



C-570-980  
Administrative Review  
POR: 03/26/12-12/31/12  
**Public Document**  
E&C, Office VII: EB

December 31, 2014

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

FROM: Gary Taverman   
Associate Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Results of the  
Countervailing Duty Administrative Review of Crystalline Silicon  
Photovoltaic Cells, Whether or Not Assembled Into Modules, from  
the People's Republic of China

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## I. SUMMARY

In response to requests from interested parties, the Department of Commerce (Department) is conducting the administrative review of the countervailing duty (CVD) order on crystalline silicon photovoltaic cells, whether or not assembled into modules (Solar Cells), from the People's Republic of China (PRC), covering the period of review (POR) of March 26, 2012, through December 31, 2012. The Department of Commerce (Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of Solar Cells from the PRC. The Department also is rescinding the review of 78 companies for which the Department initiated a review.<sup>1</sup> If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries of subject merchandise during the POR.

Unless extended, we intend to issue final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

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<sup>1</sup> See Letters to the Department from Petitioner and Shanghai BYD Company Ltd., (Shanghai BYD), dated May 5, 2014.

## II. BACKGROUND

On December 7, 2012, we published the CVD order on Solar Cells from the PRC.<sup>2</sup> On December 3, 2013, we published a notice of opportunity to request an administrative review of the CVD order on Solar Cells from the PRC.<sup>3</sup> On December 24, 2013, we received a timely request for an administrative review of this CVD order in accordance with 19 CFR 351.213(b)(3) from Smith-Bollinger & Company, Inc. (Smith-Bollinger), and on December 30, 2013 a review request from Sunperfect Solar, Inc. (Sunperfect), both importers of subject merchandise.<sup>4</sup> Also on December 30, 2013, we received a timely request for an administrative review in accordance with 19 CFR 351.213(b)(2), from Wuxi Suntech Power Co., Ltd. (Wuxi Suntech), and on December 31, 2013, from Shanghai Machinery Complete Equipment (Group) Corp., Ltd (SMCEC), Shenzhen Topray Solar Co., Ltd (Topray Solar), Yingli Green Energy Holding Company Limited (YGE) and its affiliated U.S. importer, Yingli Green Energy Americas, Inc., (collectively, Yingli),<sup>5</sup> Jiangsu Jiasheng Photovoltaic Technology Co., Ltd. (Jiasheng), Eoply New Energy Technology Co., Ltd. (Eoply), Shanghai BYD Company, Ltd. (Shanghai BYD), Konca Solar Cell Co., Ltd., and Jiangsu Green Power PV Co., Ltd., LDK Hi-Tech (Nanchang) Co., Ltd. (LDK Nanchang), Renesola Jiangsu Ltd., Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company (Zhejiang Sunflower), Ningbo Qixin Solar Electrical Appliance Co., Ltd. (Ningbo Qixin), Sopray Energy Co., Ltd. (Sopray), Hangzhou Zhejiang University Sunny Energy Science and Technology Co., Ltd (Hangzhou Zhejiang), and Chint Solar (Zhejiang) Co., Ltd. (Chint Solar).<sup>6</sup> Also on December 31, 2013, the Department received a timely request for an administrative review of 135 companies, including Shanghai BYD and Lightway Green New Energy Company Ltd. (Lightway) from SolarWorld Industries America, Inc. (SolarWorld) (Petitioner), in accordance with 19 CFR 351.213(b)(1).<sup>7</sup>

On February 3, 2014, we initiated the countervailing duty administrative review of the CVD order on Solar Cells from the PRC for 147 companies.<sup>8</sup> On May 5, 2014, Shanghai BYD

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<sup>2</sup> See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 FR 73017 (December 7, 2012) (*CVD Order*).

<sup>3</sup> See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 78 FR 72636 (December 3, 2013) (*Opportunity Notice*).

<sup>4</sup> See Letter to the Department from Smith-Bollinger, dated December 24, 2013, and Letter to the Department from Sunperfect, dated December 30, 2013. Smith-Bollinger requested a review of subject merchandise manufactured by Sun Earth Solar Power C., Ltd, and exported by De-Tech Trading Limited HK, and Sunperfect requested a review of its imports of Eoply New Energy Technology Co., Ltd. and Shanghai Machinery Complete Equipment (Group) Corp., Ltd. Import and Export Company.

<sup>5</sup> See Letter to the Department from Yingli, dated December 31, 2013. Yingli's review request covers YGE and its affiliates, including Yingli Energy (China) Co., Ltd.; Baoding Tinawei Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian; Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; and Yingli Green Energy International Trading Company Limited.

<sup>6</sup> See Letters from Jiasheng, Eoply, Shanghai BYD, Konca Solar Cell Co., Ltd., and Jiangsu Green Power PV Co., Ltd., LDK Nanchang, Renesola Jiangsu Ltd., Zhejiang Sunflower, Ningbo Qixin, Sopray, Hangzhou Zhejiang, and Chint Solar, dated December 31, 2014.

<sup>7</sup> See Letter to the Department from Petitioner, dated December 31, 2013.

<sup>8</sup> See *Initiation Notice*, 79 FR, at 6153. Note that the Department in the *Initiation Notice* inadvertently omitted two companies for which Petitioner requested a review, Hanwha SolarOne (Qidong) Co., Ltd. and Zhejiang Top Point

withdrew its self-request for review, and Petitioner withdrew its review request for 78 companies.<sup>9</sup>

We stated in the *Initiation Notice* that we intended to base our selection of mandatory respondents on U.S. Customs and Border Protection (CBP) entry data for the Harmonized Tariff Schedule of the United States (HTSUS) subheadings listed in the scope of the order. On February 19, 2014, the Department released the results of a query performed on CBP's trade database for March 26, 2012 through December 31, 2012, the POR.<sup>10</sup> On March 14, 2014, the Department amended the CBP Entry Data to account for the inadvertent omission of an entity from the initial data release.<sup>11</sup> No party submitted comments regarding the CBP entry data query.

On February 27, 2014, Petitioner submitted two new subsidy allegations (NSA) to the Department, concerning the provision of aluminum extrusions and solar glass for less than adequate remuneration.<sup>12</sup>

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Photovoltaic Co., Ltd. However, Petitioner subsequently withdrew its request for review of those two companies. *See* Letter to the Department from Petitioner, dated May 5, 2014.

<sup>9</sup> *See* Letters to the Department from Petitioners and Shanghai BYD, dated May 5, 2014, withdrawing the requests for review of the following companies: Aiko Solar, Amplesun Solar, Beijing Hope Industry, Best Solar Hi-tech, Shanghai Chaori Solar Energy, CEEG (Shanghai) Solar Science Technology Co., Ltd., CEEG Nanjing Renewable Energy Co., Ltd., China Sunergy, Chinalight Solar, Chint Solar (Zhejiang) Co., Ltd., CNPV Dongying Solar Power Co., Ltd., China Sunergy (Nanjing) Co., Ltd., Dai Hwa Industrial, EGing, ENN Solar Energy, Eoply New Energy Technology Co., Ltd., General Solar Power, Shenzhen Global Solar Energy Tech., Golden Partner development, Goldpoly (Quanzhou), Jiangxi Green Power Co. Ltd., Hanwha SolarOne (Qidong) Co., Ltd., Hangzhou Zhejiang University Sunny Energy Science and Technology Co., Ltd., Hairun Photovoltaics Technology Co., Ltd., Hareon Solar Technology, JA Solar, Technology Yangzhou Co., Ltd., Jietion Solar (China) Co., Ltd., Jia Yi Energy Technology, Jiasheng Photovoltaic Tech., Jiawei Solarchina Co. (Shenzhen), Ltd., Jiawei Solar Holding, Jiutai Energy, Jietion Solar (China) Co., Ltd., JingAo Solar Co., Ltd., Ningbo Komaes Solar Technology Co., Ltd., LDK Solar Hi-tech (Nanchang), Linuo Photovoltaic, Perfectenergy, Polar Photovoltaics, Qiangsheng (QS Solar), QXPV (Ningbo Qixin Solar Electrical Appliance Co., Ltd), Refine Solar, Risen Energy Co, Ltd., Risun Solar (JiangXi Ruijing Solar Power Co., Ltd.), Sanjing Silicon, Shanghai Solar Energy Science & Technology Co., Ltd. Shanghai JA Solar Technology Co., Ltd., Shenzhen Topray Solar Co., Ltd., Sopray Energy Co., Ltd., Shangpin Solar, Shanshan Ulica, Shuqimeng Energy Tech, Skybasesolar, Solargiga Energy Holdings Ltd., Sun Earth Solar Power Co., Ltd., Sunflower, Sunlink PV, Wuxi Sun-shine Power Co., Ltd., Sunvim Solar Technology, Tainergy Tech, tenKsolar (Shanghai) Co., Ltd., Tianjin Jinneng Solar Cell, Boading Tianwei Yingli New Energy Resources Co., Ltd., Topray, Topsolar, Trony, Weihai China Glass Solar, Yuhan Sinosola Science & Technology Co., Ltd., Yuhuan Solar Energy Source Co., Ltd., Yunnan Tianda, Yunnan Zhuoye Energy, HC Solar Power Co., Ltd., Zhejiang Leye Photovoltaic Science & Technology Co., Ltd., Zhejiang Top Point Photovoltaic Co., Ltd., Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company, Zhejiang Wanxiang Solar Co, Ltd., Zhenjiang Huantai Silicon Science & Technology Co., Ltd., Wuxi University Science Park International Incubator Co., Ltd., and Shanghai BYD, respectively.

<sup>10</sup> *See* Memorandum to the File from Kaitlin Wojnar with Attachment "Solar Cells Respondent Selection CBP Entry Data," dated February 20, 2014 (CBP Entry Data).

<sup>11</sup> *See* Memorandum to the File from Kaitlin Wojnar, dated March 14, 2014.

<sup>12</sup> *See* Letter to the Department from Petitioner; New Subsidy Allegation, dated February 27, 2014.

On March 26, 2014, based on the CBP entry data, we selected Lightway Green New Energy Co., Ltd. (Lightway) and Shanghai BYD Co. Ltd. (Shanghai BYD) for individual examination as mandatory company respondents in this CVD administrative review.<sup>13</sup> Shanghai BYD submitted comments regarding respondent selection on March 28, 2014,<sup>14</sup> and was granted an *ex parte* meeting with Enforcement and Compliance officials on April 3, 2014.<sup>15</sup>

On March 28, 2014, we sent our CVD questionnaire seeking information regarding the alleged subsidies to the mandatory company respondents and the Government of China (GOC).<sup>16</sup> Also on that date, we sent a separate courtesy copy of the questionnaire to Lightway, as it was not represented by counsel in this proceeding at the time.<sup>17</sup> On April 11, 2014, Shanghai BYD reported its affiliates and cross-owned companies, as requested in our CVD questionnaire.<sup>18</sup> We received responses to the initial questionnaire from Lightway, Shanghai BYD and its affiliates, and the GOC on May 20, 2014, June 2, 2014, and June 3, 2014, respectively.

Also, we initiated on Petitioner's NSAs on May 20, 2014,<sup>19</sup> and issued the NSA questionnaires to the GOC, Shanghai BYD and its affiliated companies, and Lightway on May 22, 2014. Lightway filed its response to our NSA questionnaire on June 5, 2014, Shanghai BYD and its affiliated companies on June 13, 2014, and the GOC on June 19, 2014. We received the GOC's response to the industry supplier appendix on June 24, 2014.

On August 26, 2014, we extended the preliminary results of review from September 2, 2014 to December 19, 2014. Then, on August 27, 2014, we issued the first supplemental questionnaire to Lightway, and to Shanghai BYD and its affiliated companies, and to the GOC on September 19, 2014. We received supplemental questionnaire responses from Lightway, Shanghai BYD and its affiliated companies, and the GOC from September 10, 2014 through October 20, 2014. Subsequently, we issued a second supplemental questionnaire to Lightway and Shanghai BYD and its affiliated companies, and received their responses on October 17, 2014. On December 11, 2014, we further extended the preliminary results of review

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<sup>13</sup> See Department Memorandum, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, Countervailing Duty Administrative Review: Respondent Selection," (March 26, 2014) (Respondent Selection Memorandum).

<sup>14</sup> See Letter to the Department from Shanghai BYD, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China: Letter Regarding Respondent Selection (March 28, 2014).

<sup>15</sup> See Memorandum to the File from Kaitlin Wojnar, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Meeting with Counsel for Shanghai BYD Co., Ltd.," (April 10, 2014).

<sup>16</sup> See Letter from the Department to the GOC, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Countervailing Duty Questionnaire," (March 28, 2014) (Initial Questionnaire).

<sup>17</sup> See Memorandum to the File from Kaitlin Wojnar with Attachment, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Shipment of Initial Questionnaire to Lightway Green New Energy Co., Ltd.," dated March 28, 2014.

<sup>18</sup> See Letter to the Department from Shanghai BYD, "Crystalline Silicon Photovoltaic Products: Reporting Companies and Affiliation Data," (April 11, 2014).

<sup>19</sup> See Memorandum to Edward Yang, Director, Office VII, AD/CVD Operations, "Initiation of the February 27, 2014 New Subsidy Allegations," (May 20, 2014) (NSA Initiation Memo).

to December 30, 2014. On December 30, 2014 we further extended the preliminary results of review until December 31, 2014.

### **Partial Rescission**

As noted above, withdrawals of certain requests for review were timely filed by Petitioner and Shanghai BYD and its affiliated companies. We are, therefore, rescinding this administrative review with respect to the companies listed in Appendix I (pursuant to 19 CFR 351.213(d)(1)), and proceeding with the review of Lightway and Shanghai BYD, and other companies not selected for individual review.<sup>20</sup>

### **Scope of the Order**

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

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

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

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding 10,000mm<sup>2</sup> in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

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

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<sup>20</sup> Note that, while Shanghai BYD withdrew its request for administrative review, Petitioner did not withdraw its review request for Shanghai BYD. See Appendix II for a list of the remaining companies subject to this review.

