



C-570-057  
Investigation  
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MEMORANDUM TO: Carole Showers  
Executive Director, Office of Policy  
performing the duties of the Deputy Assistant Secretary  
for Enforcement and Compliance

FROM: James Maeder  
Senior Director  
for Antidumping and Countervailing Duty Operations  
performing the duties of Deputy Assistant Secretary

SUBJECT: Issues and Decision Memorandum for the Final Determination:  
Countervailing Duty Investigation of Certain Tool Chests and  
Cabinets from the People's Republic of China

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## I. SUMMARY

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain tool chests and cabinets (tool chests) from the People's Republic of China (PRC), as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties.

- Comment 1: Whether to Countervail Steel Inputs Not Purchased in Coils
- Comment 2: Whether Certain Steel Producers Are Authorities
- Comment 3: Whether Steel Suppliers That Are Trading Companies Are Authorities
- Comment 4: Whether the Provision of Steel Coils is Specific
- Comment 5: Whether to Use Certain Sources as Benchmarks for Steel Inputs
- Comment 6: What to Use as a Benchmark for Certain of Geelong's Steel Purchases
- Comment 7: Whether to Use a Certain Source as a Benchmark for Ocean Freight
- Comment 8: Whether to Countervail Export Buyer's Credits
- Comment 9: Whether to Apply Adverse Facts Available With Respect to the Government of China's Response Regarding Electricity
- Comment 10: Whether the Department's Selection of Electricity Rates Was Proper
- Comment 11: Whether to Countervail Certain of Tongrun's "Other Subsidies"
- Comment 12: Whether to Countervail Geelong's Benefits for Programs Where the Department Has Applied Adverse Facts Available to the Government of China



Comment 13: Whether to Adjust the Denominator for One of Tongrun’s Cross-Owned Companies

Comment 14: Whether to Adjust the Denominator for Geelong

## II. BACKGROUND

### A. Case History

On June 27, 2016, the Department published its *Preliminary Determination* in accordance with section 703 of the Act and 19 CFR 351.205.<sup>1</sup> The selected mandatory respondents in this investigation are Jiangsu Tongrun Equipment Technology Co., Ltd. (Tongrun) and Zhongshan Geelong Manufacturing Co., Ltd. (Geelong).<sup>2</sup>

Following the *Preliminary Determination*, Geelong submitted ministerial error allegations on September 18, 2017.<sup>3</sup> On October 6, 2017, we found that the alleged errors were not ministerial in nature and that an amendment to the *Preliminary Determination* was not warranted.<sup>4</sup>

From September 18, 2017, to September 29, 2017, the Department conducted verification of the questionnaire responses submitted by the Government of the PRC (GOC), Tongrun, and Geelong. We subsequently released the verification reports<sup>5</sup> and set the briefing schedule.<sup>6</sup>

On October 13, 2017, Jin Rong Hua Le Metal Manufactures Co., Ltd. (Jin Rong) requested that the Department hold a hearing.<sup>7</sup> On November 1, 2017, Jin Rong withdrew its hearing request.<sup>8</sup> On October 18, 2017, Waterloo Industries Inc. (the petitioner), the GOC, Tongrun, Geelong, and HMC Holdings LLC (HMC) timely filed case briefs.<sup>9</sup> On October 23, 2017, the petitioner, the

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<sup>1</sup> See *Certain Tool Chests and Cabinets from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 43331 (September 15, 2017) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum (PDM).

<sup>2</sup> See *Preliminary Determination*, 82 FR at 43332; see also PDM at 2.

<sup>3</sup> See Letter from Geelong, “Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People’s Republic of China: Geelong’s Ministerial Error Allegations,” dated September 18, 2017.

<sup>4</sup> See Memorandum, “Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People’s Republic of China: Response to Ministerial Error Allegations in the Preliminary Determination,” dated October 6, 2017.

<sup>5</sup> See Memorandum to the File, “Verification of the Questionnaire Responses Submitted by Jiangsu Tongrun Equipment Technology Ltd.,” dated October 10, 2017 (Tongrun Verification Report); Memorandum to the File, “Verification Report: Zhongshan Geelong Manufacturing Co. Ltd.,” dated October 10, 2017 (Geelong Verification Report); and Memorandum to the File, “Verification Report: the Government of the People’s Republic of China,” dated October 10, 2017 (GOC Verification Report).

<sup>6</sup> See Letter to Interested Parties dated October 11, 2017.

<sup>7</sup> See Letter from Jin Rong, “Double Coin’s Request for a Hearing,” dated October 13, 2017.

<sup>8</sup> See Letter from Jin Rong, “Certain Tool Chests and Cabinets from China: Withdrawal of Hearing Request for CVD Investigation,” dated November 1, 2017.

<sup>9</sup> See the petitioner’s Case Brief dated October 18, 2017 (Petitioner Case Brief), the GOC’s Case Brief, “Certain Tool Chests and Cabinets from the People’s Republic of China, Case No. C-570-057: Case Brief,” dated October 18, 2017 (GOC Case Brief), Tongrun’s Case Brief, “Tongrun Administrative Case Brief: Countervailing Duty Investigation on Tool Chests and Cabinets from the People’s Republic of China (C-570-057),” dated October 18, 2017 (Tongrun Case Brief), Geelong’s Case Brief, “Countervailing Duty Investigation of Certain Tool Chests and

GOC, Tongrun, Geelong, and HMC timely filed rebuttal briefs.<sup>10</sup> On November 9, 2017, the Department met with counsel representing Jin Rong concerning the scope case brief.<sup>11</sup>

## B. Period of Investigation

The period of investigation (POI) is January 1, 2016, through December 31, 2016.

## III. SCOPE COMMENTS

In accordance with the preamble to the Department's regulations,<sup>12</sup> the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (scope).<sup>13</sup> Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice*. The Department issued a Preliminary Scope Decision Memorandum<sup>14</sup> and preliminarily modified the scope language that appeared in the *Initiation Notice*. The Department addressed all scope comments received<sup>15</sup> in the Final Scope Decision Memorandum.<sup>16</sup>

## IV. SCOPE OF THE INVESTIGATION

The scope of this investigation covers certain metal tool chests and tool cabinets, with drawers. The complete description of the scope of this investigation is contained in Appendix I of the final

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Cabinets from the People's Republic of China: Rebracketed Geelong' Case Brief," dated October 23, 2017 (Geelong Case Brief), and HMC's Case Brief, "Tool Chests and Cabinets from the People Republic of China and Vietnam: HMC's Case Brief," dated October 18, 2017 (HMC Case Brief).

<sup>10</sup> See the petitioner's Rebuttal Brief, "Petitioner's Rebuttal Brief," dated October 23, 2017 (Petitioner Rebuttal Brief), GOC's Rebuttal Brief, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: Rebuttal Brief," dated October 23, 2017 (GOC Rebuttal Brief), Tongrun's Rebuttal Brief, "Tongrun Rebuttal Brief: Countervailing Duty Investigation on Tool Chests and Cabinets from the People's Republic of China (C-570-057)," dated October 23, 2017 (Tongrun Rebuttal Brief), Geelong's Rebuttal Brief, "Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People's Republic of China: Geelong's Rebuttal Case Brief," dated October 23, 2017 (Geelong Rebuttal Brief), and HMC's Rebuttal Brief, "Tool Chests and Cabinets from the People's Republic of China and Vietnam: HMC's Rebuttal Case Brief," dated October 23, 2017 (HMC Rebuttal Brief).

<sup>11</sup> See Memorandum to the File, "Tools Chests and Cabinets from China and Vietnam – *Ex Parte* Meeting," dated November 9, 2017.

<sup>12</sup> See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997).

<sup>13</sup> See *Certain Tool Chests and Cabinets from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 82 FR 21516, 21517 (May 9, 2017) (*Initiation Notice*).

<sup>14</sup> See Memorandum, "Certain Tool Chests and Cabinets from the People's Republic of China and the Socialist Republic of Vietnam: Scope Comments Decision Memorandum for the Preliminary Determinations," dated September 8, 2017 (Preliminary Scope Decision Memorandum).

<sup>15</sup> The scope case briefs were due 30 days after the publication of the *Preliminary Determination*, which was Sunday, October 15, 2017. See Preliminary Scope Decision Memorandum at 6. Therefore, the actual deadline for the scope case briefs was Monday, October 16, 2017. See 19 CFR 351.303(b)(1) ("For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day."). The deadline for scope rebuttal briefs was Monday, October 23, 2017.

<sup>16</sup> See Memorandum, "Certain Tool Chests and Cabinets from the People's Republic of China and the Socialist Republic of Vietnam: Final Scope Decision Memorandum," dated concurrently with this memorandum (Final Scope Decision Memorandum).

determination *Federal Register* notice. Merchandise subject to the investigation is classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 9403.20.0021, 9403.20.0026, 9403.20.0030 and 7326.90.8688, but may also be classified under HTSUS subheading 7326.90.3500.

While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this investigation is dispositive.

## V. APPLICATION OF THE COUNTERVAILING DUTY LAW TO IMPORTS FROM THE PRC

On October 25, 2007, the Department published its final determination on coated free sheet paper from the PRC.<sup>17</sup> In *CFS from the PRC*, the Department found that:

... given the substantial differences between the Soviet-style economies and {the PRC's} economy in recent years, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as a bar to proceeding with a CVD investigation involving products from {the PRC}.<sup>18</sup>

The Department affirmed its decision to apply the CVD law to the PRC in numerous subsequent determinations.<sup>19</sup> Furthermore, on March 13, 2012, Public Law 112-99 was enacted which confirms that the Department has the authority to apply the CVD law to countries designated as non-market economies under section 771(18) of the Act, such as the PRC.<sup>20</sup> The effective date of the enacted legislation makes clear that this provision applies to this proceeding.<sup>21</sup>

## VI. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

In the *Preliminary Determination*, we applied adverse facts available (AFA) in various circumstances:

- With respect to companies that did not respond to our quantity-and-value questionnaire, we preliminarily applied AFA in determining that each of these companies used every program alleged by the petitioner or reported by Tongrun or Geelong.<sup>22</sup> In addition, we relied on our AFA hierarchy to determine the subsidy rates for each program as described in the *Preliminary Determination* with the proviso that we have updated the rates using the final subsidy rates calculated for the programs we found to be countervailable for Tongrun and

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<sup>17</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 Issues and Decision Memorandum (IDM).

<sup>18</sup> See IDM accompanying *CFS from the PRC* at Comment 6.

<sup>19</sup> See, e.g., *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008) (*CWP from the PRC*) and accompanying IDM at Comment 1.

<sup>20</sup> Section 1(a) is the relevant provision of Public Law 112-99 and is codified at section 701(f) of the Act.

<sup>21</sup> See Public Law 112-99, 126 Stat. 265 §1(b).

<sup>22</sup> See PDM at 7-8.

Geelong in this final determination, where applicable.<sup>23</sup> See Appendix to this memorandum for all of the rates we used.

- With respect to export buyer’s credits, we preliminarily applied AFA in determining that the respondents used and benefited from this program, and to determine the subsidy rate.<sup>24</sup>
- With respect to the provision of hot-rolled coiled steel and cold-rolled coiled steel for less than adequate remuneration (LTAR), we preliminarily applied AFA in determining that all the producers that supply inputs to the respondent companies are “authorities” within the meaning of section 771(5)(B) of the Act.<sup>25</sup>
- With respect to the provision of hot-rolled coiled steel and cold-rolled coiled steel for LTAR, we preliminarily applied AFA in determining that the GOC’s provision of these inputs for LTAR are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.<sup>26</sup>
- With respect to the provision of hot-rolled coiled steel and cold-rolled coiled steel for LTAR, we preliminarily applied AFA in determining that the hot-rolled coiled steel and cold-rolled coiled steel markets are distorted.<sup>27</sup>
- With regard to the provision of electricity for LTAR, we preliminarily applied AFA in determining that the 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, and we preliminarily used an adverse inference to determine the existence and the amount of the benefit, selecting as our benchmark the highest electricity rates on the record for the applicable rate and user categories.<sup>28</sup>
- With respect to the Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands program and the Small- And Medium-Sized Enterprises (SME) International Market Exploration/Development Fund program, we preliminarily applied AFA in determining that the GOC’s provision of these grants is specific within the meaning of section 771(5A)(B) of the Act and constitute a financial contribution pursuant to section 771(5)(D)(i) of the Act.<sup>29</sup>
- With respect to “other subsidies” self-reported by Tongrun and Geelong, we preliminarily applied AFA in determining that the following grants confer a financial contribution as a direct transfer of funds under section 771(5)(D)(i) of the Act, and are specific either under section 771(5A)(B) or 771(5A)(D) of the Act.<sup>30</sup>

With respect to the AFA subsidy rates for the companies that did not respond to our quantity-and-value questionnaire, we preliminarily applied the highest program-specific above-zero

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<sup>23</sup> *Id.* at 8-13. In the PDM, there were two incorrect statements with respect to AFA. First, we indicated that both the 4th Quarter Growth Comparison program and the 1-3rd Quarter Growth Comparison program were not measurable; in fact, both were measurable and correctly indicated as such in the Appendix to the PDM. Second, with respect to programs which we matched to similar programs, we indicated that these are all programs reported as “other subsidies” by the respondents for which the benefit was not measurable during the POI; in fact, the first three programs indicated were alleged in the petition.

<sup>24</sup> *Id.* at 13-15.

<sup>25</sup> *Id.* at 15-16.

<sup>26</sup> *Id.* at 16-17.

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.* at 18-22.

<sup>29</sup> *Id.* at 22.

<sup>30</sup> *Id.* at 23.

subsidy rates we calculated for either Tongrun or Geelong for the programs used by either Tongrun or Geelong; one of these programs was the Government Provision of Cold-Rolled Coiled Steel for LTAR.<sup>31</sup> Because the highest rate for the Government Provision of Cold-Rolled Coiled Steel for LTAR changed since the *Preliminary Determination*,<sup>32</sup> we updated the AFA rate for this program using the rate we calculated for Geelong in this final determination.

Aside from the single change described above, we made no other changes to our AFA determinations from the *Preliminary Determination*. For complete descriptions of our use of AFA in reaching this final determination, see the *Preliminary Determination*.<sup>33</sup>

## VII. SUBSIDIES VALUATION

### A. Allocation Period

The Department made no changes to the allocation period used in the *Preliminary Determination*, and no issues regarding the allocation period were raised by interested parties in case briefs. For a description of the allocation period and the methodology used for this final determination, see the *Preliminary Determination*.<sup>34</sup>

### B. Attribution of Subsidies

For purposes of this final determination, the Department made no changes to its preliminary attribution of subsidies analysis.<sup>35</sup>

### C. Denominators

In accordance with 19 CFR 351.525(b)(1) through (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 export sales for export subsidies or to a respondent's total sales for domestic subsidies). We made certain changes to the sales denominators used to calculate the countervailable subsidy rates for the various subsidy programs to account for the minor corrections presented by Tongrun and Geelong at the beginning of their respective verifications.<sup>36</sup> Further information regarding denominators is provided in the final calculation memoranda.<sup>37</sup>

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<sup>31</sup> *Id.* at 9.

<sup>32</sup> See "Provision of Cold-Rolled Coiled Steel for LTAR" under "Analysis of Programs" section, below.

<sup>33</sup> See PDM at 7-23.

<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.* at 24-26.

<sup>36</sup> See Tongrun Verification Report at 2 and Geelong Verification Report at 2.

<sup>37</sup> See Memorandum, "Jiangsu Tongrun Equipment Technology Co., Ltd.; Calculations for the Final Determination," dated concurrently with this memorandum (Tongrun Final Calculation Memorandum); and Memorandum, "Zhongshan Geelong Manufacturing Co., Ltd.; Calculations for the Final Determination," dated concurrently with this memorandum (Geelong Final Calculation Memorandum).

## VIII. INTEREST RATE BENCHMARKS; DISCOUNT RATES; INPUT, ELECTRICITY, AND LAND BENCHMARKS

### A. Short-Term and Long-Term RMB-Denominated Loans

The Department made no changes to the benchmark interest rates for short-term or long-term RMB-denominated loans that were used in the *Preliminary Determination*.<sup>38</sup>

### B. Discount Rates

The Department made no changes to the benchmark interest rates for foreign currency-denominated loans that were used in the *Preliminary Determination*.<sup>39</sup>

### C. Input Benchmarks

The petitioner, the GOC, Tongrun, Geelong, and HMC provided arguments in their case and rebuttal briefs regarding the Department's selection of sources for benchmarks and adjustments included in the benchmarks. These arguments are addressed below in Comments 7 through 12.

#### 1. *Hot-Rolled Coiled Steel*

The Department preliminarily found that the domestic market for hot-rolled coiled steel is distorted, based on an analysis of mid-thick wide steel strip and hot-rolled thin and wide steel strip.<sup>40</sup> Based on the finding of distortion, neither domestic PRC prices nor import prices were an appropriate basis for a Tier 1 benchmark; accordingly, we relied on world market prices as the Tier 2 benchmark.<sup>41</sup>

We revised the market distortion data for hot-rolled coiled steel, based on the results of verification.<sup>42</sup> However, for purposes of this final determination, we continue to find that the domestic market for hot-rolled coiled steel is distorted. According to data provided by the GOC, and as corrected at the start of verification, state-owned producers account for 60.89 percent of domestic wide strip production during the POI and 55.28 percent of domestic thin strip production during the POI, and the volume of imports as a percentage of domestic production and consumption (1.06 and 1.17 percent, respectively, for wide strip and 1.36 and 1.34 percent, respectively, for thin strip) is insignificant.<sup>43</sup> These factors support the continued finding that the domestic market for hot-rolled coiled steel is distorted. As such, we continue, for purposes of this final determination, to rely on world market prices as the Tier 2 benchmark.

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<sup>38</sup> See PDM at 26-29.

<sup>39</sup> *Id.* at 29.

<sup>40</sup> *Id.* at 29-31.

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

<sup>42</sup> See GOC Verification Report at 2.

<sup>43</sup> See Letter from the GOC, "Certain Tool Chests and Cabinets from the People's Republic of China, Case No. C-570-057: Initial Questionnaire Response," dated July 17, 2017 (GOC IQR) at 48-52 and Exhibit 1.

## 2. Cold-Rolled Coiled Steel

The Department preliminarily found that the domestic market for cold-rolled coiled steel is distorted, based on an analysis of cold-rolled thin and wide steel strip.<sup>44</sup> Based on the finding of distortion, neither domestic PRC prices nor import prices were an appropriate basis for a Tier 1 benchmark; accordingly, we relied on world market prices as the Tier 2 benchmark.<sup>45</sup>

We revised the market distortion data for hot-rolled coiled steel, based on the results of verification.<sup>46</sup> However, for purposes of this final determination, we continue to find that the domestic market for hot-rolled coiled steel is distorted. According to data provided by the GOC, and as corrected at the start of verification, state-owned producers account for 76.41 percent of domestic cold strip production during the POI, and the volume of imports as a percentage of domestic production and consumption (3.95 and 4.02 percent, respectively, for cold strip) is insignificant.<sup>47</sup> These factors support the continued finding that the domestic market for carbon black is distorted. As such, we continue, for purposes of this final determination, to rely on world market prices as the Tier 2 benchmark.

### D. Provision of Electricity for LTAR

The Department made no changes to the benchmark rates used in the *Preliminary Determination* for purposes of measuring the adequacy of remuneration for electricity.<sup>48</sup>

## IX. ANALYSIS OF PROGRAMS

### A. Programs Determined to Be Countervailable

The Department made no changes to its preliminary analysis of, or the methodology used to calculate the subsidy rates for, the following programs, as described in the *Preliminary Determination*, except as noted. For a complete description, analysis, and explanation of the calculation methodology used for each program, see the *Preliminary Determination*.<sup>49</sup> All issues raised by interested parties are addressed in the “Analysis of Comments” section, below.

