (CAFC 2017) (citing *Aris Gloves, Inc. v. United States*, 281 F.2d 954, 958 (1958).
[362] *See Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review*, 68 FR 1816 (January 14, 2003) (*Cement Mexico Final*), and accompanying IDM at Comment 3).
[363] *See Corus Staal BV v. DOC*, 395 F. 3d 1343, 1348 (2005) (citations omitted).

Based on the foregoing legal framework, we determine that Commerce did not violate Fujian Spring's right to due process, and that Fujian Spring bears responsibility for the ways in which it was prejudiced as a result of its unawareness of the initiation of the investigation. Thus, Commerce did not deny Fujian Spring an opportunity to comment on respondent selection or on the scope of this investigation. Fujian Spring simply failed to make the relevant submissions in accordance with the application deadlines.

Furthermore, Fujian Spring's request for treatment as a voluntary respondent was filed after the deadline for submission of factual information from parties wishing voluntary respondent treatment, and was thus untimely.[364] The CAFC has stated, "{i}t is fully within Commerce's discretion to 'set and enforce deadlines' and {a} court 'cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered."[365] Moreover, Fujian Spring's request was submitted more than two months after respondent selection was completed and less than two months before the preliminary determination was due.[366] Accordingly, even if Commerce intended to accept Fujian Spring and Masport's untimely submissions and expand its analysis to three respondents, Commerce would have been left with insufficient time before the preliminary determination to consider voluntary responses from Fujian Spring.

Moreover, Commerce explained in the Respondent Selection Memorandum that it lacked the resources to examine additional respondents within the time allotted to complete the preliminary determination.[367] We also note that the CIT has stated that, "{w}hether a certain number of mandatory respondents is 'reasonable' in any particular case is likely to depend on the facts of that case … There is no magic number of respondents that must be chosen for the number to be 'reasonable.'"[368] The CIT has also upheld Commerce's determination to analyze only one mandatory respondent where (as here) no party submitted a timely request to be individually examined.[369] Moreover, the CIT has also explicitly stated that Commerce may in some cases refuse to review any voluntary respondents.[370] The CIT indicated that this is especially true where the proceeding is an investigation (rather than an administrative review, which has a longer timeframe for completion) and where Commerce is conducting multiple investigations involving the same product from multiple countries.[371]

Furthermore, Fujian Spring's request to submit NFI left Commerce with insufficient time to consider Fujian Spring's NFI.[372] The CAFC has upheld Commerce's rejection of unsolicited

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[364] *See* Commerce's Letter, "Countervailing and Antidumping Duty Investigations of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Response to Fujian Spring Machinery Co., Ltd.'s Request for Voluntary Respondent Treatment," dated September 22, 2020.
[365] *See Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1352 (Fed. Cir. 2015).
[366] *See* Fujian Spring Voluntary Respondent Treatment Request; *see also Initiation Notice*; *Preliminary Determination* PDM at 5; 19 CFR 351.205(b)(2); and Respondent Selection Memorandum.
[367] *See* Respondent Selection Memorandum at 3-4.
[368] *See Husteel Co. v. United States*, 98 F. Supp. 3d 1315, (CIT 2015).
[369] *See YC Rubber Co., YC Rubber Co. (N. Am.) LLC v. United States*, 487 F. Supp. 3d 1367, 1378 (CIT 2020).
[370] *Id.*, 98 F. Supp. 3d at 1334.
[371] *Id.*, 98 F. Supp. 3d at 1336.
[372] *See* Fujian Spring's NFI Request.

information received less than four months before a statutory deadline for completion of a proceeding.[373]

Fujian Spring, Masport, and Power Distributors argue that Commerce's denial of Fujian Spring's request for voluntary treatment and reliance on only two respondents resulted in a skewed sample of producers/exporters. Fujian Spring also argues that Commerce should have considered Fujian Spring's NFI contained in its case brief, and that Commerce should not impose countervailing duties on an interested party which is able to demonstrate non-use of programs, but it was denied the opportunity to do so because of Commerce's procedural failings.[374] On this issue, the CAFC has stated that, "{a}s to {respondent}'s fairness and accuracy argument, this court has made clear Commerce's rejection of untimely-filed factual information does not violate a respondent's due process rights when the respondent had notice of the deadline and an opportunity to reply." Here, Fujian Spring had notice of the deadline for the mandatory respondent to submit its questionnaire response, and Fujian Spring did not submit a questionnaire response by that deadline. Therefore, Commerce did not violate Fujian Spring's, Masport's, or Power Distributors' due process rights by denying Fujian Spring's request for voluntary respondent treatment, or by refusing to consider NFI that Fujian Spring, Masport, and Power Distributors attempted to introduce untimely in their case briefs.