Merchandise covered by this order is currently classified in the HTSUS under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000.<sup>21</sup> These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.

### **Period of Review (POR)**

The POR is March 26, 2012, through December 31, 2012.

### **Companies Not Selected for Individual Review**

For the companies subject to this review and not selected for individual review (*see* Appendix II), because the rates calculated for Lightway and BYD were above *de minimis* and not based entirely on facts available (AFA), we applied a subsidy rate based on an weighted average of the subsidy rates calculated for Lightway and BYD, the companies selected for individual review (*i.e.*, the mandatory respondents) using publicly ranged sales data submitted by respondents.

## **III. SUBSIDIES VALUATION**

### **Allocation Period**

Under 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the Average Useful Life (AUL) of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2), there is a rebuttable presumption that the AUL will be taken from the IRS Tables, as updated by the U.S. Department of the Treasury. For the subject merchandise, the IRS Tables prescribe an AUL of ten years. No interested party has challenged the use of a ten-year AUL.

Further, for non-recurring subsidies, we have applied the “0.5 percent expense test” described in 19 CFR 351.524(b)(2). Under this test, we compare the amount of subsidies approved under a given program in a particular year to sales (total sales or total export sales, as appropriate) for the same year. If the amount of subsidies is less than 0.5 percent of the relevant sales, then the benefits are allocated to the year of receipt rather than allocated over the AUL period.

### **Attribution of Subsidies**

*Cross Ownership:* In accordance with 19 CFR 351.525(b)(6)(i), the Department normally attributes a subsidy to the products produced by the company that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provide additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is

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<sup>21</sup> CBP provided notification that HTSUS number 8501.31.8000 should be added to the scope of the order, as certain articles under this number might fall within the scope. *See* the May 16, 2012 Memorandum to The File, “ACE Case Reference File Update.”

primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent. According to 19 CFR 351.525(b)(6)(vi), cross-ownership “exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets.” This section of the Department’s regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The preamble to the Department’s regulations further clarifies the Department’s cross-ownership standard. According to the preamble, relationships captured by the cross-ownership definition include those where:

the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) . . . Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a “golden share” may also result in cross-ownership.<sup>22</sup>

Thus, the Department’s regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists. The U.S. Court of International Trade (CIT) upheld the Department’s authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.<sup>23</sup> Based on information on the record, we preliminarily determine that cross-ownership exists, in accordance with 19 CFR 351.525(b)(6)(vi), among the following companies.

### Lightway

Lightway reported no affiliates involved in the production of subject merchandise or inputs and no holding companies or parent companies. Therefore, we are preliminarily attributing subsidies received by Lightway to its own sales, in accordance with 19 CFR 351.525(b)(6)(i).

### Shanghai BYD, Shangluo BYD, and BYD Co.

As discussed above, we selected Shanghai BYD as a mandatory company respondent. Shanghai BYD reported that it is cross-owned with Shangluo BYD Industrial Co., Ltd. (Shangluo BYD), a producer of subject merchandise located in the PRC, and with BYD Company Limited (BYD Co.), the holding company for both Shanghai BYD and Shangluo BYD.<sup>24</sup> Since both Shanghai

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<sup>22</sup> See *Countervailing Duties; Final Rule*, 63 FR 65348, 65401 (November 25, 1998) (*CVD Preamble*).

<sup>23</sup> See *Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).

<sup>24</sup> See Letter to the Department from Shanghai BYD, “Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People’s Republic of China: Affiliated Companies Response,” dated April 11, 2014.

BYD and Shangluo BYD produced subject merchandise during the POR, and Shangluo BYD sold subject merchandise to Shanghai BYD, but did not export subject merchandise to the United States, both companies responded separately and in full to the Department's questionnaire. In addition, BYD Co., the holding company for both producers, responded in full to the Department's questionnaire.<sup>25</sup>

In the questionnaire responses, these companies stated that both Shanghai BYD and Shangluo BYD are majority owned by their parent company BYD Co. In addition, these companies reported that BYD Co. and Shanghai BYD share the same president, vice-president, and one additional member of the board of directors.<sup>26</sup> Therefore, based on these facts, and pursuant to 19 CFR 351.525(b)(6)(vi), we preliminarily determine that Shanghai BYD and Shangluo BYD are cross-owned through the common ownership of their parent company, BYD Co.<sup>27</sup> Because both Shanghai BYD and Shangluo BYD are producers of subject merchandise, we are attributing any subsidy received by either company to the combined sales of both companies, excluding intercompany sales, pursuant to 19 CFR 351.525(b)(6)(ii). Additionally, because BYD Co. is the holding company of Shanghai BYD and Shangluo BYD, but does not sell or produce subject merchandise, we are attributing any subsidy received by BYD Co. to the consolidated sales of the holding company and its subsidiaries, excluding inter-company sales, in accordance with 19 CFR 351.525(b)(6)(iii). Hereinafter, the three cross-owned companies are referred to collectively as BYD.

## Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondent's receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondent's exports or total sales. The denominators we used to calculate the countervailable subsidy rates for the various subsidy programs described below are explained in the "Preliminary Calculation Memoranda," prepared for this countervailing duty administrative review.<sup>28</sup>

## Benchmark and Discount Rates

The Department is investigating loans received by the respondents from Chinese policy banks and state-owned commercial banks (SOCBs), as well as non-recurring, allocable subsidies.<sup>29</sup>

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<sup>25</sup> See Letter to the Department from Shanghai BYD, Shangluo BYD, and BYD Co. (collectively, BYD), "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China – 2012 Review: Questionnaire Section III Response," dated June 2, 2014 (BYD IQR), at 3-5.

<sup>26</sup> *Id.*, at Exhibit 1.

<sup>27</sup> The Department's regulations at 19 CFR 351.525(b)(6)(vi) state that cross-ownership exists when one corporation can use or direct the assets of another corporation in essentially the same way it can use its own. Normally, however, "this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations."

<sup>28</sup> See Department Memoranda, "Countervailing Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: BYD Preliminary Calculation Memorandum," (BYD Preliminary Calculation Memorandum) and "Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Lightway Calculation Memorandum," both dated concurrently with this memorandum (collectively, Preliminary Calculation Memoranda).

<sup>29</sup> See 19 CFR 351.524(b)(1).

The derivation of the benchmark and discount rates used to value these subsidies is discussed below.

#### A. *Short-Term RMB-Denominated Loans*

Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the “difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market.” Normally, the Department uses comparable commercial loans reported by the company as a benchmark.<sup>30</sup> If the firm did not have any comparable commercial loans during the period, the Department’s regulations provide that we “may use a national average interest rate for comparable commercial loans.”<sup>31</sup>

As noted above, section 771(5)(E)(ii) of the Act indicates that the benchmark should be a market-based rate. For the reasons first explained in *CFS from the PRC*, loans provided by Chinese banks reflect significant government intervention in the banking sector and do not reflect rates that would be found in a functioning market.<sup>32</sup> Because of this, any loans received by the respondents from private Chinese or foreign-owned banks would be unsuitable for use as benchmarks under 19 CFR 351.505(a)(2)(i). For the same reasons, we cannot use a national interest rate for commercial loans as envisaged by 19 CFR 351.505(a)(3)(ii). Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting an external market-based benchmark interest rate. The use of an external benchmark is consistent with the Department’s practice. For example, in *Lumber from Canada*, the Department used U.S. timber prices to measure the benefit for government-provided timber in Canada.<sup>33</sup>

In past proceedings involving imports from the PRC, we calculated the external benchmark using the methodology first developed in *CFS from the PRC*<sup>34</sup> and more recently updated in *Thermal Paper from the PRC*.<sup>35</sup> Under that methodology, we first determine which countries are similar to the PRC in terms of gross national income, based on the World Bank’s classification of countries as: low income; lower-middle income; upper-middle income; and high income. As explained in *CFS from the PRC*, this pool of countries captures the broad inverse relationship between income and interest rates. For 2003 through 2009, the PRC fell in the lower-middle income category.<sup>36</sup> Beginning in 2010, however, the PRC is in the upper-middle income

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<sup>30</sup> See 19 CFR 351.505(a)(3)(i).

<sup>31</sup> See 19 CFR 351.505(a)(3)(ii).

<sup>32</sup> See *Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) (*CFS from the PRC*), and accompanying IDM at Comment 10.

<sup>33</sup> See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) (*Lumber from Canada*) and accompanying IDM at “Analysis of Programs, Provincial Stumpage Programs Determined to Confer Subsidies, Benefit.”

<sup>34</sup> See *CFS from the PRC*, and accompanying IDM at Comment 10.

<sup>35</sup> See *Lightweight Thermal Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 57323 (October 2, 2008) (*Thermal Paper from the PRC*), and accompanying IDM at 8-10.

<sup>36</sup> See World Bank Country Classification, <http://econ.worldbank.org/>; see also Calculation Memoranda.

category and remained there from 2011 to 2012.<sup>37</sup> Accordingly, as explained further below, we are using the interest rates of lower-middle income countries to construct the benchmark and discount rates for 2003-2009, and we used the interest rates of upper-middle income countries to construct the benchmark and discount rates for 2010-2012. This is consistent with the Department's calculation of interest rates for recent CVD proceedings involving PRC merchandise.<sup>38</sup>

After the Department identifies the appropriate interest rates, the next step in constructing the benchmark has been to incorporate an important factor in interest rate formation, the strength of governance as reflected in the quality of the countries' institutions. The strength of governance has been built into the analysis by using a regression analysis that relates the interest rates to governance indicators.

In each of the years from 2003-2009 and 2011-2012, the results of the regression analysis reflected the intended, common sense result: stronger institutions meant relatively lower real interest rates, while weaker institutions meant relatively higher real interest rates.<sup>39</sup> For 2010, however, the regression does not yield that outcome for the PRC's income group.<sup>40</sup> This contrary result for a single year does not lead us to reject the strength of governance as a determinant of interest rates. Therefore, we continue to rely on the regression-based analysis used since *CFS from the PRC* to compute the benchmarks for the years from 2001-2009 and 2011-2012. For the 2010 benchmark, we are using an average of the interest rates of the upper-middle income countries.

Many of the countries in the World Bank's upper-middle and lower-middle income categories reported lending and inflation rates to the International Monetary Fund, and they are included in that agency's international financial statistics (IFS). With the exceptions noted below, we used the interest and inflation rates reported in the IFS for the countries identified as "upper middle income" by the World Bank for 2010-2012 and "lower middle income" for 2001-2009.<sup>41</sup> First, we did not include those economies that the Department considered to be non-market economies for antidumping purposes for any part of the years in question, for example: Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Turkmenistan. Second, the pool necessarily excludes any country that did not report both lending and inflation rates to IFS for those years. Third, we removed any country that reported a rate that was not a lending rate or that based its lending rate on foreign-currency denominated instruments. For example, Jordan reported a deposit rate, not a lending rate, and the rates reported by Ecuador and Timor L'Este are dollar-denominated rates; therefore, the rates for these three countries have been excluded. Finally, for each year the Department calculated an inflation-adjusted short-term benchmark rate, we also excluded any countries with aberrational or negative real interest rates for the year in question.<sup>42</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., *Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Countervailing Duty Determination*, 78 FR 33346 (June 4, 2013) and accompanying Preliminary Decision Memorandum at "Benchmarks and Discount Rates," unchanged in *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013).

<sup>39</sup> See Banking Memorandum.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Because the resulting rates are net of inflation, we adjusted the benchmark to include an inflation component.<sup>43</sup>

For loans denominated in U.S. dollars, we are again following the methodology developed over a number of successive PRC investigations. Specifically, for U.S. dollar loans, the Department used as a benchmark the one-year dollar London Interbank Offering Rate (LIBOR), plus the average spread between LIBOR and the one-year corporate bond rates for companies with a BB rating. Likewise, for loans denominated in other foreign currencies, we used as a benchmark the one-year LIBOR for the given currency plus the average spread between the LIBOR rate and the one-year corporate bond rate for companies with a BB rating.

#### B. *Long-Term RMB-Denominated Loans*

The lending rates reported in the IFS represent short- and medium-term lending, and there are not sufficient publicly available long-term interest rate data upon which to base a robust benchmark for long-term loans. To address this problem, the Department developed an adjustment to the short- and medium-term rates to convert them to long-term rates using Bloomberg U.S. corporate BB-rated bond rates.<sup>44</sup>

In *Citric Acid from the PRC*, this methodology was revised by switching from a long-term mark-up based on the ratio of the rates of BB-rated bonds to applying a spread which is calculated as the difference between the two-year BB bond rate and the n-year BB bond rate, where “n” equals or approximates the number of years of the term of the loan in question.<sup>45</sup> Finally, because these long-term rates are net of inflation as noted above, we adjusted the benchmark to include an inflation component.<sup>46</sup>

On November 26, 2014, Petitioner filed an allegation regarding BYD’s creditworthiness under 19 CFR 351.505(a)(4). Because the Petitioner filed the allegation so close to the issuance of these preliminary results of review, the Department has not had adequate time to fully examine the allegation. If we determine to investigate this allegation, we intend to issue a preliminary analysis regarding BYD’s creditworthiness in a post-preliminary analysis memorandum, allowing parties the opportunity to comment on our preliminary analysis before issuing final results.

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<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *Thermal Paper from the PRC*, and accompanying IDM at 10.

<sup>45</sup> See *Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009) (*Citric Acid from the PRC*) and accompanying IDM at Comment 14.

<sup>46</sup> See, generally, Preliminary Calculation Memoranda.

