

**FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND**  
*Clearon Corp. v. United States*  
**Court No. 17-00171, Slip Op. 19-13 (CIT January 25, 2019)**

**I. SUMMARY**

The Department of Commerce (Commerce) prepared these Final Results of Redetermination (Final Results) in accordance with the opinion and remand order of the U.S. Court of International Trade (the Court) in *Clearon Corp. v. United States*, Court No. 17-00171, Slip-Op. 19-13 (CIT January 25, 2019) (*Remand Order*). These Final Results concern the final results of the 2014 administrative review of the countervailing duty (CVD) order on chlorinated isocyanurates (chlorinated isos) from the People’s Republic of China (China).<sup>1</sup> On remand, the Court ordered Commerce to provide additional explanation with respect to its determination to apply facts available with an adverse inference (AFA) to the Export Buyer’s Credit Program in determining whether the program is countervailable for Heze Huayi Chemical Co., Ltd. (Heze Huayi). Specifically, the Court remanded for Commerce to address the following issues:

- (1) Commerce shall explain how the information it sought as to (1) whether China Ex {-} Im {Bank} uses third-party banks to disburse/settle export buyer’s credits; (2) the interest rates the bank used during the POR; (3) whether the bank limits the provision of export buyer’s credits to business contracts exceeding \$ 2 million; and (4) suspected amendments to the internal procedures for the Export Buyer’s Credit Program, is necessary to make a determination of whether the “manufacture, production, or export” of Heze’s merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a). In doing so, Commerce shall tie its inquiries to Heze, its products, and/or its customers;

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<sup>1</sup> See *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review, 2014*, 82 FR 27466 (June 15, 2017) (*Final Results*) and accompanying Issues and Decisions Memorandum (IDM); see also *Chlorinated Isocyanurates from the People’s Republic of China: Countervailing Duty Order*, 79 FR 67424 (November 13, 2014).

- (2) Commerce must either provide an adequate answer relating to why the information it seeks “to fully understand the operation of the program” fills a gap as to Heze’s products and their sale, or rely on the information it has on the record;
- (3) Commerce {shall} comply with the statute by tying its facts available and adverse inference determinations to Heze, its products, or its customers; and
- (4) Commerce {shall} support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with the GOC’s responses to its questionnaires.<sup>2</sup>

As set forth in detail below, Commerce has complied with the *Remand Order* by providing additional explanation in support of its treatment of the Export Buyer’s Credit Program.

## **II. BACKGROUND**

On January 7, 2016, Commerce published a notice of initiation of administrative review covering the period of review (POR) February 4, 2014, through December 31, 2014 (the first administrative review) with respect to three companies.<sup>3</sup> Subsequently, Commerce issued questionnaires to mandatory respondents Hebei Jiheng Chemical Company Co., Ltd (Jiheng) and Heze Huayi and the Government of China (GOC).<sup>4</sup> In the *Preliminary Results*, Commerce determined that it needed additional information from the GOC with respect to the Export Buyer’s Credit Program for both mandatory company respondents, and would analyze the program in a post-preliminary memorandum.<sup>5</sup>

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<sup>2</sup> See *Remand Order* at 32-33.

<sup>3</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 736 (January 7, 2016).

<sup>4</sup> See *Chlorinated Isocyanurates from the People’s Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Preliminary Intent to Rescind Review, in Part; 2014*, 81 FR 89896 (December 13, 2016) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM) at 2.

<sup>5</sup> See *Preliminary Results* and accompanying PDM at 17.

On May 31, 2017, Commerce issued its Post-Preliminary Results Memorandum and determined that the use of AFA was warranted in determining the countervailability of the Export Buyer's Credit Program, because the GOC had failed to provide the necessary information Commerce required to analyze the program.<sup>6</sup> Commerce continued to reach this finding in the *Final Results* published on June 15, 2017. Specifically, Commerce determined, as AFA, that this program meets the financial contribution and specificity requirements of sections 771(5) and 771(5A) of the Tariff Act of 1930, as amended (the Act).<sup>7</sup> Commerce also determined that it could not rely on statements of non-use provided by Jiheng and Heze Huayi and their customers, because of the GOC's failure to provide the necessary information with respect to the operation of the program.<sup>8</sup> Consistent with Commerce's CVD AFA hierarchy,<sup>9</sup> Commerce selected the highest calculated rate for the same or similar program as the AFA rate for this program, in accordance with section 776(d) of the Act and Commerce's established practice. This rate selection issue was sustained by this Court in the *Remand Order*.<sup>10</sup>

On January 25, 2019, the Court remanded the *Final Results* to Commerce to: (1) explain why certain requested information "is necessary to make a determination of whether the "manufacture, production, or export" of Heze's merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a)," and "{i}n doing so, Commerce shall tie its inquiries to Heze, its products, and/or its customers;" (2) "either provide an adequate answer relating to why the information it seeks 'to fully understand the operation of the program' fills a gap as to Heze's products and

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<sup>6</sup> See Memorandum from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Ronald Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, "Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People's Republic of China: Post-Preliminary Results Decision Memorandum" (May 31, 2017) (Post-Preliminary Results Memorandum).

<sup>7</sup> See *Final Results* and accompanying IDM at 13-14.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 14.

<sup>10</sup> See *Remand Order* at 28-33.

their sale, or rely on the information it has on the record;” (3) “comply with the statute by tying its facts available and adverse facts available determinations to Heze, its products, or its customers;” and (4) “support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with the GOC’s responses to its questionnaires.”<sup>11</sup>

On May 2, 2019, Commerce issued the Draft Results. Commerce received timely comments from Heze and the petitioners on May 7, 2017 and May 9, 2019, respectively.<sup>12</sup>

### III. ANALYSIS

#### Solar Cells Initial Investigation of Export Buyer’s Credit Program

Commerce first investigated and countervailed the Export Buyer’s Credit Program in the 2012 investigation of solar cells.<sup>13</sup> Our initiation was based on, among other information, the China Export-Import Bank’s (China Ex-Im Bank) 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.”<sup>14</sup> Commerce initially asked the GOC to complete the “standard questions appendix” for the Export Buyer’s Credit Program. The appendix requests, among other information, a description of the program and its purpose, a description of the types of relevant

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<sup>11</sup> See *Remand Order* at 32-33.

<sup>12</sup> See Heze’s Draft Remand Comments, “Chlorinated Isocyanurates from the People’s Republic of China from the People’s Republic of China: Comment on Draft Remand Determination,” dated May 7, 2019 (Heze Huayi’s Remand Comments); see also, the Petitioner’s Draft Remand Comments, “Chlorinated Isocyanurates from the People’s Republic of China: Comments on Draft Remand Results,” dated May 9, 2019 (the petitioner’s Remand Comments).

<sup>13</sup> 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*) and accompanying IDM at 9 and Comment 18. Commerce’s determination with respect to the Export Buyer’s Credit Program was initially challenged but the case was dismissed. *Hanwha Solarone (Qidong) Co., Ltd. et al. v. United States*, CIT Court No. 13-00013.

<sup>14</sup> See *Solar Cells* and accompanying IDM at 59.

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.<sup>15</sup>

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.”<sup>16</sup> In response to a request from Commerce for information concerning the operation of the Export Buyer’s Credit 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.”<sup>17</sup> Although asked, the GOC provided no additional information concerning exactly how an exporter’s financial and foreign exchange matters would be affected. Commerce then gave the GOC another opportunity to provide the information requested.<sup>18</sup> 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.<sup>19</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 60.