#### 1. Policy Loans to the Tool Chests Industry

The Department has not modified its preliminary determination or methodology for calculating a subsidy rate for this program for Tongrun.<sup>50</sup> No party commented on our preliminary methodology for calculating the net countervailable subsidy rate for this program.

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<sup>44</sup> See PDM at 31-32.

<sup>45</sup> *Id.*

<sup>46</sup> See GOC Verification Report at 2.

<sup>47</sup> See GOC IQR at 74-76 and Exhibit 1.

<sup>48</sup> See PDM at 33.

<sup>49</sup> *Id.* at 33-39.

<sup>50</sup> *Id.* at 33-34.



Tongrun: 0.58 percent *ad valorem*<sup>51</sup>  
Geelong: not used

## 2. *Export Buyer's Credits*

As discussed above, for purposes of this final determination, the Department determines that this program is countervailable and has selected a subsidy rate of 10.54 percent on the basis of AFA consistent with the *Preliminary Determination*.<sup>52</sup> We address the comments provided by interested parties in Comment 8, below.

Tongrun: 10.54 percent *ad valorem*  
Geelong: 10.54 percent *ad valorem*

## 3. *Income Tax Deductions for Research and Development (R&D) Expenses Under the Enterprise Income Tax Law*

The Department has not modified its preliminary determination or methodology for calculating a subsidy rate for this program for Tongrun.<sup>53</sup> No party commented on our preliminary methodology for calculating the subsidy rate for this program.

Tongrun: 0.07 percent *ad valorem*<sup>54</sup>  
Geelong: not used

## 4. *Provision of Hot-Rolled Coiled Steel for LTAR*

For purposes of this final determination, the Department modified the calculation of the benefit and the net countervailable subsidy rate for the provision of hot-rolled coiled steel for LTAR. Specifically, the Department revised the benchmarks for hot-rolled coiled steel to use American Metal Market (AMM), Steel Orbis, Platts, and CRU Prices Service (CRU) data in addition to Global Trade Atlas (GTA) data as described in Comment 5, below. In addition, we revised the benchmark for ocean freight to use both Descartes and Maersk data as described in Comment 7, below. We address the comments provided by interested parties in Comments 1 through 7, below.

Tongrun: 0.01 percent *ad valorem*<sup>55</sup>  
Geelong: not used

## 5. *Provision of Cold-Rolled Coiled Steel for LTAR*

For purposes of this final determination, the Department modified the calculation of the benefit and the countervailable subsidy rates for the provision of cold-rolled coiled steel at LTAR.

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<sup>51</sup> See Tongrun Final Calculation Memorandum.

<sup>52</sup> See PDM at 35.

<sup>53</sup> *Id.* at 35-36.

<sup>54</sup> See Tongrun Final Calculation Memorandum.

<sup>55</sup> See Tongrun Final Calculation Memorandum.

Specifically, the Department has revised the benchmarks for cold-rolled coiled steel to use AMM, Steel Orbis, Platts, and CRU data in addition to GTA data as described in Comment 5, below. In addition, we revised the benchmark for ocean freight to use both Descartes and Maersk data as described in Comment 7, below. Finally, we removed from the benefit calculation for Geelong purchases of cold-rolled steel that were not in the form of coils as described in Comment 1, below. We address the comments provided by interested parties in Comments 1 through 7, below.

Tongrun: 3.44 percent *ad valorem*<sup>56</sup>  
Geelong: 2.42 percent *ad valorem*<sup>57</sup>

#### 6. *Provision of Electricity for LTAR*

For purposes of this final determination, the Department modified the calculation of the benefit and the net countervailable subsidy rates for the provision of electricity for LTAR. Specifically, we revised the benchmark rate for “peak” electricity usage and corrected a ministerial error as described in Comment 10, below. We address the comments provided by interested parties in Comments 9 and 10, below.

Tongrun: 0.23 percent *ad valorem*<sup>58</sup>  
Geelong: 0.41 percent *ad valorem*<sup>59</sup>

#### 7. *Grant Programs*

The Department has not modified its preliminary determination or methodology for calculating subsidy rates for the following programs:<sup>60</sup>

##### Geelong

- a. *4th Quarter Growth Comparison*
- b. *1-3rd Quarter Growth Comparison*
- c. *Technology Improvement*
- d. *ERP Improvement*
- e. *Engineering Center*
- f. *Unemployment insurance to support business stability*

##### Tongrun

- g. *IPO Income Tax Subsidy*
- h. *Province Commercial Development Special Subvention*
- i. *Changshu City Awards for Maintaining A Steady Increase of Foreign Trade*

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

<sup>57</sup> See Geelong Final Calculation Memorandum.

<sup>58</sup> See Tongrun Final Calculation Memorandum.

<sup>59</sup> See Geelong Final Calculation Memorandum.

<sup>60</sup> See PDM at 38-39.

- j. *Municipal Industrial Economy Transformation and Development Subvention ‘Machines Inplace of Men’ Promotion of Intelligent Manufacturing Project*
- k. *Municipal Commercial Transformation and Development Subvention*
- l. *Province Commercial Development Special Subvention Exploration of International Market Fair*
- m. *Foreign Commerce and Trade Development Fund*
- n. *High Technology Products*

We address comments from interested parties regarding the above-referenced programs in Comments 11 and 12, below.

Tongrun: 0.22 percent *ad valorem*, cumulative<sup>61</sup>  
 Geelong: 0.66 percent *ad valorem*, cumulative<sup>62</sup>

**B. Programs Determined to Not Confer a Measurable Benefit to Tongrun or Geelong**

- 1. *GOC and Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands*
- 2. *Small- And Medium-Sized Enterprises (SME) International Market Exploration/Development Fund*
- 3. *Training Cost Reimbursement from Productivity Council*
- 4. *Rent Refund*
- 5. *Export Subsidies (Value-Added Tax (VAT) loss)*
- 6. *Enterprise Salary Survey Subsidy*
- 7. *Refund of social insurance*
- 8. *IPO Income Tax Subsidy*
- 9. *2013 Industrial Economy Transformation and Escalation Technology Innovation Subvention*
- 10. *Traffic Police Team 779 Elimination Subsidy*
- 11. *Municipal Industrial Economy Transformation and Development Subvention Energy Saving and Circular Economy Project*
- 12. *QFII Equity Distribution Income Tax Withhold and Collected*
- 13. *2014 Patent*

**C. Programs Determined to Be Not Used by Tongrun or Geelong**

- 1. *Export Loans from Chinese State-Owned Banks*
- 2. *Export Seller's Credit*
- 3. *Export Credit Guarantees*
- 4. *Income Tax Reductions for High- and New-Technology Enterprises*
- 5. *Provincial Government of Guangdong Tax Offset for R&D*

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<sup>61</sup> See Tongrun Final Calculation Memorandum.

<sup>62</sup> See Geelong Final Calculation Memorandum.

6. *Import Tariff and VAT Reductions for Foreign-Invested Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries*
7. *VAT Refunds for FIEs on Purchases of Domestically-Produced Equipment*
8. *Special Fund for Energy Saving Technology Reform*
9. *SME Technology Innovation Fund*
10. *Export Assistance Grants*

## **X. ANALYSIS OF COMMENTS**

### **Comment 1: Whether to Countervail Steel Inputs Not Purchased in Coils**

The petitioner argues that the Department should countervail benefits the respondents received for purchases of hot-rolled and cold-rolled steel in both coiled and non-coil forms for LTAR. According to the petitioner, the Department's preliminary decision to exclude respondents' purchases of non-coiled hot-rolled and cold-rolled steel was arbitrary, unsupported by substantial record evidence, and inconsistent with the law and the Department's prior practice.

The petitioner argues that, although the heading of the allegation in the petition regarding the provision of hot-rolled and cold-rolled steel for LTAR noted "coiled steel," the substantive allegation was not specific to hot-rolled or cold-rolled steel in coils, but rather covered these general types of steel, in any form, as provided to Chinese tool chests producers. The petitioner asserts that it provided evidence of the GOC's continuing control over the steel industry as a whole and that it referenced prior determinations by the Department that the GOC provided hot-rolled/cold-rolled carbon steel for LTAR. Moreover, the petitioner alleges that when the Department initiated on the program, it noted in the initiation checklist that it had previously determined that "this program" confers a countervailable subsidy, citing *53-Foot Dry Containers from the PRC*,<sup>63</sup> where the Department countervailed the provision of hot-rolled sheet and plate for LTAR. Accordingly, the petitioner concludes, in its initiation checklist, the Department indicated the broad nature of the program under investigation was not limited to the coiled form of hot-rolled or cold-rolled steel.

The petitioner also asserts that, in response to the Department's questions regarding the provision of hot-rolled and cold-rolled steel for LTAR, neither mandatory respondent limited its reported purchases to steel in coiled form but, rather, they reported hot-rolled and cold-rolled steel purchases in both coiled and non-coil forms.

The petitioner further argues that the Department's preliminary AFA findings with respect to whether suppliers of hot-rolled and cold-rolled steel are government authorities, whether the provision of such inputs for LTAR is specific, and market distortion, apply to the provision of hot-rolled and cold-rolled steel, regardless of form. Indeed, the petitioner contends that the Department's AFA decision as to whether suppliers of hot-rolled and cold-rolled steel are government authorities was based on supplier lists that were based on the purchases reported by

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<sup>63</sup> See Petitioner Case Brief at 5 (citing *53-Foot Domestic Dry Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 21209 (April 17, 2015) (*53-Foot Dry-Containers from the PRC*) and accompanying IDM at 8).

respondents, including producers of both coiled and non-coil steel. According to the petitioner, the Department's AFA decision as to whether government provision of hot-rolled and cold-rolled steel is specific was based on evidence that it has information on ferroalloy metal usage, which is a much broader category of inputs than hot-rolled or cold-rolled steel in any form. Finally, the petitioner contends that the Department's analysis as to whether the hot-rolled and cold-rolled steel markets are distorted was based on surrogate information using products that encompass coils that may also be sold and used as non-coil, flat strips, and, thus, are relevant to both the coiled and non-coil forms of hot-rolled and cold-rolled steel.

In addition, the petitioner argues that the Department has sufficient record evidence to calculate benefits to the respondents for all purchases of hot-rolled and cold-rolled steel for LTAR. According to the petitioner, to the extent the Department determines it also requires GTA benchmark data for non-coil steel, it may place such data on the record – similar to other hot-rolled and cold-rolled steel in this investigation.

The petitioner concludes that, because substantial evidence on the record, as described above, demonstrates that the subject producers benefited from the provision of hot-rolled and cold-rolled steel not in coils during the POI, the Department is required to countervail such a subsidy as a matter of law. The petitioner asserts that Section 775 of the Act instructs the Department that, “{if}, in the course of a proceeding under this title, the administering authority discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition ... then the administering authority ... shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding.” Citing *Bethlehem Steel*, the petitioner avers that even if the Department continues to conclude, in the final determination, that it was not investigating the provision of hot-rolled and cold-rolled steel in non-coil form, the statute requires the Department to countervail a discovered subsidy.<sup>64</sup> The petitioner also alleges that the Department's determination in the preliminary investigation to exclude steel in non-coil form from the subsidy calculation for each respondent is inconsistent with the Department's prior practice.

The GOC, Geelong, and HMC argue that the Department properly limited its investigation to purchases of coiled steel at LTAR. The respondents assert that the original petition clearly and repeatedly referenced hot-rolled coiled and cold-rolled coiled steel. Geelong also claims that the Department's initiation checklist and all subsequent documents issued by the Department repeatedly referenced coiled hot-rolled and cold-rolled steel.

The respondents further argue that the Department has discretion to conduct the investigation into the proper material inputs as it finds is appropriate. According to the GOC and Geelong, the Court in *Bethlehem Steel* found that the Department is statutorily obligated to investigate subsidies discovered during the investigation, only if there is reasonable time prior to the completion of the Department's investigation.<sup>65</sup> The respondents assert that, in the case underlying *Bethlehem Steel*, the Department had five more months until the final determination

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<sup>64</sup> See Petitioner Case Brief at 13 (citing *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1360 (CIT 2001) (*Bethlehem Steel*)).

<sup>65</sup> See GOC Case Brief at 4 and Geelong Case Brief at 6 (citing *Bethlehem Steel*).

to further examine the discovered subsidies, whereas in this investigation there is less than a month until the deadline for the final determination. Geelong claims that the petitioner's citations to agency practice are all distinguishable from this proceeding.

Citing *Boltless Steel Shelving*, Geelong asserts that the petitioner's attempt here to convince the Department to initiate a new subsidy investigation has been a familiar tactic in other recent proceedings.<sup>66</sup> According to Geelong, in that case, the Department rejected the petitioner's argument that the Department should broaden its investigation to include cold-rolled steel, in addition to hot-rolled coiled steel.<sup>67</sup>

Furthermore, Geelong argues, the Department has the discretion to determine whether the subsidy program is not proven to be specific and did not confer a benefit, neither of which has been done by the Department for non-coiled steel in this case. The respondents assert that it would be unreasonable for the Department to initiate an investigation of purchases of all steel for LTAR now, after the close of the factual record, and with less than a month until the deadline for the final determination.

The GOC disputes the petitioner's assertion that the Department's preliminary findings apply to the provision of hot-rolled and cold-rolled steel, regardless of form. According to the GOC, the petitioner cites to no record evidence in support of its assertion.

Finally, Geelong contends, the petitioner had ample time to assert a new subsidy allegation on a different type of steel in this investigation. According to the respondents, the petitioner knew all of Geelong's steel purchases from the date of Geelong's initial response (*i.e.*, July), yet failed to allege any new steel subsidy allegations in the investigation. Geelong alleges that the petitioner's request aims to punish respondents for being cooperative in this investigation, and is contrary to the Department's policy goal of encouraging cooperation by a respondent.

**Department's Position:** We have continued to limit our investigation to purchases of hot-rolled and cold-rolled coiled steel only. The alleged program named in the petition was "Government Provision of Hot-Rolled/Cold-Rolled Coiled Steel for Less Than Adequate Remuneration."<sup>68</sup> Based on this allegation, we initiated an investigation of "Government Provision of Hot-Rolled/Cold-Rolled Coiled Steel for LTAR."<sup>69</sup>

The fact that we were investigating coiled steel only is evident from the Department's initial questionnaire, in which we instructed the GOC and the respondents that we were "investigating the provision of the following inputs for LTAR: a. hot-rolled coiled steel, b. cold-rolled coiled

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<sup>66</sup> See Geelong Case Brief at 8 (citing *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 51775 (August 26, 2015) (*Boltless Steel Shelving*) and accompanying IDM at 40-42).

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

<sup>68</sup> See Letter to the Secretary of Commerce from the petitioner "Certain Tool Chests and Cabinets from the People's Republic of China and the Socialist Republic of Vietnam—Petition for the Imposition of Antidumping and Countervailing Duties," dated April 11, 2017, Volume IV, at 40.

<sup>69</sup> See Countervailing Duty Investigation Initiation Checklist: Certain Tool Chests and Cabinets from the People's Republic of China, dated May 1, 2017 at 19.

steel.”<sup>70</sup> Moreover, in our supplemental questionnaires, we consistently referred to “coiled” steel in every instance where we referred to the input being investigated.<sup>71</sup> Thus, all parties were on notice that the Department was specifically investigating coiled steel inputs for LTAR.

Accordingly, if the petitioner intended that the Department investigate purchases of non-coiled steel to determine whether they were for LTAR, the petitioner should have submitted a new-subsidy allegation. The petitioner had adequate time to do so; although we did not ask them to report such information, both respondents reported purchases of non-coiled steel in addition to their purchases of coiled steel.<sup>72</sup> Pursuant to 19 CFR 351.301(c)(2)(iv)(A), a petitioner must file new subsidy allegations no later than 40 days before the preliminary determination. In this investigation, the petitioner made no reference to this alleged subsidy until its October 18, 2017 case brief, five weeks before the deadline for the final determination. As a result, we find this new subsidy allegation to be untimely, and have not investigated this program for the final determination.

Moreover, we disagree with the petitioner’s claim that the necessary information is on the record for the Department to determine whether the respondents purchased non-coiled steel at LTAR. In addition to not having the GTA data for all of the non-coiled HTS numbers purchased by the respondents, the GOC’s response to our questionnaire makes it evident that the GOC understood that our investigation was limited to coiled steel only; the GOC’s responses consistently referenced coiled steel.<sup>73</sup> Thus, our preliminary determinations, including our AFA determinations, were based on the GOC’s responses to our questions regarding coiled steel.

Finally, with respect to the petitioner’s reference to section 775 of the Act, our practice is guided by 19 CFR 351.311(b), which specifies that the Department will examine an apparent subsidy discovered during the course of an investigation “if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review.” With respect to the petitioner’s citation of *Bethlehem Steel*, this investigation is distinguished by the

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<sup>70</sup> See Letter to the GOC, “Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People’s Republic of China: Countervailing Duty Questionnaire,” dated May 30, 2017 (Initial Questionnaire) at Section II, at 6, and Section III, at 10. See also the Standard Questions Appendix of Section II of the Initial Questionnaire, where we asked questions “Regarding the Hot-Rolled Coiled Steel Industry” and “Regarding the Cold-Rolled Coiled Steel Industry.”

<sup>71</sup> See Letters to Tongrun dated July 26, 2017, at 1, and August 21, 2017, at 1, and August 25, 2017, at 1; Letters to Geelong dated July 26, 2017, at 2, August 15, 2017, at 1, August 21, 2017, at 1, and August 25, 2017, at 1; and Letters to the GOC dated July 26, 2017, at 2, and August 21, 2017, at 1.

<sup>72</sup> See Letter from Tongrun, “Tongrun Initial CVD Questionnaire Response: Countervailing Duty Investigation on Tool Chests and Cabinets from the People’s Republic of China (C-570-057),” dated July 13, 2017 (Tongrun IQR) at Exhibits D.1 and D.5 and Letter from Geelong, “Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People’s Republic of China: Geelong Response to Section III of CVD Questionnaire,” dated July 17, 2017 at Exhibits CVD-27 and CVD-28.

<sup>73</sup> See GOC IQR, at, e.g., at 49 (“The GOC does not collect total volume and value of Chinese domestic consumption of cold-rolled coiled steel.”), at 53 (“The GOC reiterates that there is no government ‘program’ of supplying hot-rolled coils to the Chinese tool chest industry for LTAR.”), and at 57 (“There are a vast number of uses for hot-rolled steel coil. The types of consumers that may purchase hot-rolled steel coil are highly varied within the economy. The GOC does not collect official data regarding the industries in China that purchase hot-rolled steel coil directly.”). The GOC provided similar responses with respect to cold-rolled steel. See, e.g., GOC IQR at 74, 76, and 79.

fact that, in the case underlying *Bethlehem Steel*, the subsidy was brought to the Department's attention prior to the preliminary determination,<sup>74</sup> thus, there was substantially more time to analyze the program in that proceeding than there is in this proceeding. In the instant case, the petitioner did not raise this issue until five weeks before the deadline for the final determination, and after all verifications were completed. As such, we did not have the time needed to request additional information from the GOC, much less to verify that information, to reach a determination with respect to non-coiled steel. Therefore, as described above, we determine that we do not have adequate time to investigate purchases of non-coiled steel to ascertain whether they were for LTAR.