### C. *Discount Rates*

Consistent with 19 CFR 351.524(d)(3)(i)(A), we used, as our discount rate, the long-term interest rate calculated according to the methodology described above for the year in which the government provided non-recurring subsidies.<sup>47</sup> The interest rate benchmarks and discount rates used in our preliminary calculations are provided in the Preliminary Calculation Memoranda.<sup>48</sup>

### D. *Land Benchmark*

19 CFR 351.511(a)(2) sets forth the basis for identifying comparative benchmarks for determining whether a government good or service is provided for less than adequate remuneration (LTAR). These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles. As explained in detail in previous investigations, the Department cannot rely on the use of so-called “first-tier” and “second-tier” benchmarks to assess the benefits from the provision of land for LTAR in the PRC.<sup>49</sup>

For this administrative review, BYD submitted the same 2010 Thailand benchmark information, *i.e.*, “Asian Marketview Reports” by CB Richard Ellis (CBRE) that we relied on in calculating land benchmarks in the CVD investigation of *Solar Cells from the PRC*.<sup>50</sup> We initially selected this information in the laminated woven sacks investigation after considering a number of factors, including national income levels, population density, and producers’ perceptions that Thailand is a reasonable alternative to China as a location for Asian production.<sup>51</sup> In *Solar Cells from the PRC*, we calculated annual land benchmarks covering the years 2002 through 2010, and a monthly industrial rental benchmark for 2010.<sup>52</sup> We find that these benchmarks are suitable for the preliminary determination, adjusted accordingly for inflation to account for benefits received by the respondent companies during the POR.<sup>53</sup>

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<sup>47</sup> *Id.*

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

<sup>49</sup> See, e.g., *Laminated Woven Sacks From the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 72 FR 67893, 67906-08 (December 3, 2007), unchanged in *Laminated Woven Sacks From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 FR 35639 (June 24, 2008).

<sup>50</sup> See Letter to the Department from BYD, “Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People’s Republic of China - 2012 Review: Benchmark Submission BYD,” (November 19, 2014) (BYD Benchmark Data) at 1-2 and Exhibit 1; see also *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Solar Cells from the PRC*), and accompanying IDM at 6 and Comment 11.

<sup>51</sup> The complete history of our reliance on this benchmark is discussed in *Solar Cells from the PRC, and accompanying IDM* at 6 and Comment 11. In that discussion, we reviewed our analysis from the laminated woven sacks investigation and concluded the CBRE data were still a valid land benchmark. *Id.*

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

<sup>53</sup> See Memorandum to the File from Elfi Blum, “Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China,” December 30, 2104 (Preliminary Benchmark Memorandum).

## E. *Input Benchmarks*

We selected the benchmarks for measuring the adequacy of the remuneration for solar grade polysilicon, aluminum extrusions, and solar glass in accordance with 19 CFR 351.511(a).

For polysilicon, the GOC provided information indicating that imports of polysilicon accounted for 42.1 percent of domestic consumption and that production by state-invested enterprises (SIEs) accounted for 6.86 percent.<sup>54</sup> The GOC stated it was unable to obtain statistics for solar grade polysilicon, but instead reported information for polysilicon, covering “all high-purity polysilicon extracted from industrial silicon through physical or chemical methods, which is the raw material for monocrystalline silicon.”<sup>55</sup> The GOC stated this category includes solar grade polysilicon and “others.”<sup>56</sup> The Department normally relies on so-called “first-tier” benchmarks, pursuant to 19 CFR 351.511(a)(2)(i), which include prices stemming from actual transactions between private parties, actual imports, and, in certain circumstances, actual sales from competitively run government auctions, although we do not do so where the foreign government’s presence in the input market is significant enough to lead to distorted prices. While no party suggested the use of “first-tier” benchmark for polysilicon or submitted information specifically for this purpose, respondents’ imported portions of the polysilicon they used during the POR. Under 19 CFR 351.511(a)(2)(i), actual imports may be considered a “first-tier” benchmark.

Notwithstanding the regulatory preference for the use of prices stemming from actual transactions in the country, where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.<sup>57</sup>

For these preliminary results of review, as explained below in the section, “Use of Facts Otherwise Available and Adverse Inferences,” we are finding that the GOC’s involvement in the PRC’s solar grade polysilicon market leads to significantly distorted solar grade polysilicon prices in the PRC. Thus, we preliminarily do not find it appropriate to rely on transactions in the PRC as a benchmark for polysilicon and are relying on the “Silicon Pricing Index” published by the firm Photon Consulting as the polysilicon benchmark for these preliminary results pursuant to 19 CFR 351.511(a)(2)(ii).<sup>58</sup> We have relied on this same source in prior proceedings.<sup>59</sup>

None of the parties has offered an internal “first-tier” benchmark for valuing solar glass or aluminum extrusions and we have no benchmark prices from actual transactions in the Chinese market for these inputs. Thus, we are relying on world market prices to determine the subsidy

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<sup>54</sup> See GOC IQR at 53-79 and Letter to the Department from the GOC, “*GOC First Supplemental Response : First Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules from the People’s Republic of China (C-570-980)*,” (October 10, 2014) (GOC SQR1) at 11. SIEs include companies in which the GOC maintains an ownership or management interest.

<sup>55</sup> See GOC SQR at 3.

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

<sup>57</sup> See *CVD Preamble*, 63 FR at 65377.

<sup>58</sup> See Polysilicon Benchmark Memo dated concurrently with this memo.

<sup>59</sup> See *Solar Cells from the PRC*, and accompanying IDM at 5.

rate for the provision of aluminum extrusions and solar glass for LTAR for these preliminary results of review. For aluminum extrusions, we are relying on GTA data as suggested by Petitioner and BYD. For solar glass, we are relying on data collected by the European Commission; this is the same data relied on by the Department for valuing solar glass in the recently completed investigation of solar products.<sup>60</sup>

Petitioner provided two sets of information to value ocean freight: international rates for 40-foot Maersk tankers and for shipping 20-foot cargo containers.<sup>61</sup> It suggested using the former for polysilicon and solar glass and the latter for aluminum extrusions. Lightway provided additional information on 20-foot cargo containers; specifically, Lightway provided information for shipping 20-foot cargo containers from Asian ports only, arguing that the Department's "sigma" rule in antidumping proceedings calls for relying on freight values representing freight from locations from which the respondent would reasonably import. We preliminarily determine to use the rates for the 20-foot cargo containers for all three inputs. Neither polysilicon nor solar glass are shipped by tanker and petitioner did not explain why a tanker rate would be appropriate for these two inputs. Because we are calculating a "world market price," we did not limit our freight values to nearby Asian ports as suggested by Lightway.

#### **IV. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES**

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, *inter alia*, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."<sup>62</sup> It is the Department's practice to consider information to be corroborated if it has probative value.<sup>63</sup> In analyzing

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<sup>60</sup> See BYD Benchmark Data at Exhibit 4.

<sup>61</sup> See Letter to the Department from Petitioner, "Certain Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China: Submission of Benchmark Information" (November 19, 2014) (Petitioner Benchmark Submission) at Exhibits 1-4; *see also*, Lightway Benchmark Submission.

<sup>62</sup> See, e.g., Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199 (SAA), at 870.

<sup>63</sup> *Id.*

whether information has probative value, it is the Department's practice to examine the reliability and relevance of the information to be used.<sup>64</sup> However, the SAA emphasizes that the Department need not prove that the selected facts available are the best alternative information.<sup>65</sup> For purposes of this preliminary determination, we find it necessary to apply facts available, and in some instances facts otherwise available with an adverse inference (AFA), in the following circumstances. However, we are not relying upon "secondary information" in our application of AFA in the following circumstances.

#### Application of AFA: Input Producers are "Authorities"

As discussed below under the section "Programs Preliminarily Determined to be Countervailable," the Department is investigating the provision of polysilicon, aluminum extrusions, and solar glass for LTAR by the GOC. We requested information from the GOC regarding the specific companies that produced these input products that Lightway and BYD purchased during the POR. Specifically, we sought information from the GOC that would allow us to determine whether the producers are "authorities" within the meaning of section 771(5)(B) of the Act. In our original and supplemental questionnaires, we requested detailed information from the GOC that would be needed for this analysis.<sup>66</sup>

For each producer in which the GOC was a majority owner, we stated that the GOC needed to provide the following information that is relevant to our analysis of whether that producer is an "authority."

- Translated copies of source documents that demonstrate the producer's ownership during the POR, such as capital verification reports, articles of association, share transfer agreements, or financial statements.
- The names of the ten largest shareholders and the total number of shareholders.
- The identification of any government ownership or other affiliations between the ten largest shareholders and the government.
- Total level of state ownership of the company's shares and the names of all government entities that own shares in the producer
- Any other relevant evidence the GOC believes demonstrates that the company is not controlled by the government.

For each producer that the GOC claimed was privately owned by individuals or companies during the POR we requested the following.

- Translated copies of source documents that demonstrate the producer's ownership during the POR, such as capital verification reports, articles of association, share transfer agreements, or financial statements.
- Identification of the owners, members of the board of directors, or managers of the producers who were also government or Chinese Communist Party (CCP) officials during the POR.

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<sup>64</sup> See, e.g., SAA, at 869.

<sup>65</sup> *Id.* at 869-870.

<sup>66</sup> See Department's Initial Questionnaire (March 28, 2014) at sections II-11 to II-14, and section III-16, and Department's NSA Questionnaire (May 22, 2014).

- A statement regarding whether the producer had ever been an SOE, and, if so, whether any of the current owners, directors, or senior managers had been involved in the operations of the company prior to its privatization.
- A discussion of whether and how operational or strategic decisions made by the management or board of directors are subject to government review or approval.

Finally, for producers owned by other corporations (whether in whole or in part) or with less-than-majority state ownership during the POR, we requested information tracing the ownership of the producer back to the ultimate individual or state owners. For such producers, we requested the following information.

- The identification of any state ownership of the producer’s shares; the names of all government entities that own shares, either directly or indirectly, in the producer; the identification of all owners considered “SOEs” by the GOC; and the amount of shares held by each government owner.
- For each level of ownership, identification of the owners, directors, or senior managers of the producer who were also government or CCP officials during the POR.
- A discussion of whether and how operational or strategic decisions made by the management or board of directors are subject to government review or approval.
- A statement regarding whether any of the shares held by government entities have any special rights, priorities, or privileges with regard to voting rights or other management or decision-making powers of the company; a statement regarding whether there are restrictions on conducting, or acting through, extraordinary meetings of shareholders; a statement regarding whether there are any restrictions on the shares held by private shareholders; and a discussion of the nature of the private shareholders’ interests in the company (*e.g.*, operational, strategic, or investment-related).

In its questionnaire responses, the GOC provided incomplete ownership information for nearly all of the companies that produced polysilicon, aluminum extrusions, and solar glass purchased by Lightway and by BYD. In its initial response, the GOC informed the Department that it was still gathering the requested ownership information for polysilicon, and that it expected to submit this information at a later date.<sup>67</sup> The GOC did not submit an extension request to submit this information. As stated in the initial questionnaire, the Department does not allow statements within a questionnaire response “regarding a respondent’s ongoing efforts to collect part of the requested information and promises to supply such missing information when available in the future”, to substitute for a written extension request. In its response to the input producer questionnaire for aluminum extrusions and solar glass, the GOC stated that it “has made its best effort to collect relevant information and provides the Business Registration Information, Articles of Association, Capital Verification Reports and Business license for each producers in Exhibits....”<sup>68</sup> Specifically, the GOC did not provide a written response to the input appendix for all input producers for all three inputs. For the vast majority of producers or owners of the respective company, it provided none, or parts only, of the information requested in the standard “input producers” appendix the Department issues to determine the individual owners of

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<sup>67</sup> See GOC IQR at 55. As noted below, the GOC did provide additional – although still incomplete – information in response to a supplemental questionnaire.

<sup>68</sup> See GOC NSAQR, IPA-A at 1 and IPA-G at 91.

producers and to determine the extent of GOC control, if any, over the producers.<sup>69</sup> For example, while the GOC provided the articles of association for a number of producers, it did not provide capital verification reports, business registrations, or any other documents demonstrating the producers' ownership. For other producers, it provided some information, but not enough to trace ownership back to the ultimate individual owners, as the questionnaire requested.

Further, it provided no information at all regarding the identification of owners, directors, or senior managers who were also GOC or CCP officials.<sup>70</sup> On September 19, 2014, we issued a supplemental questionnaire to the GOC requesting that it provide the remaining ownership information for the input producers. We also requested that the GOC respond to the questions above regarding the role, if any, that GOC and CCP officials had as owners, directors, or senior managers of the producers, or explain in detail the efforts it undertook to obtain the requested information.<sup>71</sup> In its supplemental response, the GOC did not provide any information regarding the role of GOC and CCP officials with the producers, nor did the GOC explain the efforts it undertook to obtain the requested information, noting that collection of that information on the numerous producers would be too burdensome.<sup>72</sup> The GOC simply stated that there is no central informational database to search for the requested information, and that the State Industry and Commerce Administration does not require companies to provide such information. The GOC further responded that, because organizations such as the CCP, People's Congress and the Chinese People's Consultative Conference are not government bodies, it cannot require them to provide the requested information. In addition, the GOC noted in that response, that no party provided any evidence demonstrating that the owners, board of directors or managers of the suppliers of the respondents are officials of the above organizations.<sup>73</sup> In the supplemental questionnaire response, the GOC again did not provide complete information requested in the input producer questionnaire regarding ownership to determine the ultimate individual owners, *etc.*, for any of the individual input producers.<sup>74</sup>

In addition to not providing all of the requested information regarding government and CCP officials, the GOC also declined to answer questions about the CCP's structure and functions that are relevant to our determination of whether the producers of polysilicon, aluminum extrusions, and solar glass are "authorities" within the meaning of section 771(5)(B) of the Act. In its initial questionnaire response, the GOC objected to our questions, stating that the CCP, along with other related organizations, is not a government organization and that the involvement of CCP officials in the management or operations of the input producers, "this circumstance would not make the management and business operations of the Company in which he/she serves subject to any intervention by the GOC."<sup>75</sup> Additionally, the GOC stated that Chinese law prohibits GOC officials from taking positions in private companies.<sup>76</sup> Furthermore, the GOC stated that "there

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<sup>69</sup> *Id.* at 55 pp. and Exhibits E.1a. and IPA-P1 to P8.