Because we have determined that Commerce did not violate the due process rights of Fujian Spring, Masport, or Power Distributors, we do not need to address the argument that we should either exclude Fujian Spring and Masport's products from the scope of the investigation, calculate an individual countervailable subsidy rate for Fujian Spring based on the NFI presented in this case brief, or modify the "all-others" rate in accordance with the information and arguments presented in Fujian Spring and Masport Case Brief.[375]

Comment 8: Whether the Provision of Electricity for Less Than Adequate Remuneration Program is Specific

GOC Case Brief

- Commerce's finding that the electricity LTAR program is specific within the meaning of section 771(5A) of the Act is not supported by substantial evidence.[376]
- Commerce claimed that the GOC failed "to provide the price proposals, to demonstrate that the price proposals were eliminated, and to explain whether the GOC controls electricity prices."[377]
- The GOC properly responded to all the questions related to the electricity for LTAR program and demonstrated that the program is not "specific;" therefore, Commerce has no basis to apply AFA in finding specificity.[378]

[373] *Id*.
[374] *See* Fujian Spring and Masport Case Brief at 3, 10, 25-28, and 31-35 (citing *Initiation Notice*; Respondent Selection Memorandum; GOC IQR at 7-8; and *Preliminary Determination* PDM at 2 and 27).
[375] *Id.* at 35.
[376] *See* GOC Case Brief at 7.
[377] *Id.* at 10 (citing *Preliminary Determination* PDM at 23).
[378] *Id.* at 7-11.

- The GOC explained that "{t}he price proposals were eliminated as clearly stipulated in {National Development and Reform Commission (NDRC)} Notice No.748" and No.3105.[379]
- The GOC explained how the provincial selling price is determined based on the cost of coal.[380]
- Commerce found that the GOC failed to provide a full explanation regarding the roles and nature of cooperation between the NDRC and provinces in setting electricity prices or that the information on the record only shows that the NDRC continues to play a major role in setting and adjusting prices.[381]
- The GOC explained that there has been an electricity market *reform* since 2015 and that the NDRC only had an extremely diminished role in setting electricity prices during the POI.[382]
- Commerce erroneously found that "neither Notice 748 nor Notice 3105 explicitly stipulates that relevant provincial pricing authorities determine and issue electricity prices within their own jurisdictions." However, Article 6 of Notice 748 states "{t}he provinces … develop and issue specific adjustment plan of electricity price and sales price in accordance with the average price adjustment standards of Annex 1, and report {sic} to our Commission *for the record*."[383]
- Notice 748 also stipulates certain price adjustments based on policy goals such as to "promot{e} energy conservation and emission reduction." Even with the price adjustment published in Annex 1 of Notice 748, the provincial government is nonetheless in charge of setting the base price – and therefore – the ultimate price.[384]
- Commerce also erred in characterizing Notice 3105 as a notice to "direct additional price reductions, and stipulates at Articles II and X, that local price authorities shall implement in time the price reductions included in the Annex, and must report resulting prices to the NDRC" and therefore "indicate that the NDRC continues to play a seminal role in setting and adjusting electricity prices." However, Notice 3105 states that "large-scale industrial electricity price is not regulated" and that the provincial government "shall formulate and release specific regulation plan of on-grid price and sales price in the province" and report to NDRC.[385]
- Notice 3105 also states that "each local price authority shall organize elaborately, arrange carefully to guarantee in time implementation of electricity price regulation measures," which shows that the NDRC delegates the power of setting electricity prices to provincial government.[386]
- The role for the NDRC is to provide, at a macro level, principles to guide each province to establish the electricity sales price and "based on its own coal market and in combination with other situations."[387]
- Commerce faulted the GOC for not explaining "actions the NDRC takes when local price authority behavior is not in accord with NDRC directives" yet the GOC responded both in

[379] *Id.* at 11 (citing GOC 2SQR at 12-13).
[380] *Id.* (citing GOC 2SQR at 18 and Exhibit ELEC-2).
[381] *Id.* at 7 (citing *Preliminary Determination* PDM at 17-19).
[382] *See* GOC Case Brief at 7 (citing GOC IQR at 17-18; Exhibit ELEC-2; and Exhibit ELEC-4 at 1-4)
[383] *Id.* at 8 (citing GOC 2SQR at Exhibit SQ-6, NDRC Notice 748 at Article 2 (emphasis added)).
[384] *Id.* at 8-9 (citing GOC 2SQR at Exhibit SQ-6, NDRC Notice 748 at Article 2).
[385] *Id.* at 9 (citing *Preliminary Determination* PDM at 20 and GOC IQR at Exhibit ELEC-2, NDRC Notice 3150 at Article II).
[386] *Id.* at 9 (citing GOC IQR at Exhibit ELEC-2, NDRC Notice 3150 at Article II).
[387] *Id.* at 9-10 (citing GOC 2SQR at 16-17).

the initial questionnaire response and supplemental questionnaire response that "[t]he NDRC neither establishes nor implements any specific electricity price for any province or municipality in China" and "[t]he GOC is unaware of any circumstances that the provincial pricing authority chose not to implement the guidelines set by the pricing department of the State Council."[388]

No other parties commented on this issue.

Commerce's Position: We continue to apply AFA to the GOC with respect to the provision of electricity for LTAR program. Section 776(a) of the Act provides that "{i}f (1) necessary information is not available on the record, or (2) an interested party or any other person (A) withholds information that has been requested; (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority ... shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title."

Section 776(b) of the Act provides that if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information the administering authority... , in reaching the applicable determination under this title— (A) may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and (B) is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information."

Similarly, 19 CFR 351.308(a) provides that Commerce "may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information." Further, 19 CFR 351.308(a) provides that "{i}f the Secretary finds that an interested party 'has failed to cooperate by not acting to the best of its ability to comply with a request for information, ' {Commerce} may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."

