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July 22, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
2018 Countervailing Duty Administrative Review:
Narrow Woven Ribbons with Woven Selvedge from the
People's Republic of China

I. SUMMARY

There is one respondent in the 2018 administrative review of the countervailing duty (CVD) order on narrow woven ribbons with woven selvedge (ribbons) from the People's Republic of China (China): Yama Ribbons and Bows Co., Ltd. (Yama). The period of review (POR) is January 1, 2018, through December 31, 2018. For the final results, we analyzed the case and rebuttal briefs submitted by interested parties in this administrative review. As a result of our analysis, we made no changes to the *Preliminary Results* and continue to determine that Yama received a 42.20 percent *ad valorem* net countervailable subsidy rate during the POR. We address the issues raised in the "Analysis of Comments" section, below.

II. BACKGROUND

On January 27, 2021, Commerce published the *Preliminary Results* of this review.¹ We invited parties to comment on the *Preliminary Results*. On February 26, 2021, we received case briefs from Yama and the Government of China (GOC).² On March 5, 2021, we received a rebuttal brief from the petitioner, Berwick Offray LLC.³ On April 1, 2021,

¹ See *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2018*, 86 FR 7264 (January 27, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

² See Yama's Letter, "First Supplemental Questionnaire Response {sic}," dated February 26, 2021 (Yama's Case Brief); see also GOC's Letter, "Case Brief," dated February 26, 2021 (GOC's Case Brief).

³ See Petitioner's Letter, "Rebuttal Brief of Petitioner Berwick Offray LLC," dated March 5, 2021.

Commerce extended the deadline for the final results of this administrative review until July 23, 2021.⁴

The “Subsidy Valuation Information” and “Programs Determined to Be Countervailable” sections, below, list the subsidy programs and the methodologies used to calculate the subsidy rates for these final results. Additionally, the “Analysis of Comments” section, below, contains our analysis of the comments submitted by interested parties in their case and rebuttal briefs. Based on the comments received, we made no changes to the rate calculated in the *Preliminary Results*.

Below is the complete list of the issues raised in this administrative review for which we received comments:

- Comment 1: Application of Adverse Facts Available (AFA) to the Provision of Synthetic Yarn and Caustic Soda for Less-than-Adequate-Remuneration (LTAR) Programs
- Comment 2: Application of AFA to the Provision of Electricity for LTAR Program
- Comment 3: Application of AFA to the Export Buyer’s Credit Program
- Comment 4: Application of AFA to Other Subsidy Programs

III. USE OF ADVERSE FACTS AVAILABLE

Commerce relied on “facts otherwise available,” including AFA, for several findings in the *Preliminary Results*. Commerce made no changes to its use of the facts otherwise available and AFA, as applied in the *Preliminary Results*.⁵

IV. SUBSIDIES VALUATION INFORMATION

A. Allocation Period

Commerce made no changes to the allocation period or the allocation methodology used in the *Preliminary Results*.⁶

⁴ See Memorandum, “Extension of Deadline for the Final Results of the 2018 Countervailing Duty Administrative Review,” dated April 1, 2021.

⁵ See *Preliminary Results* PDM at 5-16.

⁶ *Id.* at 16-17.

B. Attribution of Subsidies

Commerce made no changes to the attribution methodologies used in the *Preliminary Results*.⁷

C. Denominators

Commerce made no changes to the denominators used in the *Preliminary Results*.⁸

D. Benchmarks and Discount Rates

Commerce made no changes to the benchmarks and discount rates used in the *Preliminary Results*.⁹

V. PROGRAMS DETERMINED TO BE COUNTERAVAILABLE

Commerce made no changes to the methodology used to calculate the subsidy rates for the following programs in its *Preliminary Results*. For descriptions, analyses, and calculation methodologies for these programs, see the *Preliminary Results*. The final program rates for Yama are as follows:

1. *Policy Loans to Narrow Woven Ribbon Producers from State-owned Commercial Banks*

0.04 percent *ad valorem*

2. *Income Tax Reduction for High and New Technology Enterprises (HNTes)*

0.22 percent *ad valorem*

3. *Preferential Tax Policy for Wages of Disabled Employees*

0.02 percent *ad valorem*

4. *Preferential Tax Policies for Research and Development Expenses*

0.36 percent *ad valorem*

5. *Provision of Synthetic Yarn for LTAR*

27.74 percent *ad valorem*

6. *Provision of Caustic Soda for LTAR*

0.27 percent *ad valorem*

⁷ *Id.* at 17-18.

⁸ *Id.* at 18.

⁹ *Id.* at 18 -22.

7. *Provision of Electricity for LTAR*
1.93 percent *ad valorem*
8. *Export Buyer's Credits*
10.54 percent *ad valorem*
9. *Xiamen Municipal Science and Technology Grant Program*
0.14 percent *ad valorem*
10. *International Market Development Fund Grants for Small and Medium-sized Enterprises*
0.08 percent *ad valorem*
11. *Assistance for Recruiting Rural Labor*
0.04 percent *ad valorem*
12. *Assistance for Recruiting Vocational Institution and/or College Graduates*
0.01 percent *ad valorem*
13. *Insurance Expense Assistance*
0.10 percent *ad valorem*
14. *Assistance for Textile Exhibition*
0.01 percent *ad valorem*
15. *Training Fee Rebate*
0.02 percent *ad valorem*
16. *Assistance of Wages for Over-Recruiting Disabled Employees*
0.01 percent *ad valorem*
17. *Assistance for Industrial Transformation and Upgrading*
0.01 percent *ad valorem*
18. *Assistance for Stable Employment*
0.04 percent *ad valorem*

19. *Assistance for Fair Trade*
0.14 percent *ad valorem*
20. *Assistance for Recruiting Personnel with Difficulties in Employment*
0.01 percent *ad valorem*
21. *Assistance for Research and Development Expenses*
0.17 percent *ad valorem*
22. *Labor Service Coordination Assistance*
0.05 percent *ad valorem*
23. *Assistance for Integration of Information and Industrialization*
0.24 percent *ad valorem*
24. *Assistance for Participating in Community Care Activities for Employees*
0.01 percent *ad valorem*

VI. PROGRAMS DETERMINED NOT TO PROVIDE MEASURABLE BENEFITS DURING THE POR

1. *Payments from Xiamen Jimei District Administrative Service Center*¹⁰

VII. PROGRAMS DETERMINED NOT TO BE USED DURING THE POR

We find that Yama did not use the following programs during the POR:

1. *Preferential Tax Policies for Enterprises with Foreign Investment (Two Free, Three Half) Program*
2. *Local Income Tax Exemption and Reduction Programs for “Productive” Foreign-Invested Enterprises*
3. *Xiamen Municipal Science and Technology Grant Program*
4. *Jimei District Tax Bonus Prize*
5. *Xiamen Promotion of Domestic Market Grants*
6. *The State Key Technology Renovation Project Fund*
7. *Bonus for Fujian Province Famous Brands Program*
8. *Export Assistance Grants*
9. *Export Interest Subsidy Funds for Enterprises Located in Zhejiang Province*
10. *Technology Grants for Enterprises Located in Zhejiang Province*
11. *Xiamen Municipal Cleaner Production Program*

¹⁰ See Memorandum, “Calculation Memorandum for Yama Ribbons and Bows Co., Ltd. (Yama),” dated January 19, 2021 (Preliminary Calculation Memo) at Attachment II.

12. *Interest Assistance for Loans Obtained for Technology Projects*
13. *HNTes Local Government Assistance*
14. *Xiamen City Small Medium Enterprises Development Support Fund*
15. *Small Medium Enterprises Assistance*
16. *Finance Bureau of Xiamen City*
17. *Tax Bureau of Jimei District*
18. *Patent Application Supporting Program*
19. *Assistance for Reconstruction after Typhoon*
20. *Assistance for Recruiting Labor in Xiamen*
21. *Assistance for ERP Cloud Service*
22. *Assistance for Recruiting Immigrating Population*
23. *Import Tariff and Value Added Tax (VAT) Exemptions for Foreign-Invested Enterprises (FIEs) Using Imported Technology and Equipment*
24. *Import Tariff and VAT Exemptions for Certain Domestic Enterprises Using Imported Technology and Equipment*
25. *VAT Rebate for FIE Purchases of Domestically Produced Equipment*
26. *Tax Program for High or New Technology FIEs*
27. *Preferential Tax Policies for Research and Development for FIEs*
28. *Tax Benefits for FIEs in Encouraged Industries that Purchase Domestic Equipment*
29. *Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export-Oriented Enterprises*
30. *Preferential Tax Policies for Township Enterprises*
31. *Tax Subsidies to FIEs in Specially Designated Areas*
32. *Preferential Tax Policies for Export-Oriented FIEs*
33. *Provision of Land in the Xiamen Jimei (Xingling) Taiwanese Investment Zone for LTAR*
34. *Rural Labor Training Assistance*

VIII. ANALYSIS OF COMMENTS

Comment 1: Application of AFA to the Provision of Synthetic Yarn and Caustic Soda for LTAR Programs

*Yama's Case Brief*¹¹

- Contrary to Commerce's preliminary finding, record evidence demonstrates that the GOC gave a full, verifiable response regarding the provision of synthetic yarn and caustic soda for LTAR, and that Yama did not benefit from these programs during the POR.¹²
- The CVD questionnaire in several instances clearly instructs that, if a program is not used by the respondent during the POR, only basic information about the program is needed; full reporting is limited to those programs which a respondent used. Thus, the questions posed in the questionnaire must be viewed in light of Commerce's general requirements regarding the non-use of programs. To require more information for

¹¹ Yama notes that, where it does not specifically address the provision of caustic soda for LTAR program in its arguments regarding the provision of synthetic yarn for LTAR program, such arguments also apply to the caustic soda for LTAR program.

¹² See Yama's Case Brief at 10-11.

certain programs which were not used, and less for other programs which were not used, is arbitrary and capricious.¹³

- In response to Commerce's request for information regarding the synthetic yarn and caustic soda industries in China, the GOC provided information that demonstrated that it does not hold a majority of the shares in these industries and thus does not have control over the industries' prices to customers, such as Yama.¹⁴
- The GOC and Yama clearly stated that: (1) the synthetic yarn and caustic soda LTAR programs were not used by any of Yama's suppliers during the POR; (2) all the synthetic yarn and caustic soda suppliers were privately-owned, not state-owned enterprises (SOEs).
- In addition, Yama provided certifications from certain synthetic yarn suppliers which demonstrated that: (1) they are private companies; (2) their senior managers do not hold position in any level of the GOC and are not members of the Chinese Communist Party (CCP); and (3) their operations are independent from government control. Commerce makes no adverse finding against any of the responses submitted by Yama regarding possible LTAR benefits. Thus, there was no government influence over these suppliers, and they could not be considered to be "authorities" under the statute.
- Further, the GOC stated that it is illegal for any organization outside a company, including the CCP and its affiliates, to make business decisions for any company.¹⁵ Moreover, the GOC specifically stated that: (1) there are no government programs regarding synthetic yarn and caustic soda; and (2) it does not regulate the pricing of these industries, but these prices are dictated by market forces.¹⁶
- There is no evidence to suggest that Yama's private input suppliers were under the influence of the GOC or that the prices were influenced by any government-controlled producers.¹⁷ Rather, Commerce simply based its determination on speculation.¹⁸
- The GOC gave details on Chinese production of synthetic yarn in its first supplemental response and Commerce's second supplemental questionnaire did not ask any questions about synthetic yarn or caustic soda. Regarding certain missing information, the GOC stated that it does not have the information available to it as there are no statutory requirements on collecting such information for either industries.¹⁹
- Thus, the record demonstrates that the GOC cooperated to the best of its ability to comply with Commerce's questions and that the application of facts available, let alone AFA, is unwarranted.²⁰ When viewed in its entirety, the record established by

¹³ See Yama's Case Brief at 11 (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); and *Tung Mung Dev. Co., v. United States*, 354 F.3d 1371, 1378 (Fed. Cir. 2004)).

¹⁴ *Id.* at 12.

¹⁵ *Id.* at 13.

¹⁶ *Id.*

¹⁷ *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*Universal Camera*), quoting *Consolidated Edison Corp. v. Labor Board*, 305 U.S. 197, 229 (1938)).

¹⁸ *Id.* at 14 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) (*Lucent Techs.*); and *Novosteel SA v. United States*, 284 F.3d 1261, 1276 (Fed. Cir. 2002) (*Novosteel 2002*)).

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15.

the GOC is complete for Commerce to make a determination that no benefit was conferred at LTAR.²¹

- Furthermore, Commerce may use AFA only in compliance with section 776(b) of the Tariff Act of 1930, as amended (the Act) when evidence on the record is lacking.²² The use of AFA is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record.²³ Here, it is not necessary to complete the factual record with any other information.²⁴
- Moreover, Commerce may not use AFA to disregard information that is not missing or otherwise deficient.²⁵ Most importantly, the focus of section 776(b) of the Act is a respondent's failure to cooperate to the best of its ability, not its failure to provide requested information.²⁶
- Commerce may not use AFA against a government when there is no evidence that it maintained the data it refused to give Commerce.²⁷ Here, there is no evidence on the record to contradict the GOC's claims regarding the synthetic yarn industry during the POR. Accordingly, substantial evidence on the record shows that Yama's suppliers are neither "authorities" under U.S. law nor "public bodies" within the meaning of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement).²⁸
- Yama is the respondent in this review and Commerce made no finding that Yama deserves AFA; rather, Commerce only found the GOC to be noncompliant and allegedly deserving of AFA.²⁹ The Courts have ruled that a respondent cannot be penalized for alleged transgressions by another party.³⁰ Here, Commerce has done just that, by imposing a higher CVD margin on Yama for these programs.
- Commerce may not automatically resort to adverse inferences once it decides that a party has failed to comply with its request.³¹ The use of facts available is subject to section 782(d) of the Act, and a party must have a chance to remedy deficient submissions.³² The numerous GOC responses either directly answered Commerce's questions regarding the provision of synthetic yarn and caustic soda for LTAR or stated why such data did not exist or was unavailable to the GOC. That should have been sufficient. Thus, the use of AFA regarding these programs was unwarranted and not based on substantial evidence on the record.³³ Thus, the use of AFA

²¹ *Id.* (citing *Diversified Products Corp. v. United States*, 6 CIT 155, 161 (1983), quoting *Universal Camera*, 340 U.S. at 488).