<sup>70</sup> *Id.*, GOC NSAQR at Input Producer Appendix, Exhibits N-1 and IPA-A1 to A7 and Exhibits N-12 and IPA-G1 to G8.

<sup>71</sup> See First supplemental questionnaire to the GOC from the Department, (September 19, 2014) at Questions 6 to 11.

<sup>72</sup> See GOC SQR at 12.

<sup>73</sup> See GOC IQR at 66-68, and GOC SQR1 at 12-14.

<sup>74</sup> *Id.* GOC SQR1 at 12 pp.

<sup>75</sup> See GOC IQR at 61-62.

<sup>76</sup> *Id.* at 61.

is no central informational database to search for the requested information and the industry and commerce administration does not require the companies to provide such information.”<sup>77</sup> As such, the GOC claimed it was unable to respond to the Department’s questions.<sup>78</sup> Regarding the GOC’s objections to our questions about the role of CCP officials in the management and operations of the input producers, we observe that it is the prerogative of the Department, not the GOC, to determine what information is relevant to our investigations and administrative reviews.<sup>79</sup> The Department requests this information because public information suggests that the CCP exerts significant control over activities in the PRC.<sup>80</sup> The Department previously determined that “available information and record evidence indicates that the CCP meets the definition of the term ‘government’ for the limited purpose of applying the U.S. CVD law to China.”<sup>81</sup> Additionally, publicly available information indicates that Chinese law requires the establishment of CCP organizations “in all companies, whether state, private, domestic, or foreign-invested” and that such organizations may wield a controlling influence in the company’s affairs.<sup>82</sup> Because the GOC did not provide the information we requested regarding this issue, we have no further basis for reevaluating the Department’s prior factual findings on the role of the CCP. With regard to the GOC’s claim that Chinese law prohibits GOC officials from taking positions in private companies, we previously found that this particular law does not pertain to CCP officials.<sup>83</sup>

The information we requested regarding the ultimate owners of the producers and the role of government/CCP officials and CCP committees in the management and operations of the input producers, which sold inputs to the respondents, is necessary to our determination of whether the

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<sup>77</sup> *Id.* at 66.

<sup>78</sup> *Id.*

<sup>79</sup> See *NSK, Ltd. v. United States*, 919 F. Supp. 442, 447 (CIT 1996) (NSK) (“NSK’s assertion that the information it submitted to Commerce provided a sufficient representation of NSK’s cost of manufacturing misses the point that ‘it is Commerce, not the respondent, that determines what information is to be provided for an administrative review.’”); and *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (*Ansaldo*) (stating that “[i]t is Commerce, not the respondent, that determines what information is to be provided”).

<sup>80</sup> See Memorandum to the file from Andrew Huston, “Additional Documents Memorandum,” dated December 30, 2014, at Attachment II, which includes Memorandum for Paul Piquado, Assistant Secretary for Import Administration, through Lynn Fischer Fox, Deputy Assistant Secretary for AD/CVD Policy and Negotiation, Christian Marsh, Deputy Assistant Secretary for AD/CVD Operations, and John D McInerney, Chief Counsel for Import Administration, from Shauna Biby, Christopher Cassel, Timothy Hruby, Office of Policy, Import Administration, “Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People’s Republic of China: An Analysis of Public Bodies in the People’s Republic of China in Accordance with the WTO Appellate Body’s Findings in WTO DS379,” dated May 18, 2012 (Public Body Memorandum); and its attachment, Memorandum for Paul Piquado, Assistant Secretary for Import Administration, through Lynn Fischer Fox, Deputy Assistant Secretary for AD/CVD Policy and Negotiation, Christian Marsh, Deputy Assistant Secretary for AD/CVD Operations, and John D McInerney, Chief Counsel for Import Administration, from Shauna Biby, Christopher Cassel, Timothy Hruby, Office of Policy, Import Administration, “The relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be ‘public bodies’ within the context of a countervailing duty investigation,” dated May 18, 2012 (CCP Memorandum).

<sup>81</sup> See *id.*, at CCP Memorandum at 33.

<sup>82</sup> See *id.*, at Public Body Memorandum at 35-36, and sources cited therein.

<sup>83</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010), and accompanying IDM at 16.

producers are “authorities” within the meaning of section 771(5)(B) of the Act. If the GOC was not able to submit the required information in the requested form and manner, it should have promptly notified the Department, in accordance with section 782(c) of the Act. It did not do so, nor did it suggest any alternative forms for submitting this information.<sup>84</sup> Instead, the GOC simply stated that “{t}here is no central informational database to search for the requested information on whether any individual owners, members of the board of directors, or senior managers is a Government or CCP official, and the industry and commerce administration does not require the companies to provide such information. Therefore, the GOC cannot obtain the information requested by the Department.”<sup>85</sup> Further, the GOC did not indicate that it had attempted to contact the CCP, or that it consulted any other sources. The GOC’s responses in prior proceedings demonstrate that it is, in fact, able to access the information we requested.<sup>86</sup>

Because the GOC did not respond to our requests for information on this issue, we have no further basis for evaluating the GOC’s claim that the role of the CCP is irrelevant. Thus, the Department finds, as it has in past investigations, that the information requested regarding the role of CCP officials in the management and operations of the input producers, and in the management and operations of the producers’ owners, is necessary to our determination of whether these producers are authorities within the meaning of section 771(5)(B) of the Act. In addition, the GOC did not promptly notify the Department, in accordance with section 782(c) of the Act, that it was unable to submit the information requested in the requested form and manner, nor did it suggest any alternative forms for submitting this information. Further, the GOC did not provide any information regarding the attempts it undertook to obtain this information, despite the fact that we provided the GOC with a second opportunity to provide the information and extensions for responding to both the original and supplemental questionnaires. Therefore, we have no basis to accept the GOC’s claim that it is unable to provide this information. This is particularly appropriate given that the GOC informed the Department that such information regarding the CCP is irrelevant, when the Department made it abundantly clear on the record of this review and numerous previous investigations that such information is relevant to our analysis of whether input producers are “authorities” under the statute.

In its questionnaire responses, the GOC provided incomplete ownership information for many of the companies that produced polysilicon, aluminum extrusions, and solar glass purchased by Lightway and BYD.<sup>87</sup> For example, the GOC did not provide complete information such as articles of association, capital verification reports, or any other business documents demonstrating the owners of any of the input producers that supplied Lightway and BYD. While

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<sup>84</sup> Section 782(c)(1) of the Act states that “[i]f an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority of the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.”

<sup>85</sup> See GOC NSAQR at 13.

<sup>86</sup> See, e.g., *High Pressure Steel Cylinders from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012), and accompanying IDM at “Use of Facts Available and Adverse Inferences.”

<sup>87</sup> See, e.g., GOC IQR at 55 pp and Exhibits E.1a. and IPA-P1 to P8; see also GOC NSAQR at Input Producer Appendix, Exhibits N-1 and IPA-A1 to A7 and Exhibits N-12 and IPA-G1 to G8.

the GOC did provide some information, it was not enough information to trace the ownership back to the ultimate individual owners. In its supplemental questionnaire response, the GOC again did not provide the detailed information as requested or explain in detail its efforts taken to obtain the information requested by the Department, such that this information is still incomplete. Specifically, the GOC stated that “the amount of documentation and information requested by the Department for each of these producers is burdensome and is difficult or impossible to obtain within the time periods specified by the Department,” and that the GOC’s initial questionnaire response provided much of the information requested regarding the input producers.<sup>88</sup>

Therefore, we preliminarily determine that necessary information is not available on the record, and that the GOC withheld information that was requested of it and, thus, that the Department must rely on “facts otherwise available” in these preliminary results.<sup>89</sup> Moreover, by stating that the requested information is not relevant, the GOC placed itself in the position of the Department, yet only the Department can determine what is relevant to its investigation.<sup>90</sup> Furthermore, stating that it is unable to obtain the information because the CCP is not the government is effectively telling the Department to reach the conclusion based on the statements of the GOC without any of the information that the Department considers necessary and relevant to evaluating fully the role of the CCP in the government and in input producers. Consequently, we preliminarily determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information and an adverse inference is warranted in the application of facts available.<sup>91</sup> As AFA, we are finding that all of the producers of polysilicon, aluminum extrusions, and solar glass purchased by the respondents during the POR are “authorities” within the meaning of section 771(5)(B) of the Act.

#### Application of Facts Available: The GOC’s Involvement in the PRC’s Solar Grade Polysilicon Industry Results in the Significant Distortion of Prices

In response to our questions concerning its role in the production of solar grade polysilicon, the GOC provided no information specific to “solar grade” polysilicon.<sup>92</sup> In response to our

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<sup>88</sup> See GOC SQR1 at 12-13.

<sup>89</sup> See sections 776(a)(1) and (a)(2)(A) of the Act.

<sup>90</sup> See *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (CIT 1986) (stating that “[i]t is Commerce, not the respondent, that determines what information is to be provided”). The Court in *Ansaldo* criticized the respondent for refusing to submit information which the respondent alone had determined was not needed, for failing to submit data which the respondent decided could not be a basis for the Department’s decision, and for claiming that submitting such information would be “an unreasonable and unnecessary burden on the company.” *Id.*; see also *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1298-99 (CIT 2010) (stating that “[r]egardless of whether Essar deemed the license information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion” and that “Commerce, and not Essar, is charged with conducting administrative reviews and weighing all evidence in its calculation of a countervailing duty margin”); *NSK*, 919 F. Supp. at 447 (“NSK’s assertion that the information it submitted to Commerce provided a sufficient representation of NSK’s cost of manufacturing misses the point that ‘it is Commerce, not the respondent, that determines what information is to be provided for an administrative review.’”); *Nachi-Fujikoshi Corp. v. United States*, 890 F. Supp. 1106, 1111 (CIT 1995) (“Respondents have the burden of creating an adequate record to assist Commerce’s determinations.”).

<sup>91</sup> See section 776(b) of the Act.

<sup>92</sup> See GOC IQR at 69-73.

supplemental questions, the GOC stated the National Bureau of Statistics or State Statistical Bureau (SSB) “has not begun information collection for specific types of polysilicon. What the SSB records in its database is polysilicon, which include solar grade polysilicon and others.”<sup>93</sup> The GOC also reported that there is no specific polysilicon association in the PRC, but that in order to obtain information for solar grade polysilicon, it consulted some related industry associations (for example, the China Electronics Materials Industry Association).<sup>94</sup> It explained, however, that those associations only gather information from enterprises that are their members and therefore the data is too limited to provide an accurate picture of the entire industry.<sup>95</sup>

With respect to the information that the GOC did provide in its questionnaire response, the GOC provided information regarding state-involved enterprise (SIE) involvement in the polysilicon industry based solely on information collected from the SSB.<sup>96</sup> The GOC stated in its questionnaire response that there were 66 producers of polysilicon during the POR.<sup>97</sup> We find the information in the GOC’s response to be unreliable because of information discovered in a separate proceeding, *Solar Products from the PRC*, regarding the same data.<sup>98</sup>

Specifically, during the verification of *Solar Products from the PRC*, the Department found that the SSB only collects polysilicon information from companies with more than RMB 20 million in annual sales, and thus excluded a number of producers in its reports.<sup>99</sup> The fact that the industry information submitted to the Department does not include PRC companies in the polysilicon industry with less than RMB 20 million in sales, and has been subject to substantial revision as additional companies have been included, limits our ability to analyze the entirety of this industry in the PRC, and SIE involvement therein. Thus, we find that the production information for this industry maintained by the SSB is not reliable because reported data for a given year has significantly changed from year-to-year, after the fact.<sup>100</sup> Therefore, we preliminarily determine that necessary information is not available on the record and, pursuant to section 776(a)(1) of the Act, will rely on the facts otherwise available in reaching our determination on the GOC’s involvement in the PRC solar grade polysilicon market, and whether this government involvement significantly distorts the prices in this industry in the PRC.

Public information from the record of the solar products investigation placed on the record of this proceeding contains the following information relevant to determining whether the GOC’s involvement in the PRC solar grade polysilicon market significantly distorts prices:

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<sup>93</sup> See GOC SQR1 at 3.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 3-4.

<sup>96</sup> See GOC SQR1 at 3-4.

<sup>97</sup> See GOC IQR at 69.

<sup>98</sup> *Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 76962 (December 23, 2014) (*Solar Products from the PRC*) and accompanying IDM at 12-15; see also GOC verification report for *Solar Products from the PRC* (GOC Solar Products VR), placed on the record of this proceeding on December 30, 2014, at 10-11.

<sup>99</sup> See *Solar Products from the PRC* and accompanying IDM at 13.

<sup>100</sup> See the GOC Solar Products VR at 14.