As explained in detail in the *Preliminary Determination*, the GOC repeatedly failed either to provide the price proposals or to point to any law, regulation, or policy which eliminated the price proposals.[389] As also explained in detail in the PDM, this information is necessary to Commerce's analyses of financial contribution and specificity and benefit calculations.[390] Further, the GOC was uncooperative and clearly impeded the investigation of this program.[391] Therefore, Commerce correctly applied AFA with respect to this program, in accordance with

[388] *Id.* at 10 (citing *Preliminary Determination* PDM at 21 and GOC 2SQR at 18-19).
[389] *See Preliminary Determination* PDM at 23.
[390] *Id.* at 23.
[391] *Id.*

section 776(b) of the Act and 19 CFR 351.308(a).[392]

The GOC's claims that the provincial price proposals were eliminated with the issuance of NDRC Notice 748, NDRC Notice 3501, and NDRC Notice 1053 is not supported by the language of these NDRC notices. Neither NDRC Notice 748, NDRC Notice 1053, nor NRDC Notice 3501 indicate that the provincial price proposals have been eliminated. As the GOC points out, NDRC Notice 748 states that "{t}he provinces … develop and issue specific adjustment plan of electricity price and sales price in accordance with the average price adjustment standards of Annex 1, and report {sic} to our Commission *for the record*." Also, the GOC acknowledges that Notice 748 stipulates certain price adjustments based on policy goals such as to "promot{e} energy conservation and emission reduction," but maintains that the provincial government is nonetheless in charge of setting the base price – and therefore – the ultimate price. Regarding NDRC Notice 3105, the GOC claims that "large-scale industrial electricity price is not regulated" and that the provincial government "shall formulate and release specific regulation plan of on-grid price and sales price in the province" and report to NDRC. The GOC also claims that NDRC 3105 states that "each local price authority shall organize elaborately, arrange carefully to guarantee in time implementation of electricity price regulation measures."

Nevertheless, the GOC's claims are clearly contradicted by overwhelming evidence on the record. The NDRC notices which the GOC placed on the record and the GOC's other responses all imply that the provincial and municipal authorities' roles are largely mechanistic, and that the NDRC ultimately decides electricity prices by controlling the methodology used by the provinces to calculate electricity prices.[393] The GOC explained that with the implementation of *NDRC Notice 3169*, the GOC specifically introduced the coal-electricity price linkage mechanism into the determining of the electricity rate.[394] According to the GOC, provincial pricing authorities merely develop prices based on given variables pursuant to a set formula provided by the NDRC.[395] Notice 3169 explicitly states that "{t}he NDRC shall determine the electricity sales price, adjustment principle, and the price adjustment level of each province (price region), in a *unified* manner."[396] Referencing NDRC notice 3169, the GOC reported that "{a}s a general guidance, a provincial pricing authority must follow the general principles identified in NDRC 3169" and that "{t}he NDRC reviews the provincial calculations of the electricity price when it is submitted to NDRC for its records to ensure it is in compliance with these principles."[397] The GOC also explained that "{g}enerally speaking, the provincial pricing authority is required by the central pricing catalogue to follow the guidelines set by the NDRC or pricing department of State Council," that "{t}he pricing values as included by the mechanism is a general principle which need to be followed by the provincial pricing departments," that "{t}he provincial authorities will then make specific calculations of price changes using the specific data of their own provinces based on the variable factors provided in the formula," and that "{t}he GOC is unaware of any circumstance that the provincial pricing authority chose not to

[392] *Id.* at 24.
[393] *See* GOC 1SQR at Exhibit SQ-6 (NDRC Notice 748), GOC IQR at Exhibit ELEC-8 (NDRC Notice 3105), GOC IQR at Exhibit ELEC-3 (NDRC Notice 3169), and GOC IQR at Exhibit ELEC-9 (NDRC Notice 1191).
[394] *Id.* at Exhibit SQ-6 (*NDRC Notice 748*).
[395] *Id.* at 22-23; and GOC IQR at Exhibit ELEC-3 (*NDRC Notice 3169*).
[396] *Id.* at 14; and GOC IQR at Exhibit ELEC-3.
[397] *Id.* at 22.

implement the guidelines set by the pricing department of the State Council,"[398]

The NDRC also explicitly mandates changes in electricity prices, as evidenced by numerous NDRC Notices. For example, as explained in the *Preliminary Determination*, NDRC notice 748 and Notice 3105 explicitly direct provinces to reduce prices and to report the enactment of those changes to the NDRC.[399] Specifically, Article 1 of Notice 748 stipulates a lowering of the on-grid sales price of coal-fired electricity by an average amount per kilowatt hour.[400] Article 6 of Notice 748 stipulates that the province price departments develop and issue specific adjustment plans for electricity and sales prices in accordance with the average price adjustment standards of Annex 1, and reported to the NDRC.[401] Annex 1 of Notice 748 indicates that this average price adjustment applies to all provinces and at varying amounts.[402] Article 10 directs that "{l}ocal price departments shall organize and arrange carefully to put in place the electricity price adjustment measures."[403] Additionally, Notice 3105 directs additional price reductions, and stipulates that local price authorities shall implement, in time, the price reductions included in its Appendix and report resulting prices to the NDRC.[404] In addition, NDRC Notice 500 and NDRC Notice 1191 direct provinces to reduce prices by implementing certain measures deployed by the NDRC. Specifically, NDRC Notice 500 states that its goal is to "implement the requirements of the Central Economic Work Conference on reducing the energy cost of enterprises and the government work report on reducing the general industrial and commercial electricity prices {to} implement the target requirement of an average industrial and commercial electricity price drop of 10 {percent} on average."[405] NDRC Notice 500 describes the methods the NDRC will use to further standardize and reduce grid charges, and to temporarily reduce transmission and distribution prices.[406] Moreover, the NDRC Notice 1191 outlines additional measures that provinces and municipalities can take to reduce industrial and commercial electricity prices.[407]