## **Comment 2: Whether Certain Steel Producers Are Authorities**

The GOC argues that the Department should not apply AFA and treat hot-rolled and cold-rolled private company suppliers as government authorities. The GOC contends that it acted to the best of its ability with respect to providing information regarding Chinese Communist Party (CCP) involvement in private company suppliers. The GOC asserts that it explained that there is no central informational database to search for the information requested by the Department and that the Department should collect this information through the respondents. As such, the GOC avers, it complied with the Department's governing statutes by notifying the Department that it was unable to submit the information in the requested form and manner, together with a full explanation, and suggested alternative forms in which the Department could obtain the information. The GOC contends that the Department is required to consider the ability of the GOC to submit the information in the requested form and manner. The GOC also argues that the case cited by the Department for its assertion that the GOC could obtain the information requested was an instance of a single supplier with a limited number of owners, board members or managers, unlike the situation in this case, where the mandatory respondents reported a significant number of suppliers.<sup>75</sup>

The GOC further argues that there are no facts on the record to suggest that CCP involvement in a private company is sufficient to transform the company into a government authority. The GOC disputes the Department's established presumption, as described in the Public Body Memorandum,<sup>76</sup> that the presence of CCP party groups and committees, or primary party organizations, in private companies represents a significant CCP presence and is, alone, sufficient to transform the company into a government authority. Indeed, the GOC does not agree with the analysis and conclusions in the Public Body Memorandum, and contends that the Public Body Memorandum does not state that the CCP exerts control over private companies through primary party organizations; at most, the GOC concedes, the Public Body Memorandum expresses uncertainty over the role of primary party organizations in private companies.

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<sup>74</sup> See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73194-5 (December 29, 1999).

<sup>75</sup> See GOC Case Brief at 10 (citing *High Pressure Steel Cylinders from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) (*Steel Cylinders*) and accompanying IDM at 13).

<sup>76</sup> See Memorandum to the File, "Certain Tool Chests and Cabinets from the People's Republic of China: Placing Information on the Record," dated August 17, 2017, at Attachment 4 (Public Body Memorandum).



The GOC also contends that the facts on the record refute the claim that CCP primary party organizations exert control over private businesses, or would otherwise support the leap the Department has made that the presence of CCP officials alone is sufficient to vest a company with government authority. Specifically, the GOC asserts that the CCP Constitution plainly states that primary party organizations do not direct the work of their units. The GOC also alleges that CCP organizations exist in private domestic companies as well as Sino-foreign joint ventures and wholly foreign-owned companies, and that there can be no dispute that neither the Chinese government, nor the CCP, control wholly foreign owned companies, which, the GOC comments, the Department itself recognizes in its separate rate policy in antidumping duty proceedings. The GOC argues that the *Company Law* and the *Civil Servant Law* clearly stipulate that the company must operate independently without being subject to any government intervention.<sup>77</sup> Moreover, the GOC argues, these laws explicitly prohibit government officials from concurrently holding a position in an enterprise or any other profit-making organization. The GOC further claims that the Department has never presented any evidence to demonstrate that provisions of the *Company Law* are superseded or invalidated by primary party organization obligations.

The petitioner argues that the application of AFA was appropriate for each hot-rolled and cold-rolled steel producer that the GOC claimed was privately owned, but for which the GOC failed to provide information regarding owners, members of the board of directors, or managers who may have also been government or CCP officials during the POI. According to the petitioner, the Department requested this information, including documentation on the private suppliers such as articles of incorporation and capital verification reports, from the GOC multiple times. However, the petitioner asserts, the GOC continued to evade the Department's requests, stating only that it could not provide the information and asserting that the *Company Law* precludes government interference for privately owned enterprises.

The petitioner also contends that the GOC's explanations for why the CCP information is missing from the record do not change the fact that the Department requested the information on multiple occasions and the GOC failed to provide it. According to the petitioner, the GOC failed to explain its efforts to the Department, or propose alternatives to the requested information; as a result, the petitioner argues, the GOC failed to act to the best of its ability to comply with the Department's requests for information, thereby warranting the application of AFA.

The petitioner observes that the GOC attempts to distinguish this case from a prior proceeding in which the GOC could confirm information about government or CCP involvement in a company by arguing that the prior case involved only a single supplier, whereas here, the GOC would have to obtain information for many identified suppliers.<sup>78</sup> The petitioner alleges that the GOC's argument undermines its insistence that it is impossible for the GOC to obtain the information request by the Department. The petitioner also claims that the GOC overstates the effort required by the GOC, as not all the suppliers were privately owned. Thus, the petitioner claims, the GOC essentially concedes that it can access the requested information.

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<sup>77</sup> See GOC Case Brief at 16 (citing GOC IQR at Exhibit D-4 (*Company Law*); *Civil Servant Law* not cited in brief).

<sup>78</sup> See Petitioner Case Brief at 21 (citing *Steel Cylinders*).

The petitioner disputes the GOC's assertion that CCP involvement in a private company is not sufficient to transform the company into a government authority. The petitioner contends that the Department has previously found that the *Company Law* does not apply to CCP officials and that there is no basis for the Department to depart from such prior findings in this investigation. According to the petitioner, the role and functions of CCP officials within Chinese enterprises is relevant to the Department's analysis. While the petitioner agrees with the GOC that the record lacks information indicating government control over the privately-owned input producers, the petitioner claims that the reason the record is void of such information is because of the GOC's failure to provide it. The petitioner concludes that the GOC's withholding of necessary information requested by the Department warrants the application of AFA.

**Department's Position:** We continue to find, based on AFA, that all hot-rolled and cold-rolled coiled steel producers are "authorities" within the meaning of section 771(5)(B) of the Act.

As explained in the PDM, we sought information from the GOC regarding input producers and suppliers.<sup>79</sup> Specifically, we sought information from the GOC that would allow us to analyze whether the producers are "authorities" within the meaning of section 771(5)(B) of the Act.<sup>80</sup> With respect to the suppliers that the GOC identified as private companies, we asked the GOC to provide information about the involvement of the CCP in those companies, including whether individuals in management positions are CCP members.<sup>81</sup> Furthermore, the Department requested that the GOC provide the articles of incorporation, capital verification reports, business licenses and tax registration.<sup>82</sup> The GOC, however, did not provide this information, despite our repeated efforts.<sup>83</sup>

The GOC did not provide information that we require in order to determine the level of government ownership and involvement in hot-rolled and cold-rolled coiled steel producers. Specifically, the GOC did not identify the individual owners, members of the board of directors or senior managers of the producers who were CCP officials during the POI for any producer. The information we requested regarding the role of CCP officials in the management and operations of these producers is necessary to our determination of whether these producers are "authorities" within the meaning of section 771(5)(B) of the Act. The Department considers information regarding the CCP's involvement in the PRC's economic and political structure to be relevant because public information suggests that the CCP exerts significant control over activities in the PRC.<sup>84</sup> We have explained our understanding of the CCP's involvement in the PRC's economic and political structures in previous proceedings.<sup>85</sup> With regard to the GOC's

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<sup>79</sup> See PDM at 15-16.

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

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

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

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

<sup>84</sup> See Public Body Memorandum.

<sup>85</sup> *Id.*; see also *Certain Uncoated Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 81 FR 3110 (January 20, 2016) and accompanying IDM at 15.

claim that the *Company Law* prohibits GOC officials from taking positions in private companies, we have previously found that the *Company Law* does not pertain to CCP officials.<sup>86</sup>

Moreover, the Department disagrees with the GOC's assertion that – based on the Department's antidumping practice – the *Company Law* establishes an absence of legal state control over privately-owned companies in the PRC. The Department's evaluation of the *Company Law* in the context of separate rate analyses in antidumping proceedings does not demonstrate a lack of state control here. As explained in *Aluminum Extrusions*, antidumping PRC proceedings are separate and distinct from CVD PRC proceedings with the application of different analyses and methodologies.<sup>87</sup> As such, the Department's finding in an antidumping review is not germane to this investigation.

The GOC's claim that it acted to the best of its ability is unavailing. As the GOC acknowledged, the GOC has been able to provide the information requested previously in other proceedings.<sup>88</sup> Moreover, as the petitioner notes, the GOC overstates the burden of responding to our requests for information. Although the GOC references the total number of producers in its case brief, we only asked for this information with respect to “input producers that are not majority government-owned and that produced the input purchased by the respondent companies during the POI.”<sup>89</sup> As explained in the PDM, most of the input suppliers from whom the respondents purchased hot-rolled and cold-rolled coiled steel were identified by the GOC as being under the management or control of the GOC.<sup>90</sup> Thus, the GOC was required to provide this information for only a relatively small number of producers. Given that the GOC provided similar information previously, we find the GOC's claim that providing the information requested would be unduly burdensome to be unpersuasive.

Assuming, *arguendo*, that the GOC could not provide any information, pursuant to section 782(c) of the Act, it should have promptly explained to the Department what attempts it undertook to obtain this information and proposed alternative forms of providing the information.<sup>91</sup> The GOC did not indicate that it had attempted to contact the CCP, or that it

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<sup>86</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.

<sup>87</sup> See *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78788 (December 31, 2014) (*Aluminum Extrusions*), and accompanying IDM at Comment 8.

<sup>88</sup> See IDM accompanying *Steel Cylinders* at 13 (The Department found that the GOC's response to certain questions concerning CCP officials indicates that the GOC is able to obtain the requested information).

<sup>89</sup> See Initial Questionnaire at Section II, Input Producer Appendix, Question A.2.

<sup>90</sup> See GOC IQR at Exhibits D-1 and D-24.

<sup>91</sup> Section 782(c)(1) of the Act states, “{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 or 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.” Furthermore, the Department's questionnaire explicitly informs respondents that if they are unable to respond completely to every question in the questionnaire by the established deadline, or are unable to provide all requested supporting documentation by the

consulted any other sources. The GOC's responses in prior CVD proceedings involving the PRC demonstrate that it is, in fact, able to access information similar to what was requested in this proceeding.<sup>92</sup> Thus, the GOC did not act to the best of its ability.

In this proceeding, the GOC did not provide the information we requested regarding CCP officials' involvement in the operations of the input producers. Accordingly, we have no basis to revise the Department's preliminary AFA finding that hot-rolled and cold-rolled coiled steel producers are "authorities" within the meaning of section 771(5)(B) of the Act. Therefore, for this final determination, we continue to determine that the companies producing the hot-rolled and cold-rolled coiled steel purchased by the respondent are "authorities" within the meaning of section 771(5)(B) of the Act, and that the respondents received a financial contribution from them in the form of the provision of a good, pursuant to section 771(5)(D)(iii) of the Act.

### **Comment 3: Whether Steel Suppliers That Are Trading Companies Are Authorities**

Geelong argues that the Department's preliminary AFA finding that all of Geelong's domestic producers and suppliers of steel coils are authorities is not warranted. Geelong claims that it purchased its steel input from trading companies, and not from government authorities. According to Geelong, the Department's practice, when a respondent purchases an input from a trading company or non-producing supplier, to find a subsidy is conferred where the producer of the input is an authority within the meaning of section 771(5)(B) of the Act and the price paid by the respondent for the input was for LTAR. Geelong contends that none of Geelong's steel traders are government owned and that the application of AFA to find them to be authorities is unwarranted.

Geelong further argues that, even assuming that the producer of the input is an authority, the application of AFA is not warranted as record evidence does not show the price paid by Geelong for the steel input was for LTAR. Geelong contends that it directly purchased its steel in an arm's-length transaction with an unrelated private party and that the transaction value in such a *bona fide*, arms-length transaction with a private party is indicative of a price paid at a market-determined price, not for LTAR. Geelong claims that record evidence shows that, based upon a comparison of the unit price of cold-rolled steel Geelong purchased from trading companies with the GTA benchmark prices for cold-rolled steel, Geelong's price paid is within the proximate range of GTA benchmark prices and, for some purchases, the price paid is in excess of benchmark prices. Geelong asserts that this is indicative that the transactions did not confer a benefit in the form of a provision of a good for LTAR, and that the application of AFA in finding that all domestic producers and suppliers of steel to Geelong are authorities is not warranted.

The petitioner argues that the Department appropriately countervailed Geelong's purchases from private trading companies. The petitioner contends that the Department's practice is to countervail all inputs produced by government-owned producers even when sold through an intervening private trading company and that the Department has rejected similar arguments in

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same date, the respondents must notify the official in charge and submit a request for an extension of the deadline for all or part of the questionnaire response. *See* Initial Questionnaire at 3.

<sup>92</sup> *See, e.g., Steel Cylinders* and accompanying IDM at 13.

prior proceedings. The petitioner claims that Geelong provides no legal or factual basis for the Department to depart from its long-standing practice.

**Department’s Position:** We continue to find that Geelong’s suppliers that are private trading companies are authorities. As we explained in the PDM, in prior CVD proceedings involving the PRC, the Department determined that when a respondent purchases an input from a trading company or non-producing supplier, a subsidy is conferred if the producer of the input is an “authority” within the meaning of section 771(5)(B) of the Act and that the price paid by the respondent for the input was for LTAR.<sup>93</sup> Geelong provides no argument that persuades us to depart from this practice. Moreover, we disagree with Geelong’s assertion that record evidence does not show that the price paid by Geelong for the steel input was for LTAR. To the contrary, when we compared Geelong’s prices to benchmarks as described in the PDM, we found certain of the purchases to be for LTAR.<sup>94</sup> Indeed, had the prices paid by Geelong not been for LTAR, the calculated net countervailable subsidy rate for the Provision of Cold-Rolled Coiled Steel for LTAR would be zero.

#### **Comment 4: Whether the Provision of Steel Coils is Specific**

The GOC argues that the Department should not apply AFA to treat the provision of hot-rolled and cold-rolled coiled steel for LTAR as specific. The GOC contends that it acted to the best of its ability with respect to providing information on specificity.

The GOC asserts that the Department’s understanding of the database described in prior cases, which the Department has claimed is an electronic system which permits the State Administration of Industry and Commerce (SAIC) to gather industry-specific information, is mistaken. The GOC claims that the SAIC only has the authority to collect and maintain registration information for enterprises; although it collects other information such as annual reports, such information is collected on a firm-specific basis and cannot be used to answer industry-specific questions. The GOC further claims that the National Bureau of Statistics (SSB) collects industry-specific data on production and consumption, but, as the Department verified, does not have specific data regarding the hot-rolled and cold-rolled steel industries, as they are not industry categories that the SSB tracks.<sup>95</sup> The GOC concludes that, because it acted to the best of its ability with respect to providing information on specificity, the Department must rely on facts on the record and cannot apply an adverse inference; because there are no facts on the record with respect to specificity, the Department cannot make an adverse inference that this program is specific.

The petitioner argues that the Department should continue to conclude that the provision of hot-rolled and cold-rolled steel is specific under an AFA analysis. The petitioner asserts that the

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<sup>93</sup> See PDM at 15 (citing *CWP from the PRC* and accompanying IDM at “A. Hot-Rolled Steel for Less Than Adequate Remuneration”; and *Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) and accompanying IDM at “E. Provision of Wire Rod for Less than Adequate Remuneration.”).

<sup>94</sup> See PDM at 37; and Geelong Final Calculation Memorandum.

<sup>95</sup> See GOC Case Brief at 18 (citing GOC Verification Report at 3).

alleged inability to provide industry purchase information for a particular input does not preclude the Department's application of AFA. The petitioner cites *PET Resin* in support of this assertion, where the Department concluded that AFA was appropriate because, in part, the GOC did not attempt to provide such information from another quasi-public (*i.e.*, trade association) or public source.<sup>96</sup> Citing *RZBC Group 2015*, the petitioner further contends that the Court upheld AFA in a similar situation because (1) the GOC had constructive knowledge, from prior proceedings, that the Department would want and need data on industry use of the input, and (2) the GOC had other sources of information available to it, including from trade associations and the input-producing state-owned enterprises.<sup>97</sup>

The petitioner also alleges that the GOC has extensive experience in responding to Department investigations into the provision of steel inputs (including hot-rolled and cold-rolled steel) for LTAR, and should have been prepared to provide such information in this investigation. The petitioner finally claims that the GOC failed to seek the required information from another source, including a steel trade association or the numerous state-owned steel producers.

**Department's Position:** We continue to find the provision of hot-rolled and cold-rolled coiled steel to be specific. As explained in the PDM, we sought information from the GOC that would allow us to determine whether these subsidies are specific within the meaning of section 771(5A)(D)(iii)(I) of the Act, but the GOC did not provide the information requested.<sup>98</sup> Furthermore, as explained in the PDM, we previously found that the GOC is able to provide the information requested.<sup>99</sup> Although the GOC claims the Department was "mistaken" with respect to the Department's understanding of the electronic system, which permits the SAIC to gather industry-specific information, the GOC did not provide any evidence to support this claim. Moreover, assuming, *arguendo*, that the GOC could not provide any information, pursuant to section 782(c) of the Act, it should have promptly explained to the Department what attempts it undertook to obtain this information and proposed alternative forms of providing the information. Instead, the GOC did not provide any additional explanation of any efforts it made to gather the requested information. Thus, the GOC did not cooperate to the best of its ability and, therefore, an adverse inference is warranted.

Moreover, the GOC ignores the fact that our preliminary finding was supplemented by the fact that the Department previously found a similar program (*i.e.*, the provision of hot-rolled steel) in the PRC to be specific, because hot-rolled coiled steel is only provided to steel consuming

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<sup>96</sup> See Petitioner Case Brief at 24 (citing *Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Affirmative Determination*, 81 FR 13337 (March 14, 2016) (*PET Resin*) and accompanying IDM at 24).

<sup>97</sup> See Petitioner Rebuttal Brief at 24 (citing *RZBC Group Shareholding Co., Ltd. v. United States*, 100 F. Supp. 3d 1288, 1300-01 (CIT 2015) (*RZBC Group 2015*)).

<sup>98</sup> See PDM at 16-17.

<sup>99</sup> *Id.* at 17 (citing *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (December 26, 2012) and accompanying IDM at Comment 13 (where the Department found that the GOC's list of industries that used ferroalloy metal in 2002 supported a conclusion that the GOC tracks industry consumption information and failed to comply with our request for information). See also *Drawn Stainless Steel Sinks from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) and accompanying IDM at Comment 8 (where the GOC provided a list of industries that purchased the input)).

industries, and thus, is only provided to a limited number of industries.<sup>100</sup> We find that it is reasonable to apply the same rationale to the provision of cold-rolled coiled steel in the PRC. Thus, even if an adverse inference were not warranted, we would still find the programs to be specific as non-AFA.

#### **Comment 5: Whether to Use Certain Sources as Benchmarks for Steel Inputs**

The GOC and Tongrun argue that the Department should use the price data that the respondents submitted as benchmarks for the provision of hot-rolled and cold-rolled coil for LTAR. According to the GOC and Tongrun, the Department's rejection of price data from several sources (*i.e.*, AMM, Steel Orbis, Platts, or CRU) on the grounds that they were unverifiable and unreliable for benchmarking purposes conflicts with its practice in prior cases, where the Department accepted monthly or weekly summary data as appropriate benchmark data. Tongrun asserts that the Department has never expressed any concerns regarding pricing data from these sources and indeed the Department has consistently considered these prices sufficient and reliable for tier two benchmark purposes. Citing *Boltless Steel Shelving*, Tongrun claims that the Department recently found the pricing data from these sources to be "sufficiently reliable and representative," that there was no "information to indicate that these price data are somehow aberrational, and therefore, not reliable or unrepresentative," and that the Department "calculate the {hot-rolled coiled steel} benchmark using a simple monthly average from pricing data on the record" including these sources.<sup>101</sup> According to Tongrun, there is no information on the record of this case regarding the prices published by these sources that is different from the information available in any of these previous proceedings in which the Department used these sources.

Tongrun also argues that the reason cited by the Department for rejecting the pricing data from these sources is flawed. According to Tongrun, the Department's claim that Tongrun did not provide the raw data behind the prices provided is not accurate. Tongrun claims that it submitted the available raw data for each month of the POI, including average low prices, average high prices, average-mid prices, minimum price and maximum price; there was no raw data behind each of these sources that Tongrun could have provided but did not. Tongrun further argues that the pricing data provided in these sources is superior to the data provided in the GTA export statistics because the GTA export statistics only provide aggregated quantities and values rather than providing actual per unit prices on a shipment-by-shipment basis. In contrast, Tongrun avers, the prices provided in the sources it provided are actual per-unit prices that would be available to purchases in China.