- The petition for *Solar Products from the PRC* points to a WTO Dispute Settlement Panel determination that the GOC maintains WTO-inconsistent export restraints on silicon exports, and contends that these restraints operate to ensure “an abundant domestic supply of silicon in China, thus artificially depressing the domestic price of polysilicon.”<sup>101</sup>
- A 2009 *New York Times* article explaining that the GOC’s State Council, or cabinet, has the ability to manage several key aspects of the solar grade polysilicon industry, including its capacity, access to the industry, land use, and lending from state-owned commercial banks (SOCBs).<sup>102</sup>
- Another article on the record explains that the GOC maintains “Polysilicon Industry Access Standards,” outlining rules and restrictions that prospective solar grade polysilicon manufacturers in the PRC must adhere to.<sup>103</sup>
- The record also includes publicly available information indicating that the largest polysilicon producer in China, GCL-Poly, is selling polysilicon at prices below the amount it needs to break even, and that it is able to do so due to the assistance of government subsidies.<sup>104</sup>

In the absence of further information, these items reflect a recognition of significant distortion in the PRC’s solar grade polysilicon industry. Prices are distorted if they are higher or lower than what would be a normal price in a competitive market without government intervention such as limiting access to an industry and financing, which reduces competition. When government intervention in the marketplace actively manages the amount of supply through means such as capacity restrictions, limitations on access to the industry and subsidization of uneconomic production, it prevents a price from achieving its competitive equilibrium level, and it can result in a significant distortion of prices in the market. Thus, based on the information detailed above, and the unreliability of the information submitted by the GOC, we find that the facts otherwise available on the record of this case support a determination that the GOC’s involvement in the PRC’s solar grade polysilicon industry significantly distorts the prices in this industry. As such, we are not relying on domestic prices in the solar grade polysilicon market in the PRC as a “tier 1” benchmark pursuant to 19 CFR 351.511(a)(2)(i). Consequently, we are relying on world market prices as our benchmarks for the provision of polysilicon for LTAR program, pursuant to 19 CFR 351.511(a)(2)(ii). The use of an external benchmark is consistent with our past practice.<sup>105</sup>

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<sup>101</sup> See Letter to the Secretary, “Petition for the Imposition of Antidumping and Countervailing Duties: Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China and Taiwan (December 31, 2013) (*Solar Products from the PRC Petition*) at 38, citing *China - Measures Related to the Exportation of Various Raw Materials*, Report of the Panel, WT/DS394/R (July 5, 2011), Exhibit III-51, placed on the record of this proceeding on December 30, 2014.

<sup>102</sup> See “Chinese Solar Firm Revises Price Mark,” Keith Bradsher, *New York Times*, (August 27, 2009) Volume I of the Petition at Exhibit I-1B, placed on the record of this proceeding on December 30, 2014.

<sup>103</sup> See Polysilicon Productions Data, placed on the record of this proceeding on December 30, 2014.

<sup>104</sup> See *Solar Products from the PRC Petition* at 41-42 and sources cited therein, placed on the record of this proceeding on December 30, 2014.

<sup>105</sup> See, e.g., *Countervailing Duty Investigation of 1,1,1,2 Tetrafluoroethane From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 62594 (October 20, 2014) (*Tetrafluoro from the PRC*) and accompanying Issues and Decision Memorandum at 14 and 27.

## Application of AFA: Provision of Electricity for LTAR

The GOC did not provide complete responses to the Department's questions regarding the alleged provision of electricity for LTAR. These questions requested information to determine whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D) of the Act, whether such a provision provided a benefit within the meaning of section 771(5)(E) of the Act, and whether such a provision was specific within the meaning of section 771(5A) of the Act. In the Department's original questionnaire, for each province in which a respondent is located, the Department asked the GOC to provide a detailed explanation of: (1) how increases in the cost elements in the price proposals led to retail price increases for electricity; (2) how increases in labor costs, capital expenses, and transmission and distribution costs are factored into the price proposals for increases in electricity rates; and (3) how the cost element increases in the price proposals and the final price increases were allocated across the province and across tariff end-user categories. In its initial questionnaire response, the GOC did not adequately address these questions.<sup>106</sup>

The GOC did not explain how cost elements in the price proposals led to retail price increases, but stated, without any supporting documents, that the cost elements are "obtained directly from the data provided by the power generating companies and grid companies,"<sup>107</sup> and that electricity rates are "fully reflective of the changes in the supply and demand of the market, and further the international commitments and government policies made by the GOC for energy conservation and emission reduction."<sup>108</sup>

Moreover, when the Department asked the GOC to explain how the National Development and Reform Commission (NDRC) determines that the price adjustments proposed by the provinces reflect all relevant cost elements, and to explain how the NDRC determines that all relevant cost elements are accurately reported by the provincial level price bureaus, the GOC responded that the NDRC "corresponds with power generating companies, grid companies, and local price bureaus in cross-checking these data to ensure that the price adjustment proposals are comprehensive, true, accurate, and reliable," with no explanation of how it "corresponds" with these various parties.<sup>109</sup> When the Department requested this information again in its supplemental questionnaire to the GOC, the GOC responded that the documents are for the "NDRC's review only."<sup>110</sup>

Consequently, we preliminarily determine that the GOC withheld information that was requested of it and, thus, that the Department must rely on "facts available" in making our preliminary determination.<sup>111</sup> Moreover, we preliminarily determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. The GOC did not adequately answer our questions, nor did the GOC ask for additional time to gather and provide such information. Consequently, an adverse inference is warranted in the application of facts

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<sup>106</sup> See GOC IQR at 96-98.

<sup>107</sup> *Id.* at 96.

<sup>108</sup> *Id.* at 97.

<sup>109</sup> *Id.* at 98.

<sup>110</sup> See GOC SQR1 at 16.

<sup>111</sup> See section 776(a)(2)(A) of the Act.

available.<sup>112</sup> In drawing an adverse inference, we find that the GOC's provision of electricity constitutes a financial contribution within the meaning of section 771(5)(D) of the Act and is specific within the meaning of section 771(5A) of the Act. Because the GOC refused to provide information concerning the relationship (if any) between provincial tariff schedules and cost, we also relied on an adverse inference in selecting the benchmark for determining the existence and amount of the benefit.<sup>113</sup> The benchmark rates we selected are derived from the record of this review and are the highest electricity rates on the record for the applicable rate and user categories. For details regarding the remainder of our analysis, *see* the "Provision of Electricity for LTAR" section, below.

### Application of AFA: Land Provided to the Respondents is Specific to the Solar Products Industry

In the initial response, the GOC claimed that the provision of land or land-use rights to the respondents for LTAR as a subsidy program was non-existent, and that the GOC expressly asserts and does not waive the fact that there is no alleged program.<sup>114</sup> The GOC further stated that: (1) Lightway obtained land-use rights from the Gaobeidian City Land Administration; (2) Shanghai BYD from the Shanghai Municipal Bureau of Planning and Land Resources; (3) Shangluo BYD from the Shangluo Land Administration; and (4) BYD Co. from the Urban Planning Land and Resources Commission of Shenzhen Municipality.<sup>115</sup>

#### *Pre-2008 Land-Use Rights*

Shanghai BYD and BYD Co. obtained land-use rights prior to 2008 based on contractual agreements. According to the GOC, the application and land approval procedures prior to 2008 are documented in the Land Administration Law of the People's Republic of China (2004) and the Regulation on the Implementation of the Land Administration Law of the People's Republic of China (1998).<sup>116</sup> The Department requested that the GOC provide a description of the application and approval process for assistance under the land-approval program prior to 2008, which it failed to do, referring to the Land Administration Law and the Regulation on the Implementation of the Land Administration Law of the People's Republic of China (1998) instead.<sup>117</sup> For each company under examination that applied for, received, or accrued assistance, we asked the GOC to provide a copy of at least one application and approval package or other supporting documentation, from which to discern whether respondents' land-use rights were contingent on any particular status or activity. However, the GOC provided a copy of just one agreement for land-use prior to 2008; it did not provide the accompanying application or any other documentation pertaining to this land-use.<sup>118</sup> The Department also requested that the GOC provide information on the policies of the relevant local governments that had jurisdiction over the land and land-use rights. As indicated above, respondent companies are located in different provinces. The GOC stated that the price of land and land-use rights are administered by the

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<sup>112</sup> *See* section 776(b) of the Act.

<sup>113</sup> *See* section 776(b)(4) of the Act.

<sup>114</sup> *See* GOC IQR at 80.

<sup>115</sup> *See* GOC IQR at 90.

<sup>116</sup> *See* GOC IQR at 91.

<sup>117</sup> *Id.*

<sup>118</sup> *See* GOC SQR1 at Exhibit S-18, Land 6-7.

local jurisdictions, but provided incomplete information concerning those policies, as discussed below.<sup>119</sup>

#### *Post January 1, 2008 Land-Use Rights*

Lightway and Shangluo BYD purchased their land use rights after the beginning of 2008 through a public bidding process.<sup>120</sup> Respondents stated that all Lightway and Shangluo BYD land is located in industrial parks.<sup>121</sup>

According to the procedures in effect since 2008, land for industrial/commercial use must be transferred through bidding by invitation, auction, or quotation, and a floor price is set by which the land authority determines the floor price, according to the land valuation results.<sup>122</sup> Specifically, for land assigned after January 1, 2008, the application and approval of land-use rights follow the Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation Auction and Quotation.<sup>123</sup> According to the GOC, the Ministry of Land Resources issued the National Standards for the Minimum Transfer Prices of Land for Industrial Purposes. These standards, the GOC states, are the minimum control standards that must be executed by the municipal and county governments in transferring land for industrial use and in determining the transfer prices of land use rights.<sup>124</sup>

As noted, all Lightway and Shangluo BYD land-use rights were purchased through the public bidding process. Therefore, in our supplemental questionnaire to the GOC, we asked the GOC to provide information regarding the public bidding process, demonstrating, among other things, the floor prices of these auctions, the public notices inviting bids, and the number of bidders for all of Lightway's and Shangluo BYD's land-use rights purchases. The GOC provided the "minimum transfer price," or floor price, for land acquired by Lightway and Shangluo BYD after 2008, but it did not provide the requested information for all of the tracts of land provided by the local land bureaus to Lightway and Shangluo BYD.<sup>125</sup> Specifically, for each land-use right obtained through the public bidding process, we asked the GOC: (1) to provide us with the invitation for offer and the approval by the relevant authority of respondents' winning bid; (2) to explain how any floor price was established and provide the approval by the relevant authority of the floor price; and (3) to state the number of bids that were placed, with documentation supporting the response. However, the GOC provided only land-use certificates and "Contracts for State-owned Construction Land-use Right Assignments." These documents simply detail the ownership of the land-use rights, and do not provide any information indicating that those rights were sold through a competitive auction in adherence with applicable policies or that the prices

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<sup>119</sup> *Id.* at 90.

<sup>120</sup> *Id.* at 91 and Exhibit E.2.d.

<sup>121</sup> See Lightway IQR at 28 and BYD IQR (Shangluo) at 21-23.

<sup>122</sup> See GOC IQR at 91 and Exhibit E.2.c.

<sup>123</sup> *Id.*; see also GOC Addendum to SQR1-Response to Question 18 (October 20, 2014) (GOC SQR1 Question 18) at 1: According to the GOC, Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation Auction and Quotation were revised on September 21, 2007 and came into force as of November 1, 2007, with respect to land for industry, commerce, tourism, entertainment, commercial housing or other business operations, or on which there are two or more intended land users, assignment must be conducted through a bid invitation, auction or quotation.

<sup>124</sup> See GOC SQR1 Question 18 at 2.

<sup>125</sup> See GOC SQR1 at Exhibit S1-18-B and 18-C.

paid were consistent with the price floor for that province or locality. In short, these documents do not allow the Department to examine whether these transactions were conducted in a manner that is consistent with the post-January 1, 2008 land regime described by the GOC. For one specific Shangluo BYD parcel, the GOC provided the following additional documents: (1) “State-owned Construction Land-use Right Public Listing,” which clearly indicates subject merchandise as one of the targeted industries to be developed through the provision of land-use rights; (2) “Bidding Application Shangluo BYD;” (3) “Bidding Quotation of State-owned Construction Land-use Right – Public Listing, Transaction Confirmation;” and (5) “Land Valuation Report.”<sup>126</sup>

The GOC does not explain in its responses how the floor prices for land acquired by Lightway and Shangluo BYD after 2008 (in Exhibits 18-B and 18-C) were derived, how it was determined which companies to invite for the bid, or how many and which companies placed a bid for these land-use rights. With respect to the documentation the GOC provided for one of the several land-use rights reported by Shangluo BYD, it does not address the difference in Shangluo BYD’s bid price accepted by the municipal government and the floor price set for that category of land, as well as the “Land Valuation Report and Result.”<sup>127</sup>

Because the GOC did not provide complete responses to either the Department’s initial or supplemental questions regarding the derivation of the prices paid by Lightway and BYD for land-use rights acquired both pre-2008 and post January 1, 2008, the Department is unable to determine whether or not the provision of these land-use rights was specific. Therefore, we preliminarily determine that the GOC withheld information that was requested of it and, thus, that the Department must rely on facts available pursuant to section 776(a)(2)(A) of the Act in making our preliminary specificity determination for Lightway and BYD. Moreover, we preliminarily determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. The GOC refused to provide necessary information regarding prices paid by Lightway and BYD for their tracts of land. In its first response, described above, the GOC appears to be suggesting it cannot obtain information from local governments regarding land transactions because it is administered by the municipal governments. However, such information has been provided in other proceedings, such as the investigation of laminated woven sacks,<sup>128</sup> and, as noted above, some information from the local government was, in fact, provided in this review. Consequently, the GOC has not cooperated to the best of its ability and an adverse inference is warranted in the application of facts available.<sup>129</sup> In drawing an adverse inference, we find that the GOC’s provision of certain land tracts to Lightway and BYD is specific within the meaning of section 771(5A) of the Act given

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<sup>126</sup> *Id.* GOC SQR1.

<sup>127</sup> *See* GOC SQR1 Question 18, Land 5, and Exhibits S1-18.B and S1-18.C.

<sup>128</sup> *See, e.g.,* Additional Documents Memorandum at Attachment V (includes a public version of the Department’s report from the laminated woven sacks government verification during which the Department requested and received several official land documents involving the respondents in that investigation as well as companies that were not even part of that investigation; *e.g.,* “We asked for and were provided . . . land contracts as well as the accompanying agreements for several companies located in the New Century Industrial Park.”). Moreover, in the underlying investigation to this review, the GOC provided documentation concerning the public auction of one Trina Solar tract.

<sup>129</sup> *See* section 776(b) of the Act.

the GOC's failure to provide information regarding how land prices were determined in certain instances (land provided before 2008, and land that is auctioned). For details regarding the remainder of our analysis for this program, *see* the "Provision of Land for LTAR" section below.