²² *Id.* (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011); and *Shandong Huarong Machinery v. United States*, 435 F. Supp. 2d 1261, 1289, (CIT 2006) (*Zhejiang Dunan*)).

²³ *Id.* at 16 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003) (*Nippon Steel*)).

²⁴ *Id.*

²⁵ *Id.* at 16 (citing *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011); and *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270 (CIT 2005)).

²⁶ *Id.* (citing *Nippon Steel*, 337 F.3d at 1381).

²⁷ *Id.* (citing *Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017)).

²⁸ *Id.* at 16.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 17 (citing *Ferro Union, Inc. v. United States*, 23 CIT 178, 44 F. Supp. 2d 1310, 1328 (1999) (*Ferro Union*); and *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1246 (CIT 1998)).

³² *Id.* (citing *Ferro Union*, 44 F. Supp. 2d at 1328).

³³ *Id.* at 17.

regarding these programs was unwarranted and not based on substantial evidence on the record.³⁴

- The *Preliminary Results* do not provide information on how Commerce derived the rate (i.e., 27.74 percent) it applied to the synthetic yarn LTAR program; thus, Yama did not comment on this issue. However, if AFA is appropriate, Commerce should use the 17.76 percent rate from the 2017 administrative review.³⁵

GOC's Case Brief

- Commerce's determination to countervail the provision of synthetic yarn and caustic soda for LTAR in the *Preliminary Results* based on AFA is not based on substantial evidence and is otherwise not in accordance with the law.
- Commerce's preliminary decision is erroneous for the following reasons: (1) the GOC cooperated to the best of its ability in providing Commerce with all requested information; (2) the GOC demonstrated that, contrary to Commerce's Public Bodies Memo, CCP primary party organizations inside private companies do not make the private companies "government authorities;" and (3) even if Commerce has the legal basis to apply AFA, its finding in the *Preliminary Results* that synthetic yarn and caustic soda producers are government authorities on the basis of AFA alone is unlawful.
- First, the GOC informed Commerce there is no central government database to search whether any individual owner, member of the board of directors, or senior manager is a GOC or CCP official, and indicated that Commerce should obtain this information directly from Yama's privately owned suppliers.³⁶ Commerce's assertion that the GOC has previously demonstrated its ability to obtain such information and that the statements from companies, rather than from the GOC or CCP themselves, is not sufficient and does not explain how the GOC would access information it stated it cannot in this POR.³⁷ The GOC cannot be required to provide information that it does not possess. Further, Commerce's request includes personal information of private persons and entities that are not obligated to respond to this administrative review.
- Second, the GOC: (1) submitted complete responses to the relevant questions in the Input Producer Appendix for Yama's synthetic yarn and caustic soda suppliers;³⁸ (2) provided information regarding the ownership structure and basic registration information for each privately-owned input supplier;³⁹ and (3) provided the relevant laws which indicate that the shareholders' meeting and the board of directors are entitled to make key corporate decisions.⁴⁰ Because all of the input suppliers are not government-owned,⁴¹ the GOC provided the complete information in its possession for these input producers and that there is no additional information necessary for Commerce to determine whether these producers are "authorities" within the meaning of

³⁴ *Id.* (citing *Ferro Union*, 44 F. Supp. 2d at 1328).

³⁵ *Id.* at 32-33.

³⁶ See GOC's Brief at 12 (citing GOC's Letter, "Initial Questionnaire Response," dated January 10, 2020 (GOC's IQR) at Exhibit C-1, pp.17-18 and Exhibit C-8, pp.17-18).

³⁷ *Id.* at 12.

³⁸ *Id.* at 13 (citing GOC's IQR at Exhibits C-1 and C-8).

³⁹ *Id.* (citing *Preliminary Results* PDM at 8).

⁴⁰ *Id.* (citing GOC's IQR at Exhibit C-3 and Exhibit C-8, p.5).

⁴¹ *Id.* (citing GOC's IQR at Exhibit C-1, p.1 and Exhibit C-8, p.1).

section 771(5)(B) of the Act. Therefore, the GOC has acted to the best of its ability and there is no information missing from the record.⁴²

- Third, there are no facts on the record that Commerce can rely on that suggest that the CCP's involvement in a private company is sufficient to transform the company into a government authority. In particular, the GOC disputes Commerce's presumption, as described in the Public Bodies Memo,⁴³ that the presence of CCP party groups and committees, or primary party organizations, in private companies represent a "significant" CCP presence that is relevant to whether an otherwise private company is a government authority.⁴⁴ Further, as described in the Input Producer Appendices for these inputs, the GOC does not agree with the analysis and conclusions in the Public Bodies Memo, which does not state that the CCP exerts control over private companies through primary party organizations.⁴⁵ At most, the Public Bodies Memo expresses uncertainty over the role of the primary party organizations in private companies.
- In addition, while *The Economist* article quoted in the Public Bodies Memo mentions primary party organizations in private companies and in SOEs, it is unlikely that the statements made in article were intended to apply equally to primary party organizations in both types of entities.⁴⁶ The vast majority of this article is focused on the presence of primary party organizations in SOEs and their effect on such entities, not private companies. Thus, there is no support for the conclusion from the statements in *The Economist* that primary party organizations in the private companies "hold {} meetings that shadow formal board meetings and often trump their decisions."⁴⁷
- Moreover, the facts presented in the Input Producer Appendices, and as discussed again here, directly refute this claim.⁴⁸ The CCP Constitution plainly states that primary party organizations "exercise oversight over all Party members, including the chief administrators who are Party members, but do not direct the work of their units."⁴⁹ Under the CCP Constitution, a primary party organization within a company is required to maintain certain core principles and policies on behalf of the CCP.⁵⁰ These "obligations," however, do not overlap or conflict with the producer entity's decision-making process. The CCP cannot project direct authority over the operation of the company. The only direct action the CCP can take is refusing the appointment of a new party secretary of the private company party organization.⁵¹ Both the private company and the party organization within the private company are funded by corporate funds, and the appointment of key individuals is controlled by the company's owners.⁵² Thus, while it may be possible for the primary party organization to make suggestions related to certain laws or certain state interests, the primary party organization has no ability to compel the company to do anything.⁵³ The CCP, or the government, does not fund the

⁴² *Id.* (citing *JSW Steel Ltd. v. United States*, 315 F. Supp. 3d 1379, 1382 (CIT 2018)).

⁴³ *Id.* at 15 (citing Memorandum, "Placing Documents on the Record," dated April 2, 2020 (Additional Documents Memo) at Attachment I (Public Bodies Memo)).

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* (citing GOC's IQR at Exhibit C-1, pp.9-10 and Exhibit C-8, pp.9-10).

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* (citing Public Bodies Memo at 35-36).

⁴⁸ *Id.*

⁴⁹ *Id.* (citing GOC's IQR at Exhibit C-4, Article 32 (emphasis added)).

⁵⁰ *Id.* at 16-17.

⁵¹ *Id.* at 17 (citing GOC's IQR at Exhibit C-1, p.11 and Exhibit C-8, p.11).

⁵² *Id.*

⁵³ *Id.*

enterprise or otherwise control any of the company's funds and the party organization cannot appoint or dismiss board members of managers.⁵⁴

- Commerce has never presented any evidence to demonstrate that provisions of the Company Law in China are superseded or invalidated by primary party organization obligations.⁵⁵ While a CCP organization within a private company is tasked with helping a company follow the law and certain public services (e.g., charity), the private companies must follow Chinese law, including the Company Law, which is the fundamental law regulating a company's organization structure and its conduct.⁵⁶ Moreover, these laws also explicitly prohibit government officials from concurrently holding a position in an enterprise or any other profit-making organization.⁵⁷
- Therefore, there are no "facts otherwise available" on the record that Commerce can rely on that suggest that the CCP involvement in a private company is relevant to whether an otherwise private company is a government authority.
- Furthermore, Commerce unlawfully determined that the synthetic yarn and caustic soda producers are government authorities that provided a financial contribution on the basis of AFA alone. As explained above, the statutory requirements for AFA are not present here. However, assuming *arguendo* that AFA is appropriate, Commerce's determination that the producers of synthetic yarn and caustic soda are government authorities on the basis of AFA alone is contrary to law because Commerce did not: (1) substantiate its determination with record evidence; and (2) consider relevant evidence to the contrary.⁵⁸
- Even when applying AFA, Commerce must make the necessary findings regarding all elements of countervailability and cannot simply rely on a respondent's lack of cooperation.⁵⁹
- Here, Commerce improperly failed to address the information on the record that supports the conclusion that the synthetic yarn and caustic soda producers are not government authorities. Specifically, the GOC provided evidence that showed that all of the synthetic yarn and caustic soda producers are privately-owned companies.⁶⁰ Also, Commerce failed to address information on the record showing that: (1) for limited liability companies and joint stock limited companies, in accordance with Company Law, the private companies are governed by the shareholders, directors, and managers, and not by government or any external organization;⁶¹ (2) the shareholders and the board of directors run the company and are entitled to make key corporate decisions;⁶² and (3) private companies do not make decisions at the direction of the GOC, including the CCP or any of the other entities identified by Commerce.⁶³
- Further, Commerce failed to explain its specificity determination, and to acknowledge the information the GOC provided. Specifically, the GOC provided the following related to specificity: (1) it explained that there are many uses for the synthetic yarn and

⁵⁴ *Id.*

⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 18-19 (citing GOC's IQR at Exhibit C-3).

⁵⁷ *Id.* 19 (citing GOC's IQR at Exhibit C-1, pp.12-13 and Exhibit C-8, pp.12-13).

⁵⁸ *Id.* at 20.

⁵⁹ *Id.* (citing *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334, 1349-50 (CIT 2016) (*Trina Solar 2016*)).

⁶⁰ *Id.* at 21 (citing GOC's IQR at Exhibits C-2 and C-9).

⁶¹ *Id.* (citing GOC's IQR at Exhibit C-1, p.12 and Exhibit C-8, p.12).

⁶² *Id.* (citing GOC's IQR at Exhibit C-1, p.5 and Exhibit C-8, p.5).

⁶³ *Id.* (citing GOC's IQR at Exhibit C-1, pp.9-10 and Exhibit C-8, pp.9-10).

caustic soda inputs; (2) it does not impose any limitations on the use of {the input products}; and (3) producers of {the input products} are free to sell their product to any purchaser and at any price.⁶⁴ Thus, it was impossible for the GOC to provide the specificity information Commerce requested because it does not maintain such information.⁶⁵ Moreover, it is not reasonable for Commerce to conclude that the GOC failed to act to the best of its ability because the GOC could not provide information it does not maintain.⁶⁶

- Although the GOC could not provide the specificity information Commerce requested, the GOC acted to the best of its ability to respond to each of Commerce's questions regarding the two input products.⁶⁷ Thus, with regard to specificity the GOC acted to the best of its ability by providing the information that it could.

Finally, Commerce's determination that the synthetic yarn and caustic soda markets are distorted based on AFA is unsupported. The evidence on the record demonstrates that the synthetic yarn and caustic soda markets are not distorted, and Commerce had no reason as AFA to apply a tier two benchmark rather than a tier one benchmark to calculate the benefit of the provision for these inputs. Specifically, Commerce requested that the GOC provide the total volume and value of Chinese domestic consumption and production of synthetic yarn and caustic soda, to which the GOC explained that the State Statistics Bureau of China did not maintain the total value of each product. Therefore, it provided: (1) the total number of enterprises, as well as the total production volume, for both inputs at issue;⁶⁸ and (2) the percentage of domestic consumption accounted for by domestic production as well the total volume and value of imports during the POR.⁶⁹ Commerce

- also requested information regarding the companies producing synthetic yarn and caustic soda in which the GOC claims it maintains less than a controlling ownership or management interest, which the GOC does not maintain.⁷⁰
- Nevertheless, Commerce applied AFA to the GOC. Under these circumstances, the inability of the GOC to provide the requested data does not support the application of AFA. Moreover, what the GOC has or has not been able to provide in other cases about different inputs does not provide sufficient evidence to support the conclusion that the GOC failed to cooperate here. The record is clear that the markets for these inputs are not distorted because a minority of the producers of both synthetic yarn and caustic soda are companies in which the government maintains a majority ownership.⁷¹ Further, there were no export tariffs or other restraints on synthetic yarn or caustic soda during the POR.⁷² Therefore, Commerce's reliance on AFA to find the market for these inputs distorted was incorrect.

⁶⁴ *Id.* at 23 (citing GOC's IQR at 19 and 27).

⁶⁵ *Id.* at 22.

⁶⁶ *Id.* at 23 (citing *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342, 1365–66 (CIT 2012) (citing *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990); and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990))).

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 24 (citing the GOC's Letter, "First Supplemental Questionnaire Response," dated April 17, 2020 (GOC's SQR) at 5-6).

⁶⁹ *Id.* (citing GOC's SQR at 6-7).

⁷⁰ *Id.*

⁷¹ *Id.* at 26.

⁷² *Id.* at 26.