<sup>18</sup> *Id.* at 60-61.

<sup>19</sup> *Id.* at 61.

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.<sup>20</sup> Additionally, Commerce concluded that even if the respondent company might have some knowledge of loans provided to its customers through its involvement in the application process, such information is not of the type Commerce would examine to verify that the claim of non-use at issue was complete and accurate:

{E}ven if the {respondent exporter} might have been involved in, or might have received some notification of, its customer's application for receiving such export credits, such information is not the type of information that the Department needs to examine in order to verify that the information is complete and accurate. For verification purposes, the Department must be able to test books and records in order to assess whether the questionnaire responses are complete and accurate, which means that we need to tie information to audited financial statements, as well as to review supporting documentation for individual loans, grants, rebates, etc. If all a company received was a notification that its buyers received the export credits, or if it received copies of completed forms and approval letters, we have no way of establishing the completeness of the record because the information cannot be tied to the financial statements. Likewise, if an exporter informs the Department that it has no binder (because its customers have never applied for export buyer's credits), there is no way of confirming that statement unless the facts are reflected in the books and records of the respondent exporter.<sup>21</sup>

Essentially, Commerce concluded that usage of the program could not be confirmed at the respondent exporters in a manner consistent with its verification methods,<sup>22</sup> which are primarily

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 61-62.

<sup>22</sup> Commerce provided a similar explanation in the 2014 investigation of solar products from China. See *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products*) and accompanying IDM at 93. This was affirmed by the Court in *Changzhou Trina Solar Energy Co. v. United States*, 195 F. Supp. 3d 1334 (CIT 2016) (*Changzhou I*). In *Changzhou Trina Solar Energy Co. v. United*

the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, or other documents, such as tax returns, that provide a credible and complete picture of a company's financial activity for the period under examination. A review of ancillary documents, such as applications, correspondence, emails, etc., provides no assurance to Commerce that it has seen all relevant information.<sup>23</sup>

This “completeness” concept is an essential element of Commerce’s verification methodology. If Commerce were attempting to confirm whether a respondent exporter had received any loans from a state-owned bank, for example, its first step would be to examine the company’s balance sheets to derive the exact amount of lending outstanding during the period of examination. Second, once that figure was confirmed, Commerce would then begin examining subledgers or bank statements providing the details of all individual loans. Because Commerce could tie the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, it could be assured that the subledgers were complete and that it

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*States*, Consol. Court No. 17-00198, Slip Op. 18-166, at 9-10 (CIT November 30, 2018) (*Changzhou II*), the Court noted that the explanation from *Solar Products* constituted “detailed reasoning for why documentation from the GOC was necessary” to verify non-use. However, the Court found that the 2014 review of solar cells from China at issue in *Changzhou II* was distinguishable because the respondents submitted customer certifications of non-use, and Commerce had “failed to show why a full understanding” of the program was necessary to verify non-use. *Id.* at 10 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017), amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 46760 (October 6, 2017), and accompanying IDM). The Court in *Guizhou Tyre Co., Ltd., et al. v. United States*, Consol Ct. No. 17-00101, Slip Op. 18-140 (CIT October 17, 2018) reached a similar conclusion concerning the 2014 review of tires from China. See *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

<sup>23</sup> The Court agreed with Commerce in *RZBC Group*, following a remand, finding that Commerce could not verify non-use of the program by examining the respondent-exporter’s audited financial statements or other books and records because record evidence demonstrated that the program terms were ambiguous. See *RZBC Group Shareholding Co., Ltd. et al. v. United States*, 222 F. Supp. 3d 1196, 1201-02 (CIT 2017) (*RZBC Group*) (concerning *Citric Acid and Certain Citrate Salts from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Acid 2012*), and accompanying IDM at Comment 6).

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 Export Buyer’s Credit Program lending in respondent exporters’ books and records that could be tied to financial statements, tax returns, etc. Therefore, Commerce concluded in that investigation that it could not verify usage of the program at the respondent exporters and instead attempted verification of usage of the program at the China Ex-Im Bank itself because it “possessed the supporting records needed to verify the accuracy of the reported non-use of the Export Buyer’s Credit Program {and} would have complete records of all recipients of export buyer’s credits.” We noted our belief that “{s}uch records could be tested by the Department to check whether the U.S. customers of the company respondents had received export buyer’s credits, and such records could then be tied to the {China} Ex-Im Bank’s financial statements.”<sup>24</sup> However, the GOC refused to allow Commerce to query the databases and records of the China Ex-Im Bank.<sup>25</sup> Furthermore, there was no information on the record of the solar cells investigation from the respondent exporters’ customers.

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<sup>24</sup> See *Solar Cells* and accompanying IDM at 62.

<sup>25</sup> *Id.*



*Chlorinated Isos Investigation of Export Buyer's Credit Program*

Two years later, in the investigation of chlorinated isos,<sup>26</sup> respondents submitted certified statements from all customers claiming that they had not used the Export Buyer's Credit 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, was under the impression that the Export Buyer's Credit 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-usage appeared to be possible through examining the financial statements and books and records of the U.S. customers for evidence of loans provided directly from the China Ex-Im Bank to the U.S. customer pursuant to verification steps similar to the ones described above. As noted 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 ExIm, ... {w}e conducted verification . . . in the United States of the customers of {the respondents}, and confirmed through an examination of each selected customers' accounting and financial records that no loans were received under this program."<sup>27</sup>

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<sup>26</sup> See *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) and accompanying IDM (*Chloro Isos Investigation*).

<sup>27</sup> *Id.* at 15.

2013 Amendments to the Export Buyer's Credit Program

Our understanding of the operation of the Export Buyer's Credit Program began to change, however, after the chlorinated isos investigation had been completed in September 2014. First, during the administrative review of citric salts,<sup>28</sup> we learned for the first time at verification in October 2014 that the rules for administering the program had been revised in 2013,<sup>29</sup> and sought further information from the GOC in subsequent proceedings.

In the silica fabric investigation conducted in 2016-2017, we asked the GOC about these changes.<sup>30</sup> In response, the GOC stated that there were three sets of relevant documents pertaining to the Export Buyer's Credit Program: (1) "Implementing Rules for the Export Buyer's Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on September 11, 2005 (referred to as "*1995 Implementation Rules*"); (2) "Rules Governing Export Buyers' Credit of the Export-Import Bank of China" which were issued by the Export-Import Bank of China on November 20, 2000 (referred to as "*2000 Rules Governing Export Buyers' Credit*" or "*Administrative Measures*"); and (3) 2013 internal guidelines of the Export-Import Bank of China.<sup>31</sup> According to the GOC, "{t}he Export-Import Bank of China

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<sup>28</sup> See *Citric Acid 2012*, and accompanying 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.")

<sup>29</sup> See Memorandum, "Administrative Review of Countervailing Duty Order on Citric and Certain Citrate Salts; Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China," dated October 7, 2014, at 2 (noting "EXIM officials indicated the Administrative Measures was revised in 2013 and eliminated the {two million dollar} contract minimum") (public version) (Citric Acid Verification Report) (placed on the record of this remand in "Memorandum: Placing Information on the Record," dated concurrently with the Draft Results (New Information Memorandum)).