The GOC's claims that the language of Article NDRC Notices 748 and 3105 indicate that the provincial and municipal authorities set electricity prices independently of the NDRC and that the NDRC's role is to *record* electricity prices.[408] However, none of the NDRC notices the GOC provided discuss provincial price proposals, and no other evidence has been provided which conclusively demonstrates that the provincial price proposals have been eliminated or that the NDRC's role in setting electricity prices has otherwise been eliminated. None of the NDRC notices submitted by the GOC explicitly demonstrate that the GOC eliminated provincial pricing proposals, nor fully defined the NDRC and the provinces' roles in setting electricity prices.[409] In fact, NDRC Notice 748 and NDRC Notice 3105, as well as NDRC Notice 748, NDRC Notice 500, and NDRC 1191 all indicate that the NDRC continues to play a seminal and authoritative

[398] *See* GOC 2SQR at 6.
[399] *See Preliminary Determination* PDM at 10-11.
[400] *See* GOC 1SQR at Exhibit SQ-6 (*NDRC Notice 748*).
[401] *See* GOC 1SQR at Exhibit SQ-6 (*NDRC Notice 748*).
[402] *Id.*
[403] *Id.*
[404] *See* GOC IQR at Exhibit ELEC-2 at Articles II and X.
[405] *Id.* at Exhibit ELEC-6.
[406] *Id.*
[407] *Id.*
[408] *See* GOC Case Brief at 8 (citing GOC 2SQR at Exhibit SQ-6, NDRC Notice 748 at Article 2 (emphasis added)).
[409] *See* GOC 1SQR at Exhibit SQ-6 (*NDRC Notice 748*) at Article 10; Exhibit ELEC-8 (NDRC Notice 3105); and *Zhongji* at 1338.

role in setting and adjusting electricity prices both by establishing electricity pricing formulas and by mandating average price adjustment targets with which the provinces are obliged to comply in setting their own specific prices.

Our preliminary decision to rely on the facts otherwise available and to use an adverse inference with respect to financial contribution, specificity, and benefit is consistent with Commerce's established practice.[410] Further, the CIT responded to these arguments in *Zhongji* where the specific facts were similar. There, the CIT found that "{NDRC Notices 748 and 3105} undermine the GOC's claim that the NDRC no longer controls electricity prices."[411] The CIT also concluded that "{g}iven that record evidence suggests that the GOC controls electricity pricing, the GOC's failure to provide information regarding how electricity pricing is set prevented Commerce from determining specificity. Accordingly, Commerce's use of AFA to find specificity is supported by substantial evidence."[412]

Consequently, and consistent with past proceedings,[413] we preliminarily determined, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, that information necessary to our analysis of financial contribution and specificity is not available on the record, that the GOC withheld information requested by us, and that the GOC significantly impeded this proceeding. Thus, we relied on "facts available" in making our preliminary determination.[414] Moreover, we preliminarily determined, in accordance with section 776(b) of the Act, that the GOC failed to cooperate by not acting to the best of its ability to comply with our repeated requests for information regarding the pricing of electricity. As a result, we used an adverse inference in the application of facts available.[415] In applying AFA, we found that the GOC's provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act and is specific within the meaning of section 771(5A) of the Act.

The GOC also failed to provide requested information regarding the nature of the NDRC's enforcement mechanism over the price setting practices of the provincial governments. Therefore, we also used an adverse inference in selecting the benchmark for determining the existence and amount of the benefit.[416] The benchmark rates we selected were derived from the

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[410] *See, e.g., Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 FR 9282 (March 5, 2018), and accompanying IDM at Comment 23; and *Certain Aluminum Foil from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review; 2017-2018*, 86 FR 12171 (March 2, 2021), and accompanying IDM at Comment 12; *see also Certain Aluminum Foil from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 17360 (April 19, 2018).
[411] *See Jiangsu Zhongji I*.
[412] *Id.* at 1338.
[413] *See, e.g.*, *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 44562 (September 25, 2017), and accompanying PDM at 22-24, unchanged in *Countervailing Duty Investigation of Cold Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175 (December 11, 2017).
[414] *See Preliminary Determination* PDM at 17-24.
[415] *See* section 776(b) of the Act.
[416] *Id.*

record of this investigation and are the highest electricity rates on the record for the applicable rate and user categories.[417]

Comment 9: Whether Commerce's Selection of Inland Freight Benchmarks for Ningbo Daye Under the Cold-Rolled Steel for Less Than Adequate Remuneration Program Is Correct