Petitioner's Rebuttal Brief

- Commerce correctly determined that synthetic yarn and caustic soda were provided for LTAR because the GOC and Yama failed to cooperate by not acting to the best of their ability to comply with Commerce's requests for information. Moreover, because the domestic prices from actual transactions involving Chinese buyers and sellers were significantly distorted by the involvement of the GOC, the use of an external benchmark was warranted in calculating the benefit for these programs. Yama's claims that there is record evidence to contradict these findings is misguided.⁷³
- As discussed in the *Preliminary Results*, the GOC did not provide a response to Commerce's questions asking the GOC to provide: (1) the total number of yarn producers; (2) the total volume and value of Chinese domestic consumption and production of yarn; (3) the percentage of domestic accounted for by domestic production; (4) the percentage of domestic production that is accounted for by companies in which the government maintains an ownership interest, either directly or indirectly, including a list of companies that meet these criteria; and (5) a discussion of what laws, plans or policies address the pricing of the input, the levels of production of the input, the importation or exportation of the input, or the development of the input capacity.⁷⁴
- In prior cases, Commerce has determined that the GOC maintains the above-referenced information electronically.⁷⁵ Therefore, the GOC should have an electronic record of the above-referenced information but refused to provide it.
- Moreover, it is incumbent on the GOC to remedy any gaps in the record regarding Commerce's specificity analysis for these programs.⁷⁶
- Regarding the information concerning the "authority" status of individual input suppliers, the GOC failed to provide the necessary information for Commerce's financial contribution analysis. Therefore, Commerce should continue to find the individual input suppliers to be government authorities in the final results.⁷⁷
- Commerce correctly determined that the GOC failed to provide critical information on the CCP's role in Yama's operations. Commerce should reject Yama's arguments that the CCP is not involved in its operations and that such involvement would be illegal, and continue to find that the GOC failed to act to the best of its ability, as it has done in prior reviews.⁷⁸
- Further, the GOC, as a subordinate to the CCP, must know whether individuals within the corporate structures of the input suppliers are members of the CCP.⁷⁹
- Therefore, Commerce should continue to find that Yama's input suppliers are government authorities because the GOC has failed to provide critical information regarding the CCP and its control over Yama.⁸⁰

⁷³ *Id.* at 2-3.

⁷⁴ *Id.* at 10.

⁷⁵ *Id.* at 10-11 (citing *Utility Scale Wind Towers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012) (*Wind Towers from China*), and accompanying IDM at Comment 13).

⁷⁶ *Id.* at 11 (citing *Wind Towers from China* IDM at Comment 13).

⁷⁷ *Id.*

⁷⁸ *Id.* at 11-12 (citing *Preliminary Results* PDM at 8-9).

⁷⁹ *Id.* at 12.

⁸⁰ *Id.*

Commerce’s Position: In these final results, we continue to find that, in the synthetic yarn and caustic soda markets: (1) Chinese prices are significantly distorted by the involvement of the GOC; and (2) privately-owned input suppliers of synthetic yarn and caustic soda are “authorities” within the meaning of section 771(5)(B) of the Act. We have also reexamined the specificity of both the synthetic yarn and caustic soda for LTAR and now find that provision of these inputs is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act.

Market Distortion

As we stated in the *Preliminary Results*, we requested that the GOC provide the following information regarding the synthetic yarn and caustic soda industries to determine whether the GOC is the predominant provider of these inputs and whether its significant presence in the market distorts all transaction prices for both inputs:⁸¹

- a. The total number of producers.
- b. The total volume and value of Chinese domestic consumption of {input} and the total volume and value of Chinese domestic production of {input}.
- c. The percentage of domestic consumption accounted for by domestic production.
- d. The total volume and value of imports of {input}.
- e. The percentage of total volume and (separately) value of domestic production that is accounted for by companies in which the Government maintains an ownership or management interest, either directly or through other Government entities, including a list of the companies that meet these criteria.
- f. A discussion of what laws, plans or policies address the pricing of the input, the levels of production of the input, the importation or exportation of the input, or the development of the input capacity. Please state which, if any, central and sub- central level industrial policies pertain to the input industry.

As outlined in the *Preliminary Results*, the GOC stated that the State Statistics Bureau does not maintain statistics on the total value of each product. Therefore, the GOC provided the total number of enterprises, as well as the total production volume for synthetic yarn and caustic soda for the POR.⁸² In addition, for each of these inputs, the GOC provided: (1) the percentage of domestic consumption accounted for by domestic production; and (2) the total volume and value of imports during the POR.⁸³

Commerce issued a supplemental questionnaire requesting further information regarding market distortion for the two inputs, including that the GOC provide a list of the number of producers in which it maintains an ownership or management interest.⁸⁴ In response, the GOC stated that it does not maintain: (1) a list of companies in which the government maintains a majority ownership or a controlling management interest; or (2) data regarding companies in which the government maintains some, but not a majority, ownership interest.⁸⁵ Therefore, the GOC maintained that it was not able to provide the percentages of total volume and value of domestic

⁸¹ See *Preliminary Results* PDM at 7.

⁸² See GOC’s SQR at 5-6.

⁸³ *Id.* at 6-7.

⁸⁴ See Commerce’s Letter, “Second Supplemental Questionnaire,” dated July 24, 2020.

⁸⁵ See GOC’s Letter, “Second Supplemental Questionnaire Response,” dated August 14, 2020 (GOC’s 2SQR) at 10-11.

production, as Commerce requested.⁸⁶ Consequently, the GOC failed to identify, and provide GOC ownership information for, the companies comprising the synthetic yarn and caustic soda industries.

We disagree with Yama and the GOC that the GOC's responses demonstrate the GOC used its best efforts to comply with Commerce's questions and provided complete responses with information available to it.⁸⁷ In a previous proceeding, Commerce was able to confirm at verification that the GOC maintains two databases at the State Administration of Industry and Commerce: one is the business registration database, showing the most up-to-date company information; a second system, "ARCHIVE," houses electronic copies of documents such as business licenses, annual reports, capital verification reports, *etc.*⁸⁸ Therefore, we find that the GOC has an electronic system available to it to gather the industry-specific information Commerce requested, including the GOC's minority ownership interests in companies producing synthetic yarn and caustic soda, but elected not to assist Commerce in obtaining necessary information for this proceeding.

Thus, because we determine that the GOC withheld necessary information that was requested of (and is available to) it, and the record lacks such information, Commerce continues to rely on facts available in these final results.⁸⁹ Moreover, we determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information.⁹⁰ Consequently, an adverse inference is warranted in the application of facts available. In drawing an adverse inference, we continue to find that Chinese prices from transactions involving Chinese buyers and sellers are significantly distorted by the involvement of the GOC.⁹¹

We disagree with the GOC that Commerce should not find the market for these inputs to be distorted because: (1) only a minority of the producers of both synthetic yarn and caustic soda are companies in which the government maintains a majority ownership;⁹² and (2) there were no export tariffs or other restraints on these inputs during the POR.⁹³ As noted above, the GOC did not provide information on the companies producing synthetic yarn and caustic soda in which the government maintains any ownership interest (majority or otherwise);⁹⁴ thus, the record does not support the GOC's claim. Further, the fact that the GOC does not impose export tariffs or other restraints on these inputs does not mean that the market for them is not distorted by the GOC's presence. Other factors (such as the presence of GOC-owned companies in the market, information which the GOC did not provide) would also indicate that the GOC's presence in the market is distortive.

⁸⁶ *Id.* at 11.

⁸⁷ See Yama's Case Brief at 11-13.

⁸⁸ See *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*; 2016, 83 FR 50891 (October 10, 2018), and accompanying PDM at 8 (citing, e.g., *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2015, 83 FR 11177 (March 14, 2018) (*Ribbons AR 2015*), and accompanying IDM at 6-7).

⁸⁹ See section 776(a)(2)(A) of the Act.

⁹⁰ See section 776(b) of the Act.

⁹¹ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65377 (November 25, 1998).

⁹² See GOC's Case Brief at 26.

⁹³ *Id.*

⁹⁴ See GOC's 2SQR at 10-11.

Input Suppliers are “Authorities”

Consistent with the *Preliminary Results*, we continue to find that each of the private companies which supplied Yama with synthetic yarn and caustic soda is an “authority” within the meaning of section 771(5)(B) of the Act. As discussed in the *Preliminary Results* under “Certain Producers of Synthetic Yarn and Caustic Soda are ‘Authorities,’” in order for Commerce to do a complete analysis of whether producers of synthetic yarn and caustic soda are “authorities” within the meaning of section 771(5)(B) of the Act, we sought information regarding whether any individual owners, board members, or senior managers were government or CCP officials and the role of any CCP primary organization within the companies.⁹⁵ Specifically, to the extent that the owners, managers, or directors of a producer are CCP officials or otherwise influenced by certain entities, Commerce requested information regarding the means by which the GOC may exercise control over company operations and other CCP-related information.⁹⁶ Commerce explained its understanding of the CCP’s involvement in China’s economic and political structure in the current and past China CVD proceedings,⁹⁷ including why it considers the information regarding the CCP’s involvement in China’s economic and political structure to be relevant.

The GOC provided information regarding the ownership structure and basic registration information for each of Yama’s privately-owned input suppliers.⁹⁸ 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 members, in order to evaluate whether the privately-owned input suppliers are “authorities” with the meaning of section 771(B) of the Act. While the GOC provided a long narrative explanation of the role of the CCP, when asked to identify any owners, members of the board of directors, or managers of the input suppliers who were government or CCP officials during the POR, the GOC explained that there is “no central informational database to search for the requested information.”⁹⁹ Therefore, the GOC directed that Commerce should obtain this information directly from Yama’s privately-owned input suppliers.¹⁰⁰ In *Citric Acid 2012 AR*, we found that the GOC was able to obtain the information requested independently from the companies involved, and that statements from companies, rather than from the GOC or CCP themselves, were not sufficient.¹⁰¹ Therefore, we continue to find that the GOC failed to provide the information requested of (and available to) it for Yama’s privately-owned input suppliers.

As explained in the *Preliminary Results*, we understand that the CCP exerts significant control over economic activities in China.¹⁰² Thus, Commerce continues to find, as it has in prior CVD proceedings,¹⁰³ that the information requested regarding the role of CCP officials and CCP

⁹⁵ See *Preliminary Results* PDM at 8.

⁹⁶ *Id.*

⁹⁷ 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 AR*), and accompanying IDM at Comment 5; and Additional Documents Memo, which includes the Public Bodies Memo and its attachment, the CCP Memorandum.

⁹⁸ See *Preliminary Results* PDM at 8.

⁹⁹ *Id.* at 8-9.

¹⁰⁰ See GOC’s IQR at Exhibit C-1 at 18.

¹⁰¹ *Id.* (citing *Citric Acid 2012 AR* IDM at Comment 5).

¹⁰² *Id.* (citing Additional Documents Memo, which includes the Public Bodies Memo and its attachment, the CCP Memorandum).

¹⁰³ See, e.g., *Citric Acid 2012 AR*.

committees in the management and operations of Yama's privately-owned input suppliers is necessary to our determination of whether these producers are "authorities" within the meaning of section 771(5)(B) of the Act.

Therefore, we find that the GOC withheld necessary information that was requested of it and that Commerce must rely on facts available in conducting our analysis of Yama's privately-owned input suppliers.¹⁰⁴ As a result of the incomplete responses to Commerce's supplemental 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. Consequently, we determine that the GOC withheld information, and that an adverse inference is warranted in the application of facts available.¹⁰⁵ As AFA, we find that CCP officials are present in each of Yama's privately-owned input suppliers as individual owners, managers, and members of the boards of directors, and that this gives the CCP, as the government, meaningful control over the companies and their resources. As explained in the Public Bodies Memo, 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.¹⁰⁶ Thus, for these final results we continue to find that privately-owned input suppliers of synthetic yarn and caustic soda provided a financial contribution and that supplied Yama are "authorities" within the meaning of section 771(5)(B) of the Act.

We disagree with the GOC that Commerce is requesting the personal information of private persons and entities that are not obligated to respond to this administrative review. Commerce's requests regarding the ownership of certain companies and the CCP membership of officials in those companies in this review is necessary to determine whether Yama's input suppliers of synthetic yarn and caustic soda were "authorities." In any event, to the extent that Commerce is requesting business proprietary or personally identifiable information, such information can be submitted under administrative protective order (as the GOC is well aware), and it will be released only to authorized applicants and receive other protections.

Moreover, we disagree with Yama that it and the GOC provided information showing that: (1) the synthetic yarn and caustic soda LTAR programs were not used by any of Yama's suppliers during the POR; (2) all the synthetic yarn and caustic soda suppliers were privately-owned, not SOEs; (3) the suppliers' senior managers do not hold position in any level of the GOC and are not members of the CCP; (4) the suppliers' operations are independent from government control; and (5) that it is illegal for any organization outside a company, including the CCP and its affiliates, to make business decisions for any company.¹⁰⁷ As an initial matter, Yama's declaration that its input suppliers did not use the synthetic yarn and caustic soda for LTAR programs is not meaningful to our analysis of these programs; rather, Commerce must examine whether these input suppliers are "authorities" with the meaning of section 771(5)(B) of the Act and, if so, whether they supplied synthetic yarn and caustic soda to Yama for LTAR during the POR. The fact that Yama's input suppliers are privately-owned companies is not dispositive to our determination regarding whether they are "authorities" because of the potential for the GOC's or CCP's involvement in these companies. Further, while Yama provided certifications that the senior managers of certain of its input suppliers are not GOC officials or members of the

¹⁰⁴ See section 776(a)(2)(A) of the Act.

¹⁰⁵ See section 776(b) of the Act.

¹⁰⁶ See, e.g., Additional Documents Memo at Public Bodies Memo at 33-36, and 38.

¹⁰⁷ See Yama's Case Brief at 13.

CCP,¹⁰⁸ Yama did not provide this information for all of its input suppliers, nor did it provide such information for the individual owners or board members of any of these companies. In any event, it is the GOC which is in the best position to answer questions about individuals who hold positions in the GOC or are members of the CCP. Therefore, because complete information regarding the senior managers, individual owners, or board members who may hold positions in the GOC or are members of the CCP, Commerce cannot rely on partial information Yama provided. As a result, for the reasons discussed above, we cannot conclude that Yama's input suppliers are independent from government control. In addition, for the reasons discussed below, we also disagree that it is illegal for organizations outside of a company, including the CCP to make decisions for it.