<sup>30</sup> See Letter from the GOC, "Re: Certain Amorphous Silica Fabric from the People's Republic of China; CVD Investigation; GOC 7th Supplemental Response," dated September 6, 2016, at 4-5 (GOC's September 6, 2016, Silica Fabric Questionnaire Response) (provided by the GOC in GOC's Supplemental Response, "GOC Third Supplemental Questionnaire Response: First Administrative Review of the Countervailing Duty Order on Certain Chlorinated Isocyanurates from the People's Republic of China (C-570-991)," dated February 8, 2017 (GOC First Export Buyer's Credit Response) at Exhibit S3-1).

<sup>31</sup> *Id.*

has confirmed to the GOC that its 2013 guidelines are internal to the bank, non-public, and not available for release.”<sup>32</sup> The GOC further stated that “those internal guidelines do not formally repeal or replace the provisions of the {*Administrative Measures*} which remain in effect.”<sup>33</sup>

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

Through its response to the Department’s supplemental questionnaire, the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for the Department to analyze how the program functions. We requested the 2013 *Administrative Measures* revisions (2013 Revisions) because information on the record of this proceeding indicated that the 2013 Revisions affected important program changes. For example, the 2013 Revisions may have eliminated the USD 2 million contract minimum associated with this lending program. By refusing to provide the requested information, and instead asking the Department to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyers’ Credit remained in effect, the GOC impeded the Department’s understanding of how this program operates and how it can be verified.

Additional information in the GOC’s supplemental questionnaire response also indicated that the loans associated with this program are not limited to direct disbursements through the EX-IM Bank. Specifically, the GOC stated that customers can open loan accounts for disbursements through this program with other banks. The funds are first sent from the EX-IM Bank to the importer’s account, which could be at the EX-IM Bank or other banks, and that these funds are then sent to the exporter’s bank account. Given the complicated structure of loan disbursements for this program, the Department’s complete understanding of how this program is administrated is necessary. Thus, the GOC’s refusal to provide the most current 2013 Revisions, which provide internal guidelines for how this program is administrated by the EXIM Bank, impeded the Department’s ability to conduct its investigation of this program.<sup>34</sup>

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.”<sup>35</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 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 Inv*) and accompanying IDM at 12 (citing Citric Acid Verification Report and GOC’s September 6, 2016, Silica Fabric Questionnaire Response).

<sup>35</sup> *Id.* at 62.

Additionally, we explained that “we now have information on the record that demonstrates the GOC updated certain measures of the program, but the GOC refused to provide the updated measures {,} and “{b}ecause the GOC withheld critical information regarding this program, we are unable to determine how the program now operates, and, thus, we cannot verify ACIT’s declarations as submitted.”<sup>36</sup>

### The Underlying Administrative Review

In the underlying first administrative review of chlorinated isos conducted in 2016-2017 (reviewing the period January 1, 2014 through December 31, 2014), our initial questionnaire requested that the GOC submit any revisions to the program and to identify whether the respondent companies used the program.<sup>37</sup> The GOC reported that “{n}one of the respondents under review or their reported cross-owned companies used the alleged program during the POR.”<sup>38</sup> Subsequently, we issued a supplemental questionnaire asking for governing documents related to the program.<sup>39</sup> In response, the GOC provided the 1995 Implementation Rules and the 2000 Rules Governing Export Buyers’ Credit which were identified in its silica fabrics September 6, 2016, questionnaire response, but not the 2013 revisions.<sup>40</sup> Additionally, Heze Huayi initially reported that its three U.S. customers did not use the Export Buyer’s Credit Program during the POR.<sup>41</sup> To support its claim, Heze Huayi stated that its customers did not

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<sup>36</sup> *Id.*

<sup>37</sup> See Letter to the GOC, “Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People’s Republic of China: Countervailing Duty Questionnaire,” dated April 1, 2016, at II-3.

<sup>38</sup> See GOC’s May 16, 2016 Response at 7.

<sup>39</sup> See Letter to GOC, “Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People’s Republic of China: Supplemental Questionnaire,” dated February 1, 2017 (First Export Buyer’s Credit Supplemental), at 4.

<sup>40</sup> See GOC First Export Buyer’s Credit Response at Exhibit S3-2 and S3-3.

<sup>41</sup> See Heze Huayi’s Initial Questionnaire Response, “Chlorinated Isocyanurates from the People’s Republic of China: Section III Questionnaire Response,” dated May 16, 2016 (Heze Huayi’s Initial Questionnaire Response) at 10-11.

meet the requirements for eligibility of the program, providing the 2000 Rules Government Export Buyers' Credit provided by the GOC in its response, and an unlabeled flowchart depicting its understanding of the process of obtaining loans under the program.<sup>42</sup> Heze Huayi also provided declarations from its U.S. customers that they did not obtain financing through the program.<sup>43</sup> Heze Huayi provided a similar response in its supplemental questionnaire response.<sup>44</sup>

We continue to find that the GOC's responses with respect to the Export Buyer's Credit Program are deficient in two key respects.

First, as we found in the silica fabric investigation, we continue to find that the GOC has refused to provide the requested information or any information concerning the 2013 program revision, which is necessary for Commerce to analyze how the program functions. We requested all documents related to revisions to the program, including the 2013 revisions, because our prior knowledge of this program (as established in the Citric Acid Verification Report on the record of this segment of the proceeding) demonstrates that the 2013 revisions affected important program changes. For example, in the Citric Acid Verification Report we stated that "EXIM officials indicated the Administrative Measures was revised in 2013 and eliminated the {USD 2 million} contract minimum."<sup>45</sup> We, therefore, sought the 2013 revisions in this proceeding to review this change in program requirements and any other revisions. Specifically, the 2013 revisions (which the GOC refers to as "internal guidelines") appear to be significant and have impacted a major condition in the provision of loans under the program.

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<sup>42</sup> *Id.* at 10-11 and Exhibits 7 and 8.

<sup>43</sup> *Id.* at Exhibit 9.

<sup>44</sup> See Letter from Heze Huayi, "Chlorinated Isocyanurates from the People's Republic of China: Third Supplemental Questionnaire Response," dated February 15, 2017 (Heze Huayi's Export Buyer's Credit Response) at Exhibit SQ3-2.

<sup>45</sup> See Citric Acid Verification Report at 2 (provided in the New Information Memorandum).

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

Second, Commerce’s understanding of the Export Buyer’s Credit Program changed after Commerce began questioning the GOC’s earlier indication that loans provided pursuant to the Export Buyer’s Credit 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 Export Buyer’s Credit 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.<sup>46</sup> Thus, Commerce asked the GOC to provide the same information it provided in the silica fabrics investigation regarding the rules implementing the Export Buyer’s Credit Program,

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<sup>46</sup> See *Silica Fabric Inv* and accompanying IDM at 12.

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:

- Provide a sample buyer’s credit application along with the application’s approval and the agreement between the respondent’s customer and the bank, which establish the terms of the assistance provided under the facility.<sup>47</sup>
- Report the interest rate(s) during the POR for the Buyer Credit Facility for all types of financing provided, for all loan terms (*e.g.*, loans ranging from 0 to 180 days and 180 to 270 days, etc.), and all denominations (*i.e.*, RMB and foreign currency). Please provide documentation to support your answer.<sup>48</sup>
- Provide a list of all partner/correspondent bank involved in disbursement of funds under the Export Buyer’s Credit Program.<sup>49</sup>

Although the GOC provided certain of the requested implementation rules (discussed above), the GOC provided non-responsive answers to Commerce’s specific questions, stating in response to the first question: “Not applicable. None of the respondents’ U.S customers used Chine Ex-Im’s Export Buyer’s Credit program and, thus, there are no loans or applications/approvals to report.”<sup>50</sup> The GOC stated in response to the second question: “Not applicable. None of the respondents’ U.S customers used Chine Ex-Im’s Export Buyer’s Credit program and, thus, there are no relevant interest rates to report.”<sup>51</sup> The GOC stated in response to the third question: “The GOC is unable to provide the information requested because China Ex-Im has determined

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<sup>47</sup> See First Export Buyer’s Credit Supplemental at 3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 4.