Ningbo Daye Case Brief

- Commerce rejected Ningbo Daye's domestic freight benchmark data in favor of petitioner's benchmark data, the same data used as facts available to calculate inland freight for Zhejiang Dobest. In doing so, Commerce inappropriately used facts available as the benchmark for domestic inland freight expenses in calculating the benefit to Ningbo Daye under the CRS for LTAR program.[418]
- Ningbo Daye properly responded to Commerce's request for domestic inland freight benchmark data. In order to fully cooperate with Commerce's request, Ningbo Daye obtained an estimate of the domestic freight rate for its CRS purchases from one of its suppliers.[419]
- The petitioner's domestic inland freight data are not representative of domestic inland freight actually used for Ningbo Daye's CRS purchases,[420] and Commerce should instead use the domestic freight rate information submitted by Ningbo Daye.[421]

The Petitioner's Rebuttal Brief

- Commerce correctly applied facts available to calculate benchmark inland freight expenses for Ningbo Daye.[422]
- Ningbo Daye claims that its responses were complete, and the petitioner's data are "inconsistent with commercial reality." However, despite multiple attempts by Commerce to obtain the requested (and necessary) inland freight information, Ningbo Daye provided only irrelevant information. Therefore, Commerce correctly applied facts available to fill in the gap in the record by using information provided by the petitioner.[423]

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[417] *See* Ningbo Daye Preliminary Calculation Memorandum and Zhejiang Amerisun Preliminary Calculation Memorandum; *see also* GOC IQR at ELEC-13 and GOS 1SQR at 21-26.
[418] *See* Ningbo Daye Case Brief at 12-13 (citing *Preliminary Determination* PDM at 16-17 and 44).
[419] *Id.* at 13-15 (citing Ningbo Daye IQR at 26; Ningbo Daye's Letter "Certain Walk-Behind Lawn Mowers And Parts Thereof from the People's Republic of China, Case No. C-570-130: Ningbo Daye's Second Supplemental Questionnaire Response," dated September 10, 2020 (Ningbo Daye 2SQR) at 15-16, Exhibit D-8, and Exhibit D-9; *Preliminary Determination* PDM at 44; and Commerce's Letter, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: In Lieu of On-Site Verification Questionnaire – Ningbo Daye Garden Machinery Co., Ltd.," dated March 5, 2021).
[420] *Id.* at 16-17 (citing *Preliminary Determination* PDM at 44; Petitioner Benchmark Submission at Attachment 4 and Attachment 5 at 121, 125, 129, 132, and 135; Ningbo Daye's Letter, "Certain Walk-Behind Lawn Mowers And Parts Thereof from the People's Republic of China, Case No. C-570-130: Rebuttal Factual Information to Petitioner's Benchmark Submission," dated October 5, 2020 at 5-7 and Attachment 1); Memorandum "Preliminary Determination Calculations for Ningbo Daye Garden Machinery Co., Ltd.," (October 23, 2020) (Ningbo Daye Preliminary Analysis Memorandum) at Attachment 2, Tabs "Inland.Freight.Public" and "CRS.BM.BPI").
[421] *Id.* at 18-20 (citing Ningbo Daye 2SQR at Exhibit D-8 and D-9, and sections 776(a) and 782(d) of the Act).
[422] *See* Petitioner Rebuttal Brief at 9-13.
[423] *Id.* at 9-10 (citing Ningbo Daye Case Brief at 17; Ningbo Daye IQR at 26; Ningbo Daye 2SQR at 16 and Exhibit D-8; Petitioner Benchmark Submission at Attachments 5 and 6; and *Preliminary Determination* PDM at 17).

- The *Nan Ya Plastics* standard reaffirms the reasonableness of Commerce's inland freight calculation: to the extent that Commerce's application of facts available occurred within the larger applicable statutory framework, the resultant benchmark freight rates are *ipso facto* "accurate" and reflective of "commercial reality."[424]

Commerce's Position: We agree with the petitioners, in part, and with Ningbo Daye, in part. As an initial matter, Commerce's preliminary use of the petitioner's inland freight benchmark data was a resort to record facts otherwise available but was not based on an adverse inference.[425] Ningbo Daye provided no actual inland freight expense data. The data it provided was an "estimated freight rate from one of its customers[426] for its purchased cold-rolled steel."[427] Thus, it is clear that the estimate is neither an actual freight expense, nor the information requested: the actual expense for transporting CRS or a "closely-related input product or finished product" between Ningbo Daye's production facility and Ningbo's nearest port.[428]

As evidenced by the information regarding inland freight expenses Commerce routinely requests in its initial questionnaires, Commerce uses the actual experience of the respondent to calculate inland freight benchmarks, when possible.[429] When respondents' actual freight expense information is not provided or is otherwise not available, Commerce refers to other benchmarks, such as those contained in the *Doing Business* report, which the petitioner provided, and which Commerce has used often in the past.[430] While Commerce has occasionally used information which is not based on actual prices to calculate inland freight benchmarks, Commerce did so only when no suitable benchmark information was otherwise available on the record.[431] In this