Tongrun also argues that the benchmark prices from these sources are more specific to the products being valued and eliminate the distortive effect of different size and quality products included within the GTA data. According to Tongrun, the Department has rejected basket HTS categories in favor of more product-specific benchmarks in the past. Tongrun claims that, whereas the Department used HTS categories of varying grades of steel coils of 600 mm and above, Tongrun only uses steel coils of one grade and 1000 mm and above. Tongrun alleges that the record demonstrates this fact. Therefore, Tongrun argues, the inclusion of the type of steel not purchased by the company makes the GTA export data unsuitable for use as a tier 2

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<sup>100</sup> See PDM at 17 (citing *Steel Cylinders* and accompanying IDM at 17).

<sup>101</sup> See Tongrun Case Brief at 4 (citing IDM accompanying *Boltless Steel Shelving* at Comment VII).

benchmark under 19 CFR 351.511(a)(2)(ii), because they are not prices Tongrun would have paid since it would never import this product.

The petitioner argues that the Department properly rejected the input benchmark data submitted by the respondents. The petitioner contends that the data from the sources in question are inferior to GTA data because they are comprised of transaction prices, offers for sale, and other price estimates that are further adjusted based on each source's proprietary methodology and are not subject to verification, and do not contain transaction volumes. Citing *PET Resin*, the petitioner asserts that the Department has indicated its preference for weight-averaged prices in recent investigations.<sup>102</sup>

In contrast, the petitioner avers, the GTA data placed on the record by the Petitioner and the Department reflect actual, weight-averaged shipment transactions. The petitioner alleges that 19 CFR 351.511(a)(2)(ii) provides that, when faced with more than one "commercially available world market price to be used as a benchmark," it will consider them all with "due allowance for factors affecting comparability." The petitioner asserts that, given the deficiencies in the subscription data and inability to verify such data, there is simply no comparability between the GTA data and any of the sources in question.

The petitioner further argues that Tongrun did not provide the raw data underlying its benchmark information. According to the petitioner, the raw data that allow the Department to verify the summary monthly or weekly data provided by respondents is the detail of the transactions that go into that average price. For example, the petitioner asserts that it submitted with its benchmark comments an Excel file capturing monthly transactions between all reporting export countries that comprised the monthly summary world export data and that the Department placed similar information on the record with its GTA export data.

The petitioner also contends that Tongrun's argument that the subscription data are more specific to its purchases than the GTA data that the Department used as benchmarks is without merit. The petitioner contends that the GTA data used by the Department are specific to the HTS numbers reported by the respondents for their actual POI purchases of hot-rolled and cold-rolled steel. The petitioner asserts that although Tongrun claims that it only uses steel coils of 1000 mm and above, the Department verified this is not supported by record evidence.

Moreover, the petitioner claims that Tongrun's and the GOC's assertion that the Department's rejection of the sources in question is inconsistent with past Department practice is not correct. The petitioner observes that in a recent investigation, the Department rejected the respondents' data because these are a summary of raw data that were not included in the submission which were unverifiable and unreliable for benchmarking purposes.<sup>103</sup>

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<sup>102</sup> See Petitioner Rebuttal Brief at 30 (citing *PET Resin* and accompanying IDM at 12).

<sup>103</sup> See Petitioner Rebuttal Brief at 6 (citing *Certain Aluminum Foil from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 37844 (August 14, 2017) and accompanying Decision Memorandum at 28).



**Department’s Position:** Although we preliminarily rejected the data from AMM, Steel Orbis, Platts, or CRU, we reconsidered our approach for this final determination. After reviewing the record, we have determined it is appropriate to include the data at issue, consistent with prior cases, given that the data are from commercially published independent sources.<sup>104</sup>

Although the petitioner is correct that these sources use proprietary methodologies for obtaining their assessments, it is clear from the record that the purpose of the assessments is to provide market prices for various products. For example, Platt’s price assessments “are designed to produce price assessments that are representative of market value, and of the particular markets to which they relate.”<sup>105</sup> Similarly, AMM’s price assessments “are based on regular contact with a wide variety of market participants, a group which is reviewed periodically by senior editors to ensure a balance of participants, buyers, sellers and others legitimately and actively involved in the marketplace.”<sup>106</sup> Likewise, Steel Orbis’ price assessments “are derived from actual international & local transactions made, confirmed by both the sellers and buyers.”<sup>107</sup> Finally, CRU’s price assessments are based “on a strong and transparent methodology, with trained price assessors and expert analysts working together to ensure prices are unbiased and accurate” and its “US hot rolled coil price is the leading benchmark for the US steel industry, relied on by 85% of those who use a benchmark to settle contracts.”<sup>108</sup>

Based on these facts, we determine that there is no reason for us to question the validity or representativeness of such data. Although we do not have the underlying data for these sources , the data comes from commercially published independent sources for use in steel and other industries. Moreover, we do not have a practice of verifying such data. Accordingly, we revised our benchmarks for hot-rolled coiled steel and cold-rolled coiled steel to use these data. In accordance with 19 CFR 351.511(a)(2)(ii), we have averaged these data. Specifically, we used a simple average to average these data because we had no means of weighting the data. Moreover, because it is not evident from the record what the HTS number is for the products covered by the AMM, Steel Orbis, and CRU data,<sup>109</sup> we averaged all data together and have not attempted to match purchases to benchmarks by HTS number.

#### **Comment 6: What to Use as a Benchmark for Certain Geelong Steel Purchases**

Geelong and HMC argue that the Department’s benchmark for the calculation of Geelong’s subsidy rate for cold-rolled steel coil for LTAR requires an adjustment to address distortions. According to Geelong, the HTS code the Department used as a benchmark to measure certain of Geelong’s purchases is a basket category that does not include only coils. Geelong contends the

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<sup>104</sup> See, e.g., IDM accompanying *Boltless Steel Shelving* at Comment VII.

<sup>105</sup> See Letter from the petitioner, “Certain Tool Chests and Cabinets from the People’s Republic of China – Petitioner’s Rebuttal to Respondents’ Benchmark Submissions and Request to Reject Tongrun’s Untimely New Factual Information,” dated August 18, 2017, at Attachment 3.

<sup>106</sup> *Id.* at Attachment 4.

<sup>107</sup> *Id.* at Attachment 5.

<sup>108</sup> *Id.* at Attachment 2.

<sup>109</sup> See Letter from Tongrun, “Tongrun Benchmark Submission: Countervailing Duty Investigation on Tool Chests and Cabinets from the People’s Republic of China (C-570-057),” dated August 9, 2017, at Exhibits 1 and 2; and Letter from Geelong, “Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People’s Republic of China: Benchmark Submission,” dated August 9, 2017, at Exhibits 1 and 2.

products not in coils are typically valued at a higher price because they undergo more processing than coiled steel. Geelong contends that the Department has a duty to employ a coil-specific benchmark and suggests alternative HTS numbers the Department could use.

The petitioner argues that the Department should reject the argument put forth by Geelong and HMC. The petitioner contends that although Geelong and HMC would have the Department abandon the GTA benchmark data for the HTS number in question as a basket category, based on the record, it is the most precise benchmark available for calculating benefits for certain of Geelong's purchases of cold-rolled steel. In addition, the petitioner asserts that tier-two benchmarks are not required to be identical to a respondent's actual input purchases. Accordingly, the petitioner concludes, the Department should continue to utilize GTA data for world export prices of cold-rolled steel under the HTS number in question in the final determination.

**Department's Position:** We disagree with Geelong and HMC. We verified that Geelong reported the correct HTS code for all purchases we examined.<sup>110</sup> Therefore, we properly used, as a benchmark, the GTA data for the HTS number applicable to the products in question. While it is true that the HTS number in question includes both coiled and non-coiled products, there are other characteristics that distinguish the products in question from the HTS numbers which Geelong suggests we use.<sup>111</sup> Thus, we have no reason to believe that the pricing data for the HTS numbers Geelong suggests we use are any more representative than the pricing data for the HTS number we used for purposes of the *Preliminary Determination*.<sup>112</sup> That said, we revised our benchmarks in accordance with our position in response to Comment 5, above.

#### **Comment 7: Whether to Use a Certain Source as a Benchmark for Ocean Freight**

Tongrun argues that the Department should not reject the ocean freight rates it submitted. Tongrun claims that the ocean freight rates it submitted are no more unreliable than the Maersk rate submitted by the petitioner. In contrast to prior cases, Tongrun asserts, there is no evidence that these Maersk Line ocean freight rates are actual transactions. In addition, Tongrun claims that the rates it submitted cover each month of the POI, whereas the petitioner's data only cover five months of the POI. Tongrun concludes that the Department should use its ocean freight rates for benchmark purposes, or, at the very least, average Tongrun's rates with the rates submitted by the petitioner.

The petitioner argues that the ocean freight data Tongrun submitted are less reliable than the Maersk data. According to the petitioner, Tongrun's ocean freight data cannot represent actual transaction prices because there are no variations in reported monthly prices by port throughout the entire POI. Moreover, the petitioner claims that the only ports included by Tongrun are in the United States and are, therefore, not representative of world market rates. The petitioner also observes that the rates offered by Tongrun for Norfolk, Virginia, the highest rates submitted, are

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<sup>110</sup> See Geelong Verification Report at 6.

<sup>111</sup> Because this information is proprietary, it cannot be summarized here. However, the petitioner provides an accurate description of these differences in its case brief. See Petitioner Case Brief at 36-37 for a description of these differences.

<sup>112</sup> See Geelong Final Calculation Memorandum.

inexplicably only reported for two months in 2016. Thus, the petitioner concludes, the Department was correct to preliminarily determine that Tongrun's ocean freight data are merely approximations and are unreliable for its benchmarking purposes

**Department's Position:** We reconsidered our benchmark for ocean freight for this final determination. As Tongrun observes, the Maersk prices are "an indication only."<sup>113</sup> Upon further consideration of the disclaimers in both the Maersk and Descartes data, we believe both data sources reasonably reflect market prices, and there is insufficient basis on the record to exclude one over the other. Accordingly, we used the average of the two commercially available world market prices (*i.e.*, Descartes and Maersk) on the record of this investigation consistent with 19 CFR 351.511(a)(2)(ii).<sup>114</sup>

### **Comment 8: Whether to Countervail Export Buyer's Credits**

The GOC argues that, in the *Preliminary Determination*, the Department did not address the financial contribution element of a subsidy in applying AFA to the Export Buyer's Credit program. The GOC contends that, although the Department has previously determined to use AFA to find that this program constitutes a financial contribution, the Court of International Trade (CIT) has held that, when the Department invokes its authority to use AFA, the agency must still make the necessary factual findings to satisfy the requirements for countervailability pursuant to Section 776(a)-(c) of the Act.<sup>115</sup> The GOC further argues that the WTO Appellate Body has held that Article 12.7 of the SCM Agreement requires that an investigating authority must use those facts available that reasonably replace the missing "necessary" information that an interested party failed to provide, and that ascertaining the "reasonable replacements for missing necessary information involves a process of reasoning and evaluation on the part of the investigating authority."<sup>116</sup> As such, the GOC asserts that the Department has not made any factual findings regarding financial contribution in this case. Indeed, the GOC argues that if the Department were to do so, it cannot ignore evidence on the record showing no direct financial contribution to the mandatory respondents.

Citing section 771(5)(D) of the Act, the GOC contends that the Department's governing statute define "financial contribution" as "the *direct* transfer of funds, such as grants, loans, and equity infusions, of potential *direct* transfer of funds or liabilities, such as loan guarantees."<sup>117</sup> Citing the *Citric Salts* verification report, the GOC argues that this verification report contains verified

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<sup>113</sup> See Letter from the petitioner, "Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People's Republic of China – Petitioner's Comments and Submission of Factual Information Regarding Measurement of Adequacy of Remuneration," dated August 9, 2017, at Attachment 2.

<sup>114</sup> See *TMK IPSCO v. United States*, 222 F. Supp. 3d 1306, 1319-1321 (CIT 2017) (Sustaining the Department's decision to use an average of two freight quotes.).

<sup>115</sup> See the GOC Case Brief at 4 (citing *Changzhou Trina Solar Energy Co., Ltd. v United States*, 195 F. Supp. 3d 1334, 1350 (CIT 2016)).

<sup>116</sup> See the GOC Case Brief at 4 (citing Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, circulated 14 July 2014 at Paras. 4.178 – 4.179).

<sup>117</sup> See the GOC Case Brief at 4 (citing section 771(5)(D) of the Act (emphasis added)).

information that there is no financial contribution to the Chinese respondents.<sup>118</sup> According to the GOC, under the Export Buyer's Credit program, the financial contribution is in the form of a loan or credit, and the benefit is a preferential interest rate which is provided directly to the U.S. customer/foreign importer, not the Chinese respondents. The GOC asserts further that, based on the *Citric Salts* verification report, there is no direct or potential direct transfer of the loan or credit to the Chinese respondents and, thus, no financial contribution meeting the statutory definition. According to the GOC, this means that once the financial contribution and benefit are conferred on the U.S. customer/foreign importer, the Department is not required to consider how this subsidy might later benefit the Chinese respondent/exporter.

The GOC further argues that the Department cannot continue to request information that it deems relevant to usage as justification for applying AFA. According to the GOC, under section 776(a)(2)(A) of the Act, the information that the Department requests, and that the interested party withholds, must be related to the applicable determination. The GOC states that, while the Department is always quick to point out that it is the prerogative of the Department, not the interested party, to determine what information is relevant to a proceeding, the statute cannot be so open-ended that the Department can request any information of an interested party and, if the party withholds this information, no matter how irrelevant it is to the applicable determination, then the Department can use facts otherwise available.

The GOC asserts that the Department did not need to review the 2013 Administrative Measures because the respondents, in claiming non-use of the program, were not relying on the \$2 million contract minimum.<sup>119</sup> The GOC argues further that, the fact that the GOC withheld the 2013 Administrative Measures is not a lawful basis for the Department to apply facts otherwise available, let alone AFA. The GOC claims that the 2013 Administrative Measures bears no relation to the applicable determination of usage in this particular investigation, unlike the statements of the mandatory respondents and their customers that they, in fact, did not use the Export Buyer's Credit program.

The GOC contends that the 10.54 percent AFA rate is uncorroborated and punitive because it is not a similar program to the Government Policy Lending program used as the basis for the AFA rate calculated in *Coated Paper from the PRC*.<sup>120</sup> The GOC claims that the Department previously determined that the Government Policy Lending program provides assistance in the form of preferential interest rates on various types of loans sourced from Chinese-owned financial institutions.<sup>121</sup> According to the GOC, under the Export Buyer's Credit program, any

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<sup>118</sup> See Memorandum to the File, "Certain Tool Chests and Cabinets from the People's Republic of China: Placing Information on the Record," dated August 17, 2017, at Attachment 5 (see *Citric and Certain Citrate Salts* from the PRC verification report, dated October 7, 2014 (*Citric Salts* verification report)).

<sup>119</sup> See the GOC Case Brief at 7.

<sup>120</sup> *Id.* at 9 (citing PDM at 11, citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 70201, 70202 (November 17, 2010) (*Coated Paper from the PRC*) (citing Memorandum, "Countervailing Duty Investigation: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Ministerial Errors for Final Determination," dated November 12, 2010)).

<sup>121</sup> *Id.* at 8 (citing *Truck and Bus Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, in Part*, 82 FR 8606 (January 27, 2017) and accompanying IDM at Comment 6)

benefit in the form of preferential interest rates on various types of loans is provided to the U.S. customer/foreign importer, not the mandatory respondents. The GOC argues that as a result, the “Government Policy Lending” program is not a similar program to the Export Buyer’s Credit program based on treatment of benefit, because the benefit to the mandatory respondents, if any, is not in the form of preferential interest rates on various types of loans. Thus, the GOC alleges, the 10.54 percent rate is uncorroborated and punitive. The GOC argues that, instead, the Department should use a rate for the Export Seller’s Credit program, which, according to the GOC, is a similar export contingent program administered by the same EXIM Bank.

Tongrun argues that, in a CVD proceeding, the Department’s investigation of any alleged subsidy program has two goals: 1) to determine how the program operates and whether it could provide a countervailable subsidy; and 2) to determine whether it was used by the respondents in the case. Citing *Stainless Steel Sheet and Strip in Coils from France*, Tongrun argues that these inquiries are distinct and the exploration into one cannot be used to bootstrap the existence of the other.<sup>122</sup> Tongrun asserts that, in this case, while the Department may have had questions and requests that were unanswered with regard to this first goal, no such ambiguity or uncertainty exists with regard to the second as this program was undeniably not used by Tongrun’s U.S. customers.

Tongrun claims that, regardless of the GOC’s actions in this investigation, the company placed sufficient evidence on the record of this case that it has not benefitted from the EXIM Bank Export Buyer’s Credit program. Citing *Solar POR 2*, Tongrun argues that identical information was sufficient in this case to establish non-use for the same Export Buyer’s Credit program, even though, the GOC’s actions with regard to this program were deemed uncooperative.<sup>123</sup> Tongrun argues that the Department should follow the precedent established in *Solar POR 2*, here, and find that the customer declarations are sufficient to establish non-use of the Export Buyer’s Credit program.

Tongrun asserts that the Department has an obligation to consider whether record evidence establishes non-use of this program in this case, regardless of the GOC’s potentially uncooperative actions. Tongrun argues that the CIT confirmed this obligation in similar circumstances where the GOC’s actions warranted the application of AFA<sup>124</sup>.

Tongrun further asserts that in its benchmark submission, it notified the Department that it was unable to obtain a customer declaration of non-use for the Export Buyer’s Credit program from the petitioner in this case. According to Tongrun, the petitioner refused to provide Tongrun with a declaration attesting to the fact that it did not use the Export Buyer’s Credit program. Tongrun argues that the Department should have requested usage information from the petitioner and verified this information.

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<sup>122</sup> See Tongrun Case Brief at 12 (citing *Stainless Steel Sheet and Strip in Coils from France: Final Results of Countervailing Duty Administrative Review*, 67 FR 62098 (October 3, 2002) and accompanying IDM at Comment 1 (*Stainless Steel Sheet and Strip in Coils from France*)).

<sup>123</sup> See Tongrun Case Brief at 12 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 FR 46904 (July 19, 2016) (*Solar POR 2*) and accompanying IDM at Comment 1).

<sup>124</sup> See Tongrun Case Brief at 13 citing (*Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013) (*Archer Daniels*)).

Additionally, Tongrun argues that the AFA rate of 10.54 percent that the Department preliminarily applied in the *Preliminary Determination* cannot be corroborated in this case because it is mathematically impossible for any company to receive a U.S. dollar loan that would result in a rate above the U.S. dollar benchmark interest rate of 0.56 percent. Citing section 776(c) of the Act, Tongrun asserts that while the statute does not require the Department to estimate what Tongrun's CVD would have been, corroboration acts to prevent the Department from selecting unreasonable AFA rates.

Geelong argues that the Department erred in deviating from its practice in *Trina Solar*, a practice which the CIT reviewed and upheld.<sup>125</sup> According to Geelong, the Department in *Trina Solar* properly relied upon the same substantial evidence as in the present case to establish the non-use of the Export Buyer's Credits program and to refrain from applying AFA. Geelong alleges that the CIT stated in *Trina Solar* stated that it would have been inappropriate for the Department to apply AFA for no reason other than to deter the GOC's non-cooperation in future proceedings when relevant evidence existed elsewhere on the record.<sup>126</sup> According to Geelong, the facts in this investigation are the same as those in *Trina Solar*, and, therefore, it is inappropriate for the Department to i apply AFA in this instance.