<sup>50</sup> See GOC First Export Buyer’s Credit Response at 1.

<sup>51</sup> *Id.* at 1-2.

that none of the respondent companies' customers received Export Buyer's Credits or otherwise used this program during the POR."<sup>52</sup> We followed up with a supplemental questionnaire,<sup>53</sup> and the GOC again refused to provide the requested information, reiterating non-use of the program by the respondent's U.S. customers.<sup>54</sup>

We continue to find the GOC's responses deficient and unresponsive to our request for necessary information with respect to the operation of the program. This information is necessary and critical to our understanding of the program and for any determination of whether the "manufacture, production, or export" of Heze Huayi's merchandise has been subsidized. As noted above, information on the record of this segment of this proceeding altered Commerce's understanding of how the Export Buyer's Credit Program operated (*i.e.*, how funds were disbursed under the program) from Commerce's understanding of this same program in the chlorinated isos investigation. Specifically, the record indicates that the loans associated with this program are not limited to direct disbursements through the China Ex-Im Bank.<sup>55</sup> For instance, it appears 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 China Ex-Im Bank or other banks; and that these funds are then sent to the exporter's bank account.<sup>56</sup> Given the complicated structure of loan disbursements which can involve various banks for this program, Commerce's complete understanding of how

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<sup>52</sup> *Id.* at 2.

<sup>53</sup> See Letter to GOC, "Countervailing Duty Administrative Review of Chlorinated Isocyanurates from the People's Republic of China: Supplemental Questionnaire," dated April 28, 2017 (Second Export Buyer's Credit Supplemental) at 3.

<sup>54</sup> See GOC's Supplemental Response, "GOC EXIM Supplemental Questionnaire Response: First Administrative Review of the Countervailing Duty Order on Certain Chlorinated Isocyanurates from the People's Republic of China (C-570-991)," dated May 3, 2017 (GOC Second Export Buyer's Credit Response) at 1-2.

<sup>55</sup> See GOC's September 6, 2016, Silica Fabric Questionnaire Response at 4-5.

<sup>56</sup> *Id.*



this program is administrated is necessary to verify claims of non-use.<sup>57</sup> Thus, the GOC's refusal to provide the 2013 revisions, which provide internal guidelines for how this program is administrated by the China Ex-Im Bank, as well as other requested information, such as key information and documentation pertaining to the application and approval process, interest rates, and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to verify the claims of non-use by Heze Huayi's customers.

This missing information was especially significant because the available record evidence indicates that the credits were *not direct* transactions from the China Ex-Im Bank to U.S. customers of the respondent exporters, but rather, that there were intermediary banks involved, the identities of which were unknown to Commerce. As noted above, in the chlorinated isos investigation, based on our understanding of the program at that time, verification of non-usage appeared to be possible through examining the financial statements and books and records of U.S. customers for evidence of loans *provided directly from the China Ex-Im Bank to the U.S. customer* pursuant to verification steps similar to the ones described above.<sup>58</sup> However, based on our more recent understanding of the program in this segment of the proceeding discussed above, performing the verification steps outlined above to make a determination of whether the "manufacture, production, or export" of Heze Huayi's 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. As explained recently in the investigation of aluminum sheet:

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

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 15.

disbursements through this program with other banks, whereby the funds are first sent to . . . the importer’s account, which could be at the China Ex-Im Bank or other banks, and that these funds are then sent to the exporter’s bank account.<sup>59</sup>

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,<sup>60</sup> having a list of the correspondent banks is critical for us to perform verification at the U.S. customers.

Furthermore, although Heze Huayi reported that its U.S. customers did not use the program,<sup>61</sup> when we asked Heze Huayi to explain in detail the steps it took to determine non-use of the Export Buyer’s Credit Program for its customers, its responses hinged on its assertions with respect to the operation of the program – information which Commerce needed and sought directly from the GOC. According to Heze Huayi, its customers “do not meet the criteria of the Buyer’s Credit program” for various reasons, including:

To apply for the buyer’s credit, the value of the commercial contract must be more than USD 2 million. None of Heze Huayi’s purchase orders/sales contract reached such a large amount....

{A}ccording to the mechanism of the buyer’s credit program, the loan from China Ex-Im, if any, would be directly released to the Chinese exporter, *i.e.* Heze Huayi, as a kind of proceeds payment. Heze Huayi went through its payments and account receivables and confirmed that it has never received any funds from China Ex-Im. Rather, Heze Huayi received the payments from the customer directly. This is another way to demonstrate non-use of this program by Heze Huayi’s customers in the POR.<sup>62</sup>

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<sup>59</sup> 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), and accompanying IDM at 30.

<sup>60</sup> Commerce no longer attempts to verify usage with the GOC given the inadequate information provided in its questionnaire responses, in particular, the GOC’s refusal to provide the 2013 revisions to the administrative rules. *Id.* at Comment 2.

<sup>61</sup> See Heze Huayi’s Export Credit Response.

<sup>62</sup> See Heze Huayi’s Export Buyer’s Credit Response at 2-3.

However, Heze Huayi's assertion that the value of commercial contracts is limited to USD 2 million is contradicted by evidence that the 2013 amendments may have eliminated this minimum requirement,<sup>63</sup> and has not been addressed by the GOC. Likewise, Heze Huayi's assertion that the payments would be issued directly from China Ex-Im Bank is contradicted by evidence that third party banks may be involved in the disbursement of funds,<sup>64</sup> and also has not been addressed by the GOC. Thus, the explanation and evidence (or lack thereof) on the record from both the GOC and Heze Huayi has failed to support the claim that the program was not used.

Without such explanation and evidence, it would be unreasonably onerous for Commerce to comb through the business activities of Heze Huayi's customers without any guidance as to how to simplify the process or any guidance as to which loans or banks to subject to scrutiny for each company. A careful verification of Heze Huayi's customers' non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Because it does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (no correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a sub-set of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for *all* entries from the subledger *to attempt* to confirm the origin

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<sup>63</sup> See Citric Acid Verification Report at 2 (provided in the New Information Memorandum).

<sup>64</sup> See *Silica Fabric Inv* and accompanying IDM at 12 (citing GOC's September 6, 2016, Silica Fabric Questionnaire Response).

of each loan—*i.e.*, whether the loan was provided from the China Ex-Im Bank via an intermediary bank. This would be an unreasonably onerous undertaking for any company that received more than a small number of loans.