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[424] *See* Petitioner Rebuttal Brief at 13-15 (citing *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1343 (CIT 2016).
[425] *See* section 776(b) of the Act.
[426] We note that Ningbo Daye identified the party supplying the estimate as Ningbo Daye's "customer" in Ningbo Daye 2SQR, while Ningbo Daye Case Brief repeatedly refers to this party as Ningbo Daye's "supplier." *See* Ningbo Daye 2SQR at 16 and Exhibit D-8. On this basis, the petitioner claims that Ningbo Daye has inserted untimely NFI it to its case brief. *See* Petitioner Rebuttal Brief at 11 and footnote 13. However, Ningbo Daye 2SQR contains certain information, for which Ningbo Daye requested business proprietary treatment, which supports Ningbo Daye's claims in its Ningbo Daye Case Brief that the party in question is Ningbo Daye's supplier (as Ningbo Daye now states publicly that the party is its supplier, it can no longer claim business proprietary treatment for its previous statements implying that the party is a supplier). Thus, we do not consider Ningbo Daye's claims that the party is its supplier to be NFI. Rather, we find that Ningbo Daye has been somewhat inconsistent in its explanations of the source of this estimate.
[427] *See* Ningbo Daye IQR at 26; and 2SQR at 15-16, Exhibit D-8, and Exhibit D-9 (emphasis added).
[428] *See*, *e.g.*, Ningbo Daye IQR at 26; *see also* Ningbo Daye 2SQR at 15-16.
[429] *See*, *e.g.*, Initial Questionnaire at part "Provision of Inputs for LTAR," Question "d."
[430] *See Preliminary Determination* PDM at 44; and Petitioner Benchmark Submission at Attachment 5; *see also, e.g.*, *Certain Vertical Shaft Engines Between 99cc and up to 225cc, and Parts Thereof, from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 85 FR 52086 (August 24, 2020), and accompanying PDM at 23, unchanged in *Certain Vertical Shaft Engines Between 99cc and Up to 225cc, and Parts Thereof, from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 86 FR 14077 (March 12, 2021), and accompanying IDM.
[431] *See*, *e.g.*, *Aluminum Wire and Cable from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 67 FR 13886 (April 8, 2019), and accompanying PDM at 16, unchanged in *Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 58137 (October 30, 2019), and accompanying IDM.

case, because there was more suitable inland freight benchmark information on the record, *i.e.*, the petitioner's inland freight benchmark data from the *Doing Business* report, there was no need for Commerce to inquire further into the reliability of Ningbo Daye's data.[432]

In contrast to Ningbo Daye's "estimated freight rate," the petitioner's benchmark data from the *Doing Business* report represent realistic costs of shipping from Tianjin Port to Beijing and from Shanghai Port to Shanghai City.[433] For this final determination, given that Ningbo Daye has no cost data for shipping CRS or similar merchandise between the nearest ocean port and Ningbo Daye's production facility, therefore this information is missing from the record in accordance with section 776(a)(1) of the Act, and because we find Ningbo Daye's reported supplier's estimate to be unreliable,[434] we must resort to selecting from "the facts otherwise available," in accordance with section 776(a)(1) of the Act and 19 CFR 351.308, to calculate the per-MT, per-KM cost of inland freight for transporting CRS to Ningbo Daye's production facility. Therefore, we have continued to use the per-MT, per-KM rates reported in *Doing Business* to calculate the cost of transporting CRS from the ocean port to Ningbo Daye's production facility.[435]

Pursuant to 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration using a tier-one or tier-two benchmark, Commerce will adjust the benchmark price for delivery costs "to reflect the price that a firm actually paid or would pay if it imported the product."[436] In the *Preliminary Determination*, to calculate Ningbo Daye's inland freight benchmarks, we applied the rates mentioned above to the distances between Ningbo Daye's production facility and the Tianjin and Shanghai ports.[437] However, these distances are significantly greater than, and thus not comparable to, the distance between Ningbo Daye's production facility and the nearest ocean port to that facility. Consequently, on further analysis, we find that using these distances does not reflect the price that Ningbo Daye "would pay" if it imported CRS.[438] Therefore, for the final determination, to calculate the overall cost of shipping CRS to Ningbo Daye's production facility, while we are relying on the per-MT, per-KM rates from *Doing Business*, we are applying those rates to the actual reported distance between Ningbo Daye's production facility and its nearest ocean port.[439]

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[432] *See*, *e.g.*, Petitioner Benchmark Submission at Attachments 5 and 6.
[433] *See Preliminary Determination* PDM at 44 and Petitioner Benchmark Submission at Attachment 5
[434] *See* section 776(a)(2)(d) of the Act.
[435] When Commerce resorts to using a "tier-two" world market price to construct a benchmark to measure the adequacy of remuneration, and there are multiple commercially available market prices, 19 CFR 351.511(a)(2)(ii) directs Commerce to "average such prices to the extent practicable." Therefore we have used both the per-MT per-KG rates for Tianjin Port to Beijing and the per-MT per-KG rates for Shanghai Port to Shanghai City, multiplied each of these rates by the distance reported by Ningbo Daye, as explained below, and simple averaged the resulting per-MT costs of inland freight to calculate the inland freight benchmark. *See* Ningbo Daye Final Calculation Memorandum.
[436] *See also*, *e.g.*, *Steel Propane Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 FR 29159 (June 21, 2019), and accompanying IDM at Comment 8.
[437] At Ningbo Daye Preliminary Analysis Memorandum, Attachment 2, tab "Inland Freight Public," Commerce included the following label at cell "C16" and cell "C19": "Distance from Tianjin Port to Shanghai." However, the distance indicated is actually the distance from Tianjin Porty to Beijing.
[438] *See* 19 CFR 351.511(a)(2)(iv).
[439] *See* Ningbo Daye 2SQR at Exhibit D-9.