Geelong contends that it went to great lengths in order to fully cooperate with the Department's investigation. Geelong contends further that, with respect to the Export Buyer's Credits program, it provided a multitude of information proving that no financial contribution was given directly or indirectly from the EXIM Bank to Geelong or its customers. Geelong also claims that during verification, the Department examined the company's sub-ledger detail for various Geelong accounts in which subsidy assistance would likely be recorded for evidence of any unreported subsidies, and did not find any account with the EXIM Bank or any funds related to the Export-Import Bank of China. Geelong concludes that its questionnaire response, and the Department's verification prove that Geelong did not benefit from this program.

HMC argues that the Department failed to consider record evidence establishing that the mandatory respondents did not use the Export Buyer's Credit program, and therefore it must remove the subsidy rate for the program in the final determination. HMC argues that the mandatory respondents and the GOC fully cooperated by responding to the Department's questionnaires regarding this program, and by providing documentation. HMC claims that the mandatory respondents provided affirmative record evidence confirming non-use of this program on exports of subject merchandise.

Citing *Solar POR 2* and *Chlorinated Isocyanurates from the PRC*,<sup>127</sup> HMC argues that the proper course is for the Department to apply a zero percent CVD margin for this program.<sup>128</sup>

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<sup>125</sup> See Geelong Case Brief at 17 citing (*Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312 (CIT 2017) (*Trina Solar*)).

<sup>126</sup> *Id.* at 17 citing (*Trina Solar* at 6).

<sup>127</sup> See *Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 2012, 79 FR 56560 (September 22, 2014), and accompanying IDM for the Final Determination, at Comment 15 (*Chlorinated Isocyanurates from the PRC*).

<sup>128</sup> See HMC Case Brief at 5 (citing *Chlorinated Isocyanurates from the PRC*).

HMC claims that the actual record in this case provides not a single piece of affirmative evidence that the mandatory respondents' customers benefitted from this program. HMC argues that by its AFA finding, the Department invented a benefit that the record confirms does not exist for the mandatory respondents. Citing 19 CFR 351.308(e), HMC argues that failure to consider Tongrun's and Geelong's record evidence demonstrating non-use ran contrary to the Department's regulatory obligation to "not decline to consider information that is submitted by an interested party and is necessary to the determination."

HMC argues that the CIT has consistently recognized that while foreign governments are in the best position to provide information regarding the administration of their alleged subsidy programs, respondent companies will have information pertaining to the existence and amount of the benefit conferred on them by the program.<sup>129</sup> HMC also argues that the CIT has made clear that the Department is obligated to limit the impact of an AFA determination to the party that has failed to comply with the Department's request for information.<sup>130</sup> According to HMC, the information submitted by the mandatory respondents and the GOC was sufficient to confirm non-use of this particular program, regardless of what the Department concludes with respect to the GOC's level of cooperation.

The petitioner contends that because the GOC did not provide the requested information, the Department properly concluded –as it has in several other recent proceedings – that the GOC's and mandatory respondents' claims of non-use are not verifiable and that the application of AFA as to both use of and benefit from the program is justified.<sup>131</sup>

The petitioner argues that, contrary to the GOC's interpretation, the *Citric Salts* verification report states that, "{O}fficials then indicated that the funds cannot be transferred outside of China, even though it was not explicit in law, it was understood in practice."<sup>132</sup> The petitioner contends that while the GOC is attempting to change tactics in this investigation by arguing that the Export Buyer's Credit program funds do not go directly to the Chinese producer, it does so without any record support. The petitioner asserts that the discrepancy between how the GOC officials have explained the program's operations in various proceedings calls into question the reliability of the GOC's statements without the critical supporting documentation repeatedly sought by the Department but not provided in this case.<sup>133</sup>

The petitioner contends that the GOC's argument that the Department did not need to review the 2013 Administrative Measures because the respondents, in claiming non-use of the program, were not relying on the contract minimum, misses the point of the Department's reason for its request. According to the petitioner, the Department was not requesting the 2013 Administrative Measures in order to verify or corroborate respondents' claims of non-use, but rather, the Department requested the guidelines for an understanding of how this program operates and how it can be verified. The petitioner argues that the GOC's refusal to provide the 2013

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<sup>129</sup> *Id.* at 6 (citing *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1297 (CIT 2010)).

<sup>130</sup> *Id.* at 6 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1262 n. 10 (CIT 2012)) (*Fine Furniture*)).

<sup>131</sup> See Petitioner Rebuttal Brief at 6 (citing PDM at 14-15).

<sup>132</sup> *Id.* at 3 (citing *Citric Salts* verification report at 3).

<sup>133</sup> *Id.* at 4 (citing *Citric Salts* verification report at 3).

Administrative Measures impeded the Department’s understanding, not just of the contract minimum (which may have been eliminated by the 2013 Administrative Measures), but also of how the program functions – including the complicated loan structure, how funds are disbursed, and the involvement of third-party banks. The petitioner claims that understanding the Export Buyer’s Credit program has a direct impact on the Department’s ability to analyze the program’s countervailability and to determine how benefits should be calculated.

The petitioner further argues that the GOC refused to complete the Department’s standard questions appendix regarding this program, and subsequently refused to comply with additional and repeated requests for program governance documentation. Citing *Certain Cold-Drawn Mechanical Tubing from the PRC*, the petitioner argues that the Department has repeatedly found in recent proceedings that the type of program information it sought from the GOC in this investigation is “critical to understanding how the Export Buyer’s Credit program operates and is critical to the Department’s use determination.”<sup>134</sup> The petitioner argues further that the Department has found that the GOC is the only party that can answer questions about the internal administration of this program.

Regarding the argument that the Department should not have substituted an AFA determination of use of the Export Buyer’s Credit program for purported record evidence of non-use, the petitioner argues that although respondents cite to a few proceedings where the Department has previously accepted such evidence of non-use, the respondents fail to recognize the Department’s most recent practice, including in later administrative reviews in the very cases they cite. The petitioner contends that the respondents’ reliance on *Solar POR 2* and *Chlorinated Isocyanurates from the PRC* is not applicable because it argues that those decisions have been superseded by more recent finding by the Department in later administrative reviews of those same countervailing duty orders.

The petitioner contends that the Department’s decision in *Solar POR 3* is notable because the Department distinguished its most recent administrative review results concerning this issue with prior analysis found in the cases cited by the respondents.<sup>135</sup> The petitioner argues specifically that the Department learned of the 2013 Administrative Measures and the involvement of third-party banks in disbursing program funds and that the GOC has consistently failed to cooperate in supplying information and supporting documentation on these newly-discovered aspects of the program. According to the petitioner, this is the fundamental basis for the Department’s current policy of disregarding customer declarations as evidence of non-use. The petitioner explains that, it is for this reason, Geelong’s reliance on *Trina Solar* is misplaced because the CIT upheld the final results of the second (earlier) administrative review in which the Department did not countervail the Export Buyer’s Credit program due to evidence that the respondent’s customers did not use the program.

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<sup>134</sup> *Id.* at 6 (citing *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 44562 (September 25, 2017) (*Certain Cold-Drawn Mechanical Tubing from the PRC*) and accompanying PDM).

<sup>135</sup> *Id.* at 11 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 32678 (July 17, 2017) and accompanying IDM at Comment 1 (*Solar POR 3*)).



In addition, the petitioner contends that the respondents are incorrect that the Department has an obligation to use the respondent companies' information to determine the existence (or lack thereof) of a benefit from the program in order to avoid a collateral impact on cooperating parties. Citing *Biaxial Integral Geogrid Products from the PRC*, the petitioner argues that the Department's current and correct position on customer declarations as evidence of non-use is that they are not verifiable.<sup>136</sup> Citing *RZBC Group 2016*, the petitioner argues that, in the context of a countervailing duty proceeding, the Federal Circuit has found that, a government's failure to cooperate is a legitimate basis to apply an adverse inference that nonetheless affects a cooperating respondent that has benefitted from subsidies from that government.<sup>137</sup> The petitioner asserts that the Department's application of AFA, therefore, with respect to the GOC's failure to cooperate regarding the Export Buyer Credit program, was appropriate and consistent with the Department's practice and court precedent.

The petitioner argues that the Department should reject the respondents' claim that the 10.54 percent AFA rate is uncorroborated and punitive because that rate is consistent with the Department's AFA hierarchy and has been corroborated. The petitioner rebuts the GOC's contention that the preferential government lending program is not a similar program to the Export Buyer's Credit program by arguing that the treatment of benefit is unknown by the Department because of the GOC's refusal to provide information regarding program operation. The petitioner argues that, as the treatment of benefit is unknown, the GOC can only assume that the Department's treatment of the preferential lending program benefit is dissimilar (or that its treatment of the Export Seller's Credits program is similar) to how the Department would treat benefits from the Export Buyer's Credit program if it had the necessary record information. Moreover, citing *Silica Fabric from the PRC*, the petitioner argues that the Department has corroborated the 10.54 percent AFA rate in this investigation and in other cases relying on such a rate for this program.<sup>138</sup>

The petitioner also rebuts Tongrun's argument that the highest CVD rate a company could conceivably receive under the Export Buyer's Credit is 0.56 percent. The petitioner claims that Tongrun assumes that the loans are received in U.S. dollars and that the program operates in a particular manner, the fundamental understanding of which is not available to the Department due to the GOC's failure to cooperate. The petitioner argues that Tongrun's assumptions are incorrect because the information about the terms of the loans under the program and how the funds are disbursed, including whether directly to U.S. importers or Chinese exporters, is either missing from the record or unverifiable. The petitioner argues further that, export sales, the relevant subject of the lending under this program are denominated in renminbi (RMB) which

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<sup>136</sup> See Petitioner Rebuttal Brief at 13 (citing *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 82 FR 3284 (January 11, 2017) (*Biaxial Integral Geogrid Products from the PRC*) and accompanying IDM at Comment 1).

<sup>137</sup> See Petitioner Rebuttal Brief at 14 (citing (citing *RZBC Group Shareholding Co., Ltd. v. United States*, Court No. 15-00022, Slip Op. 16-64 (CIT 2016) (*RZBC Group 2016*)).

<sup>138</sup> See *Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China: Final Affirmative Determination*, 82 FR 8405 (January 25, 2017) (*Silica Fabric from the PRC*) and accompanying IDM.

means that, pursuant to Tongrun's calculations, the potential loan interest rate under the program of RMB 10.74 percent would result in a maximum calculated subsidy rate of 10.74 percent.

**Department's Position:** Consistent with the *Preliminary Determination*, and the Department's past practices, we continue to find that the record of the instant investigation does not support a finding of non-use regarding the Export Buyer's Credit program,<sup>139</sup> and therefore, we disagree with the arguments made by the GOC, HMC, and the respondent companies. In prior examinations of this program, we found that the EXIM Bank, as a lender, is the primary entity that possesses the supporting information and documentation that are necessary for the Department to fully understand the operation of this program, which is a prerequisite to the Department's ability to verify the accuracy of the respondents' claimed non-use of the program.<sup>140</sup> As we discussed in the *Preliminary Determination*, and in the "Use of Facts Otherwise Available and Adverse Inferences," section above, the GOC did not provide the requested information and documentation necessary for the Department to develop a complete understanding of this program (*i.e.*, information regarding whether EXIM Bank uses third-party banks to disburse/settle export buyer's credits, and information on the size of the business contracts for which export buyer's credits are applicable).<sup>141</sup> Furthermore, as we stated in the *Preliminary Determination*, this information is critical for the Department to understand how export buyer's credits flow to and from foreign buyers and the EXIM Bank.<sup>142</sup> Absent the requested information, the GOC's claims that the respondent companies did not use the program are not reliable. Moreover, without a full and complete understanding of the involvement of third-party banks, the respondent companies (and their customers) claims are also not reliable because the Department cannot be confident in its ability to verify those claims.

We also disagree with the GOC's argument that the verification report concerning the *Citric and Certain Citrate Salts from the PRC* case contains verified information that there is no financial contribution to the Chinese respondents.<sup>143</sup> The verification report states:

Ms. Tao indicated that a condition of the buyer's credit program is to pay the Chinese exporter for the goods purchased by the foreign producer. Officials then indicated that the funds cannot be transferred outside of China, even though it was not explicit in law, it was understood in practice.<sup>144</sup>

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<sup>139</sup> See PDM at 13-15. See also, IDM accompanying *Solar POR 3* at Comment 1.

<sup>140</sup> See, e.g., *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Determination and Final Affirmative Critical Circumstances Determination*, in Part, 81 FR 35308 (June 2, 2016) and accompanying IDM at Comment 6; see also *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) (*Chlorinated Isocyanurates from the PRC Final Results*) and accompanying IDM at Comment 2 (concluding that "without the GOC's necessary information, the information provided by the respondent companies is incomplete for reaching a determination of non-use").

<sup>141</sup> See *Preliminary Determination* at 13-14.

<sup>142</sup> *Id.* at 14.

<sup>143</sup> See GOC Case Brief at 4.

<sup>144</sup> See *Citric Salts* verification report at 2-3.

Further, in the final results of *Citric Citrate Salts from the PRC Final Results 2014*,<sup>145</sup> the Department confirmed that the transfer of funds directly to the Chinese producer was not explicit in law, but understood in practice.<sup>146</sup> Thus, we find the GOC's argument unpersuasive in this regard because there is no record evidence to support the GOC's assertion that the Export Buyer's Credit program funds do not go directly to the Chinese producer, as it contends.

We also disagree with the GOC's argument that the Department did not need to review the 2013 Administrative Measures because the respondents were not relying on the \$2 million contract minimum when they claimed non-use of the program. As we explained above, and in the *Preliminary Determination*, we requested the 2013 Administrative Measures because information on the record of this proceeding indicated that the 2013 Administrative Measures affected important program changes. For example, the 2013 Administrative Measures may have eliminated the \$2 million contract minimum associated with this lending program.<sup>147</sup> By refusing to provide the requested information, and instead asking the Department to rely upon unverifiable assurances that the 2000 Rules Governing Export Buyer's Credit remained in effect, the GOC impeded the Department's understanding of how this program operates and how to verify it, with both the GOC and the respondent companies. In addition, record evidence indicates that the loans associated with this program are not limited to direct disbursements through EXIM Bank.<sup>148</sup> Specifically, the record information indicates that customers can open loan accounts for disbursements through this program with other banks whereby the funds are first sent to the EXIM Bank to the importer's account, which could be at the EXIM Bank or other banks, and that these funds are then sent to the exporter's bank account.<sup>149</sup> Given the complicated structure of loan disbursements for this program, the Department's complete understanding of how this program is administered is necessary. Thus, the GOC's refusal to provide the most current 2013 Administrative Measures, which provide internal guidelines for how this program is administered by the EXIM Bank, impeded the Department's ability to conduct its investigation of this program.

Furthermore, we disagree with HMC's and respondent companies' assertion that the Department should have substituted an AFA determination of use of the Export Buyer's Credit program for alleged record evidence of non-use in the form of customer declarations. In this investigation, we have information on the record indicating that there were revisions to the 2013 Administrative Measures program and the involvement of third-party banks, which were not present on the record of *Solar POR 2*, and *Chlorinated Isocyanurates from the PRC*, which have been cited by HMC and respondent companies to support their arguments.<sup>150</sup> In addition, we find that, with respect to *Chlorinated Isocyanurates from the PRC*, the Department has since modified its position with respect to the Export Buyer's Credit program in the most recent

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<sup>145</sup> See *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 78799 (December 31, 2014) (*Citric Citrate Salts from the PRC Final Results 2014*) and accompanying IDM at Comment 6.

<sup>146</sup> *Id.*

<sup>147</sup> See *Citric Salts* verification report.

<sup>148</sup> See GOC IQR at Exhibit A-15.

<sup>149</sup> *Id.*

<sup>150</sup> See *Citric Salts* verification report.

administrative review (*i.e.*, *Chlorinated Isocyanurates from the PRC AR 2014*)<sup>151</sup> where it determined that AFA was warranted because the GOC did not cooperate to the best of its ability in responding to the Department's request for additional information regarding the operations of the Export Buyer's Credit program.<sup>152</sup> As such, we find HMC's and respondent companies' reliance on *Chlorinated Isocyanurates from the PRC* to be unpersuasive.

Moreover, in *Solar POR 2*, we specifically stated that, even though we found the record there supported a conclusion of non-use, we intended to continue requesting the GOC's cooperation regarding this program in future proceedings, and we would base subsequent evaluations of this program on the record for each respective proceeding.<sup>153</sup> Thus, by not responding to our requests for additional information regarding the operation of this program, the GOC was uncooperative in the instant proceeding. Without this additional information, the Department determines that the information provided by the GOC and our understanding of this program is incomplete and unreliable. As such, we recognize that we cannot rely on information about this program provided by parties other than the GOC (*i.e.*, the respondent company's customers' certifications of non-use).<sup>154</sup>

With regard to Geelong's reliance on *Trina Solar*, we find that in that case, the Department's decision not to apply AFA was predicated on the Department's understanding of the Export Buyer's Credit program prior to the shift in the type of information available to the Department regarding the program. As we explain above, we have information on the record regarding the 2013 Administrative Measures to the program and the involvement of third-party banks.<sup>155</sup> In *Trina Solar*, we did not have such information and, therefore, we cannot rely on information about this program provided by parties other than the GOC (*i.e.*, the respondent company's customers' certifications of non-use).<sup>156</sup>

With respect to the arguments that AFA should not be applied for this program, we continue to find that the GOC withheld necessary information that was requested and significantly impeded the proceeding and, thus, that the Department must rely on facts otherwise available in issuing the final determination, pursuant to sections 776(a)(2)(A) and 776(a)(2)(C) of the Act. Moreover, we determine that the GOC failed to cooperate by not acting to the best of its ability to comply with our request for information. Specifically, the GOC withheld information that we requested that was reasonably available to it. Consequently, we find that an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act. As AFA,

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<sup>151</sup> See *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 FR 27466 (June 15, 2017) (*Chlorinated Isocyanurates from the PRC AR 2014*), and accompanying IDM at Comment 2 (concluding that "without the GOC's necessary information, the information provided by respondent companies is incomplete for reaching a determination of non-use").

<sup>152</sup> See *Chlorinated Isocyanurates from the PRC AR 2014* and accompanying IDM at Comment 2.

<sup>153</sup> See IDM accompanying *Solar POR 2* at Comment 2.

<sup>154</sup> See *Certain Crystalline Silicon Photovoltaic Product from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review; 2014-2015*, 82 FR 42792 (September 12, 2017) and accompanying IDM at Comment 11 (*Certain Crystalline Silicon from the PRC*).

<sup>155</sup> See *Citric Salts* verification report at 2-3.

<sup>156</sup> See *Trina Solar* at 7; see also *Certain Crystalline Silicon from the PRC* and accompanying IDM at Comment 11.

we determine that this program provides a financial contribution, is specific, and provides a benefit to the respondent companies within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E), respectively, of the Act. This finding is identical to the application of AFA in prior proceedings (e.g., *Chlorinated Isocyanurates from the PRC AR 2014*). Specifically, we find that the circumstances in this case are like those in *Chlorinated Isocyanurates from the PRC AR 2014*, where the Department requested operational program information from the GOC on this program, pointing out that there were substantial changes to the 2013 Administrative Measures, which the GOC declined to provide. As we explained in the *Preliminary Determination*, this information is necessary to the analysis of this program.<sup>157</sup>

Furthermore, we disagree with the GOC's, HMC's, and respondent companies' arguments that non-use of the program is verifiable and cannot be found otherwise because the Department decided not to verify the customers' certifications of non-use. The Department is not finding the mandatory respondents' customers' certifications of non-use to be unreliable because it declined to verify them, but rather, the Department finds the mandatory respondents' customers' certifications of non-use to be unreliable because, without a complete understanding of the operation of the program, which could only be achieved through a complete response by the GOC to the Department's questionnaires, verification of the respondents' customers' certifications of non-use are meaningless.