Furthermore, the third step of Commerce’s typical non-use verification procedures (*i.e.*, selecting *specific* entries from the subledger and requesting to see underlying documentation, such as applications and loan agreements) likewise would be of no value. This step might serve merely to confirm whether banks were correctly identified in the subledger – not necessarily whether those banks were correspondent banks participating in the Export Buyer’s Credit Program. This is especially true given the GOC’s failure to provide other requested information, such as the 2013 revisions, a sample application, and other documents making up the “paper trail” of a direct or indirect export credit from the China Ex-Im Bank, 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 whether particular subledger entries for HSBC might actually be Ex-Im Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of 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 respondents’ non-use of the Export Buyer’s Credit Program notwithstanding its lack of knowledge of which banks are

intermediary/correspondent banks by examining *each* loan received by *each* of the respondents' U.S. customers, Commerce still would not be able to verify which loans were normal loans versus Export Buyer's Credit Program loans due to its lack of understanding of what underlying documentation to expect, and whether/how that documentation would indicate China Ex-Im Bank involvement. In effect, companies could provide Commerce with incomplete loan documentation without Commerce understanding that the loan documentation was incomplete. Even if it were complete and identified China Ex-Im Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

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

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

The GOC responses in this review essentially mirror the GOC responses in solar cells and tires<sup>65</sup> from China proceedings. Although Commerce requested information about the amendments to and the current inner workings of the program as it currently administered, the GOC provided no additional information concerning exactly how an exporter's financial foreign exchange matters would be affected.<sup>66</sup> Based on the GOC's responses, Commerce understood that under this program loans were provided either directly from the China Ex-Im Bank to the borrowers (*i.e.*, a respondent's customers), or through an intermediary third party bank, and that a respondent might have knowledge of loans provided to its customers through its involvement in the application process. Commerce gave the GOC another opportunity to provide the information requested.<sup>67</sup> The GOC once again refused to provide the sample application documentation or any regulations or manuals governing the approval process, providing instead its statement that none of the respondent companies or their foreign buyers had used the export buyer's credits from the China Ex-Im Bank.<sup>68</sup>

According to the GOC, "None of the respondent's customers used Export Buyer's Credits."<sup>69</sup> The GOC explained that to make this determination, China Ex-Im (1) obtained a list of all U.S. customers of each respondent, (2) logged into its credit record database that contains users of its Export Buyer's and Seller's Credit Programs, (3) entered the name of each customer on the respondents' list into the database, (4) ensured that the customer names were entered correctly, (5) reviewed the outcome of the database search, and (6) confirmed that no credit was issued to any company on the list.<sup>70</sup> The GOC's response indicated that exporters would know

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<sup>65</sup> See *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM.

<sup>66</sup> See First Export Buyer's Credit Supplemental; *see also* Second Export Buyer's Credit Supplemental.

<sup>67</sup> *Id.*

<sup>68</sup> See GOC First Export Buyer's Credit Response; *see also* GOC Second Export Buyer's Credit Response.

<sup>69</sup> See GOC First Export Buyer's Credit Response.

<sup>70</sup> *Id.*

whether there was an interaction between the China Ex-Im Bank and the borrowers (*i.e.*, the respondents' U.S. customers, who were not participating in the proceeding) but neither Heze Huayi nor the GOC provided enough information for Commerce to understand this interaction or how it was reflected, if at all, in Heze Huayi's or its customers' books and records. As determined in the *Final Results*, we continue to find that Commerce could not verify non-use or export buyer's credits relying solely on Heze Huayi. Furthermore, the lack of information concerning the operation of the Export Buyer's Credit Program prevents an accurate assessment of usage at verification:

In prior proceedings in which we have examine this program, we have found that the China Ex-Im, as the lender, is the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of the program which is prerequisite to the program. As we noted in the Post-Preliminary Results, the GOC has not provided the requested information and documentation necessary for the Department to develop a complete understanding of this program, *i.e.*, the use of third-party banks to disburse/settle export buyer's credits, information on the interest rates China Ex-Im established during the POR, and information on the size of the business contracts for which export buyer's credits flow from foreign buyers and China Ex-Im.<sup>71</sup>

We continue to find that usage of the Export Buyer's Credit Program could not be verified at Heze Huayi's 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 statements,<sup>72</sup> 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 Heze Huayi's U.S. customers' books and records, and therefore could not verify the claims of non-use. A review of ancillary documents,

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<sup>71</sup> See *Final Results* and accompanying IDM at 13.

<sup>72</sup> *Id.*

such as applications, the interest rates used during the POR, correspondence, emails, *etc.*, are insufficient for Commerce to verify any bank disbursement or loan amount pertaining to Heze Huayi's, its customers, and/or the GOC's participation in the program.<sup>73</sup> 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 respondent's, such as Heze Huayi, reported information from its questionnaire responses. Additionally, we note that the requested information such as the interest rates available to Heze Huayi's customers during the POR is not only necessary for understanding the program during verification but also necessary for calculating a benefit. 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 Heze Huayi 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 Export Buyer's Credit 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.<sup>74</sup> 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 Heze Huayi's customers. Therefore, there are gaps in the record because the GOC refused to provide the requisite disbursement information.

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<sup>73</sup> *Id.*

<sup>74</sup> See *Countervailing Duty Investigation of 1,1,1,2 Tetrafluoroethane From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 24, 2014) and accompanying IDM at 31 (confirming that the GOC solely owns the China Ex-Im Bank).



Thus, were Commerce even to attempt to verify respondents' U.S. customers, Commerce would still not be able to verify which loans were normal loans versus Export Buyer's Credit Program loans due to its lack of understanding of the underlying documentation, and whether/how that documentation would indicate China Ex-Im Bank involvement pertaining to this program. In effect, companies could provide Commerce with incomplete loan documentation with respect to this program without Commerce even understanding that the information provided was incomplete. Even if it were complete and identified China Ex-Im Bank involvement, without a thorough understanding of the program, Commerce might not recognize indicia of such involvement.

For the reasons explained above, Commerce continues to conclude that the application of facts available with an adverse inference is warranted regarding this program pursuant to sections 776(a)(1) and (2) of the Act. First, the record is lacking necessary information concerning the use of the Export Buyer's Credit Program, warranting the application of facts available pursuant to section 776(a)(1) of the Act. Next, although Heze Huayi provided customer certifications that benefits were not received under this program, this is not sufficient information to determine non-use in this review because of the changes to the program since the previous segment. In this review, the GOC refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes to the program, and thus the GOC withheld information requested by Commerce pursuant to 776(a)(2)(A) of the Act. As a result, the GOC significantly impeded the review pursuant to section 776(a)(2)(C) of the Act. Therefore, Commerce determines that application of facts available to Heze Huayi is warranted pursuant to sections 776(a)(1) and (2)(A), (C) of the Act.

In addition, section 776(b) of the Act provides that Commerce may use an adverse inference when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In this review, as noted above, the GOC failed to cooperate to the best of its ability to comply with Commerce's request for information because it refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes. As a result, the application of an adverse inference to facts available to Heze Huyai is warranted pursuant to section 776(b)(2) of the Act. As recognized by the Court of Appeals for the Federal Circuit (Federal Circuit), Commerce may allow an adverse inference against a government to impact an otherwise cooperative respondent, when the government is the holder of the missing necessary information, as is the case here.<sup>75</sup>

#### *Responses to Court's Remand Order*

In its *Remand Order*, the Court requested that Commerce to address four issues:

- (1) Commerce shall explain how the information it sought as to (1) whether China Ex{-}Im {Bank} uses third-party banks to disburse/settle export buyer's credits; (2) the interest rates the bank used during the POR; (3) whether the bank limits the provision of export buyer's credits to business contracts exceeding \$2 million; and (4) suspected amendments to the internal procedures for the Export Buyer's Credit Program, is necessary to make a determination of whether the "manufacture, production, or export" of Heze's merchandise has been subsidized, pursuant to 19 U.S.C. § 1671(a). In doing so, Commerce shall tie its inquiries to Heze, its products, and/or its customers;
- (2) Commerce must either provide an adequate answer relating to why the information it seeks "to fully understand the operation of the program" fills a gap as to Heze's products and their sale, or rely on the information it has on the record;
- (3) Commerce {shall} comply with the statute by tying its facts available and adverse