## V. ANALYSIS OF PROGRAMS

### **Programs Preliminarily Determined to be Countervailable**

Based upon our analysis of the record and the responses to our questionnaires, we preliminarily determine the following:

#### **A. Programs Preliminarily Determined To Be Countervailable**

##### 1. Provision of Inputs for LTAR

###### a. Provision of Polysilicon for LTAR

In the original investigation, the Department determined this program to be countervailable based on AFA.<sup>130</sup> For the reasons explained in the "Use of Facts Otherwise Available and Adverse Inferences" section above, we are basing our determination regarding the government's provision of polysilicon, in part, on AFA. Specifically, we determine as AFA that all of the producers of the polysilicon purchased by both respondents are "authorities" within the meaning of section 771(5)(B) of the Act and, as such, that the provision of polysilicon constitutes a financial contribution under section 771(5)(D)(iii) of the Act.

In response to our questions concerning specificity, the GOC stated: "There are a vast number of uses for polysilicon, and the type of consumer that may purchase polysilicon is highly varied within China's economy."<sup>131</sup> However, the GOC provided no information concerning the industries consuming polysilicon and the amounts purchased by those individual industries. Then, in its supplemental response, the GOC stated that "Polysilicon has a wide range of uses, including but not limited to use in the solar and semiconductor industries." Accordingly, we preliminarily determine that the provision of polysilicon is limited to specific industries under section 771(5A)(D)(iii) of the Act, namely the solar and semiconductor industries.

Lastly, a benefit is being conferred because the polysilicon is being provided for LTAR. As discussed above under the "Subsidies Valuation Information" section, the Department is relying on world market prices, the "Silicon Pricing Index" published by Photon Consulting, to calculate a benefit for each respondent. The Department adjusted the benchmark price to include delivery charges, import duties, and value added tax (VAT) pursuant to 19 CFR 351.511(a)(2)(iv).<sup>132</sup> Regarding delivery charges, we included ocean freight and the inland freight charges that would be incurred to deliver polysilicon to respondents' production facilities. We added import duties as reported by the GOC, and the VAT applicable to imports of polysilicon into the PRC, where

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<sup>130</sup> *See Solar Cells from the PRC*, and accompanying IDM at 12-13.

<sup>131</sup> *See* GOC IQR at 55.

<sup>132</sup> The Department concludes that these data do not already include delivery charges. *See* Preliminary Benchmark Memorandum.

applicable, also as reported by the GOC.<sup>133</sup> In calculating VAT, we applied the applicable VAT rate to the benchmark after first adding amounts for ocean freight and import duties, as applicable. We compared these monthly benchmark prices to the respondents' reported purchase prices for individual domestic transactions, including VAT and delivery charges.

Based on this comparison, we preliminarily determine that polysilicon was provided for LTAR and that a benefit exists for each respondent in the amount of the difference between the benchmark prices and the prices each respondent paid.<sup>134</sup> We divided the total benefits for each respondent by the appropriate total sales denominator, as discussed in the "Subsidies Valuation Information" section above, and in the Preliminary Calculation Memoranda. On this basis, we preliminarily determine a countervailable subsidy rate of 1.61 percent *ad valorem* for Lightway and 0.40 percent *ad valorem* for BYD.

b. Provision of Aluminum Extrusions for LTAR

Petitioner alleged that the respondents received countervailable subsidies in the form of the provision of aluminum extrusions for LTAR.<sup>135</sup> For the reasons explained in the "Use of Facts Otherwise Available and Adverse Inferences" section above, we are basing our determination regarding the government's provision of aluminum extrusions, in part, on AFA. Specifically, we determine as AFA that the producers of the aluminum extrusions purchased by both respondents are "authorities" within the meaning of section 771(5)(B) of the Act and, as such, that the provision of aluminum extrusions constitutes a financial contribution under section 771(5)(D)(iii) of the Act.

In addressing specificity, the GOC stated that "{t}here are a vast number of uses for aluminum extrusions, and the type of consumers that may purchase aluminum extrusions is highly varied within China's economy, . . ."<sup>136</sup> In response to our questions concerning specificity, the GOC provided a list of a few dozen "major end-use" applications for aluminum and aluminum extrusions in the United States taken from the aluminum extrusions injury analysis of the ITC. The GOC stated: "Consumption patterns and the diversity of consumers is no different in China. Indeed, given the breadth of manufacturing in China one would expect it to be broader than in the United States."<sup>137</sup> However, the GOC provided none of the information requested concerning amounts purchased by individual industries.

Petitioner's NSA provided information demonstrating the largest aluminum extrusions producer, Zhonhwang Holdings Ltd, has three categories of customers: transportation, machinery and equipment, and electric power engineering industries.<sup>138</sup> The GOC, however, reported six industries consuming aluminum extrusions: construction industry, transportation industry, mechanical and electrical equipment industry, consumer durable goods industry, electricity, and other industries.<sup>139</sup> Thus, we find that the recipients of aluminum extrusions are limited in

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<sup>133</sup> See GOC IQR at 72.

<sup>134</sup> See 19 CFR 351.511(a).

<sup>135</sup> See NSA Initiation Memo at 2-3.

<sup>136</sup> See GOC NSA IQR at 2.

<sup>137</sup> *Id.* at 8-9; see also GOC SQR1 at 10-11.

<sup>138</sup> See NSA Initiation Memo at 3.

<sup>139</sup> See GOC NSA IQR at 14 and Exhibit N.10 (Sun Report).

number to the industries listed by the GOC, and that the provision of aluminum extrusions is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. This is consistent with our past practice. For example, in *CWP from the PRC*, we found that, although hot-rolled steel is used in a spectrum of industries, the actual users of hot-rolled steel were limited in number.<sup>140</sup> Likewise, although the GOC's information indicates aluminum extrusions is used in a variety of industries and sectors across the PRC, on an enterprise or industry basis, the industries within those sectors that actually consume aluminum extrusions are limited in number. The statute notes that the term "enterprise or industry" "includes a group of such enterprises or industries."<sup>141</sup>

Lastly, a benefit is being conferred because the aluminum extrusions are being provided for LTAR. As discussed above under the "Subsidies Valuation Information" section, we are basing our aluminum extrusions benchmark on GTA data for HTSUS subheading 7604.29, *e.g.*, "solid profiles of aluminum alloys," as provided by BYD.<sup>142</sup> We adjusted the benchmark price to include delivery charges, import duties, and VAT pursuant to 19 CFR 351.511(a)(2)(iv).<sup>143</sup> We added import duties as reported by the GOC, and the VAT applicable to imports of aluminum extrusions into the PRC, also as reported by the GOC.<sup>144</sup> In calculating VAT, we applied the applicable VAT rate to the benchmark after first adding amounts for ocean freight and import duties. We compared these monthly benchmark prices to the respondents' reported purchase prices for individual transactions, including VAT and delivery charges.

Based on this comparison, we preliminarily determine that aluminum extrusions were provided for LTAR and that a benefit exists for each respondent in the amount of the difference between the benchmark prices and the prices each respondent paid.<sup>145</sup> We divided the total benefits for each respondent by the appropriate total sales denominator, as discussed in the "Subsidies Valuation Information" section above, and in the Preliminary Calculation Memoranda. On this basis, we preliminarily determine a countervailable subsidy rate of 0.70 percent *ad valorem* for Lightway and 0.40 percent *ad valorem* for BYD.

c. Provision of Solar Glass for LTAR

Petitioner alleged that the respondents received countervailable subsidies in the form of the provision of solar glass for LTAR. For the reasons explained in the "Use of Facts Otherwise Available and Adverse Inferences" section above, we are basing our preliminary determination regarding the GOC's provision of solar glass, in part, on AFA. Specifically, we determine as AFA that the producers of the solar glass purchased by both respondents are "authorities" within the meaning of section 771(5)(B) of the Act and, as such, that the provision of solar glass constitutes a financial contribution under section 771(5)(D)(iii) of the Act. In response to our questions concerning specificity, the GOC stated: "{a}s a basic material input, solar glass is suitable for many downstream applications including use in the solar

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<sup>140</sup> See *CWP from the PRC* and accompanying Issues and Decision Memorandum at 62.

<sup>141</sup> Section 771(5A)(D).

<sup>142</sup> See BYD Benchmark Submission, at Exhibit. 3.

<sup>143</sup> The Department concludes that these data do not already include delivery charges. See Preliminary Benchmark Memorandum.

<sup>144</sup> See GOC NSA IQR at 7.

<sup>145</sup> See 19 CFR 351.511(a).

industry.”<sup>146</sup> The GOC provided none of the information requested concerning amounts purchased by individual industries. Petitioner’s NSA provided information demonstrating solar glass has lower iron content than other types of glass in order to allow the transmission of more sunlight and that it has a particular thickness, between three and four millimeters.<sup>147</sup> Thus, solar glass is a particular type of flat and rolled glass most suitable for particular purposes and customers. Based on this, we preliminarily determine that the provision of solar glass is limited to specific industries under section 771(5A)(D)(iii) of the Act, namely the solar industry.

Lastly, a benefit is being conferred because the solar glass is being provided for LTAR. As discussed above under the “Subsidies Valuation Information” section, the Department is selecting as a solar glass benchmark the world pricing data provided by BYD.<sup>148</sup> The Department adjusted the benchmark price to include delivery charges, import duties, and value added tax (VAT) pursuant to 19 CFR 351.511(a)(2)(iv).<sup>149</sup> We added import duties as reported by the GOC, and the VAT applicable to imports of solar glass into the PRC, also as reported by the GOC.<sup>150</sup> In calculating VAT, we applied the applicable VAT rate to the benchmark after first adding amounts for ocean freight and import duties. We compared the benchmark prices to the respondents’ reported purchase prices for individual transactions, including VAT and delivery charges.

Based on this comparison, we preliminarily determine that solar glass was provided to the company respondents for LTAR and that a benefit exists for each respondent in the amount of difference between the benchmark prices and the prices each respondent paid.<sup>151</sup> We divided the total benefits for each respondent by the appropriate total sales denominator, as discussed in the “Subsidies Valuation Information” section above, and in the Preliminary Calculation Memoranda. On this basis, we preliminarily determine a countervailable subsidy rate of 0.76 percent *ad valorem* for Lightway and 5.02 percent *ad valorem* for BYD.

#### d. Provision of Electricity for LTAR

In the original investigation, the Department determined this program to be countervailable based on the application of AFA.<sup>152</sup> For the reasons explained in the “Use of Facts Otherwise Available and Adverse Inferences” section above, we are basing our determination regarding the GOC’s provision of electricity in part on AFA. For these preliminary results, we determine that Lightway and BYD received a countervailable subsidy from electricity provided for LTAR.

Because of the GOC’s unwillingness to remedy deficiencies in its questionnaire responses, as explained in the “Use of Facts Otherwise Available and Adverse Inferences” section above, we

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<sup>146</sup> See GOC NSR IQR at 28.

<sup>147</sup> See Letter to the Department from Petitioner, “*Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: New Subsidy Allegations*,” (February 27, 2014) at 13.

<sup>148</sup> See BYD Benchmark Submission at Exhibits 3 and 4.

<sup>149</sup> The Department concludes that these data do not already include delivery charges. See Preliminary Benchmark Memorandum.

<sup>150</sup> See GOC NSA IQR at 27; see also the Preliminary Benchmark Memorandum for a full explanation of how the benchmarks were adjusted.

<sup>151</sup> See 19 CFR 351.511(a).

<sup>152</sup> See *Solar Cells from the PRC*, and accompanying IDM at 14-15.

are basing our determination regarding the government's provision of electricity, in part, on AFA. In a CVD proceeding, the Department requires information from both the government of the country whose merchandise is under investigation and from the foreign producers and exporters. When the government fails to provide requested information concerning alleged subsidy programs, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific.<sup>153</sup> However, where possible, the Department will rely on respondents' reported information to determine the existence and the amount of the benefit to the extent that such information is useable and verifiable.<sup>154</sup> Thus, we relied on the usage information reported by the respondents in each instance. Lightway and BYD each provided data on electricity consumed and electricity rates paid during the POR.<sup>155</sup>

As described above in detail, the GOC did not provide certain information requested regarding its provision of electricity to the respondents and, as a result, we determine, as AFA, that the GOC is providing a financial contribution that is specific within the meaning of sections 771(5)(D)(iii) and 771(5A)(D) of the Act, respectively. To determine the existence and the amount of any benefit under this program pursuant to section 771(5)(E)(iv) of the Act and 19 CFR 351.511, we relied on the companies' reported consumption volumes and rates paid. We compared the rates paid by the respondents to the benchmark rates, which, as discussed above, are the highest rates charged in the PRC during the POR. We made separate comparisons by price category (*e.g.*, great industry peak, basic electricity, *etc.*). We multiplied the difference between the benchmark and the price paid by the consumption amount reported for that month and price category. We then calculated the total benefit during the POR for each company by summing the difference between the benchmark prices and the prices paid by each company.

To calculate the electricity benchmark, in accordance with 19 CFR 351.511(a)(2), we selected the highest rates in the PRC for the user category of the respondents (*e.g.*, "large industrial users") for the non-seasonal general, peak, normal, and valley ranges, as provided in the electricity tariff schedules submitted by the GOC.<sup>156</sup> This benchmark reflects an adverse inference, which we drew as a result of the GOC's failure to act to the best of its ability in providing requested information about its provision of electricity in this review.<sup>157</sup>

To calculate the subsidy rates, we divided the benefit amount by the appropriate total sales denominator, as discussed in the Preliminary Calculation Memoranda. On this basis, we preliminarily determine countervailable subsidy rates for this program of 4.44 percent *ad valorem* for Lightway and 0.71 percent *ad valorem* for BYD.