Specifically, we disagree with the GOC's claim that the presence of the CCP, or primary party organizations, in private companies does not represent a "significant" CCP presence relevant to whether an otherwise private company is a government authority (or that the CCP can exert control over private companies through primary party organizations. The GOC's arguments ignore a significant body of past findings, record evidence and expert third-party sources relied upon in the Public Bodies Memo and the attached CCP Memorandum. The full analysis in the context of China is presented in the Public Bodies Memo and its attached CCP Memorandum, and is summarized here. Commerce notes that the means of government control or influence as it relates to the standard of an "authority" in the context of CVD proceedings may extend beyond ownership – and therefore may extend to private enterprises. Therefore, Commerce first considered what entities comprised the "government" (for purposes of this analysis) in China in order to assess the various means of control that it may – or may not – exercise over enterprises. In this regard, Commerce considers information regarding the CCP's involvement in China's economic and political structure to be relevant because public information demonstrates that the CCP exerts significant control over activities in China such that the CCP can properly be considered part of the government structure in China for purposes of this analysis.¹⁰⁹ The GOC's arguments do not rebut this finding nor the definition of "government" relied upon in the CCP Memorandum. Commerce explained in the Public Bodies Memo that it found that the government in China includes both the CCP and the state apparatus. Commerce then explored the variety of means by which the GOC and CCP may exercise control over enterprises. Commerce has noted that publicly available information indicates that Chinese law requires the establishment of CCP organizations, *i.e.*, primary organizations of party, in all companies, whether state, private, domestic, or foreign-invested that have three or more party members and that such organizations may wield a controlling influence in the company's affairs.¹¹⁰

We also disagree with the GOC that, because the CCP Constitution states that primary party organizations "exercise oversight over all Party members, including the chief administrators who are Party members, but do not direct the work of their units," this means that the CCP cannot project direct authority over the operation of the company. As discussed in the Public Bodies Memo:

¹⁰⁸ See Yama's Letter, "Response to Section III Questionnaire," dated January 10, 2020 (Yama's IQR) at 12 and 15, and Exhibits 8-2 and 10-2.

¹⁰⁹ See Additional Documents Memo at CCP Memorandum at 33, stating that "available information and record evidence indicates that the CCP meets the definition of the term 'government' for the limited purpose of applying the U.S. CVD law to China."

¹¹⁰ See Additional Documents Memo at Public Bodies Memo at 35-36 (and sources cited therein).

In accordance with the CPP Constitution, all organizations, including private commercial enterprises, are required to establish “primary organizations of the party” (or “Party committees”) if the firm employs at least three party members.¹¹¹

This section of the report also cites to expert, third-party sources, noting that:

The party has cells in most big companies—in the private as well as the state-owned sector -- complete with their own offices and files on employees. It controls the appointment of captains of industry and, in the SOEs, even corporate dogsbodies. It holds meetings that shadow formal board meetings and often trump their decisions, particularly on staff appointments. It often gets involved in business planning and works with management to control pay.¹¹²

Further, the Public Bodies Memo notes that, according to the Xinhua News Agency, there were a total of “178,000 party organs in private firms in 2006, a rise of 79.8 percent over 2002.”¹¹³ The GOC fails to acknowledge or address that Primary Party Organizations are present in private enterprises in growing numbers and therefore have an influence on the business decision within these entities. These Primary Party Organizations may be imbued with significant power according to expert, third-party sources.¹¹⁴ Notably, the GOC has simply failed to respond to Commerce’s questions and explain the purpose of CCP committees, which might shed light on the purpose, meaning and role of these committees in private enterprises as well as state-invested enterprises.

Specificity

As an initial matter regarding specificity, we note that Commerce’s longstanding practice is not to reexamine the specificity of a subsidy that it has previously found to be countervailable unless new evidence challenges such a finding.¹¹⁵ Throughout the history of this proceeding, we have found the provision of synthetic yarn and caustic soda for LTAR programs to be countervailable based on AFA due to the GOC’s failure to provide requested information.¹¹⁶ Because the countervailability of these programs was based on AFA, we asked the GOC to provide necessary

¹¹¹ *Id.* at 35.

¹¹² *Id.* at 36 (citing “A Choice of Models,” *The Economist* (January 2012)).

¹¹³ *Id.* (citing “Brief Introduction of the Communist Party of China,” ChinaToday.com, current as of April 2012 at <http://www.chinatoday.com/org/cpc/>).

¹¹⁴ *See, e.g.*, Public Bodies Memo at 4.

¹¹⁵ *See, e.g.*, *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review*; 2013, 80 FR 77318 (December 14, 2015), and accompanying IDM at Comment 1 (“the {Government of China} has provided no new evidence in this review that would cause us to reverse our findings from prior administrative reviews regarding the specificity of the steam coal for {less than adequate remuneration} program.”); *Final Results of Countervailing Duty Administrative Review: Certain In-Shell Pistachios from the Islamic Republic of Iran*; 71 FR 37056 (June 29, 2006), and accompanying IDM at Comment 2; and *Live Swine from Canada: Final Results of Countervailing Duty Administrative Reviews*, 61 FR 52408 (October 7, 1996) (“It is the Department’s policy not to reexamine the issue of {a} program’s countervailability in subsequent reviews unless new information or evidence of changed circumstances is submitted which warrants reconsideration.”).

¹¹⁶ *See AR 2015 IDM*; *see also* *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review*; 2016, 84 FR 11052 (March 25, 2019) (*Ribbons AR 2016*); and *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review*; 2017, 84 FR 10653 (February 25, 2020) (*Ribbons AR 2017*).

information regarding these programs in this review.¹¹⁷ Specifically, we requested that the GOC: (1) provide a list of industries in China that purchase synthetic yarn and caustic soda; (2) provide the amounts (volume and value) purchased by the industry in which the mandatory respondent company operates, as well as the totals purchased by every other industry; and (3) identify the classification scheme the government normally relies on to define industries and classify companies. However, the GOC failed to provide the requested information.¹¹⁸

Regarding the GOC's and Yama's arguments that: (1) there are no government programs regarding synthetic yarn and caustic soda and the GOC does not regulate the pricing of these industries, but these prices are dictated by market forces;¹¹⁹ (2) there are many uses for the synthetic yarn and caustic soda inputs; (3) the GOC does not impose any limitations on the use of synthetic yarn and caustic soda; and (3) producers of synthetic yarn and caustic soda are free to sell their product to any purchaser and at any price;¹²⁰ we note that the GOC provided this information in response to questions regarding the *de jure* specificity of these input LTAR programs. Commerce agrees that the provision of synthetic yarn and caustic soda for LTAR programs are not *de jure* specific. However, the fact that the prices and the production of these inputs are not regulated by the GOC is not meaningful to our analysis of the *de facto* specificity of these subsidies. Furthermore, the GOC's statement that "there are many uses for the synthetic yarn and caustic soda inputs" is the only statement relevant to Commerce's specificity questions.¹²¹ However, that sentence was non-responsive to Commerce's question because the GOC provided no list of industries, as Commerce requested. Without any supporting information, the statement amounted to a speculative, conclusory statement and thus did not answer any of Commerce's questions on specificity. Therefore, we find that the information on the record is incomplete regarding whether these subsidies are specific within the meaning of section 771(5A) of the Act.

Accordingly, because the GOC failed to provide this necessary information needed to allow Commerce to fully analyze these subsidies, and as a result, the information is not available on the record of this review, Commerce has relied on facts otherwise available for this determination.¹²² Moreover, as a result of the incomplete responses to Commerce's questionnaires,¹²³ we find that the GOC failed to cooperate by not acting to the best of its ability in providing requested information.¹²⁴

Therefore, as AFA in the absence of the requested information from the GOC in this review regarding the *de facto* specificity of these programs, we relied on the information we used to initiate an investigation of the provision of caustic soda and synthetic yarn for LTAR programs in this proceeding.¹²⁵ Specifically, regarding the provision of synthetic yarn for LTAR program, in its 2015 NSA, the petitioner provided information demonstrating that synthetic yarn is used

¹¹⁷ See Commerce's Letters, "Initial Questionnaire," dated November 20, 2019 (Initial Questionnaire); and "First Supplemental Questionnaire," dated April 3, 2020.

¹¹⁸ *Id.*

¹¹⁹ See Yama's Case Brief at 13.

¹²⁰ See GOC's IQR at 15-20 and 23-28.

¹²¹ *Id.* at 22.

¹²² See section 776(a)(1) of the Act.

¹²³ See GOC's IQR at 19 and 27; see also GOC's SQR at 7.

¹²⁴ See section 776(b) of the Act.

¹²⁵ See Petitioner's Letter, "Narrow Woven Ribbons with Woven Selvage from the People's Republic Of China: New Subsidy Allegations," dated February 7, 2017 (2015 NSA).

solely by the textiles industry in China.¹²⁶ In past cases, Commerce has found that when use of an input was limited to eight industries, the industries were limited in number in China and, thus, the subsidy was *de facto* specific.¹²⁷ Consequently, we find that the use of synthetic yarn by one industry (the textiles industry) is limited in number and, as a result, the provision of synthetic yarn for LTAR program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act.

Similarly, regarding the provision of caustic soda for LTAR program, in its 2015 NSA, the petitioner provided information demonstrating that caustic soda is used by only a limited number of industries (*i.e.*, chemicals, pulp and paper, aluminum, food, water treatment, and textiles) in China.¹²⁸ As noted above, Commerce has found that when eight industries used an input in China, these industries were limited in number and, thus, the subsidy was *de facto* specific.¹²⁹ Consequently, we continue to apply AFA and find that the use of caustic soda by six industries is limited in number and, as a result, the provision of caustic soda for LTAR program is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Regarding the GOC's claim that these "programs" do not exist, we note that the applicable statutory provision does not refer to or otherwise use the term "program." The statutory provision, section 771(5) of the Act, defines the terms "countervailable subsidy" and "subsidy," and does not refer to or use the term "program." In particular, the specificity section in 771(5A) of the Act does not indicate that Commerce must find a "program" to be specific. Rather, that section focuses on whether a "subsidy" is specific. In interpreting and applying the applicable provision, Commerce's focus is, therefore, on the subsidy itself. At one point, Commerce sought to define the term "program" in a proposed regulation, but did so in a manner consistent with section 771(5A) of the Act, emphasizing that "the use of this term is for purposes of convenience; it is not intended to limit the universe of countervailable subsidies to certain routine actions of a foreign government."¹³⁰ In particular, Commerce noted the example of "equity infusions in a firm by a government, which tend to be isolated acts, would be regarded as a program for purposes of the regulations."¹³¹ Consistent with section 771(5A) of the Act, the aim of the prior regulation was to address the provision of the subsidy itself.

While Commerce's current regulation no longer defines the term "program," Commerce has continued to use the term solely as shorthand and for convenience, but this reference is not a legal term, and its use is not and cannot be inconsistent with the statutory provision. In addition to the governing statutory provisions discussed above, 19 CFR 351.511 directly addresses Commerce's examination with respect to the provision of goods and services for LTAR. Thus, for the LTARs at issue, consistent with the regulation, a countervailing subsidy exists when an authority provides a good for LTAR and when the provision of that subsidy is specific.¹³² A separate finding of a "program" is not required under the law and is not part of Commerce's determination, as Commerce looks specifically to the subsidy itself. Thus, for the LTARs at

¹²⁶ See 2015 NSA at Exhibit II-P.

¹²⁷ See, e.g., *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008) (*CWP from China*), and accompanying IDM at Comment 7.

¹²⁸ See 2015 NSA at Exhibit III-H.

¹²⁹ See *CWP from China* IDM at Comment 7.

¹³⁰ See *Countervailing Duties; Notice of Proposed Rulemaking and Request for Comments*, 54 FR 23366, 23367 (May 31, 1989).

¹³¹ *Id.*

¹³² See 19 CFR 351.511.

issue, an authority can provide a subsidy by providing a good at LTAR to an enterprise, industry, or group thereof, notwithstanding whether the government intended to subsidize the recipient or set up a program to do so. The only questions under the statute are whether the authority provided the respondent with a subsidy, whether the subsidy is specific, and whether a benefit is thereby conferred.¹³³ Accordingly, Commerce does not place weight on the GOC's statements concerning whether a program exists. To the contrary, the evidence sought is whether the synthetic yarn and caustic soda producers are authorities under the law; whether the prices of the inputs purchased are made at prices that are less-than-adequate remuneration, and whether the subsidy provided is limited to an enterprise, industry, or group thereof. This is the evidence Commerce sought to obtain to make its determination. As a result, we find that the information outlined above demonstrates that the GOC's assertions that no program existed are incorrect.

AFA and the Calculated Rate

Regarding Yama's argument that Commerce made no finding that it deserves AFA,¹³⁴ we acknowledge that the effect of applying AFA to a government may impact respondents.¹³⁵ As the U.S. Court of International Trade (CIT) has recognized, "{w}here the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry."¹³⁶ This is because the foreign government is in the best position to provide information regarding financial contribution.¹³⁷ We recognize that this has an effect on the respondent company, but this does not mean that Commerce's application of AFA is unlawful. The respondent company has the opportunity to demonstrate that it did not use, or benefit from, the program at issue. The CIT has affirmed Commerce's application of AFA to governments in such situations:

This court has recognized in the CVD context, unlike the typical AD case, that often the government rather than the respondent in the investigation possesses the information needed by Commerce to accurately evaluate and calculate the alleged subsidies. *See, e.g., Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1260–62 (CIT 2012). When the government refuses to cooperate in a CVD case, Commerce may be permitted to draw an adverse inference with regard to government-held information, with possible collateral effects on a respondent.

Id. at 1262 n.10. Rather than a direct application of the adverse facts available statute, this may be a simple evidentiary expediency.¹³⁸

¹³³ See section 771(5)(A) and (B) of the Act.

¹³⁴ See Yama's Case Brief at 16.

¹³⁵ See, e.g., *Certain Quartz Surface Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23760 (May 23, 2019) (Quartz from China), and accompanying IDM at Comment 4; and *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 77206 (December 12, 2011) (*Citric Acid 2009 AR*), and accompanying IDM at Comment 8). See also *Certain In-Shell Roasted Pistachios from the Islamic Republic of Iran: Final Result of Countervailing Duty New Shipper Review*, 73 FR 9993 (February 25, 2008) (*Pistachios from Iran*), and accompanying IDM at Comment 2; and *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) (*Hot-Rolled from India*), and accompanying IDM at Comment 6.