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<sup>75</sup> See *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010) (*KYD*) (finding that a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper); see also *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365 (Fed. Cir. 2014) (*Fine Furniture*) (affirming Commerce's application of adverse inferences when the government of China did not provide requested information despite the respondents' cooperation).

inference determinations to Heze, its products, or its customers; and

- (4) Commerce {shall} support with substantial evidence its necessary conclusion that there were gaps in the record evidence that could only be filled with the GOC's responses to its questionnaires.<sup>76</sup>

With respect to the first issue, the Court ordered Commerce to explain why it needs to know answers to the following four questions: (1) which banks are involved in the disbursement of the program; (2) what are the interest rates; (3) whether the program is limited to specified business contracts; and (4) what are the amendments to the program—as they specifically relate to Heze Huayi in this review. As discussed above, knowing the bank that disbursed the loan, which may have changed with the amendments, is necessary information because Commerce needs to know which bank names to look for in the books and records during verification of Heze Huayi's customers. Without having knowledge of the banks that disburse funds or how those funds are disbursed to Heze Huayi's customers, Commerce is unable to decipher which loans could be attributed to receiving export buyer's credits. Thus, a thorough verification of Heze Huayi's customers' non-use of this program without understanding the identity of these correspondent banks would be unreasonably onerous, if not impossible. Without knowing the identities of these banks, Commerce's second step of its typical non-use verification procedure (*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 (*e.g.*, no correspondent banks in the subledger). Nor could this second step of Commerce's typical non-use verification procedure be used to narrow down the company's lending to a subset of loans likely to be the export buyer's credit (*i.e.*, loans from the corresponding banks). Furthermore, the third step of Commerce's typical non-use verification procedures (*i.e.*, selecting

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<sup>76</sup> See *Remand Order* at 32-33.

*specific* entries from the subledger and requesting to see underlying documentation such as applications and loan agreements) likewise would be of no value without knowing which banks disburse the loans. 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 Export Buyer’s Credit Program. This is especially true given the GOC’s failure to provide other requested information, such as the 2013 revisions, a sample application, and other documents making up the “paper trail” of a direct or indirect export credit from the China Ex-Im Bank. In addition, as noted above, knowing the interest rates for Heze Huayi’s customers during the POR is not only necessary for verifying whether a loan was received under this program by matching the reported interest rate for this program with interest rates in the books and records of Heze Huayi’s customers during verification, but is also necessary for calculating a benefit.

Similarly, knowing the size of the business contracts for which export buyer’s credits flow from foreign buyers and the China Ex-Im Bank, or other Chinese banks, is necessary to narrow the scope of the verification and identify which export buyer’s credit loans are being examined during verification proceedings. A thorough understanding of the extent of the export buyer’s credits afforded to Heze Huayi’s customers would have allowed Commerce to further determine whether a loan was provided under the Export Buyer’s Credit Program. Thus, verifying non-use of the programs without knowledge of the correspondent banks and the limits on the size of business contracts that would be subject to export buyer’s credits would require Commerce to view the underlying documentation for all entries from the subledger *to attempt* to confirm the origin of each loan (*i.e.*, whether the loan was provided from the China Ex-Im Bank via an intermediary bank). This would be an unreasonably onerous undertaking for any

company. Therefore, answers to all these questions make up the framework which is used at verification, so Commerce knows which documents to request for review and then what information to use for confirming non-use in the books and records (*i.e.*, which bank names, interest rate amounts, *etc.*). Without this information, Commerce lacks the requisite roadmap for verification. Specifically, answers to these questions were necessary before Commerce could verify Heze Huayi's U.S. customers' claims of non-use in this review.

With respect to the second and fourth issues, the Court ordered Commerce to provide an adequate answer, supported by the record, as to why it needed the requested information to fill a gap as to Heze Huayi's products and their sale. These issues have the same underlying rationale as the first issue in that Commerce does not know what to look for in Heze Huayi's books and records if it does not know the bank names or interest rates. This program has gaps on the record because the GOC refused to provide requested information about the Export Buyer's Credit Program's bank disbursement, interest rates, or possible limitations regarding business contracts.

With respect to the third issue, the Court ordered that Commerce tie the application of adverse facts available with an adverse inference to Heze Huayi. As discussed above, by refusing to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes, the GOC withheld information requested by Commerce pursuant to 776(a)(2)(A) of the Act. As a result, the GOC significantly impeded the review pursuant to section 776(a)(2)(C) of the Act. Accordingly, Commerce continued to determine that application of facts available to Heze Huayi regarding this program is warranted pursuant to sections 776(a)(1) and (2)(A), (C) of the Act because we are unable to rely on the information provided by Heze Huayi due to our lack of an understanding of the Export Buyer's Credit Program. Further, by failing to provide the necessary information after

repeated requests, the GOC failed to cooperate to the best of its ability to comply with Commerce's request for information because it refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes. Accordingly, the application of an adverse inference to facts available to Heze Huayai is warranted pursuant to section 776(b)(2) of the Act. As noted above, Commerce may allow an adverse inference against a government to impact an otherwise cooperative respondent, when the government is the holder of the missing necessary information, as is the case here.<sup>77</sup>

### III. ANALYSIS OF COMMENTS FROM INTERESTED PARTIES

#### Comment 1: Non-Use of Export Buyer's Credit Program

*Heze Huayai's Draft Remand Redetermination Comments:*

- Commerce's description of its verification procedures and how the Export Buyer's Credit Program's non-use cannot be verified is disingenuous given the breadth of verification procedure and programs that Commerce verifies.<sup>78</sup>
- While this description of the verification methodology is accurate with respect to its general procedures, Commerce is actually describing its general procedures for verifying the completeness of reported loans. However, Commerce's inquiry to determine non-use of this program is different. The only relevant question to verifying respondents' certifications of non-use is why a particular loan was used – *i.e.*, was the loan disbursed through the Export Buyer's Credit Program.<sup>79</sup>
- The Export Buyer's Credit Program has no unique qualities that require Commerce to have a detailed roadmap of the amendments to the program to determine non-use or that Commerce must analyze every loan received by every one of Heze Huayai's customers. Verification does not entail examining all documentation for all loans. Commerce selects a sample to verify, which then confirms the accuracy of the company's reporting.<sup>80</sup>
- The only way for Commerce to verify whether the loan was received under the Export Buyer's Credit Program is to review the underlying loan documentation, if there is any loan at all. Even if the Ex-Im Bank was the only lender disbursing loans under the

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<sup>77</sup> See *KYD*, 607 F.3d 760 (finding that a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper); see also *Fine Furniture*, 748 F.3d 1365 (affirming Commerce's application of adverse inferences when the government of China did not provide requested information despite the respondents' cooperation).

<sup>78</sup> See Heze Huayai's Remand Comments at 2.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> *Id.* at 4.