Comment 10: Whether Commerce Should Include Negative Transaction Benefit Values in the Calculation of Benefits Under the Cold-Rolled Steel for Less Than Adequate Remuneration and Policy Loans Programs

GOC Case Brief

- In calculating LTAR benefits, and benefits from policy lending, Commerce set negative transaction benefits (*i.e.*, from purchases that were higher than the benchmark price or loans at interest rates higher than the benchmark interest rate) to zero. Commerce's decision to "zero" negative benefits is inconsistent with the statute. In the final determination, Commerce must correct this error and calculate the overall benefit for the respondent.[440]
- This calculation error is contrary to the statutory and regulatory requirement to determine the overall benefits from all government sales of the goods in question or from all government loans under examination.[441]
- Under Section 771(5)(E) of the Act, a benefit is "conferred where there is a benefit to the recipient, including … where goods … are provided for less than adequate remuneration …" As also stated in 19 CFR 351.511(a)(1), "{i}n the case where goods... are provided, a benefit exists to the extent that such goods... are provided for less than adequate remuneration." The legal provisions' use of "benefit" in the singular and "goods" in the plural indicates that Commerce must determine the overall benefit but zeroing violates this requirement.[442]
- Article 14(d) of the *SCM Agreement* provides that "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration." Zeroing the transactions that were priced higher than the benchmark prevents an accurate calculation of benefits and therefore is contrary to law.[443]

Commerce's Position: Commerce has addressed and rejected arguments similar to those made by the GOC in various other proceedings.[444] Consistent with Commerce's determinations in

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[440] *See* GOC Case Brief at 1 and 15.
[441] *Id.* at 15-16.
[442] *Id.* at 16.
[443] *Id.*
[444] *See Wood Moldings and Millwork Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 86 FR 67 (January 4, 2021), and accompanying IDM at Comment 8; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2017, 85 FR 79163 (December 9, 2020), and accompanying IDM at Comment 10; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules Final Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2016*, 84 FR 45125 (August 28, 2019), and accompanying IDM at Comment 8; *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) at Comment 15; *Certain Crystalline Silicon Photovoltaic Products Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42792 (September 12, 2017), and accompanying IDM at Comment 9; *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017), and accompanying IDM at Comment 26; *Drill Pipe from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 150 (August 5, 2013), and accompanying IDM at Comment 3; *Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comment 14; *OCTG from China* IDM at Comment 14; *Notice of*

those proceedings, we disagree with the GOC regarding the offsetting of "negative benefits." The CRS for LTAR program and Policy Loans program benefit methodology applied in the *Preliminary Determination*, which compared the actual input purchases and loan interest payments made by the respondent to a world benchmark price or to a benchmark interest rate, is consistent with the regulations and Commerce's practice.[445] In a subsidy analysis, a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked or otherwise offset by "negative benefits" from other transactions. The adjustment the GOC is seeking is essentially a credit for transactions that did not provide a benefit – this is an impermissible offset, contrary to the Act, and inconsistent with Commerce's practice.

The Act defines the "net countervailable subsidy" as the gross amount of the subsidy less three statutorily prescribed offsets: (1) the deduction of application fees, deposits or similar payments necessary to qualify for or receive a subsidy; (2) accounting for losses due to deferred receipt of the subsidy; and (3) the subtraction of export taxes, duties or other charges intended to offset the countervailable subsidy.[446] Offsetting the benefit calculated with a "negative" benefit is not among the enumerated permissible offsets. Furthermore, the *Preamble* clarifies that this result would be inconsistent with the purpose of a benefit inquiry: "if there is a financial contribution and a firm pays less for an input than it would otherwise pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit is concerned."[447]

Therefore, if Commerce determines that a good was provided by the government for LTAR or a loan was provided by the government at a rate below the appropriate benchmark rate, a benefit exists, and the inquiry ends. The converse is also true: a good provided at price higher than the benchmark price, or a loan provided at an interest rate greater than the benchmark interest rate provides no benefit, and the inquiry ends. Each instance of the provision of a good, or of the granting of a loan garners an independent evaluation and comparison to the relevant benchmark. Each instance either provides a benefit or does not. We will not "reduce" the amount of the benefit provided by one instance of the provision of a good for LTAR or a loan at an interest rate lower than the benchmark by other instances of the provision of a good for price higher than the benchmark price or a loan provided at an interest rate higher than the benchmark, *i.e.*, by transactions that purportedly provide "negative" benefits. Thus, we have made no modifications to the final determination calculations regarding alleged "negative" benefits.

Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada, 70 FR 73448 (December 12, 2005), and accompanying IDM at Comment 43; *and Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada*, 70 FR 56640 (September 28, 2005), and accompanying IDM at Comment 6.

[445] *See* 19 CFR 351.511(a)(2)(ii)

[446] *See* section 771(6) of the Act.

[447] *See Countervailing Duties; Final Rule*, 63 FR 65348, 65361 (November 25, 1998).