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<sup>153</sup> See, *e.g.*, *Hardwood and Decorative Plywood from the People's Republic of China: Final Affirmative Countervailing Duty Determination*; 2011 78 FR 58283 (September 23, 2013), and accompanying IDM at Comment 3, "Provision of Electricity."

<sup>154</sup> See BYD IQR at 22-23 and Exhibits 14-16 (Shanghai BYD), at 20-21 and Exhibits 18, 19, and 20 (Shangluo BYD), and at 21 and Exhibits 12-14 (BYD Co.).

<sup>155</sup> *Id.*

<sup>156</sup> See GOC IQR at Exhibit E.3.c..

<sup>157</sup> See "Application of AFA: Provision of Electricity for LTAR" section, above.

## 2. Provision of Land for LTAR

In the original investigation, the Department determined this program to be countervailable based on the application of AFA.<sup>158</sup> For the reasons explained in the “Use of Facts Otherwise Available and Adverse Inferences” section above, we are basing our determination regarding the GOC’s provision of land in part on AFA. For these preliminary results, we determine that Lightway and BYD received a countervailable subsidy through land provided for LTAR.

We continue to find that the provision of land by the GOC constitutes a financial contribution from an authority in the form of providing goods or services pursuant to section 771(5)(D)(iii) of the Act. Furthermore, as discussed above in the “Use of Facts Otherwise Available and Adverse Inferences” section, the Department continues to determine as AFA that the provision of land to Lightway and BYD was specific.

In order to calculate the benefit, we first multiplied the Thailand industrial land benchmarks discussed above under the “Land Benchmark” section, by the total area of Lightway’s and Shangluo BYD’s countervailed tracts. We then subtracted the price actually paid for each tract to derive the total unallocated benefit. Because land is related to the respondents’ capital structure, we treated the amount of the unallocated benefit as a non-recurring subsidy, pursuant to 19 CFR 351.524(c)(2)(iii). We thus conducted the “0.5 percent test,” as instructed by 19 CFR 351.524(b)(2), for the year of the relevant land-use agreement by dividing the total unallocated benefit for each tract by the appropriate sales denominator. If more than one tract was provided in a single year, we combined the total unallocated benefits from the tracts before conducting the “0.5 percent test.” As a result, we found that the benefits were greater than 0.5 percent of relevant sales and that allocation was appropriate for all tracts found to be countervailable. We allocated the total unallocated benefit amounts across the terms of the land-use agreements, using the standard allocation formula of 19 CFR 351.524(d), and determined the amount attributable to the POR. We then summed all of the benefits attributable to the POR and divided this amount by the appropriate total sales denominator, as discussed in the “Subsidies Valuation Information” section above, and in the Preliminary Calculation Memoranda, to derive preliminary subsidy rates of 1.86 percent *ad valorem* for Lightway and 1.86 percent *ad valorem* for BYD.

## 3. Preferential Policy Lending to the Renewable Energy Industry, aka Preferential Loans and Directed Credit

In the original investigation, the Department determined this program to be countervailable.<sup>159</sup> Article 25 of the REL specifically calls for financial institutions to offer favorable loans to the renewable energy industry. In addition, Catalogue No. 40 contains a list of encouraged projects, including solar energy, which the GOC targets through the provision of loans and other forms of assistance.

In the original investigation, the Department determined that this program conferred countervailable subsidies on subject merchandise because: 1) it provides a financial contribution

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<sup>158</sup> See *Solar Cells from the PRC*, and accompanying IDM at 7-8.

<sup>159</sup> See *Solar Cells from the PRC*, and accompanying IDM at 12, “Preferential Policy Lending.”

pursuant to sections 771(5)(B)(i) and 771(5)(D)(i) of the Act, and 2) the loans provide a benefit pursuant to 771(E)(ii) equal to the difference between what the recipients paid on their loans and the amount they would have paid on comparable commercial loans. The Department further determined that there is a program of preferential policy lending specific to the renewable energy industry, including solar cells, within the meaning of section 771(5A)(D)(i) of the Act. There is no new information on the record for us to reconsider this determination. Therefore, we continue to find that this program provides a countervailable subsidy.

In its initial response, the GOC stated that this above program does not exist and that no loans to any of the respondents were issued pursuant to a policy lending program. The GOC further claimed that if an industrial policy existed, it had “no connection to or effect upon the decision of any bank to issue loans to any respondent,” and thus those loans did not constitute a countervailable subsidy.<sup>160</sup> The GOC provided no documentation in support of these assertions that would call into question the Department’s conclusions from the investigation.

Lightway and BYD reported having loans outstanding from banks in China during the POR under this program.<sup>161</sup>

To calculate the benefit under this program, we used the benchmarks described under “Benchmark and Discount Rates” above. We divided the total benefits received during the POR by the appropriate total sales denominator, as discussed in the “Subsidies Valuation Information” section above, and in the Preliminary Calculation Memoranda.

On this basis, we preliminarily determine a subsidy rate of 12.49 percent *ad valorem* for Lightway and 0.11 percent *ad valorem* for BYD.

#### 4. Tax Benefit Programs

##### a. Enterprise Income Tax Law, Research and Development (R&D) Program

In the original investigation, the Department determined this program to be countervailable.<sup>162</sup> Article 30.1 of the Enterprise Income Tax Law of the PRC created a new program regarding the deduction of research and development expenditures by companies, which allows enterprises to deduct, through tax deductions, research expenditures incurred in the development of new technologies, products, and processes. As explained in *Solar Cells from the PRC*, the income tax deduction afforded by this program is limited as a matter of law to certain enterprises, those with R&D in eligible high-technology sectors.<sup>163</sup>

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<sup>160</sup> See Letter to the Department from the GOC, “First Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules from the People's Republic of China (C-570-980),” (June 2, 2014) (GOC IQR), at 3

<sup>161</sup> See Letters to the Department from Lightway “Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People’s Republic of China – 2012 Review: Questionnaire Section III Response” (May 19, 2014) (Lightway IQR), at Exhibit 2-7, and BYD IQR, at 12 (Shanghai BYD), at 11 (Shangluo), at 11-12 (BYD Co.).

<sup>162</sup> See *Solar Cells from the PRC*, and accompanying IDM at 17, “Enterprise Income Tax Law, Research and Development (R&D) Program.”

<sup>163</sup> See *Solar Cells from the PRC*, and accompanying IDM at 17.

Article 95 of Regulation 512 provides that, if eligible research expenditures do not “form part of the intangible assets value,” an additional 50 percent deduction from taxable income may be taken on top of the actual accrual amount. Where these expenditures form the value of certain intangible assets, the expenditures may be amortized based on 150 percent of the intangible assets costs.<sup>164</sup>

The Department determined in the original investigation, that this income tax reduction provides a financial contribution in the form of revenue foregone by the government, and it confers a benefit to the recipients in the amount of the tax savings, pursuant to section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also continue to determine that the income tax deduction afforded by this program is limited as a matter of law to certain enterprises, *i.e.*, those with R&D in eligible high-technology sectors and, thus, is specific under section 771(5A)(D)(i) of the Act. There is no new information on the record for us to reconsider our determination from the original investigation. Therefore, we continue to find that this program provides a countervailable subsidy.

Lightway and BYD reported benefitting from this program during the POR.<sup>165</sup> To calculate the benefit from this program to Lightway and BYD, we treated the tax deduction as a recurring benefit, consistent with 19 CFR 351.524(c)(1).<sup>166</sup> To compute the amount of the tax savings, we calculated the amount of tax each respondent would have paid absent the tax deductions. We then divided the tax savings by the appropriate total sales denominator for each respondent, respectively.

On this basis, we determine a countervailable subsidy rate of 0.53 percent *ad valorem* for Lightway and 0.03 percent *ad valorem* for BYD under this program.

b. Preferential Tax Programs for High or New Technology Enterprises (HNTE)

Article 28.2 of the Enterprise Income Tax Law of the PRC provides for the reduction of the income tax rate to 15 percent, from 25 percent, for enterprises that are recognized as HNTEs, regardless of whether the enterprise is an FIE or domestic company. Circular 172 provides details regarding the type of enterprises that qualify for HNTE status and it identifies eligible projects, which include renewable, clean energy technologies such as solar photovoltaic technologies.<sup>167</sup>

The Department determined in the original investigation, that this program confers a countervailable subsidy, because the income tax reduction provides a financial contribution in the form of revenue foregone by the government, and it confers a benefit to the recipients in the amount of the tax savings, pursuant to section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). The Department also found that the income tax reduction afforded by this program is limited as a matter of law to certain enterprises, *i.e.*, HNTEs and, thus, is specific

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<sup>164</sup> See GOC IQR, at 7-12; see also BYD SQR1, at Exhibit S-36

<sup>165</sup> See Lightway IQR, at 7, and BYD IQR, at 14 (Shanghai BYD) and at 13 (BYD Co.).

<sup>166</sup> See *Solar Cells from the PRC*, and accompanying IDM at 17, “Enterprise Income Tax Law, Research and Development (R&D) Program.”

<sup>167</sup> See GOC Initial Response, at 4-7 and Exhibit B.2.b.

under section 771(5A)(D)(i) of the Act. There is no new information on the record for us to reconsider our prior determination. Therefore, we continue to find that this program provides a countervailable subsidy.

Lightway and BYD reported benefitting from this program.<sup>168</sup> To calculate the benefit the respondents received from this program, we treated the income tax reductions claimed by Lightway and BYD as recurring benefits, consistent with 19 CFR 351.524(c)(1). To compute the amount of the tax savings, we compared the companies' tax rates (15 percent) applicable under this program to the rate that would have been paid by Lightway and BYD otherwise (the standard income tax rate of 25 percent). We multiplied the difference by the taxable income of each company. We then divided these amounts by the appropriate total sales denominator, as discussed in the "Benchmarks and Discount Rates" section above. On this basis, we determine a countervailable subsidy rate of 0.28 percent *ad valorem* for Lightway and 0.01 percent *ad valorem* for BYD under this program.

#### 5. Import Tariff and Value Added Tax (VAT) Exemptions for Use of Imported Equipment - Encouraged Industries

In the original investigation, the Department determined this program to be countervailable. Circular 37 exempts FIEs and certain domestic enterprises from VAT and tariffs on imported equipment used in their production so long as the equipment does not fall into prescribed lists of non-eligible items, in order to encourage foreign investment and to introduce foreign advanced technology equipment and industry technology upgrades. As of January 1, 2009, the GOC discontinued VAT exemptions under this program, but companies can still receive import duty exemptions.<sup>169</sup> There is no new information on the record for us to reconsider this determination. Therefore, we continue to find that this program provides a countervailable subsidy.

In the investigation, we found that VAT and tariff exemptions on imported equipment confer a countervailable subsidy. The exemptions are a financial contribution in the form of revenue foregone by the GOC, and they provide a benefit to the recipient in the amount of the VAT and tariff savings.<sup>170</sup> We also determined that the VAT and tariff exemptions afforded by the program are specific under section 771(5A)(D)(iii)(I) of the Act because the program is limited to certain enterprises, *i.e.*, FIEs and domestic enterprises involved in "encouraged" projects.

Lightway reported benefits from this program. BYD reported that it did not apply for or receive any benefit from this program and submitted a listing reporting the equipment imported, its value, the duties and VAT owed, and the duties and VAT paid, for the Department to see that both Shanghai BYD and Shangluo BYD did not receive any benefit from this program.<sup>171</sup> Upon

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<sup>168</sup> See Lightway Initial Response, at 8, and BYD IQR, at 12-14 (Shanghai BYD) and at 13 (BYD Co.).

<sup>169</sup> See *Solar Cells from the PRC*, and accompanying IDM at 18, "Import Tariff and Value Added Tax (VAT) Exemptions for Use of Imported Equipment." Note that the GOC did not provide any laws and regulations in its submissions on the record of this review pertaining to this program.

<sup>170</sup> See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a)(1).

<sup>171</sup> See Lightway IQR, at 8, and BYD IQR, at 16 and Exhibit 13 (Shanghai BYD) and at 13-14 and Exhibit 13 (Shangluo BYD).

the Department's request, both respondents provided the China Tariff Schedules for the equipment listed in the respective exhibits.<sup>172</sup> The Department's comparison of these tariff schedules to the goods imported by respondents, by tariff schedule heading, confirmed the benefit information reported by respondents.<sup>173</sup>

Since this indirect tax is provided for, or tied to, the capital structure or capital assets of a firm, as reported by Lightway, the Department treated this tax as a non-recurring benefit and allocated the amount of the VAT and/or tariff exemptions, as applicable in the given year, over the AUL.<sup>174</sup> To calculate the countervailable subsidy, we used our standard methodology for non-recurring grants.<sup>175</sup> In the years that the benefits received by each company under this program did not exceed 0.5 percent of relevant sales for that year, we expensed those benefits in the years that they were received, pursuant to 19 CFR 351.524(b)(2). We used the discount rates described above in the section "Subsidies Valuation Information," to calculate the amount of the benefit allocable to the POR. We then divided the benefit amount by the appropriate sales denominator.

On this basis, we determine a countervailable subsidy rate of 0.05 percent *ad valorem* for Lightway and 0.0 percent *ad valorem* for BYD under this program.

## **B. Programs Preliminarily Determined To Be Not Used or Not to Confer a Measurable Benefit During the POR**

### Grant Programs<sup>176</sup>

1. Golden Sun Demonstration Program\*
2. 2010 Special Funds for the Development of Five Key Industries (Equipment Manufacturing Industry, Electronic Information Industry, New Materials Industry, Biological Technology and Pharmaceutical Industry, and New Energy Industry) by Changzhou Municipal Government and Xinbei District Government, Changzhou\*
3. Development Credit Insurance Funds supported by Changzhou Municipal Government\*
4. Award for Science and Technology Progress by Changzhou Municipal Government\*
5. Financial Subsidies for 2009 by Changzhou Municipal Government\*
6. Award from the export processing zone of Changzhou by Changzhou Municipal Government\*
7. Subsidy of 3.15 Income by Changzhou Municipal Government\*
8. Award for Municipal Technology Center Enterprise by Changzhou Municipal Government\*

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<sup>172</sup> See Letter to the Department from BYD, "Crystalline Silicon Photovoltaic Cells, Whether Or Not Assembled Into Modules, from the People's Republic of China - 2012 Review: Questionnaire Section III Response" (September 22, 2014) (BYD SQR1), at Exhibits S-41 and S-42 for Shanghai BYD and Shangluo BYD, respectively.