¹³⁶ See *Essar Steel Limited v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010).

¹³⁷ *Id.*

¹³⁸ See *GPX Int'l Tire Corp v. United States*, 893 F. Supp. 2d 1296, 1331 (CIT 2013) (*GPX*).

Finally, we disagree with Yama that we did not explain how we derived the 27.74 percent rate applied to the synthetic yarn for LTAR program in the *Preliminary Results*. In the *Preliminary Results*,¹³⁹ we explained our methodology and the Preliminary Calculation Memo¹⁴⁰ contains our calculation of the rate for this program using Yama's reported data (not Commerce's CVD AFA hierarchy).

Comment 2: Application of AFA to the Provision of Electricity for LTAR Program

GOC's Case Brief

- Commerce's application of AFA to electricity for LTAR is unlawful and Commerce should not continue to apply AFA to find the provision of electricity for LTAR countervailable for the final results.¹⁴¹
- The GOC did act to the best of its ability in providing verifiable information sufficient for Commerce to analyze the provision of electricity and to determine that it is not a countervailable subsidy.¹⁴² Specifically, the GOC: (1) answered each and every question in the Electricity Appendix; (2) explained to Commerce that Chinese electricity rates fully reflective of changes in supply and demand in the market; and (3) explained that after January 1, 2016, the National Development and Reform Commission (NDRC) does not set electricity prices for provinces—instead, electricity prices are determined by market forces.¹⁴³
- In response to Commerce's supplemental questions regarding the relationship between the NDRC and provincial pricing, the GOC explained that the NDRC only provides guiding principles and that the provincial authorities make their own specific calculations of electricity prices using data specific to their own provinces.¹⁴⁴
- Thus, Commerce reliance on AFA to select the highest electricity rates on the record as benchmarks for the applicable rates and user categories is without a lawful basis.
- Furthermore, Commerce's finding that the electricity provided by the GOC was specific is based solely on AFA, without providing factual support or taking into account record information contradicting this conclusion.¹⁴⁵ According to *Trina Solar 2016*, even when using AFA, Commerce must search "the far reaches of the record" for facts that support the elements of a countervailable subsidy.¹⁴⁶ The GOC provided all requested legislation and regulations regarding the elimination of provincial price proposals, as well as the electricity rates in Fujian Province, where Yama is located.¹⁴⁷
- Although in the *Preliminary Results*, Commerce pointed to Notices 3105 and 748 as indicative of the NDRC's involvement in local price adjustments, during the POR there was no NDRC review of the provincial price proposals and the provincial agencies are only required to provide their final adjusted price schedules to the NDRC for its

¹³⁹ See *Preliminary Results* PDM at 28-29.

¹⁴⁰ See Preliminary Calculation Memo at Attachment II (Excel Spreadsheet ACCESS Barcode 4077816-02).

¹⁴¹ See GOC's Brief at 28 (citing *Nippon Steel*, 337 F.3d at 1383).

¹⁴² *Id.* (citing GOC's SQR pp. 8.11).

¹⁴³ *Id.* at 27 (citing GOC's IQR at Exhibit C-10 pp. 1-6).

¹⁴⁴ *Id.* at 28 (citing GOC's SQR at 9).

¹⁴⁵ *Id.* at 26.

¹⁴⁶ *Id.* at 28 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1349-50.)

¹⁴⁷ *Id.* at 28.

records.¹⁴⁸ However, Commerce ignored this evidence and failed to provide evidence contradicting it.

- Thus, there are no facts on the record that suggest that the provision of electricity is specific. Instead, the record makes clear that retail prices for electricity are set according to purchasing cost, transmission prices, transmission losses and government surcharges, regardless of a particular firm's participation in a specific sector.¹⁴⁹

Petitioner's Rebuttal Brief

- Commerce correctly determined in the *Preliminary Results* that Yama received electricity for LTAR based on the failure of both the GOC and Yama to fully respond to Commerce's requests for information.¹⁵⁰
- Commerce should continue to apply AFA to the GOC and find this program countervailable in the final results.¹⁵¹

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

As explained in the *Preliminary Results*, in order to analyze the financial contribution and specificity of this program, we requested that the GOC provide information regarding the roles of provinces, the NDRC, and cooperation between the provinces and the NDRC in electricity price adjustments.¹⁵² Specifically, we requested, *inter alia*: Provincial Price Proposals for the province where Yama is located for applicable tariff schedules that were in effect during the POR; all original NDRC Electricity Price Adjustment Notice(s) that were in effect during the POR; the procedure for adjusting retail electricity tariffs and the role of the NDRC and the provincial governments in this process; the price adjustment conferences that took place between the NDRC and the provinces, grids and power companies with respect to the creation of all tariff schedules that were applicable to the POR; the cost elements and adjustments that were discussed between the provinces and the NDRC in the price adjustment conferences; and how the NDRC determines that the provincial level price bureaus have accurately reported all relevant cost elements in their price proposals with respect to generation, transmission and distribution. We requested this information in order to determine the process by which electricity prices and price adjustments are derived, identify entities that manage and impact price adjustment processes, and examine cost elements included in the derivation of electricity prices in effect throughout China during the POR.

As discussed in detail below, we disagree with the GOC regarding: (1) the role of the NDRC in setting electricity rates in China; (2) that the sales price of electricity is determined by market forces, rather than by the direction of the government; and (3) that the GOC acted to the best of its ability to provide requested information about this program. As explained in the *Preliminary*

¹⁴⁸ *Id.* at 29.

¹⁴⁹ *Id.* at 30 (citing GOC's IQR at Exhibit C-10, pp. 6-7, 11).

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.* at 12.

¹⁵² See PDM at 9-10.

Results, we found that both the Notice of the NDRC on “Lowering Coal-Fired Electricity On-Grid Price and General Industrial and Commercial Electricity Price” (Notice 3105) and the “Notice of National Development and Reform Commission on Adjusting Schedule of Coal-fired Power Generation Grid Purchase Price and Sale Price of Industrial and Commercial Electricity of Each Province (District or City)” (Notice 748) explicitly direct provinces to reduce prices and to report the enactment of those changes to the NDRC.¹⁵³ 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.¹⁵⁴ The Appendix to Notice 3150 indicates that this average price adjustment applies to all provinces and at varying amounts.¹⁵⁵ The “Notice of National Development and Reform Commission on the use of measures of expanding the scale of cross-provincial power transactions to reduce the general industrial and commercial electricity prices (No. 1053 {2018} of the NDRC)” (Notice 1053) 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.”¹⁵⁶ Notice 1053 describes the methods the NDRC will use to further reduce the general industrial and commercial electricity prices.¹⁵⁷ NDRC Notice 3105 also directs additional price reductions, and stipulates, at Articles II and X, that local price authorities shall implement in time the price reductions included in its Annex and report resulting prices to the NDRC.¹⁵⁸

As explained in the *Preliminary Results*, in its initial questionnaire response, the GOC stated that the provincial price proposals are not mandated by law and that the proposals are obsolete now that the provinces have the authority to set their own prices, under Notice 3105.¹⁵⁹ According to the GOC, the creation of this new structure eliminated the need for Provincial Price Proposals that had previously been used by the NDRC to set prices for each province.¹⁶⁰ However, we found that neither Notice 3105 nor Notice 748 explicitly stipulates that relevant provincial pricing authorities determine and issue electricity prices within their own jurisdictions, as the GOC states to be the case.¹⁶¹ Rather, both notices indicate that the NDRC continues to play a seminal role in setting and adjusting electricity prices, by mandating average price adjustment targets with which the provinces are obligated to comply in setting their own specific prices.¹⁶² Furthermore, in a supplemental questionnaire response, when we requested that the GOC identify the legislation which may have eliminated the Provincial Price Proposals, the GOC referred Commerce to Notice 748 and Notice 3105.¹⁶³ As discussed above, these two documents, issued by the NDRC, direct provinces to reduce prices by amounts specific to provinces. They neither explicitly eliminate Provincial Price Proposals nor define distinctions in price-setting roles between national and provincial pricing authorities. Finally, we requested that the GOC explain

¹⁵³ See *Preliminary Results* PDM at 10.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 10-11.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 10 (citing GOC’s IQR at 5-9 and Exhibits C-12 and C-13).

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Id.*

¹⁶² *Id.* at 11 (citing, e.g., GOC’s IQR at Exhibit C-13 (Notice 3105 Articles II and X); and GOC April 17, 2020 SQR at Exhibit C-23 (Notice 748 Article 10)).

¹⁶³ *Id.*

how the NDRC monitors compliance with the price changes directed in Notice 748 and what action the NDRC would take were any province not to comply with the directed price changes. The GOC's response failed to explain what concrete actions the NDRC would take in the event of non-compliance with directed price changes.¹⁶⁴ Thus, contrary to the GOC's claims, we find that the evidence on the record demonstrates that the NDRC continues to play a major role in setting electricity prices in China, and it appears that the NDRC is involved in every step of the process.¹⁶⁵

Furthermore, the record demonstrates that the GOC did not act to the best of its ability. As explained in the *Preliminary Results*, the GOC failed on several occasions to explain the roles and nature of cooperation between the NDRC and provinces in deriving electricity price adjustments.¹⁶⁶ Further, the GOC failed to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by provinces themselves.¹⁶⁷ Thus, in accordance with sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act, we found that information necessary to our analysis of financial contribution and specificity was not available on the record, that the GOC withheld information requested by us, and that the GOC significantly impeded this proceeding. Therefore, consistent with the *Preliminary Results*, we continue to rely on "facts available" in the final results.¹⁶⁸ Moreover, we determine, in accordance with section 776(b) of the Act, that the GOC failed to cooperate to the best of its ability to comply with our repeated requests for information. As a result, consistent with the *Preliminary Results*, we continue to determine that an adverse inference is warranted in the application of facts available.¹⁶⁹ In applying AFA, we find 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 failed to provide certain requested information regarding the relationship (if any) between provincial tariff schedules and cost, as well as requested information regarding cooperation (if any) in price setting practices between the NDRC and provincial governments. Therefore, consistent with the *Preliminary Results*, we continue to rely on AFA in selecting the benchmark for determining the existence and amount of the benefit.¹⁷⁰ The benchmark rates we selected are derived from the record of this review and are the highest electricity rates on the record for the applicable rate and user categories.

Comment 3: Application of AFA to the Export Buyer's Credit Program

Yama's Case Brief

- The record clearly demonstrates that the GOC gave Commerce complete and verifiable information regarding the Export Buyer's Credit (EBC) program. Both the GOC and Yama fully answered the relevant questions about the EBC program during the POR and stated that it was not used.
- The GOC confirmed that the Export-Import Bank of China (China EX-IM Bank) did not provide bank credits to any of Yama's U.S. customers during the POR, and

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (citing Notice 3105 Articles II and X and Notice 748 Article 10); *see also* GOC's IQR, Electricity Appendix at Exhibit C-10 at 8; Pricing Law at Exhibit C-5 and Electric Power Law of China at Exhibit C-19).

¹⁶⁶ *Id.* at 11-12.

¹⁶⁷ *Id.* at 11.

¹⁶⁸ *See* section 776(a) of the Act.

¹⁶⁹ *See* section 776(b) of the Act.

¹⁷⁰ *See Preliminary Results* PDM at 12.

explained that if the program had been used, both the China EX-IM Bank and Yama would have the records. Given the above answers, Commerce's additional questions about how this program operated was moot. The original questionnaire in numerous places absolves any party from answering detailed questions when a program was not used. Making the EBC program an exception to this stated requirement is clearly arbitrary and capricious.¹⁷¹

- Commerce found three faults with the GOC's responses regarding the EBC program: (1) it did not supply certain data from China EX-IM Bank; (2) it did not provide the 2013 EX-IM Bank revisions; or (3) it did not provide a list of commercial banks involved in this program. The GOC failure to provide this information is not fatal since it is related to general usage and how the program operated.
- The information the GOC and Yama provided regarding non-use was capable of verification; however, Commerce simply chose not to verify these responses.
- Additionally, while the GOC did not provide a listing of the banks involved in this program, it did note that banks apply to be distribution points for the funds only if the U.S. customer first applies for this program and does not open an account at the China EX-IM Bank.¹⁷² Thus, submitting a list of secondary banks is moot because there was no usage by Yama's customers, and there could not be any list of banks to report.
- In a previous review segment, based on facts identical to those in this administrative review, the Court held that the GOC and Yama had answered Commerce's questions sufficiently to determine that the EBC program was not used.¹⁷³
- Commerce failed to adhere to its policy to use a rate from a similar program as AFA. If Commerce continues to countervail this non-existent program, it should apply a rate from the Export Seller's Credit (ESC) program, a more similar program, rather than a policy loan program that is only available to the coated paper industry, a program for which Yama does not qualify.¹⁷⁴ The ESC program rate is not only the most similar rate available, but it also is much closer in time to the POR.
- In *Chlorinated Isos*, Commerce used the ESC program rate of 0.87 percent as the AFA for the EBC program.¹⁷⁵ For Commerce to do otherwise here is arbitrary and capricious.
- In *Chlorinated Isos*, Commerce explained that, even when the foreign government fails to cooperate fully, Commerce will determine the existence and the amount of the benefit conferred based on the respondent's books and records, to the extent possible.¹⁷⁶

¹⁷¹ *Id.* at 19.

¹⁷² *Id.* at 20.

¹⁷³ *Id.* at 27 (citing *Yama Ribbons & Bows Co. v. United States*, 419 F. Supp. 3d 1341 (CIT 2019) (*Yama Ribbons*)).

¹⁷⁴ *Id.* at 21.

¹⁷⁵ *Id.* (citing *Chlorinated Isocyanurates from the People's Republic of China, Final Results of Countervailing Duty Administrative Review*; 2015, 83 FR 26954 (June 11, 2018) (*Chlorinated Isos*), and accompanying IDM at Comment 1).