IX. CALCULATION OF THE ALL-OTHERS RATE

Sections 703(d) and 705(c)(5) of the Act state that Commerce shall determine an estimated all-others rate for companies not individually examined. This rate shall be an amount equal to the weighted average of the estimated subsidy rates established for those companies individually examined, excluding any zero and *de minimis* rates and any rates based entirely under section 776 of the Act. Notwithstanding the language of section 705(c)(5)(A)(i) of the Act, we have not calculated the all-others rate by weight-averaging the rates of the two individually investigated respondents, because doing so risks disclosure of proprietary information. We therefore calculated a weighted-average all-others rate using the mandatory respondents' publicly ranged U.S. export sales value for the subject merchandise. On that basis, we are assigning 16.29 percent *ad valorem* as the all-others rate.[448]

X. RECOMMENDATION

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

☒ Agree ☐ Disagree

5/14/2021

X

Signed by: RYAN MAJERUS

Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations

[448] *See* Memorandum, "Countervailing Duty Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China; Revised All-Others Calculation for the Final Determination," dated concurrently with this memorandum.

Appendix

NOT-USED OR NOT-MEASURABLE PROGRAMS, BY COMPANY

Zhejiang Amerisun (including Zhejiang Dobest)

Programs Determined Not to Provide Measurable Benefits During the POI

Count	Title
1	Small and Medium-Sized Enterprise Development Award
2	Subsidies for Loss Caused by Typhoon in October 2013
3	Patent Award for Self-locking Stepless Control Handle
4	Subsidy for Enterprise Meeting the Safety Production Standard
5	Revenue from Foreign-related Development
6	Award for Products Updating
7	Land Use Performance Award
8	New Technology Application and Promotion
9	Assistance for Establishing Cross-border E-commerce Platform
10	First-round Rewards for Passing Cleaner Production Audits
11	New Materials Patents Subsidy
12	Financial Incentive Funds for Technological Transformation Projects of Industrial Enterprises
13	Rewards to Foreign Trade Enterprise
14	Reimbursement to Expenditure Spent on Training of International Manpower
15	Rewards for Continuous High Exchange Earnings
16	Subsidy for Foreign Trade Import and Export Business Qualification Enterprises for 2016
17	2016 CITIC Insurance Subsidy
18	Subsidy to Exhibition Fees in 2016
19	Rewards for Overbase Export in Year 2016
20	Tax Rebate per Mu in 2016
21	Science and Technology Patents Subsidy
22	Subsidies for Tax Payment per Mu
23	Innovation-driven Awards
24	Subsidy for High-tech Enterprise
25	Subsidy for Enterprise of Quality and Integrity
26	Rewards for Overbase Export in Year 2017
27	2017 CITIC Insurance Subsidy
28	Subsidy for Foreign Trade Import and Export Business Qualification Enterprises for 2017
29	Rewards for Businesses in Chengxi New Zone

Programs Determined to Be Not Used During the POI

Count	Title
1	Export Loans from Chinese State-Owned Banks
2	Export Seller's Credits from China Export-Import Bank
3	Income Tax Concessions for Enterprises Engaged in Comprehensive Resource Utilization
4	Income Tax Deduction/Credits for Purchase of Special Equipment
5	Import Tariff and VAT Exemptions on Imported Equipment in Encouraged Industries
6	Provision of Land and/or Land Use Rights for LTAR (Nanjing Economic and Technology Development Zone; and Chongqing High-Tech Development Zone)
7	Provision of Hot-Rolled Steel for LTAR
8	Provision of Unwrought Aluminum for LTAR
9	The State Key Technology Project Grants
10	Grants for Energy Conservation and Emission Reduction
11	SME Technology Innovation Fund

Ningbo Daye

Programs Determined Not to Provide Measurable Benefits During the POI

Count	Title
1	Import Tariff and VAT Exemptions on Imported Equipment in Encouraged Industries
2	Various Subsidies Self-Reported by Ningbo Daye[449]

Programs Determined to Be Not Used During the POI

Count	Title
1	Export Loans from Chinese State-Owned Banks
2	Export Seller's Credits from China Export-Import Bank
3	Income Tax Concessions for Enterprises Engaged in Comprehensive Resource Utilization
4	Income Tax Deductions/Credits for Purchase of Special Equipment
5	Provision of Land and/or Land Use Rights for LTAR
6	Provision of Land and/or Land Use Rights for LTAR (Nanjing Economic and Technology Development Zone; and Chongqing High-Tech Development Zone)
7	Provision of Hot-Rolled Steel for LTAR
8	Provision of Unwrought Aluminum for LTAR
9	The State Key Technology Project Grants

[449] As discussed above in the "other Subsidies" section above, Ningbo Daye reported receiving various non-recurring "other subsidies" from the GOC during the POI and throughout the AUL period. Ningbo Daye requested business proprietary treatment for the details of these "other subsidies." We treated these "other subsidies" as non-recurring grants. Certain of these grants either provided benefits during the POI which were not measurable or provided benefits during the AUL period which were expensed prior to the POI according to our allocation methodology (*see* "Subsidies Valuation" section above and 19 CFR 351.524).

10	Grants for Energy Conservation and Emission Reduction
11	SME Technology Innovation Fund