The Department considered all the information on the record of this proceeding, including the statements of non-use provided by the mandatory respondents. As explained above and in the *Preliminary Determination*, we are unable to rely on the information provided by the respondents because the Department lacks complete and reliable understanding of the program.<sup>158</sup>

With respect to the GOC's and respondents' claim that the 10.54 percent AFA is punitive, we reviewed the comments from interested parties, and made no change to the AFA rate selected in the *Preliminary Determination* for this program. Accordingly, we continue to apply the rate of 10.54 percent AFA rate to the Export Buyer's Credit program. As we explained in the *Preliminary Determination*, it is the Department's practice in CVD proceedings to compute a total AFA rate for non-cooperating companies using the highest calculated program-specific rates determined for the cooperating respondents in the instant investigation, or, if not available, rates calculated in prior CVD cases involving the same country.<sup>159</sup> When selecting AFA rates, section 776(d) of the Act provides that the Department may use a countervailable subsidy rate

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<sup>157</sup> See PDM at 13-15.

<sup>158</sup> See PDM at 13-14.

<sup>159</sup> See, e.g., *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 FR 70971, 70975 (November 24, 2008) and accompanying PDM (unchanged in *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 29180 (June 19, 2009) and accompanying IDM at "Application of Facts Available, Including the Application of Adverse Inferences") (*Certain Tow-Behind Lawn Groomers from the PRC*); see also *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011) and accompanying IDM at "Application of Adverse Inferences: Non-Cooperative Companies."

applied for the same or similar program in a countervailable duty proceeding involving the same country, or, if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use, including the highest of such rates.<sup>160</sup> Accordingly, when selecting AFA rates, if we have cooperating respondents, as we do in this investigation, we first determine if there is an identical program in the investigation and use the highest calculated rate for the identical program. If there is no identical program that resulted in a subsidy rate above zero for a cooperating respondent in the investigation, we then determine if an identical program was used in another CVD proceeding involving the same country, and apply the highest calculated rate for the identical program (excluding *de minimis* rates).<sup>161</sup> If no such rate exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the similar/comparable program. Finally, where no such rate is available, we apply the highest calculated above-*de minimis* rate from any non-company specific program in a CVD case involving the same country that the company's industry could conceivably use.<sup>162</sup>

Further, in applying AFA to each of the non-responsive companies, we are guided by the Department's methodology detailed above. We begin by selecting, as AFA, the highest calculated program-specific above-zero rates determined for the cooperating respondents in the instant investigation. In relying on AFA for the selection of a subsidy rate, we point out that there is no identical program in this investigation for which we have calculated a rate; neither has the Department calculated a rate for this program in any other CVD proceeding involving China. On this basis, we find that using an AFA rate of 10.54 percent *ad valorem*, the highest rate determined for a similar program in *Coated Paper from the PRC*,<sup>163</sup> as the rate for this program, is appropriate. Thus, we disagree with the GOC and respondents as this methodology is consistent with the Department's practice in the selecting an appropriate AFA rate.

With regard to the GOC's and respondents' argument that the AFA rate is uncorroborated, we disagree. As we explained in the *Preliminary Determination*, 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.<sup>164</sup> Secondary information is defined as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any

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<sup>160</sup> See, e.g., *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 50391 (August 19, 2013) (*Shrimp from the PRC*) and accompanying IDM at 13; see also *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373-1374 (Fed. Cir. 2014) (upholding "hierarchical methodology for selecting an AFA rate").

<sup>161</sup> For purposes of selecting AFA program rates, we normally treat rates less than 0.5 percent to be *de minimis*. See, e.g., *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 28557 (May 21, 2010) and accompanying IDM at "1. Grant Under the Tertiary Technological Renovation Grants for Discounts Program," and "2. Grant Under the Elimination of Backward Production Capacity Award Fund."

<sup>162</sup> See IDM accompanying *Shrimp from the PRC* at 13-14.

<sup>163</sup> See *Coated Paper from the PRC* (revised rate for "Preferential Lending to the Coated Paper Industry" program).

<sup>164</sup> See PDM at 7.

previous review under section 751 concerning the subject merchandise.”<sup>165</sup> The SAA provides that to “corroborate” secondary information, the Department will satisfy itself that the secondary information to be used has probative value.<sup>166</sup>

The Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information.<sup>167</sup> Furthermore, the Department is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.<sup>168</sup>

With respect to the reliability aspect of corroboration, we point out that the rate on which we are relying, as indicated above, is a subsidy rate calculated in *Coated Paper from the PRC*, another PRC CVD proceeding. Further, we find that the calculated rate was based on information about the same or similar program. Moreover, no information has been presented that calls into question the reliability of the calculated rate that we are applying for this program. Finally, unlike other types of information, such as publicly available data on a country’s national inflation rate or national average interested rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs. With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it.<sup>169</sup>

Due to the failures of the GOC to cooperate to the best of its ability, the Department, as explained above, relied on a subsidy rate from another CVD proceeding involving China. The Department corroborated this rate to the extent practicable for this final determination. Because this rate reflects the actual behavior of the GOC with respect to similar subsidy programs, and lacking adequate information demonstrating otherwise, the Department corroborated the rate that it selected to the extent practicable.

With regard to the GOC’s contention that the preferential government lending program is not similar to the Export Buyer’s Credit program, we find that because the GOC did not provide the necessary information requested with respect to the 2013 Administrative Measures, there is no evidence on the record that indicates that the Government Policy Lending program from *Coated Paper from the PRC*, is dissimilar to the Export Buyer’s Credit program. As such, we find the GOC’s assumption in this regard is unpersuasive.

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<sup>165</sup> See 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>166</sup> *Id.*

<sup>167</sup> *Id.* at 869-870.

<sup>168</sup> See section 776(d)(3) of the Act.

<sup>169</sup> See PDM at 12.

Finally, with respect to the GOC's argument regarding a WTO Appellate Body decision,<sup>170</sup> the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.<sup>171</sup> Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.<sup>172</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.<sup>173</sup>

### **Comment 9: Whether to Apply Adverse Facts Available With Respect to the Government of China's Response Regarding Electricity**

The GOC argues that in the *Preliminary Determination*, the Department stated that "the GOC failed on multiple occasions to explain the roles and nature of cooperation between the NDRC {National Development and Reform Commission} and provinces in deriving electricity price adjustments. Further, the GOC failed to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by provinces themselves."<sup>174</sup> The GOC asserts that, as a result, the Department preliminarily determined that the GOC withheld information that was requested for the Department's analysis of financial contribution and specificity and did not act to the best of its ability to comply with the Department's requests, and preliminarily relied on AFA in finding the program countervailable as well as in applying a benchmark. The GOC contends that it did act to the best of its ability with respect to providing information on the roles and nature of cooperation between the NDRC and the provinces in deriving electricity price adjustment, and in explaining both the derivation of price reductions directed to the provinces by the NDRC and the derivation of prices by the provinces themselves. The GOC claims that it consistently stressed in its responses for this case, as well as in prior CVD cases, that electricity prices are determined by the provincial governments within their jurisdictions, and that the NDRC's role is to set price adjustment targets and formulas and to review the electricity pricing schedules submitted by the provincial governments. The GOC indicates that, as it explained on the record, all the provincial governments have been given the authority to prepare and publish schedules of electricity tariff rates for their own jurisdictions under the guidance of notices published and enforced by the NDRC, while providing the NDRC with the notices of their price schedules for the NDRC's records. The GOC contends that it provided the Department with the schedules of electricity tariff rates for the Jiangsu and Guangdong provinces during 2016 in the GOC IQR at Exhibits D-32 and D-38, respectively.<sup>175</sup>

The GOC asserts that, in the *Preliminary Determination*, the Department stated that "both Notice 748 and Notice 3105 explicitly direct provinces to reduce prices and to report the enactment of those changes to the NDRC" and that "both notices indicate that the NDRC continues to play a

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<sup>170</sup> See the GOC Case Brief at 4 (citing Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, circulated 14 July 2014 at Paras. 4.178 – 4.179).

<sup>171</sup> See *Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

<sup>172</sup> See, e.g., 19 U.S.C. § 3533, 3538

<sup>173</sup> See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

<sup>174</sup> See the GOC Case Brief at 20 (citing PDM at 21).

<sup>175</sup> *Id.* at 20 (citing Exhibits D-32 and D-38 of GOC IQR).



seminal role in setting and adjusting electricity prices, by mandating average price adjustment targets with which the provinces are obligated to comply in setting their own specific prices.”<sup>176</sup> The GOC claims further that, in the *Preliminary Determination*, the Department indicated that “Articles 2 and 4 of Notice 3169 also makes {sic} clear that the NDRC stipulates the formulate by which prices are to be adjusted.”<sup>177</sup> The GOC argues that, the Department has not, however, pointed to any evidence to show that the NDRC explicitly mandates specific electricity price schedule for the provinces or materially alters the electricity proposals provided by the provincial governments. The GOC contends that, rather, as the Department correctly pointed out, the NDRC notices mandate “average price adjustment targets” and adjustment formulas, while leaving it to the provincial governments to ultimately set prices in accordance with these targets and formulas.<sup>178</sup>

The GOC contends that, as evidenced by the Department’s consistent recitation of the relevant NDRC notices in the *Preliminary Determination*, the GOC acted to the best of its ability in explaining the roles and nature of cooperation between the NDRC and provinces in deriving electricity price adjustments. The GOC further contends that it explained to the Department that the NDRC’s role is to set price adjustment targets and formulas, while the provinces role is to prepare and publish electricity tariff rate schedules under the guidance of the NDRC notices.

The GOC also argues that it acted to the best of its ability with respect to explaining both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by the province themselves. Specifically, the GOC argues that it explained on the record that the derivation of electricity prices and price reductions in China is based on market principles. Moreover, the GOC indicates that it explained that the distribution electricity price is mainly made up of power purchase costs, loss from power transmission and distribution, and the cost of power transmission and distribution. The GOC explains that the cost elements that are considered are not derived from any complicated calculation, but instead are obtained directly from the data provided by the power generating companies and grid companies. The GOC states that the price authorities will conduct investigations on price and cost, and request relevant companies to provide the necessary information. Further, the GOC indicates that the prices for fuel and coal, which are the main inputs to power generation, are determine by the market (including international market forces). The GOC explains that the interests of power generation, transmission, and distribution enterprises are adequately considered, and the capacity and willingness to pay by users and residents is also taken into account. According to the GOC, this makes the electricity rates fully reflective of changes in supply and demand in the market, and of the international commitments and governments policies made by the GOC for energy conservation and emissions reduction. The GOC claims that, as such, electricity prices in China are based on purely market mechanisms and reflect market supply and demand.

Citing 19 CFR 351.511(a)(2)(ii), the GOC argues that the factors it outlined are the same factors that the Department would examine under its Tier-3 market principle analysis in finding that a government price is “consistent with market principles.” The GOC asserts that, it did act to the

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<sup>176</sup> *Id.* at 21 (citing PDM at 21).

<sup>177</sup> *Id.* (citing PDM at 19-21).

<sup>178</sup> *Id.* at 22.

best of its ability in explaining that electricity prices in China are based on market principles and thus, the Department's application of AFA on this basis was also unwarranted.

HMC argues that in applying AFA to determine the Electricity Program benefit with respect to the GOC's alleged failure to provide requested information related to the NDRC, the Department created a mix-and-match of rates from three different provinces in China, depending on which one had the highest rate for the specific electricity user/rate category required to be measured. HMC argues further that there are several problems with the Department's method in this regard. First, according to HMC, the Department is making an inferred determination that the provision of electricity in China is a regional or geographic subsidy, and that NDRC determines the electricity price for different provinces. HMC contends, however, that the Department, in the *Preliminary Determination*, did not indicate any missing information requested from the GOC related to the reasons for differences in electricity rates between different provinces. HMC argues that there is no basis for picking and choosing among different rate categories from across China based on an inferred regional subsidy program where the GOC did not refuse to answer any questions as to regional differences of electricity prices.

HMC also argues that the Department's claim that the GOC failed on multiple occasions to explain the roles and nature of cooperation between the NDRC and provinces in deriving electricity price adjustments is factually inaccurate, because the GOC did explain that the provincial governments determined the electricity prices, and the NDRC reviews the electricity pricing schedules submitted by the local governments. HMC argues further that the GOC provided documentation showing that the electricity price schedules were formulated by the provincial governments rather than by the NDRC.

According to HMC, the provision of electricity is, by definition, a domestic subsidy and electricity cannot be exported or imported. HMC contends that the Department did not make any of the necessary findings for classifying a domestic subsidy as "specific" under section 771(5A)(D) of the Act.

HMC argues that the Department failed to cite to any facts, requested or otherwise on the record, that would support the proposition that electricity rates differ for users or industries with the regions, which is a required finding to conclude that a domestically available benefit is regionally specific under section 771(5A)(D)(iv) of the Act. HMC contends that section 771(5A)(D)(iv) of the Act states that "{w}here a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific." HMC argues that the Department asked the GOC to provide a list of "any 'special industry sectors' or 'encourage' companies that receive preferential electricity rates."<sup>179</sup> According to HMC, the GOC responded that according to NDRC's notice No. 748, "the preferential electricity price for fertilizer, which was a preferential electricity rate commonly existing among provinces, should be totally abolished in China by April 20, 2016. Given the highly independent role of provincial price departments in the 2016 electricity price adjustment, some of the provinces published new notices to eliminate the preferential electricity rates in April, May, or June in 2016."<sup>180</sup> HMC argues that, even though,

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<sup>179</sup> See HMC Case Brief at 9 (citing the Department's CVD Initial Questionnaire at Electricity Appendix).

<sup>180</sup> *Id.* (citing the Department's CVD Initial Questionnaire at Electricity Appendix).

the preferential electricity price for fertilizer existed, the tool chests industry does not fall into this special category. Citing section 771(5A)(D)(iv) of the Act, HMC argues that there is no basis to assume that the tool chests industry benefits from preferential electricity rates that are “limited to an enterprise or industry located within a designated geographical region.”

HMC claims that the Department’s *de facto* regional subsidy finding conflicts with Article 2.2 of the SCM Agreement, which states, “{I}t is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.”<sup>181</sup> According to HMC, in this case, the GOC did not fail to respond to any questions addressing whether electricity rates are generally applicable within the provinces, but on the contrary, the GOC explained how the provincial governments state electricity tariff rates of their own jurisdictional areas, and the NDRC just reviews the electricity prices schedule prepared and submitted by the local governments. HMC contends that for this reason, there is no basis for the Department to conclude otherwise, even under AFA.

Additionally, HMC argues that the Department’s precise manner of selecting the worst possible rates in all of China is nonsensical, because it imputes electricity rates from three different provinces in China to the same (stationary) facility. HMC argues further that the respondent’s factories cannot be in multiple provinces in China at the same time, even when applying an adverse inference to a cooperative party. HMC asserts that the law does not permit the Department to apply strictly punitive measures, even under AFA, and there is no way to view the application of penalty benchmarks to a respondent as if it were located simultaneously in three different places in China as anything but punitive.

Finally, HMC asserts that, if the Department continues to find that electricity for LTAR is a countervailable subsidy program in the final determination, the Department should benchmark the respondents’ electricity rates against an average of the rates listed in the GOC’s electricity exhibit.

The petitioner asserts that the arguments made by the GOC and HMC were previously raised in numerous other cases and have not prevailed before either the Department or the Court. Thus, the petitioner argues that the Department’s preliminary decision to apply AFA to the GOC for this program was correct and should be affirmed in the final determination.

The petitioner argues that, with respect to this investigation, the Department correctly concluded that the GOC failed to cooperate to the best of its ability because it did not provide direct or complete responses to the Department’s questions, did not provide the requested supporting documentation, and merely repeated its initial claims regarding the delegation of pricing authority to the provinces.

The petitioner indicates that, as the Department explained in the *Preliminary Determination*, the Department needed a sufficient understanding of the role of the provinces and the NDRC in electricity price adjustments to analyze and assess the financial contribution and specificity of

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<sup>181</sup> *Id.* at 10 (citing Article 2.2 of the SCM Agreement on Subsidies and Countervailing Measures).

the program.<sup>182</sup> Specifically, according to the petitioner, the Department requested Provincial Price Proposals to determine the applicable tariff schedules during the POI. The petitioner claims that in response to the Department’s initial questionnaire, the GOC contended that the Provincial Price Proposals no longer exist because provinces “have been given authority to prepare and publish...electricity tariff rates for their own jurisdictions.”<sup>183</sup> The petitioner claims further that the GOC also asserted on the record that “electricity prices in China are based purely on market mechanisms and reflect market supply and demand.”

The petitioner argues that information provided by the GOC, in its initial and supplemental questionnaire responses, demonstrates that the opposite is true. Specifically, the petitioner asserts that record evidence indicates that, “the relevant and most recent central government measures regarding provincial electricity pricing explicitly direct provinces to reduce prices and to report enactment of those changes to the NDRC....”<sup>184</sup> Furthermore, the petitioner points out that the GOC agreed with the Department’s assessment, and explained “that the NDRC’s role is to set price adjustment targets and formulas, while the provinces role is to prepare and publish electricity tariff rate schedules under the guidance of the NDRC notices.”<sup>185</sup>

The petitioner argues that, in this investigation, the GOC refused to supply critical responses as to how its electricity costs are evaluated when setting electricity rates, and how it makes price rate adjustments. According to the petitioner, the Department has not obtained, on the record, sufficient information to allow it to analyze the provision of electricity for LTAR programs. Therefore, the petitioner argues that the Department should continue to apply AFA to the GOC with respect to this program in the final determination.

The petitioner argues that HMC is incorrect with respect to its argument that the Department made a regional subsidy finding when it applied the electricity rates from different provinces. According to the petitioner, the Department did not select various regional electricity rates because it was making a substantive determination about the nature of the subsidy, rather because it was selecting benchmark rates according to the applicable AFA rate.

The petitioner finally argues that HMC’s argument that, “the Department’s precise manner of selecting the worst possible rates in all of China is nonsensical, because it imputes electricity rates from three different provinces in China to the same (stationary) facility,” misses the point of adverse inferences.<sup>186</sup>

**Department’s Position:** We disagree with the GOC’s and HMC’s arguments. As we explained in the *Preliminary Determination*, the GOC did not provide complete responses to the Department’s questions regarding the alleged provision of electricity for LTAR.<sup>187</sup> Specifically, we explained in the *Preliminary Determination* that the various questions provided to the GOC

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<sup>182</sup> See Petitioner Rebuttal Brief at 39 (citing PDM at 18).

<sup>183</sup> *Id.* (citing GOC IQR at 85).

<sup>184</sup> *Id.* at 40 (citing the GOC IQR at 85).

<sup>185</sup> *Id.* (citing the GOC Case Brief at 22)

<sup>186</sup> *Id.* at 42 (citing the HMC Case Brief at 9-10).