¹⁷⁶ *Id.* at 22 (citing, e.g., *Chlorinated Isos* IDM at Comment 1; see also *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination: 2012*, 79 FR 56560 (September 22, 2014) (*Chlorinated Isos Investigation*), and accompanying IDM at 21; *Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination: 2011*, 78 FR 58283 (September 23, 2013), and accompanying IDM at "Provision of Electricity for LTAR"; and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Preliminary Intent To Rescind, in Part: 2014*, 82 FR 2317 (January 9, 2017), and accompanying PDM at 38).

- Moreover, the Courts have consistently found that even when a foreign government is found to be uncooperative, Commerce should avoid adversely impacting the cooperating parties.¹⁷⁷
- Finally, Commerce must also consider additional recent decisions regarding its treatment of the EBC program.¹⁷⁸

GOC's Case Brief

- Commerce's application of AFA to the EBC program is not support by substantial evidence and is otherwise not in accordance with the law; thus, Commerce should reverse its AFA determination for this program in the final results.
- Neither Yama nor any of its U.S. customers used export buyer credits during the POR, nor were there any "gaps" on the record to fill regarding the EBC program. Therefore, there is no financial contribution and no need for Commerce to resort to a facts available finding, much less an AFA finding.¹⁷⁹
- The CIT has reversed Commerce's determinations in several prior China CVD proceedings regarding this program, holding that when evidence on the record indicates that the EBC program was not used, Commerce cannot apply AFA to determine that it was.¹⁸⁰ Similarly, here, Commerce cannot apply AFA to determine use of this program where there was none.
- Commerce also claims that information obtained in a prior CVD proceeding indicates that the GOC revised the Administrative Measures regarding this program in 2013 and that Commerce's analysis of this program was impeded by the GOC's failure to provide the 2013 revisions.¹⁸¹ However, as the CIT has held, these revisions will not impact whether the program was used.¹⁸²
- The GOC acted to the best of its ability and demonstrated on the record of this proceeding that this program was not used by: (1) confirming with the respondent that it did not use the program; (2) confirming with the China Ex-Im Bank that the program was not used; and (3) providing several pages of information about the program.¹⁸³
- The Court of Appeals for the Federal Circuit (Federal Circuit) has held that Commerce may only draw an adverse inference where it is reasonable to expect that more forthcoming responses should have been made.¹⁸⁴ Here, there is no basis for Commerce to find that the GOC failed to cooperate by not acting to the best of its ability.

¹⁷⁷ *Id.* at 23 (citing *Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1357 (CIT 2019) (*Clearon*), citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013); and *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014)).

¹⁷⁸ *Id.* at 24 (citing *Clearon*, 359 F. Supp. 3d at 1357; *Guizhou Tyre Co. v. United States*, 348 F. Supp. 3d 1261, 1271 (CIT 2018) (*Guizhou Tyre 2018*); and *Changzhou Trina Solar Energy Co. v. United States*, 352 F. Supp. 3d 1316 (Ct. Int'l Trade 2018) (*Changzhou Trina 2018*); and *Changzhou Trina Solar Energy Co. v. United States*, Ct. No. 17-00246, Slip Op. 2018-167 (Nov. 30, 2018)).

¹⁷⁹ See GOC's Case Brief at 2-3 (citing sections 776(a)-(c) of the Act).

¹⁸⁰ *Id.* at 6 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1334 and 1350; *Yama Ribbons*, 419 F. Supp. 3d 1341; *Guizhou Tyre Co. v. United States*, 415 F. Supp. 3d 1402 (CIT 2019); *Guizhou Tyre 2018*, 348 F. Supp. 3d at 1271; *Guizhou Tyre Co. v. United States*, 389 F. Supp. 3d 1315 (CIT 2019); *RZBC Grp. Shareholding Co. v. United States*, No. 15-00022, 2016 WL 3880773, at *5 (CIT June 30, 2016); *Changzhou Trina 2018*, 352 F. Supp. 3d 1316, 1326; and *Clearon*, 359 F. Supp. 3d at 1357).

¹⁸¹ *Id.* at 7 (citing *Preliminary Results PDM* at 13-14).

¹⁸² *Id.* (citing *Guizhou Tyre 2018*, 348 F. Supp. 3d at 1270).

¹⁸³ *Id.* at 8 (citing GOC's IQR at 33-36).

¹⁸⁴ *Id.* (citing *Nippon Steel*, 337 F.3d at 1383).

- Commerce’s AFA determination regarding the EBC program is contrary to the law because Commerce did not: (1) substantiate its determination with record evidence; and (2) consider relevant evidence to the contrary. Specifically, when Commerce invokes its authority to use AFA, it must still make the necessary factual findings to satisfy the countervailability requirements (*i.e.*, that the program constitutes a financial contribution that provides a benefit and is specific).¹⁸⁵
- In order to satisfy these statutory requirements, Commerce must “search ‘the far reaches of the record’ . . . and may re-open the record to make the prerequisite factual findings.”¹⁸⁶ Furthermore, the CIT has held that Commerce must “consider{} . . . relevant evidence that ‘fairly detract{s}’ from the reasonableness of its conclusions.”¹⁸⁷
- Here, Commerce failed to address record evidence that supports the conclusion that the EBC program was not used.¹⁸⁸ This renders Commerce’s decision unsupported by substantial evidence and contrary to law.

Petitioner’s Rebuttal Brief

- The GOC failed to adequately report details of the EBC program. Specifically, the GOC failed to respond fully to Commerce’s Standard Appendix questions, questions regarding the 2013 China EX-IM Bank revisions in the initial CVD questionnaire; and failed to provide a list of banks that might participate in these credits.
- Furthermore, the GOC has consistently resisted Commerce’s attempts in prior cases to gather necessary information on the EBC program.¹⁸⁹
- The GOC is the only entity that maintains the information necessary to determine usage of the EBC program and whether Yama’s customers received funding from the China EX-IM Bank or another third party.
- Thus, Commerce acted reasonably in determining that it could not verify claims of non-use by Yama or its customers because the GOC’s failure to cooperate to the best of its ability prevented Commerce from fully understanding the operation of the program.
- Moreover, Commerce’s selection of the AFA rate is lawful. As detailed in the *Preliminary Results*, Commerce followed the applicable statute and its established AFA hierarchy and practice.¹⁹⁰
- Despite Yama’s claims to the contrary, the 10.54 percent rate Commerce applied to the EBC program is not punitive because it was in accordance with the statutory requirements. The Federal Circuit has recognized that Commerce possesses considerable discretion when selecting an appropriate source for an AFA rate.¹⁹¹ In any

¹⁸⁵ *Id.* at 9 (citing *Trina Solar 2016*, 195 F. Supp. 3d at 1334).

¹⁸⁶ *Id.* (citing *RZBC Grp. Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1298 (CIT 2015) (*RZBC Grp.*)).

¹⁸⁷ *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484 (1951) (*Universal Camera*)).

¹⁸⁸ *Id.* at 10 (citing *Universal Camera* at 1350 (quoting *RZBC Grp.*, 100 F. Supp. 3d at 1298)).

¹⁸⁹ *Id.* at 4 (citing, *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) IDM at Comment 18; and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 80 FR 41003 (July 14, 2015), and accompanying IDM at Comment 1).

¹⁹⁰ *Id.* at 7 (citing *Preliminary Results PDM* at 10).

¹⁹¹ *Id.* at 8-9.

event, Commerce has previously calculated rates on individual subsidy programs in China CVD investigations of up to 45 percent.¹⁹²

- Thus, Commerce should continue to apply AFA to the GOC regarding this program, regardless of whether this decision impacts Yama's subsidy rate.¹⁹³

Commerce's Position: Consistent with the *Preliminary Results* and Commerce's practice, we continue to find that the record of the instant review does not support a finding of non-use regarding the EBC program for Yama.¹⁹⁴

Solar Cells from China Initial Investigation of EBC Program

Commerce first investigated and countervailed the EBC program in the 2012 investigation of solar cells.¹⁹⁵ 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."¹⁹⁶ Commerce initially asked the GOC to complete the "standard questions appendix" for the EBC program. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant records the government maintains, the identification of the relevant laws and regulations, and a description of the application process (along with sample application documents). The standard questions appendix is intended to help Commerce understand the structure, operation, and usage of the program.¹⁹⁷

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."¹⁹⁸ In response to a request from Commerce for information concerning the operation of the EBC program and how we might verify usage of the program, the GOC stated that none of the respondents' customers had used the program either. The GOC added: "{t}he GOC understands that this program, including the buyer's credit cannot be implemented without knowledge of the exporters because the program has a substantial impact on the exporter's financial and foreign exchange business matters."¹⁹⁹ Although asked, the GOC

¹⁹² *Id.* at 9 (citing, e.g., *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008), and accompanying IDM at 12.)

¹⁹³ *Id.* at 14-15.

¹⁹⁴ See *Preliminary Results* PDM at 12-15; see also, e.g., *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products from China*), and accompanying IDM at Comment 16; and *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 FR 9274 (March 5, 2018) (*Aluminum Foil from China*), and accompanying IDM at Comment 6.

¹⁹⁵ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules; from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Solar Cells from China Investigation*), and accompanying IDM at 9 and Comment 18. While Commerce's determination with respect to the EBC Program was initially challenged, the case was dismissed.

¹⁹⁶ See *Solar Cells from China Investigation* IDM at 59.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 60.

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.²⁰⁰ The GOC again refused to provide sample application documents, regulations, or manuals governing the approval process, and instead provided only a short description of the application process which gave no indication of how an exporter might be involved in the provision of export buyer's credits, how it might have knowledge of such credits, or how such credits might be reflected in a company's books and records.²⁰¹

Based on the GOC's responses, Commerce's understanding was that, under this program, loans were provided directly from the China EX-IM Bank to the borrowers (*i.e.*, a respondent's customers), with no involvement of third parties, such as exporters, or third-party banks. Accordingly, Commerce made clear its understanding that the only way to establish non-use of the program was through the GOC and not the respondent companies.²⁰² Additionally, Commerce concluded that even if the respondent company might have some knowledge of loans provided to its customers through its involvement in the application process, such information is not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

{E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that the Commerce needs to examine in order to verify that the information is complete and accurate. For verification purposes, the Commerce must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as well as to review supporting documentation for individual loans, grants, rebates, *etc.* If all a company received was a notification that its buyers received the export credits, or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs Commerce that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.²⁰³

On this basis, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its long-standing verification methods.²⁰⁴

²⁰⁰ *Id.* at 60-61.

²⁰¹ *Id.* at 61.

²⁰² *Id.*

²⁰³ *Id.* at 61-62.

²⁰⁴ Commerce provided a similar explanation in the 2014 investigation of solar products from China. *See Solar Products from China* IDM at 93. This was affirmed by the CIT in *Trina Solar 2016* at 1350. In *Changzhou Trina 2017*, the CIT noted that the explanation from *Solar Products* constituted "detailed reasoning for why documentation from the GOC was necessary" to verify non-use. *See Changzhou Trina Solar Energy Co. v. United States*, 255 F. Supp. 3d 1312, 1318 (CIT 2017) (*Changzhou Trina 2017*). However, the CIT found that the 2014 review of solar cells from China at issue in *Changzhou Trina 2018* 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. *See Changzhou Trina 2018*; and *Solar Products from China* IDM at 10; *see also*

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.²⁰⁵

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

In the investigation of solar cells, however, despite Commerce’s repeated requests for information, the GOC failed to offer any guidance as to how Commerce could search for EBC program lending in respondent exporters’ books and records that could be tied to financial statements, tax returns, or other relevant company documents. Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the China EX-IM Bank itself because it “possessed the supporting records needed to verify the accuracy of the reported non-use of the EBC Program {and} would have complete records of all recipients of export buyer’s credits.”²⁰⁶ We noted our belief that “{s}uch records could be tested by {Commerce} to check whether the U.S. customers of the company respondents had received export buyer’s credits, and such

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014, 82 FR 32678 (July 17, 2017) (amended by Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014, 82 FR 46760 (October 6, 2017), and accompanying IDM)). The CIT in *Guizhou Tyre 2018* reached a similar conclusion concerning the 2014 review of tires from China. *See Guizhou Tyre 2018*, 348 F. Supp. 3d at 1261; *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.*

²⁰⁵ The CIT agreed with Commerce in *RZBC 2017*, following a remand, finding that Commerce could not verify non-use of the program by examining the respondent-exporter’s audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. *See RZBC Group Shareholding Co. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC 2017*); *see also Citric Acid 2012 AR IDM* at Comment 6.

²⁰⁶ *See Solar Cells from China Investigation IDM* at 62.

records could then be tied to the {China} Ex-Im Bank's financial statements."²⁰⁷ However, the GOC refused to allow Commerce to query the databases and records of the China EX-IM Bank.²⁰⁸ Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters' customers.

Chlorinated Isos Investigation of EBC Program

Two years later, in the *Chlorinated Isos Investigation*,²⁰⁹ respondents submitted certified statements from all customers claiming that they had not used the EBC program. This appears to have been the first instance of respondents submitting such customer certifications. At that point in time, as explained in detail above, Commerce, based on the limited information provided by the GOC in earlier investigations, it was Commerce's understanding that the EBC program provided medium- and long-term loans and that those loans were provided directly from the China EX-IM Bank to the borrowers (*i.e.*, the respondent exporters' customers) *only*. Because the respondents' customers were participating in the proceeding, verification of non-use appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China EX-IM Bank to the U.S. customers pursuant to verification steps similar to the ones described above. Based on the GOC's explanation of the program, we had expected to be able to verify non-use of this program through review of the participating U.S. customers' subledgers themselves. Therefore, despite being "unable to conduct a complete verification of non-use of this program at China Ex-Im, ... {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customer's accounting and financial records that no loans were received under this program."²¹⁰

2013 Amendments to the EBC Program

Our understanding of the operation of the EBC program began to change after the *Chlorinated Isos Investigation* was completed in September 2014. In *Citric Acid 2012 AR*, Commerce began to gain a better understanding of how the China 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.²¹¹ In subsequent proceedings, Commerce continued to investigate and evaluate this program.