Export Buyer's Credit program, Commerce would still need to review the underlying documentation at verification because the Ex-Im Bank runs other loan programs.<sup>81</sup>

- The mere existence of a loan from Ex-Im Bank does not establish that the loan was granted under the Export Buyer's Credit Program. Additionally, if third-party banks were involved in the program, Commerce would need to review the underlying loan documentation in order to determine the purpose of the loans and confirm that they were not issued through the Export Buyer's Credit program.<sup>82</sup>
- The exporter's role in the loan process illustrates that the exporter itself can verify usage because the loan applications require documentation from the exporter, and the exporter itself is the entity that receives the money from the bank.<sup>83</sup>
- The GOC corroborated Heze Huayi's non-use by confirming that none of Heze Huayi's U.S. customers benefitted from this program during the POR. Commerce's statements about needing to know which banks were dispersing funds does not undermine the corroboration of the GOC's confirmation of non-use.<sup>84</sup>
- Even if funds are disbursed to borrowers indirectly through third-party banks, nothing on record suggests that Ex-Im Bank would not record these loans under the program as the Ex-Im Bank determines the applicant's creditworthiness and is the ultimate source of the disbursed funds.<sup>85</sup>

*The petitioner's Draft Remand Redetermination Comments:*

- Certifications from Heze Huayi's customers claiming non-use of export buyer's credits are not enough for Commerce to either investigate the nature of the credits or verify their usage.<sup>86</sup>
- Potential recipients of export buyer's credits are not limited to direct customers identified by Chinese suppliers. The "Administrative measure of Export Buyer's Credit," do not limit "foreign importer" to the direct customers that have been identified by Chinese chlorinated isos producers.<sup>87</sup>
- Without access to the list of recipients maintained by the GOC, the Ministry of Finance, or China Ex-Im bank, it is not possible to verify whether export buyer's credits were received by respondents or respondents' customers.<sup>88</sup>

## **Commerce's Position**

Commerce has complied with the Court's order in finding that the customer certifications of non-use are unverifiable and explaining its determination to apply, in the absence of verifiable

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<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Id.* at 7-8.

<sup>86</sup> See the Petitioner's Remand Comments, "Chlorinated Isocyanurates from the People's Republic of China: Comments on Draft Results," dated May 9, 2019 (the petitioner's Remand Comments) at 2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 3.

usage information from the GOC or Heze Huayi, adverse facts available with respect to the Export Buyer's Credit Program.

We disagree with Heze Huayi that the description of our verification process outlined above is disingenuous and that the only way for Commerce to verify whether a loan was received under the Export Buyer's Credit Program was to review the underlying documentation at verification because the China Ex-Im Bank runs other loan programs. The verification process outlined above, though it describes our normal verification process, applies to every case, including this one. We cannot verify Heze Huayi or its customers because the necessary information that we need to review is unknown or not on the record. As stated above, in this instance, it was necessary for Commerce to have a fulsome understanding of the Export Buyer's Credit Program to understand how the funds were disbursed under this program. Specifically, Commerce did not: (1) know which bank names to look for in the books and records during verification; (2) did not have an understanding of the identity of these correspondent banks; (3) know the interest rates for Heze Huayi's customers during the POR; or (4) know the size of the business contracts for which export buyer's credits flow from foreign buyers to the China Ex-Im Bank, or other Chinese banks. The GOC is the only party that can answer these questions about the internal administration of this program, and, thus, its failure to provide the requested information further undermines Commerce's ability to verify claims of non-use. Commerce cannot verify non-use without a complete set of administrative measures on the record that would provide guidance in querying the records and electronic databases of the China Ex-Im Bank.<sup>89</sup>

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<sup>89</sup> Commerce also notes that GOC has a history of refusing to provide Commerce with adequate access to its books and records relevant to understanding this program. *See, e.g., Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing*



Similar to the obstacles we would face in attempting to verify usage at the exporter or U.S. customer, 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 information there is on the record indicating non-usage (*e.g.*, the claims of the GOC and certifications from U.S. customers), pursuant to section 776(a)(2)(D) with the exporters, U.S. customers, or at the China Ex-Im Bank itself given the refusal of the GOC to provide the 2013 Revision and a complete list of correspondent/partner/intermediate banks.

Commerce finds that required missing information concerning the operation and administration of the Export Buyer's Credit Program is necessary, as it demonstrates why usage information provided by the GOC and the respondents cannot be verified and why there is therefore a gap in the record concerning usage. Commerce has explained how the gap in the record (missing information concerning the operation of the Export Buyer's Credit Program) prevents complete and effective verification of the customer's certifications of non-use. A very similar rationale has been accepted by the Court in prior reviews. In particular, in *Changzhou I*,<sup>90</sup> given similar facts, the Court found Commerce reasonably concluded it could not verify usage of the Export Buyer's Credit Program at the exporter's facilities absent an adequate

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*Duty Determination*, 79 FR 76962 (December 23, 2014) and accompanying IDM at 92 ("At verification, the GOC repeatedly denied Department officials the opportunity to examine the basis for the GOC's contention that none of the company respondents in this investigation, or their customers, used this program during the POI... Despite repeated requests to verify the basis of statements made on the record of this investigation, the GOC refused to allow the Department to query the databases and records of the Ex-Im Bank to establish the accuracy of its non-use claim.")

<sup>90</sup> See *Changzhou I*, 195 F. Supp. 3d at 1354.

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...").<sup>91</sup>

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

In addition, the suggestion of Heze Huayi that Commerce sample or spot check customer loans is not realistic in this instance.<sup>92</sup> While Heze Huayi is correct that sampling is commonly relied on by Commerce during verification, Commerce engages in sampling when the record indicates some limiting parameters that can effectively narrow down the detail to sample; in other words, the record provides some more precise guidelines as to where to look for the

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<sup>91</sup> *Id.* at 1355.

<sup>92</sup> *See* Heze Huayi Remand Comments at 4.

unreported subsidy. For example, when Commerce looks for unreported grants, it know which relatively small offsetting accounts to examine (*e.g.*, “special payables,” “government payables,” “subsidy income”), rather than trying to root through every single cash account to look for the actual deposit, each of which can have thousands of transactions a year.<sup>93</sup> With a limited universe of loans, Commerce can also trace a company’s lending to that company’s financial statements. Or, if Commerce is looking for unreported loans from state owned banks, it focuses typically on the subledgers dedicated to the “big four” state-owned banks, instead of randomly sampling from the overall lending detail of multiple subledgers, which might include hundreds of loans from foreign banks outside of China. Therefore, our understanding of the operation of the programs guides the scope of our verification of the use or non-use of these types of programs.

At the very least, even when Commerce has no means of limiting the universe of transactions before it begins sampling, Commerce knows what it is looking for when it begins selecting documents or transactions for review. When, because of the GOC’s failure to provide complete information, there are no such parameters, or there is no guidance as to what indicia Commerce should look for, it is unreasonable to expect Commerce to hunt for a needle in a haystack – a very large haystack in some instances. As an illustrative example, regarding the VAT and import duty exemptions, Commerce has met with the GOC to discuss how that program works, and in such instances the GOC has been fully cooperative. Therefore, Commerce knows what documents it should 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

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<sup>93</sup> A grant, like any other transaction, is booked twice into a company balance sheet: once as an asset (*i.e.*, into a cash account), and again as an offsetting entry as a liability (*e.g.*, special payables), which is the written down as the cash used. The grant could also be booked into the income statement under, possibly, “subsidy income” or “non-operating income.”

program. Commerce can also simply ask to see a VAT invoice or a payment to the Chinese customs service to verify whether VAT and duties were charged and paid. By contrast, we simply do not know what to look for when we look at a loan to determine whether the China Ex-Im Bank was involved or whether a given loan was provided under the Export Buyer's Credit Program, for the reasons detailed in the Final Analysis above. Another example is when Commerce is verifying non-use of an income tax rebate or exemption, it relies on information gathered from the GOC during meetings with the relevant tax authorities at the national and local levels. Commerce would expect the GOC officials to provide blank tax forms indicating where the rebate would be recorded, including the specific line item on the form. Commerce would then know precisely which documentation to ask for when verifying the company respondent and would also know with certainty whether the company should have this document. Furthermore, as noted above, we also disagree that Commerce must limit its verification only to the underlying loan documentation. For the reasons explained above, such documentation is insufficient without being able to tie it to the company's books and records.

Heze Huayi argues Commerce could have verified non-use at the exporters because the record demonstrates that the "record clearly establishes that the use of the Export Buyer's Credit Program cannot be implemented without the knowledge of the exporter."<sup>94</sup> Commerce, however, has already explained why it cannot verify non-usage at the exporters given similar deficiencies with the GOC's explanation of the operation of the program.<sup>95</sup> Commerce

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<sup>94</sup> See Heze Huayi Remand Comments at 6.

<sup>95</sup> See, e.g., *Chlorinated Isocyanurates From the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2012, 79 FR 56560 (September 22, 2014) (*Isos CVD Final Determination*) and accompanying IDM at 15 ("While the Department was unable to conduct a complete verification of non-use of this program at China ExIm, both Jiheng and Kangtai in their questionnaire responses provided statements from each of their U.S. customers in which each customer certified that they did not receive any financing from China ExIm.")

specifically explained how verification methods require examining books and records that can be tied to audited financial statements, tax returns, *etc.* to ensure a complete picture of the company's activities rather than searching through filing cabinets, binders, *etc.* looking for what may or may not be a complete set of application documents.<sup>96</sup> Moreover, the idea of searching through Heze Huayi's cash accounts in an effort to find evidence that certain funds may have been deposited pursuant to the Export Buyer's Credit Program is similarly onerous as searching through the details of the customer's borrowings to find such evidence.

Heze Huayi argues that Commerce has never found an instance of use of the program, except through AFA.<sup>97</sup> Relying on a list of investigations presented in *Changzhou II*, Heze Huayi asserts that reliance on the fact that Commerce has never identified evidence of a U.S. customer benefitting from the Export Buyer's Credit Program during one of several attempted verifications at the China Ex-Im Bank as support for the non-use certifications of its own customers is misplaced. There has not been a single instance of the China Ex-Im Bank cooperating to the best of its ability in verifying this program, and Heze Huayi has cited no instances indicating otherwise. In the few instances in which Commerce determined that the Export Buyer's Credit Program was not used, Commerce reached that determination because of the non-use certifications provided on behalf of the respondents' customers, not because the China Ex-Im Bank cooperated with Commerce's questions or verification to demonstrate non-use.<sup>98</sup> Moreover, that singular instance occurred in the context of what now seems to have been our misunderstanding of how the lending under the program is actually made, *i.e.*, as direct

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<sup>96</sup> "The Department cannot typically look at the contents of a filing cabinet or binder and determine whether it includes everything that it's supposed to include." *See Changzhou I*, 195 F. Supp. 3d at 1355.

<sup>97</sup> *See* Heze Huayi Remand Comments at 9, Attachment 1.

<sup>98</sup> *See, e.g., Isos CVD Final Determination*; 79 FR at 56560 and accompanying IDM at 15 ("While the Department was unable to conduct a complete verification of non-use of this program at China ExIm, both Jiheng and Kangtai in their questionnaire responses provided statements from each of their U.S. customers in which each customer certified that they did not receive any financing from China ExIm.")

disbursements from the China Ex-Im Bank to the customers, rather than, as Commerce has subsequently learned, as indirect disbursements involving third-party banks. Thus, as detailed in the remand results above, we no longer consider such non-use certifications verifiable.

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

## **Comment 2: Use of Adverse Inference regarding the Export Buyer's Credit Program**

*Heze Huayi's Final Remand Redetermination Comments:*

- Commerce fails to tie its adverse inference to Heze Huayi and its customers. Commerce merely reiterates that because the GOC failed to cooperate in providing all information required, Commerce cannot properly verify the information provided by Heze Huayi.<sup>99</sup>
- To the extent that these administrative rules are missing from the record, the only gaps that Commerce could fill with an adverse inference is that third-party banks did settle/disburse credits and the identity of the banks operating as corresponding banks under the Export Buyer's Credit Program.<sup>100</sup>

### **Commerce's Position:**

Commerce has complied with the Court's instructions to tie its facts available and adverse inference determinations to Heze Huayi. As explained above, Commerce explained that information is missing from the record, because the GOC withheld information that was requested, and significantly impeded the proceeding, pursuant to sections 776(a)(1) and (2) of the Act. Specifically, the record is lacking necessary information concerning the use of the Export Buyer's Credit Program, and the GOC has withheld such information and significantly

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<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.*

impeded the proceeding warranting the application of facts available pursuant to pursuant to sections 776(a)(1) and (2) of the Act. Next, although Heze Huayi provided customer certifications that benefits were not received under this program, this is not sufficient information to determine non-use in this review because of the changes to the program since the previous segment. In this review, the GOC refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes to the program, and thus the GOC withheld information requested by Commerce pursuant to 776(a)(2)(A) of the Act. As a result, the GOC significantly impeded the review pursuant to section 776(a)(2)(C) of the Act. Therefore, Commerce determines that application of facts available to Heze Huyai is warranted pursuant to sections 776(a)(1) and (2)(A), (C) of the Act. As a result, the lack of information rendered Heze Huayi's and the GOC's claims of Heze Huayi's non-use of the program unverifiable.<sup>101</sup>

In addition, in this review, as discussed above, the GOC failed to cooperate to the best of its ability to comply with Commerce's request for information because it refused to provide information regarding the operation, disbursement, and allocation of funds of the Export Buyer's Credit Program after it implemented changes. Court precedent allows an adverse inference against a government to impact an otherwise cooperative respondent, when the government is the holder of the missing necessary information.<sup>102</sup> This Court held that the application of facts available with an adverse inference "if a foreign government fails to cooperate in a countervailing duty case," is reasonable "even if the collateral effect is to adversely impact a

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<sup>101</sup> See section 782(e)(2) of the Act.

<sup>102</sup> See *e.g.*, *KYD*, 607 F.3d 760 (finding that a collateral impact on a cooperating party does not render the application of adverse inferences in a CVD investigation improper); *Fine Furniture*, 748 F.3d 1365 (affirming Commerce's application of adverse inferences when the government of China did not provide requested information despite the respondents' cooperation).

‘cooperating party.’”<sup>103</sup> Accordingly, Commerce reasonably exercised its discretion to apply an adverse inference to facts available to Heze Huyai based on the GOC’s lack of cooperation pursuant to section 776(b)(2) of the Act.

These Final Remand Results are, therefore, in accordance with the statutory framework for applying facts available and adverse inferences and are tied to Heze Huayi.

#### IV. FINAL RESULTS OF REDETERMINATION

We have re-examined the Export Buyer’s Credit Program decision made in the *Final Results* in light of the Court’s *Remand Order*, and have explained why application of facts available with an adverse inference is warranted in determining that Heze Huayi benefitted from this program. As a result, as AFA, we continue to apply a rate of 0.87 *ad valorem* to the respondents receiving benefits under the Export Buyer’s Credit Program.

5/16/2019

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Signed by: JEFFREY KESSLER

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Jeffrey I. Kessler  
Assistant Secretary  
for Antidumping and Countervailing Duty Operations

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<sup>103</sup> *Changzhou II* at 8 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013)).