<sup>187</sup> See PDM at 18.

throughout the course of this investigation requested information needed to determine whether the provision of electricity constituted a financial contribution within the meaning of section 771(5)(D) of the Act and whether such a provision was specific within the meaning of section 771(5A) of the Act.<sup>188</sup> We explained further that in order for the Department to analyze the financial contribution and specificity of this particular program, we needed for the GOC to provide information regarding the roles of provinces, the NDRC, and any cooperation between the provinces and the NDRC in electricity price adjustments.<sup>189</sup> Moreover, in the *Preliminary Determination*, we explained that the Department requested the information in order to determine the process by which electricity prices and price adjustments are derived, to identify entities that manage and impact price adjustments processes, and to examine cost elements included in the derivation of electricity prices in effect throughout the PRC during the POI.<sup>190</sup> As we explained in the *Preliminary Determination*, the GOC did not provide all of the requested information, and, therefore, we found that the GOC did not act to the best of its ability to comply with our requests for information. As a result of the GOC's unwillingness to be cooperative, the Department was unable to determine whether the electricity rates included in the electricity schedules submitted by the GOC were calculated based on market principles. Accordingly, the Department applied facts available with an adverse inference to the determination of the appropriate benchmark. Specifically, because the GOC provided the provincial electrical tariff schedules, the Department relied on this information for the application of facts available and, in making an adverse inference, the Department identified the highest rates amongst these schedules for each reported electrical category and used those rates as the benchmarks in the benefits calculations.<sup>191</sup>

As the selected highest electricity rates for each category are spread across electricity schedules from different provinces, HMC argues that the Department has made an inference that the provision of the electricity for LTAR is a regional or geographical-specific program.<sup>192</sup> We find that HMC misconstrues our reliance on the highest electrical rate from any of the provincial schedules as a determination on program specificity. As we outlined in the *Preliminary Determination*, the selection of electrical benchmark rates is based on the GOC's failure to cooperate to the best of its ability, which resulted in the Department's need to identify electricity benchmarks based on facts available with an adverse inference.<sup>193</sup> The Department's determination to use regional rates for the provision of electricity for LTAR does not reflect a determination by the Department that the program is regionally or geographically specific; rather, the GOC's failure to cooperate means that both our specificity determination and our benchmark determination must rely on the facts available on the record, with appropriate adverse inferences. As we explained in the *Preliminary Determination*, we attempted to obtain information on how PRC provincial schedules are calculated and why they differ, which could have contributed to the Department's analysis of an appropriate benchmark for the benefit calculation in this program.<sup>194</sup> The GOC's failure to provide complete responses to our questions regarding this program is the reason the Department is applying AFA in this case with

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 19.

<sup>191</sup> *Id.* at 22.

<sup>192</sup> See HMC Case Brief at 7.

<sup>193</sup> See PDM at 21-22.

<sup>194</sup> *Id.* at 18-22.

respect to the selection of an electricity benchmark. Therefore, the Department has not made a determination, inferred or otherwise, related to this program being a regional or geographical-specific program. The fact that the GOC refused to answer the Department's questions completely with respect to the roles and nature of cooperation between the NDRC and provinces in deriving electricity price adjustments, and failed to explain both the derivation of the price reductions directed to the provinces by the NDRC and the derivation of prices by provinces themselves, means that the Department is unable to carry out this analysis. Moreover, U.S. law, as implemented through the Uruguay Rounds Agreements Act, is consistent with the WTO obligations of the United States.<sup>195</sup>

With regard to HMC's argument that the Department should benchmark the respondents' electricity rates against an average of the rates listed in the GOC's electricity exhibit, we find that such a calculation would be equivalent to the application of facts otherwise available rather than the application of facts available with an adverse inference. We find that a benchmark of this kind fails to take into account the fact that the GOC refused to act to the best of its ability in complying with our request for specific information on this program, and does little to incentivize the GOC to cooperate on this, or other programs, in future proceedings. Moreover, without sufficient record information on how the different electrical rates were determined, the Department considers it reasonable that a respondent in the PRC could have been subject to the highest electrical rates in the PRC, regardless of its location. Accordingly, based on the record of this review, we find it appropriate to continue selecting the electricity benchmarks based on the highest rate for each category across all PRC electricity schedules.

#### **Comment 10: Whether the Department's Selection of Electricity Rates Was Proper**

The petitioner argues that in the *Preliminary Determination*, the Department stated its intention to use "the highest electricity rates on the record for the applicable rate and user categories" for the benchmark electricity rates because it drew an adverse inference in the selection of the benchmark with which to measure the adequacy of remuneration.<sup>196</sup> The petitioner argues that the Department's preliminary benchmarks, however, do not comport with the stated methodology. Specifically, according to the petitioner, the Department did not select the highest electricity rates on the record in this investigation that also have been used in other concurrent investigations. The petitioner indicates that for "normal" usage, the Zhejiang Province schedule indicates a rate of 0.933 RMB per kilowatt for large-scale industry, 1-10KV.<sup>197</sup> The petitioner indicates also that for the Zhejiang Province schedule, the rate of 1.1146 RMB per kilowatt was reported for "Peak," not "Super Peak," usage for the 1-10 KV industry classification.<sup>198</sup> According to the petitioner, for the "Super Peak" usage, the Jiangsu Province schedule charges the highest rate on the record, 1.2020 RMB per kilowatt, to 1-10 KV industry for "restricted production with high energy consumption."<sup>199</sup> The petitioner argues that because the Department did not select the highest electricity rates on the record in this investigation, the Department's preliminary calculations were inconsistent with its intended methodology,

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<sup>195</sup> See, generally, SAA at 656.

<sup>196</sup> See Petitioner Case Brief at 19-20 (citing the PDM at 18-22).

<sup>197</sup> *Id.* (citing the GOC SQR at Exhibit D-45).

<sup>198</sup> *Id.* at 21 (citing the GOC SQR at Exhibit D-45).

<sup>199</sup> *Id.*

understating the countervailable benefits conferred upon Geelong and Tongrun from the GOC's provision of electricity. Thus, the petitioner argues that for the final determination, the Department should correct the electricity benchmark rates used to accurately reflect the countervailable benefits received by the subject producers during the POI.

The petitioner also asserts that in the preliminary calculations for Tongrun, the formula used to aggregate Tongrun Equipment Technology's total benefit from the Provision of Electricity for LTAR mistakenly excluded the column aggregating the company's benefit during the POI.<sup>200</sup> According to the petitioner, this omission understated Tongrun's total preliminary program benefit by 0.01 percent ad valorem.<sup>201</sup> The petitioner requests that the Department correct this error in the company's final benefit calculations.

Tongrun argues that the Department should reject the petitioner's request to revise the electricity benchmark because it misreads the record as it relates to the electricity rates on the record. Tongrun indicates that a review of Zhejiang Province electricity tariff schedule reveals four categories of electricity: "Electricity Degree Price," "Peak Price," "High Price," and "Low Price."<sup>202</sup> Tongrun contends that the petitioner's suggestion that the "Normal" rate for 1-10KV, industrial usage is 0.933 RMB per kilowatt is not accurate. Tongrun claims that the 0.933 RMB per kilowatt rate is for the "High Price" category, not the "Normal" category. In fact, according to Tongrun, the Zhejiang Province electricity tariff schedule does not contain any category named "Normal." Tongrun asserts that, of the four categories presented in the Zhejiang Province electricity tariff schedule, the only category that could possibly be interpreted as the "Normal" category is the "Electricity Degree Price" category.<sup>203</sup> Tongrun states that the rate in this category is consistent with the "Normal" category rates in other Provinces. According to Tongrun, the other categories the Zhejiang Province schedule correspond to are the peak, sharp peak and valley categories that can be seen in other provincial tariff schedules. Thus, according to Tongrun, the petitioner's arguments are without merit, and, therefore, the Department should continue to use the electricity benchmarks used in the *Preliminary Determination* for the final determination.

The GOC argues that the petitioner's suggestion that the "High Price" category, which has a much higher usage rate of 0.933 RMB per kilowatt, is the equivalent category to "Normal" is simply not a reasonable interpretation of the record evidence. The GOC contends that if the Department decides to change its electricity rate benchmark for the "Normal" category to a usage rate from the Zhejiang Province's electricity sales schedule, then, it must select the "Electricity Degree price" of 0.6966 RMB per kilowatt for the "Normal" category, which is consistent with the Department's stated practice of applying "the highest electricity rates on the record for the applicable rate and user categories."

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<sup>200</sup> *Id.* at 21 (citing Tongrun's Preliminary Determination Calculation Memorandum, dated September 8, 2017 (Tongrun Preliminary Calculation Memorandum), at Attachment II).

<sup>201</sup> *See* Petitioner Case Brief at 21.

<sup>202</sup> *See* Tongrun' Rebuttal Brief at 5 (citing GOC SQR at Exhibit D-45).

<sup>203</sup> *Id.*

**Department’s Position:** We have not changed the electricity benchmarks used in the *Preliminary Determination*, except for the benchmark for “Peak” usage for the 1-10 KV industry classification. With respect to the Zhejiang schedule, the usage category translated as “High” was translated as “Peak” for the other schedules, which can be seen by comparing the Chinese characters from the original schedules (for example, compare the original Zhejiang schedule with the original Beijing, Guangzhou, or Jiangsu schedules).<sup>204</sup> Similarly, the usage category translated as “Peak” in the Zhejiang schedule was translated as “Pinnacle” for the other schedules, which we treated as “Super Peak” usage, which can be seen by comparing the Chinese characters from the original schedules (for example, compare the original Zhejiang schedule with the original Beijing or Hebei schedules).<sup>205</sup> In addition, by comparing the original Zhejiang schedule with the original schedules of other provinces, it is apparent that translations for “Maximum Demand” and “Transformer Capacity” were reversed.<sup>206</sup> Thus, no changes are required to account for the Zhejiang schedule.

In re-examining the record, however, we find that we did not use the correct rate for “Peak” usage.<sup>207</sup> Although the petitioner claimed that Jiangsu Province charges the highest rate on record for “Super Peak” usage,<sup>208</sup> the record reflects (as confirmed by checking the original schedule), that the highest “Peak” usage for large-scale industry for the 1-10 KV industry classification is from the Jiangsu Province January 1 schedule for “restricted production with high energy consumption.”<sup>209</sup> Accordingly, we have revised our calculations for “Peak” usage for large-scale industry for the 1-10 KV industry classification using the rate from the Jiangsu Province January 1 schedule.

In addition, we agree with the petitioner’s assertion that we inadvertently understated Tongrun’s total preliminary program benefit by not aggregating all benefits. We have corrected this error for the final determination.<sup>210</sup>

### **Comment 11: Whether to Countervail Certain Tongrun “Other Subsidies”**

The petitioner argues that the Department should countervail “compensation” grants reported to have been received by Tongrun during the POI by the GOC. Specifically, the petitioner asserts that Tongrun provided a list of government grants in its initial questionnaire response, received under both alleged and unalleged programs during the average-useful-life (AUL) period. The petitioner contends that, although Tongrun complied with the Department’s request for additional information with respect to these compensation grants, the GOC answered only one of

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<sup>204</sup> See Letter from the GOC, “Certain Tool Chests and Cabinets from the People’s Republic of China, Case No. C-570-057: Supplemental Questionnaire Response,” dated August 11, 2017 (GOC SQR) at Exhibit D-45.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See, e.g., Tongrun Preliminary Calculation Memorandum at 4-5.

<sup>208</sup> See Petitioner’s Case Brief at 21.

<sup>209</sup> See GOC SQR at Exhibit D-45. We note that the petitioner incorrectly indicates the rate to be 1.2020 RMB/KWH; the schedule indicates 1.2002 RMB/KWH. See Petitioner’s Case Brief at 21. We also observe that the Chinese characters the GOC translated as “huge industry” in the Jiangsu schedule is translated as “large scale industry” in the other schedules (e.g., Beijing). See GOC SQR at Exhibit D-45.

<sup>210</sup> See Tongrun Final Calculation Memorandum.



the Department's supplemental questions concerning one of the programs where Tongrun challenged the countervailability of the program. The petitioner indicates that, as a result, the GOC provided no information on any of the three grants purported to be compensation from the GOC.

The petitioner argues that the Department's preliminary finding that these government grants are not countervailable was inconsistent with the record and the Department's normal practice. Citing *Photovoltaic Cells from the PRC* the petitioner argues that the Department typically relies on factual evidence from the government to determine a program's countervailability.<sup>211</sup> The petitioner contends that because the GOC did not cooperate in providing complete information on the program in question, the Department appropriately concluded that AFA was warranted, considering the GOC's failure to cooperate to the best of its ability. The petitioner argues that consistent with case precedent, the Department's practice in this regard uses the grant amount reported by respondents to calculate the countervailable benefits conferred by these programs.

The petitioner argues further that, in this case, however, the Department excluded certain government assistance, stating that based on information on the record, the grants in question did not appear to be countervailable and therefore were not used in the *Preliminary Determination*. The petitioner argues that the Department's conclusion that these grants do not appear to be countervailable is not reasonable considering the Department's established practice regarding subsidy program information.

The petitioner argues that based on the record evidence and case precedent, the Department should amend its *Preliminary Determination* and find all company-specific government grants, for which the GOC did not provide full and complete information, to be countervailable subsidies. Indeed, the petitioner asserts that the Department's final benefit calculations should include Tongrun's "compensation" grants received during the POI.

Tongrun argues that the petitioner both misstates the law and ignores the nature of the compensation items in question. Tongrun contends that when requested information from the GOC is missing from the record, the Department does not automatically apply an adverse inference and find a program to be countervailable. According to Tongrun, the Department's approach is, in fact, more reasonable and measured than what the petitioner suggests. Citing *Archer Daniels*, Tongrun argues that in such circumstances, the Department has an obligation to "avoid {the} impact {of AFA to the GOC} if relevant information exists elsewhere on the record."<sup>212</sup> Citing *RZBC Group 2016*, Tongrun argues further that while such an inference is permissible under the statute, it is disfavored and should not be employed when facts not collaterally adverse to a cooperative party are available.<sup>213</sup> Tongrun states that, as a result, regardless of the GOC's actions, with respect to these compensation items in the instant case, the Department must determine whether independent information exists on the record to find the compensation not to be countervailable.

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<sup>211</sup> See Petitioner Case Brief at 18-19 (citing *Cystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012), and accompanying IDM at Comment 23) (*Photovoltaic Cells from the PRC*)).

<sup>212</sup> See Tongrun Rebuttal Brief at 2 (citing *Archer Daniels*, 917 F. Supp. 2d at 1342).

<sup>213</sup> *Id.* (citing *RZBC Group 2016*).

Tongrun asserts that in its initial questionnaire response, it self-reported the receipt of numerous grant programs over the course of the AUL period, but it argued that these programs did not represent countervailable subsidies because each “compensation” item was either a result of a contract for services between Tongrun and the local government or an agreement to be reimbursed for the loss of property. Tongrun explains that it provided documentation on the record conclusively demonstrating the nature of the compensation items.

Tongrun claims that as the evidence on the record demonstrates, the reported compensation items do not operate like a grant program that would require appendix responses from the GOC. Tongrun explains that, unlike grant programs where parties must apply for and then be approved for a particular grant amount (or simply be awarded monies), these compensation funds were established through a contractual agreement between Tongrun and the local government. Tongrun argues that, rather than a grant, the funds were either compensation in return for services rendered or reimbursement for loss of property. Tongrun provides that, for example, with regard to the first compensation item, it expended more money on the construction of the drainage ditch than it was reimbursed for by the government.<sup>214</sup> Tongrun states that, similarly, with regard to the other compensation items, the local government needed to take some of its land for the construction of a highway and compensated Tongrun for this loss as a result. Thus, according to Tongrun, unlike grant programs, there is no specificity to analyze but instead these are merely contractual agreements between two parties for money in exchange for certain obligations. Tongrun argues that absent the need to analyze specificity, no information is required from the GOC and all necessary information to find these programs not countervailable is on the record of this case.

Tongrun contends that not only is the record sufficient to demonstrate that these compensation items could not represent countervailable subsidies, but also that it is apparent that the Department agrees because after issuing a supplemental questionnaire on this issue, the Department issued several other supplemental questionnaires and none addressed these compensation items. Tongrun contends further that after preliminarily finding these compensations not to be countervailable, the Department found no discrepancies on this issue at verification. Tongrun asserts that, for these reasons, the Department should continue to find these compensations not to be countervailable.

The GOC argues that the record indicates that although these payments were received from local government agencies, the transactions did not result in countervailable benefits. Thus, according to the GOC, the Department correctly did not countervail these payments in the *Preliminary Determination*, and was well within its discretion to find these payments not countervailable. The GOC further asserts that, while it is true that the Department typically relies on factual evidence from the foreign government to determine a program’s countervailability (*i.e.*, financial contribution and specificity), there is nothing in the statute that requires the Department to apply adverse inferences with respect to countervailability if the foreign government does not provide

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<sup>214</sup> See Tongrun’s Supplemental Questionnaire Response, dated August 11, 2017 (Tongrun’s SQR) at Exhibit S-13. Examples of names of the types of fees in question are “Compensation and Resettlement of House Relocation,” “Fast-track Construction Compensation,” and “Land Cost Compensation.”

information. According to the GOC, the statute states that the Department may use an adverse inference if it finds that an interested party has failed to cooperate by not acting to the best of its ability.<sup>215</sup> Citing *RZBC Group 2016*, the GOC also argues that the Department is under an obligation to avoid collaterally impacting a mandatory respondent when a foreign government has not cooperated with the Department. The GOC concludes that for these reasons, the Department was well within its discretion in not applying an adverse inference with respect to the countervailability of the subject government payments, and should continue to find these payments not countervailable in its final determination.

**Department’s Position:** In its initial questionnaire response, dated July 13, 2017, Tongrun indicated that, “{f}or some payments received from the GOC during the AUL, including some programs identified in Exhibit E.1, the responding companies believe that they do not satisfy the legal requirements for a countervailable subsidy.”<sup>216</sup> Tongrun described the first program in question, as a compensation for the reconstruction of a new plant drainage channel.<sup>217</sup> Tongrun explained further that, with respect to this program, the costs Tongrun incurred in the reconstruction of a new plant drainage was larger than the compensation from government agencies.<sup>218</sup> Tongrun indicated that this compensation occurred because the local government determined that a drainage channel for public use was needed.<sup>219</sup> Tongrun explained further that part of this drainage channel was designed to flow under its land, and for the convenience of the construction and so as to not unnecessarily impact Tongrun’s daily operations, the local government signed a contract with Tongrun and agreed that Tongrun would pay for the construction of the channel on its own land.<sup>220</sup>

Regarding the other two compensation items in question, Tongrun explained that it signed a relocation agreement with the local government to begin construction on the “Changshu Tonggang International Logistic Fast Road Project.”<sup>221</sup> Tongrun elaborated that because the road construction covered a part of its land, the local government appropriated this land and compensated Tongrun for the take over and the relocation of the company once the construction progressed to a certain point.<sup>222</sup>

In our supplemental questionnaire, we requested Tongrun to provide copies of the agreements between Tongrun and the local government agencies regarding these compensations.<sup>223</sup> Tongrun complied with the Department’s request and provided the agreements between Tongrun and the government for the three types of compensation.<sup>224</sup> We reviewed the agreements placed on the record by Tongrun and we confirmed the information with respect to whether these compensation items were either a result of a contract for services between

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<sup>215</sup> See the GOC’s Rebuttal Brief at 7 (citing section 776(b) of the Act).

<sup>216</sup> See Tongrun IQR, at 35.

<sup>217</sup> *Id.* at 36.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 37.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> See the Department’s supplemental questionnaire, dated July 26, 2017, at 5. See also Tongrun’s SQR at 24.

<sup>224</sup> Tongrun’s SQR at 24, and Exhibit S-13.

Tongrun and the local government or an agreement to be reimburse for the loss of property by reviewing the agreements provided on the record.<sup>225</sup> Based on the information on the record, we preliminarily determined that these compensation fees were not countervailable and, therefore, we did not include such fees in our *Preliminary Determination* subsidy calculations.<sup>226</sup>

While we acknowledge that the Department typically relies on factual evidence from the government to determine a program's countervailability, in this case, we preliminarily determined that the information placed on the record by Tongrun was sufficient for the Department to determine that Tongrun's compensation items did not consist of countervailable grants. For example, the agreements between Tongrun and the local governments as provided in Exhibit S-13 of Tongrun's SQR, indicate that these fees were either a result of a contract for services between the parties (Tongrun and the local government) or a reimbursement for the loss of property incurred by Tongrun.<sup>227</sup> As such, we preliminarily determined that, unlike grant programs where parties apply for and then obtain approval for a particular grant amount, these compensation fees were established through contractual agreements between Tongrun and the local government for money in exchange for certain obligations as outlined by the agreements provided on the record.<sup>228</sup> Thus, to the extent there may be a subsidy, such a subsidy would presumably have to be an allegation of goods or services provided at more than adequate remuneration (MTAR). However, the petitioner did not submit a new subsidy allegation alleging that these goods or services were provided at MTAR, nor do we have any evidence on the record suggesting they were provided at MTAR. Accordingly, we have not countervailed these compensation fees in this final determination.