For example, in the *Silica Fabric Investigation* conducted in 2016-2017, based on what we had learned in *Citric Acid 2012 AR*, we asked the GOC about certain changes to the EBC program, including changes in 2013 that eliminated the \$2 million minimum business contract

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Chlorinated Isos Investigation*, 79 FR at 56560.

²¹⁰ See *Chlorinated Isos Investigation* IDM at 15.

²¹¹ See *Citric Acid 2012 AR* IDM at Comment 6 ("{N}otwithstanding the non-use claims of the RZBC Companies and the GOC, we find that the GOC's refusal to allow the verifiers to examine the EXIM Bank database containing the list of foreign buyers that were provided assistance under the program during the POR precluded the Department from verifying the non-use claims made by the RZBC Companies and the GOC.")

requirement.²¹² In response, the GOC stated that there were three relevant documents pertaining to the EBC program: (1) “Implementing Rules for the Export Buyer’s Credit of the {China EX-IM Bank}” which were issued by the China EX-IM Bank on September 11, 1995 (referred to as “1995 Implementation Rules”); (2) “Rules Governing Export Buyer’s Credit of the {China EX-IM Bank}” which were issued by the China EX-IM Bank on November 20, 2000 (referred to as “2000 Rules Governing Export Buyer’s Credit” or “Administrative Measures”); and (3) 2013 internal guidelines of the China EX-IM Bank.²¹³ According to the GOC, “{t}he {China EX-IM Bank} has confirmed to the GOC that . . . its 2013 guidelines are internal to the bank, non-public, and not available for release.”²¹⁴ The GOC further stated that “those internal guidelines do not formally repeal or replace the provisions of the {Administrative Measures} which remain in effect.”²¹⁵

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

Through its response to {Commerce’s} supplemental questionnaire, the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for {Commerce} to analyze how the program functions.

We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013 Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking the Commerce to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer’s Credit remained in effect, the GOC impeded the 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 China 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 China 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.²¹⁶

²¹² 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 Investigation*), and accompanying IDM at Comment 17.

²¹³ *Id.*

²¹⁴ See *Silica Fabric Investigation* IDM at Comment 17.

²¹⁵ *Id.*

²¹⁶ *Id.* at 12.

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.”²¹⁷

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 {the respondent’s} declarations as submitted.”²¹⁸

The Instant Administrative Review

As stated in the *Preliminary Results*, we did not intend to reevaluate the countervailability of this program and requested that the GOC answer specific questions regarding the export buyer’s credits provided to Yama’s U.S. customers. In addition, we requested that the GOC provide the original and translated copies of laws, regulations or other governing documents for this program; a list of all partner/correspondent banks involved in disbursement of funds under the EBC program; and if the GOC claims that no customer respondent used the buyer credits to explain in detail the steps the government took to determine that the EBC program was not used and to identify the documents, databases, accounts *etc.* that were examined to determine there was no use.²¹⁹

In response, the GOC stated that Commerce should reevaluate the information required to establish non-use of the EBC program, citing recent rulings from the CIT that much of the information Commerce requests regarding this program is not necessary to determine non-use.²²⁰ Furthermore, the GOC asserted that, to the best of its knowledge, Yama never applied for, used, or benefited from this program, and that the China EX-IM Bank searched its records and confirmed that none of Yama’s customers received credits under this program during the POR.²²¹ Therefore, the GOC argued that Commerce’s request for information regarding the export buyer’s credits provided to Yama’s U.S. customers is not applicable. The GOC stated that the information Commerce requested regarding all partner/correspondent banks involved in disbursement of funds under this program is also not applicable. However, the GOC provided the *2000 Administrative Measures of Export Buyer’s Credit of the Export-Import Bank of China (Administrative Measures)* and *Detailed Implementation Rules Governing Export Buyer’s Credit of the Export-Import Bank of China (Implementing Rules)*.²²² According to the GOC, in accordance with the requirements set forth in these documents, the Chinese exporter should be aware of the buyer’s receipt of loans and should be involved in the loan evaluation proceeding and in the post-lending loan management.²²³ Therefore, the GOC argued that the Chinese exporter is in a position to verify and confirm the existence of any sales contracts that were supported by the EBC program.

²¹⁷ *Id.* at 62.

²¹⁸ *Id.*

²¹⁹ See *Preliminary Results* PDM at 12.

²²⁰ *Id.* at 12 (citing GOC’s IQR at 32-33).

²²¹ *Id.*

²²² *Id.* at 13 (citing GOC’s IQR at Exhibits D-2 and D-3).

²²³ *Id.*

Furthermore, in the first supplemental questionnaire, we requested that the GOC provide additional information regarding the EBC program including documentation from the China EX-IM Bank; the original and English translation of the 2013 revisions to the Administrative Measures; and a list of all partner/correspondent banks involved in disbursement of funds under the EBC program.²²⁴ In response, the GOC provided the *Rules Governing Export Buyer's Credit of the Export-Import Bank of China* and the *Detailed Implementation Rules Governing Export Buyer's Credit of the Export-Import Bank of China (the Rules)*, and maintains that the *Rules* further demonstrate that if there is an EBC loan provided by the EX-IM Bank, the Chinese exporter and the U.S. importer are involved and can verify usage. Specifically, the GOC explained that in accordance with the *Rules*: (1) the EX-IM Bank must investigate and verify the performance capability of the Chinese exporters in its loan evaluation and approval proceeding; (2) in making decisions on loan approval, the EX-IM Bank also pays great attention to the credit level of the exporters; and (3) the lending contract has specific provisions regarding the conditions of the disbursement of the credit (the EX-IM Bank must notify the buyer of this disbursement on the day it occurs, after it receives the shipping documents from the exporter, when the EX-IM Bank will debit the buyer's account and credit the funds to the exporter's account).²²⁵ Thus, the GOC stated that the exporter is the entity that actually receives the money directly from the EX-IM Bank.²²⁶ However, the GOC also stated that it does not maintain the 2013 revisions to the Administrative Measures, and that Commerce's request for a list of all partner/correspondent banks involved in disbursement of funds under the EBC program is not applicable since none of Yama's customers obtained export buyer's credits during the POR.²²⁷

Commerce's understanding of the EBC program changed after Commerce began questioning the GOC's earlier indication that loans provided pursuant to the EBC program were between the GOC and the borrower *only*, essentially a *direct* deposit from the China EX-IM Bank to the foreign buyer. In particular, in the *Silica Fabric Investigation*, Commerce identified that the rules implementing the EBC program appeared to indicate that the China EX-IM Bank's payment was instead disbursed to U.S. customers via an intermediary Chinese bank, thereby contradicting the GOC's response otherwise.²²⁸ Thus, Commerce asked the GOC to provide the same information it provided in the *Silica Fabric Investigation* regarding the rules implementing the EBC program, as well as any other governing documents (discussed above). Commerce also asked a series of questions regarding the method of transferring funds from the China EX-IM Bank to Chinese exporters on behalf of U.S. customers via the credits at issue:

- Please provide original and translated copies of any laws, regulations or other governing documents cited by the GOC in the Export Buyer's Credit Supplemental Questionnaire Response.²²⁹
- Please explain in detail the steps the GOC took to determine that no customer used the Buyer Credit Facility. In your answer, please identify the documents, databases, accounts, *etc.* that were examined to determined there was no use.²³⁰

²²⁴ *Id.*

²²⁵ *Id.* (citing GOC's SQR at 7)

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *Silica Fabric Investigation* IDM at 12.

²²⁹ See Initial Questionnaire.

²³⁰ *Id.*

- Provide a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program.²³¹

This information is necessary and critical to our understanding of the program and for any determination of whether the “manufacture, production, or export” of the company respondent’s merchandise has been subsidized. As noted above, based on the information obtained in the *Silica Fabric Investigation*, Commerce altered its understanding of how the EBC program operated (*i.e.*, how funds were disbursed under the program).²³² Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the China EX-IM Bank.²³³

For instance, it appears that: (1) customers can open loan accounts for disbursements through this program with other banks; (2) the funds are first sent from the China EX-IM Bank to the importer’s account, which could be at the China EX-IM Bank or other banks; and (3) that these funds are then sent to the exporter’s bank account.²³⁴ Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce’s complete understanding of how this program is administrated is necessary to verify claims of non-use.²³⁵ Thus, the GOC’s refusal to provide the 2013 revisions, as well as other requested information, such as key information and documentation pertaining to the application and approval process, and partner/correspondent banks, impeded Commerce’s ability to conduct its investigation of this program and to verify the claims of non-use by Yama’s customers.

This missing information was especially significant because the available record evidence indicates that under the EBC program, credits are not direct transactions from the China EX-IM Bank to the U.S. customers of the respondent exporters; rather, there can be intermediary banks involved,²³⁶ the identities of which the GOC has refused to provide to Commerce. In *Chlorinated Isos Investigation*, based on our understanding of the program at that time, verification of non-use appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans provided directly from the China EX-IM Bank to the U.S. customer.²³⁷ However, based on our more recent understanding of the program in the *Silica Fabric Investigation* discussed above, performing the verification steps to make a determination of whether the “manufacture, production, or export” of the company respondents’ merchandise has been subsidized would therefore require knowing the names of the intermediary banks; it would be their names, not the name “China Ex-Im Bank,” that would appear in the subledgers of the U.S. customers if they received the credits. Commerce addressed this issue in *Aluminum Sheet from China*, stating:

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

²³¹ *Id.*

²³² See Memorandum, “Placing Information on the Record,” dated concurrently with this memorandum.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Chlorinated Isos Investigation* IDM at 15.

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.²³⁸

In other words, there will not necessarily be an account in the name "China Ex-Im Bank" in the books and records (*e.g.*, subledger, tax return, bank statements) of the U.S. customer. Thus, if we cannot verify claims of non-use at the GOC,²³⁹ having a list of the correspondent banks is critical for us to perform verification at the U.S. customers.

Without such information, it would be unreasonably onerous for Commerce to comb through the business activities of the company respondent's customers without any guidance as to how to simplify the process or any guidance as to which loans or banks should be subject to scrutiny as part of a verification for each company. A careful verification of the company respondent's customers' non-use of this program without understanding the identity of these correspondent banks would be extremely difficult, 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.*, by examining whether there were any correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a subset of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin of each loan—*i.e.*, whether the loan was provided from the China EX-IM Bank via an intermediary bank. This would be an extremely onerous undertaking for any company that received more than a small number of loans.

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

This same sample "paper trail" would be necessary even if the GOC provided the list of correspondent banks. For instance, assuming that one of the correspondent banks is HSBC, Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the China EX-IM Bank. In order to do this, Commerce would need to know what underlying documentation to look for in order to determine

²³⁸ See *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 FR 57427 (November 15, 2018) (*Aluminum Sheet from China*), and accompanying IDM at 30.

²³⁹ Commerce no longer attempts to verify usage with the GOC given the inadequate information provided in its questionnaire responses. See *Aluminum Sheet from China* IDM at Comment 2.

whether particular subledger entries for HSBC might actually be China EX-IM Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of China EX-IM Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information. Thus, even were Commerce to attempt to verify the respondent's non-use of the EBC program, notwithstanding its lack of knowledge of which banks are intermediary/correspondent banks, by examining *each* loan received by the respondent's U.S. customers, Commerce still would not be able to verify which loans were normal loans versus EBC program loans due to its lack of understanding of what underlying documentation to expect to review, and whether/how that documentation would indicate China EX-IM Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete.

Even if it were complete and identified China EX-IM Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement. That is why Commerce determined that the information contained in the 2013 Administrative Measures, as well as other information concerning the operation of the EBC program, is required in order to verify usage. However, because the GOC refused to provide the necessary information needed to understand the operation of the program, which is not solely a matter of determining whether there is a financial contribution or whether a subsidy is specific. A complete understanding of the program provides a "roadmap" for the verifiers by which they can conduct an effective verification of usage.²⁴⁰ Thus, Commerce could not *accurately and effectively* verify usage at the company respondent's customers, even were it to attempt the unreasonably onerous examination of each of the customers' loans. To conduct verification of the customers without the information requested from the GOC would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found.

Thus, as we determined in the *Preliminary Results*, we continue to find that Commerce could not verify the non-use of export buyer's credits by Yama's customers.

In prior proceedings in which we have examined this program, before the 2013 amendments, we have found that the China EX-IM Bank, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for Commerce to fully understand the operation of the program which is prerequisite to Commerce's ability to verify the accuracy of the {respondents' claimed non-use of the} program. Because the program changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the China EX-IM Bank limits the provision of export buyer's credits to business contracts exceeding \$2 million, and whether it uses third-party banks to disburse/settle export buyer's credits. Such information is critical to understanding how export buyer's credits flow to and from foreign buyers and the China EX-IM Bank and forms the basis of determining countervailability. Absent the requested information,

²⁴⁰ By analogy, consider attempting to verify whether a company has received a tax exemption without having an adequate understanding of how the underlying tax returns should be completed or where use of the tax exemption might be recorded.

and without a full understanding of the involvement of third-party banks, Yama's (and its customers') claims of non-use are not verifiable.²⁴¹

We continue to find that usage of the EBC program could not be verified at the company respondent in a manner consistent with Commerce's verification methods because Commerce could not confirm usage or claimed non-use by examining books and records which can be reconciled to audited financial statements²⁴² or other documents, such as tax returns. Without the GOC providing bank disbursement information, Commerce could not tie any loan amounts to banks participating in this program in the company respondent's U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents, such as applications, correspondence, emails, *etc.*, is insufficient for Commerce to verify any bank disbursement or loan amount pertaining to the company respondent, its customers, and/or the GOC's participation in the program.²⁴³ Commerce needed to have a better understanding of the program before it could verify it because it did not know what documents to request to review at verification or what information in the books and records to tie to the company respondent's reported information from its questionnaire response. Therefore, we found it necessary to have had this information prior to verification in order to ensure the information we would have received was complete and accurate to fully analyze and calculate the benefits the company respondent received under this program during the course of the POR.