<sup>173</sup> See Preliminary Calculation Memoranda.

<sup>174</sup> See 19 CFR 351.524(c)(2)(iii) and 19 CFR 351.524(d)(2).

<sup>175</sup> See 19 CFR 351.524(b).

<sup>176</sup> Please note that certain programs (*see* \*) were found to be non-recurring subsidies and, therefore, the Department is examining benefits provided under these programs for the period between January 1, 2003, and the end of the POR.

9. Credit Guarantee Supporting Funds by Changzhou Municipal Government\*
10. Award for Water Conservation by Changzhou Municipal Government\*
11. Patent Funding\*
12. Subsidy for Other Technology Research Development Expenses by Changzhou Municipal Government\*II-5
13. Subsidy for Applied Technology Research and Development by Xinbei District Government, Changzhou\*
14. Incentives for Listed Enterprises by Changzhou Municipal Government\*
15. Patent Award by Changzhou Municipal Government\*
16. Award for listing by Changzhou Municipal Government\*
17. Incentive for Patents Invention from Xinbei District Government, Changzhou\*
18. Science and Technology Progress Award by Xinbei District Government, Changzhou\*
19. Top 10 in Tax Paid Amount of Year 2008 Award\*
20. Funding for Technological Transformation of 50 MW Highly Efficient Ultra-Thin Silicon Solar Cells Production Line by Xinbei District Government, Changzhou\*
21. Funding for 100 KW grid-connected photovoltaic generation system by Changzhou Municipal Government\*
22. Subsidies for the Overseas Exports by Changzhou Municipal Government\*
23. Funding for International Trade Fair Booth, Exhibition, Exhibits, Transportation, Costs of Exploring International Markets by Changzhou Municipal Government\*
24. Funding for technology development promotion center topics by Changzhou Municipal Government\*
25. Funding to further promote the Steady Growth of Foreign Trade Act of 2009 by Changzhou Municipal Government\*
26. Grants for major technology transformation project on equipment by Changzhou Municipal Government\*
27. Patent award by Xinbei District Government, Changzhou\*
28. Grants for efficient screen printing silicon solar battery development project by Xinbei District Government, Changzhou\*
29. Incentives for Patents of Invention by Changzhou Municipal Government\*
30. Funds for Promoting SME to be Listed by Jiangsu Finance Department/Funds for Technology Improvement by Jiangsu Province\*
31. Award for Provincial Engineering Technology Center\*
32. Awards for Jiangsu Famous Brand Products\*
33. Supporting Funds for “Going Global”\*
34. Subsidies for Foreign Cell Installation Experts\*
35. Grants for National High Technology Industry\*
36. Science and Technology Award\*
37. Subsidies for Environmental Protection\*
38. BIPV Projects\*
39. Funding on Infrastructure\*
40. Grants for Employee Bonuses\*
41. Wuxi Airport 800 KW Program\*
42. PV Technology Research Institute of Jiangsu (Suntech)\*
43. Fund for Solar Optoelectronic Application Demonstration by Management Committee of the New District\*

44. Self-Research on Core Equipment of Solar PV and Semiconductor Lighting Industry/Self-Research on New Online Direct Method of PEVCD\*
45. Demonstration Project of 300 KW Roof Solar PV Grid Power Generation System\*
46. Industrialization and Research of New Solar Cells\*
47. Research and Industrialization of Thin Film Cells\*
48. Research on Highly Efficient and Low-Cost Thin Film Cells\*
49. Technology and Application Research on Glass-Base Suede Gazno Transparent and Electrically Conductive Film Manufacture\*
50. Demonstration Program of 300 KW Roof Solar PV Grid Power Generation System\*
51. Renewable Energy of Finance Bureau, Wuxi City\*
52. Research on New-Style High-Transmission Solar Cell Reducing the Reflection Film with Nano Structure\*
53. Fund for Construction of Energy Institution by the Management Committee of New District\*
54. Public Welfare Project Funding from Supervision and Examination Station of Product Quality, Wuxi City\*
55. Provincial Export Credit Insurance Supporting Development Fund Allocation by Management Committee of New District from December 2008 to June 2009\*
56. Patent Fund from Management Committee of New District, Wuxi Government\*
57. Special Reward for “333” Program by Municipal Organization Department\*
58. Science and Research Budget Allocation for Renewable Energy Construction Application Technology Project by Construction Bureau of Wuxi\*
59. Photovoltaic Technology Research Expenses by Personnel Bureau\*
60. Social Insurance Fund for Employers from Sichuan Earthquake Stricken Area\*
61. Import Discount by Jiangsu Provincial Government\*
62. Employment Expansion Planning Reward by Management Committee of New District\*
63. Fund for Demonstration Company of 2009 Provincial Intelligence Introduction Program\*
64. The First Group of Patent Fund in 2010 Provided by the Wuxi Government\*
65. Research, Development, and Industrialization of Technology and Key Equipment for P-Type Solar Power Cells with High Efficiency and Low Cost\*
66. Award for Luoyang City Outstanding Private Enterprise for 2009\*
67. Plan for Thousand Talents\*
68. Fund for Henan Industry Structure Adjustment and High-New Technology Industrialization Program\*
69. Discount Loans for Luoyang High-New Technology Industrialization Program (1.5 million RMB)\*
70. Research and Development Expenditure for Highly Efficient Crystalline Silicon Solar Cells\*
71. Special Reward for the 2008 Annual Investment Invitation of Major Program\*
72. Reward for Industry Development in the High-New District\*
73. Investment Invitation Reward in the High-New District\*
74. Shanghai Major Program for Industrialization of Innovation and High-New Technology in 2010\*
75. Key technology renovation regarding industrialization of PV cells\*
76. Ultra-thin PV cells with annual productivity of 10 MW\*

77. Research and Development and Industrialization of Effective Crystalline Silicon Solar Cell\*
78. PV energy technology research center of Jiangsu Province\*
79. Research, development, and application of high temperature dispersing furnace with wide and closed-pipe\*
80. Industrialization research on highly efficient PV cells with new structure\*
81. Independent PV power generating system with mixing storage capability of ultracapacitor\*
82. Demonstration program of high-tech industrialization on solar cell\*
83. Solar cells expansion project with a 120 MW annual productivity\*
84. Science subsidy from New District Management Committee of Wuxi government\*
85. Patent Fund from New District Management Committee of Wuxi City\*
86. Fund for Construction of Patent Theme Database by Enterprises\*
87. Fund for Introduction of Talents\*
88. Reward for Patent\*
89. Reward for Nation-recognized Enterprise Tech Center\*
90. Standard for Program Construction\*
91. Social Security Refund for Employment of People from Earthquake Stricken Area in the Second Quarter of 2010\*
92. Export Credit Insurance Fund in the second quarter\*
93. Employment Activities Fund\*
94. Energy-saving and Economy-recycling Fund\*
95. Fund for Introduction of Talents of National and Provincial Level\*
96. Patent Fund\*
97. Fund for Introduction of Talents in Wuxi City\*
98. Reward for Establishment of General Standard of Polysilicon Solar Cell\*
99. Post-doctoral Fund\*
100. Import Discounting by New District Government of Wuxi City\*
101. Reward for Provincial Famous Brand\*
102. Economic Development Fund for Private Enterprises\*
103. Reward for Science and Technology Development\*
104. Fund for Foreign Trade Development\*
105. First Prize for Provincial Science and Technology Development\*
106. Reward for Recognition as Provincial Technology Center\*
107. Fund for Six Biggest Expenses\*
108. Reward Fund for Recycled Economy\*
109. Renewable Energy Development Fund\*
110. Adjusting the balance government grants of last year\*
111. Science and Technology and Other Fund and Reform Fund for Potential of Enterprises\*
112. Tengfei Prize\*
113. Reform Fund for Potential of Enterprises\*
114. Science and Technology and Other Fund\*
115. Fund for Clean Production Enterprises\*
116. Renewable Energy Fund\*
117. National “863” Program\*
118. Reward by Trade Promotion Commission\*

119. Standard Fund by Financial Bureau of New District\*
120. Fund for Employment of People from Earthquake Stricken Area\*
121. Export Credit Insurance Fund by Management Committee of New District\*
122. Patent Fund by Management Committee of New District of Wuxi City\*
123. Free Financing Program Contract of Innovation Fund in Luoyang High-New Technology Industry Development District (Energy-Saving and Pollution-Reduction Type)\*
124. Special Fund for Information Development of “Double-Hundred” Planning Program\*
125. International Science and Technology Cooperation Fund Program/Science and Research Planning Program of Shanghai City\*
126. Shanghai Major Program for Industrialization of Innovation and High-New Technology in 2009\*
127. Technical Improvement of Energy Saving and Pollution Deduction Program in 2009\*
128. Program for Encouraging Purchase of International Advanced Research Equipment in 2009\*
129. Technical Innovation Program in Minhang District in 2010\*
130. 2010 Shanghai Pujiang Talent Plan\*
  131. Technology Introduction and Innovation Plan in Shanghai City (Exclusively for Thin Film Cells)\*
132. Development and Industrialization of Advanced Manufacturing Tech for Production of Highly Efficient and Low-cost Wafers\*
133. Polysilicon Wet Etching Insulation Machine\*
134. Research and Development and Industrialization of Complete Set of Production Line for Photovoltaic Cells and Key Technology for Wet Processing Equipment\*
135. Research and Development and Industrialization of SC0809 Efficient Low-cost P-type Solar Cell Texturing Cleaning Equipment\*
136. Research and Development and Industrialization of efficient low-cost p-type solar cell texturing cleaning equipment\*
137. Science and Technology Development Planning Fund\*
138. High-tech Development Fund from the Financial Bureau of Wuzhong\*
139. Fund for Municipal High-tech Enterprises\*
140. Fund for Support of Introduced Research and Development Institute from the Financial Bureau of Wuzhong District\*
141. Science and Technology Innovation Reward from Financial Bureau of Wuzhong District\*
142. Big taxpayer incentives granted by the Financial Bureau of Wuzhong District\*
143. Taxpayer reward from Financial Bureau of Wuzhong District\*
144. Export Product Research and Development Fund
145. Subsidies for Development of “Famous Brands” and “China World Top Brands”
146. Sub-Central Government Subsidies for Development of “Famous Brands” and “China World Top Brands”
147. Special Energy Fund (Established by Shandong Province)
148. Funds for Outward Expansion of Industries in Guangdong Province

## Tax Benefit Programs

1. The Two Free/Three Half Program for FIEs
2. Income Tax Reductions for Export-Oriented Enterprises
3. Income Tax Benefits for FIEs Based on Geographic Locations – Preferential Tax

### Programs for Western Development

4. Local Income Tax Exemption and Reduction Programs for “Productive” FIEs
5. Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises
6. Tax Reductions for High and New-Technology Enterprises Involved in Designated

### Projects

7. Preferential Income Tax Policy for Enterprises in the Northeast Region
8. Guangdong Province Tax Programs

## Other Tax Programs

1. VAT and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade and Development Fund Program
2. The Over-Rebate of VAT Program

## Export Credit Subsidies

1. Export Buyer’s Credits from China EX-IM
2. Export Credit Insurance from SINOSURE

## **C. Programs for Which Additional Information is Required**

1. VAT Rebates on FIE Purchases of Chinese-Made Equipment

BYD reported using this program, but did not report its benefit information because it claimed it did not use the program to purchase equipment related to the production of subject merchandise. The Department intends to collect information from the GOC concerning the countervailability of the program and information from BYD concerning the benefits it received in a post-preliminary supplemental questionnaire.

2. Tax Reductions for FIEs Purchasing Chinese-Made Equipment

BYD reported using this program, but did not report its benefit information because it claimed it did not use the program to purchase equipment related to the production of subject merchandise. The GOC reported that neither respondent used this program and provided no information concerning the countervailability of the program. The Department intends to collect information from the GOC concerning the countervailability of the program and information from BYD concerning the benefits it received in a post-preliminary supplemental questionnaire.

## VI. DISCLOSURE AND PUBLIC COMMENT

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results.<sup>177</sup> Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs.<sup>178</sup> Rebuttal briefs must be limited to issues raised in the case briefs.<sup>179</sup> Parties who submit case or rebuttal briefs are requested to submit with the argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.<sup>180</sup>

Interested parties who wish to request a hearing, or to participate if one is requested, must do so within 30 days of publication of these preliminary results by submitting a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, using Enforcement and Compliance's ACCESS system.<sup>181</sup> Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, at a time and location to be determined.<sup>182</sup> Parties should confirm by telephone the date, time, and location of the hearing. Issues addressed at the hearing will be limited to those raised in the briefs.<sup>183</sup> All briefs and hearing requests must be filed electronically and received successfully in their entirety through ACCESS by 5:00 p.m. Eastern Time on the due date.

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<sup>177</sup> See 19 CFR 351.224(b).

<sup>178</sup> See 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

<sup>179</sup> See 19 CFR 351.309(d)(2).

<sup>180</sup> See 19 CFR 351.309(c)(2) and (d)(2).

<sup>181</sup> See 19 CFR 351.310(c).

<sup>182</sup> See 19 CFR 351.310.

<sup>183</sup> See 19 CFR 351.310(c).

**VII. CONCLUSION**

We recommend that you approve the preliminary findings described above.

✓  
Agree

\_\_\_\_\_  
Disagree

*Paul Piquado*  
Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

31 DECEMBER 2014  
Date