#### **Comment 12: Whether to Countervail Geelong's Benefits for Programs Where the Department Has Applied Adverse Facts Available to the Government of China**

Geelong argues that it is inappropriate to use AFA in calculating Geelong's subsidy rate. Geelong contends that it did not in any way fail to cooperate with the Department's requests for information to the best of its ability. According to Geelong, the Department applied AFA to its purchases of cold-rolled steel and to the receipt of Export Buyer's Credits, electricity, and other subsidies due to the GOC's failures. Geelong contends that it is unreasonable for the Department to punish Geelong for the supposed actions of third parties that are beyond Geelong's control. Geelong also protests the fact that, although it purchased little cold-rolled coil steel during the POI, the Department presumed otherwise in the *Preliminary Determination*.

**Department's Position:** We disagree with Geelong that we may not incorporate into our calculation of a respondent's subsidy rate the rates we find for programs a respondent uses where the government of the country in question does not provide needed information. We rejected a

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<sup>225</sup> *Id.*

<sup>226</sup> See Tongrun Preliminary Calculation Memorandum.

<sup>227</sup> See Tongrun's SQR, at Exhibit S-13.

<sup>228</sup> *Id.*

similar argument in *Multilayered Wood Flooring*.<sup>229</sup> In that case, we disagreed with the respondent's argument that "we are constrained in relying upon adverse inferences," stating that the respondent's argument "presumes that the Department could never apply adverse inferences in a CVD investigation where the government of the country being investigated fails to reply to any of the Department's questionnaires, but the mandatory respondents have supplied certain information."<sup>230</sup> We further stated that "this argument . . . prohibits the Department from effectively determining whether a financial contribution is provided by the government, and whether the benefit is specific" and that "{t}he Department often relies upon information that only the government could possess."<sup>231</sup> We further observed that "where possible, the Department will normally rely on the responsive producer's or exporter's records to determine the existence and amount of the benefit, to the extent that those records are useable and verifiable."<sup>232</sup> On this basis, consistent with past practice, we countervailed the programs Geelong benefitted from using AFA for our financial contribution and/or specificity determinations as a result of the GOC's failure to adequately respond to our requests for information.

With respect to Export Buyer's Credits, *see* Comment 8, above. With respect to Geelong's purchases of cold-rolled steel with a certain HTS number, we preliminarily treated all such purchases as having been in coils because "it is not clear from the record whether these purchases were in coils or not in coils."<sup>233</sup> Based on our verification findings, we are now able to distinguish which purchases were in coils and which were not in coils.<sup>234</sup> Accordingly, no presumption is necessary for this final determination and, consistent with our position in Comment 1, above, we have limited our calculation of the benefit Geelong received to only its purchases of cold-rolled coiled steel.<sup>235</sup>

### **Comment 13: Whether to Adjust the Denominator for One of Tongrun's Cross-Owned Companies**

Tongrun asserts that in the *Preliminary Determination*, the Department attributed subsidies received by General Electrical Factory over that company's consolidated sales only, but it argues that the Department erroneously did not include Tongrun's (one of the selected mandatory respondent in the investigation) sales as part of the denominator in the calculation of subsidies. Specifically, Tongrun argues that it reported General Electrical Factory as a cross-owned holding company and, thus, subsidies received by General Electrical Factory should be attributed over General Electrical Factory's, Tongrun's, and Taron Machinery's combined sales.

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<sup>229</sup> *See Multilayered Wood Flooring from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 64313 (October 18, 2011) (*Multilayered Wood Flooring*) and accompanying IDM at Comment 4.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *See* Memorandum to File, "Zhongshan Geelong Manufacturing Co., Ltd.; Calculations for the Preliminary Determination," dated September 8, 2017 at 3.

<sup>234</sup> *See* Geelong Verification Report at 6.

<sup>235</sup> *See* Geelong Final Calculation Memorandum.

Tongrun contends that while it agrees that General Electrical Factory's consolidated sales should be used as a denominator, its sales and Taron Machinery's sales (both are producers of subject merchandise), should also be added to the denominator because General Electrical Factory's consolidated sales figure does not include Tongrun's and Taron Machinery's combined sales figures.

The petitioner argues that 19 CFR 351.525(b)(6)(iii), indicates, with respect to attribution for subsidies received by holding companies, "If the firm that received a subsidy is a holding company, including a parent company with its own operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries." Thus, according to the petitioner, as a holding company, the subsidies received by General Electrical Factory should be attributed to its own sales and those of its subsidiaries (*i.e.*, Tongrun M&E Equipment). The petitioner asserts that, in fact, Tongrun agrees that General Electrical Factory's consolidated sales should be used in its denominator.

The petitioner argues that, contrary to Tongrun's claims, there is no factual or legal basis for adding the sales of Tongrun and Taron Machinery to that denominator. The petitioner argues further that Tongrun is not a subsidiary of General Electrical Factory; rather, General Electrical Factory is a subsidiary of Tongrun. The petitioner contends that, while Taron Machinery is affiliated with General Electrical Factory through cross-ownership, it is also not a subsidiary of General Electrical Factory.

The petitioner asserts that the Department's regulations limit the attribution of General Electrical Factory's subsidy benefits to its subsidiaries and therefore, the Department has complied with this rule in the *Preliminary Determination*, and should continue to do so in the final determination.

**Department's Position:** We disagree with Tongrun. Section 351.525(b)(6)(iii) of the Act states that, "If the firm that received a subsidy is a holding company, including a parent company with its own operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries."<sup>236</sup> In its June 20, 2017, submission, in response to the Department's affiliation questionnaire, Tongrun identified its affiliate, General Electrical Factory as the holding company of Tongrun M&E Equipment.<sup>237</sup> Further, the record indicates that General Electrical Factory is a subsidiary of Tongrun, the mandatory respondent in this investigation.<sup>238</sup> Thus, the record indicates that Tongrun is not a subsidiary of General Electrical Factory, but rather, General Electrical Factory is a subsidiary of Tongrun.<sup>239</sup> In addition, the record indicates that, although Taron Machinery is affiliated with General Electrical Factory through cross-ownership, it is not a subsidiary of General Electrical Factory.<sup>240</sup> Thus, consistent with section 351.525(b)(6)(iii) of the Act, because General Electrical Factory is a holding

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<sup>236</sup> See Section 351.525(b)(6)(iii) of the Act.

<sup>237</sup> See Tongrun's Affiliation Questionnaire Response, "Tongrun Affiliation Response: Countervailing Duty Investigation on Tool Chests and Cabinets from the People's Republic of China (C-570-057)," dated June 20, 2017, at 4.

<sup>238</sup> *Id.* at Exhibit A-1.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

company as evidenced by the record, and does not have any subsidiaries, the Department attributed the subsidies received by General Electrical Factory over that company's consolidated sales only in the *Preliminary Determination*.<sup>241</sup> We find no reason to follow Tongrun's request for this final determination.

#### **Comment 14: Whether to Adjust the Denominator for Geelong**

Geelong and HMC argue that the Department's preliminary decision to base the denominator on Geelong's sales to Geelong Sales (Macao Commercial Offshore) Limited (MCO), which is Geelong's international sales agent for all non-China sales, instead of MCO's sales was improper. According to Geelong, the record evidence demonstrates that MCO is a cross-owned affiliate within the meaning of 19 CFR 351.525(b)(6)(vi). Geelong asserts that the record shows that it and MCO are owned and controlled by the same holding company and, therefore, MCO meets the regulatory definition of a cross-owned company. Geelong contends that its relationship with MCO is analogous to Tongrun and its cross-owned affiliates.

Geelong and HMC further argue that 19 CFR 351.525(b)(3) does not limit the attribution of subsidies only to products that are exported by the production facility receiving the subsidy. According to Geelong and HMC, record evidence reflects that Geelong's products are exported by MCO and, thus, the proper calculation of the countervailable subsidy rate should utilize a sales denominator that includes Geelong products exported by MCO, because MCO's sales reflect the first unaffiliated, export sales.

Geelong also observes that the Department preliminarily found that it and MCO were affiliated for the purposes of subsidy attribution.<sup>242</sup> Geelong asserts that the Department cannot declare that subsidies allegedly received by MCO are attributable to Geelong, while declaring that Geelong and MCO are not cross-owned affiliates for purposes of the sales denominator.

HMC contends that the Department has an established practice of consolidating the sales of the trading company that exports subject merchandise and the producing respondent that manufactures the subject merchandise for purposes of calculating the sales denominator for a subsidy benefit calculation.

The petitioner argues that Geelong and HMC are incorrect that the denominator it seeks is predicated on MCO being found to be a cross-owned affiliate trading company because, in this case, MCO has been found not to have received any subsidies from the GOC. The petitioner contends that the case cited by HMC is inapposite because, in that case, the Department combined the sales of the cross-owned affiliated trading company with the sales of the producing companies net of intracompany sales only for purposes of calculating benefits from subsidies received by the trading company; the Department attributed those subsidies received by the producing companies only to the consolidated sales of each of the other producing affiliates.<sup>243</sup>

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<sup>241</sup> See Tongrun Preliminary Calculation Memorandum at Attachment II.

<sup>242</sup> See Geelong Case Brief at (citing PDM at 25-26).

<sup>243</sup> See Petitioner Case Brief at 46 (citing *Certain Steel Wheels From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 77 FR 17017 (March 23, 2012) and accompanying IDM at 5-6).

The petitioner asserts that Geelong should have requested an export value adjustment. According to the petitioner, the Department has a practice of making an adjustment to the calculated subsidy rate when the sales value used to calculate that subsidy rate does not match the entered value of the merchandise, such as where subject merchandise is exported to the United States with a mark-up from an affiliated company, and where the respondent can provide data to demonstrate certain criteria are met. However, the petitioner claims, Geelong has not requested an export value adjustment in this investigation, nor has it established eligibility for such an adjustment by submitting the requisite information.

**Department’s Position:** We have not used MCO’s sales in the denominator in our subsidy calculations for this final determination. Under the Department’s regulations at 19 CFR 351.525(a), the Department calculates subsidy rates by dividing the amount of the benefit by the sales value of the products to which the subsidy is attributed under paragraph (b) of section 19 CFR 351.525. The Department’s regulations further state that subsidies will normally be attributed to the products produced by the corporation that received the subsidy.<sup>244</sup> While exceptions to this rule are provided in 19 CFR 351.525(b)(6)(ii)-(v), Geelong and MCO do not meet those exceptions. Therefore, we attributed the subsidies received by Geelong to Geelong’s sales and not to MCO’s sales.<sup>245</sup> This is consistent with our practice in other proceedings.<sup>246</sup>

With respect to Geelong’s argument regarding 19 CFR 351.525(b)(6)(vi),<sup>247</sup> when applying the attribution regulations at 19 CFR 351.525(b)(6)(i) – (v), the Department has recognized four exceptions to its normal rule of attributing a subsidy to the products produced by the corporation that received the subsidy.<sup>248</sup> In *SC Paper from Canada*, we found that, although the respondent “may meet the general definition of cross-ownership, pursuant to 19 CFR 351.525(b)(6)(vi), the Department has promulgated its regulations to limit the scope of its investigation of subsidies to the respondent and cross-owned corporations that provide inputs for, or produce, subject merchandise and meet one of the four exceptions as provided in 19 CFR 351.525(b)(6)(ii) – (v).”<sup>249</sup> As described above, Geelong and MCO do not meet any of these four exceptions.<sup>250</sup> Accordingly, we continue to determine that Geelong and MCO are not cross-owned, and that Geelong’s subsidies are properly attributed to its own sales.

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<sup>244</sup> See 19 CFR 351.525(b)(6)(i).

<sup>245</sup> See Geelong Final Calculation Memorandum.

<sup>246</sup> See *Countervailing Duties; Final Rule*, 63 FR 65348, 65402 (November 25, 1998). See also *Certain Tow-Behind Lawn Groomers from the PRC* and *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 41801 (July 19, 2010) (*Narrow Woven Ribbons from PRC*), and accompanying IDM at Comment 4.

<sup>247</sup> In its case brief, Geelong cited to 19 CFR 351.525(b)(6)(iv). See Geelong Case Brief at 14-15. However, because the language cited comes from 19 CFR 351.525(b)(6)(vi), and because 19 CFR 351.525(b)(6)(iv) pertains to input suppliers (and Geelong does not argue that MCO is an input supplier), it appears that Geelong meant to cite to 19 CFR 351.525(b)(6)(vi).

<sup>248</sup> See *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017) (*SC Paper from Canada*) and accompanying IDM at Comment 34.

<sup>249</sup> *Id.*

<sup>250</sup> By contrast, Tongrun and its cross-owned affiliates do meet these exceptions; two of Tongrun’s affiliates are cross-owned because they produce the subject merchandise (19 CFR 351.525(6)(b)(ii)) and three are cross-owned because they are holding companies (19 CFR 351.525(6)(b)(iii)). See PDM at 25.



With respect to Geelong argument regarding 19 CFR 351.525(b)(3), we find that 19 CFR 351.525(b)(3) merely instructs that the Department will attribute a domestic subsidy to all products sold by a firm, including products that are exported. Indeed, 19 CFR 351.525(b)(3) does not provide guidance as to whether the “products that are exported” are to be based on the producer’s sales or to an affiliated reseller’s sales.

Finally, contrary to Geelong’s assertion, we are not “having it two ways.” It is true that, had we found MCO received any subsidies, we would have attributed them to Geelong based on the plain reading of 19 CFR 351.525(c) because MCO is a trading company. However, the fact remains that we do not use the sales through an affiliated third-country reseller in the denominator for the reasons described above, unless that reseller satisfies one of the four exceptions as provided in 19 CFR 351.525(b)(6)(ii) through (v).

The petitioner is correct in observing that the Department has made an “entered value adjustment” in certain cases when the entered value of the merchandise into the United States differs from the export price from the country under investigation because the sale to the United States is made through an affiliated third-country reseller who marks up the price it pays to the affiliated producer of subject merchandise.<sup>251</sup> However, in such cases, the Department has not used “consolidated” sales reflecting the affiliated reseller’s prices, but instead has adjusted the subsidies calculated by the ratio of the sales value of exports from the country under investigation and the sales value to the United States.<sup>252</sup> The adjustment requires specific verifiable information beyond the consolidated sales, which Geelong did not provide. Therefore, we have not made the adjustment.<sup>253</sup>

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<sup>251</sup> See, e.g., IDM accompanying *CFS from the PRC* at Comment 21.

<sup>252</sup> *Id.* at 9.

<sup>253</sup> The burden to establish entitlement to an adjustment is on the party seeking the adjustment, because that party has access to the necessary information. See SAA at 829; *Certain Tow-Behind Lawn Groomers from the PRC* and *Narrow Woven Ribbons from PRC* accompanying IDM at Comment 4.

**XI. RECOMMENDATION**

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

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

11/22/2017

X



Signed by: CAROLE SHOWERS

\_\_\_\_\_  
Carole Showers  
Executive Director, Office of Policy  
performing the duties of the Deputy Assistant Secretary  
for Enforcement and Compliance

## APPENDIX

### AFA Rate Calculation

	Program Name	AFA Rate	Source
1.	Policy Loans to the Tool Chests Industry	10.54%	Highest Rate for Similar Program Based on Benefit Type
2.	Export Loans from Chinese State-Owned Banks		
3.	Export Seller's Credit	4.25%	Highest Rate for Same Program Based on Benefit Type
4.	Export Credit Guarantees	4.25%	Highest Rate for Similar Program Based on Benefit Type
5.	Export Buyer's Credits	10.54%	Highest Rate for Similar Program Based on Benefit Type
6.	Income Tax Reduction for High or New Technology Enterprises	25.00%	Income Tax Rate
7.	Income Tax Deductions for Research and Development (R&D) Expenses Under the Enterprise Income Tax Law		
8.	Provincial Government of Guangdong Tax Offset for R&D		
9.	IPO Income Tax Subsidy		
10.	QFII Equity Distribution Income Tax Withhold and Collected		
11.	Import Tariff and Value-Added Tax (VAT) Reductions for Foreign-Invested Enterprises (FIEs) and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries	9.71%	Highest Rate for Same Program Based on Benefit Type
12.	VAT Refunds for FIEs Purchasing Domestically-Produced Equipment	9.71%	Highest Rate for Similar Program Based on Benefit Type
13.	Government Provision of Hot-Rolled Coiled Steel for LTAR	0.01%	Calculated –Tongrun
14.	Government Provision of Cold-Rolled Coiled Steel for LTAR	3.44%	Calculated - Tongrun
15.	Provision of Electricity for LTAR	0.41%	Calculated - Geelong
16.	GOC and Sub-Central Government Subsidies for the Development of Famous Brands and China World Top Brands	0.58%	Highest Rate for Similar Program Based on Benefit Type

17.	Special Fund for Energy Savings Technology Reform	0.58%	Highest Rate for Similar Program Based on Benefit Type
18.	Small and Medium-Sized Enterprises (SMEs) International Market Exploration/Development Fund	0.58%	Highest Rate for Similar Program Based on Benefit Type
19.	SME Technology Innovation Fund	0.58%	Highest Rate for Similar Program Based on Benefit Type
20.	Export Assistance Grants	0.58%	Highest Rate for Similar Program Based on Benefit Type
21.	4th Quarter Growth Comparison	0.05%	Calculated - Geelong
22.	1-3rd Quarter Growth Comparison	0.04%	Calculated - Geelong
23.	Technology Improvement	0.53%	Calculated - Geelong
24.	ERP Improvement	0.01%	Calculated - Geelong
25.	Engineering Center	0.01%	Calculated - Geelong
26.	Unemployment insurance to support business stability	0.02%	Calculated - Geelong
27.	Province Commercial Development Special Subvention	0.01%	Calculated - Tongrun
28.	Changshu City Awards for Maintaining A Steady Increase of Foreign Trade	0.01%	Calculated - Tongrun
29.	Municipal Industrial Economy Transformation and Development Subvention 'Machines Inplace of Men' Promotion of Intelligent Manufacturing Project	0.06%	Calculated - Tongrun
30.	Municipal Commercial Transformation and Development Subvention	0.03%	Calculated - Tongrun
31.	Province Commercial Development Special Subvention Exploration of International Market Fair	0.01%	Calculated - Tongrun
32.	Foreign Commerce and Trade Development Fund	0.03%	Calculated - Tongrun
33.	High Technology Products	0.04%	Calculated - Tongrun
34.	Training Cost Reimbursement from Productivity Council	0.58%	Highest Rate for Similar Program Based on Benefit Type
35.	Rent Refund	0.58%	Highest Rate for Similar Program Based on Benefit Type
36.	Export Subsidies (VAT loss)	9.71%	Highest Rate for Similar Program Based on Benefit Type
37.	Enterprise Salary Survey Subsidy	0.58%	Highest Rate for Similar Program Based on Benefit Type

38.	Refund of social insurance	0.58%	Highest Rate for Similar Program Based on Benefit Type
39.	2013 Industrial Economy Transformation and Escalation Technology Innovation Subvention	0.58%	Highest Rate for Similar Program Based on Benefit Type
40.	Traffic Police Team 779 Elimination Subsidy	0.58%	Highest Rate for Similar Program Based on Benefit Type
41.	Municipal Industrial Economy Transformation and Development Subvention Energy Saving and Circular Economy Project	0.58%	Highest Rate for Similar Program Based on Benefit Type
42.	2014 Patent	0.58%	Highest Rate for Similar Program Based on Benefit Type

**Total AFA Rate: 95.96%**