In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the China EX-IM Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China EX-IM Bank via a correspondent bank under the EBC program. This necessary information is missing from the record because such disbursement information is only known by the originating bank, the China EX-IM Bank, which is a government-controlled bank.²⁴⁴ Without cooperation from the China EX-IM Bank and/or the GOC, we cannot know the banks that could have disbursed export buyer's credits to the company respondent's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

Additionally, Commerce finds that it is not possible to determine whether export buyer's credits were received with respect to the export of ribbons because the potential recipients of export buyer's credits are not limited to Yama's customers, as they may be received by other third-party banks and institutions. Again, Commerce would not know what indicia to look for in searching for usage or even what records, databases, or supporting documentation we would need to examine to conduct the verifications (*i.e.*, without a complete set of laws, regulations, application and approval documents, and administrative measures, Commerce would not even know what books and records the China EX-IM Bank maintains in the ordinary course of its operations). Essentially, Commerce is unable to verify in a meaningful manner what little

²⁴¹ See *Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*; 2016, 83 FR 62841 (December 7, 2018), and accompanying PDM at 16-17, unchanged in *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2016, 84 FR 37627 (August 1, 2019).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ 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).

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 requested information regarding this program, including, for example, a complete list of correspondent/partner/intermediate banks.

Commerce finds that required missing information concerning the operation and administration of the EBC program is necessary because it demonstrates why usage information provided by the GOC and Yama cannot be verified and, thus, why there is a gap in the record concerning usage. Commerce has explained how the gap in the record (*i.e.*, missing information concerning the operation of the EBC program) prevents complete and effective verification of the customers' certifications of non-use. A very similar rationale has been accepted by the CIT in a review of *Solar Products from China*. Specifically, in *Trina Solar 2016*,²⁴⁵ given similar facts, the CIT found that Commerce reasonably concluded it could not verify usage of the EBC program at the exporter's facilities absent an adequate explanation from the GOC of the program's operation (*i.e.*, "absent a well-documented understanding of how an exporter would be involved in the application of its customer for an export buyer credit and 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....").²⁴⁶

Moreover, we disagree Yama that Commerce does not need the information requested from the GOC to determine non-use.²⁴⁷ Given the constraints on Commerce resulting from the GOC's failure to provide the necessary information requested for this program, Commerce reasonably determined that it would be unable to examine each and every loan obligation of each of Yama's customers and that, even if such an undertaking were possible, it would be meaningless, because Commerce would have no idea of 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 information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example regarding the VAT and import duty exemptions, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative.²⁴⁸ Therefore, Commerce knows what documents it should see when VAT and import duties are paid and when they are exempted. It knows, in other words, when it has a complete document trace. The GOC, in fact, provides sample documents to help Commerce understand the paper flow under the program. Commerce

²⁴⁵ See *Trina Solar 2016*, 195 F. Supp. 3d at 1355 (citing *Solar Products from China* IDM at 91-94).

²⁴⁶ *Id.*

²⁴⁷ See Yama's Case Brief at 18.

²⁴⁸ 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.")

can also simply ask to see a VAT invoice or a payment to the Chinese customs service to verify whether VAT and duties were charged and paid. By contrast, we simply do not know what to look for when we look at a loan to determine whether the China Ex-Im Bank was involved or whether a given loan was provided under the EBC program, for the reasons explained above.

Thus, we find that the GOC withheld necessary information that was requested of it which resulted in necessary information not being available on the record of this review, and that the GOC significantly impeded the proceeding. Accordingly, Commerce must rely on facts otherwise available in issuing the final results, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(C) of the Act. Specifically, necessary information is not on the record because the GOC withheld information that we requested that was reasonably available to it, which significantly impeded the proceeding. In addition, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act because the GOC did not act to the best of its ability in providing the necessary information to Commerce. Additionally, we continue to find this program provides a financial contribution, is specific, and provides a benefit to Yama within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E) of the Act, respectively. Thus, Commerce's use of an adverse inference when selecting from among the facts otherwise available is reasonable and supported by substantial evidence on the record and we continue to find that the EBC program provides loan support through export buyer's credits.

Finally, with respect to the selection of the AFA rate to apply to this program, we continued to apply our CVD AFA hierarchy to assign a rate of 10.54 percent *ad valorem* to this program. As discussed in the *Preliminary Results*,²⁴⁹ under section 776(d) of the Act, Commerce may use as AFA a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, Commerce is not required for purposes of section 776(c) of the Act, or any other purpose, to estimate what the countervailable subsidy rate would have been if the non-cooperating interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.²⁵⁰

Consistent with section 776(d) of the Act and our established practice, we select the highest calculated rate for the same or similar program as AFA.²⁵¹ When selecting rates in an administrative review, we first determine if there is an identical program from any segment of the proceeding and use the highest calculated rate for the identical program (excluding *de minimis* rates). If no such identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) within the same proceeding and apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates. Where there is no comparable program, we apply the highest calculated rate from any non-company specific program in any CVD case involving the same country, but we do not use a rate from a program if the industry in the proceeding cannot use that program.²⁵²

²⁴⁹ See *Preliminary Results* PDM at 15.

²⁵⁰ See section 776(d)(3) of the Act.

²⁵¹ See, e.g., *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from China*), and accompanying IDM at 13; and *Essar Steel Limited v. United States*, 753 F.3d 1368, 1373-1374 (Fed. Cir. 2014) (upholding "hierarchical methodology for selecting an AFA rate").

²⁵² See *Shrimp from China* IDM at 13-14.

Thus, as discussed in the *Preliminary Results*, because we have not previously calculated an above-*de minimis* rate for the EBC program in this proceeding, and we found no similar/comparable program within this proceeding without a *de minimis* rate, we relied on the rate determined for a comparable program in another CVD proceeding involving China.²⁵³ As set forth above, where no identical or similar program exists within a proceeding, as is the case here, Commerce’s AFA hierarchy directs it to use a calculated rate for any non-company specific program in any CVD case involving the same country. Consistent with our standard methodology and instructed by section 776(d) of the Act, Commerce may use as AFA a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or, if there is no same or similar program, a CVD rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such. We therefore determine that the highest calculated rate for a comparable lending program is the 10.54 percent rate calculated for the preferential policy lending program in *Coated Paper from China*.²⁵⁴ We disagree with Yama that the preferential policy lending program in *Coated Paper from China* is not available to it because such a loan is only available to the coated paper industry. Based on the record of *Coated Paper from China*, there is no evidence to support Yama’s argument that preferential lending in China is only provided to the coated paper industry. We further note that Commerce has found this program to be similar to the EBC program and used this same rate in several other reviews or investigations that do not involve the coated paper industry.²⁵⁵ Specifically, in *Shrimp from China*, Commerce addressed this same argument, explaining that we determine that a lending program is similar to the program at issue based on the treatment of the benefit because the credits function as short-term or medium-term loans.²⁵⁶ We therefore determine that the highest calculated rate for a comparable/similar lending program is the 10.54 percent rate calculated for the preferential policy lending program in *Coated Paper from China*.

Moreover, the CIT in *Changzhou Trina 2018* recognized that section 776(d)(1)(A) of the Act does not require that Commerce select the *most* similar program when selecting among subsidy rates based on facts otherwise available with an adverse inference.²⁵⁷ Rather, the plain text of the Act merely requires Commerce to select a *similar* program.²⁵⁸ Further, the CIT has recognized that Commerce has broad discretion in determining and applying an AFA rate, as long as it

²⁵³ See *Preliminary Results* PDM at 15; see also *Ribbons AR 2016* IDM at Comment 3; and *Ribbons AR 2017* IDM at Comment 2.

²⁵⁴ See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 70201 (November 17, 2010) (*Coated Paper from China*) (revised rate for “Preferential Lending to the Coated Paper Industry” program).

²⁵⁵ See, e.g., *Certain Fabricated Structural Steel from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 5384 (January 30, 2020); and *Truck and Bus Tires from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, In Part*, 82 FR 8606 (January 27, 2017).

²⁵⁶ See *Shrimp from China* IDM at 13.

²⁵⁷ See *Changzhou Trina 2018*, 352 F. Supp. 3d at 1328-29 (upholding Commerce’s selection of an AFA rate from a sufficiently similar program from an earlier administrative review and holding that Commerce needed not use plaintiff’s proffered Export Seller’s Credit Program rate to calculate an AFA rate for the export buyer’s credit program) (emphasis added).

²⁵⁸ *Id.* (emphasis added).

“reasonably balance{s} the objectives of inducing compliance and determining an accurate rate.”²⁵⁹

Therefore, consistent with our AFA hierarchy, we continue to find the preferential policy lending program in *Coated Paper from China* to be similar to the export buyer’s credit program based on the treatment of benefit. As a result, we disagree with Yama that we should instead rely on the export seller’s rate calculated in *Chlorinated Isos*. Consequently, and consistent with our practice in *Ribbons AR 2017*, we continued to assign as the AFA rate for this program the 10.54 percent rate calculated for a similar program in *Coated Paper from China*.²⁶⁰

Comment 4: Application of AFA to Other Subsidy Programs

GOC’s Case Brief

- Commerce’s determination to apply AFA to Yama’s self-reported subsidy programs in the *Preliminary Results* because the GOC failed to report information related to these programs is without legal foundation under both U.S. law and the WTO.
- The GOC argues that the AFA call as to “other subsidies” is contrary to 19 CFR 351.311(a)-(b): (1) because Commerce did not first determine that the discovered “other subsidies” reported by Yama “appeared to provide countervailable subsidies;” and (2) that sufficient time remained to examine them and make a finding before the final determination.²⁶¹
- The GOC also argues that Commerce’s decision is in violation of WTO law because Commerce may not initiate investigations of alleged subsidies on the basis of a simple assertion, unsubstantiated by relevant evidence under Article 11.2 of the SCM Agreement. Nowhere in Commerce’s supplemental questionnaires to the GOC did Commerce explain why these measures appeared to be countervailable subsidies and why it believed there was sufficient time in the ongoing administrative review to include them. Thus, Commerce ignored its obligations under 19 CFR 351.311 to render a finding backed by substantial evidence, rather than one based entirely on AFA.
- Under Article 11.2(ii) of the SCM Agreement, sufficient evidence must be presented to investigating authorities before they may initiate the investigation of another alleged subsidy program.²⁶² The WTO Appellate Body recently upheld this position in *Supercalendered Paper* when it affirmed the panel’s decision that Commerce cannot infer the existence of a countervailable subsidy based on the government’s failure to respond fully to the “other assistance” question.²⁶³
- Commerce’s practice of concluding that a respondent has failed to cooperate when providing a full response to this open-ended inquiry is premature absent Commerce’s initiation of an investigation of these programs, supported by evidence.²⁶⁴ Thus, Commerce should reverse its AFA determination regarding the other subsidy programs Yama reported for the final results.

²⁵⁹ *Id.* (citing *Solarworld Americas, Inc. v. United States*, 229 F. Supp. 3d 1362, 1366 (CIT 2017)).

²⁶⁰ *See Coated Paper from China*, 75 FR at 70201.

²⁶¹ *See* GOC’s Case Brief at 30 (citing section 705 of the Act and 19 CFR 351.311(a)-(b)).

²⁶² *Id.* at 31.

²⁶³ *Id.* at 32 (citing Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, para.5.58, WTO Doc. WT/DS505/AB/R (March 5, 2020) (*Supercalendered Paper*)).

²⁶⁴ *Id.* at 32.

The petitioner did not comment on this issue.

Commerce’s Position: We disagree that Commerce’s request that respondent interested parties report the “other assistance” they received from the government is inconsistent with U.S. law or the United States’ international obligations. With respect to U.S. law, our conduct is in accordance with law and supported by substantial evidence because the “other subsidies” at issue here were reported by Yama, the mandatory respondent in this administrative review, in its initial questionnaire response to the question of whether it received other government assistance. Yama self-reported receiving such subsidies on January 13, 2020, in the early stages of this administrative review.²⁶⁵ Yama’s reporting of other subsidies constitutes factual information pursuant to 19 CFR 351.102(b)(21)(i) which revealed programs that appeared to provide countervailable subsidies with respect to the subject merchandise.

Given that Yama reported these other subsidies early in the review, there was sufficient time for Commerce to make a determination on the countervailability of these “other subsidy” programs before the final results. Moreover, Commerce is not required to explain why these programs appeared to be countervailable subsidies as part of its supplemental questionnaire, as the GOC argues. In any event, the information on the record regarding how these programs were discovered through Yama’s self-reporting of them in its initial questionnaire response, itself supports a finding that the programs appeared to provide countervailable subsidies.

With respect to the GOC’s argument that Commerce’s investigation of these programs is in violation of WTO law, we note that Commerce is conducting this proceeding under U.S. law. However, Commerce has not initiated an investigation of alleged subsidies on the basis of a simple assertion, unsubstantiated by record evidence, because Yama self-reported these subsidies in its questionnaire response. Thus, the existence of these programs is supported by factual information on the record of this administrative review. There is no evidence on the record of this administrative review which calls into question the reliability of Yama’s questionnaire response. Thus, Commerce is satisfied that the investigation of Yama’s self-reported subsidies in this administrative review is consistent with U.S. and WTO law.

Finally, Commerce has previously explained its practice with respect to the application of AFA to governments in the context of CVD proceedings, including in *Ribbons AR 2016*.²⁶⁶ In general, Commerce’s practice is to find, as AFA, that the alleged “other subsidy” programs for which the GOC has failed to provide requested information constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively.²⁶⁷ Therefore, consistent with our practice, where the GOC withheld necessary information and failed to cooperate by not acting to the best of its ability to comply with our requests for information, Commerce continued to apply AFA to the GOC in the final results by finding that the subsidies reported by Yama for the first time in this administrative review provide a financial contribution and are specific.

²⁶⁵ See Yama’s IQR.

²⁶⁶ See *Ribbons AR 2016* IDM at Comment 4; see also *Ribbons AR 2015* IDM at Comment 3.

²⁶⁷ See, e.g., *Citric Acid 2009 AR* IDM at Comment 8; *Pistachios from Iran* IDM at Comment 2; and *Hot-Rolled from India* IDM at Comment 6.

IX. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of this administrative review and the final subsidy rate in the *Federal Register*.

☒

Agree

☐

Disagree

7/22/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance